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Contents

II *Information*

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

European Commission

2022/C 248/01 Communication from the Commission – COMMISSION NOTICE – Guidelines on vertical restraints 1

Council

2022/C 248/02 Statement by the Commission on the exclusive competence in respect of Regulation (EU) 2022/1031 of the European Parliament and of the Council 86

III *Preparatory acts*

EUROPEAN CENTRAL BANK

2022/C 248/03 Opinion of the European Central Bank of 27 April 2022 on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, environmental, social and governance risk (CON/2022/16) 87

IV *Notices*

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

Council

2022/C 248/04 Council conclusions on Addressing the external dimension of a constantly evolving terrorist and violent extremist threat 97

EN

European Commission

2022/C 248/05 Euro exchange rates — 29 June 2022 104

NOTICES FROM MEMBER STATES

2022/C 248/06 Commission notice pursuant to Article 16(4) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community – Changes to public service obligations in respect of scheduled air services ([1]) 105

2022/C 248/07 Commission notice pursuant to Article 16(4) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community – Changes to public service obligations in respect of scheduled air services ([1]) 106

V *Announcements*

PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMMON COMMERCIAL POLICY

European Commission

2022/C 248/08 Notice of initiation of an anti-dumping proceeding concerning imports of high tenacity yarn of polyesters originating in the People's Republic of China, limited to Zhejiang Hailide New Material Co. Ltd, and of initiation of a review of the anti-dumping measures on imports of high tenacity yarn of polyesters originating in the People's Republic of China 107

2022/C 248/09 Notice of initiation of an expiry review of the anti-subsidy measures applicable to imports of certain coated fine paper originating in the People's Republic of China 119

2022/C 248/10 Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain coated fine paper originating in the People's Republic of China 130

2022/C 248/11 Notice of initiation of an interim review of the anti-dumping measures applicable to imports of high tenacity yarns of polyesters originating in the People's Republic of China 142

2022/C 248/12 Notice of re-opening of the anti-dumping investigation with regard to Commission Implementing Regulation (EU) 2017/763 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea following the judgement of the General Court of 2 April 2020 in Case T-383/17, as upheld by the Court of Justice in case C-260/20 P 152

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION POLICY

European Commission

2022/C 248/13 Prior notification of a concentration (Case M.10778 – TA ASSOCIATES / CLEARLAKE / KOFAX) – Candidate case for simplified procedure ([1]) 156

([1]) Text with EEA relevance.

II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

COMMISSION NOTICE

Guidelines on vertical restraints

(2022/C 248/01)

TABLE OF CONTENTS

Page

1. Introduction 3
   1.1. Purpose and structure of these Guidelines 3
   1.2. Applicability of Article 101 of the Treaty to vertical agreements 4
2. Effects of vertical agreements 6
   2.1. Positive effects 6
   2.2. Negative effects 9
3. Vertical agreements that generally fall outside the scope of Article 101(1) of the Treaty 10
   3.1. No effect on trade, agreements of minor importance and small and medium sized undertakings 10
   3.2. Agency agreements 11
      3.2.1. Agency agreements that fall outside the scope of Article 101(1) of the Treaty 11
      3.2.2. Application of Article 101(1) of the Treaty to agency agreements 15
      3.2.3. Agency and the online platform economy 16
   3.3. Subcontracting agreements 17
4. Scope of Regulation (EU) 2022/720 17
   4.1. Safe harbour established by Regulation (EU) 2022/720 17
   4.2. Definition of vertical agreements 18
      4.2.1. Unilateral conduct falls outside the scope of Regulation (EU) 2022/720 18
      4.2.2. The undertakings operate at different levels of the production or distribution chain 19
      4.2.3. The agreement relates to the purchase, sale or resale of goods or services 19
   4.3. Vertical agreements in the online platform economy 20
   4.4. Limits to the application of Regulation (EU) 2022/720 21

4.4.1. Associations of retailers 21
4.4.2. Vertical agreements containing provisions on intellectual property rights (IPRs) 22
4.4.3. Vertical agreements between competitors 25
4.4.4. Vertical agreements with providers of online intermediation services that have a hybrid function 28
4.5. Relationship with other block exemption regulations 30
4.6. Specific types of distribution system 30
4.6.1. Exclusive distribution systems 31
4.6.2. Selective distribution systems 35
4.6.3. Franchising 40
5. Market definition and market share calculation 42
5.1. Market Definition Notice 42
5.2. The calculation of market shares under Regulation (EU) 2022/720 42
5.3. Calculation of market shares under Regulation (EU) 2022/720 43
6. Application of Regulation (EU) 2022/720 43
6.1. Hardcore restrictions under Regulation (EU) 2022/720 43
6.1.1. Resale price maintenance 45
6.1.2. Hardcore restrictions pursuant to Article 4, points (b), (c), (d) and (e) of Regulation (EU) 2022/720 49
6.1.3. Restrictions of the sales of spare parts 57
6.2. Restrictions that are excluded from Regulation (EU) 2022/720 57
6.2.1. Non-compete obligations exceeding a duration of five years 58
6.2.2. Post-term non-compete obligations 58
6.2.3. Non-compete obligations imposed on members of a selective distribution system 59
6.2.4. Across-platform retail parity obligations 59
7. Withdrawal and Disapplication 59
7.1. Withdrawal of the benefit of Regulation (EU) 2022/720 59
7.2. Disapplication of Regulation (EU) 2022/720 62
8. Enforcement policy in individual cases 63
8.1. The framework of analysis 63
8.1.1. Relevant factors for the assessment under Article 101(1) of the Treaty 64
8.1.2. Relevant factors for the assessment under Article 101(3) of the Treaty 66
8.2. Analysis of specific vertical restraints 67
8.2.1. Single branding 68
8.2.2. Exclusive supply 72
8.2.3. Restrictions on the use of online marketplaces 74
8.2.4. Restrictions on the use of price comparison services 75
8.2.5. Parity obligations 77
8.2.6. Upfront access payments 82
8.2.7. Category management agreements 83
8.2.8. Tying 83

1. INTRODUCTION

1.1. Purpose and structure of these Guidelines

(1) These Guidelines set out principles for the assessment of vertical agreements and concerted practices under Article 101 of the Treaty on the Functioning of the European Union ([1]) and Commission Regulation (EU) 2022/720 ([2]). Unless stated otherwise, in these Guidelines the term 'agreement' also covers concerted practices ([3]).

(2) By issuing these Guidelines, the Commission aims to help undertakings conduct their own assessment of vertical agreements under the Union's competition rules and to facilitate the enforcement of Article 101 of the Treaty. However, these Guidelines should not be applied mechanically, as each agreement must be evaluated in the light of its own facts ([4]). These Guidelines are also without prejudice to the case-law of the General Court and the Court of Justice of the European Union (hereinafter 'Court of Justice of the European Union').

(3) Vertical agreements may be concluded for intermediate or final goods and services. Unless stated otherwise, these Guidelines apply to all types of goods and services, and to all levels of trade. Furthermore, unless stated otherwise, the term 'end user' includes undertakings and final consumers, namely natural persons who are acting for purposes which are outside their trade, business, craft or profession.

(4) These Guidelines are structured as follows:

— this first introductory section explains why the Commission provides guidance on vertical agreements and the scope of that guidance. It also explains the objectives of Article 101 of the Treaty, how Article 101 of the Treaty applies to vertical agreements, and the main steps in the assessment of vertical agreements under Article 101 of the Treaty;

— the second section provides an overview of the positive and negative effects of vertical agreements. Regulation (EU) 2022/720, these Guidelines, and the Commission's enforcement policy in individual cases are based on the consideration of those effects;

— the third section deals with vertical agreements that generally fall outside Article 101(1) of the Treaty. While Regulation (EU) 2022/720 does not apply to those agreements, it is necessary to provide guidance on the conditions under which vertical agreements may fall outside Article 101(1) of the Treaty;

— the fourth section provides further guidance on the scope of Regulation (EU) 2022/720, including explanations on the safe harbour established by the Regulation and the definition of a vertical agreement. That section also contains guidance on vertical agreements in the online platform economy, which plays an increasingly important role in the distribution of goods and services. That section also explains the limits of the application of Regulation (EU) 2022/720, as set out in Article 2(2), (3) and (4) of the Regulation. This includes the specific limits that apply to the exchange of information between a supplier and a buyer in scenarios of dual distribution, pursuant to Article 2(5) of the Regulation, and those that apply to agreements relating to the provision of online intermediation services where the provider of those services has a hybrid function, pursuant to Article 2(6) of the Regulation. The fourth section also explains how Regulation (EU) 2022/720 applies in cases where a vertical agreement falls within the scope of another block exemption regulation, as set out in Article 2(7) of the Regulation. Lastly, that section contains a description of certain common types of distribution system, in particular those which are the subject of specific provisions in Article 4 of the Regulation relating to hardcore restrictions;

([1]) These Guidelines replace the Commission Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1).

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

([3]) See paragraph (51).

([4]) The Commission will continue to monitor the operation of Regulation (EU) 2022/720 and these Guidelines and may revise this notice in light of future developments.

— the fifth section addresses the definition of the relevant markets and the calculation of market shares, by reference to the Market Definition Notice ([5]). This is relevant because vertical agreements may only benefit from the block exemption provided by Regulation (EU) 2022/720 if the market shares of the undertakings that are party to the agreement do not exceed the thresholds set out in Article 3 of Regulation (EU) 2022/720;

— the sixth section covers the hardcore restrictions set out in Article 4 of Regulation (EU) 2022/720 and the excluded restrictions set out in Article 5 of the Regulation, including explanations as to why the qualification as 'hardcore' or 'excluded' restriction is relevant;

— the seventh section contains guidance on the powers of the Commission and the competition authorities of the Member States ('NCAs') to withdraw the benefit of Regulation (EU) 2022/720 in individual cases, pursuant to Article 29 of Council Regulation (EC) No 1/2003 ([6]) and Article 6 of Regulation (EU) 2022/720, as well as guidance on the power of the Commission to adopt regulations declaring that Regulation (EU) 2022/720 does not apply, pursuant to Article 7 of Regulation (EU) 2022/720;

— the eighth section describes the Commission's enforcement policy in individual cases. To that end, it explains how vertical agreements that are not covered by Regulation (EU) 2022/720 are assessed under Article 101(1) and (3) of the Treaty, and provides guidance on various common types of vertical restraints.

1.2. **Applicability of Article 101 of the Treaty to vertical agreements**

(5) The objective of Article 101 of the Treaty is to ensure that undertakings do not use agreements, whether horizontal or vertical ([7]), to prevent, restrict or distort competition on the market to the detriment of consumers ([8]). Article 101 of the Treaty also pursues the wider objective of achieving an integrated internal market, which enhances competition in the Union. Undertakings may not use vertical agreements to re-establish private barriers between Member States where State barriers have been successfully abolished.

(6) Article 101 of the Treaty applies to vertical agreements and restrictions in vertical agreements that affect trade between Member States and that prevent, restrict or distort competition ([9]). It provides a legal framework for the assessment of vertical restraints ([10]), which takes into account the distinction between anti-competitive and pro-competitive effects. Article 101(1) of the Treaty prohibits agreements that appreciably restrict or distort competition. However, that prohibition does not apply to agreements that fulfil the conditions of Article 101(3) of the Treaty, notably where the agreement provides sufficient benefits to outweigh its anti-competitive effects, as indicated in the Article 101(3) Guidelines ([11]).

([5]) Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5) or any future Commission guidance relating to the definition of relevant market for the purposes of Union competition law including any guidance that might replace the Market Definition Notice.

([6]) 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).

([7]) Further guidance on the definition of 'vertical agreement' within the meaning of Article 1(1), point (a) of Regulation (EU) 2022/720 is provided in section 4.2. of these Guidelines.

([8]) See for example, the judgments of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission,* Case 6/72, EU:C:1973:22, paragraphs 25 and 26; 17 February 2011, *Konkurrensverket* v *TeliaSonera Sverige AB,* Case C-52/09, EU:C:2011:83, paragraphs 20 to 24 and 18 November 2021, *SIA 'Visma Enterprise'* v *Konkurences padome,* Case C-306/20, EU:C:2021:935, paragraph 58 ('Case C-306/20 - *Visma Enterprise*').

([9]) See for example, judgments of 13 July 1966, *Grundig-Consten and Grundig* v *Commission of the EEC,* Joined Cases 56/64 and 58/64, EU:C:1966:41; 30 June 1966, *Société Technique Minière* v *Maschinenbau Ulm,* 56/65, EU:C:1966:38 ('Case 56/65 - *Société Technique Minière*'); and 14 July 1994, *Parker Pen* v *Commission,* Case T-77/92, EU:T:1994:85 ('Case T-77/92 - *Parker Pen*').

([10]) For the application of Regulation (EU) 2022/720, Article 1(1), point (b) of Regulation (EU) 2022/720 defines a 'vertical restraint as 'a restriction of competition in a vertical agreement falling *within* the scope of Article 101(1) of the Treaty [emphasis added]'. Further guidance on vertical agreements that generally fall *outside* the scope of Article 101(1) of the Treaty is provided in section 3 of these Guidelines.

([11]) Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97), which sets out the Commission's general methodology and interpretation of the conditions for applying Article 101 of the Treaty and in particular Article 101(3) thereof.

(7) While there is no mandatory sequence for the assessment of vertical agreements, the assessment generally involves the following steps:

— first, the undertakings involved need to establish the market shares of the supplier and the buyer on the relevant market where they respectively sell and purchase the contract goods or services;

— if neither the market share of the supplier nor that of the buyer exceeds the 30 % market share threshold set out in Article 3 of Regulation (EU) 2022/720, the vertical agreement is covered by the safe harbour established by the Regulation, provided that the agreement does not contain hardcore restrictions within the meaning of Article 4 of the Regulation or any excluded restrictions within the meaning of Article 5 of the Regulation that cannot be severed from the rest of the agreement;

— if the relevant market share of the supplier or the buyer exceeds the 30 % threshold or the agreement contains one or more hardcore restrictions or non-severable excluded restrictions, it is necessary to assess whether the vertical agreement falls within the scope of Article 101(1) of the Treaty;

— if the vertical agreement falls within the scope of Article 101(1) of the Treaty, it is necessary to examine whether it fulfils the conditions of the exception provided by Article 101(3) of the Treaty.

(8) Sustainable development is a core principle of the Treaty and a priority objective for the policies of the Union ([12]), together with digitalisation and a resilient Single Market ([13]). The notion of sustainability includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), limiting the use of natural resources, reducing waste and promoting animal welfare ([14]). The Union's sustainability, resilience and digital objectives are furthered by efficient supply and distribution agreements between undertakings. Vertical agreements which pursue sustainability objectives or which contribute to a digital and resilient Single Market are not a distinct category of vertical agreements under Union competition law. These agreements must therefore be assessed using the principles set out in these Guidelines, while taking into account the specific objective that they pursue. Accordingly, the exemption provided by Article 2(1) of Regulation (EU) 2022/720 applies to vertical agreements that pursue sustainability, resilience and digital objectives, provided that they meet the conditions of the Regulation. These Guidelines include examples to illustrate the assessment of vertical agreements that pursue sustainability objectives ([15]).

(9) Where a vertical agreement restricts competition within the meaning of Article 101(1) of the Treaty and Regulation (EU) 2022/720 does not apply, the agreement may nonetheless fulfil the conditions of the Article 101(3) exception ([16]). This also applies to vertical agreements which pursue sustainability objectives or which contribute to a digital and resilient Single Market. While section 8 includes guidance on the assessment of such vertical agreements in individual cases, other Commission guidelines may also be relevant. That includes the Article 101(3) Guidelines, the Horizontal Guidelines ([17]) and any guidance that may be provided in future versions of those Guidelines. Those Guidelines may, in particular, provide guidance on the circumstances under which sustainability, digital or resilience benefits can be taken into account as qualitative or quantitative efficiencies under Article 101(3) of the Treaty.

([12]) See Article 3(3) of the Treaty on European Union.

([13]) See Communication from the Commission of 5 May 2021 on Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery (COM/2021/350 final).

([14]) Where Union law includes definitions of sustainability, digitalisation or resilience, the assessment of vertical agreements may take such definitions into account.

([15]) See paragraphs (144) and (316).

([16]) These Guidelines do not apply to agreements of producers of agricultural products that fall within the scope of Article 210a, of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).

([17]) Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1).

2. EFFECTS OF VERTICAL AGREEMENTS

(10) For the purpose of assessing vertical agreements under Article 101 of the Treaty and applying Regulation (EU) 2022/720, it is necessary to take into account all relevant parameters of competition, such as prices, output in terms of product quantities, product quality and variety, and innovation. The assessment must also take into account that vertical agreements between undertakings operating at different levels of the production or distribution chain are generally less harmful than horizontal agreements between competing undertakings supplying substitutable goods or services ([18]). In principle, this is due to the complementary nature of the activities carried out by the parties to a vertical agreement, which generally implies that pro-competitive actions by one party to the agreement will benefit the other party to the agreement and will ultimately benefit consumers. By contrast to horizontal agreements, the parties to a vertical agreement therefore tend to have an incentive to agree on lower prices and higher levels of service, which also benefit consumers. Similarly, a party to a vertical agreement usually has an incentive to oppose actions by the other party that may harm consumers, as such actions will typically also reduce the demand for the goods or services supplied by the first party. Moreover, the complementary nature of the activities of the parties to a vertical agreement in putting goods or services on the market also implies that vertical restraints provide greater scope for efficiencies, for example by optimising manufacturing and distribution processes and services. Examples of such positive effects are set out in section 2.1.

(11) Nevertheless, undertakings with market power may, in certain cases, use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers. As further explained in section 2.2., vertical restraints can notably lead to foreclosure, softening of competition or collusion. 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 ([19]). The degree of market power required to establish a restriction of competition within the meaning of Article 101(1) of the Treaty is less than the degree of market power required for a finding of dominance under Article 102 of the Treaty.

2.1. Positive effects

(12) Vertical agreements may produce positive effects, including lower prices, the promotion of non-price competition and improved quality of services. Simple contractual arrangements between a supplier and a buyer which determine only the price and the quantity of a transaction can often lead to sub-optimal levels of investments and sales, as they do not take into account externalities arising from the complementary nature of the activities of the supplier and its distributors. These externalities fall into two categories: vertical externalities and horizontal externalities.

(13) Vertical externalities arise because the decisions and actions taken at different levels of the production or distribution chain determine aspects of the sale of goods or services, such as price, quality, related services and marketing, which affect not only the undertaking making the decisions but also other undertakings at other levels of the production or distribution chain. For instance, a distributor may not gain all the benefits of its efforts to increase sales, as some of those benefits may go to the supplier. This is because, for every extra unit that a distributor sells by lowering its resale price or by increasing its sales efforts, the supplier benefits if its wholesale price exceeds its marginal production costs. This represents a positive externality bestowed on the supplier by the distributor's sales-enhancing actions. Conversely, there may be situations where, from the supplier's perspective, the distributor may be pricing too high ([20]), making insufficient sales efforts or both.

(14) Horizontal externalities may arise in particular between distributors of the same goods or services where a distributor is unable to fully appropriate the benefits of its sales efforts. For example, where demand-enhancing pre-sales services are provided by one distributor, such as personalised advice in relation to particular goods or services, this may lead to higher sales by competing distributors offering the same goods or services and thus create incentives among distributors to free-ride on costly services provided by others. In an omni-channel

([18]) See, for example, Case C-306/20 - *Visma Enterprise*, paragraph 78.
([19]) See paragraph 25 of the Article 101(3) Guidelines.
([20]) This is sometimes referred to as the 'double marginalisation problem'.

distribution environment, free riding can occur between the online and offline sales channels, and in both directions ([21]). For example, customers may visit a brick and mortar shop to test goods or services or to obtain other useful information on which they base their decision to purchase, but then order the product online from a different distributor. Conversely, customers may gather information in the pre-purchase phase from an online store and then visit a brick and mortar shop, use the information they have gathered online to select and test particular goods or services, and ultimately purchase offline in a brick and mortar shop. Where such free riding is possible and where the distributor that provides pre-sales services is unable to fully appropriate the benefits, this may lead to sub-optimal provision of such pre-sales services in terms of quantity or quality.

(15) In the presence of such externalities, suppliers may have an incentive to control certain aspects of their distributors' operations and *vice versa*. In particular, vertical agreements may be used to internalise such externalities, increase the joint profit of the vertical supply and distribution chain, and, under certain circumstances, consumer welfare.

(16) Although these Guidelines seek to give an overview of the various justifications for vertical restraints, they do not claim to be complete or exhaustive. The reasons that may justify the application of particular vertical restraints include the following:

(a) to address the vertical externality issue. The setting of too high a price by the distributor, not taking into account the effect of its decisions on the supplier, can be avoided by the supplier imposing a maximum resale price on the distributor. Similarly, to increase the distributor's sales efforts, the supplier may use selective or exclusive distribution;

(b) to address the free-rider problem. Free riding between buyers may occur at the wholesale or retail level, in particular where it is not possible for the supplier to impose effective promotion or service requirements on all buyers. Free riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. Pre-sales efforts on which free riding can occur may be important, for example, where the goods or services are relatively new, technically complex or of high value, or where the reputation of the goods or services is an important determinant of their demand ([22]). Restrictions in exclusive or selective distribution systems, or other restrictions may be helpful in avoiding or reducing such free riding. Free riding can also occur between suppliers, for instance where one manufacturer invests in promotion at the buyer's premises that also attracts customers for the competitors of that manufacturer. Non-compete type restrictions can help to overcome free riding between suppliers ([23]);

(c) to open up or enter new markets. Where a supplier wishes to enter a new geographic market, for instance by exporting to another country, this may involve special sunk investments by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection so that the distributor can recoup its investments. This may justify restricting distributors located in other geographic markets from selling on the new market (see also paragraphs (118), (136) and (137)). This is a special case related to the free-rider problem set out in point (b);

([21]) See Commission Staff Working Document – Evaluation of the Vertical Block Exemption Regulation, document SWD (2020) 172 final of 10 May 2017, pages 31 to 42 and the referenced evaluation study; Report from the Commission to the Council and the European Parliament of 10 May 2017, Final report on the E-commerce Sector Inquiry, COM(2017) 229 final (hereinafter 'E-Commerce Sector Inquiry Final Report'), paragraph 11.

([22]) Whether consumers actually benefit overall from extra promotional efforts depends on whether the extra promotion informs and convinces and thus benefits many new customers or mainly reaches customers who already know what they want to buy and for whom the extra promotion only or mainly implies a price increase.

([23]) See, in particular, the definition of 'non-compete obligation' in Article 1(1), point (f) of Regulation (EU) 2022/720, on which guidance is provided in section 6.2. of these Guidelines, and the guidance on 'single branding' provided in section 8.2. of these Guidelines.

(d) to address the certification free-rider issue. In some sectors, certain distributors have a reputation for stocking only quality goods or providing quality services (so-called 'premium distributors'). In such a case, selling through those distributors may be crucial, in particular for the successful launch of a new product. If the supplier cannot ensure that the distribution of its products is limited to such premium distributors, it runs the risk of not being listed by such distributors. In that scenario, the use of exclusive or selective distribution may be justified;

(e) to address the hold-up problem. Either the supplier or the buyer may need to make relationship-specific investments (for example in specific equipment or training) which are sunk investments and have little or no value outside the specific vertical relationship. For instance, a component manufacturer may have to build specific machines to satisfy the requirements of one of its customers, but the machines may be unsuitable for use with other customers and it may be impossible to resell them. In the absence of an agreement, the investing party will find itself in a weak bargaining position once it has made the relationship-specific investment, as it risks being 'held up' during negotiations with its trading partner. The threat of such opportunistic hold-up may lead to sub-optimal investments by the investing party. Vertical agreements can eliminate the scope for hold-up (in particular when the investment can be fully contracted and all future contingencies can be foreseen) or they can reduce the scope for hold-up. For example, non-compete obligations, quantity forcing, or exclusive sourcing can lessen the hold-up problem when the relationship-specific investment is made by the supplier, whereas exclusive distribution, exclusive customer allocation or exclusive supply can lessen the hold-up problem when the investment is made by the buyer;

(f) to address the specific hold-up problem that may arise where there is a transfer of substantial know-how. The provider of know-how may not wish the know-how to be used by or for the benefit of its competitors, for example in franchising. Insofar as the know-how was not readily available to the buyer, and it is substantial and indispensable for the implementation of the agreement, such a transfer may justify a non-compete restriction, which would generally fall outside Article 101(1) of the Treaty in such cases;

(g) to achieve economies of scale in distribution. To have scale economies exploited and thereby see a lower retail price for its goods or services, the manufacturer may want to concentrate the resale of its goods or services on a limited number of distributors. To do so, the manufacturer could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing a minimum purchasing requirement or exclusive sourcing;

(h) to ensure uniformity and quality standardisation. A vertical restraint can help to create or promote a brand image, by imposing a certain measure of uniformity and quality standardisation on the distributors. This can protect the reputation of the brand, increase the attractiveness of the goods or services concerned for end users and increase sales. Such standardisation can, for instance, be achieved through selective distribution or franchising;

(i) to address capital market imperfections. Providers of capital such as banks and equity markets may provide capital sub-optimally when they have imperfect information on the solvency of the borrower or where there is an inadequate basis to secure the loan. The buyer or supplier may have better information and may be able, through an exclusive relationship, to obtain extra security for its investment. Where the supplier provides the loan to the buyer, this may lead to the imposition of a non-compete obligation or quantity forcing on the buyer. Where the buyer provides the loan to the supplier, this may be the reason for imposing exclusive supply or quantity forcing on the supplier.

(17) There is a large degree of substitutability between the various vertical restraints, meaning that the same inefficiency problem can be addressed using different vertical restraints. For instance, it may be possible to achieve economies of scale in distribution by using exclusive distribution, selective distribution, quantity forcing or exclusive sourcing. However, the negative effects on competition may differ between the various vertical restraints. This is taken into account when indispensability is assessed under Article 101(3) of the Treaty.

2.2. **Negative effects**

(18) The negative effects on the market which can result from vertical restraints and which Union competition law aims to prevent are, in particular, the following:

(a) anti-competitive foreclosure of other suppliers or other buyers, by raising barriers to entry or expansion;

(b) softening of competition between the supplier and its competitors and/or the facilitation of explicit or tacit collusion between competing suppliers, often referred to as the reduction of inter-brand competition;

(c) softening of competition between the buyer and its competitors or the facilitation of explicit or tacit collusion between competing buyers, often referred to as the reduction of intra-brand competition where it concerns distributors of the goods or services of the same supplier ([24]);

(d) the creation of obstacles to market integration, including, in particular, limitations on the consumer's choice to purchase goods or services in any Member State.

(19) Foreclosure, softening of competition and collusion at the supplier level may harm consumers, in particular by:

(a) increasing the prices charged to buyers of goods or services, which may in turn lead to higher retail prices;

(b) limiting the choice of goods or services;

(c) lowering the quality of goods or services;

(d) reducing innovation or service at the supplier level.

(20) Foreclosure, softening of competition and collusion at the distributor level may harm consumers, in particular by:

(a) increasing the retail prices of goods or services;

(b) limiting the choice of price-service combinations and distribution formats;

(c) lowering the availability and quality of retail services;

(d) reducing the level of innovation at the distribution level.

(21) A reduction of intra-brand competition (i.e. competition between distributors of the goods or services of the same supplier) is by itself unlikely to lead to negative effects for consumers if inter-brand competition (i.e. competition between distributors of the goods or services of different suppliers) is strong ([25]). In particular, in markets where individual retailers distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general.

(22) The possible negative effects of vertical restraints are reinforced where several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects ([26]).

([24]) As regards the notions of explicit and tacit collusion, see judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120.

([25]) See judgment in Case C-306/20 - *Visma Enterprise*, paragraph 78.

([26]) Cumulative anti-competitive effects can notably justify a withdrawal of the benefit of Regulation (EU) 2022/720, see section 7.1. of these Guidelines.

3. VERTICAL AGREEMENTS THAT GENERALLY FALL OUTSIDE THE SCOPE OF ARTICLE 101(1) OF THE TREATY

3.1. No effect on trade, agreements of minor importance and small and medium sized undertakings

(23) Before addressing the scope of Regulation (EU) 2022/720, its application, and more generally the assessment of vertical agreements under Article 101(1) and 101(3) of the Treaty, it is important to recall that Regulation (EU) 2022/720 applies only to agreements falling *within* the scope of Article 101(1) of the Treaty.

(24) Agreements that are not capable of appreciably affecting trade between Member States (no effect on trade) or which do not appreciably restrict competition (agreements of minor importance) fall outside the scope of Article 101(1) of the Treaty ([27]). The Commission has provided guidance on the effect on trade in the Effect on Trade Guidelines ([28]), and on agreements of minor importance in the De Minimis Notice ([29]). The present Guidelines are without prejudice to the Effect on Trade Guidelines and the De Minimis Notice, or any future Commission guidance.

(25) The Effect on Trade Guidelines set out the principles developed by the Union Courts to interpret the effect on trade concept and indicate when agreements are unlikely to be capable of appreciably affecting trade between Member States. They include a negative rebuttable presumption that applies to all agreements within the meaning of Article 101(1) of the Treaty, irrespective of the nature of the restrictions included in such agreements, thus also applying to agreements containing hardcore restrictions ([30]). According to that presumption, vertical agreements are in principle not capable of appreciably affecting trade between Member States when:

(a) the aggregate market share of the parties on any relevant market within the Union affected by the agreement does not exceed 5 %, and

(b) the aggregate annual Union turnover of the supplier generated with the products covered by the agreement does not exceed EUR 40 million or, in cases involving agreements concluded between a buyer and several suppliers, the buyer's combined purchases of the products covered by the agreements does not exceed EUR 40 million ([31]). The Commission may rebut the presumption if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

(26) As set out in the De Minimis Notice, vertical agreements entered into by non-competitors are generally considered to fall outside the scope of Article 101(1) of the Treaty if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement ([32]). This general rule is subject to two exceptions. First, as regards restrictions of competition by object, Article 101(1) of the Treaty applies even if the market share held by each of the parties does not exceed 15 % ([33]). This is because an agreement that may affect trade between Member States and which has an anti-competitive object may by its nature and independently of any concrete effect constitute an appreciable restriction on

([27]) See judgment of 13 December 2012, *Expedia Inc.* v *Autorité de la concurrence and Others,* C-226/11, EU:C:2012:795, paragraphs 16 and 17 (hereinafter 'Case C-226/11 - *Expedia*').

([28]) Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81).

([29]) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (OJ C 291, 30.8.2014, p. 1). Further guidance is provided in Commission Staff Working Document – Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final.

([30]) See paragraph 50 of the Effect on Trade Guidelines.

([31]) See paragraph 52 of the Effect on Trade Guidelines.

([32]) See paragraph 8 of the De Minimis Notice, which also includes a market share threshold for agreements between actual or potential competitors, according to which such agreements do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement.

([33]) See judgment in Case C-226/11 - *Expedia*, paragraphs 21 to 23 and 37, with reference to judgment of 9 July 1969, *Völk* v *Vervaecke,* C-5/69, EU:C:1969:35; see also judgments of 6 May 1971, *Cadillon* v *Höss,* C-1/71, EU:C:1971:47; and 28 April 1998, *Javico* v *Yves Saint Laurent Parfums,* C-306/96, EU:C:1998:173, paragraphs 16 and 17 (hereinafter 'Case C-306/96 - *Javico* v *Yves Saint Laurent Parfums*').

competition ([34]). Second, the 15 % market share threshold is reduced to 5 % where, in a relevant market, competition is restricted by the cumulative effect of parallel networks of agreements. Paragraphs (257) to (261) deal with cumulative effects in the context of the withdrawal of the benefit of Regulation (EU) 2022/720. The De Minimis Notice clarifies that individual suppliers or distributors with a market share not exceeding 5 % are in general not considered to contribute significantly to a cumulative foreclosure effect ([35]).

(27) Furthermore, there is no presumption that vertical agreements concluded by undertakings, one or more of which has an individual market share exceeding 15 % automatically fall within the scope of Article 101(1) of the Treaty. Such agreements may still have no appreciable effect on trade between Member States or may not constitute an appreciable restriction of competition ([36]). They therefore need to be assessed in their legal and economic context. These Guidelines include criteria for the individual assessment of such agreements, as set out in section 8.

(28) In addition, the Commission considers that vertical agreements between small and medium-sized undertakings ('SMEs') ([37]) are rarely capable of appreciably affecting trade between Member States. The Commission also considers that such agreements rarely appreciably restrict competition within the meaning of Article 101(1) of the Treaty, as interpreted by the Court of Justice of the European Union, unless they include restrictions of competition by object within the meaning of Article 101(1) of the Treaty. Therefore, vertical agreements between SMEs generally fall outside the scope of Article 101(1) of the Treaty. In cases where such agreements nonetheless meet the conditions for the application of Article 101(1) of the Treaty, the Commission will generally refrain from opening proceedings, due to a lack of sufficient interest for the Union, unless the undertakings individually or collectively hold a dominant position in a substantial part of the internal market.

3.2. **Agency agreements**

3.2.1. *Agency agreements that fall outside the scope of Article 101(1) of the Treaty*

(29) An agent is a legal or natural person entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal.

(30) Article 101 of the Treaty applies to agreements between two or more undertakings. Under certain circumstances, the relationship between an agent and its principal may be characterised as one in which the agent no longer acts as an independent economic operator. This applies where the agent bears no significant financial or commercial risks in relation to the contracts concluded or negotiated on behalf of the principal, as further explained in paragraphs (31) to (34) ([38]). In that case, the agency agreement falls wholly or partially outside the scope of Article 101(1) of the Treaty ([39]). As this constitutes an exception to the general applicability of Article 101 of the Treaty to agreements between undertakings, the conditions for categorising an agreement as an agency agreement that falls outside the scope of Article 101(1) of the Treaty should be interpreted narrowly. For example, it is less likely that an agency agreement will be categorised as falling outside the scope of Article 101(1) of the Treaty where the agent negotiates and/or concludes contracts on behalf of a large number of principals ([40]). The qualification given to their agreement by the parties or by national law is not material for this categorisation.

([34]) See Case C-226/11 - *Expedia*, paragraph 37.

([35]) See paragraph 8 of the De Minimis Notice.

([36]) See paragraph 3 of the De Minimis Notice. See judgment of 8 June 1995, *Langnese-Iglo* v *Commission*, Case T-7/93, EU:T:1995:98, paragraph 98.

([37]) As defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

([38]) See judgments of 15 September 2005, *DaimlerChrysler* v *Commission*, Case T-325/01, EU:T:2005:322 (hereinafter 'Case T-325/01 - *DaimlerChrysler* v *Commission*'); 14 December 2006, *Confederación Espanola de Empresarios de Estaciones de Servicio* v *CEPSA*, Case C-217/05, EU:C:2006:784; and 11 September 2008, *CEPSA Estaciones de Servicio SA* v *LV Tobar e Hijos SL*, Case C-279/06, EU:C:2008:485.

([39]) See section 3.2.2. of these Guidelines as regards provisions of the agency agreement that may still fall within the scope of Article 101(1) of the Treaty.

([40]) See judgment of 1 October 1987, *ASBL Vereniging van Vlaamse Reisbureaus contre ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, EU:C:1987:418, paragraph 20.

(31) There are three types of financial or commercial risks that are material to the categorisation of an agreement as an agency agreement that falls outside the scope of Article 101(1) of the Treaty:

(a) contract-specific risks, which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as the financing of stocks;

(b) risks related to market-specific investments. Those are investments specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate a specific type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss;

(c) risks related to other activities undertaken on the same product market, to the extent that the principal requires, as part of the agency relationship, the agent to undertake such activities not as an agent on behalf of the principal, but at the agent's own risk.

(32) An agreement will be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty where the agent bears none of the types of risk listed in paragraph (31) or where it bears such risks only to an insignificant extent. The significance of any such risks assumed by the agent is generally to be assessed by reference to the remuneration earned by the agent for providing the agency services, for example its commission, rather than by reference to the revenues generated by the sale of the goods or services covered by the agency agreement. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel that could be used for any type of activity, are not material to the assessment.

(33) In light of the above, an agreement will generally be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty where all of the following conditions apply:

(a) the agent does not acquire the property in the goods bought or sold under the agency agreement and does not itself supply the services bought or sold under the agency agreement. The fact that the agent may temporarily, for a very brief period of time, acquire the property in the contract goods while selling them on behalf of the principal, does not preclude the existence of an agency agreement that falls outside the scope of Article 101(1) of the Treaty, provided that the agent does not incur any costs or risks in relation to the transfer of property;

(b) the agent does not contribute to the costs relating to the supply or purchase of the contract goods or services, including the costs of transporting the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal;

(c) the agent does not maintain at its own cost or risk stocks of the contract goods, including the cost of financing the stock and the cost of lost stock. The agent should be able to return unsold goods to the principal without charge, unless the agent is at fault, for example, because it fails to comply with reasonable security or anti-theft measures to avoid stock losses;

(d) the agent does not take responsibility for the customers' non-performance of the contract, with the exception of the loss of the agent's commission, unless the agent is at fault (for example, failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or the police or to communicate to the principal all necessary information available to it on the customer's financial reliability);

(e) the agent does not assume responsibility towards customers or other third parties for loss or damage resulting from the supply of the contract goods or services, unless the agent is at fault;

(f) the agent is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal or to advertising or promotional activities specifically relating to the contract goods or services, unless such costs are fully reimbursed by the principal;

(g) the agent does not make market-specific investments in equipment, premises, training of personnel or advertising, such as the petrol storage tank in the case of petrol retailing, specific software to sell insurance policies in the case of insurance agents, or advertising relating to routes or destinations in the case of travel agents selling flights or hotel accommodation, unless such costs are fully reimbursed by the principal;

(h) the agent does not undertake other activities within the same product market required by the principal under the agency relationship (for example, the delivery of the goods), unless those activities are fully reimbursed by the principal.

(34) While the list set out in paragraph (33) is non-exhaustive, where the agent incurs one or more of the risks or costs mentioned in paragraphs (31) to (33), the agreement between the agent and principal will not be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty ([41]). The question of risk must be assessed on a case-by-case basis and with regard to the economic reality of the situation, rather than the legal form of the agreement. For practical reasons, the risk analysis may start with the assessment of the contract-specific risks. If the agent incurs contract-specific risks which are not insignificant, that will be enough to conclude that the agent is an independent distributor. If the agent does not incur contract-specific risks, then it will be necessary to continue the analysis by assessing the risks relating to market-specific investments. Finally, if the agent does not incur any contract-specific risks or any risks relating to market-specific investments, the risks related to other activities required as part of the agency relationship within the same product market may have to be considered.

(35) A principal may use various methods to cover the relevant risks and costs, as long as such methods ensure that the agent does not bear any significant risks of the types set out in paragraphs (31) to (33). For example, a principal may choose to reimburse the precise costs incurred, or it may cover the costs by way of a fixed lump sum, or it may pay the agent a fixed percentage of the revenues generated by the sale of goods or services under the agency agreement. To ensure that all relevant risks and costs are covered, the method used by the principal should allow the agent to easily distinguish between the amount(s) intended to cover the relevant risks and costs and any other amount(s) paid to the agent, for example intended to remunerate the agent for providing the agency services. Otherwise, the agent may not be able to verify whether the method chosen by the principal covers its costs. It may also be necessary to provide a simple method for the agent to declare and request the reimbursement of any costs exceeding the agreed lump sum or fixed percentage. It may also be necessary for the principal to systematically monitor any changes to the relevant costs and to adapt the lump sum or fixed percentage accordingly. Where the relevant costs are reimbursed by way of a percentage of the price of the products sold under the agency agreement, the principal should also take into account the fact that the agent may incur relevant market-specific investment costs even where it makes limited or no sales for a certain period of time. Such costs have to be reimbursed by the principal.

(36) An independent distributor of some goods or services of a supplier may also act as an agent for other goods or services of the same supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated, for example because they concern goods or services with additional functionalities or new features. For the agreement to be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty, the independent distributor must be genuinely free to enter into the agency agreement (for example, the agency relationship must not be *de facto* imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship). Similarly, the principal must not directly or indirectly impose on the agent an activity as an independent distributor, unless such activity is fully reimbursed by the principal, as set out in paragraph (33), point (h). Moreover, as mentioned in paragraphs (31) to (33), all relevant risks linked to the sale of the goods or services covered by the agency agreement, including market-specific investments, must be borne by the principal.

(37) Where an agent undertakes other activities for the same supplier, not required by that supplier, at its own risk, there is a possibility that the obligations imposed on the agent in relation to its agency activity will influence its incentives and limit its decision-making independence when it sells products as an independent activity. In particular, there is a possibility that the pricing policy of the principal for the products sold under the agency

([41]) See also paragraph (192). In particular, under an agency agreement that falls within the scope of Article 101(1) of the Treaty, the agent must remain free to reduce the effective price paid by the customer, by sharing its remuneration with the customer.

agreement will influence the incentives of the agent/distributor to price independently the products that it sells as an independent distributor. In addition, the combination of agency and independent distribution for the same supplier creates difficulties in distinguishing between investments and costs that relate to the agency function, including market-specific investments, and those that relate solely to the independent activity. In such cases, the assessment of whether an agency relationship meets the conditions set out in paragraphs (30) to (33) may therefore be particularly complex ([42]).

(38) The concerns described in paragraph (37) are more likely to arise where the agent undertakes other activities as an independent distributor for the same principal in the same relevant market. Conversely, those concerns are less likely to arise if the other activities undertaken by the agent as an independent distributor relate to a different relevant market ([43]). More generally, the less interchangeable the products sold under the agency agreement and the products sold independently by the agent, the less likely it is that those concerns will arise. Where any objective differences between the characteristics of the products (for example, higher quality, novel features or additional functions) are insignificant, it may be more difficult to delineate the agent's two types of activity, in which case there may be a significant risk of the agent being influenced by the terms of the agency agreement, in particular as regards price setting, for the products it distributes independently.

(39) To identify the market-specific investments to be reimbursed when entering into an agency agreement with one of its independent distributors that is already active on the relevant market, the principal should consider the hypothetical situation of an agent that is not yet active in the relevant market in order to assess which investments are relevant to the type of activity for which the agent is appointed. The principal would have to cover market-specific investments that are required in order to operate in the relevant market, including where those investments also concern differentiated products distributed outside the scope of the agency agreement but are not exclusively related to the sale of such differentiated products. The only case in which the principal would not have to cover market-specific investments on the relevant market would be when those investments relate exclusively to the sale of differentiated products that are not sold under the agency agreement, but are distributed independently. This is because the agent would incur all market-specific costs to operate on the market, but would not incur the market-specific costs that relate exclusively to the sale of the differentiated products if it did not also act as an independent distributor for those products (provided that the agent can operate on the relevant market without selling the differentiated products in question). To the extent that the relevant investments (for example, investments in activity-specific equipment) have already been depreciated, the reimbursement may be adjusted proportionately. Similarly, the reimbursement may also be adjusted if the market-specific investments made by the independent distributor significantly exceed the market-specific investments that are necessary for an agent to start operating on the relevant market, as a result of its activity as independent distributor.

(40) Example of how costs can be allocated in the case of a distributor that also acts as agent for certain products for the same supplier.

> Products A, B and C are generally sold by the same distributor(s). Products A and B belong to the same product and geographic market, but are differentiated and present objectively different characteristics. Product C belongs to a different product market.
>
> A supplier that generally distributes its products using independent distributors wishes to use an agency agreement for the distribution of its product A, which features a new functionality. It offers this agency agreement to its independent distributors (for product B) already operating in the same product and geographic market, without legally or factually requiring them to enter into this agreement.

([42]) See judgment of 16 December 1975, *'Suiker Unie'* v *Commission*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, EU:C:1975:174., paragraphs 537 to 557.

([43]) See Case T-325/01 - *DaimlerChrysler* v *Commission*, paragraphs 100 and 113.

For the agency agreement not to fall within the scope of Article 101(1) of the Treaty and to meet the conditions set out in paragraphs (30) to (33), the principal must cover all investments relating to the activity of selling each of products A and B (and not only product A) as the two products belong to the same product and geographic market. For example, the costs incurred to adapt or furnish a shop in order to display and sell products A and B are likely to be market-specific. Similarly, the costs of training personnel in order to sell products A and B and costs relating to specific storage equipment needed for products A and B are also likely to be market-specific. Those relevant investments, which would generally be required for an agent to enter the market and start selling products A and B, should be borne by the principal even if the specific agent is already established on the relevant market as an independent distributor.

The principal would however not have to cover investments relating to the sale of product C, which does not belong to the same product market as products A and B. Moreover, where the sale of product B requires specific investments that are not necessary for the sale of product A, for example, investments in dedicated equipment or staff training, such investments would not be relevant and would therefore not have to be covered by the principal, provided that a distributor can operate on the relevant market comprising products A and B by selling only product A.

As regards advertising, investments in advertising for the agent's shop as such, as opposed to advertising that is specific to product A, would benefit both the agent's shop in general as well as the sales of products A, B and C, whereas only product A is sold under the agency agreement. These costs would therefore be partly relevant for the assessment of the agency agreement, to the extent that they relate to the sale of product A which is sold under the agency agreement. The cost of an advertising campaign relating exclusively to products B or C would however not be relevant and therefore would not have to be covered by the principal, provided that a distributor can operate on the relevant market by selling only product A.

The same principles apply to investments in a website or online store, since part of those investments would not be relevant, as they would have to be made irrespective of the products sold under the agency agreement. Therefore, the principal would not have to reimburse general investments in the design of the agent's website, insofar as the website itself could be used to sell products other than those belonging to the relevant product market, for example, product C or, more generally, products other than A and B). However, investments relating to the activity of advertising or selling on the website products belonging to the relevant product market, that is to say both products A and B, would be relevant. Therefore, depending on the level of investment required to advertise and sell products A and B on the website, the principal would have to cover part of the costs of setting up and/or operating the website or online store. Any investments relating specifically to the advertising or sale of product B would not have to be covered, provided that a distributor can operate on the relevant market by selling only product A.

3.2.2. *Application of Article 101(1) of the Treaty to agency agreements*

(41) Where an agreement meets the conditions to be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty, the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods or services, all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1) of the Treaty. The assumption by the agent of the obligations listed in this paragraph is considered to form an inherent part of an agency agreement, as those obligations relate to the ability of the principal to determine the scope of the agent's activity in relation to the contract goods or services. This is essential if the principal is to assume the risks in respect of the contracts concluded and/or negotiated by the agent on the principal's behalf. Thus, the principal is able to determine the commercial strategy in relation to:

(a) limitations on the territory in which the agent may sell the contract goods or services;

(b) limitations on the customers to whom the agent may sell the contract goods or services;

(c) the prices and conditions at which the agent must sell or purchase the contract goods or services.

(42) By contrast, where the agent bears one or more of the relevant risks described in paragraphs (31) to (33), the agreement between agent and principal does not constitute an agency agreement that falls outside the scope of Article 101(1) of the Treaty. In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to Article 101(1) of the Treaty, like any other vertical agreement. For that reason, Article 1(1), point (k) of Regulation (EU) 2022/720 clarifies that an undertaking which, under an agreement falling within the scope of Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking is a buyer.

(43) Even if the agent bears no significant risks of the type described in paragraphs (31) to (33), it remains a separate undertaking from the principal and therefore provisions governing the relationship between the agent and the principal may fall within Article 101(1) of the Treaty, irrespective of whether they form part of the agreement governing the sale or purchase of goods or services or a separate agreement. Such provisions can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, provided that the conditions of the Regulation are fulfilled. Outside the scope of Regulation (EU) 2022/720, such provisions require an individual assessment under Article 101 of the Treaty, as described in section 8.1, in particular to determine whether they produce restrictive effects within the meaning of Article 101(1) of the Treaty and, if so, whether they satisfy the conditions of Article 101(3) of the Treaty. For instance, agency agreements may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) or a provision preventing the agent from acting as an agent or distributor for undertakings that compete with the principal (single branding provisions). Exclusive agency provisions will, in general, not result in anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may restrict competition within the meaning of Article 101(1) of the Treaty where, in isolation or by way of cumulative effects, they result in foreclosure of the relevant market where the contract goods or services are sold or purchased (see in particular sections 6.2.2 and 8.2.1).

(44) An agency agreement may also fall within the scope of Article 101(1) of the Treaty even if the principal bears all the relevant financial and commercial risks, in cases where the agreement facilitates collusion. That could be the case, for instance, where a number of principals use the same agents while collectively excluding other principals from using those agents, or where principals use the agents to collude on marketing strategy or to exchange sensitive market information.

(45) In the case of an independent distributor that also acts as an agent for certain goods or services of the same supplier, compliance with the requirements set out in paragraphs (36) to (39) has to be assessed strictly. This is necessary to avoid misuse of the agency model in scenarios where the supplier does not actually become active at the retail level via the agency agreement and take all associated commercial decisions and assume all related risks, in accordance with the principles set out in paragraphs (30) to (33) , but rather uses the agency model as a means to control retail prices for those products that allow high resale margins. Since resale price maintenance ('RPM') is a hardcore restriction under Article 4 of Regulation (EU) 2022/720, as set out in section 6.1.1, and a restriction by object under Article 101(1) of the Treaty, the agency relationship should not be misused by suppliers to circumvent the application of Article 101(1) of the Treaty.

3.2.3. *Agency and the online platform economy*

(46) Agreements entered into by undertakings active in the online platform economy generally do not meet the conditions to be categorised as agency agreements that fall outside the scope of Article 101(1) of the Treaty. Such undertakings generally act as independent economic operators and not as part of the undertakings for which they provide services. In particular, undertakings active in the online platform economy often serve a

very large number of sellers, which prevents them from effectively becoming part of any of the sellers' undertakings. In addition, strong network effects and other features of the online platform economy can contribute to a significant imbalance in the size and bargaining power of the contracting parties. This can result in a situation where the conditions under which goods or services are sold and the commercial strategy are determined by the undertaking active in the online platform economy rather than by the sellers of the goods or services. In addition, undertakings active in the online platform economy typically make significant market-specific investments, for example, in software, advertising and after-sales services, indicating that those undertakings bear significant financial or commercial risks associated with the transactions that they intermediate.

3.3. **Subcontracting agreements**

(47) Subcontracting agreements are defined in the Subcontracting Notice ([44]) as agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf. As a general rule, subcontracting agreements fall outside the scope of Article 101(1) of the Treaty. The Subcontracting Notice includes further guidance on the application of that general rule. In particular, the Subcontracting Notice states that Article 101(1) of the Treaty does not apply to clauses limiting the use of technology or equipment that the contractor provides to a subcontractor, on condition that the technology or equipment is necessary to enable the subcontractor to produce the products concerned ([45]). The Subcontracting Notice also clarifies the scope of application of that general rule and in particular, that other restrictions imposed on the subcontractor can fall within the scope of Article 101 of the Treaty, such as the obligation not to conduct or exploit the subcontractor's own research and development or not to produce in general for third parties ([46]).

4. **SCOPE OF REGULATION (EU) 2022/720**

4.1. **Safe harbour established by Regulation (EU) 2022/720**

(48) The exemption provided by Article 2(1) of Regulation (EU) 2022/720 establishes a safe harbour for vertical agreements within the meaning of the Regulation, provided that the market shares held by the supplier and the buyer on the relevant markets do not exceed the thresholds set out in Article 3 of the Regulation (see section 5.2.)and the agreement does not include any of the hardcore restrictions set out in Article 4 of the Regulation (see section 6.1.) ([47]). The safe harbour applies as long as the benefit of the block exemption has not been withdrawn in a particular case by the Commission or by an NCA pursuant to Article 29 of Regulation (EC) No 1/2003 (see section 7.1.). The fact that a vertical agreement falls outside the safe harbour does not mean that the agreement falls within the scope of Article 101(1) of the Treaty or that it does not fulfil the conditions of Article 101(3) of the Treaty.

(49) Where a supplier uses the same vertical agreement to distribute several types of goods or services, the application of the market share thresholds set out in Article 3(1) of Regulation (EU) 2022/720 may result in the exemption provided by Article 2(1) of the Regulation applying in respect of some goods or services but not in respect of others. As regards the goods or services to which Article 2(1) of the Regulation does not apply, an individual assessment under Article 101 of the Treaty is necessary.

([44]) Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (OJ C 1, 3.1.1979, p. 2).

([45]) See paragraph 2 of the Subcontracting Notice, which provides further clarifications in particular on the use of industrial property rights and know-how.

([46]) See paragraph 3 of the Subcontracting Notice.

([47]) As regards excluded restrictions and the meaning of Article 5 of Regulation (EU) 2022/720, see section 6.2. of these Guidelines.

4.2. **Definition of vertical agreements**

(50) Article 101(1) of the Treaty refers to agreements between undertakings. It makes no distinction regarding whether the undertakings operate at the same level or at different levels of the production or distribution chain. Article 101(1) of the Treaty thus applies to both horizontal and vertical agreements ([48]).

(51) Pursuant to the power conferred on the Commission by Article 1 of Regulation No. 19/65/EEC to declare by regulation that Article 101(1) of the Treaty shall not apply to certain categories of agreements between undertakings, Article 1(1), point (a) of Regulation (EU) 2022/720 defines a vertical agreement as 'an agreement or concerted practice entered into between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services' ([49]).

4.2.1. *Unilateral conduct falls outside the scope of Regulation (EU) 2022/720*

(52) Regulation (EU) 2022/720 does not apply to unilateral conduct by undertakings. Unilateral conduct can, however, fall within the scope of Article 102 of the Treaty, which prohibits the abuse of a dominant position ([50]).

(53) Regulation (EU) 2022/720 applies to vertical agreements. For there to be an agreement within the meaning of Article 101 of the Treaty, it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way (a so-called concurrence of wills). The form in which that intention is expressed is irrelevant, as long as it constitutes a faithful expression of the parties' intention ([51]).

(54) If there is no explicit agreement expressing the parties' concurrence of wills, a party or authority that alleges an infringement of Article 101 of the Treaty must prove that the unilateral policy of one party receives the acquiescence of the other party. As regards vertical agreements, acquiescence to a specific unilateral policy may be either explicit or tacit:

(a) explicit acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the terms of that agreement provide for or authorise one party to subsequently adopt a specific unilateral policy that is binding on the other party, the acquiescence to that policy by the other party can be established on that basis ([52]).

(b) for tacit acquiescence, it is necessary to show that one party explicitly or implicitly requires the cooperation of the other party for the implementation of its unilateral policy and that the other party has complied with that requirement by implementing that unilateral policy in practice ([53]). For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors immediately reduce their orders and stop engaging in parallel trade, it can be concluded that those distributors tacitly acquiesce to the supplier's unilateral policy. However, such a conclusion cannot be reached if the distributors continue to engage in parallel trade.

([48]) See judgment in Case C-56/65 - *Société Technique Minière* v *Maschinenbau Ulm*, page 249.

([49]) In accordance with Article 1(1), point (a) of Regulation (EU) 2022/720, in these Guidelines the term "vertical agreement" includes vertical concerted practices, unless stated otherwise.

([50]) Conversely, where there exists a vertical agreement within the meaning of Article 101 of the Treaty, the application of Regulation (EU) 2022/720 and these Guidelines is without prejudice to the possible parallel application of Article 102 of the Treaty to the vertical agreement.

([51]) See judgment of 14 January 2021, Case C-450/19, *Kilpailu- ja kuluttajavirasto*, EU:C:2021:10, paragraph 21.

([52]) See judgment of 13 July 2006, *Commission* v *Volkswagen AG*, Case C-74/04 P, EU:C:2006:460, paragraphs 39 to 42.

([53]) See judgment of 26 October 2000, *Bayer AG* v *Commission*, Case T-41/96, EU:T:2000:242, paragraph 120.

(55) In light of the above, the imposition of general terms and conditions by one party amounts to an agreement within the meaning of Article 101(1) of the Treaty where such terms and conditions have been explicitly or tacitly accepted by the other party ([54]).

4.2.2. *The undertakings operate at different levels of the production or distribution chain*

(56) Regulation (EU) 2022/720 applies to agreements between two or more undertakings, irrespective of their business model. The Regulation does not apply to agreements entered into with natural persons who are acting for purposes which are outside their trade, business, craft or profession, as such persons are not undertakings.

(57) To qualify as a vertical agreement within the meaning of Article 1(1), point (a) of Regulation (EU) 2022/720, an agreement must be entered into between undertakings operating, for the purposes of the agreement, at different levels of the production or distribution chain. For example, a vertical agreement exists where one undertaking produces a raw material or provides a serviceand sells it to another undertaking that uses it as an input, or where a manufacturer sells a product to a wholesaler that resells it to a retailer. Likewise, a vertical agreement exists where one undertaking sells goods or services to another undertaking which is the end user of the goods or services.

(58) As the definition in Article 1(1), point (a) of Regulation (EU) 2022/720 refers to the purpose of the specific agreement, the fact that one undertaking party to the agreement is active at more than one level of the production or distribution chain does not preclude the application of Regulation (EU) 2022/720. However, where a vertical agreement is entered into between competing undertakings, Regulation (EU) 2022/720 does not apply, unless the conditions of Article 2(4) of the Regulation are fulfilled (see sections 4.4.3. and 4.4.4.).

4.2.3. *The agreement relates to the purchase, sale or resale of goods or services*

(59) To qualify as a vertical agreement within the meaning of Article 1(1), point (a) of Regulation (EU) 2022/720, the agreement must relate to the conditions under which the parties "may purchase, sell or resell certain goods or services". Pursuant to the purpose of block exemption regulations to provide legal certainty, Article 1(1), point (a) of Regulation (EU) 2022/720 must be interpreted broadly as applying to all vertical agreements, irrespective of whether they relate to intermediate or final goods or services. For the purpose of applying the Regulation to a particular agreement, both the goods or services supplied and, in the case of intermediate goods or services, the resulting final goods or services, are considered contract goods or services.

(60) Vertical agreements in the online platform economy, including those entered into by providers of online intermediation services, as referred to in Article 1(1), point (d) of Regulation (EU) 2022/720, are covered by Article 1(1), point (a) of Regulation (EU) 2022/720. In the case of vertical agreements relating to the provision of online intermediation services, both the online intermediation services and the goods or services that are transacted via the online intermediation services are considered as contract goods or services for the purpose of applying Regulation (EU) 2022/720 to the agreement.

(61) Regulation (EU) 2022/720 does not apply to vertical restraints that do not relate to the conditions under which goods or services may be purchased, sold or resold. Such restraints must therefore be assessed individually, namely it is necessary to determine whether they fall within the scope of Article 101(1) of the Treaty and, if so, whether they fulfil the conditions of Article 101(3) of the Treaty. For example, Regulation (EU) 2022/720 does not apply to an obligation that prevents the parties from carrying out independent research and development, even though the parties may have included it in their vertical agreement. Another example concerns rent and

([54]) See Commission Decision in AT.40428 - *Guess*, recital 97, with reference to judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici* v *Commission*, Case C-277/87, EU:C:1990:6, paragraph 2, and judgment of 9 July 2009, *Peugeot and Peugeot Nederland* v *Commission*, Case T-450/05, EU:T:2009:262, paragraphs 168 to 209.

lease agreements. Although Regulation (EU) 2022/720 applies to agreements for the sale and purchase of goods for the purpose of renting them to third parties, rent and lease agreements as such are not covered by the Regulation, because in that case there is no sale or purchase of goods.

4.3. **Vertical agreements in the online platform economy**

(62) Undertakings active in the online platform economy play an increasingly important role in the distribution of goods and services. They enable new ways of doing business, some of which are not easy to categorise using the concepts applied to vertical agreements in the brick and mortar environment.

(63) Undertakings active in the online platform economy are often qualified as agents in contract or commercial law. However, this qualification is not material for the categorisation of their agreements under Article 101(1) of the Treaty ([55]). Vertical agreements entered into by undertakings active in the online platform economy will only be categorised as agency agreements that fall outside the scope of Article 101(1) of the Treaty where they fulfil the conditions set out in section 3.2. Due to the factors mentioned in section 3.2.3., those conditions will generally not be fulfilled in the case of agreements entered into by undertakings active in the online platform economy.

(64) Where a vertical agreement entered into by an undertaking active in the online platform economy does not meet the conditions to be categorised as an agency agreement falling outside the scope of Article 101(1) of the Treaty, it is necessary to consider whether the agreement relates to the provision of online intermediation services. Article 1(1), point (e) of Regulation (EU) 2022/720 defines online intermediation services as information society services ([56]) which allow undertakings to offer goods or services to other undertakings or to final consumers, with a view to facilitating the initiating of direct transactions between undertakings or between an undertaking and a final consumer, irrespective of whether and where the transactions are ultimately concluded ([57]). Examples of online intermediation services may include e-commerce marketplaces, app stores, price comparison tools and social media services used by undertakings.

(65) In order to qualify as a provider of online intermediation services, an undertaking must facilitate the initiating of direct transactions between two other parties. In principle, the functions performed by the undertaking must be assessed separately for each vertical agreement that the undertaking enters into, notably because undertakings active in the online platform economy often apply different business models in different sectors or even within the same sector. For example, in addition to providing online intermediation services, such undertakings may buy and resell goods or services, in some cases performing both functions vis-à-vis a single counterparty.

(66) The fact that an undertaking collects payments for transactions that it intermediates, or offers ancillary services in addition to its intermediation services, for example, advertising services, rating services, insurance or a guarantee against damage, does not preclude it from being categorised as a provider of online intermediation services ([58]).

(67) For the purpose of applying Regulation (EU) 2022/720, undertakings that are party to vertical agreements are categorised as either suppliers or buyers. Pursuant to Article 1(1), point (d) of the Regulation, an undertaking that provides online intermediation services within the meaning of Article 1(1), point (e) of the Regulation is

([55]) See also paragraph (30).

([56]) See Article 1(1), point (b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

([57]) See also Article 2(2) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57).

([58]) See, for example, judgment of 19 December 2019, X, Case C-390/18, EU:C:2019:1112, paragraphs 58 to 69.

categorised as a supplier in respect of those services and an undertaking that offers or sells goods or services via online intermediation services is categorised as a buyer in respect of those online intermediation services, irrespective of whether it pays to use the online intermediation services ([59]). This has the following consequences for the application of Regulation (EU) 2022/720:

(a) the undertaking that provides the online intermediation services cannot be categorised as a buyer within the meaning of Article 1(1), point (k) of the Regulation in respect of goods or services offered by third parties using those online intermediation services;

(b) for the purpose of applying the market share thresholds set out in Article 3(1) of the Regulation, the market share of the undertaking that provides the online intermediation services is calculated on the relevant market for the supply of those services. The scope of the relevant market depends on the facts of the case, in particular the degree of substitutability between online and offline intermediation services, between intermediation services used for different categories of goods or services and between intermediation services and direct sales channels;

(c) restrictions imposed by the undertaking that provides the online intermediation services on buyers of those services relating to the price at which, the territories to which, or the customers to whom the intermediated goods or services may be sold, including restrictions relating to online advertising and online selling, are subject to the provisions of Article 4 of the Regulation (hardcore restrictions). For example, pursuant to Article 4, point (a) of the Regulation, the exemption provided by Article 2(1) of the Regulation does not apply to an agreement under which a provider of online intermediation services imposes a fixed or minimum sale price for a transaction that it facilitates;

(d) pursuant to Article 5(1), point (d) of the Regulation, the exemption provided by Article 2(1) of the Regulation does not apply to across-platform retail parity obligations imposed by the undertaking that provides the online intermediation services on buyers of those services;

(e) pursuant to Article 2(6) of the Regulation, the exemption provided by Article 2(1) of the Regulation does not apply to agreements relating to the provision of online intermediation services where the provider of the services is a competing undertaking on the relevant market for the sale of the intermediated goods or services (hybrid function). As set out in section 4.4.4., such agreements must be assessed under the Horizontal Guidelines as regards possible collusive effects and under section 8 of these Guidelines as regards any vertical restraints.

(68) Undertakings active in the online platform economy that do not provide online intermediation services within the meaning of Article 1(1), point (e) of Regulation (EU) 2022/720 may be categorised as either suppliers or buyers for the purpose of applying the Regulation. For example, such undertakings may be categorised as suppliers of upstream input services or as (re)sellers of goods or services downstream. This categorisation may affect, in particular, the definition of the relevant market for the purpose of applying the market share thresholds set out in Article 3(1) of the Regulation, the applicability of Article 4 of the Regulation (hardcore restrictions), and the applicability of Article 5 of the Regulation (excluded restrictions).

4.4. **Limits to the application of Regulation (EU) 2022/720**

4.4.1. *Associations of retailers*

(69) Article 2(2) of Regulation (EU) 2022/720 provides that vertical agreements entered into by an association of undertakings that fulfils certain conditions can benefit from the safe harbour, thereby excluding from the safe harbour vertical agreements entered into by all other associations. More specifically, vertical agreements entered into between an association and individual members, or between an association and individual

([59]) The guidance provided in this section 4 of these Guidelines is without prejudice to the categorisation of undertakings that are party to agreements that fall outside the scope of Regulation (EU) 2022/720.

suppliers, fall within the scope of Regulation (EU) 2022/720 only if all the members are retailers, selling goods (and not services) to final consumers, and if each individual member of the association has an annual turnover not exceeding EUR 50 million ([60]). However, where only a limited number of the members of the association have an annual turnover exceeding the EUR 50 million threshold and where those members together represent less than 15 % of the collective turnover of all the members, this will generally not change the assessment under Article 101 of the Treaty.

(70) An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements must be assessed according to the principles set out in the Horizontal Guidelines. If the conclusion of that assessment is that a cooperation between undertakings in the area of purchasing or selling does not raise concerns, in particular because it meets the conditions set out in those Guidelines relating to purchasing and/or commercialisation agreements, a further assessment will be necessary to examine the vertical agreements concluded by the association with individual suppliers or individual members. That further assessment must be conducted in accordance with the rules of Regulation (EU) 2022/720, and in particular with the conditions laid down in Articles 3, 4 and 5 thereof, and with these Guidelines. For instance, horizontal agreements concluded between the members of the association or decisions adopted by the association, such as the decision to require the members to purchase from the association or the decision to allocate exclusive territories to the members must first be assessed as a horizontal agreement. Only if that assessment leads to the conclusion that the horizontal agreement or decision is not anti-competitive is it necessary to assess the vertical agreements between the association and individual members or between the association and individual suppliers.

4.4.2. *Vertical agreements containing provisions on intellectual property rights (IPRs)*

(71) Article 2(3) of Regulation (EU) 2022/720 provides that vertical agreements containing certain provisions which relate to the assignment or use of IPRs can benefit from the exemption provided by Article 2(1) of the Regulation, subject to certain conditions. Accordingly, Regulation (EU) 2022/720 does not apply to other vertical agreements containing IPR provisions.

(72) Regulation (EU) 2022/720 applies to vertical agreements containing IPR provisions where all of the following conditions are fulfilled:

(a) the IPR provisions must be part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

(b) the IPRs must be assigned to or licensed for use by the buyer;

(c) the IPR provisions must not constitute the primary object of the agreement;

(d) the IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;

(e) the IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints that are not exempted under Regulation (EU) 2022/720.

(73) These conditions ensure that Regulation (EU) 2022/720 applies to vertical agreements where the use, sale or resale of goods or services can be performed more effectively because IPRs are assigned to or licensed for use by the buyer. This means that restrictions concerning the assignment or use of IPRs benefit from the exemption provided by Article 2(1) of the Regulation where the main object of the agreement is the purchase or distribution of goods or services.

([60]) The annual turnover ceiling of EUR 50 million is based on the turnover ceiling for SMEs in Article 2 of the Annex to the Commission Recommendation 2003/361/EC.

(74) The first condition, set out in paragraph (72), point (a), makes clear that the IPRs must be provided in the context of an agreement to purchase or distribute goods, or an agreement to purchase or provide services, and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement. Regulation (EU) 2022/720 does not cover for instance:

(a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with that recipe;

(b) the pure licence of a trade mark or sign for the purposes of merchandising;

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

(d) copyright licensing such as broadcasting contracts concerning the right to record or broadcast an event.

(75) It follows from the second condition, set out in paragraph (72), point (b), that Regulation (EU) 2022/720 does not apply where the IPRs are provided by the buyer to the supplier, regardless of whether the IPRs concern the manner of manufacture or of distribution. An agreement relating to the transfer of IPRs to the supplier and containing possible restrictions on the sales made by the supplier is not covered by Regulation (EU) 2022/720. This means that subcontracting involving the transfer of know-how to a subcontractor is not covered by Regulation (EU) 2022/720 (see also section 3.3). However, vertical agreements under which the buyer merely provides specifications to the supplier which describe the goods or services to be supplied are covered by Regulation (EU) 2022/720.

(76) The third condition, set out in paragraph (72), point (c), requires that the primary object of the agreement is not the assignment or licensing of IPRs. The primary object must be the purchase, sale or resale of goods or services, and the IPR provisions must serve the implementation of the vertical agreement.

(77) The fourth condition, set out in paragraph (72), point (d), requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or its customers. The goods or services for use or resale are usually supplied by the licensor, but they may also be purchased by the licensee from a third party supplier. The IPR provisions will generally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells to the franchisee goods for resale and licenses the franchisee to use its trademark and know-how to market the goods, or where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

(78) The fifth condition, set out in paragraph (72), point (e), requires that the IPR provisions do not have the same object as any of the hardcore restrictions listed in Article 4 of Regulation (EU) 2022/720 or any of the restrictions that are excluded from the benefit of the Regulation pursuant to Article 5 of the Regulation (see section 6).

(79) IPRs relevant to the implementation of vertical agreements within the meaning of Article 2(3) of Regulation (EU) 2022/720 generally concern three main areas: trademarks, copyright and know-how.

4.4.2.1. Trademarks

(80) A trademark licence to a distributor may be related to the distribution of the licensor's products in a particular territory. If it is an exclusive licence, the agreement amounts to exclusive distribution.

4.4.2.2. Copyright

(81) Resellers of goods or services covered by copyright (for example, books and software) may be obliged by the copyright holder to only resell under the condition that the buyer, irrespective of whether it is another reseller or the end user, does not infringe the copyright. To the extent that they fall within the scope of Article 101(1) of the Treaty, such obligations on the reseller are covered by Regulation (EU) 2022/720.

(82) As mentioned in paragraph 62 of the Technology Transfer Guidelines ([61]), the licensing of software copyrights for the purpose of mere reproduction and distribution of the protected work is not covered by Commission Regulation (EU) No 316/2014 ([62]) but is instead covered by analogy by Regulation (EU) 2022/720 and these Guidelines.

(83) Furthermore, agreements under which hard copies of software are supplied for resale and the reseller does not acquire a licence to any rights in the software but only has the right to resell the hard copies, are to be regarded as agreements for the supply of goods for resale for the purpose of Regulation (EU) 2022/720. Under that form of distribution, the licensing of the software only takes place between the copyright owner and the user of the software. It may take the form of a "shrink wrap" licence, that is, a set of conditions included in the package of the hard copy, which the end user is deemed to accept by opening the package.

(84) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. To the extent that they fall within the scope of Article 101(1) of the Treaty, such restrictions on use are covered by Regulation (EU) 2022/720.

4.4.2.3. Know-how

(85) Franchise agreements, with the exception of industrial franchise agreements, are an example of know-how being communicated to the buyer for marketing purposes ([63]). Franchise agreements contain licences of IPRs relating to trademarks or signs, and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPRs, the franchisor usually provides the franchisee with commercial or technical assistance for the duration of the agreement, such as procurement services, training, advice on real estate and financial planning. The licence and the assistance provided are integral components of the business method being franchised.

(86) Licensing contained in franchise agreements is covered by Regulation (EU) 2022/720 where all five conditions listed in paragraph (72) are fulfilled. This is usually the case, as under most franchise agreements, including master franchise agreements, the franchisor provides goods and/or services, in particular commercial or technical assistance services, to the franchisee. The IPRs help the franchisee to resell the products supplied by the franchisor or by a supplier designated by the franchisor, or to use those products and sell the resulting goods or services. Where the franchise agreement concerns solely or primarily the licensing of IPRs, it is not covered by Regulation (EU) 2022/720, but the Commission will, as a general rule, apply the principles set out in Regulation (EU) 2022/720 and these Guidelines to such an agreement.

(87) The following IPR-related obligations are generally considered necessary to protect the franchisor's IPRs and, where such obligations fall within the scope of Article 101(1) of the Treaty, they are also covered by Regulation (EU) 2022/720:

(a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;

(b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as to give the franchisee the power to influence the economic conduct of such undertaking;

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

([61]) Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3).

([62]) Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L 93, 28.3.2014, p. 17).

([63]) Paragraphs (85) to (87) apply by analogy to other types of distribution agreement that involve the transfer of substantial know-how from the supplier to the buyer.

(d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor and other franchisees a non-exclusive licence for the know-how resulting from that experience;

(e) an obligation on the franchisee to inform the franchisor of infringements of licensed IPRs, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;

(g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent.

4.4.3. *Vertical agreements between competitors*

(88) As regards vertical agreements between competitors, it should first be noted that, pursuant to Article 2(7) of Regulation (EU) 2022/720, on which guidance is provided in section 4.5., the Regulation does not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such other regulation.

(89) Article 2(4), first sentence, of Regulation (EU) 2022/720 establishes the general rule that the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements between competing undertakings.

(90) Article 1(1), point (c) of Regulation (EU) 2022/720 defines a competing undertaking as an actual or potential competitor. Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market. An undertaking is treated as a potential competitor of another undertaking if, absent the vertical agreement between the undertakings, it is likely that the former would, within a short period of time (normally not longer than one year), make the additional necessary investments or incur other necessary costs to enter the relevant market in which the latter undertaking is active. This assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context. The mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for the undertaking to enter the market and no insurmountable barriers to entry. Conversely, there is no need to demonstrate with certainty that the undertaking will in fact enter the relevant market and that it will be capable of retaining its place there ([64]).

(91) Vertical agreements between competing undertakings that do not fall within the exceptions set out in Article 2(4), second sentence, of Regulation (EU) 2022/720, on which guidance is provided in paragraphs (93) to (95), must be individually assessed under Article 101 of the Treaty. These Guidelines are relevant for the assessment of any vertical restraints in such agreements. The Horizontal Guidelines may provide relevant guidance for the assessment of possible collusive effects.

(92) A wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the brand name of that wholesaler or retailer is not considered a manufacturer of such own-brand goods and consequently not a competitor of the manufacturer for the purpose of applying Article 2(4), point (a) of Regulation (EU) 2022/720. Therefore, the exemption provided by Article 2(1) of the Regulation can apply to a vertical agreement entered into between, on the one hand, a wholesaler or retailer that sells own-brand goods that have been manufactured by a third party (and not in-house) and, on the other hand, a manufacturer of competing branded goods ([65]). By contrast, wholesalers and retailers that manufacture goods in-house for sale under their own brand name are considered to be manufacturers and therefore the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements entered into by such wholesalers or retailers with manufacturers of competing branded goods.

([64]) See the judgments of 30 January 2020, *Generics (UK) and Others* v *Competition and Markets Authority*, Case C-307/18, EU:C:2020:52, paragraphs 36 to 45; 25 March 2021, *H. Lundbeck A/S and Lundbeck Ltd* v *European Commission*, Case C-591/16 P, EU:C:2021:243, paragraphs 54 to 57.

([65]) This is without prejudice to the application of the Subcontracting Notice, see paragraph (47) of these Guidelines.

(93) Article 2(4), second sentence, of Regulation (EU) 2022/720 contains two exceptions to the general rule that the block exemption does not apply to agreements between competing undertakings. More specifically, the second sentence of Article 2(4) provides that the exemption provided by Article 2(1) of the Regulation applies to non-reciprocal vertical agreements between competing undertakings that fulfil the conditions of either Article 2(4), point (a) or point (b) of the Regulation. Non-reciprocal means in particular that the buyer of the contract goods or services does not also supply competing goods or services to the supplier.

(94) The two exceptions set out in the second sentence of Article 2(4) of Regulation (EU) 2022/720 both concern scenarios of dual distribution, namely where a supplier of goods or services is also active at the downstream level, thereby competing with its independent distributors. Article 2(4), point (a) of the Regulation concerns the scenario where the supplier sells the contract goods at several levels of trade, namely at the upstream level as a manufacturer, importer or wholesaler and at the downstream level as an importer, wholesaler or retailer, whereas the buyer sells the contract goods at a downstream level, namely as an importer, wholesaler or retailer, and is not a competing undertaking at the upstream level where it buys the contract goods. Article 2(4), point (b) of the Regulation concerns the scenario where the supplier is a provider of services operating at several levels of trade, whereas the buyer provides services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

(95) The rationale for the exceptions set out in Article 2(4), points (a) and (b) of Regulation (EU) 2022/720 is that, in a dual distribution scenario, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and the buyer at the downstream level is considered to be less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream levels. As Article 2(4), points (a) and (b) are exceptions to the general rule that Regulation (EU) 2022/720 does not apply to agreements between competitors, those exceptions should be construed narrowly.

(96) If the conditions set out in Article 2(4), point (a) or (b) of Regulation (EU) 2022/720 are fulfilled, the exemption provided by Article 2(1) of the Regulation applies to all aspects of the vertical agreement in question, including, in general, exchanges of information between the parties relating to the implementation of the agreement ([66]). Information exchange can contribute to the pro-competitive effects of vertical agreements, including the optimisation of production and distribution processes. This also applies in scenarios of dual distribution. However, not all exchanges of information between a supplier and buyer in a dual distribution scenario are efficiency-enhancing. For this reason, Article 2(5) of Regulation (EU) 2022/720 provides that the exceptions set out in Article 2(4), points (a) and (b) do not apply to the exchange of information between a supplier and buyer that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which meets neither of those conditions. Article 2(5) of the Regulation and the guidance provided in paragraphs (96) to (103) only concern information exchange in the context of dual distribution, namely information exchange between the parties to a vertical agreement that fulfils the conditions of Article 2(4), point (a) or (b) of the Regulation.

(97) For the purpose of applying Article 2(5) of the Regulation and these Guidelines, information exchange includes any communication of information by one party to the vertical agreement to the other party, irrespective of the characteristics of the exchange, for instance whether the information is communicated by only one party or by both parties, or whether the information is exchanged in writing or orally. It is also immaterial whether the form and content of the information exchange is expressly agreed in the vertical agreement or if it takes place on an informal basis, including, for example, where one party to the vertical agreement communicates information without a request from the other party.

([66]) The guidance provided in these Guidelines is without prejudice to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1) and other Union law applicable to the exchange of information within the meaning of paragraph (97) of these Guidelines.

(98) Whether an exchange of information in a dual distribution scenario is directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services within the meaning of Article 2(5) of Regulation (EU) 2022/720 may depend on the particular model of distribution. For example, under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to their respective sales activities in particular territories or in respect of particular customer groups. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network ([67]). In a selective distribution system, it may be necessary for the distributor to share information with the supplier relating to its compliance with the selection criteria and with any restrictions on sales to unauthorised distributors.

(99) The following is a non-exhaustive list of examples of information that may, depending on the particular circumstances, be directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services ([68]):

(a) technical information relating to the contract goods or services, including information relating to the registration, certification, handling, use, maintenance, repair, upgrading or recycling of the contract goods or services, notably where such information is required to comply with regulatory measures, and information that enables the supplier or buyer to adapt the contract goods or services to the requirements of the customer;

(b) logistical information relating to the production and distribution of the contract goods or services at the upstream or downstream levels, including information relating to production processes, inventory, stocks and, subject to paragraph (100), point (b), sales volumes and returns;

(c) subject to paragraph (100), point (b), information relating to customer purchases of the contract goods or services, customer preferences and customer feedback, provided that the exchange of such information is not used to restrict the territory into which or the customers to whom the buyer may sell the contract goods or services within the meaning of Article 4, points (b), (c) or (d) of Regulation (EU) 2022/720;

(d) information relating to the prices at which the contract goods or services are sold by the supplier to the buyer;

(e) subject to paragraph (100), point (a), information relating to the supplier's recommended or maximum resale prices for the contract goods or services and information relating to the prices at which the buyer resells the goods or services, provided that the exchange of such information is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) 2022/720 ([69]);

(f) subject to paragraph (100) and point (e) of this paragraph, information relating to the marketing of the contract goods or services, including information on promotional campaigns and information on new goods or services to be supplied under the vertical agreement;

(g) performance-related information, including aggregated information communicated by the supplier to the buyer relating to the marketing and sales activities of other buyers of the contract goods or services, provided that this does not enable the buyer to identify the activities of particular competing buyers, as well as information relating to the volume or value of the buyer's sales of the contract goods or services relative to its sales of competing goods or services.

(100) The following are examples of information that is generally unlikely to fulfil the two conditions set out in Article 2(5) of Regulation (EU) 2022/720 when exchanged between a supplier and a buyer in a dual distribution scenario:

([67]) See paragraph 31 of the Article 101(3) Guidelines.

([68]) Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct.

([69]) See Section 6.1.1. for further guidance on RPM, including on indirect means to apply RPM.

(a) information relating to the future prices at which the supplier or buyer intend to sell the contract goods or services downstream;

(b) information relating to identified end users of the contract goods or services, unless the exchange of such information is necessary:

(1) to enable the supplier or buyer to satisfy the requirements of a particular end user, for example to adapt the contract goods or services to the end user's requirements, to grant the end user special conditions, including under a customer loyalty scheme, or to provide pre- or after-sales services, including guarantee services,

(2) to implement or monitor compliance with a selective distribution agreement or an exclusive distribution agreement under which particular end users are allocated to the supplier or buyer;

(c) information relating to goods sold by a buyer under its own brand name exchanged between the buyer and a manufacturer of competing branded goods, unless the manufacturer is also the producer of those own-brand goods.

(101) The examples set out in paragraphs (99) and (100) are provided to assist undertakings with their self-assessment. However, the inclusion of a particular type of information in paragraph (99) does not imply that the exchange of such information will fulfil the two conditions set out in Article 2(5) of Regulation (EU) 2022/720 in all cases. Likewise, the inclusion of a particular type of information in paragraph (100) does not imply that the exchange of such information will never fulfil those two conditions. Undertakings must therefore apply the conditions of Article 2(5) of the Regulation to the particular facts of their vertical agreement.

(102) Where the parties to a vertical agreement that fulfils the conditions of Article 2(4), point (a) or (b) of Regulation (EU) 2022/720 exchange information that is either not directly related to the implementation of their vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions, the information exchange must be assessed individually under Article 101 of the Treaty. Such exchanges do not necessarily infringe Article 101 of the Treaty. Furthermore, the other provisions of the vertical agreement can still benefit from the exemption provided by Article 2(1) of the Regulation, provided that the agreement otherwise complies with the conditions set out in the Regulation.

(103) Where competing undertakings enter into a vertical agreement and engage in exchanges of information that do not benefit from the exemption provided by Article 2(1) of the Regulation ([70]), they may take precautions to minimise the risk that the information exchange will raise competition concerns ([71]). For example, they may exchange information only in aggregated form or ensure an appropriate delay between the generation of the information and the exchange. They may also use technical or administrative measures, such as firewalls, to ensure that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity. However, the use of such precautions cannot bring within the scope of the exemption provided by Article 2(1) of Regulation (EU) 2022/720 information exchanges that would otherwise fall outside the scope of that exemption.

4.4.4. *Vertical agreements with providers of online intermediation services that have a hybrid function*

(104) Pursuant to Article 2(6) of Regulation (EU) 2022/720, the dual distribution exceptions set out in Article 2(4), points (a) and (b) of the Regulation do not apply to vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services has a hybrid function, namely

([70]) For example, because the conditions of Article 2(4), Article 2(5) or Article 3(1) of the Regulation are not fulfilled.
([71]) See the chapter on information exchange in the Horizontal Guidelines and any future version of those Guidelines.

it is also a competing undertaking on the relevant market for the sale of the intermediated goods or services ([72]). Article 2(6) of Regulation (EU) 2022/720 applies to vertical agreements "relating to" the provision of online intermediation services, irrespective of whether the agreement relates to the provision of those services to a party to the agreement or to third parties.

(105) Vertical agreements relating to the provision of online intermediation services entered into by providers of online intermediation services with such a hybrid function do not fulfil the rationale for the dual distribution exceptions, set out in Article 2(4), points (a) and (b) of Regulation (EU) 2022/720. Such providers may have an incentive to favour their own sales and the ability to influence the outcome of competition between undertakings that use their online intermediation services. Such vertical agreements may therefore raise concerns for competition in general on relevant markets for the sale of the intermediated goods or services.

(106) Article 2(6) of Regulation (EU) 2022/720 applies to vertical agreements relating to the provision of online intermediation services where the provider of online intermediation services is an actual or potential competitor on the relevant market for the sale of the intermediated goods or services. In particular, it must be likely that the provider of online intermediation services would, within a short period of time (normally not longer than one year), make the additional necessary investments or incur other necessary costs to enter the relevant market for the sale of the intermediated goods or services ([73]).

(107) Agreements relating to the provision of online intermediation services that, pursuant to Article 2(6) of Regulation (EU) 2022/720, do not benefit from the exemption provided by Article 2(1) of the Regulation must be assessed individually under Article 101 of the Treaty. Such agreements do not necessarily restrict competition within the meaning of Article 101(1) of the Treaty, or they may fulfil the conditions of an individual exemption under Article 101(3) of the Treaty. The De Minimis Notice may apply where the parties hold low market shares on the relevant market for the provision of online intermediation services and the relevant market for the sale of the intermediated goods or services ([74]). The Horizontal Guidelines may provide relevant guidance for the assessment of possible collusive effects. These Guidelines may provide guidance for the assessment of any vertical restraints.

(108) In the absence of restrictions of competition by object, appreciable anti-competitive effects are unlikely where the provider of online intermediation services does not enjoy market power in the relevant market for online intermediation services, for example because it has only recently entered such market (start-up phase). In the online platform economy, the revenue generated by a provider of online intermediation services (for example, commissions) may be only a first proxy for the extent of its market power and it may also be necessary to take into account alternative metrics, such as the number of transactions intermediated by the provider, the number of users of the online intermediation services (sellers and/or buyers) and the extent to which such users use the services of other providers. It is also unlikely that a provider of online intermediation services enjoys market power where it does not benefit from appreciable positive direct or indirect network effects.

(109) In the absence of restrictions by object or significant market power, it is unlikely that the Commission will prioritise enforcement action in respect of vertical agreements relating to the provision of online intermediation services where the provider has a hybrid function. This is in particular the case where, in a dual distribution scenario, a supplier allows buyers of its goods or services to use its website to distribute the goods or services, but does not allow the website to be used to offer competing brands of goods or services and is not otherwise active on the relevant market for the provision of online intermediation services in respect of such goods or services.

([72]) The application of Article 2(6) of Regulation (EU) 2022/720 presupposes that the vertical agreement entered into by the provider of online intermediation services with a hybrid function does not qualify as an agency agreement that falls outside the scope of Article 101(1) of the Treaty, see paragraphs (46) and (63).

([73]) See paragraph (90).

([74]) See paragraph (26).

4.5. Relationship with other block exemption regulations

(110) As explained in sections 4.1. and 4.2., Regulation (EU) 2022/720 applies to vertical agreements, which must be assessed exclusively under Regulation (EU) 2022/720 and these Guidelines, unless specifically stated otherwise in these Guidelines. Such agreements can benefit from the safe harbour established by Regulation (EU) 2022/720.

(111) Pursuant to Article 2(7) of Regulation (EU) 2022/720, the Regulation does not apply to vertical agreements where their subject matter falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation'. It is therefore important to verify from the outset whether a vertical agreement falls within the scope of any other block exemption regulation.

(112) Regulation (EU) 2022/720 does not apply to vertical agreements covered by the following block exemption regulations or any future block exemption regulations relating to the types of agreements referenced in this paragraph, unless otherwise provided for in the respective regulation:

— Commission Regulation (EU) No 316/2014;

— Commission Regulation (EU) No 1217/2010 ([75]);

— Commission Regulation (EU) No 1218/2010 ([76]).

(113) Regulation (EU) 2022/720 does not apply to the types of agreements between competitors mentioned in the Horizontal Guidelines, unless otherwise provided by the Horizontal Guidelines.

(114) Regulation (EU) 2022/720 does apply to vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles. Such agreements only benefit from the safe harbour created by Regulation (EU) 2022/720 if, in addition to the conditions of Regulation (EU) 2022/720, they comply with the conditions of Commission Regulation (EU) No 461/2010 ([77]) and its accompanying guidelines.

4.6. Specific types of distribution system

(115) A supplier is free to organise the distribution of its goods or services as it sees fit. The supplier may, for instance, choose vertical integration, namely selling its goods or services directly to end users or distributing them through its vertically integrated distributors, which are connected undertakings within the meaning of Article 1(2) of Regulation (EU) 2022/720. This type of distribution system involves a single undertaking and thus falls outside the scope of Article 101(1) of the Treaty.

(116) The supplier may also decide to use independent distributors. To that end, the supplier may use one or more types of distribution system. Certain types of distribution system, namely selective distribution and exclusive distribution, are the subject of specific definitions in Article 1(1), points (g) and (h) of Regulation (EU) 2022/720. Guidance on exclusive distribution and selective distribution is provided in sections 4.6.1 and 4.6.2 respectively ([78]). The supplier may also distribute its goods or services using neither selective distribution nor exclusive distribution. These other types of distribution are categorised as free distribution systems for the purpose of applying the Regulation ([79]).

([75]) Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 335, 18.12.2010, p. 36).

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

([77]) Commission Regulation (EU) No 461/2010 f 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 129, 28.5.2010, p. 52).

([78]) See also sections 6.1.2.3.1 and 6.1.2.3.2.

([79]) See also section 6.1.2.3.3.

4.6.1. *Exclusive distribution systems*

4.6.1.1. Definition of exclusive distribution systems

(117) In an exclusive distribution system, as defined in Article 1(1), point (h) of Regulation (EU) 2022/720, the supplier allocates a territory or a group of customers exclusively to one or a limited number of buyers, while restricting all its other buyers within the Union from actively selling into the exclusive territory or to the exclusive customer group ([80]).

(118) Suppliers often use exclusive distribution systems to incentivise distributors to make the financial and non-financial investments needed to develop the supplier's brand in a territory where the brand is not well known, or to sell a new product in a particular territory or to a particular customer group, or to incentivise distributors to focus their selling and promotional activities on a particular product. For the distributors, the protection provided by exclusivity may enable them to secure a certain volume of business and a margin that justifies their investment efforts.

4.6.1.2. Application of Article 101 of the Treaty to exclusive distribution systems

(119) In a distribution system where the supplier allocates a territory or customer group exclusively to one or more buyers, the main possible competition risks are market partitioning, which may facilitate price discrimination, and reduced intra-brand competition. When most or all of the strongest suppliers active in a market operate an exclusive distribution system, this may also soften inter-brand competition and/or facilitate collusion, at both the supplier and the distributor levels. Lastly, exclusive distribution may lead to the foreclosure of other distributors and thereby reduce both inter-brand and intra-brand competition at the distributor level.

(120) Exclusive distribution agreements can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, provided that the supplier's and the buyer's market share do not exceed 30 %, the agreement does not contain any hardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720, and the number of distributors appointed per exclusive territory or customer group does not exceed five. An exclusive distribution agreement can still benefit from the safe harbour provided by Regulation (EU) 2022/720 if it is combined with other non-hardcore vertical restraints, such as a non-compete obligation not exceeding five years, quantity forcing or exclusive purchasing.

(121) The exemption provided by Article 2(1) of Regulation (EU) 2022/720 is limited to a maximum of five distributors per exclusive territory or customer group, in order to preserve the incentive of the distributors to invest in promoting and selling the supplier's goods or services, while providing the supplier with sufficient flexibility to organise its distribution system. Above that number, there is an increased risk that the exclusive distributors may free-ride on each other's investments, thereby eliminating the efficiency that exclusive distribution is intended to achieve.

(122) For the exclusive distribution system to benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, the appointed distributors must be protected from active sales into the exclusive territory or to the exclusive customer group by all the supplier's other buyers. Where a supplier appoints more than one distributor for an exclusive territory or customer group, all these distributors must likewise be protected from active sales into the exclusive territory or to the exclusive customer group by all the supplier's other buyers, but active and passive sales by these distributors within the exclusive territory or customer group cannot be restricted. Where, for practical reasons and not with the object of preventing parallel trade, the exclusive territory or customer group is not protected from active sales by certain buyers for a temporary period, for example where the supplier modifies the exclusive distribution system and requires time to re-negotiate active sales restrictions with certain buyers, the exclusive distribution system may still benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720.

([80]) See Article 1(1), point (h) of Regulation (EU) 2022/720.

(123) The vertical agreements used for exclusive distribution should define the scope of the territory or customer group that is exclusively allocated to the distributors. For example, the exclusive territory may correspond to the territory of a Member State or to a larger or smaller area. An exclusive customer group may be defined, for example, by using one or more criteria, such as the occupation or activity of the customers or by using a list of identified customers. Depending on the criteria used, the customer group may be limited to a single customer.

(124) Where a territory or customer group has not been exclusively allocated to one or more distributors, the supplier may reserve the territory or customer group for itself, in which case it must inform all its distributors. This does not require the supplier to be commercially active in the reserved territory or in relation to the reserved customer group. For example, the supplier may wish to reserve the territory or customer group for the purpose of allocating it to other distributors in the future.

4.6.1.3. Guidance on the individual assessment of exclusive distribution agreements

(125) Outside the scope of Regulation (EU) 2022/720, the market position of the supplier and its competitors is of major importance, as a loss of intra-brand competition will only be problematic if inter-brand competition is limited at the supplier or distributor level ([81]). The stronger the position of the supplier, notably above the 30 % threshold, the higher the likelihood that inter-brand competition is weak and the greater the risk for competition resulting from any reduction in intra-brand competition.

(126) The position of the supplier's competitors can have a dual significance. The existence of strong competitors generally indicates that any reduction in intra-brand competition will be outweighed by sufficient inter-brand competition. However, if the number of suppliers in a market is rather limited and their market position is rather similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems.

(127) Multiple exclusive dealerships, that is, when multiple suppliers appoint the same exclusive distributor(s) in a given territory, may further increase the risk of collusion and/or softening of competition at the supplier and distributor level. If one or more distributors are granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition may be substantially restricted for those brands. The higher the cumulative market share of the brands distributed by the exclusive multiple brand distributors, the higher the risk of collusion and/or softening of competition and the greater the reduction of inter-brand competition. If one or more retailers are exclusive distributors for a number of brands, there is a risk that a reduction of the wholesale price by one supplier for its brand will not be passed on by the exclusive retailers to the consumer, as this would reduce the retailers' sales and profits made with the other brands. Relative to a situation without multiple exclusive dealerships, suppliers will have a reduced incentive to enter into price competition with one another. Where the market shares of the individual suppliers and buyers are below the 30 % threshold, such cumulative effects may be a reason to withdraw the benefit of Regulation (EU) 2022/720.

(128) Entry barriers that may hinder suppliers from creating their own integrated distribution network or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding, which obliges or induces the distributor to concentrate its orders for a particular type of product with one supplier. The combination of exclusive distribution and single branding can make it more difficult for other suppliers to find alternative distributors, in particular when single branding is applied to a dense network of exclusive distributors with small territories or in the case of a cumulative anti-competitive effect. In such a scenario, the principles on single branding set out in section 8.2.1. should be applied.

([81]) See Case C-306/20 - *Visma Enterprise*, paragraph 78.

(129) The combination of exclusive distribution with exclusive sourcing, which requires the exclusive distributors to buy the supplier's brand directly from the supplier, increases the risks of reduced intra-brand competition and market partitioning. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors per exclusive territory and implies that no other distributors may sell actively in that territory. Exclusive sourcing also eliminates possible arbitrage by the exclusive distributors, who are prevented from buying from other distributors in the exclusive distribution system. This increases the possibility for the supplier to limit intra-brand competition while applying dissimilar conditions of sale to the detriment of consumers, unless the combination of exclusive distribution with exclusive sourcing generates efficiencies that benefit consumers.

(130) Foreclosure of other distributors is not problematic where the supplier operating the exclusive distribution system appoints a large number of exclusive distributors on the same relevant market and those exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however be problematic where there is market power downstream, in particular in the case of very large territories where an exclusive distributor becomes the exclusive buyer for a whole market. An example would be a supermarket chain that becomes the only distributor of a leading brand on a national food retail market. The foreclosure of other distributors may be aggravated in the case of multiple exclusive dealerships.

(131) Buying power may also increase the risk of collusion on the buyer side when the exclusive distribution arrangements are imposed by important buyers, possibly located in different territories, on one or more suppliers.

(132) Assessing the dynamics of the market is important, as growing demand, changing technologies and changing market positions may make the negative effects of exclusive distribution systems less likely than in mature markets.

(133) The nature of the product can also be relevant to the assessment of the possible anti-competitive effects of exclusive distribution. Those effects will be less acute in sectors where online sales are more prevalent, as online sales may facilitate purchases from distributors beyond the exclusive territory or customer group.

(134) The level of trade is important, as possible negative effects may differ between the wholesale and retail level. Exclusive distribution is mainly applied in the distribution of final goods or services. A loss of intra-brand competition is especially likely at the retail level when the exclusive territories are large, as, in that case, consumers may have little possibility to choose between a high price/high service distributor and a low price/low service distributor for a leading brand.

(135) A manufacturer that chooses a wholesaler as its exclusive distributor will normally do so for a larger territory, such as a whole Member State. As long as the wholesaler can sell the products without limitation to downstream retailers, appreciable anti-competitive effects are unlikely. A possible loss of intra-brand competition at the wholesale level may easily be outweighed by efficiencies obtained in logistics and promotion, especially when the manufacturer is based in a different Member State. However, multiple exclusive dealerships create greater risks for inter-brand competition at the wholesale level than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, there is not only a risk that competition between these brands is reduced, but also a higher risk of foreclosure at the wholesale level of trade.

(136) An exclusive distribution system that restricts competition within the meaning of Article 101(1) of the Treaty may nevertheless create efficiencies that fulfil the conditions of Article 101(3) of the Treaty. For example, exclusivity may be necessary to incentivise distributors to invest in developing the supplier's brand or in providing demand-enhancing services. Outside the scope of Regulation (EU) 2022/720, the higher the number of exclusive distributors appointed for a particular territory, the lower the likelihood that they will have sufficient incentives to invest in the promotion of the supplier's products and the development of its brand, as the other exclusive distributors that share the territory may free-ride on their investment efforts.

(137) The nature of the product is relevant for the assessment of efficiencies. Objective efficiencies are more likely in the case of new products, complex products and products whose qualities are difficult to judge before consumption (so-called experience products) or even after consumption (so-called credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution. The combination of exclusive distribution and single branding may increase the incentives for the exclusive distributor(s) to focus their efforts on a particular brand.

(138) The factors mentioned in paragraphs (125) to (137) remain relevant for the assessment of exclusive distribution systems under which the supplier allocates a customer group exclusively to one or more buyers. For the assessment of this type of exclusive distribution system, the additional factors listed in paragraphs (139) and (140) should also be taken into account.

(139) Similarly to the exclusive allocation of a territory, the exclusive allocation of a customer group generally makes arbitrage by buyers more difficult. In addition, as each appointed distributor has its own group of customers, buyers that do not fall within any such group may find it difficult to obtain the supplier's products. Consequently, the scope for arbitrage by such buyers will be reduced.

(140) In addition to the types of efficiency mentioned in paragraph (136), exclusive customer allocation may generate efficiencies where it is necessary for the distributors to invest in specific equipment, skills or know-how to meet the needs of a particular category of customers, or where such investments lead to economies of scale or scope in logistics ([82]). The depreciation period for those investments is an indication of the duration for which exclusive customer allocation may be justified. In general, the justification for exclusive customer allocation is strongest for new or complex products and for products that require adaptation to the needs of the particular customer. Identifiable differentiated needs are more likely for intermediate products, namely products that are sold to various types of professional buyers. By contrast, the allocation of consumers is unlikely to lead to efficiencies.

(141) The following is an example of multiple exclusive dealerships in an oligopolistic market:

> On a national market for a final product, there are four market leaders, each having a market share of around 20 %. Those four market leaders sell their product through exclusive distributors at the retail level. Retailers are given an exclusive territory that corresponds to the town, or a district of the town, in which they are located. In most territories, the four market leaders happen to appoint the same exclusive retailer ('multiple dealership'), often centrally located and rather specialised in the relevant product. The remaining 20 % of the national market is composed of small local producers, the largest of those producers having a market share of 5 % on the national market. Those local producers sell their products, in general, through other retailers, mainly because the exclusive distributors of the four largest suppliers show in general little interest in selling less well-known and cheaper brands. There is strong branding and product differentiation on the market. The four market leaders have large national advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the national level. The market is rather mature, with stable demand and no major product and technological innovation. The product is relatively simple.
>
> In such an oligopolistic market, there is a risk of collusion between the four market leaders. That risk is increased through multiple dealerships. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit that price cut to the consumer as it would reduce its sales

([82]) An example of this is where the supplier appoints a dedicated distributor to respond to invitations to tender from public authorities relating to IT equipment or office supplies.

and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly between the low brand image goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, the conditions of Article 101(3) of the Treaty may not be fulfilled and withdrawal of the block exemption may be necessary for the agreements concluded with distributors whose market share is below 30 % of the procurement market.

(142) The following is an example of exclusive customer allocation:

An undertaking has developed a sophisticated sprinkler installation. The undertaking currently has a market share of 40 % on the market for sprinkler installations. When it started selling the sophisticated sprinkler, it had a market share of 20 % with an older product. The installation of the new type of sprinkler depends on the type of building where it is installed and on the use of the building (for example, office, chemical plant or hospital). The undertaking has appointed a number of distributors to sell and install the sophisticated sprinkler. Each distributor needed to train its employees for the general and specific requirements of installing the sophisticated sprinkler for a particular class of customer. To ensure that the distributors would specialise, the undertaking assigned an exclusive class of customers to each distributor and prohibited active sales to the others' exclusive customer classes. After 5 years, all of the exclusive distributors will be allowed to actively sell to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. The competitors have market shares between 5 % and 25 % and are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their initial sales efforts on a certain class of customer in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions of Article 101(3) of the Treaty are likely to be fulfilled.

4.6.2. *Selective distribution systems*

4.6.2.1. Definition of selective distribution systems

(143) In a selective distribution system, as defined in Article 1(1), point (g) of Regulation (EU) 2022/720, the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria. Those distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate the system.

(144) The criteria used by the supplier to select distributors may be qualitative or quantitative, or both. Quantitative criteria limit the number of distributors directly by, for instance, imposing a fixed number of distributors. Qualitative criteria limit the number of distributors indirectly, by imposing conditions that cannot be met by all distributors, for instance, relating to the product range to be sold, the training of sales personnel, the service to be provided at the point of sale or the advertising and presentation of the products. Qualitative criteria may refer to the achievement of sustainability objectives, such as climate change, protection of the environment or limiting the use of natural resources. For example, suppliers could require distributors to provide recharging services or recycling facilities in their outlets or to ensure that goods are delivered via sustainable means, such as cargo bike instead of by motor vehicle.

(145) Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorised distributors and the possibilities of resale. The main difference between the two types of distribution system lies in the nature of the protection granted to the distributor. In an exclusive distribution system, the distributor is protected against active selling from outside its exclusive territory, whereas in a selective distribution system, the distributor is protected against active and passive sales by unauthorised distributors.

4.6.2.2. Application of Article 101 of the Treaty to selective distribution systems

(146) The possible competition risks of selective distribution systems include a reduction in intra-brand competition and, especially in the case of a cumulative effect, the foreclosure of certain types of distributors, as well as the softening of competition and the facilitation of collusion between suppliers or between buyers, due to the limitation of the number of buyers.

(147) To assess the compatibility of a selective distribution system with Article 101 of the Treaty, it is first necessary to determine whether the system falls within the scope of Article 101(1). To that end, a distinction needs to be drawn between purely qualitative selective distribution and quantitative selective distribution.

(148) Purely qualitative selective distribution may fall outside the scope of Article 101(1) of the Treaty provided that the three conditions laid down by the Court of Justice of the European Union in the *Metro* judgment ([83]) ('*Metro* criteria') are fulfilled. This is because, if these criteria are fulfilled, it can be assumed that the restriction of intra-brand competition associated with selective distribution is offset by an improvement in inter-brand quality competition ([84]).

(149) The three *Metro* criteria can be summarised as follows: first, the nature of the goods or services in question must necessitate a selective distribution system. This means that, having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use. For instance, the use of selective distribution may be legitimate for high-quality or high-technology products ([85]) or for luxury goods ([86]). The quality of such goods may result not only from their material characteristics, but also from the aura of luxury surrounding them. Therefore, establishing a selective distribution system that seeks to ensure that the goods are displayed in a manner that contributes to sustaining that aura of luxury may be necessary to preserve their quality ([87]). Secondly, resellers must be chosen on the basis of objective qualitative criteria, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Third, the criteria laid down must not go beyond what is necessary ([88]).

([83]) See judgments of 25 October 1977, *Metro* v *Commission*, Case 26/76, EU:C:1977:167, paragraphs 20 and 21 (hereinafter 'Case C-26/76 - *Metro* v *Commission*'); 11 December 1980, *L'Oréal v De Nieuwe AMCK*, C-31/80, EU:C:1980:289, paragraphs 15 and 16 (hereinafter 'Case C-31/80 - *L'Oréal v De Nieuwe AMCK*'); 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS* v *Président de l'Autorité de la concurrence*, Case C-439/09, EU:C:2011:649, paragraph 41 (hereinafter 'Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*'); 6 December 2017, *Coty Germany GmbH* v *Parfümerie Akzente GmbH*, Case C-230/16, EU:C:2017:941, paragraph 24 (hereinafter 'Case C-230/16 - *Coty Germany*').

([84]) See in Case C-26/76 - *Metro* v *Commission*, paragraphs 20 to 22; judgments of 25 October 1983, *AEG* v *Commission*, Case C-107/82, EU:C:1983:293, paragraphs 33, 34 and 73 (hereinafter 'Case C-107/82 - *AEG* v *Commission*'); 22 October 1986, *Metro* v *Commission*, C-75/84, EU:C:1986:399, paragraph 45; 12 December 1996, *Leclerc* v *Commission*, Case T-88/92, EU:T:1996:192, paragraph 106.

([85]) See Case C-26/76 - *Metro* v *Commission*; and Case C-107/82 - *AEG* v *Commission*.

([86]) See Case C-230/16 - *Coty Germany*.

([87]) See Case C-230/16 - *Coty Germany*, paragraphs 25 to 29.

([88]) See Case C-26/76 - *Metro* v *Commission*, paragraphs 20 and 21; Case C-31/80 - *L'Oréal v De Nieuwe AMCK*, paragraphs 15 and 16; Case C-107/82 - *AEG* v *Commission*, paragraph 35; 27 February 1992, *Vichy* v *Commission*, Case T-19/91, EU:T:1992:28, paragraph 65.

(150) The assessment of whether the *Metro* criteria are met requires not only an overall assessment of the selective distribution agreement in question, but also a separate analysis of each potentially restrictive clause of the agreement ([89]). This implies, in particular, assessing whether the restrictive clause in question is appropriate in the light of the objective pursued by the selective distribution system and whether the clause goes beyond what is necessary to achieve that objective ([90]). Hardcore restrictions do not meet this proportionality test. Conversely, for instance, it may be proportionate for a supplier of luxury goods to prohibit its authorised distributors from using online marketplaces, as long as this does not indirectly prevent the effective use of the internet by the authorised distributor to sell the goods to particular territories or customers ([91]). In particular, such a prohibition on the use of online marketplaces would not restrict sales to particular territories or customers where the authorised distributor remains free to operate its own online store and to advertise online in order to raise awareness of its online activities and attract potential customers ([92]). In that case, the restrictive clause, if proportionate, falls outside the scope of Article 101(1) of the Treaty and no further analysis is required.

(151) Irrespective of whether they fulfil the *Metro* criteria, qualitative and/or quantitative selective distribution agreements can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, provided that the market shares of both the supplier and the buyer do not exceed 30 % and the agreement does not contain any hardcore restrictions ([93]). The benefit of the exemption is not lost if selective distribution is combined with other non-hardcore vertical restraints, such as non-compete obligations as defined in Article 1(1), point (f) of Regulation (EU) 2022/720. The exemption provided by Article 2(1) of the Regulation applies regardless of the nature of the product concerned and the nature of the selection criteria. Moreover, the supplier is not obliged to publish its selection criteria ([94]).

(152) Where in a particular case a selective distribution agreement that benefits from the block exemption restricts competition appreciably at the supplier or distributor level and does not generate efficiencies that outweigh the effects of the restriction, for example because the selection criteria are not linked to the characteristics of the product or are not necessary to improve the distribution of the product, the benefit of the block exemption may be withdrawn.

4.6.2.3. Guidance on the individual assessment of selective distribution agreements

(153) Outside the scope of Regulation (EU) 2022/720, the market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects, as the loss of intra-brand competition is, in principle, only problematic where inter-brand competition is limited ([95]). The stronger the position of the supplier, notably above the 30 % threshold, the higher the risk for competition resulting from the loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same relevant market. Where selective distribution is applied by only one supplier in the market, quantitative selective distribution generally does not lead to anti-competitive effects. In practice, however, selective distribution is often applied by several suppliers in a particular market (cumulative effect).

(154) In the case of a cumulative effect, it is necessary to take into account the market position of the suppliers that apply selective distribution: where selective distribution is used by a majority of the leading suppliers in a market, this may lead to foreclosure of certain types of distributors, for instance price discounters. The risk of foreclosure of more efficient distributors is greater in the case of selective distribution than for exclusive distribution, given that under a selective distribution system sales to non-authorised distributors are restricted. That restriction is designed to give selective distribution systems a closed character in which only the authorised distributors that fulfil the criteria have access to the product, while making it impossible for non-

([89]) See paragraph (149).
([90]) See Case C-230/16 – *Coty Germany*, paragraphs 43 to 58.
([91]) See Case C-230/16 – *Coty Germany*, in particular paragraph 67; see also paragraph (208) of these Guidelines.
([92]) See also paragraph (208).
([93]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraph 54. See also section 6.1.2.3.2.
([94]) See also by analogy judgment of 14 June 2012, *Auto 24 SARL* v *Jaguar Land Rover France SAS*, Case C-158/11, EU:C:2012:351, paragraph 31.
([95]) See Case C-306/20 - *Visma Enterprise*, paragraph 78.

authorised distributors to obtain supplies. Accordingly, selective distribution is particularly well suited to avoid pressure by price discounters (whether offline or pure online distributors) on the margins of the manufacturer, as well as on the margins of the authorised distributors. Foreclosure of such distribution formats, whether resulting from the cumulative use of selective distribution or from its use by a single supplier with a market share exceeding 30 %, reduces the possibilities for consumers to take advantage of the specific benefits offered by those distribution formats, such as lower prices, more transparency and wider access to the product.

(155) Where individual selective distribution networks benefit from the exemption provided by Regulation (EU) 2022/720, the withdrawal of the block exemption or the disapplication of Regulation (EU) 2022/720 may be considered where such networks create cumulative anti-competitive effects. However, such cumulative anti-competitive effects are unlikely where the total share of the market covered by selective distribution does not exceed 50 %. Competition concerns are also unlikely to arise where the market coverage exceeds 50 %, but the aggregate market share of the five largest suppliers does not exceed 50 %. Where both the share of the five largest suppliers and the share of the market covered by selective distribution exceed 50 %, the assessment may vary depending on whether or not all five of the largest suppliers apply selective distribution. The stronger the position of the competitors that do not apply selective distribution, the less likely that other distributors will be foreclosed. Competition concerns may arise where all five of the largest suppliers apply selective distribution. This is likely to be the case, in particular, where the agreements entered into by the largest suppliers contain quantitative selection criteria that directly limit the number of authorised distributors, or where the qualitative criteria applied foreclose certain distribution formats, such as a requirement to have one or more brick and mortar shops or to provide specific services that can typically only be provided in a particular distribution format.

(156) The conditions of Article 101(3) of the Treaty are, in general, unlikely to be fulfilled if the selective distribution systems that contribute to the cumulative effect exclude from the market new distributors that are capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, thereby limiting distribution, to the advantage of certain existing channels and to the detriment of final consumers. More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with a requirement for the distributors to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, in particular if the minimum amount in question does not represent a significant proportion of the distributor's total turnover from the type of products in question and does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution. A supplier with a market share not exceeding 5 % is, in general, not considered to contribute significantly to a cumulative effect.

(157) Entry barriers are mainly relevant in the case of foreclosure of non-authorised distributors from the market. Entry barriers could be significant where selective distribution is applied by manufacturers of branded products, as it will generally take time and considerable investment for distributors excluded from the selective distribution system to launch their own brands or obtain competitive supplies elsewhere.

(158) Buying power may increase the risk of collusion between distributors. Distributors that hold a strong market position may induce the suppliers to apply selection criteria that foreclose market access to new and more efficient distributors. Consequently, buying power may appreciably change the analysis of the possible anti-competitive effects of selective distribution. Foreclosure of more efficient distributors from the market may arise where a strong distributor organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.

(159) Pursuant to Article 5(1), point (c) of Regulation (EU) 2022/720, the supplier may not impose an obligation causing the authorised distributors, either directly or indirectly, not to sell the brands of particular competing suppliers. This provision is intended to discourage horizontal collusion to exclude particular brands through the creation of a selective group of brands by the leading suppliers. Such an obligation is unlikely to be exemptible when the combined market share of the five largest suppliers is equal to or exceeds 50 %, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers on the market.

(160) Competition concerns relating to the foreclosure of other suppliers will generally not arise as long as other suppliers are not prevented from using the same distributors, as may occur where, for example, selective distribution is combined with single branding. In the case of a dense network of authorised distributors or in the case of a cumulative effect, the combination of selective distribution and a non-compete obligation may pose a risk of foreclosure of other suppliers. In that case, the guidance relating to single branding set out in section 8.2.1. applies. Where selective distribution is not combined with a non-compete obligation, foreclosure of competing suppliers from the market may still be a concern. This is the case where the leading suppliers apply not only purely qualitative selection criteria, but also impose on their distributors certain additional obligations such as the obligation to reserve a minimum shelf-space for the supplier's products or to ensure that the distributor's sales of the supplier's products reach a minimum share of the distributor's total turnover. Such a problem is unlikely to arise if the share of the market covered by selective distribution does not exceed 50 % or, where that coverage ratio is exceeded, if the market share of the five largest suppliers does not exceed 50 %.

(161) Assessing the dynamics of the market is important, as growing demand, changing technologies and changing market positions may make negative effects less likely than would be the case in mature markets.

(162) Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport, which may occur irrespective of the nature of the product (see paragraph (16), point (g)). However, this type of efficiency is usually only marginal in selective distribution systems. To assess whether selective distribution is justified to help solve a free-rider problem between distributors (see paragraph (16), point (b)) or to help create or maintain a brand image (see paragraph (16), point (h)), the nature of the product is important. In general, the use of selective distribution to achieve those types of efficiencies is more likely to be justified for new products, complex products or products whose qualities are difficult to judge before consumption (so-called experience products) or even after consumption (so-called credence products). The combination of selective distribution with a location clause, for the purpose of protecting an authorised distributor against competition from other authorised distributors opening a shop in its vicinity, may in particular fulfil the conditions of Article 101(3) of the Treaty if the combination is indispensable to protect substantial and relationship-specific investments made by the authorised distributor (see paragraph (16), point (e)). To ensure that the least anti-competitive restraint is used, it is relevant to assess whether the same efficiencies can be obtained at a comparable cost by, for instance, imposing service requirements alone.

(163) The following is an example of quantitative selective distribution:

On a market for consumer durables, brand manufacturer A, which is the market leader with a market share of 35 %, sells its product to consumers through a selective distribution system. There are several criteria for admission to the system: the shop must employ trained staff and provide pre-sales services; there must be a specialised area in the shop devoted to the sales of the product and similar hi-tech products; and the shop is required to sell a wide range of models of the supplier and to display them in an attractive manner. Moreover, the number of admissible retailers in the system is directly limited through the establishment of a maximum number of retailers per number of inhabitants in each province or urban area. Manufacturer A has six competitors in that market. Brand manufacturers B, C and D are its largest competitors with market shares of 25 %, 15 % and 10 % respectively, whilst other manufacturers have smaller market shares. A is the only manufacturer that uses selective distribution. The selective distributors of brand A always handle a few competing brands. However, competing brands are also widely sold in shops which are not members of manufacturer A's selective distribution system. There are various channels of distribution: for instance, brands B and C are sold in most of A's selected shops, but also in other shops providing a high quality service, and in hypermarkets. Brand D is mainly sold in high service shops. Technology is evolving quite rapidly in this market, and the main suppliers maintain a strong quality image for their products through advertising.

In this market, the coverage ratio of selective distribution is 35 %. Inter-brand competition is not directly affected by the selective distribution system of A. Intra-brand competition for brand A may be reduced, but consumers have access to low service/low price retailers for brands B and C, which have a quality image comparable to brand A. Moreover, access to high service retailers for other brands is not foreclosed, since there is no limitation on the capacity of selected distributors to sell competing brands and the quantitative limitation on the number of distributors for brand A leaves other high service retailers free to distribute competing brands. In this case, in view of the service requirements and the efficiencies that these are likely to generate and the limited effect on intra-brand competition, the conditions of Article 101(3) of the Treaty are likely to be fulfilled.

(164) The following is an example of selective distribution with cumulative effects:

> On a market for a particular sports article, there are seven manufacturers, whose respective market shares are 25 %, 20 %, 15 %, 15 %, 10 %, 8 % and 7 %. The five largest manufacturers distribute their products through selective distribution, whilst the two smallest use different types of distribution systems, which results in a coverage ratio of selective distribution of 85 %. The criteria for access to the selective distribution systems are uniform across the manufacturers: the distributors are required to have one or more brick and mortar shops; those shops are required to have trained personnel and to provide pre-sale services; there must be a specialised area in the shop devoted to the sales of the product; and a minimum size for that area is specified. In addition, the shop is required to sell a wide range of the brand in question and to display the product in an attractive manner; the shop must be located in a commercial street, and that type of product must represent at least 30 % of the total turnover of the shop. In general, the same distributor is authorised for all five brands. The two manufacturers which do not use selective distribution usually sell through less specialised retailers with lower service levels. The market is stable, both on the supply and on the demand side, and there is strong product differentiation with brand image being important. The five market leaders have strong brand images acquired through advertising and sponsoring, whereas the two smaller manufacturers have a strategy of cheaper products, with no strong brand image.
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> In this market, access to the five leading brands by general price discounters and pure online distributors is denied. This is because the requirement that the product represents at least 30 % of the activity of the distributors and the criteria on presentation and pre-sales services rule out most price discounters from the network of authorised distributors. Moreover, the requirement to have one or more brick and mortar shops excludes pure online distributors from the network. As a consequence, consumers have no choice but to buy the five leading brands in high service/high price shops. This leads to reduced inter-brand competition between the five leading brands. The fact that the two smallest brands can be bought in low service/low price shops does not compensate for this, because the brand image of the five market leaders is much better. Inter-brand competition is also limited through multiple dealerships. Even though there exists some degree of intra-brand competition and the number of distributors is not directly limited, the criteria for admission are strict enough to lead to a small number of distributors for the five leading brands in each territory.
>
> The efficiencies associated with such quantitative selective distribution systems are low: the product is not very complex and does not justify a particularly high service. Unless the manufacturers can prove that there are clear efficiencies associated with their selective distribution system, it is likely that the benefit of the block exemption will have to be withdrawn, due to the presence of cumulative anti-competitive effects resulting in less choice and higher prices for consumers.

4.6.3. *Franchising*

(165) Franchise agreements contain licences of IPRs relating, in particular, to trademarks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee with commercial or technical assistance during the lifetime of the agreement. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of various vertical restraints concerning the products being distributed, for instance selective distribution and/or non-compete obligations.

(166) Franchising (with the exception of industrial franchise agreements) has some specific characteristics, such as the use of a uniform business name, uniform business methods (including the licensing of IPRs) and the payment of royalties in return for the benefits granted. In view of these characteristics, provisions that are strictly necessary for the functioning of franchising systems can be considered as falling outside the scope of Article 101(1) of the Treaty. This concerns, for instance, restrictions that prevent the franchisee from using the know-how and assistance provided by the franchisor for the benefit of the franchisor's competitors ([96]) and non-compete obligations relating to the goods or services purchased by the franchisee that are necessary to maintain the common identity and reputation of the franchise network. In the latter case, the duration of the non-compete obligation is irrelevant, provided that it does not exceed the duration of the franchise agreement.

(167) Franchise agreements can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 where neither the supplier's nor the buyer's market shares exceed 30 %. Specific guidance on the calculation of market shares in the context of franchising is provided in paragraph (174). The licensing of IPRs contained in franchise agreements is addressed in paragraphs (71) to (87). Vertical restraints contained in franchise agreements will be assessed using the principles applicable to the distribution system that most closely corresponds to the particular franchise agreement. For instance, a franchise agreement that results in a closed network, where the franchisees are prohibited from selling to non-franchisees, must be assessed under the principles applicable to selective distribution. By contrast, a franchise agreement that does not create a closed network but which grants territorial exclusivity and protection from active sales by other franchisees must be assessed under the principles applicable to exclusive distribution.

(168) Franchise agreements that are not covered by Regulation (EU) 2022/720 require an individual assessment under Article 101 of the Treaty. That assessment should take into account that the more important the transfer of know-how, the more likely it is that the vertical restraints create efficiencies and/or are indispensable to protect the know-how and thus fulfil the conditions of Article 101(3) of the Treaty.

(169) The following is an example of franchising:

> A manufacturer has developed a new format for selling sweets in so-called 'fun shops', where the sweets can be coloured on demand from the consumer. The sweets manufacturer has also developed the machines to colour the sweets and produces the colouring liquids. The quality and freshness of the liquid is of vital importance to producing good sweets. The manufacturer made a success of its sweets through a number of own retail outlets all operating under the same trade name and with the uniform fun image (for example, common shop style and advertising). In order to expand sales, the sweets manufacturer has started a franchising system. To ensure a uniform product quality and shop image, the franchisees are obliged to buy the sweets, liquid and colouring machine from the manufacturer, to operate under the same trade name, to pay a franchise fee, to contribute to common advertising and to ensure the confidentiality of the operating manual prepared by the franchisor. In addition, the franchisees are only allowed to sell from the agreed premises to end users or other franchisees. They are not allowed to sell other sweets in their shops. The franchisor undertakes not to appoint another franchisee or operate a retail outlet in a given contract territory. The franchisor is also under an obligation to update and further develop its products, business outlook and operating manual and to make those improvements available to all franchisees. The franchise agreements are concluded for a duration of 10 years.
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> Sweet retailers buy their sweets on a national market from either national producers that cater for national tastes or from wholesalers that import sweets from foreign producers in addition to selling sweets from national producers. In that market, the franchisor's products compete with a number of national and international brands of sweets, sometimes produced by large diversified food companies. The franchisor's market share of the market for machines that colour food is below 10 %. The franchisor has a market share of 30 % on the market for sweets sold to retailers. There are many points of sale for sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops.

([96]) See judgment of 28 January 1986, *Pronuptia de Paris GmbH* v *Pronuptia de Paris Irmgard Schillgallis*, C-161/84, EU:C:1986:41, paragraph 16.

Most of the obligations contained in the franchise agreements can be deemed necessary to protect IPRs or to maintain the common identity and reputation of the franchise network and thus fall outside the scope of Article 101(1) of the Treaty. The restrictions on selling (that is to say, the allocation of a contract territory and selective distribution) provide an incentive to the franchisees to invest in the franchise concept and the colouring machine and to help maintain the common identity, thereby offsetting the loss of intra-brand competition. The non-compete clause excluding other brands of sweets from the shops for the full duration of the agreements allows the franchisor to keep the outlets uniform and prevents competitors from benefiting from its trade name. In view of the high number of outlets available to other sweet producers, it does not lead to any serious foreclosure. Consequently, to the extent that they fall within the scope of Article 101(1) of the Treaty, the franchise agreements are likely to fulfil the conditions of Article 101(3).

5. MARKET DEFINITION AND MARKET SHARE CALCULATION

5.1. Market Definition Notice

(170) The Market Definition Notice provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues. The relevant market for the purpose of applying Article 101 of the Treaty to vertical agreements should therefore be defined on the basis of that guidance, respectively any future guidance relating to the definition of relevant market for the purposes of Union competition law including any guidance that might replace the Market Definition Notice. These Guidelines only deal with specific issues that arise in the context of the application of Regulation (EU) 2022/720, and that are not covered by the Market Definition Notice.

5.2. The calculation of market shares under Regulation (EU) 2022/720

(171) Pursuant to Article 3 of Regulation (EU) 2022/720, the market share of both the supplier and the buyer are decisive in determining if the block exemption applies. In order for Regulation (EU) 2022/720 to apply, the market share of the supplier on the market where it sells the contract goods or services to the buyer and the market share of the buyer on the market where it purchases the contract goods or services must not exceed 30 %. For agreements between SMEs, it is in general not necessary to calculate market shares (see paragraph (28)).

(172) At the distribution level, the vertical restraints usually concern not only the sale of goods or services between supplier and buyer, but also their resale. As different distribution formats usually compete, markets are in general not defined by the form of distribution that is applied, namely exclusive, selective or free distribution. In sectors where suppliers generally sell a portfolio of goods or services, the entire portfolio may determine the market definition, if the portfolios, and not the individual goods or services contained in the portfolio, are regarded as substitutes by the buyers.

(173) Where a vertical agreement involves three parties, each operating at a different level of trade, each party's market share must not exceed 30 % in order for Regulation (EU) 2022/720 to apply. As specified in Article 3(2) of the Regulation, where in a multi-party agreement an undertaking (the first undertaking) buys the contract goods or services from one undertaking that is a party to the agreement and sells the contract goods or services to another undertaking that is also a party to the agreement, the Regulation only applies if the first undertaking's market share does not exceed the 30 % threshold both as a buyer and as a supplier. If, for instance, in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer, a non-compete obligation is agreed, then the market shares of the manufacturer and the wholesaler (or association of retailers) on their respective supply markets must not exceed 30 % and the market share of the wholesaler (or association of retailers) and the retailer must not exceed 30 % on their respective purchase markets in order to benefit from the exemption provided by Article 2(1) of the Regulation.

(174) Where the vertical agreement, in addition to the supply of the contract goods or services, also contains IPR provisions (such as a provision concerning the use of the supplier's trademark), which help the buyer to market the contract goods or services, the supplier's market share on the market where it sells the contract goods or services is relevant for the application of Regulation (EU) 2022/720. Where a franchisor does not supply goods or services to be resold, but provides a bundle of services and goods combined with IPR provisions that together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method for the provision of specific goods or services to end users. For that purpose, the franchisor needs to calculate its market share on the market where the business method is exploited, namely the market where the franchisees exploit the business method to supply goods or services to end users. The franchisor must therefore base its market share on the value of the goods or services supplied by its franchisees on that market. On such a market, the franchisor's competitors may include providers of other franchised business methods, but also suppliers of substitutable goods or services that do not apply franchising. For instance, without prejudice to the definition of such a market, if there was a market for fast-food services, a franchisor operating on such a market would need to calculate its market share on the basis of the relevant sales figures of its franchisees on that market.

5.3. **Calculation of market shares under Regulation (EU) 2022/720**

(175) As set out in Article 8, point (a) of Regulation (EU) 2022/720, the market shares of the supplier and the buyer should in principle be calculated on the basis of value data, taking into account all sources of revenue generated by the sale of the goods or services. Where value data are not available, substantiated estimates can be made, based on other reliable market information, such as volume figures.

(176) In-house production, namely the production or supply of intermediate goods or services for the supplier's own use may be relevant for the competition analysis in a particular case, but it is not taken into account for the purposes of market definition or for the calculation of market shares under Regulation (EU) 2022/720. However, pursuant to Article 8, point (c) of the Regulation, in dual distribution scenarios, the market definition and market share calculation should include the supplier's sales of its own goods made through its vertically integrated distributors and agents ([97]). Integrated distributors are connected undertakings within the meaning of Article 1(2) of the Regulation.

6. **APPLICATION OF REGULATION (EU) 2022/720**

6.1. **Hardcore restrictions under Regulation (EU) 2022/720**

(177) Article 4 of Regulation (EU) 2022/720 contains a list of hardcore restrictions. These are serious restrictions of competition which should in most cases be prohibited because of the harm that they cause to consumers. Where a vertical agreement contains one or more hardcore restrictions, the whole agreement is excluded from the scope of application of Regulation (EU) 2022/720.

(178) The hardcore restrictions listed in Article 4 of Regulation (EU) 2022/720 apply to vertical agreements concerning trade within the Union. Therefore, in so far as a vertical agreement concerns exports outside the Union or imports/re-imports from outside the Union, it cannot be regarded as having the object of appreciably restricting competition within the Union or as being capable of affecting, as such, trade between Member States ([98]).

([97]) For this purpose, any sales by the integrated distributor of the goods or services of competing suppliers are not taken into account.

([98]) See Case C-306/96 - *Javico* v *Yves Saint Laurent Parfums*, paragraph 20.

(179) Hardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720 are generally restrictions of competition by object within the meaning of Article 101(1) of the Treaty ([99]). Restrictions of competition by object are types of coordination between undertakings which can be regarded as being harmful by their very nature to the proper functioning of normal competition ([100]). The Court of Justice of the European Union has held that certain types of coordination between undertakings reveal a sufficient degree of harm to competition for it to be considered unnecessary to assess their effects ([101]). A finding of a restriction by object requires an individual assessment of the vertical agreement concerned. By contrast, hardcore restrictions are a category of restrictions set out in Regulation (EU) 2022/720, for which it is presumed that they generally result in a net harm to competition. Therefore, vertical agreements that contain such hardcore restrictions cannot benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720.

(180) However, hardcore restrictions do not necessarily fall within the scope of Article 101(1) of the Treaty. If a hardcore restriction listed in Article 4 of Regulation (EU) 2022/720 is objectively necessary for the implementation of a particular vertical agreement, for instance, to ensure compliance with a public ban on selling dangerous substances to certain customers for reasons of safety or health, that agreement exceptionally falls outside the scope of Article 101(1) of the Treaty. It follows from the above that the Commission will apply the following principles when assessing a vertical agreement:

(a) where a hardcore restriction within the meaning of Article 4 of Regulation (EU) 2022/720 is included in a vertical agreement, that agreement is likely to fall within the scope of Article 101(1) of the Treaty.

(b) an agreement that includes a hardcore restriction within the meaning of Article 4 of Regulation (EU) 2022/720 is unlikely to fulfil the conditions of Article 101(3) of the Treaty.

(181) An undertaking may demonstrate pro-competitive effects under Article 101(3) of the Treaty in an individual case ([102]). For that purpose, the undertaking must substantiate that efficiencies are likely and that the efficiencies are likely to result from including the hardcore restriction in the agreement, as well as demonstrating that the other conditions of Article 101(3) of the Treaty are fulfilled. Where this is the case, the Commission will assess the negative impact on competition that is likely to result from including the hardcore restriction in the agreement before making a final assessment of whether the conditions of Article 101(3) of the Treaty are fulfilled.

(182) The examples in paragraphs (183) and (184) are intended to illustrate how the Commission will apply the principles mentioned above.

(183) The following is an example of cross-supplies between authorised distributors:

> In the case of a selective distribution system, cross-supplies between authorised distributors must generally remain free (see paragraph (237). However, restrictions on active sales may, under certain circumstances, fulfil the conditions of Article 101(3) of the Treaty. This may be the case, for example, if it is necessary for authorised wholesalers located in different territories to invest in promotional activities in the territory in which they distribute the contract goods or services in order to support sales by authorised retailers and it is not practical to specify the required promotional activities as a contractual obligation in the agreement.

([99]) See Commission Staff Working Document, Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, 25 June 2014, SWD(2014) 198 final, p. 4.

([100]) See judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 26.

([101]) See judgment of 2 April 2020, *Budapest Bank and Others*, Case C-228/18, EU:C:2020:265, paragraphs 35 to 37 and case law cited.

([102]) See in particular paragraph (16), points (a) to (i) of these Guidelines describing types of efficiency that are generally associated with vertical restraints and section 6.1.1. of these Guidelines on RPM. For general guidance on the assessment of efficiencies, see also the Article 101(3) Guidelines.

(184) The following is an example of genuine testing:

> In the case of genuine testing of a new product in a limited territory or with a limited group of customers, or in the case of a staggered introduction of a new product, the distributors that are appointed to sell the new product on the test market, or those that participate in the first round(s) of the staggered introduction may be restricted from making active sales outside the test market or to market(s) or customer groups where the product has not yet been introduced. Such restrictions may fall outside the scope of Article 101(1) of the Treaty for the period necessary for the testing or introduction of the product.

6.1.1. *Resale price maintenance*

(185) The hardcore restriction set out in Article 4, point (a) of Regulation (EU) 2022/720 concerns resale price maintenance ('RPM'), that is, agreements which, directly or indirectly, have the object of restricting the buyer's ability to determine its sale price, including those which establish a fixed or minimum sale price to be observed by the buyer ([103]). A requirement for the buyer to set its sale price within a certain range is RPM within the meaning of Article 4, point (a) of the Regulation.

(186) RPM can be applied through direct means. This is the case for contractual provisions or concerted practices that directly set the price that the buyer must charge to its customers ([104]), or which allow the supplier to set the resale price, or which prohibit the buyer from selling below a certain price level. The restriction is also clear-cut where the supplier requests a price increase and the buyer complies with the request.

(187) RPM can also be applied through indirect means, including incentives to observe a minimum price or disincentives to deviate from a minimum price. The following examples provide a non-exhaustive list of such indirect means:

(a) fixing the resale margin;

(b) fixing the maximum level of discount that the distributor can grant from a prescribed price level;

(c) making the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level;

(d) imposing minimum advertised prices ('MAPs'), which prohibit the distributor from advertising prices below a level set by the supplier;

(e) linking the prescribed resale price to the resale prices of competitors;

(f) threats, intimidations, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to the observance of a given price level.

(188) Pursuant to Article 4, point (a) of Regulation (EU) 2022/720, the imposition by the supplier of a maximum resale price or the recommendation of a resale price is not a hardcore restriction. However, if the supplier combines such a maximum price or resale price recommendation with incentives to apply a certain price level or disincentives to lower the sale price, this can amount to RPM. This would be the case, for example, where the supplier reimburses promotional costs incurred by the buyer subject to the condition the buyer does not deviate from the maximum resale price or the recommended resale price. An example of a disincentive to lower the sale price would be where the supplier threatens to cut further supplies in response to a deviation by the buyer from the maximum or recommended resale price.

([103]) It should be noted that RPM can be linked to other restrictions, including horizontal collusion in the form of hub-and-spoke arrangements. These are addressed in paragraph 55 of the Horizontal Guidelines.

([104]) See, for example, Commission Decision in AT.40428 - *Guess*, recitals 84, 86 and 137.

(189) Although in principle MAPs leave the distributor free to sell at a price that is lower than the advertised price, they disincentivise the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts. A key parameter for price competition between retailers is thereby removed. For the purpose of applying Article 4, point (a) of Regulation (EU) 2022/720, MAPs will therefore be treated as an indirect means of applying RPM.

(190) Direct or indirect means of applying RPM can be made more effective when combined with measures aimed at identifying price-cutting distributors, such as implementing a price monitoring system, or obliging retailers to report other members of the distribution network that deviate from the standard price level.

(191) Price monitoring is increasingly used in e-commerce, where both suppliers and retailers often use price monitoring software ([105]). This software increases price transparency in the market and allows manufacturers to effectively track the resale prices in their distribution network ([106]). It also allows retailers to track the prices of their competitors. However, on their own, price monitoring and price reporting are not RPM.

(192) Under an agency agreement, the principal generally sets the sale price, as it bears the commercial and financial risks relating to the sale. However, where the agreement does not meet the conditions to be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty (see in particular paragraphs (30) to (34) of these Guidelines), any direct or indirect obligation preventing or restricting the agent from sharing its remuneration with the customer, irrespective of whether the remuneration is fixed or variable, is a hardcore restriction within the meaning of Article 4, point (a) of Regulation (EU) 2022/720 ([107]). The agent should therefore be left free to reduce the effective price paid by the customer without reducing the income due to the principal ([108]).

(193) Under a fulfilment contract, the supplier enters into a vertical agreement with a buyer for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer. Where the supplier selects the undertaking that will provide the fulfilment services, the imposition of a resale price by the supplier is not RPM. In that case, the resale price imposed in the fulfilment contract does not restrict competition for the supply of the goods or services to the customer or competition for the supply of the fulfilment services. For example, this applies where customers purchase goods from an undertaking active in the online platform economy which is operated by a group of independent retailers under a common brand and that undertaking determines the price for the sale of the goods and forwards orders to the retailers for fulfilment ([109]). By contrast, where the undertaking that will provide the fulfilment services is selected by the customer, the imposition of a resale price by the supplier may restrict competition for the provision of the fulfilment services. In that case, the imposition of a resale price may amount to RPM.

(194) Article 4, point (a) of Regulation (EU) 2022/720 is fully applicable in the online platform economy. In particular, where an undertaking provides online intermediation services within the meaning of Article 1(1), point (e) of the Regulation, it is a supplier in respect of those services and therefore Article 4, point (a) of the Regulation applies to restrictions imposed by the undertaking on buyers of the online intermediation services relating to the sale price of goods or services that are sold via the online intermediation services. While this

([105]) See E-commerce Sector Inquiry Final Report, paragraphs 602 to 603.

([106]) See Commission Decisions in AT.40182 - *Pioneer*, recitals 136 and 155; AT. 40469 - *Denon Marantz*, recital 95; AT.40181 - *Philips*, recital 64; AT.40465 - *Asus*, recital 27.

([107]) Restrictions of the ability of providers of online intermediation services within the meaning of Article 1(1), point (e) of the Regulation to share their remuneration relating to the provision of the online intermediation services are not hardcore restrictions within the meaning of Article 4, point (a) of the Regulation, as they do not restrict the ability of a buyer to determine its sale price. See paragraphs (64) to (67) of these Guidelines, in particular paragraph (67), point (a).

([108]) See, for instance, Commission Decision in Case No IV/32.737 - *Eirpage*, in particular recital 6.

([109]) This guidance is without prejudice to the assessment of the horizontal agreements between the retailers that set up and operate such a fulfilment model under Article 101 of the Treaty, taking into account the guidance provided by the Horizontal Guidelines.

does not prevent a provider of online intermediation services from incentivising users of the services to sell their goods or services at a competitive price or to reduce their prices, the imposition by the provider of online intermediation services of a fixed or minimum sale price for the transactions that it intermediates is a hardcore restriction within the meaning of Article 4, point (a) of Regulation (EU) 2022/720.

(195) The Court of Justice of the European Union has held on several occasions that RPM is a restriction of competition by object within the meaning of Article 101(1) of the Treaty ([110]). However, as stated in paragraphs (179) to (181), the qualification of a restriction as a hardcore restriction or as a by object restriction does not mean that it is a *per se* infringement of Article 101 of the Treaty. Where undertakings consider RPM to be efficiency-enhancing in an individual case, they may rely on efficiency justifications under Article 101(3) of the Treaty.

(196) RPM can restrict intra-brand and/or inter-brand competition in various ways:

(a) RPM may facilitate collusion between suppliers, by enhancing price transparency in the market, thereby making it easier to detect whether a supplier is deviating from the collusive equilibrium by cutting its price. This negative effect is more likely in markets prone to collusive outcomes, for example, where suppliers form a tight oligopoly and a significant share of the market is covered by RPM agreements;

(b) RPM may facilitate collusion between buyers at the distribution level, in particular where it is driven by the buyers. Strong or well organised buyers may be able to force or convince one or more of their suppliers to fix their resale price above the competitive level, thereby helping the buyers reach or stabilise a collusive equilibrium. RPM serves as a commitment device for retailers not to deviate from the collusive equilibrium through discounting prices;

(c) in some cases, RPM may also soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them;

(d) RPM may reduce the pressure on the supplier's margin, in particular where a manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In that situation, the manufacturer may prefer to agree to RPM, to help it to commit not to lower the price for subsequent distributors, and to reduce the pressure on its own margin;

(e) by preventing price competition between distributors, RPM may prevent or hinder the entry and expansion of new or more efficient distribution formats, thus reducing innovation at the distribution level;

(f) RPM may be implemented by a supplier with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors may incentivise them to favour the supplier's brand over rival brands when advising customers, even where such advice is not in the customer's interest, or not to sell the rival brands at all;

(g) the direct effect of RPM is the elimination of intra-brand price competition, by preventing some or all distributors from lowering their sale price for the brand concerned, thus resulting in a price increase for that brand.

(197) However, RPM may also lead to efficiencies, in particular where it is supplier driven. Where undertakings rely on an efficiency defence for RPM, they must be able to substantiate this with concrete evidence and show that all the conditions of Article 101(3) are fulfilled in the individual case ([111]). Four examples of such efficiencies are set out below.

(a) When a manufacturer introduces a new product, RPM may be an efficient means to induce distributors to better take into account the manufacturer's interest in promoting that product. Article 101(3) of the Treaty also requires that there are no realistic and less restrictive alternative means of incentivising the distributors to promote the product. To meet that requirement, suppliers may, for example, demonstrate that it is not

([110]) See the judgments of 3 July 1985, *Binon* v *AMP*, C-243/83, EU:C:1985:284, paragraph 44; 1 October 1987, *VVR* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, C-311/85, EU:C:1987:418, paragraph 17; 19 April 1988, *Erauw-Jacquery* v *La Hesbignonne*, C-27/87, EU:C:1988:183, paragraph 15.

([111]) Pursuant to Article 2 of Regulation (EC) No 1/2003, the undertaking claiming the benefit of Article 101(3) of the Treaty bears the burden of proving that the conditions of that paragraph of the Treaty are fulfilled.

feasible in practice to impose on all buyers effective promotion obligations by contract. In such circumstances, the imposition of fixed or minimum retail prices for a limited period of time in order to facilitate the introduction of the new product may be considered on balance pro-competitive.

(b) Fixed resale prices, and not just maximum resale prices, may be necessary to organise a coordinated short-term low price campaign (of 2 to 6 weeks in most cases), in particular in a distribution system where the supplier applies a uniform distribution format, such as a franchise system. In such a case, given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.

(c) A minimum resale price or MAP can be used to prevent a particular distributor from using the product of a supplier as a loss leader. Where a distributor regularly resells a product below the wholesale price, this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image. In that case, preventing that distributor from selling below the wholesale price, by imposing on it a targeted minimum resale price or MAP may be considered on balance pro-competitive.

(d) In some situations, the extra margin provided by RPM may allow retailers to provide additional pre-sales services, in particular in the case of complex products. If enough customers take advantage of such services in order to choose a product but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur those costs), high-service retailers may reduce or stop providing pre-sales services, which enhance the demand for the supplier's product. The supplier must demonstrate that there is a risk of free riding at the distribution level, that fixed or minimum resale prices provide sufficient incentives for investments in pre-sale services and that there is no realistic and less restrictive alternative means of overcoming such free riding. In this situation, the likelihood that RPM will be considered as pro-competitive is higher when competition between suppliers is fierce and the supplier has limited market power.

(198) The use of recommended resale prices or maximum resale prices can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 where the market share of each of the parties to the agreement does not exceed the 30 % threshold and provided that this does not amount to the imposition of a minimum or fixed sale price as a result of pressure or incentives from any of the parties, as set out in paragraphs (187) and (188). Paragraphs (199) to (201) provide guidance for the assessment of recommended or maximum resale prices above the market share threshold.

(199) The risks to competition associated with recommended and maximum resale prices are, first, that they may act as a focal point for resellers and may be followed by most or all of them. Second, they may soften competition or facilitate collusion between suppliers.

(200) An important factor for assessing possible anti-competitive effects of recommended or maximum resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended or maximum resale price will lead to a more or less uniform application of that price level by the resellers, because they may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier.

(201) Where recommended or maximum resale prices produce appreciable anti-competitive effects, it is necessary to assess whether they fulfil the conditions of the exception provided by Article 101(3) of the Treaty. As regards maximum resale prices, the avoidance of 'double marginalisation' ([112]) may be particularly relevant. A maximum resale price may also help to ensure that the supplier's brand competes more fiercely with other brands distributed by the same distributor, including private label products.

([112]) See in this respect paragraphs (13) and (16).

6.1.2. *Hardcore restrictions pursuant to Article 4, points (b), (c), (d) and (e) of Regulation (EU) 2022/720*

6.1.2.1. Qualification as a hardcore restriction pursuant to Article 4, points (b), (c), (d) and (e) of Regulation (EU) 2022/720

(202) Article 4, points (b), (c) and (d) of Regulation (EU) 2022/720 contain a list of hardcore restrictions and exceptions that apply to various types of distribution system, respectively: exclusive distribution, selective distribution and free distribution. The hardcore restrictions set out in Article 4, points (b), (c)(i) and (d) of Regulation (EU) 2022/720 concern agreements that, directly or indirectly, in isolation or in combination with other factors controlled by the parties, have the object of restricting the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services. Article 4, points (c)(ii) and (iii) of Regulation (EU) 2022/720 provide that, in a selective distribution system, restrictions of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade and restrictions of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade are hardcore restrictions. Article 4, points (b), (c) and (d) of the Regulation apply irrespective of the sales channel used, for example, whether sales are made offline or online.

(203) Article 4, point (e) of Regulation (EU) 2022/720 provides that a vertical agreement which, directly or indirectly, in isolation or in combination with other factors controlled by the parties, has the object of preventing the effective use of the internet by the buyer or its customers to sell the contract goods or services to particular territories or customers is a hardcore restriction. A vertical agreement containing one or more restrictions of online sales or online advertising ([113]) which *de facto* prohibit the buyer from using the internet to sell the contract goods or services has at the very least the object of restricting passive sales to end users wishing to purchase online and located outside the buyer's physical trading area ([114]). Therefore such agreements fall within the scope of Article 4, point (e) of Regulation (EU) 2022/720. The same applies to vertical agreements which do not directly prohibit, but have the object of preventing the effective use of the internet by a buyer or its customers to sell the contract goods or services to particular territories or customers. For instance, this is the case for vertical agreements which have the object of significantly diminishing the aggregate volume of online sales of the contract goods or services or the possibility for end users to buy the contract goods or services online. Similarly, this is the case for vertical agreements that have the object of preventing the use of one or more entire online advertising channels by the buyer, such as search engines ([115]) or price comparison services, or of preventing the buyer from establishing or using its own online store ([116]). The assessment of whether a restriction is hardcore within the meaning of Article 4, point (e) of Regulation (EU) 2022/720 may take into account the content and context of the restriction, but it cannot depend on market-specific circumstances or the individual characteristics of the parties to the vertical agreement.

(204) The hardcore restrictions referred to in paragraph (202) may result from direct obligations, such as the obligation not to sell to particular territories or customers, or the obligation to refer orders from such customers to other distributors. They may also result from the supplier applying indirect measures to induce the buyer not to sell to such customers, such as:

(a) requiring the buyer to request the supplier's prior approval for sales to such customers ([117]);

(b) refusing or reducing bonuses or discounts if the buyer sells to such customers ([118]) or making compensatory payments to the buyer if it stops selling to such customers;

(c) terminating the supply of products if the buyer sells to such customers;

([113]) See also paragraphs (204), (206) and (210) relating to various types of online sales and online advertising restrictions.
([114]) See also Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraph 54.
([115]) See also Commission Decision in AT.40428 - *Guess*, recitals 118 to 126.
([116]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 56 and 57 and paragraph (224) of these Guidelines.
([117]) See, for example, Case T-77/92 - *Parker Pen* v *Commission*, paragraph 37.
([118]) See, for example, judgment of 9 July 2009, *Peugeot and Peugeot Nederland* v *Commission*, Case T-450/05, EU:T:2009:262, paragraph 47.

(d) limiting or reducing the volumes supplied, for instance, so that the volumes correspond to the demand from customers in certain territories or the demand from certain customer groups;

(e) threatening to terminate the vertical agreement ([119]) or not to renew it if the buyer sells to such customers;

(f) charging a higher price to the distributor for products that are to be sold to such customers ([120]);

(g) limiting the proportion of sales made by the buyer to such customers;

(h) preventing the buyer from using additional languages on the packaging or for the promotion of the products ([121]);

(i) supplying another product in return for the buyer stopping its sales to such customers;

(j) paying the buyer to stop selling to such customers;

(k) obliging the buyer to pass on to the supplier profits from such customers ([122]);

(l) excluding from a Union-wide guarantee service reimbursed by the supplier products that are resold outside the buyer's territory or products that are sold in the buyer's territory by buyers located in other territories ([123]).

(205) Measures that allow a manufacturer to verify the destination of the supplied goods, such as the use of differentiated labels, specific language clusters or serial numbers, or the threat or performance of audits to verify the buyer's compliance with other restrictions ([124]) are not in themselves restrictions of competition. However, they may be considered to form part of a hardcore restriction of the buyer's sales when used by the supplier to control the destination of the supplied goods, for instance when used in conjunction with one or more of the practices mentioned in paragraphs (203) and (204).

(206) In addition to the direct and indirect restrictions referred to in paragraphs (202) to (204), hardcore restrictions specifically relating to online sales may similarly be the result of direct or indirect obligations. Besides a direct prohibition of the use of the internet to sell the contract goods or services, the following are examples of obligations that indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers within the meaning of Article 4, point (e) of Regulation (EU) 2022/720:

(a) requiring the buyer to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller. However, obliging the buyer to offer links to the online stores of the supplier or of other sellers is not a hardcore restriction ([125]);

(b) requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's territory ([126]);

(c) requiring the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialised personnel ([127]);

([119]) See, for example, judgment of 6 July 2009, *Volkswagen* v *Commission*, Case T-62/98, EU:T:2000:180, paragraph 44.
([120]) See, for example, Commission Decision in AT.40433 - *Film merchandise*, recital 54.
([121]) See, for example, Commission Decision in AT.40433 - *Film merchandise*, recitals 52 and 53.
([122]) See, for example, Commission Decision in AT.40436 - *Nike*, recital 57; Commission Decision in AT.40433 - *Film merchandise*, recitals 61 to 63.
([123]) See, for example, Commission Decision in AT.37975 - *PO/Yamaha*, recitals 111 and 112. Conversely, an arrangement under which the supplier agrees with its distributors that where one distributor makes a sale to a territory that has been allocated to another distributor, the first distributor must pay the second distributor a fee based on the cost of the services to be carried out does not have the object of restricting sales by the distributors outside their allocated territories (see judgment of 13 January 2004, *JCB Service* v *Commission* , Case T-67/01, EU:T:2004:3, paragraphs 136 to 145).
([124]) See, for example, Commission Decision in AT.40436 - *Nike*, recitals 71 and 72; Commission Decision in AT.40433 - *Film merchandise*, recitals 65 and 66.
([125]) Article 3 of Regulation (EU) 2018/302.
([126]) Article 5 of Regulation (EU) 2018/302.
([127]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 36 and 37.

(d) requiring the buyer to seek the supplier's prior authorisation before making individual online sales transactions;

(e) prohibiting the buyer from using the supplier's trademarks or brand names on its website or in its online store;

(f) prohibiting the buyer from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the buyer's own server or on a third party server ([128]);

(g) prohibiting the buyer from using an entire online advertising channel, such as search engines ([129]) or price comparison services, or restrictions which indirectly prohibit the use of an entire online advertising channel, such as an obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction on providing price-related information to price comparison services. Such restrictions have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers, as they limit the buyer's ability to target customers beyond its physical trading area, inform them about its offers and attract them to its online store or other sales channels. Prohibiting the use of particular price comparison services or search engines is generally not a hardcore restriction, as the buyer may use other online advertising services to raise awareness of its online sales activities. However, prohibiting the use of the most widely used advertising services in the particular online advertising channel may amount to a hardcore restriction, if the remaining services in that advertising channel are *de facto* not capable of attracting customers to the buyer's online store.

(207) Contrary to the restrictions referred to in paragraph (204), requirements imposed by the supplier on the buyer relating to the manner in which the contract goods or services are to be sold can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, irrespective of the type of distribution system. In particular, the supplier may impose requirements relating to quality. For example, in a selective distribution system, the supplier may impose requirements relating to the minimum size and appearance of the buyer's shop (for example, relating to fixtures, furnishings, design, lighting and floor coverings) or the presentation of the product (for example, the minimum number of products of the brand to be displayed, the minimum space between products) ([130]).

(208) Similarly, the supplier may impose requirements on the buyer relating to the manner in which the contract goods or services are to be sold online. Restrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales can generally benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, irrespective of the type of distribution system, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers. Online sales restrictions generally do not have such an object where the buyer remains free to operate its own online store ([131]) and to advertise online ([132]). In such cases, the buyer is not prevented from making effective use of the internet to sell the contract goods or services. The following are examples of requirements relating to online sales that can benefit from the exemption provided by Article 2(1) of the Regulation:

(a) requirements intended to ensure the quality or a particular appearance of the buyer's online store;

(b) requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed, the way the supplier's trademarks or brands are displayed);

(c) a direct or indirect ban on the use of online marketplaces ([133]);

(d) a requirement that the buyer operates one or more brick and mortar shops or showrooms, for instance as a condition for becoming a member of the supplier's selective distribution system;

([128]) See also paragraph (203).
([129]) See also Commission Decision in AT.40428 - *Guess*, recitals 118 to 126.
([130]) For other examples, see E-commerce Sector Inquiry Final Report, paragraph 241.
([131]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 56 and 57, and paragraph (224) of these Guidelines.
([132]) See also Commission Decision in AT.40428 - *Guess*, recitals 118 to 126, and paragraph 200 of these Guidelines.
([133]) Case C-230/16 - *Coty Germany*, paragraphs 64 to 69; see also section 8.2.3. of these Guidelines.

(e) a requirement that the buyer sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick and mortar shop. This requirement can be the same for all buyers, or it can be set at a different level for each buyer, based on objective criteria, such as the buyer's size relative to other buyers, or its geographic location.

(209) A requirement that the buyer pays a different wholesale price for products sold online than for products sold offline (dual pricing) can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, as it may incentivise or reward an appropriate level of investments in online or offline sales channels, provided that it does not have the object of restricting sales to particular territories or customers, as provided for in Article 4, points (b), (c) and (d) of Regulation (EU) 2022/720 ([134]). However, where the difference in the wholesale price has the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers, it is a hardcore restriction within the meaning of Article 4, point (e) of Regulation (EU) 2022/720. This would, in particular, be the case where the difference in the wholesale price makes selling online unprofitable or financially unsustainable ([135]), or where dual pricing is used to limit the quantity of products made available to the buyer for sale online ([136]). Conversely, dual pricing can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel. Similarly, the supplier may charge a different wholesale price for products that are to be sold through a combination of offline and online channels, where the price difference takes into account investments or costs related to that type of distribution. The parties may agree an appropriate method to implement dual pricing, including, for example, an ex post balancing of accounts on the basis of actual sales.

(210) Online advertising restrictions can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, provided that they do not have the object of preventing the use of an entire advertising channel by the buyer. Examples of online advertising restrictions that can benefit from the exemption include:

(a) a requirement that online advertising meets certain quality standards or includes specific content or information;

(b) a requirement that the buyer does not use the services of particular online advertising providers that do not meet certain quality standards;

(c) a requirement that the buyer does not use the brand name of the supplier in the domain name of its online store.

6.1.2.2. Distinction between 'active sales' and 'passive sales'

(211) Article 4 of Regulation (EU) 2022/720 distinguishes between restrictions of active sales and restrictions of passive sales in the context of exclusive distribution systems. Article 1(1), points (l) and (m) of Regulation (EU) 2022/720 provide definitions of active and passive sales.

(212) Article 1(1), point (m) of Regulation (EU) 2022/720 sets out that, in the case of sales to customers in an exclusively allocated territory or customer group, sales to customers who have not been actively targeted by the seller are passive sales. For instance, setting up an online store is a form of passive selling, as it is a means to allow potential customers to reach the seller. The operation of an online store may have effects that extend beyond the seller's physical trading area, including by enabling online purchases by customers located in other territories or customer groups. Nonetheless, such purchases (including the delivery of the products) are passive sales, provided that the seller does not actively target the specific customer or the specific territory or customer group to which the customer belongs. The same applies where a customer opts to be kept automatically

([134]) See also paragraph (206), point (g).
([135]) See also paragraph 203.
([136]) See also paragraph 208, point (e).

informed by the seller and such information leads to a sale. Similarly, the use of search engine optimisation, namely tools or techniques intended to improve the visibility or ranking of the online store in search engine results, or offering an app in an app store, are, in principle, means to enable potential customers to reach the seller and are therefore forms of passive selling.

(213) Conversely, Article 1(1), point (l) of Regulation (EU) 2022/720 sets out that in the case of sales to customers in an exclusively allocated territory or customer group, offering a language option in an online store that is different from the languages commonly used in the territory in which the seller is established generally indicates that the seller is targeting the territory in which the language is commonly used and thus amounts to active selling ([137]). However, offering an English language option in an online store does not as such indicate that the seller is targeting English-speaking territories, as English is widely understood and used throughout the Union. Similarly, establishing an online store with a top-level domain corresponding to a territory other than the one in which the seller is established is a form of active selling into that territory, whereas offering an online store with a generic and non-country specific domain name is a form of passive selling.

(214) Pursuant to Article 1(1), point (l) of Regulation (EU) 2022/720, active sales mean sales resulting from actively targeting customers by visits, letters, emails, calls or other means of direct communication. Targeted advertising or promotions are a form of active selling. In particular, online advertising services often allow the seller to select the territories or customers for which the online advertisement will be displayed. This is the case, for example, for search engine advertising and other online advertising, for instance on websites, app stores, social media, provided that the advertising service allows the advertiser to target customers according to their particular characteristics, including their geographic location or personal profile. By contrast, where the seller addresses online advertising to customers in its own territory or customer group and it is not possible to prevent such advertising from being seen by customers in other territories or customer groups, this is a form of passive selling. Examples of such general advertising include sponsored content on the website of a local or national newspaper that may be accessed by any visitor to that website, or the use of price comparison services with generic and non-country-specific domain names. Conversely, if such general advertising is made in languages not commonly used in the seller's territory or on websites with a top-level domain corresponding to territories outside the seller's territory, this amounts to active selling into those other territories.

(215) Participation in public procurement is a form of passive selling, irrespective of the type of public procurement procedure (e.g. open procedure, restricted procedure or other). This qualification is coherent with the purposes of public procurement law, which include facilitating intra-brand competition. As a result, a vertical agreement which restricts the ability of a buyer to participate in public procurement is a hardcore restriction within the meaning of Article 4, points (b), (c) and (d) of Regulation (EU) 2022/720. Similarly, responding to invitations to tender issued by non-public entities is a form of passive selling. Such invitations to tender are a form of unsolicited customer request addressed to multiple potential sellers and therefore the submission of a bid in response to an invitation to tender by a non-public entity is a form of passive selling.

6.1.2.3. Hardcore restrictions relating to specific distribution systems

(216) Article 4, points (b), (c) and (d) of Regulation (EU) 2022/720 contain a list of hardcore restrictions and exceptions that apply depending on the type of distribution system operated by the supplier: exclusive distribution, selective distribution or free distribution.

6.1.2.3.1. Where the supplier operates an exclusive distribution system

(217) The hardcore restriction set out in Article 4, point (b) of Regulation (EU) 2022/720 concerns agreements that, directly or indirectly, have as their object the restriction of the territory into which or of the customers to whom a buyer, to which an exclusive territory or customer group has been allocated, may actively or passively sell the contract goods or services.

([137]) See judgment of 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH Co. KG and Hotel Alpenhof GesmbH v Oliver Heller,* Joined Cases C-585/08 and C-144/09, EU:C:2010:740, paragraph 93.

(218) There are five exceptions to the hardcore restriction laid down in Article 4, point (b) of Regulation (EU) 2022/720.

(219) First, Article 4, point (b)(i) of Regulation (EU) 2022/720 allows the supplier to restrict active sales by the exclusive distributor into a territory or to a customer group exclusively allocated to a maximum of five buyers, or reserved to the supplier. In order to preserve their investment incentives, the supplier must protect its exclusive distributors against active sales, including targeted online advertising, into their exclusive territory or to their exclusive customer group by all the supplier's other buyers.

(220) The investment incentives of exclusive distributors could also be undermined by active selling by customers of the supplier's others buyers. Therefore, Article 4, point (b)(i) of Regulation (EU) 2022/720 also allows the supplier to require its other buyers to restrict their direct customers from actively selling into territories or to customer groups that the supplier has exclusively allocated to other distributors or reserved to itself. However, the supplier may not require such other buyers to pass on the active sales restrictions to customers further down the distribution chain.

(221) The supplier may combine the allocation of an exclusive territory and an exclusive customer group by, for instance, appointing an exclusive distributor for a particular customer group in a specific territory.

(222) The protection of exclusively allocated territories or customer groups is not absolute. To prevent market partitioning, passive sales into such territories or customer groups may not be restricted. Article 4, point (b) of Regulation (EU) 2022/720 applies only to restrictions imposed on the buyer. The supplier may therefore accept restrictions on sales by itself, both online and offline, into the exclusive territory or to some or all of the customers belonging to an exclusive customer group. However, restrictions of passive sales to end users may, in certain circumstances, be void pursuant to Article 6(2) of Regulation (EU) 2018/302 of the European Parliament and of the Council ([138]).

(223) Second, Article 4, point (b)(ii) of Regulation (EU) 2022/720 allows a supplier that operates an exclusive distribution system in a certain territory and a selective distribution system in another territory to restrict its exclusive distributors from selling actively or passively to unauthorised distributors located in the territory where the supplier already operates a selective distribution system or which it has reserved for the operation of such a system. The supplier may also require its exclusive distributors to similarly restrict their customers from making active and passive sales to unauthorised distributors in territories where the supplier operates a selective distribution system or which it has reserved for that purpose. The ability to pass on active and passive sales restrictions further down the distribution chain in this scenario is intended to protect the closed nature of selective distribution systems.

(224) Third, Article 4, point (b)(iii) of Regulation (EU) 2022/720 allows a supplier to restrict the place of establishment of the buyer to which it has allocated an exclusive territory or customer group ('location clause'). This means that the supplier may require the buyer to restrict its distribution outlets and warehouses to a particular address, place or territory. As regards mobile distribution outlets, the agreement may specify an area outside which the outlet cannot be operated. However, the establishment and use of an online store by the distributor is not equivalent to the opening of a physical outlet and thus cannot be restricted ([139]).

(225) Fourth, Article 4, point (b)(iv) of Regulation (EU) 2022/720 allows a supplier to restrict active and passive sales by an exclusive wholesaler to end users, thus allowing the supplier to keep the wholesale and retail levels of trade separate. This exception includes allowing the wholesaler to sell to certain end users (for example, a few large ones), while prohibiting sales to all other end users ([140]).

([138]) Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60I, 2.3.2018, p. 1).

([139]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 56 and 57.

([140]) See also paragraph (222) concerning Regulation (EU) 2018/302.

(226) Fifth, Article 4, point (b)(v) of Regulation (EU) 2022/720 allows a supplier to restrict an exclusive distributor's ability to actively or passively sell components, supplied for the purposes of incorporation, to competitors of the supplier who would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.

6.1.2.3.2. Where the supplier operates a selective distribution system

(227) The hardcore restriction set out in Article 4, point (c)(i) of Regulation (EU) 2022/720 concerns agreements that, directly or indirectly, have as their object the restriction of the territory into which or the customers to whom the members of a selective distribution system ('authorised distributors') may actively or passively sell the contract goods or services. This includes restrictions of active or passive sales to end users imposed by a supplier on authorised distributors operating at the retail level.

(228) There are five exceptions to the hardcore restriction set out in Article 4, point (c)(i) of Regulation (EU) 2022/720.

(229) The first exception concerns restrictions of the ability of authorised distributors to sell outside the selective distribution system. It allows the supplier to restrict active sales, including targeted online advertising, by authorised distributors into other territories or to customer groups that are exclusively allocated to other distributors or reserved to the supplier. The supplier may also require the authorised distributors to impose such permitted restrictions of active sales on their direct customers. However, the protection of such exclusively allocated territories or customer groups is not absolute, as the supplier may not restrict passive sales into such territories or to such customer groups.

(230) The second exception allows the supplier to restrict its authorised distributors and their customers from making active or passive sales to unauthorised distributors located in any territory where the supplier operates a selective distribution system.

(231) The third exception allows the supplier to impose a location clause on its authorised distributors, to prevent them from operating their business from different premises or from opening a new outlet in a different location. This implies that the benefit of Regulation (EU) 2022/720 is not lost if the distributor agrees to restrict its distribution outlets and warehouses to a particular address, place or territory. As regards mobile distribution outlets, the agreement may specify an area outside which the outlet cannot be operated. However, the establishment and use by the distributor of an online store is not equivalent to the opening of a physical outlet and thus cannot be restricted ([141]).

(232) The fourth exception allows the supplier to restrict active and passive sales by an authorised wholesaler to end users, thus allowing the supplier to keep the wholesale and retail levels of trade separate. This exception includes allowing the wholesaler to sell to certain end users (for example, a few large ones), while prohibiting sales to all other end users ([142]).

(233) The fifth exception allows the supplier to restrict an authorised distributor's ability to actively or passively sell components, supplied for the purposes of incorporation, to competitors of the supplier who would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods, and the term 'incorporation' refers to the use of any input to produce goods.

(234) The hardcore restriction set out in Article 4, point (c)(iii) of Regulation (EU) 2022/720 concerns the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level. This means that the supplier may not restrict its authorised distributors from selling to end users, or to purchasing agents acting on behalf of end users, except where such end users are located in a territory or belong

([141]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 55 to 58.
([142]) See also paragraph (222) concerning Regulation (EU) 2018/302.

to a customer group that has been exclusively allocated to another distributor or reserved to the supplier in a territory where the supplier operates an exclusive distribution system (see Article 4, point (c)(i)(1) of the Regulation and paragraph (229). This also does not exclude the possibility of prohibiting the authorised distributors from operating out of an unauthorised place of establishment (see Article 4, point (c)(i)(3) of the Regulation and paragraph (231) of these Guidelines).

(235) A supplier operating a selective distribution system may select its authorised distributors on the basis of qualitative and/or quantitative criteria. Any qualitative criteria generally have to be set for both online and offline channels. However, considering that online and offline channels have different characteristics, a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not equivalent to those imposed for sales in brick and mortar shops, provided that the requirements imposed for online sales do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers. For example, a supplier may impose requirements to ensure quality standards for online sales, such as a requirement to set up and operate an online after-sales helpdesk; a requirement to cover the costs of customers returning purchased products, or the use of secure payment systems. Similarly, a supplier may define different criteria relating to sustainable development for online and offline sales channels. For example, a supplier could require eco-responsible sales outlets or the use of delivery services using green bicycles.

(236) The combination of selective distribution with exclusive distribution in the same territory cannot benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, including where the supplier applies exclusive distribution at the wholesale level and selective distribution at the retail level. This is because such a combination would require the authorised distributors to accept hardcore restrictions within the meaning of Article 4, point (b) or (c) of Regulation (EU) 2022/720, for example, restrictions of active sales to territories or customers that have not been exclusively allocated, restrictions of active or passive sales to end users ([143]), or restrictions of cross-supplies between authorised distributors ([144]). However, the supplier may commit to supply only certain authorised distributors, for example, in certain parts of the territory where the selective distribution system is operated, or it may commit not to make any direct sales in that territory itself ([145]). Pursuant to the third exception to Article 4, point (c)(i) of Regulation (EU) 2022/720, the supplier may also impose a location clause on its authorised distributors.

(237) The hardcore restriction set out in Article 4, point (c)(ii) of Regulation (EU) 2022/720 concerns the restriction of cross-supplies between authorised distributors within a selective distribution system. This means that the supplier cannot prevent active or passive sales between its authorised distributors, which must remain free to purchase the contract products from other authorised distributors within the network, operating either at the same or at a different level of trade ([146]). Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that, in a selective distribution system, the supplier cannot restrict sales by authorised wholesalers to authorised distributors.

6.1.2.3.3. Where the supplier operates a free distribution system

(238) The hardcore restriction set out in Article 4, point (d) of Regulation (EU) 2022/720 concerns agreements or concerted practices that, directly or indirectly, have as their object the restriction of the territory into which or the customers to whom a buyer in a free distribution system may actively or passively sell the contract goods or services ([147]).

(239) There are five exceptions to the hardcore restriction set out in Article 4, point (d) of Regulation (EU) 2022/720.

([143]) See paragraph (227).
([144]) See paragraph (237).
([145]) See also paragraph (222) concerning Regulation (EU) 2018/302.
([146]) See, for example, Commission decision in case AT.40428 - *Guess*, recitals 65 to 78.
([147]) See also paragraph (116).

(240) First, Article 4, point (d)(i) of Regulation (EU) 2022/720 allows the supplier to restrict active sales, including targeted online advertising, by the buyer into territories or to customer groups that are allocated exclusively to other buyers or reserved to the supplier. The supplier may also require the buyer to impose such permitted restrictions of active sales on the buyer's direct customers. However, the protection of such exclusively allocated territories or customer groups is not absolute, as the supplier may not restrict passive sales into such territories or customer groups.

(241) Secondly, Article 4, point (d)(ii) of Regulation (EU) 2022/720 allows the supplier to restrict the buyer and to require the buyer to restrict its customers from selling actively or passively to unauthorised distributors located in a territory where the supplier operates a selective distribution system or which the supplier has reserved for the operation of such a system. The restriction may cover active or passive sales at any level of trade.

(242) Third, Article 4, point (d)(iii) of Regulation (EU) 2022/720 allows the supplier to impose a location clause on the buyer, to restrict its place of establishment. This means that the supplier may require the buyer to restrict its distribution outlets and warehouses to a particular address, place or territory. As regards mobile distribution outlets, the agreement may specify an area outside which the outlet cannot be operated. However, the establishment and use by the buyer of an online store is not equivalent to the opening of a physical outlet and thus cannot be restricted ([148]).

(243) Fourth, Article 4, point (d)(iv) of Regulation (EU) 2022/720 allows the supplier to restrict active and passive sales by a wholesaler to end users, thus allowing the supplier to keep the wholesale and retail levels of trade separate. This exception includes allowing the wholesaler to sell to certain end users (for example, certain large ones), while prohibiting it from selling to other end users ([149]).

(244) Fifth, Article 4, point (d)(v) of Regulation (EU) 2022/720 allows the supplier to restrict a buyer's ability to actively or passively sell components, supplied for the purposes of incorporation, to competitors of the supplier, which would use them to manufacture the same type of goods as those produced by the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.

6.1.3. *Restrictions of the sales of spare parts*

(245) The hardcore restriction set out in Article 4, point (f) of Regulation (EU) 2022/720 concerns agreements that prevent or restrict end users, independent repairers, wholesalers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. An agreement between a manufacturer of spare parts and a buyer that incorporates those parts into its own products, such as original equipment manufacturers ('OEMs'), may not, either directly or indirectly, prevent or restrict sales by the manufacturer of those spare parts to end users, independent repairers, wholesalers or service providers. Indirect restrictions may arise particularly when the manufacturer of the spare parts is restricted in supplying technical information and special equipment, which are necessary for the use of spare parts by end users, independent repairers or service providers. However, the agreement may place restrictions on the supply of the spare parts to the repairers or service providers entrusted by the OEM with the repair or servicing of its own goods. This also means that the OEM may require its own repair and service network to buy spare parts from itself or from other members of its selective distribution system, where it operates such a system.

6.2. **Restrictions that are excluded from Regulation (EU) 2022/720**

(246) Article 5 of Regulation (EU) 2022/720 excludes certain obligations contained in vertical agreements from the benefit of the block exemption, irrespective of whether the market share thresholds set out in Article 3(1) of the Regulation are exceeded or not. In particular, Article 5 of the Regulation sets out obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions of Article 101(3) of the Treaty. There is nonetheless no presumption that the obligations listed in Article 5 of the Regulation fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3) of the Treaty. The exclusion of

([148]) See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 55 to 58.
([149]) See also paragraph (222) concerning Regulation (EU) 2018/302.

these obligations from the block exemption means only that they are subject to an individual assessment under Article 101 of the Treaty. Moreover, unlike Article 4 of Regulation (EU) 2022/720, the exclusion of an obligation from the block exemption pursuant to Article 5 of the Regulation is limited to the specific obligation, provided that the obligation in question can be severed from the rest of the vertical agreement. In that case, the remainder of the vertical agreement continues to benefit from the block exemption.

6.2.1. *Non-compete obligations exceeding a duration of five years*

(247) Pursuant to Article 5(1), point (a) of Regulation (EU) 2022/720, non-compete obligations exceeding a duration of five years are excluded from the block exemption. Non-compete obligations, as defined in Article 1(1), point (f) of Regulation (EU) 2022/720, are arrangements that cause the buyer to purchase more than 80 % of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year from the supplier or from another undertaking designated by the supplier. This means that the buyer is prevented from purchasing competing goods or services or that such purchases are limited to less than 20 % of its total purchases. If no relevant data is available for the buyer's purchases in the calendar year preceding the conclusion of the vertical agreement, the buyer's best estimate of its annual total requirements may be used instead. However actual purchasing data should be used as soon as it is available.

(248) Non-compete obligations cannot benefit from the block exemption if their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the 5-year period. If, for instance, the vertical agreement contains a 5-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan must not hinder the buyer from effectively terminating the non-compete obligation at the end of the 5-year period. Similarly, where the supplier provides equipment to the buyer that is not relationship-specific, the buyer should have the possibility to take over the equipment at its market asset value once the non-compete obligation expires.

(249) Pursuant to Article 5(2) of Regulation (EU) 2022/720, the limitation of non-compete obligations to a duration of 5 years does not apply where the contract goods or services are resold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer. In such cases, the non-compete obligation may be imposed for a longer duration, provided this does not exceed the period of occupancy of the point of sale by the buyer. The reason for this exception is that it is generally unreasonable to expect a supplier to allow competing products to be sold from premises and land that it owns without its permission. By analogy, the same principles apply where the buyer operates from a mobile outlet owned or leased by the supplier from third parties not connected with the buyer. Artificial ownership constructions, such as a transfer by the distributor of its proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the 5-year limitation, cannot benefit from this exception.

6.2.2. *Post-term non-compete obligations*

(250) Pursuant to Article 5(1), point (b) in conjunction with Article 5(3) of Regulation (EU) 2022/720, post-term non-compete obligations imposed on the buyer are excluded from the benefit of the block exemption, unless all of the following conditions are fulfilled:

(a) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;

(b) it is limited to the point of sale from which the buyer has operated during the contract period;

(c) it is limited to a maximum period of 1 year.

(251) The know-how concerned must be secret, substantial and identified within the meaning of Article 1(1), point (j) of Regulation (EU) 2022/720, in particular it must include information that is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

6.2.3. *Non-compete obligations imposed on members of a selective distribution system*

(252) Article 5(1), point (c) of Regulation (EU) 2022/720 concerns the sale of competing goods or services in a selective distribution system. The exemption provided by Article 2(1) of the Regulation applies to the combination of selective distribution with a non-compete obligation, requiring authorised distributers not to resell competing brands. However, if the supplier prevents its authorised distributors, either directly or indirectly, from buying products for resale from one or more specific competing suppliers, such an obligation is excluded from the block exemption. The rationale for this exclusion is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one or more specific competitors from using those outlets to distribute their products. Such a scenario could lead to foreclosure of a competing supplier through a form of collective boycott.

6.2.4. *Across-platform retail parity obligations*

(253) The fourth exclusion from the block exemption, which is set out in Article 5(1), point (d) of Regulation (EU) 2022/720, concerns across-platform retail parity obligations imposed by suppliers of online intermediation services, namely direct or indirect obligations which cause buyers of such services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The retail parity obligation may result from a contractual clause or from other direct or indirect measures, including the use of differential pricing or incentives whose application depends on the conditions under which the buyer of the online intermediation services offers goods or services to end users via competing online intermediation services. For example, where the provider of online intermediation services makes the offering of better visibility for the buyer's goods or services on the provider's website or the application of a lower commission rate dependent on the buyer granting it parity of conditions relative to competing providers of such services, this amounts to an across-platform retail parity obligation.

(254) All other types of parity obligation can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720. This includes, for example:

(a) retail parity obligations relating to the direct sales channels of buyers of online intermediation services (so-called 'narrow' retail parity obligations);

(b) parity obligations relating to the conditions under which goods or services are offered to undertakings that are not end users;

(c) parity obligations relating to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs ('most favoured customer' obligations).

(255) Section 8.2.5. provides guidance for the assessment of parity obligations in individual cases where Regulation (EU) 2022/720 does not apply.

7. **WITHDRAWAL AND DISAPPLICATION**

7.1. **Withdrawal of the benefit of Regulation (EU) 2022/720**

(256) As stated in Article 6(1) of Regulation (EU) 2022/720, the Commission may withdraw the benefit of Regulation (EU) 2022/720 pursuant to Article 29(1) of Regulation (EC) No 1/2003, if it finds that, in a particular case, a vertical agreement to which Regulation (EU) 2022/720 applies has certain effects that are incompatible with Article 101 of the Treaty. Moreover, if, as stated in Article 6(2) of Regulation (EU) 2022/720, in a particular case, a vertical agreement has effects that are incompatible with Article 101(3) of the Treaty in the territory of a

Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the NCA of that Member State may also withdraw the benefit of Regulation (EU) 2022/720, pursuant to Article 29(2) of Regulation (EC) No 1/2003. Article 29 of Regulation (EC) No 1/2003 does not mention the courts of the Member States, which therefore have no power to withdraw the benefit of Regulation (EU) 2022/720 ([150]), unless the court concerned is a designated competition authority of a Member State pursuant to Article 35 of Regulation (EC) No 1/2003.

(257) The Commission and the NCAs may withdraw the benefit of Regulation (EU) 2022/720 in two scenarios. First, they may withdraw the benefit of Regulation (EU) 2022/720 if a vertical agreement falling within the scope of Article 101(1) of the Treaty has *in isolation* effects on the relevant market which are incompatible with Article 101(3) of the Treaty. Secondly, as referred to in recital 20 of Regulation (EU) 2022/720, they may also withdraw the benefit of Regulation (EU) 2022/720 if the vertical agreement has those effects *in conjunction* with similar agreements entered into by competing suppliers or buyers. This is because parallel networks of similar vertical agreements can produce cumulative anti-competitive effects that are incompatible with Article 101(3) of the Treaty. The restriction of access to the relevant market and the restriction of competition therein are examples of such cumulative effects that can justify the withdrawal of the benefit of Regulation (EU) 2022/720 ([151]).

(258) Parallel networks of vertical agreements are to be regarded as similar if they contain the same type of restrictions producing similar effects on the market. Such cumulative effects may arise, for example, in the case of retail parity obligations, selective distribution or non-compete obligations.

(259) As regards retail parity obligations relating to direct sales channels (narrow retail parity obligations), Article 6 of Regulation (EU) 2022/720 provides that the benefit of the Regulation may be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, in particular where the relevant market for the supply of online intermediation services is highly concentrated and competition between the providers of such services is restricted by the cumulative effect of parallel networks of similar agreements restricting buyers of the online intermediation services from offering, selling or reselling goods or services to end users under more favourable conditions on their direct sales channels. Further guidance on that scenario is provided in section 8.2.5.2.

(260) As regards selective distribution, a situation of sufficiently similar parallel networks may exist if, on a given market, certain suppliers apply purely qualitative selective distribution while other suppliers apply quantitative selective distribution, with similar effects on the market. Such cumulative effects may also arise when, on a given market, parallel selective distribution networks use qualitative criteria that foreclose distributors. In those circumstances, the assessment must take account of the anti-competitive effects attributable to each individual network of agreements. Where appropriate, the withdrawal of the benefit of Regulation (EU) 2022/720 may be limited to particular qualitative criteria or particular quantitative criteria which, for example, limit the number of authorised distributors.

(261) The responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings that make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall within the scope of Article 101(1) of the Treaty ([152]). They are therefore not subject to the withdrawal mechanism ([153]).

([150]) Nor may the courts of the Member States modify the scope of Regulation (EU) 2022/720 by extending its sphere of application to agreements not covered by Regulation (EU) 2022/720. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence (judgment of 28 Feburary 1991, *Stergios Delimitis* v *Henninger Bräu AG*, C-234/89, EU:C:1991:91, paragraph 46 ('Case C-234/89 - *Delimitis*').

([151]) However, a cumulative foreclosure effect is unlikely to arise where the parallel networks of vertical agreements cover less than 30 % of the relevant market, see paragraph 10 of the De Minimis Notice.

([152]) Individual suppliers or distributors with a market share not exceeding 5 % are in general not considered to contribute significantly to a cumulative foreclosure effect, see paragraph 10 of the De Minimis Notice; and Case C-234/89 - *Delimitis* v *Henninger Bräu*, paragraphs 24 to 27.

([153]) The assessment of such a contribution will be made in accordance with the criteria set out in section 8 relating to enforcement policy in individual cases.

(262) Pursuant to Article 29(1) of Regulation (EC) No 1/2003, the Commission may withdraw the benefit of Regulation (EU) 2022/720 on its own initiative or on the basis of a complaint. This includes the possibility for NCAs to ask the Commission to withdraw the benefit of Regulation (EU) 2022/720 in a particular case, without prejudice to the application of the rules on case allocation and assistance within the European Competition Network ('ECN') ([154]), and without prejudice to their own power of withdrawal pursuant to Article 29(2) of Regulation (EC) No 1/2003. If at least three NCAs ask the Commission to apply Article 29(1) of Regulation (EC) No 1/2003 in a particular case, the Commission will discuss the case within the framework of the ECN. In that context, the Commission will take utmost account of the views of the NCAs that have asked the Commission to withdraw the benefit of Regulation (EU) 2022/720 to reach a timely conclusion on whether the conditions for a withdrawal in the specific case are fulfilled.

(263) It follows from Article 29(1) and (2) of Regulation (EC) No 1/2003 that the Commission has the exclusive competence to withdraw the benefit of Regulation (EU) 2022/720 Union-wide, in that it may withdraw the benefit of Regulation (EU) 2022/720 in respect of vertical agreements that restrict competition on a relevant geographic market which is wider than the territory of a single Member State, whereas an NCA may only withdraw the benefit of the Regulation in relation to the territory of its Member State.

(264) Therefore, the withdrawal power of an individual NCA relates to cases where the relevant market covers one single Member State, or a region located exclusively in one Member State, or part thereof. In such a case, the NCA of that Member State has the competence to withdraw the benefit of Regulation (EU) 2022/720 in relation to a vertical agreement that has effects that are incompatible with Article 101(3) of the Treaty on that national or regional market. This is a concurrent competence, as Article 29(1) of Regulation (EC) No 1/2003 also empowers the Commission to withdraw the benefit of Regulation (EU) 2022/720 in relation to a national or regional market, provided the vertical agreement concerned may affect trade between Member States.

(265) Where several separate national or regional markets are concerned, several competent NCAs can withdraw the benefit of Regulation (EU) 2022/720 in parallel.

(266) It follows from the wording of Article 29(1) of Regulation (EC) No 1/2003 that, where the Commission withdraws the benefit of Regulation (EU) 2022/720, the Commission has the burden of proving, first, that the vertical agreement concerned restricts competition within the meaning of Article 101(1) of the Treaty ([155]). Secondly, the Commission must prove that the agreement has effects that are incompatible with Article 101(3) of the Treaty, which means that the agreement fails to fulfil at least one of the four conditions of Article 101(3) of the Treaty ([156]). Pursuant to Article 29(2) of Regulation (EC) No 1/2003, the same requirements apply where a NCA withdraws the benefit of Regulation (EU) 2022/720 in respect of the territory of its Member State. In particular, as regards the burden of proving that the second requirement is fulfilled, Article 29 requires the competent competition authority to substantiate that at least one of the four conditions of Article 101(3) of the Treaty is not fulfilled ([157]).

([154]) See Chapter IV of Regulation (EC) No 1/2003.

([155]) If a vertical agreement falls outside the scope of Article 101(1) of the Treaty, as set out in section 3 of these Guidelines, the question of the application of Regulation (EU) 2022/720 does not arise, because Regulation (EU) 2022/720 defines categories of vertical agreements that normally satisfy the conditions of Article 101(3) of the Treaty, which presupposes that the vertical agreement falls within the scope of Article 101(1) of the Treaty.

([156]) It is sufficient for the Commission to substantiate that one of the four conditions of Article 101(3) of the Treaty is not fulfilled. This is because, in order for the Article 101(3) exception to apply, all four conditions must be met.

([157]) The requirement under Article 29 of Regulation (EC) No 1/2003 regarding the burden of proof of the competent competition authority follows from the situation in which Regulation (EU) 2022/720 does not apply and an undertaking invokes Article 101(3) of the Treaty in an individual case. In that situation, pursuant to Article 2 of Regulation (EC) No 1/2003, the undertaking has the burden of proving that all four conditions of Article 101(3) of the Treaty are met. To this end, it must substantiate its claims, see for example, Commission Decision in AT.39226 - *Lundbeck*, upheld in judgments of 8 September 2016, *Lundbeck* v *Commission*, T-472/13, EU:T:2016:449; and of 25 March 2021, *Lundbeck* v *Commission*, Case C-591/16 P, EU:C:2021:243.

(267) If the requirements of Article 29(1) of Regulation (EC) No 1/2003 are fulfilled, the Commission may withdraw the benefit of Regulation (EU) 2022/720 in an individual case. Such a withdrawal, and its requirements as set out in this section, must be distinguished from the findings of a Commission infringement decision pursuant to Chapter III of Regulation (EC) No 1/2003. However, a withdrawal can be combined, for example, with the finding of an infringement and imposition of a remedy, and even with interim measures ([158]).

(268) If the Commission withdraws the benefit of Regulation (EU) 2022/720 pursuant to Article 29(1) of Regulation (EC) No 1/2003, the withdrawal only produces effects ex nunc, that is to say the exempted status of the agreements concerned remains unaffected for the period preceding the date on which the withdrawal becomes effective. In the case of a withdrawal pursuant to Article 29(2) of Regulation (EC) No 1/2003, the NCA concerned must also take into account its obligations under Article 11(4) of Regulation (EC) No 1/2003, in particular its obligation to provide the Commission with any relevant envisaged decision.

7.2. **Disapplication of Regulation (EU) 2022/720**

(269) In accordance with Article 1a of Regulation No 19/65/EEC, Article 7 of Regulation (EU) 2022/720 enables the Commission to exclude from the scope of Regulation (EU) 2022/720, by means of regulation, parallel networks of similar vertical restraints where such networks cover more than 50 % of a relevant market. Such a regulation is not addressed to individual undertakings but concerns all undertakings whose agreements fulfil the conditions set out in a regulation made pursuant to Article 7 of Regulation (EU) 2022/720. When assessing the need to adopt such a regulation, the Commission will consider whether an individual withdrawal would be a more appropriate remedy. The number of competing undertakings contributing to a cumulative effect on a relevant market and the number of affected geographic markets within the Union are two aspects that are particularly relevant to that assessment.

(270) The Commission will consider the adoption of a regulation pursuant to Article 7 of Regulation (EU) 2022/720 if similar restraints that cover more than 50 % of the relevant market are likely to appreciably restrict access to that market or competition therein. This may in particular be the case where parallel selective distribution networks covering more than 50 % of a market are liable to foreclose the market, due to the use of selection criteria that are not required by the nature of the relevant goods or services or which discriminate against certain types of distribution of such goods or services. To calculate the 50 % market coverage ratio, account must be taken of each individual network of vertical agreements containing restraints or combinations of restraints that produce similar effects on the market. However, Article 7 of Regulation (EU) 2022/720 does not require the Commission to adopt such a regulation where the 50 % market coverage ratio is exceeded.

(271) The effect of a regulation adopted pursuant to Article 7 of Regulation (EU) 2022/720 is that Regulation (EU) 2022/720 becomes inapplicable in respect of the restraints and the markets concerned, and threrefore Article 101(1) and (3) of the Treaty apply fully.

(272) Any regulation adopted pursuant to Article 7 of Regulation (EU) 2022/720 must clearly set out its scope. Therefore, the Commission must first define the relevant product and geographic market(s) and, secondly, the type of vertical restraint(s) in respect of which Regulation (EU) 2022/720 will no longer apply. As regards the latter aspect, the Commission may modulate the scope of the regulation according to the competition concern that it intends to address. For instance, while all parallel networks of single-branding type arrangements may be taken into account when determining the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the regulation that it adopts pursuant to Article 7 of Regulation (EU) 2022/720 to non-compete obligations that exceed a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature

([158]) The Commission used its power to withdraw the benefit of previously applicable block exemption regulations in its decision of 25 March 1992 (interim measures) relating to a proceeding under Article 85 of the EEC Treaty in Case IV/34.072 – *Mars/Langnese and Schöller*, upheld by the judgment of 1 October 1998, *Langnese-Iglo* v *Commission*, C-279/95 P, EU:C:1998:447 and in its decision of 4 December 1991 (interim measures) relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 – *Eco System/Peugeot*.

may be left unaffected, in view of the lesser degree of foreclosure attributable to such restraints. Similarly, if, on a particular market, undertakings use selective distribution in combination with additional restraints, such as non-compete obligations or quantity forcing, a regulation adopted pursuant to Article 7 of Regulation (EU) 2022/720 might concern only such additional restraints. Where appropriate, the Commission may also specify the level of market share which, in the specific market context, may be regarded as insufficient for an individual undertaking to make a significant contribution to the cumulative effect.

(273) In accordance with Article 1a of Regulation No 19/65/EEC, a regulation adopted pursuant to Article 7 of Regulation (EU) 2022/720 must fix a transitional period of not less than six months before it becomes applicable. That period is intended to enable the undertakings concerned to adapt their vertical agreements accordingly.

(274) A regulation adopted pursuant to Article 7 of Regulation (EU) 2022/720 will not affect the exempted status of the agreements concerned for the period preceding the date of application of that regulation.

8. ENFORCEMENT POLICY IN INDIVIDUAL CASES

8.1. The framework of analysis

(275) Where the block exemption provided by Regulation (EU) 2022/720 does not apply to a vertical agreement, it is necessary to assess whether, in the individual case, the vertical agreement falls within the scope of Article 101(1) of the Treaty and, if so, whether the conditions of Article 101(3) of the Treaty are fulfilled. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720, there is no presumption that vertical agreements that fall outside the scope of Regulation (EU) 2022/720 fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3) of the Treaty. Such agreements require an individual assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) of the Treaty or which fulfil the conditions of Article 101(3) of the Treaty are valid and enforceable.

(276) Pursuant to Article 1(2) of Regulation (EC) No 1/2003, undertakings do not need to notify their vertical agreements to benefit from an individual exemption under Article 101(3) of the Treaty. In the case of an individual examination by the Commission, it is the Commission which bears the burden of proof that the vertical agreement in question restricts competition within the meaning of Article 101(1) of the Treaty. Undertakings which claim the benefit of Article 101(3) of the Treaty bear the burden of proving that the conditions of that provision are fulfilled. Where likely anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a particular distribution arrangement is indispensable to bring likely benefits to consumers without eliminating competition. The Commission will then decide whether the agreement satisfies the conditions of Article 101(3) of the Treaty.

(277) The assessment of whether a vertical agreement has the effect of restricting competition is made by comparing the situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the vertical agreement. In the assessment of individual cases, the Commission may take both actual and likely effects into account. For vertical agreements to be restrictive of competition by effect, they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of the goods or services can be expected with a reasonable degree of probability. The negative effects on competition must be appreciable ([159]). Appreciable anti-competitive effects are more likely to occur when at least one of the parties to the agreement

([159]) See section 3.1.

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 the agreement 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 generally required for a finding of a restriction of competition within the meaning of Article 101(1) of the Treaty is less than the degree of market power required for a finding of dominance under Article 102 of the Treaty.

8.1.1. *Relevant factors for the assessment under Article 101(1) of the Treaty*

(278) In assessing individual vertical agreements between undertakings with market shares above the 30 % threshold, the Commission will undertake a full competition analysis. The following factors are particularly relevant to establish whether a vertical agreement brings about an appreciable restriction of competition within the meaning of Article 101(1) of the Treaty:

(a) the nature of the agreement;

(b) the market position of the parties;

(c) the market position of competitors (upstream and downstream);

(d) the market position of buyers of the contract goods or services;

(e) entry barriers;

(f) the level of the production or distribution chain that is affected;

(g) the nature of the product;

(h) the dynamics of the market.

(279) Other relevant factors may also be taken into account.

(280) The importance of individual factors may vary depending on the circumstances of the case. For instance, a high market share of the parties is usually a good indicator of market power. However, in the case of low entry barriers market power may be sufficiently constrained by actual or potential entry. It is therefore not possible to provide firm rules of general applicability on the importance of individual factors.

(281) Vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it contains, the duration of those restraints and the share of total sales on the (downstream) market affected by those restraints. It may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be deduced from the way in which the agreement is implemented by the parties and the incentives that they face.

(282) The market position of the parties provides an indication of the degree of market power, if any, held by the supplier, the buyer, or both. The higher their market share, the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. Such competitive advantages may, for instance, result from being a first mover on the market (having the best site, etc.), from holding essential patents or having superior technology, or from being the brand leader or having a superior portfolio. The degree of product differentiation can also be a relevant indicator for the presence of market power. Branding tends to increase product differentiation and reduce the substitutability of the product, leading to reduced elasticity of demand and an increased possibility to raise price.

(283) The market position of competitors is also important. The stronger the competitive position of competitors and the greater their number, the lower the risk that the parties will be able to individually exercise market power and foreclose the market or soften competition. It is also relevant to consider whether there are effective and timely counterstrategies that competitors would be likely to deploy. However, if the number of undertakings in the market is rather small and their market positions (in terms of, for example, size, costs and RD potential) similar, vertical restraints may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.

(284) The market position of the downstream customers of the parties to the vertical agreement provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchasing market. That market share reflects the importance of the customer's demand for possible suppliers. Other indicators are the position of the customer on the resale market where it is active, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image among end users. In some circumstances, buyer power may prevent consumer harm from an otherwise problematic vertical agreement. This is particularly so when strong customers have the ability and incentive to bring new sources of supply onto the market in the case of a small but permanent increase in relative prices.

(285) Entry barriers are measured by the extent to which incumbent firms can increase their price above the competitive level without attracting new entry. As a general rule, entry barriers can be said to be low when effective entry, capable of preventing or eroding the exercise of market power by the incumbent firms, is likely to occur within 1 or 2 years. Entry barriers may be present at the supplier level or the buyer level or at both levels. Entry barriers may result from a broad range of factors such as economies of scale and scope (including network effects of multi-sided businesses), government regulations (especially where they establish exclusive rights), State aid, import tariffs, IPRs, ownership of resources where the supply is limited (for example, due to natural limitations), essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising over a period of time. The question of whether some of those factors should be considered as entry barriers depends, in particular, on whether they entail sunk costs. Sunk costs are costs that have to be incurred to enter or be active on a market but which cannot be recovered upon exiting the market. Advertising costs to build consumer loyalty are normally sunk costs, unless an existing firm could either sell its brand name or use it somewhere else without a loss. Where entry requires high sunk costs, the threat of fierce competition by incumbents post-entry may deter such entry, as potential entrants cannot justify the risk of losing their sunk investments.

(286) Vertical restraints may also work as an entry barrier, by making access more difficult and foreclosing (potential) competitors. For instance, a non-compete obligation that ties distributors to a supplier may have a significant foreclosing effect, if setting up its own distributors will impose sunk costs on the potential entrant.

(287) The level of the production or distribution chain is linked to the distinction between intermediate and final goods or services. Intermediate goods or services are sold to undertakings for use as an input to produce other goods or services and are generally not recognisable in the final goods or services. The buyers of intermediate goods or services are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods or services are, directly or indirectly, sold to end users, which often rely more on brand and image.

(288) The nature of the product plays a role in assessing both the likely negative and the likely positive effects of vertical restraints, in particular for final goods or services. When assessing the likely negative effects, it is important to determine whether the goods or services sold on the relevant market are homogeneous or rather differentiated ([160]), whether the product is expensive, taking up a large part of the consumer's budget, or rather inexpensive and whether the product is a one-off purchase or purchased repeatedly.

([160]) See also paragraph (282).

(289) The dynamics of the relevant market have to be carefully assessed. In some dynamic markets the potential negative effects of particular vertical restraints may be unproblematic, as inter-brand competition from dynamic and innovative rivals may act as a sufficient constraint. However, in other cases, vertical restraints may afford an incumbent in a dynamic market a lasting competitive advantage and hence result in long-term negative effects for competition. This may be the case where a vertical restraint prevents rivals from benefiting from network effects, or where a market is prone to tipping.

(290) Other factors may also be relevant to the assessment. Those factors can include in particular:

(a) the presence of cumulative effects, deriving from the fact that the market is covered by similar vertical restraints imposed by other suppliers or buyers;

(b) whether the agreement is 'imposed' (namely, most of the restrictions or obligations apply only to one party to the agreement) or 'agreed' (both parties accept restrictions or obligations);

(c) the regulatory environment;

(d) behaviour that may indicate or facilitate collusion, such as price leadership, pre-announced price changes and price discussions, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

8.1.2. *Relevant factors for the assessment under Article 101(3) of the Treaty*

(291) Vertical agreements which restrict competition within the meaning of Article 101(1) of the Treaty may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. The assessment of efficiencies against anti-competitive effects takes place within the framework of Article 101(3) of the Treaty, which contains an exception from the prohibition set out in Article 101(1) of the Treaty. For that exception to be applicable, the vertical agreement must fulfil the following four cumulative conditions:

(a) it must produce objective economic benefits,

b) consumers must receive a fair share of the resulting benefit ([161]),

(c) the restrictions of competition must be indispensable to attain those benefits, and

(d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the goods or services concerned ([162]).

(292) Under Article 101(3) of the Treaty, the assessment of vertical agreements is made within the actual context in which they occur ([163]) 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 provided by Article 101(3) of the Treaty applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case ([164]). When applying Article 101(3) of the Treaty in accordance with these principles, it is necessary to take into account the investments made by the parties to the agreement, as well as the time needed and the restraints required to commit and recoup an efficiency-enhancing investment.

([161]) As set out in paragraph 84 of the Article 101(3) Guidelines, the concept of 'consumers' within the meaning of Article 101(3) of the Treaty encompasses all direct or indirect users of the products covered by the agreement, including producers that use the product as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which are outside their trade or profession.

([162]) See Article 101(3) Guidelines.

([163]) See judgment of *Ford* v *Commission*, Joined Cases 25/84 and 26/84, EU:C:1985:340 paragraphs 24 and 25; Article 101(3) Guidelines, paragraph 44.

([164]) See, for example, Commission Decision 1999/242/EC (Case No IV/36.237 - *TPS*), (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition enshrined in Article 101(1) of the Treaty only applies as long as the agreement has a restrictive object or restrictive effects; Article 101(3) Guidelines, paragraph 44.

(293) The first condition of Article 101(3) of the Treaty requires an assessment of the objective benefits in terms of efficiencies produced by the vertical agreement. In this respect, vertical agreements often have the potential to help realise efficiencies, as explained in section 2.1., by improving the way in which the parties to the agreement conduct their complementary activities.

(294) The second condition of Article 101(3) of the Treaty requires that consumers must receive a fair share of the benefits. This implies that consumers of the goods or services purchased and/or (re)sold under the vertical agreement must at least be compensated for the negative effects of the agreement ([165]). In other words, the efficiency gains must fully offset the likely negative impact on prices, output and other relevant factors caused by the vertical agreement.

(295) Third, when applying the indispensability test contained in Article 101(3) of the Treaty, the Commission will, in particular, examine whether individual restrictions make it possible to perform the production, purchase or (re) sale of the contract goods or services 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 faced by the parties to the agreement must be taken into account. Undertakings invoking the benefit of Article 101(3) of the Treaty are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would not produce the same efficiencies. 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.

(296) The fourth condition of Article 101(3) of the Treaty requires that the vertical agreement must not afford the parties to the agreement the possibility of eliminating competition in respect of a substantial part of the goods or services concerned. This presupposes an analysis of the remaining competitive pressures on the market and the impact of the agreement on such remaining sources of competition. When applying this condition, it is necessary to take into account the relationship between Article 101(3) of the Treaty and Article 102 of the Treaty. According to settled case law, the application of Article 101(3) of the Treaty cannot prevent the application of Article 102 of the Treaty ([166]). Moreover, since Articles 101 and 102 of the Treaty both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of the exception rule to restrictive vertical agreements that constitute an abuse of a dominant position ([167]). The vertical agreement must not eliminate effective competition by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. A restrictive agreement which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

8.2. **Analysis of specific vertical restraints**

(297) Whereas section 6 includes guidance on the assessment of vertical restraints that amount to hardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720, or to excluded restrictions within the meaning of Article 5 of the Regulation, the following paragraphs provide guidance on other specific vertical restraints. As regards vertical restraints that are not specifically addressed in these Guidelines, the Commission will assess them vertical restraints in accordance with the same principles taking into account the relevant factors, as set out in this section 8.

([165]) See paragraph 85 of the Article 101(3) Guidelines.

([166]) See judgment of 16 March 2000, *Compagnie Maritime Belge,* Joined Cases C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 130. Similarly, the application of Article 101(3) of the Treaty does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 101(1) of the Treaty, see to that effect the judgment of 19 February 2002, *Wouters and Others,* C-309/99, EU:C:2002:98, paragraph 120.

([167]) See judgment of 10 July 1990, *Tetra Pak* v *Commission,* Case T-51/89, EU:T:1990:41. See also paragraph 106 of the Article 101(3) Guidelines.

8.2.1. *Single branding*

(298) Under the heading of 'single branding' fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That requirement can be found amongst others in non-compete and quantity forcing clauses agreed with the buyer. A non-compete arrangement is based on an obligation or incentive scheme which causes the buyer to purchase more than 80 % of its requirements on a particular market from only one supplier. This does not mean that the buyer must buy directly from the supplier, but that the buyer must *de facto* not buy, sell or incorporate competing goods or services. Quantity forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer result in the latter concentrating its purchases to a large extent with one supplier. Quantity forcing may, for example, take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called English clause, requiring the buyer to report any better offer and allowing the buyer to accept such an offer only if the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

(299) The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in the case of cumulative use and, where the buyer is a retailer, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

(300) Single branding agreements can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 where neither the supplier's nor the buyer's market share exceeds 30 % and the non-compete obligation does not exceed five years. As set out in paragraph (248), single branding agreements that are tacitly renewable beyond a period of five years can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the single branding agreement by giving a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the 5-year period. If those conditions are not satisfied, the single branding agreement must be individually assessed.

(301) The potential for single branding obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint would be exercised by competitors that are either not yet present on the market at the time the obligations are concluded, or are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the supplier in question is an unavoidable trading partner for at least part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many consumers, or because the capacity constraints on the other suppliers are such that a part of the demand can only be provided by the supplier in question ([168]). The market position of the supplier is thus of primary importance when assessing the possible anti-competitive effects of single branding obligations.

(302) If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations imposed by a single supplier are generally unlikely to restrict competition appreciably unless the ability of customers to switch between suppliers is rendered difficult by the duration and market coverage of the single branding obligations. The higher the proportion of its market share that a supplier sells under a single branding obligation and the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant undertakings.

([168]) See judgment of 23 October 2003, *Van den Bergh Foods* v *Commission,* Case T-65/98, EU:T:2003:281, paragraphs 104 and 156.

(303) When assessing the supplier's market power, the market position of its competitors is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not very likely where they hold similar market positions and can offer similarly attractive products. However, in such a case, foreclosure may occur for potential entrants where a number of major suppliers enter into single branding agreements with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where single branding agreements may facilitate collusion between competing suppliers. Where those agreements individually benefit from the exemption provided by Regulation (EU) 2022/720, a withdrawal of the benefit of the block exemption may be necessary to deal with such a negative cumulative anti-competitive effect. A tied market share of less than 5 % is generally not considered to contribute significantly to such a cumulative effect.

(304) In cases where the market share of the largest supplier is below 30 % and the combined market share of the five largest suppliers is below 50 %, there is unlikely to be a single or a cumulative anti-competitive effect. In such cases, where a potential entrant cannot penetrate the market profitably, it is likely to be due to factors other than single branding obligations, such as consumer preferences.

(305) To determine whether anti-competitive foreclosure is likely, it is necessary to assess the scale of entry barriers. Where it is relatively easy for competing suppliers to create their own integrated distribution network or find alternative distributors for their product, foreclosure is unlikely to be a real problem.

(306) Countervailing buyer power is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing goods or services. More generally, in order to convince customers to accept single branding, the supplier may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into a single branding obligation with the supplier. However, it would be wrong to conclude from this that all single branding obligations, taken together, are overall beneficial for customers in that market and for the consumers. It is, in particular, unlikely that consumers as a whole will benefit if the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings.

(307) Lastly, the level in the production or distribution chain is relevant. Foreclosure is less likely in the case of an intermediate product. Where the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial share of demand that is free. However, single branding may lead to anti-competitive foreclosure effects below the level of dominance in cases where there is a cumulative effect situation. A cumulative anti-competitive effect is unlikely to arise as long as less than 50 % of the market is tied.

(308) Where the agreement concerns the supply of a final product at the wholesale level, the likelihood of a competition problem arising depends to a large extent on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of foreclosure if competing manufacturers can easily establish their own wholesaling system. Whether entry barriers are low depends in part on the type of wholesaling system the supplier can efficiently establish. In a market where wholesaling can operate efficiently with only the product concerned by the agreement (for example ice cream), the manufacturer may have the ability and incentive, if necessary, to set up its own wholesaling system, in which case it is unlikely to be foreclosed from that market. By contrast, in a market where it is more efficient to wholesale a whole range of products (for example frozen foodstuffs), it is not efficient for a manufacturer selling only one product to set up its own wholesaling operation. Without access to established wholesalers, the manufacturer is likely to be excluded from the market. In that case, anti-competitive effects may arise. In addition, a cumulative anti-competitive effect may arise if several suppliers tie most of the available wholesalers.

(309) As regards final products, foreclosure is in general more likely to occur at the retail level, given the significant entry barriers for most manufacturers to start retail outlets solely for their own products. In addition, it is at the retail level that single branding agreements may lead to reduce in-store inter-brand competition. It is for those

reasons that, as regards final products at the retail level, significant anti-competitive effects may arise, taking into account all other relevant factors, where a non-dominant supplier ties 30 % or more of the relevant market. For a dominant undertaking, even a modest tied market share may lead to significant anti-competitive effects.

(310) A cumulative foreclosure effect may also arise at the retail level. Where all suppliers have market shares below 30 %, a cumulative foreclosure effect is unlikely where the total tied market share is less than 40 %, in which case withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors such as the number of competitors or entry barriers are taken into account. Where some of the undertakings have market shares above the threshold set out in Article 3 of Regulation (EU) 2022/720 but no undertaking is dominant, a cumulative foreclosure effect is unlikely if the total tied market share is below 30 %.

(311) Where the buyer operates from premises and land owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies to address a possible foreclosure effect resulting from a single branding agreement will be limited. In that case, intervention by the Commission below the level of dominance is unlikely.

(312) In certain sectors, the selling of more than one brand from a single site may be difficult, in which case a foreclosure problem can better be remedied by limiting the duration of contracts.

(313) Where single branding produces appreciable restrictive effects, it is necessary to asses whether the agreement generates efficiencies that fulfil the conditions of Article 101(3) of the Treaty. For non-compete obligations, the efficiencies described in paragraph (16), point (b) (free riding between suppliers), points (e) and (f) (hold-up problems) and point (i) (capital market imperfections), may be particularly relevant.

(314) As regards the efficiencies described in paragraph (16), points (b), (e) and (i), it is possible that quantity forcing on the buyer may be a less restrictive alternative. Conversely, a non-compete obligation may be the only viable means to achieve the efficiency described in paragraph (16), point (f) (hold-up problem related to the transfer of know-how).

(315) In the case of a relationship-specific investment made by the supplier, as described in paragraph (16), point (e), a non-compete or quantity forcing obligation for the period of depreciation of the investment will, in general, fulfil the conditions of Article 101(3) of the Treaty. In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when that equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are generally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans in or next to the canning factory of a food producer, that new capacity may only be economically viable when producing for that particular customer, in which case the investment would be considered to be relationship-specific.

(316) Non-compete obligations may also be used to address a hold-up problem for investments pursuing sustainability objectives. For example, a hold-up problem could arise where an energy supplier facing increased demand for renewable energy ([169]) wishes to invest in a hydropower plant or wind farm. The supplier may only be willing to take that long-term investment risk if a sufficient number of buyers are willing to commit to purchase renewable energy for a longer period. Such vertical agreements with buyers may be pro-competitive, as the long-term non-compete obligation may be necessary for the investment to take place at all, or for it to take place on the foreseen scale or within the foreseen time. Therefore, such non-compete obligations may fulfil the conditions of Article 101(3) of the Treaty if the supplier's investment has a long depreciation period, exceeding the 5 years set out in Article 5(1), point (a) of Regulation (EU) 2022/720 ([170]).

([169]) See Article 2(1) of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82).

([170]) Other EU rules may also apply to such investments in renewable energy, including those flowing from Article 106(1) of the Treaty, the State aid and internal market rules.

(317) Where the supplier provides the buyer with a loan or with equipment that is not relationship-specific, this is generally unlikely in itself to constitute an efficiency that fulfils the conditions of Article 101(3) of the Treaty where the agreement produces anti-competitive foreclosure effects. In the event of capital market imperfections, it may be more efficient for a product supplier to provide a loan, rather than a bank (see paragraph (16), point (i)). However, in that case, the loan should be provided in the least restrictive way possible, and the buyer should generally not be prevented from terminating the obligation and repaying the outstanding amount of the loan at any point in time and without paying a penalty.

(318) The transfer of substantial know-how, as referred to in paragraph (16), point (f), usually justifies a non-compete obligation for the whole duration of the supply agreement, as, for example, in the context of franchising.

(319) The following is an example of a non-compete obligation

> The market leader in a national market for an impulse consumer product, with a market share of 40 %, sells most of its products (90 %) through tied retailers (tied market share 36 %). The vertical agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in more densely populated areas, such as the capital. It has 10 competitors, but the products of some of them are only available in certain locations and they all have much smaller market shares, the largest having 12 %. These 10 competitors together supply another 10 % of the market via tied outlets. There is strong brand and product differentiation in the market. The market leader has the strongest brands. It is the only one with regular national advertising campaigns and it provides its tied retailers with special stocking cabinets for its product.
>
> This results in a situation where, in total, 46 % (36 % + 10 %) of the market is foreclosed to potential entrants and to incumbents not having tied outlets. Potential entrants find entry even more difficult in the densely populated areas, where foreclosure is even higher, even though it is in those areas that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and high search costs relative to the price of the product, the absence of in-store inter-brand competition leads to an extra welfare loss for consumers. The possible efficiencies of the outlet exclusivity, which the market leader claims to result from reduced transport costs and a possible hold-up problem concerning the stocking cabinets, are limited and do not outweigh the negative effects on competition. The efficiencies are limited, as the transport costs are linked to quantity and not exclusivity, and the stocking cabinets do not involve special know-how and are not brand specific. Accordingly, it is unlikely that the conditions of Article 101(3) of the Treaty are fulfilled.

(320) The following is an example of quantity forcing

> A producer X with a 40 % market share sells 80 % of its products through contracts which specify that the reseller is required to purchase at least 75 % of its requirements for that type of product from X. In return, X is offering financing and equipment at favourable rates. The contracts have a duration of five years and the loan is to be repaid in equal instalments. However, after the first two years, buyers have the possibility to terminate the contract with a 6-month notice period if they repay the outstanding amount of the loan and take over the equipment at its market asset value. At the end of the 5-year period the equipment becomes the property of the buyer. There are 12 competing producers, most of which are small, the biggest having a market share of 20 %, and they use similar contracts with different durations. The producers with market shares below 10 % often have contracts with longer durations and less generous termination clauses. The contracts of producer X leave 25 % of requirements free to be supplied by competitors. In the last three years, two new producers have entered the market and gained a combined market share of around 8 %, partly by taking over the loans of a number of resellers in return for contracts with those resellers.

Producer X's tied market share is 24 % (0.75 × 0.80 × 40 %). The other producers' tied market share is around 25 %. Therefore, in total, around 49 % of the market is foreclosed to potential entrants and to incumbents not having tied outlets for at least the first two years of the supply contracts. It appears that the resellers often have difficulty in obtaining loans from banks and they are generally too small to raise capital through other means, such as by issuing shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows it to plan its sales better and to save transport costs. In view of the efficiencies generated by the purchasing obligation, on the one hand, and the 25 % non-tied share in the contracts of producer X, the real possibility for early termination of the contracts, the recent entry of new producers and the fact that around half the resellers are not tied, on the other hand, the quantity forcing of 75 % applied by producer X is likely to fulfil the conditions of Article 101(3) of the Treaty.

8.2.2. *Exclusive supply*

(321) Exclusive supply refers to restrictions that oblige or induce the supplier to sell the contract products only or mainly to one buyer, in general or for a particular use. Such restrictions may take the form of an exclusive supply obligation, obliging the supplier to sell to only one buyer for the purposes of resale or a particular use. They may also for instance take the form of quantity forcing on the supplier, where incentives are agreed between a supplier and a buyer which make the former concentrate its sales mainly with that buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

(322) Exclusive supply agreement can benefit from the block exemption provided by Regulation (EU) 2022/720 where neither the supplier's nor the buyer's market share exceeds 30 %, even if combined with other non-hardcore vertical restraints, such as non-compete obligations. The remainder of this section 8.2.2. provides guidance for the assessment of exclusive supply agreements in individual cases above the market share threshold.

(323) The main competition risk of exclusive supply is anti-competitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular where the exclusive distributor becomes the exclusive buyer for a whole market (see in particular paragraph (130). The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. However, the importance of the buyer's position on the downstream market is the most significant factor to determine whether a competition problem may arise. If the buyer does not have market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise when the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30 %. Where the market share of the buyer on the upstream market does not exceed 30 %, significant foreclosure effects may still arise, especially where the market share of the buyer on its downstream market exceeds 30 % and the exclusive supply relates to a particular use of the contract products. Where a buyer is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects.

(324) As well as the market position of the buyer on the upstream and downstream market, it is also important to take into account the extent and duration of the exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply obligation, the more significant the foreclosure effect is likely to be. Exclusive supply agreements shorter than five 5 years entered into by non-dominant undertakings usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are, for most types of investments, not necessary to achieve the claimed efficiencies, or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

(325) The market position of competing buyers on the upstream purchase market is also important, as it is likely that exclusive supply agreements will foreclose competing buyers for anti-competitive reasons, such as increasing their costs, if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where these competitors have similar buying power to that of the buyer party to the agreement and

can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies where a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative foreclosure effect may lead to withdrawal of the benefit of Regulation (EU) 2022/720.

(326) The existence of entry barriers at the supplier level, as well as their size are relevant to assessing whether there is foreclosure. In as far as it is efficient for competing buyers to provide the goods or services themselves via upstream vertical integration, foreclosure is unlikely to be a problem.

(327) Countervailing power of suppliers should also be taken into account, as important suppliers will not easily let one buyer cut them off from alternative buyers. Foreclosure is therefore mainly a risk in the case of weak suppliers and strong buyers. In the case of strong suppliers, the exclusive supply obligation may be found in combination with non-compete obligations. For such combinations, it also necessary to refer to the guidance on single branding. Where there are relationship-specific investments involved on both sides (hold-up problem), the combination of exclusive supply and non-compete obligations will often be justified, in particular below the level of dominance.

(328) Lastly, the level in the production or distribution chain and the nature of the product are relevant to the assessment of possible foreclosure effects. Anti-competitive foreclosure is less likely in the case of an intermediate product, or where the product is homogeneous. First, a foreclosed manufacturer that uses a certain input generally has more flexibility to respond to the demand of its customers than a wholesaler or retailer that needs to respond to the demand of final consumers, for whom brands may play an important role. Second, the loss of a possible source of supply matters less for the foreclosed buyers in the case of homogeneous products than in the case of a heterogeneous product with different grades and qualities. For final branded products or differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream market.

(329) Efficiencies can be expected in the case of a hold-up problem (paragraph (16), points (e) and (f)), and such efficiencies are more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph (16), point (g)) do not seem likely to justify exclusive supply.

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

(331) The following is an example of exclusive supply

> On a market for a certain type of component (intermediate product market), supplier A agrees with buyer B to develop a different version of the component, using its own know-how and considerable investment in new machines and with the help of specifications supplied by buyer B. Buyer B will have to make considerable investments to incorporate the new component. It is agreed that supplier A will supply the new product only to buyer B for a period of five years from the date of first entry on the market. Buyer B is obliged to buy the new product only from supplier A for the same period of five years. Both A and B can continue to respectively buy and sell other versions of the component elsewhere. The market share of buyer B on the upstream component market and on the downstream final goods market is 40 %. The market share of the supplier A is 35 %. There are two other component suppliers with around 20-25 % market share and a number of small suppliers.
>
> Given the considerable investments by both parties, the agreement is likely to fulfil the conditions of Article 101(3) of the Treaty, in view of the efficiencies and the limited foreclosure effect. Other buyers are foreclosed from a particular version of a product of a supplier with 35 % market share, but other component suppliers could develop similar new products. The foreclosure of part of buyer B's demand to other suppliers is limited to a maximum of 40 % of the market.

8.2.3. *Restrictions on the use of online marketplaces*

(332) Online marketplaces connect merchants and potential customers with a view to enabling direct purchases and are generally providers of online intermediation services. Online services that offer no direct purchasing functionality, but re-direct customers to other websites where goods and services can be purchased, are considered as advertising services for the purpose of these Guidelines, not as online marketplaces ([171]).

(333) Online marketplaces have become an important sales channel for suppliers and retailers, providing them with access to a large number of customers, as well as for end users. Online marketplaces may allow retailers to start selling online with lower initial investments. They may also facilitate cross-border sales and increase the visibility of, in particular small and medium-sized sellers that do not have their own online store or are not well known to end users.

(334) Suppliers may wish to restrict the use of online marketplaces by their buyers ([172]), for instance to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services, or to ensure that the buyer maintains a direct relationship with customers. Such restrictions may range from a total ban on the use of online marketplaces to restrictions on the use of online marketplaces that do not meet certain qualitative requirements. For instance, suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to ensure certain quality standards regarding the environment in which their goods or services may be sold. The imposition of certain qualitative requirements may *de facto* ban the use of online marketplaces, because no online marketplace is capable of meeting the requirements. This may be the case, for example, where the supplier requires that the logo of the online marketplace is not visible, or it requires that the domain name of any website used by the retailer contains the name of the retailer's business.

(335) Vertical agreements which restrict the use of online marketplaces can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, provided that the agreement does not, directly or indirectly, have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers, within the meaning of Article 4, point (e) of the Regulation and that the market shares of both the supplier and the buyer do not exceed the thresholds set out in Article 3 of the Regulation.

(336) As set out in section 6.1.2, a restriction or ban of sales on online marketplaces concerns the manner in which the buyer may sell online and does not restrict sales to a particular territory or customer group. While such a restriction or ban restricts the use of a specific online sales channel, other online sales channels remain available to the buyer ([173]). In particular, despite a restriction or a ban of sales on online marketplaces, the buyer may still sell the contract goods or services via its own online store and other online channels and it may use search engine optimisation techniques or advertise online, including on third-party platforms, to increase the visibility of its online store or other sales channels. Therefore, such a restriction can, in principle, benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720.

(337) The remainder of this section 8.2.3. provides guidance for the assessment of restrictions on the use of online marketplaces in individual cases where the market share thresholds set out in Article 3 of Regulation (EU) 2022/720 are exceeded.

(338) Restrictions on the use of online marketplaces are often agreed in selective distribution systems. Section 4.6.2 sets out the criteria according to which a selective distribution system may fall outside the scope of Article 101(1) of the Treaty ([174]). In instances where the supplier does not enter into an agreement with the online marketplace, the supplier may be unable to verify that the online marketplace meets the conditions that its authorised distributors must fulfil for the sale of the contract goods or services. In that case, a restriction or ban

([171]) See also paragraph (343).
([172]) E-commerce Sector Inquiry Final Report, section 4.4.
([173]) See Case C-230/16 - *Coty Germany*, paragraphs 64 to 69.
([174]) See Case C-230/16 - *Coty Germany*, paragraphs 24 to 36.

on the use of online marketplaces may be appropriate and not go beyond what is necessary to preserve the quality and ensure the proper use of the contract goods or services. However, in cases where a supplier appoints the operator of an online marketplace as a member of its selective distribution system, or where it restricts the use of online marketplaces by some authorised distributors but not others, or where it restricts the use of an online marketplace, but uses that online marketplace itself to sell the contract goods or services, restrictions on the use of those online marketplaces are unlikely to fulfil the conditions of appropriateness and proportionality ([175]).

(339) Where a selective distribution falls within the scope of Article 101(1) of the Treaty, the vertical agreement and any restrictions on the use of online marketplaces must be assessed under Article 101 of the Treaty.

(340) The main risk to competition arising from restrictions on the use of online marketplaces is a reduction of intra-brand competition at the distribution level. For instance, certain authorised distributors, such as small or medium-sized buyers, may rely on online marketplaces to attract customers. Restrictions on the use of online marketplaces may deprive those buyers of a potentially important sales channel and reduce the competitive constraint they exert on other authorised distributors.

(341) To assess the possible anti-competitive effects of restrictions on the use of online marketplaces, it is first necessary to assess the degree of inter-brand competition, as a reduction of intra-brand competition is by itself unlikely to lead to negative effects for consumers if inter-brand competition is strong at the supplier and distributor levels ([176]). For this purpose, the market position of the supplier and of its competitors should be taken into account. Secondly, it is necessary to take into account the type and scope of the restrictions on the use of online marketplaces. For instance, a ban on all sales through online marketplaces is more restrictive than a restriction on the use of particular online marketplaces or a requirement to only use online marketplaces that meet certain qualitative criteria. Third, the relative importance of the restricted online marketplaces as a sales channel in the relevant product and geographic markets should be taken into account. Lastly, the cumulative effect of any other restrictions on online sales or advertising imposed by the supplier should be taken into account.

(342) As set out in paragraph (334), restrictions on the use of online marketplaces may lead to efficiencies, in particular linked to ensuring brand protection, a certain level of service quality or reducing opportunities for counterfeiting. To the extent that the restrictions fall within the scope of Article 101(1) of the Treaty, the assessment must consider whether such efficiencies could be achieved through less restrictive means, in accordance with the conditions of Article 101(3) of the Treaty. This could, for instance, be the case where the online marketplace allows retailers to create their own brand shop within the marketplace and thus exert more control over the manner in which their goods or services are sold. Any quality-related justifications relied on by the supplier will be unlikely to meet the conditions of Article 101(3) of the Treaty in the following situations:

(a) the supplier itself uses the online marketplace that the buyer is prevented from using;

(b) the supplier imposes the restriction on some distributors but not on others;

(c) the operator of the online marketplace is itself an authorised member of the selective distribution system.

8.2.4. *Restrictions on the use of price comparison services*

(343) Price comparison services ([177]), such as price comparison websites or apps, enable sellers to increase their visibility and generate traffic for their online store and enable potential customers to find retailers, compare different products and compare offers for the same product. Price comparison services increase price transparency and have the potential to intensify intra-brand and inter-brand price competition at the retail level.

([175]) See paragraphs (147) to (150) of these Guidelines; and Case C-230/16 – *Coty Germany*, paragraphs 43 to 58.

([176]) See Case C-306/20 - *Visma Enterprise*, paragraph 78.

([177]) For the purpose of these Guidelines, price comparison services refer to services that do not provide a direct purchasing functionality. Services enabling users to conclude purchase transactions by providing sale and purchase functionality are classified as online marketplaces for the purposes of these Guidelines. Restrictions on the use of online marketplaces are dealt with in section 8.2.3.

(344) Unlike online marketplaces, price comparison services typically do not offer sale and purchase functionality, but rather re-direct customers to the online store of the retailer, enabling the initiation of a direct transaction between the customer and the retailer outside the price comparison service. Price comparison services are therefore not a distinct online sales channel, but rather an online advertising channel.

(345) Suppliers may wish to restrict the use of price comparison services ([178]), for instance to protect their brand image, as price comparison services typically focus on price and may not allow retailers to differentiate themselves through other features, such as the range or quality of the contract goods or services. Other reasons for restricting the use of price comparison services may be to reduce opportunities for counterfeiting, or to protect the supplier's business model, for instance, when that model relies on elements such as specialisation or quality rather than price.

(346) Restrictions on the use of price comparison services may range from a direct or indirect ban to restrictions based on quality requirements or requirements to include specific content in the offers advertised on the price comparison service. For example, a restriction on providing price information to price comparison services, a requirement to obtain the supplier's authorisation before using price comparison services, or a restriction on the use of the supplier's brand on price comparison services may amount to a ban on the use of price comparison services.

(347) Restrictions on the use of price comparison services may increase consumer search costs and thereby soften retail price competition. They may also restrict the buyer's ability to reach potential customers, inform them about its offering and direct them to its online store. As set out in paragraph (203), a ban on the use of price comparison services prevents the buyer from using an entire online advertising channel, which is a hardcore restriction within the meaning of Article 4, point (e) of Regulation (EU) 2022/720. Banning the use of price comparison services hinders the buyer from selling to customers who are located outside its area of activity and who wish to purchase online. It could therefore lead to market partitioning and reduced intra-brand competition.

(348) Conversely, where the vertical agreement prevents the use of price comparison services that target customers in a territory or customer group that is allocated exclusively to other buyers or reserved exclusively to the supplier, it can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, pursuant to the exceptions set out in Article 4, points (b)(i), (c)(i)(1) and d(i) of the Regulation relating to exclusive distribution. For example, a price comparison service may be considered to target an exclusive territory where the service uses a language commonly used in that territory and not in the territory of the buyer, or where the service uses a top-level domain corresponding to the exclusive territory.

(349) Vertical agreements which restrict the use of price comparison services, but which do not directly or indirectly prevent the use of all price comparison services, for instance a requirement that the price comparison service meets certain quality standards, can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720.

(350) The following guidance is provided for the assessment of vertical agreements restricting the use of price comparison services that do not benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, for instance because the market share thresholds set out in Article 3 of the Regulation are exceeded.

(351) Restrictions on the use of price comparison services are often imposed in selective distribution systems. Section 4.6.2. sets out the criteria under which a selective distribution system falls outside the scope of Article 101(1) of the Treaty. Therefore, where restrictions on the use of price comparison services are used in a selective distribution agreement, it is first necessary to assess whether the restrictions are an appropriate and proportionate means to preserve the quality or ensure the proper use of the contract goods or services. In this respect, it should be noted that price comparison services re-direct potential customers to the online store of the authorised distributor for the conclusion of the sales transaction and that the supplier is typically able to exert control over the authorised distributor's online store through the selection criteria and by imposing requirements in the selective distribution agreement.

([178]) E-commerce Sector Inquiry Final Report, Section B.4.5.

(352) Where restrictions on the use of price comparison services are used in a selective distribution agreement that falls within the scope of Article 101(1) of the Treaty or in other types of distribution agreement, it is necessary to assess whether the restriction has an appreciable restrictive effect on competition within the meaning of Article 101(1) of the Treaty. Restrictions on the use of price comparison services that do not benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 may, in particular, soften price competition or partition markets, ultimately impacting inter-brand and intra-brand competition. For example, such restrictions may reduce price competition, by restricting the possibility for the buyer to inform potential customers about lower prices. Intra-brand competition may be particularly affected where a supplier imposes the restrictions on only some of its distributors, or where the supplier itself uses the price comparison services covered by the restrictions. To the extent that buyers are limited in their ability to rely on a potentially significant online advertising channel, they may only be able to exercise limited competitive pressure on the supplier or any other distributors not facing that restriction.

(353) Relevant factors for the assessment under Article 101(1) of the Treaty include:

(a) the market position of the supplier and its competitors;

(b) the importance of price comparison services as an advertising channel in the relevant market for the sale of the contract goods or services;

(c) the type and scope of the restrictions and the relative importance of the particular price comparison service whose use is restricted or banned;

(d) whether the supplier also imposes restrictions on the buyer's ability to use other forms of online advertising.

(354) The combined restrictive effect of the restriction on the use of price comparison services and any other restrictions on online advertising imposed by the supplier should be taken into account.

(355) As set out in paragraph (345), restrictions on the use of price comparison services may lead to efficiencies, in particular linked to ensuring brand protection or a certain level of service quality, or reducing opportunities for counterfeiting. Pursuant to the conditions of Article 101(3) of the Treaty, it is necessary to assess whether any such efficiencies could be achieved through less restrictive means. This may be the case where, for example, the use of price comparison services is made conditional on the service also providing for comparisons or reviews relating to the quality of the goods or services concerned, the level of customer service provided by the buyer, or other features of the buyer's offerings. Any assessment of quality-related justifications under Article 101(3) of the Treaty should also take into account that the sale is not concluded on the website of the price comparison service, but in the buyer's online store.

8.2.5. *Parity obligations*

(356) Parity obligations, sometimes called Most Favoured Nation clauses ('MFNs') or Across Platform Parity Agreements ('APPAs'), require a seller of goods or services to offer the goods or services to another party on conditions that are no less favourable than the conditions offered by the seller to certain other parties or via certain other channels. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The parity obligation may take the form of a contractual clause or it may be the result of other direct or indirect measures, such as differential pricing or other incentives whose application depends on the conditions under which the seller offers its goods or services to other parties or via other channels.

(357) Retail parity obligations relate to the conditions under which goods or services are offered to end users. These obligations are often imposed by providers of online intermediation services (for example, online marketplaces or price comparison services) on the buyers of their intermediation services (for example, undertakings that sell via the intermediary platform).

(358) Retail parity obligations refer to various other sales or advertising channels. For example, across-platform retail parity obligations refer to the conditions offered via competing online intermediation services (competing platforms). So-called narrow retail parity obligations refer to the conditions offered on the direct sales channels of sellers of goods or services. Some retail parity obligations refer to the conditions offered on all other sales channels (sometimes called 'wide' retail parity obligations).

(359) With the exception of across-platform retail parity obligations within the meaning of Article 5(1), point (d) of Regulation (EU) 2022/720, all types of parity obligation in vertical agreements can benefit from the exemption provided by Article 2(1) of the Regulation. The following guidance is provided for the assessment of the across-platform retail parity obligations referred to in Article 5 (1), point (d) of Regulation (EU) 2022/720 and for other types of parity obligations in cases where the block exemption does not apply.

8.2.5.1. Across-platform retail parity obligations

(360) Retail parity obligations which cause a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services, within the meaning of Article 5(1), point (d) of Regulation (EU) 2022/720, are more likely than other types of parity obligation to produce anti-competitive effects. This type of retail parity obligation may restrict competition in the following ways:

(a) it may soften competition and facilitate collusion between providers of online intermediation services. In particular, it is more likely that a provider which imposes this type of parity obligation will be able to raise the price or reduce the quality of its intermediation services without losing market share. Irrespective of the price or quality of the provider's services, sellers of goods or services which choose to use the provider's platform are obliged to offer conditions on the platform that are at least as good as the conditions they offer on competing platforms;

(b) it may foreclose entry or expansion by new or smaller providers of online intermediation services, by limiting the ability of such providers to offer buyers and end users differentiated price-service combinations.

(361) For the assessment of this type of parity obligation, the following factors should be taken into account:

(a) the market position of the provider of online intermediation services that imposes the obligation and of its competitors;

(b) the share of buyers of the relevant online intermediation services that are covered by the obligations;

(c) the homing behaviour of the buyers of the online intermediation services and of end users (how many competing online intermediation services they use);

(d) the existence of barriers to entry to the relevant market for the supply of online intermediation services;

(e) the significance of the direct sales channels of buyers of the online intermediation services and the extent to which those buyers are able to remove their products from the platforms of the providers of online intermediation services (de-listing).

(362) The restrictive effects of across-platform retail parity obligations are generally more severe where they are used by one or more leading providers of online intermediation services. Where such providers have a similar business model, the parity obligations are likely to reduce the scope for disruption of the model. This type of obligation may also enable a market leader to maintain its position against smaller providers.

(363) The share of buyers of the relevant online intermediation services that are subject to the retail parity obligations and the homing behaviour of those buyers are important, as they may indicate that the provider's parity obligations restrict competition in respect of a share of demand that exceeds the provider's market share. For example, a provider of online intermediation services may hold a share of 20 % of total transactions made using such services, but the buyers upon which it imposes across-platform retail parity obligations may – because they use multiple platforms – account for more than 50 % of total platform transactions. In that case, the provider's parity obligations may restrict competition in respect of more than half of total relevant demand.

(364) Buyers of online intermediation services often multi-home in order to reach customers that single-home (use only one platform) and do not switch between platforms. Buyer multi-homing is incentivised by platform business models under which the buyer only has to pay for using the online intermediation service when the service generates a transaction. As explained in paragraph (363), multi-homing by buyers of online intermediation services can increase the share of total demand for such services that is affected by a provider's parity obligations. Single homing by end users may mean that each provider of online intermediation services controls access to a distinct group of end users. This may increase the provider's bargaining power and its ability to impose retail parity obligations.

(365) Markets for the provision of online intermediation services are often characterised by significant barriers to entry and expansion, which can aggravate the negative effects of retail parity obligations. These markets often feature positive indirect network effects: new or smaller providers of such services may find it difficult to attract buyers because their platforms provide access to insufficient numbers of end users. Where the end users are final consumers, brand loyalty, single-homing and the lock-in strategies of incumbent intermediation services providers can also create barriers to entry.

(366) Buyers of online intermediation services may also sell their goods or services to end users directly. Such direct sales may constrain the ability of the providers of online intermediation services to raise the price of their services. It is therefore necessary to assess whether such direct sales channels are also covered by the retail parity obligation, the share of sales of relevant goods or services that are made via the direct sales channels and via the online intermediation services, and the substitutability of the two types of channel from the perspective of sellers and buyers of the intermediated goods or services.

(367) Across-platform retail parity obligations may produce appreciable restrictive effects where they are imposed on buyers representing a significant share of total demand for the relevant online intermediation services. In the case of a cumulative anti-competitive effect, restrictive effects will generally only be attributed to the parity obligations of providers whose market share exceeds 5 %.

(368) In principle, retail parity obligations may also be imposed by retailers in relation to the conditions under which the seller's goods or services are offered to final consumers by competing retailers. However, where this type of parity obligation relates to price, it will generally require the seller of goods or services that accepts the obligation to agree a minimum sale price (RPM) with the competing retailers with which it deals. RPM is a hardcore restriction within the meaning of Article 4, point (a) of Regulation (EU) 2022/720. In cases where undertakings are able to implement such retail parity obligations in compliance with the rules relating to RPM, including where the parity obligation relates to conditions other than price, the obligations can benefit from the block exemption. Above the market share threshold set out in Article 3(1) of the Regulation, the guidance provided in paragraphs (360) to (367) applies by analogy.

8.2.5.2. Retail parity obligations relating to direct sales channels

(369) Retail parity obligations imposed by providers of online intermediation services relating to direct sales channels prevent buyers of the services from offering prices and conditions on their direct sales channels that are more favourable than the conditions that they offer on the platform of the provider of online intermediation services that imposes the obligation. These obligations are often called 'narrow' retail parity obligations. In principle, narrow retail parity obligations do not restrict the ability of a buyer of online intermediation services to offer more favourable prices or conditions via other online intermediation services. However, where the buyer uses multiple providers of online intermediation services that apply narrow retail parity obligations, these obligations prevent it from offering on its direct channels conditions that are more favourable than the conditions that it offers on the most expensive intermediary platform.

(370) Narrow retail parity obligations eliminate the constraint exerted by the buyer's direct sales channels. Where competition for the supply of online intermediation services is limited, these obligations may allow a provider of online intermediation services to maintain a higher price for its services, possibly resulting in higher retail prices for the intermediated goods or services.

(371) Under certain conditions, in particular where the number of providers of online intermediation services is limited, narrow retail parity obligations may affect the incentives of buyers of the online intermediation services to pass on changes in the price of the intermediation services in their retail prices. This may lead to a softening of competition between the providers of online intermediation services which is similar to the effect of across-platform retail parity obligations.

8.2.5.3. Assessment of retail parity obligations under Article 101(3) of the Treaty

(372) Where retail parity obligations produce appreciable restrictive effects, possible efficiency justifications need to be assessed under Article 101(3) of the Treaty. The most common justification for the use of retail parity obligations by providers of online intermediation services is to address a free-rider problem. For example, the provider may not have an incentive to invest in the development of its platform, in pre-sales services or demand-enhancing promotion if the benefits of such investments in terms of increased sales go to competing platforms or to direct sales channels which can offer the same goods or services on more favourable conditions.

(373) Relevant factors for the assessment under Article 101(3) of the Treaty include whether the investments made by the provider of online intermediation services create objective benefits, that is, whether they add value for end users; whether the risk of free riding on the provider's investments is real and substantial, and whether the particular type and scope of parity obligation is indispensable for the achievement of the objective benefits. The likely level of free riding must be sufficient to significantly impact the incentives to invest in the online intermediation services. Evidence of the extent to which users of the intermediation services (sellers and buyers) multi-home is particularly relevant, though it is also necessary to consider whether their behaviour is influenced by the effects of the parity obligations. If the provider of online intermediation services or its competitors operate in other comparable markets without using retail parity obligations or using less restrictive obligations, this may indicate that the obligations are not indispensable. Where the supply of online intermediation services is highly concentrated and there are significant entry barriers, the need to protect residual competition may outweigh possible efficiency gains. Other justifications relating to the general benefits provided by intermediary platforms, such as the pooling of users' promotional expenditure, increased price transparency or reduced transaction costs can only fulfil the conditions of Article 101(3) of the Treaty if the provider of online intermediation services can show a direct causal link between the benefit claimed and the use of the particular type of parity obligation.

(374) In general, narrow retail parity obligations are more likely to fulfil the conditions of Article 101(3) of the Treaty than across-platform retail parity obligations. This is primarily because their restrictive effects are generally less severe and therefore more likely to be outweighed by efficiencies. Moreover, the risk of free riding by sellers of goods or services via their direct sales channels may be higher, in particular because the seller incurs no platform commission costs on its direct sales. However, where the narrow retail parity obligations do not generate efficiencies within the meaning of Article 101(3) of the Treaty, the benefit of the block exemption may be withdrawn. This may be the case, in particular, where the risk of free riding is limited or where the narrow retail parity obligations are not indispensable to achieve the efficiencies. In the absence of efficiencies, withdrawal is particularly likely where narrow retail parity obligations are applied by the three largest providers of online intermediation services in the relevant market and those providers hold a combined market share exceeding 50 %. In the absence of efficiencies, the block exemption may also be withdrawn, depending on the particular circumstances, where buyers representing a significant share of the total relevant demand for online intermediation services are subject to narrow retail parity obligations. The block exemption may be withdrawn in respect of the agreements of all providers of online intermediation services whose narrow retail parity obligations make a significant contribution to the cumulative anti-competitive effect, namely providers with market shares exceeding 5 %.

(375) The following is an example of the use of narrow retail parity obligations:

> In a certain Member State, two thirds of restaurant meals that are delivered for home consumption are ordered via online platforms and one third is ordered directly from restaurants. Platforms A, B, C and D generate respectively 25 %, 20 %, 20 % and 15 % of the orders made via platforms. Platforms A, B and C have operated in the Member State for between three and five years and the share of total orders made via platforms has grown during that period. Platform D entered the market more recently. The platforms charge the restaurants 15-20 % commission per order. Most consumers that use platforms use either one or two platforms, whereas most restaurants that use platforms use two or more platforms.

During the last twelve months, all the platforms have introduced a narrow retail parity clause, which prevents the restaurants from offering lower prices for direct online or telephone orders. In the same period, three of the platforms have increased their standard commission rate. The platforms claim that the narrow parity clause is necessary to prevent restaurants from free riding on their investments, in particular in the development of user-friendly search and comparison functions and secure payment services.

None of the three largest platforms have added new features or services or made significant improvements to their services in the past twelve months. There is no concrete evidence of an appreciable risk of free riding, notably that a significant share of consumers use the platforms to search for and compare restaurant offers, but then order directly from the restaurant. Nor is there evidence that the alleged threat of free riding has negatively affected the platforms' past investments in developing their services.

If it is concluded that the relevant product market consists of the supply of platform services to restaurants, the supply of these services appears to be concentrated. In view of the recent increases in platform commission rates and the lack of evidence that the parity clauses produce efficiencies, it is likely that the benefit of the block exemption will be withdrawn in respect of the restaurant agreements of all four platforms.

8.2.5.4. Upstream parity obligations

(376) Across-platform and narrow parity obligations may also be imposed by providers of online intermediation services relating to the conditions under which goods or services are offered to undertakings other than end users (for example, to retailers). This type of parity obligation can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720. In principle, this type of upstream parity obligation is capable of restricting competition for the provision of online intermediation services in similar ways to retail parity obligations. However, to assess this type of upstream parity obligation, it is also necessary to take into account the conditions of competition downstream, that is, between the undertakings which buy goods or services via the online intermediation service. In cases where the block exemption does not apply, the guidance provided in paragraphs (360) to (374) may be applied by analogy.

8.2.5.5. Most favoured customer obligations

(377) Parity obligations may also be imposed by manufacturers, wholesalers or retailers relating to the conditions under which they purchase goods or services as inputs from suppliers. This type of traditional most favoured customer obligation does not directly affect the conditions under which the purchasing undertakings compete downstream. The main concern associated with parity obligations relating to the conditions under which goods or services are purchased as inputs is that they may reduce the incentives of input suppliers to compete and thereby raise input prices. Relevant factors for the assessment of these obligations include the relative size and market power of the supplier and buyer that agree the parity obligation, the share of the relevant market covered by similar obligations, and the cost of the input in question relative to buyers' total costs.

(378) Traditional most favoured customer obligations may create efficiencies that fulfil the conditions of Article 101(3) of the Treaty. In particular, they may enable the parties to a long-term supply agreement to minimize transaction costs. They may also prevent opportunistic behaviour by the supplier and address a hold-up problem for the buyer, whereby, for example, the buyer might refrain from investing in or launching a new product due to fears that the supplier of the input may lower its price for subsequent buyers. This type of efficiency is more likely in long-term relationships involving sunk investments.

8.2.6. *Upfront access payments*

(379) Upfront access payments are fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices, such as slotting allowances ([179]), so-called pay-to-stay fees ([180]), and payments to have access to a distributor's promotion campaigns. This section 8.2.6. provides guidance for the assessment of upfront access payments in individual cases above the market share threshold stipulated in Article 3 of Regulation (EU) 2022/720.

(380) Upfront access payments can result in anti-competitive foreclosure of other distributors. For example, a high fee may incentivise a supplier to channel a substantial volume of its sales through one or a limited number of distributors in order to cover the costs of the fee. In such a case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation. To assess the likelihood of this type of negative effect, the guidance relating to exclusive supply obligations may be applied by analogy (in particular paragraphs (321) to (330).

(381) Exceptionally, upfront access payments may result in anti-competitive upstream foreclosure effects. For example, where the distributor has a strong bargaining position, or the use of upfront access payments is widespread, such payments may increase barriers to entry for small suppliers. To assess the likelihood of this type of negative effect, the guidance relating to single branding obligations may be applied by analogy (in particular paragraphs (298) to (318)). The assessment must also take into account whether the distributor in question sells competing products under its own brand. In that case, horizontal concerns may also arise, with the consequence that the block exemption does not apply, pursuant to Article 2(4) of Regulation (EU) 2022/720 (see section 4.4.3.).

(382) In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products, since the supplier must cover the expense of such payments. Higher supply prices may reduce the incentive of retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments. Such reduction of competition between distributors through the cumulative use of upfront access payments generally only arises where the distribution market is highly concentrated.

(383) However, the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products. When suppliers launch new products, distributors often have less information than the supplier about whether the new product is likely to be successful and, as a result, they may stock sub-optimal quantities of the product. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors, by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive advance warning about which products are most likely to be successful, since a supplier will generally only agree to pay an upfront access fee if it considers there is a low probability that the product launch will fail.

(384) Furthermore, due to the asymmetry in information mentioned in the previous paragraph, suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce sub-optimal products. If a product is not successful, the distributors will incur part of the costs of the product failure. The use of upfront access payments may prevent such free riding, by shifting the risk of product failure back to the supplier, thereby contributing to an optimal rate of product launches.

([179]) Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.
([180]) Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

8.2.7. *Category management agreements*

(385) Category management agreements are agreements ([181]) under which the distributor entrusts the supplier (the 'category captain') with the marketing of a category of products. This may include not only the supplier's products, but also the products of the supplier's competitors. The category captain may thus have an influence on, for instance, the product placement and product promotion in the shop and product selection for the shop. Category management agreements can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 where neither the category captain's nor the distributor's market shares exceed 30 % and provided that the agreement does not include hardcore restrictions, for example, restrictions of the distributor's ability to determine its sale price within the meaning of Article 4, point (a) of Regulation (EU) 2022/720.

(386) While category management agreements will generally not raise concerns, they may distort competition between suppliers and result in anti-competitive foreclosure of other suppliers in cases where the category captain is able to limit or disadvantage the distribution of products of competing suppliers. In general, the distributor will not have an interest in limiting its choice of products. However, where the distributor also sells competing products under its own brand, it may also have incentives to exclude certain suppliers. To assess the likelihood of such an upstream foreclosure effect, the guidance relating to single branding obligations may be applied by analogy (in particular paragraphs (298) to (318)). In particular, this assessment should take into account the market coverage of the category management agreements, the possible cumulative use of such agreements and the market position of competing suppliers and the distributor.

(387) Category management agreements may, in addition, facilitate collusion between distributors where the same supplier serves as a category captain for all or most of the competing distributors. Such agreements may also facilitate collusion between suppliers, through increased opportunities to exchange sensitive market information via retailers, for instance information relating to future pricing, promotional plans or advertising campaigns ([182]). Regulation (EU) 2022/720 does not cover such information exchanges between competitors. In particular, the guidance on information exchange provided in paragraphs (95) to (103) applies only to information exchange in the context of the dual distribution scenarios set out in Article 2(4) of the Regulation. However, paragraph (103), which describes precautions that undertakings may take to minimise the risk of collusion arising from information exchange in the context of dual distribution, may be relevant by analogy.

(388) The use of category management agreements may lead to efficiencies. Such agreements may allow distributors to gain access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale, as they ensure that the optimal quantity of products is presented at the right time. In general, the higher the degree of inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

8.2.8. *Tying*

(389) Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying may constitute an abuse within the meaning of Article 102 of the Treaty ([183]). Tying may also constitute a vertical restraint within the meaning of Article 101 of the Treaty where it results in a single branding type of obligation for the tied product (see paragraphs (298) to (318). Only the latter situation is dealt with in these Guidelines.

([181]) An agreement within the meaning of Article 101 of the Treaty may also arise where the category captain issues non-binding recommendations which are systematically implemented by the distributor.

([182]) See the case law of the Union Courts relating to the exchange of information between competitors, for example, the judgments of 10 November 2017, *ICAP* v *Commission*, Case T-180/15, EU:T:2017:795, paragraph 57, 4 June 2009, *T-Mobile Netherlands and Others*, Case C-8/08, EU:C:2009:343, paragraph 51, 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 127, 21 January 2016, *Eturas UAB and Others*, Case C-74/14 ECLI:EU:C:2016:42, paragraphs 40-44; 10 November 2017, *ICAP* v *Commission*, Case T-180/15, EU:T:2017:795, paragraph 57.

([183]) See judgment of 14 November 1996, *Tetra Pak* v *Commission*, C-333/94 P, EU:C:1996:436, paragraph 37. See also Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7).

(390) Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product ([184]). Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product ([185]), or evidence indicating that undertakings with little market power, particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.

(391) Tying may lead to anti-competitive foreclosure effects on the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. As regards the question of what can be considered appreciable foreclosure under Article 101(1) of the Treaty, the analysis for single branding can be applied. Tying means that there is at least a form of quantity forcing on the buyer in respect of the tied product. Where, in addition, a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers that will buy the tied product alone to sustain competitors of the supplier on the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry onto the tying market alone more difficult.

(392) Tying may also directly lead to prices that are above the competitive level, especially in three situations. First, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products, the supplier may seek to avoid this substitution and as a result be able to raise its prices. Second, the tying may allow price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Third, in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it may be difficult for customers to calculate the consequences of the tying.

(393) Tying can benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720 where the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30 %. It may be combined with other vertical restraints that are not hardcore restrictions within the meaning of the Regulation, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section 8.2.8 provides guidance for the assessment of tying in individual cases above the market share threshold.

(394) The market position of the supplier on the market of the tying product is obviously of central importance for the assessment of possible anti-competitive effects. In general, this type of agreement is imposed by the supplier. The importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse a tying obligation.

(395) The market position of the supplier's competitors on the market of the tying product is important in assessing the supplier's market power. As long as its competitors are sufficiently numerous and strong, no anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are applying similar tying. In addition, entry barriers on the market of the tying product are relevant to establish the market position of the supplier. When tying is combined with a non-compete obligation in respect of the tying product, this considerably strengthens the position of the supplier.

([184]) See judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraphs 917, 921 and 922.
([185]) See judgment of 12 December 1991, *Hilti* v *Commission*, T-30/89, EU:T:1991:70, paragraph 67.

(396) Buying power is relevant, as important buyers will not easily be forced to accept tying without obtaining at least part of the possible efficiencies. Tying not based on efficiency is therefore mainly a risk where buyers do not have significant buying power.

(397) Where appreciable anti-competitive effects are established, it is necessary to assess whether the conditions of Article 101(3) of the Treaty are fulfilled. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. Where the tied product is not produced by the supplier, an efficiency may also arise from the supplier buying large quantities of the tied product. For tying to fulfil the conditions of Article 101(3) of the Treaty, it must, however, be shown that at least part of those cost reductions are passed on to the consumer, which is normally not the case where the retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph (16), point (h)). However, it needs to be demonstrated that the positive effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase them from the supplier or someone designated by the latter. The requirements concerning minimum quality standards would not normally fall within the scope of Article 101(1) of the Treaty. Where the supplier of the tying product requires the buyer to purchase the tied product from designated suppliers, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of Article 101(1) of the Treaty, especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.

COUNCIL

Statement by the Commission on the exclusive competence in respect of Regulation (EU) 2022/1031 of the European Parliament and of the Council [1]

(2022/C 248/02)

As confirmed in the Opinion 2/15 of the Court of Justice, the participation of third-country economic operators, goods and services in the Union's procurement procedures falls within the scope of the common commercial policy for which, as explicitly stated in Article 3(1)(e) TFEU, the Union has exclusive competence. Therefore, Member States and their contracting authorities and contracting entities shall not adopt or maintain any legislative or other generally applicable measures governing access by third-country economic operators, goods and services beyond those applied in accordance with this Regulation and other Union legislation.

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[1] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument - IPI) (OJ L173, 30.6.2022, p. 1).

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 27 April 2022

on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, environmental, social and governance risk

(CON/2022/16)

(2022/C 248/03)

Introduction and legal basis

On 17 and 21 January 2022 the European Central Bank (ECB) received requests from the European Parliament and the Council of the European Union for an opinion on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, environmental, social and governance risk ([1]) (hereinafter the 'proposed amendments to the CRD').

The proposed amendments to the CRD are closely linked to another proposal on which the ECB received a consultation request, namely the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor ([2]) (together with the proposed amendments to the CRD, the 'Commission's banking reform package').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed amendments to the CRD contain provisions affecting the ECB's tasks concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty and the European System of Central Banks' contribution to the smooth conduct of policies relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB strongly supports the Commission's banking reform package, which implements important elements of the global regulatory reform agenda into Union legislation. This will reinforce the EU Single Rulebook and substantially strengthen the regulatory framework in areas where supervisory authorities have identified gaps that could potentially lead to risks being insufficiently monitored and covered.

First, enhancing the way environmental, social and governance (ESG) risks are addressed by imposing stricter requirements and by broadening the supervisory toolkit in this area will help to ensure that institutions proactively develop enhanced risk management frameworks, thereby reducing the probability of the build-up of excessive risks by individual institutions and the financial system as a whole.

([1]) COM(2021) 663 final.
([2]) COM(2021) 664 final.

Second, the faithful implementation of the output floor will reduce unwarranted risk weight variability ([3]) and it is welcome that there will be no double-counting of risks with respect to other requirements, while operational complexities should be avoided.

Third, harmonised provisions for the assessment of banks' directors and key staff (fit and proper assessments) will facilitate supervisory effectiveness and enhance sound governance.

Fourth, a common set of rules for branches of third-country banking groups operating in Member States will replace heterogeneous national approaches and strengthen the single market.

Fifth, further harmonising national powers related to the acquisition of qualifying holdings, transfers of assets or liabilities, mergers or divisions, as well as the sanctioning regime, will ensure the consistency and robustness of the framework.

Sixth, the ECB calls for consistency between Directive 2013/36/EU of the European Parliament and of the Council ([4]) (hereinafter 'the CRD') and Council Regulation (EU) No 1024/2013 ([5]), on matters relating to supervisory independence in general and conflicts of interest in particular. In limiting **possible** conflicts of interest, a **strict but** proportional and flexible approach is important, allowing due consideration of each individual situation.

Finally, allowing supervisors to withdraw the authorisation of credit institutions that have been declared failing or likely to fail, but do not qualify for resolution because the public interest criterion is not met, will facilitate the orderly exit of these banks from the market ([6]).

This opinion addresses issues of particular importance to the ECB, which have been divided into the sections listed below.

1. Environmental, social and governance risks (ESG risks)

1.1. *Support for the proposed amendments*

The ECB strongly welcomes the proposal of the Commission to enhance the requirements with respect to ESG risks for credit institutions and the respective mandate for competent authorities. The ECB shares the view that ESG risks can have far-reaching implications for the stability of both individual institutions and the financial system as a whole. The Commission has rightly set ambitious targets for the adaptation of the EU to the impacts of ESG risks and its transition towards a sustainable economy, involving specific changes to its productive system over a limited time horizon. The strategy highlights that 'the success of the European Green Deal depends on the contribution of all economic stakeholders and on their incentives to meet our targets. To that end, financial institutions must translate EU sustainability goals into their long-term financing strategies and decision-making processes' ([7]). The transition and the associated risks affect almost all sectors of the economy and have widespread impacts across regions; they moreover depend on decarbonisation policies, shifts in consumer and investor preferences as well as technological changes. These widespread impacts warrant bespoke strategies as well as enhanced risk management capabilities to ensure the resilience of the business models of credit institutions in the short, medium and long term and to avoid the build-up of excessive transition risk in their portfolios. It is therefore crucial that credit institutions monitor the risk arising from the misalignment of their portfolios with the transition objectives of the EU, thereby setting ambitious and concrete timelines, including intermediate milestones, for the purpose of their strategic planning.

([3]) See, regarding the general implementation of the output floor, Opinion CON/2022/11 of the European Central Bank of 24 March 2022 on a proposal for amendments to Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk and the output floor. All ECB opinions are available on EUR-Lex.

([4]) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

([5]) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

([6]) See, in particular, ECB contribution to the European Commission's targeted consultation on the review of the crisis management and deposit insurance framework, p. 9, available on the ECB website at www.ecb.europa.eu

([7]) See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 July 2021: Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final, p. 14.

The ECB supports the proposal to cover ESG risks more explicitly in supervisory requirements, which will help minimise the threats that these risks pose to individual institutions and financial stability. The need for better bank-internal risk management and more supervisory scrutiny regarding these risks has been highlighted by a recent ECB supervisory assessment. This comprehensive exercise revealed that no institution is close to fully aligning their practices with supervisory expectations on climate-related and environmental (C&E) risks and that institutions themselves consider 90 % of their reported practices to be only partially or not at all aligned with the ECB's supervisory expectations ([8]).

The ECB acknowledges the prioritisation of C&E risks over social and governance factors, also in light of the differences in methodologies. C&E risks notably comprise threats stemming from the required transition towards a more sustainable economy and the adaptation to increasing physical threats. Transition and physical risks are special compared to other prudential risks and as they build up over time, careful planning and clear mitigation strategies are needed, while decisive and immediate short-term action may be required to mitigate long-term impacts.

The ECB supports the proposed requirement for credit institutions to develop specific plans to monitor and address ESG risks arising in the short, medium and long term. This will ensure that credit institutions measure ESG risks over longer-time horizons and thoroughly assess the structural changes that are likely to occur within the industries they are exposed to, according to the transition pathways determined by the EU legal framework ([9]). The requirement to develop such plans will increase transparency on the risks to which the financial system is exposed. Furthermore, it will also ensure that credit institutions proactively review, also in relation to the EU's transition objectives, whether their strategies sufficiently incorporate ESG-related considerations, thereby mitigating reputational risks or risks arising from rapidly changing market sentiment as well.

The ECB stands ready to collaborate with EU agencies to monitor credit institutions' progress in developing their specific plans (new Article 76(2)) and stresses the need for timely action on this front. The ECB sees a need to prioritise the resilience and adaptation of institutions to the long-term negative impacts of ESG risks. The proposed European Banking Authority (EBA) guidelines on the content of institutions' plans (new Article 87a(5)(b)) will be particularly important in this regard, and the ECB considers therefore that these guidelines should be published within 12 months. Conversely, a deadline of 24 months seems more appropriate for the proposed guidelines on minimum standards and reference methodologies (new Article 87a(5)(a)).

Proper internal risk management, including specific planning, will also facilitate the assessment by competent and macroprudential authorities of ESG risks. In the context of the further articulation of the requirement for credit institutions to manage all material risks, by testing their resilience to the long-term negative impacts of C&E risks, the ECB welcomes the enhancement of the related supervisory powers in a manner that is consistent with the time horizon for the materialisation of ESG risks. This will allow the ECB to more effectively address ESG risks, starting with climate-related and environmental risks, affecting the prudential situation of the credit institution (e.g. capital and liquidity) also in the medium to long term (i.e. 5-10 years). Such requirements will also help macroprudential authorities to mitigate the system-wide repercussions of ESG risks, notably analysing their systemic aspects, e.g. through economy-wide climate stress testing. All this should provide the ECB with more adequate tools to help avert, jointly with the other relevant authorities, the build-up of stranded assets on credit institutions' balance sheets and ensuring complementarity between the microprudential and macroprudential approaches.

With respect to the macroprudential toolbox, the ECB also welcomes the clarification in a recital of the proposed amendments to the CRD that the systemic risk buffer (SyRB) framework may already be used to address various kinds of systemic risks, including risks related to climate change. To the extent that risks related to climate change have the potential to have serious negative consequences for the financial system and the real economy in Member States, a SyRB rate can be introduced to mitigate those risks.

([8]) *The state of climate and environmental risk management in the banking sector – Report on the supervisory review of banks' approaches to manage climate and environmental risks*, November 2021, available on the ECB website at www.ecb.europa.eu

([9]) E.g. Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (OJ L 111, 25.4.2019, p. 13). Such standards directly affect credit institutions, via their counterparties, in the short, medium and long term.

1.2. *Resilience to long-term negative impacts of ESG risks*

With respect to the scenarios and methods to assess resilience to long-term negative impacts of ESG risks, particularly climate change and environmental degradation, the ECB wishes to highlight the fact that the challenges they pose to the financial sector can only be assessed and addressed by integrating scientific analysis into policymaking. The contribution of scientific research, financial sector entities and environmental agencies will be instrumental in this respect. The ECB welcomes the Commission's commitment to strengthen the cooperation among all relevant public authorities, including supervisors and that such cooperation is intended 'to help define intermediate targets for the financial sector' ([10]). Nevertheless, it would be useful to recall, in the recitals of the proposed amendments to the CRD, the commitment made in Action point 5.c of the Strategy for Financing the Transition to a Sustainable Economy (COM(2021) 390 final). Specifically, it is important to stress that the Commission has committed to strengthen the cooperation with the ECB, the European Systemic Risk Board, the European Supervisory Authorities and the European Environment Agency and that such cooperation is intended to help define intermediate targets for the financial sector, understand better whether ongoing and prospective progress is sufficient, and thus facilitate taking a more collaborative policy action by all relevant public authorities where necessary. The ECB would welcome a reference to such commitment also in the context of the mandate established in the new Article 87a(5)(c) of the CRD.

2. **Output floor**

The ECB welcomes the introduction of the output floor, which is an important element of the Basel III reforms ([11]). The ECB notes that the proposed amendments to the CRD include some mechanisms governing the interaction between the output floor and the setting of (i) supervisory Pillar 2 requirements and (ii) macroprudential buffers.

The ECB agrees with the overall objective of avoiding double-counting of risks within the microprudential and macroprudential frameworks and with the intention of ensuring that the respective requirements remain appropriate. With regard to the Pillar 2 requirements, the ECB wishes to underline the fact that there is already a general requirement to avoid any double-counting of risks and, therefore, stands ready to ensure that no such double-counting of risks occurs within its remit. With respect to macroprudential buffers, as presently used, these address macroprudential risks which are different from the output floor's target of reducing risks of excessive variability or lack of comparability of risk weights from the use of internal models by the institution.

Furthermore, the proposal requires that the nominal amount of Pillar 2 requirements does not immediately increase as a result of an institution becoming bound by the output floor. The ECB agrees with the underlying objective and the spirit of these provisions to neutralise unwarranted arithmetic effects on Pillar 2 requirements arising from the introduction of the output floor and stands ready to undertake the necessary steps to neutralise this impact.

It is important that the proposed mechanisms are respectful of existing supervisory and macroprudential practices and avoid operational complexities and administrative burdens for competent and macroprudential authorities. In particular, with regard to Pillar 2 requirements, as already mentioned, the ECB considers that competent authorities are already mandated, in the current regulatory framework, to avoid double-counting of risks and unwarranted changes in prudential requirements, and that the guidelines issued by the EBA under Article 107(3) of the CRD provide a sound legal basis for establishing a common methodology for achieving this. While the ECB therefore does not see the need for permanently enshrining in Level 1 legislation how the output floor should be taken into account when setting Pillar 2 requirements, it takes note of the specific legislative proposal on this issue and stresses the need to ensure that the proposed provision – including the temporary freeze – does not permanently interfere with both the current Pillar 2 approach and its frequency. The ECB is of the view that the instantaneous neutralisation should take place at the moment when the bank becomes bound by the floor. In subsequent years any needed adjustment would be done in the context of the regular supervisory review and evaluation process.

EU legislators may wish to provide the EBA with a specific mandate to develop guidelines on how competent authorities should deal with the impact of the output floor when setting Pillar 2 requirements, as defined in the Commission's proposal for a Regulation amending Regulation (EU) No 575/2013 (Article 465(1)). Should EU legislators wish to include a legislative reference to this issue, the ECB has also provided suggestions in the technical

([10]) See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 July 2021: Strategy for Financing the Transition to a Sustainable Economy, COM(2021) 390 final, p. 17.

([11]) See also Opinion CON/2022/11, which provides more detailed comments on the implementation of the output floor, notably with respect to its level of application and transitional arrangements.

working document on how the legislative draft could be amended to be respectful of both the current Pillar 2 approach and its frequency, while also explicitly regulating the interaction between the output floor and Pillar 2 requirements in the Level 1 text.

With regard to the SyRB, the ECB has strong concerns with regard to the proposed requirement for a mandatory review of its calibration, which includes a dynamic cap on the buffer, freezing it at pre-output floor levels until such a review has been concluded and the outcome published.

There are three reasons for these concerns.

First, the proposed mandatory review increases the complexity of the framework and the administrative burden, as it implies that authorities would need to review the calibration of the SyRB for each credit institution becoming bound by the output floor individually. Second, a temporary cap and institution-specific review of the SyRB is at odds with the macroprudential nature of the buffer and its (sub-) sector-wide application. This would establish an unwarranted specific treatment of an individual credit institution which is affected by a SyRB and becomes bound by the output floor. Third, the CRD already includes adequate provisions for the regular review of capital buffers, which are sufficient to ensure any required changes in the implemented rates.

The ECB has similar concerns regarding the proposed requirement to review the calibration of the other systemically important institutions (O-SII) buffer when the output floor becomes binding. Similar to the review of the SyRB, this obligation to review the O-SII buffer increases the complexity of the framework and the administrative burden. Moreover, the O-SII buffer regular reviews are already provided for in the CRD.

Instead of the proposed review mechanism of the SyRB when the output floor becomes binding for a credit institution, the ECB proposes the insertion of an explicit clarification specifying that the SyRB may not be used to address the risk that is captured by the output floor, regardless of whether the output floor becomes binding for a specific institution or not. This clarification should preferably be inserted as a recital but could also be inserted in an article of the CRD. It should address any potential concerns that risks could be double-counted under the output floor and the SyRB. The same reasoning and clarification could also be implemented in relation to the O-SII buffer.

3. **Fit and proper**

3.1. *Support for the proposed amendments*

The ECB strongly welcomes the proposal of the Commission to revise the fit and proper framework. The supervision of the fitness and propriety of members of the management board of credit institutions is a key supervisory tool that is essential to improve the governance of credit institutions. Good governance in credit institutions increases their resilience to adverse market developments and is a key prerequisite for financial stability. Within its supervisory activities the ECB still sees a considerable need to plug gaps and to raise the bar in the quality of governance frameworks ([12]), and therefore strongly welcomes the strengthening of the supervisory toolkit as proposed by the Commission. The current fit and proper framework stands out as one of the least harmonised areas of supervisory law due to the divergence of national laws implementing the CRD. These differences hamper the efficiency of the ECB's fit and proper supervision and have hindered the level playing field within the EU. The Commission proposals constitute a major step forward, as they would ensure a more consistent, efficient and effective supervision of board members and of key function holders, focusing on the more important issues for prudential supervision. This is the case especially in relation to matters such as (i) the establishment of clear deadlines and processes for all Member States; (ii) the need for the occurrence of new facts in order to assess renewals of terms of office; (iii) mandatory *ex ante* assessments for the most impactful institutions; (iv) the assessment of key function holders; (v) the removal of the CEO-Chair waiver from Article 88 of the CRD; and (vi) the credit institution's responsibility for ensuring the suitability of their board members.

The ECB considers that an adequate level of proportionality should be embedded in the new framework, which would also benefit from an even more proportionate approach to fit and proper assessments by competent authorities. While the proposed framework in general already takes a duly proportionate approach to fit and proper assessments (including by limiting *ex ante* assessments to large institutions), the ECB is open to further explore and discuss

([12]) Deficiencies in management bodies' steering capabilities are among the key vulnerabilities of credit institutions listed in the ECB's supervisory priorities for 2022-2024, which will inform the supervisory review and examination process, available on the ECB website at www.ecb.europa.eu

avenues to ensure the appropriate level of proportionality of the new framework. In particular, proportionality allows competent authorities to focus their resources on the most important assessments.

Finally, the ECB notes that the *ex ante* fit and proper assessments envisaged in the proposed amendments to the CRD do not affect the statutory rights of certain bodies to appoint representatives to supervised entities' boards under national law.

Notwithstanding the overall strong support for the proposed changes, the ECB provides, both below and in the technical working document, a number of comments on specific aspects.

3.2. *Clarification that the proposed ex ante fit and proper assessments are only of a procedural nature: Recital 38 of the proposed amendments to the CRD*

Recital 38 highlights the importance of the suitability assessment of large institutions' members of the management body before those members take up their position. While the ECB strongly supports the envisaged proportionate *ex ante* assessment, it could be further clarified that the proposed provisions on *ex ante* fit and proper assessment are mostly procedural and do not affect national statutory rights of certain bodies or legal entities to appoint representatives to supervised entities' management bodies under applicable national law. Therefore, the ECB proposes the introduction of an additional clarification to Recital 38, which aims at reassuring Members States that any statutory rights based in applicable national law shall not be affected by the proposed amendments to the CRD. Nevertheless, appropriate safeguards should be in place to ensure the suitability of these representatives, such as an effective supervision of the suitability of the management body as a whole (collective suitability) and follow-up measures to tackle potential conflicts of interest and issues related to time commitment and experience where necessary.

3.3. *Introduction of a 2-day deadline for the acknowledgement of receipt: new Articles 91b(3) and 91d(3) of the CRD*

The suggested deadline of only 2 days for the written acknowledgement of receipt would in practice be extremely challenging to meet by all competent authorities involved due to the very high inflow of fit and proper applications and the extensive documentation that needs to be checked. Specifically, in the many cases where the application concerns multiple appointees, this deadline might not be achievable for supervisors. Overall, this provision may jeopardise meeting the given deadline for fit and proper procedures.

The ECB thus urges the deletion of the 2-day deadline.

3.4. *Mandate to develop implementing technical standards (ITS) on standard forms, templates and procedures for the provision of information: new Articles 91b(10) and 91d(8) of the CRD*

The ECB is responsible for the effective and consistent functioning of the Single Supervisory Mechanism (SSM). In this respect, progress has been made within the SSM as regards the consistent use of forms and IT solutions for the purposes of processing fit and proper applications. The ECB thus underlines that the ITS should be consistent with this harmonisation effort and could possibly leverage the infrastructure already developed.

In light of the above, the ECB proposes the insertion, in the relevant provisions or recitals, of a reference encouraging the EBA to build on the best existing practices and tools when developing the ITS.

3.5. *Procedural consequences where supervised entities do not comply with obligations and deadlines: new Articles 91b(7) and 91d(6) of the CRD*

The supervisory powers available to supervisors in cases where entities do not reply to requests for additional information within the given deadline do not include the power for the competent authorities to declare the application incomplete requiring, as a consequence, the submission of a new application. The ECB therefore calls for the introduction of an additional legal basis allowing competent authorities to consider an application incomplete, with the consequent need for its re-submission. This would ensure that there is a procedural consequence for breach of the deadlines for the provision of additional documentation or information, without prejudice to the possibility for the entity to submit a new application thereby initiating a new procedure.

In light of the above, the ECB proposes adding such an additional procedural consequence in the new Articles 91b(4) and 91d(4) of the CRD.

3.6. *Possibility to extend the assessment period where information is requested from other parties*

New Articles 91b(4) and 91d(4) of the CRD allow for the extension of the assessment period where competent authorities request additional documentation or information from entities, but not where documentation or information is requested by other parties, e.g. judicial authorities and/or other supervisory authorities. The latter is a very common occurrence which often consumes more time.

The ECB therefore proposes that these provisions be amended to also cover situations in which documentation or information is required from other entities/authorities.

3.7. *Possibility for entities to conduct the (internal) suitability assessment of board members after they have taken up their positions: new Article 91a(2) of the CRD*

A new Article 91a(2), second subparagraph, of the CRD allows for the appointment of members of the management body, in urgent contexts, without any kind of suitability assessment. The ECB is concerned that this possibility may lead to the appointment of unsuitable candidates, also due to the ambiguity underlying the interpretation of the terms 'strictly necessary' and 'immediately' used in that context.

Therefore, the ECB proposes that entities should be required to perform a suitability assessment before members of the management body take up their position even in the most exceptional cases. Nevertheless, in such a scenario a lighter assessment might be warranted, under conditions to be specified in guidelines developed by the EBA. These guidelines would also give guidance on cases that might be considered urgent, i.e. when it is strictly necessary to immediately replace board members.

4. **Third-country branches (TCBs) requirements**

The harmonisation of the TCB framework is important to establish a comprehensive view on the activities of third country groups in the EU, to align practices within the EU and to ensure a level playing field for third country groups in the EU and European credit institutions by avoiding possibilities for regulatory arbitrage, while at the same time not preventing the access of third country groups to the EU financial market via the establishment of branches. The ECB considers it essential to provide the relevant competent authorities with effective supervisory tools. The harmonisation of the TCB framework is also an opportunity to align the EU's requirements with comparable standards in other major jurisdictions and maintain global openness of the Single Market.

Against this background, the ECB welcomes the harmonised minimum standards for the authorisation and withdrawal of authorisations of branches, as well as in the area of internal governance and risk controls and the increased harmonised reporting requirements. The ECB also welcomes the power for competent authorities to require TCBs to establish a subsidiary in cases of systemic importance, which should not be subject to an automatic trigger but rather to an open-outcome supervisory assessment mechanism, once certain thresholds are reached. In addition, the new framework will allow comprehensive supervision via enhanced cooperation between supervisors, for example by including Class 1 TCBs in colleges of supervisors. In this regard the ECB also appreciates the efforts of the Commission to ensure an adequate involvement of supervisors of other group entities (i.e. subsidiaries) in the decisions that affect the structure of the operations of third country groups in the EU.

Furthermore, the ECB supports the clarification that TCBs may only conduct the activities for which they have been authorised and solely within the territory of the Member State that has provided such authorisation, and that conducting such activities on a cross-border basis within the territories of the Union is expressly prohibited.

In addition to its strong support for the proposal, the ECB proposes amendments in the following areas.

To ensure that the actual size of the activities of a branch is captured, thus helping to avoid that third country groups use specific booking practices to stay under the thresholds, it is important that not only the assets that are booked in the branch are taken into consideration, but also the assets that are originated by the branch but booked remotely to another location, to the extent that this practice is considered feasible under the new legislation. While the proposed amendments to the CRD include a mandate for the EBA to develop regulatory technical standards on booking

arrangements, the ECB considers that it would be more effective to include in the CRD itself also a direct clarification as to how to calculate the assets of a branch for the purposes of assessing thresholds (e.g. for the classification of the branches as Class 1 and for the assessment of systemic importance).

Furthermore, the ECB proposes that the aggregated information on the assets and liabilities held or booked by a third country group's subsidiaries and third country branches in the Union, which the third country branches are required to report to their competent authority, should also be made available to the competent authorities that are responsible for the supervision of the subsidiaries of that third country group. This proposal will allow for a comprehensive overview and analysis of the European footprint of third country groups. To this end, the ECB also proposes that the scope of this reporting requirement related to services provided by the head undertaking is enhanced to capture also the direct provision of cross border investment services by the third country group and the investment services that are provided by the third country group on the basis of reverse solicitation.

5. **Direct provision of banking services in the EU by third country undertakings**

5.1. *Requirement to establish a branch for the provision of banking services by third country undertakings: new Article 21c of the CRD*

The ECB welcomes the clarification included in the new Article 21c of the CRD that, in order to provide banking services within the Union, third country undertakings must either establish a branch or create a subsidiary in any of the territories of the Union, in order to avoid unregulated and unsupervised activities creating risks to financial stability in the EU.

However, the ECB considers that the scope of core banking services included within the new Article 21c of the CRD is unclear. Therefore, the ECB invites the Union legislative bodies to clarify the wording of the new Article 21c of the CRD and in particular to provide a clear list of core banking services included within this article, taking into consideration also existing requirements in other EU law that regulate particular services, such as payment services and electronic money**,** as well as the impact of the new article on the liquidity of global financial markets.

6. **Supervisory powers**

The ECB welcomes the proposed amendments to the CRD as regards supervisory powers as they further harmonise three types of powers, by requiring the competent authority to assess (i) acquisitions of holdings in financial and non-financial sector entities; (ii) material transfers of assets and (iii) mergers/divisions. The present divergence in national powers in these three respects and the fact that the ECB currently exercises such powers only when available under national law leads to an uneven playing field and renders the ECB's supervisory actions within the SSM less efficient. A common set of rules on core prudential powers will simultaneously foster harmonisation within the internal market and increase the overall quality and efficacy of supervision. Further coordination between these new supervisory powers and powers already provided for in the CRD is needed. To this end, the ECB provides some drafting recommendations in the technical working document.

The ECB welcomes, in particular, the fact that the Commission's proposal recognises the necessity to align the powers provided for in Title III, Chapters 3, 4 and 5, of the CRD concerning acquisitions of a qualifying holding in a credit institution and acquisitions of a material holding by an institution. However, this alignment should not only provide for the exchange of information between the competent authorities, but also provide for the process and timing of the relevant procedures occurring simultaneously for the same operation.

In addition to this procedural alignment, a clear distinction should be made between the concept of a 'qualifying holding', which should be focused on the impact of an acquisition on the target credit institution, and a 'material acquisition', which should be focused on the impact of an acquisition on the acquirer.

Furthermore, in line with its earlier expressed stance ([13]), the ECB encourages the inclusion of additional supervisory powers on (i) the amendment of credit institutions' articles of association, (ii) related party transactions, and (iii) material outsourcing arrangements. The harmonisation of these powers remains necessary and would help to progress further towards a genuine single rulebook and reduce regulatory fragmentation across the SSM.

7. **Administrative sanctions**

The proposed amendments to the CRD reflect the ECB's position on the matter ([14]). All efforts to further harmonise and strengthen the sanctioning and enforcement powers at Union level are welcomed, which will foster the effective enforcement of prudential requirements within the Union. In particular, it is noted that the enforcement powers of competent authorities are enhanced by introducing the possibility to impose periodic penalty payments as a new enforcement measure aimed at restoring compliance with prudential requirements and that such measure is without prejudice to the subsequent possibility of sanctioning the occurrence of the breach. It is therefore crucial that the distinction between this new enforcement measure, administrative penalties and other administrative measures under the CRD is also reflected in the Member States' transposition into national law. Moreover, the ECB also welcomes the fact that the list of breaches subject to administrative penalties is extended and that the definition of 'total annual turnover' is clarified.

8. **Supervisory benchmarking**

The ECB welcomes the amendments proposed to Article 78 of the CRD and, in particular, the fact that these amendments expand the scope of supervisory benchmarking to models used by credit institutions in order to calculate expected credit losses under IFRS9. This is very important to ensure the robustness of models which are used, inter alia, by credit institutions which do not have approved internal models for the determination of their capital requirements for credit risk. The addition of the alternative standardised approach for market risk to the scope of supervisory benchmarking is also welcomed as a complement to the information from the internal model approach and as an additional step towards the full implementation of the Basel market risk framework in the EU.

Furthermore, the ECB welcomes the proposal to give the EBA the flexibility to conduct the benchmarking exercises on a biennial basis. The ECB recommends giving even more flexibility to the EBA to set the frequency of these exercises. The ECB also proposes that the exercises are more clearly defined.

Finally, the ECB suggests that institutions should not be required to submit the results of their calculations to the competent authorities annually, i.e. also in years where the EBA does not conduct the exercise. Instead, the ECB proposes that the frequencies for submission and assessment are aligned, reducing the reporting burden for institutions.

9. **Disclosure**

The ECB welcomes the objective of the new integrated hub managed by the EBA for Pillar III disclosure by credit institutions, which aims to reduce the burden for banks and to facilitate the use of Pillar III information by all stakeholders. Supervisors could benefit from a centralised disclosure hub as it would make it easier for them to ensure the quality of Pillar III information.

The proposal is to apply a different approach in relation to the quantitative public disclosure of small and non-complex institutions (SNCIs) and larger credit institutions. For SNCIs, the EBA will use supervisory reporting to compile the corresponding (quantitative) public disclosure on the basis of a predefined mapping, while for larger institutions the EBA will receive the full disclosure files 'in electronic format' and will need to publish the files on the same day it receives them. This different approach does not seem justified. The same approach for quantitative disclosures could be applied to all credit institutions, regardless of their size and complexity, with the objective of reducing the reporting burden of all credit institutions. Also, the timeline for the EBA to publish Pillar III information on the centralised hub does not allow for the reconciliation between supervisory reporting and Pillar III disclosure

([13]) See paragraph 1.12.2 of Opinion CON/2017/46 of the European Central Bank of 8 November 2017 on amendments to the Union framework for capital requirements of credit institutions and investment firms (OJ C 34, 31.1.2018, p. 5).

([14]) See paragraph 1.15 of Opinion CON/2017/46.

information to be performed, which could lead to additional workload for supervisors and lack of clarity for investors and other users of Pillar III information. Moreover, qualitative disclosures and some quantitative disclosures cannot be extracted from supervisory reporting on the basis of the predefined mapping. This issue concerns both SNCIs and other institutions. Therefore, the process to submit such disclosures to the EBA should be clarified. Additional considerations regarding the envisaged Pillar III centralised disclosure hub are provided in the context of Opinion CON/2022/11.

Where the ECB recommends that the proposed amendments to the CRD are amended, a specific drafting proposal is set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 27 April 2022.

The President of the ECB
Christine LAGARDE

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

COUNCIL

Council conclusions on Addressing the external dimension of a constantly evolving terrorist and violent extremist threat

(2022/C 248/04)

Introduction

1. In line with the Strategic Compass for Security and Defence endorsed by the European Council on March 25, the Council recognises that terrorism and violent extremism, in all their forms and irrespective of their origin, continue to pose a major challenge in a strategic environment already impacted by multiple geopolitical shifts and growing instability. As such, it reaffirms its unwavering resolve to protect EU citizens against these threats and to place the EU in a position to become a stronger and more capable security provider, while reaffirming its fundamental values and principles in compliance with international law, in particular international human rights law and humanitarian law. To this end, the Council recognizes the need for enhanced multilateral engagement and strengthened cooperation with strategic international partners where it serves EU interests.

2. In this context, the Council recalls its condemnation in the strongest possible terms of the unprovoked, unjustified and illegal military aggression against Ukraine by the Russian Federation that grossly violates international law, and the principles of UN Charter, and undermines European and global security and stability. It expresses serious concern about possible long-term implications this aggression could have on the terrorist threat both within the EU and globally.

3. The Council stresses the enduring relevance of the assessment and commitments emanating from its June 15, 2020 Conclusions on EU External Action on Preventing and Countering Terrorism and Violent Extremism. Together with previous Conclusions from February 9, 2015 and June 19, 2017, and in line with the EU's 2005 Counter-Terrorism Strategy, the European Agenda on Security and the EU's 2016 Global Strategy as well as the July 24, 2020 EU Security Union Strategy, and the December 9, 2020 Counter-Terrorism agenda for the EU, they represent a sound and consistent political framework for an ambitious European engagement on the global stage.

4. The new Conclusions the Council adopted today therefore aim at ensuring that the political guidance driving our common action remains adjusted to the reality of the EU's security exposure. To this end, they focus on recent significant evolutions in the nature of the threat itself, but also in the global context in which the EU operates in order to prevent and counter terrorism and violent extremism.

A constantly evolving international terrorist threat

5. The Council underlines that Da'esh, al-Qaeda and their affiliates continue to represent the most prominent terrorist threat worldwide. Despite the loss of its territorial control over parts of Iraq and Syria, as well as the continuous and significant strikes against its leadership, Da'esh has purposely reverted back to an underground insurgency while seeking to further destabilize both countries, liberate its detained fighters, maintain its influence and hold on local supporters, preserve its funding sources, and eventually reconstitute a threat projection capability. Against this backdrop, the Council calls on the EU and its Member States to focus on strengthening their comprehensive approach, maintaining an unwavering commitment to combat terrorism in Iraq and Syria, alongside the Global Coalition against Da'esh and other key partners, while resolutely addressing the threat posed by the expansion of both terrorist organisations' global networks. The Council also reiterates the need for a political solution to the conflict in Syria in line with UNSCR 2254.

6. The Council notes that several regions in Africa are experiencing a particularly concerning expansion of the terrorist and violent extremist threat, including in the Sahel with a risk of spill-over towards West-Africa and the Gulf of Guinea. Against such a backdrop, it reaffirms its support to African-led initiatives aimed at placing prevention and the protection of civilian populations at the heart of their counter-terrorism efforts, as stated during the 6th EU-AU Summit held in Brussels from February 17th to 18th 2022. Both Da'esh and al-Qaeda have managed to exploit security, economic, social and governance vacuums in order to foster territorial expansion of their local affiliates. The Council notes with great concern the alteration of democratic principles and the rule of law in an increased number of countries, and the growing militarization and proliferation of violent actors in vulnerable regions. From this standpoint, it expresses its conviction that the deployment of allegedly private military companies such as Russia sponsored Wagner groupwhich, under the pretext of combatting terrorism, engage in local natural resources predation, grossly violate human rights, and exacerbate ethnic tensions, all of which are bound to serve the interests of Da'esh, al-Qaeda and their affiliated groups and organisations in the long run.

7. The Taliban takeover in Afghanistan raises significant concerns for the EU in the fight against terrorism, with a potential regional spill-over effect and the resurgence of Da'esh Khorasan Province which now represents the most immediate terrorist threat in the country. The Council also reiterates deep concerns about the Taliban's connections with both al-Qaeda core and its regional branch (al-Qaeda in the Indian Subcontinent -AQIS), assessing that those groups are likely to benefit from the current situation in the long run in order to gain and secure funding, including by engaging in various types of illicit trafficking, and attract new recruits which might lead to a renewed capability to pose a direct threat to European interests. It recalls the unequivocal demand that the Taliban cease all direct and indirect ties with international terrorism, and will continue to monitor the situation closely, in line with its Conclusions adopted on September 15th 2021, and in accordance with United Nations Security Council resolution 2593. Taking note of the measures recommended in the EU Afghanistan Counter-Terrorism Action Plan, the Council stands ready to mobilise all relevant tools at its disposal to ensure that Afghanistan doesn't become again a safe haven for terrorist organisations.

8. The Council emphasises the need to address the critical challenge posed by the capability of Da'esh and al-Qaeda in attracting an unprecedented number of supporters worldwide. Despite military setbacks suffered by both organisations in the recent past, the continued presence of numerous mostly local but also foreign terrorist fighters in many regions, especially in Iraq and Syria, still represents a major security risk. Noting that there can be no lasting victory against these groups unless this issue is adequately addressed, the Council stresses the need for the EU and its Member States to further develop a comprehensive approach aiming at preventing recruitment of terrorist fighters among vulnerable populations, including youth, by addressing humanitarian, social and development needs. It also underlines the necessity of preventing undetected relocation of terrorist fighters and their families, promoting accountability, defining tailored deradicalisation, rehabilitation and reintegration strategies, ensuring appropriate during and post-detention monitoring of those convicted of terrorism, where necessary, as well as offering increased support to the countries which are primarily impacted by the 'returnees' phenomenon.

9. The Council recognises the increasing threat emanating from right-wing violent extremism and terrorism, representing a serious global challenge for the EU and its Member States. Transnational connections between right-wing violent extremist groups and individuals have gone beyond mere communication on the Internet, and now entail coordination, financing, recruitment, and shared operational tactics. Additionally, the Council notes a growing number of violent actions associated to left-wing violent extremism and terrorism which also require continued close scrutiny. It therefore calls for fostering a common understanding of the threat and strengthening international engagement in the fight against politically motivated violent extremism and terrorism, including in the fields of counter-narratives, exchange of information, capacity building, and dissemination of best practices, *inter alia* by cultivating critical thinking, digital literacy, and online public safety and by promoting intercultural dialogue and tolerance through education at all levels.

10. The Council expresses concern regarding the growing threat posed by home-grown terrorism and attacks perpetrated by lone actors. It notes that global terrorist organisations have wilfully engaged in a strategy focused on inspiring individuals who, in most instances, do not have previous connections with international terrorism, and mainly resort to rudimentary *modi operandi*, thus making their actions more difficult to prevent. This strategy has been amplified during the COVID-19 pandemic which has increased isolation of vulnerable people and reinforced their exposure to often quick radicalisation phenomenon, specifically online. The Council therefore stresses the need to keep investing efforts in sharing analysis, detecting as well as preventing radicalisation both online and offline.

11. The Council notes with concerns the spread of violent extremist ideologies that can create a breeding ground for terrorism. It stresses the need to prevent dissemination and funding of all types of violent extremist propaganda, including violent extremist Islamist ideology, that are inconsistent with fundamental rights and freedoms which are at the core of EU values and principles. To this end, the Council especially calls on addressing the challenge of non-transparent funding emanating from foreign actors that foster undesirable influence on civil and religious organizations within the EU and on a global scale. It also calls on identifying effective ways to address the threat posed by organisations, individuals and entities whose activities directly aim at radicalizing, indoctrinating, and inspiring people to carry out violent and terrorist acts.

Misuse of new technologies for terrorist purpose

12. The Council acknowledges that new technologies first and foremost represent a tremendous opportunity for the EU's economy and society, and may equally facilitate the EU's CT and P/CVE efforts. At the same time, it also stresses the need to take into account legitimate security concerns arising from the potential misuse of some of these tools by terrorist actors, such as 3D printing, unmanned aerial systems (UAS), etc. To this end, the Council encourages the EU to maintain a comprehensive multi-stakeholder approach encompassing robust engagement with partner countries, multilateral fora, the private sector, academia and the meaningful participation of the civil society including women's rights organisations and women- and youth-led organisations.

13. The Council stresses the critical importance of preserving freedom of expression and other fundamental rights, which play a central role in democratic societies. It recognises that a significant part of the fight against radicalisation leading to terrorism needs to be conducted online, at a time when international terrorist organisations are relying significantly on digital tools for spreading their propaganda, recruiting and expanding their footprint on the Internet. While the adoption of the Regulation on Addressing the dissemination of terrorist content online, and the adoption of the Digital Services Act have placed the EU at the forefront of this fight, technical developments continue to present vulnerabilities which terrorist groups have shown every intent to seize in order to maintain their presence online. This includes malign cyber activities through the misuse of smaller platforms, often based on blockchain technology and the decentralised web, which make the detection and, when appropriate, suppression of illegal content even more difficult. Against this backdrop, the Council calls on the tech industry and especially online platforms, regardless of their size, to take on more responsibility for preventing and countering the spread of terrorist and violent extremist content online, including by its algorithmic amplification.

14. The Council reaffirms the critical importance of cutting off sources of terrorism funding, including through illicit trafficking such as of cultural property, in line with EU and Financial Action Task Force (FATF) standards. It also notes with concern the risk associated with the increased use of new and anonymous forms of payments involving e-money, crypto-assets and blockchain technologies, mobile money, and prepaid cards by terrorists. It therefore calls on the EU and its Member States to support partner countries to increase compliance with EU and FATF requirements and enhance their efforts to address the anonymity of transactions, by tracing, detecting, sanctioning and effectively dismantling illegal money transmitters. It encourages to that end more active cooperation from the Fintech industry with financial intelligence units, law enforcement and judicial investigation services. The Council recognises the essential role played by non-profit organizations and stresses the need to include them as central partners in the fight against violent extremism. It also reiterates the importance not to disrupt nor discourage civil society activities, and to ensure that measures to counter the financing of terrorism are not misused to target or criminalise legitimate humanitarian actors or human rights defenders. In the meantime, the Council calls upon Member States to fully cooperate with non-profit organisations through a risk-based approach as well as targeted and proportionate measures in order to prevent any abuse by and for terrorists.

A need for the EU to reaffirm its fundamental values and principles

15. The Council regrets a trend of growing politicisation in the fight against terrorism. On the one hand, terrorist organisations have been increasingly trying to capitalise on weak governance systems, especially in the most fragile countries, in order to impose their dominance, attract support from local populations, and portray themselves as more legitimate and efficient alternatives to governments. Comparably, the ability of the international community to present a united front against terrorism continues to be undermined by undisguised attempts from mainly authoritarian regimes aiming at using counter-terrorism as a pretext to achieve their own political goals, thus contributing to exacerbate the polarisation in multilateral fora on this issue. Against this backdrop, the Council stresses the need to strongly push-back against any attempt of politicisation in the fight against terrorism, including in international fora. The EU and its Member States will endeavour to preserve and promote an approach based on objective facts and the evolution of the threat, while also taking into account that comprehensively preventing and countering terrorism requires the fostering of sound, inclusive and democratic governance models based on the respect for human rights.

16. Against this backdrop of a mounting systemic rivalry on the global stage, the Council resolutely reaffirms its conviction that democracy, transparency, accountability, gender responsiveness, as well as compliance with International law, including the respect for human rights and the rule of law, and international humanitarian law are the only sustainable response to terrorism and violent extremism. The Council notes with great concern that dictatorships, military and authoritarian regimes are on the rise in several countries most affected by terrorism and that such models of governance are proven to exacerbate this threat. The EU and its Member States should therefore ensure that the promotion and respect for these fundamental principles remain the cornerstone of their engagement in both bilateral and multilateral settings while reinforcing the link between adherence to these values and principles and the assistance they provide or are ready to provide to prevent and counter terrorism and violent extremism throughout the world.

17. Combatting impunity for acts committed by terrorists and ensuring recognition and adequate assistance, support and compensation for the victims are absolutely critical to ensure terrorist threats can be successfully addressed in the long term. The Council therefore calls for pursuing EU capacity building activities aiming at reinforcing partners' capability to adequately investigate and prosecute terrorism cases with due respect for human rights and the rule of law. Recognising the key role that victims and their families can play, including in countering the terrorist propaganda, it also emphasizes the need to promote international solidarity and ensure they are treated with dignity and respect.

18. The Council reaffirms its conviction that terrorism and violent extremism are not an inevitability. Defeating them requires a consistent, comprehensive global effort that cannot only rely on military action, but also encompasses a civilian-led, whole of society, response aiming at tackling the root causes of the threat, including socio-economic inequalities, lack of good governance, as well as the impact of organised crime activities and climate change.

Protecting cultural heritage can also play a key role in promoting peace, democracy, sustainable development and prevention of terrorism by fostering tolerance, dialogue and mutual understanding. The Council recognises that this global effort should entail a strong gender-responsive dimension, with a view to address the impact of gender stereotypes and gender-based violence on terrorism and violent extremism, while ensuring promotion of women's active and meaningful participation in the prevention and counter-terrorism efforts. This comprehensive approach should *inter alia* include humanitarian assistance in most critical settings, stabilisation aid in countries emerging from crisis, development cooperation and an increased investment in preventing and countering violent extremism through enhanced partnerships with local actors. While remaining committed to do so, the Council also recalls that the importance of local ownership and that the primary responsibility of this fight lies with governments of the countries that are confronted with these threats in the first place.

19. The Council recognises the critical work undertaken by international and non-governmental humanitarian actors in order to provide vital assistance to populations in need affected by conflict and instability, noting that this humanitarian aid contributes to ultimately prevent the resurgence of the threat in areas liberated from the control of terrorist organisations. From this standpoint, the Council reaffirms its conviction that counter-terrorism policy and humanitarian action based on the principles of humanity, impartiality, neutrality, and independence can mutually reinforce each other. In line with the commitments taken in the framework of the European Humanitarian Forum held from March 21st to 23rd 2022, the Council reiterates its resolve to safeguard humanitarian space and adopt concrete measures aiming at preventing any potential negative impact of counter-terrorism actions on principled humanitarian activities without undermining the integrity of the EU counter-terrorism architecture. These measures should, *inter alia*, involve concrete solutions to facilitate non-profit organisations' financial access, address difficulties emanating from over-compliant behaviour from the private banking sector, and provide further guidance to humanitarian organisations with regards to their rights and responsibilities under the different EU counter-terrorism sanctions regimes.

20. Noting that the EU's international involvement against terrorism and violent extremism is being undermined by increasingly aggressive information manipulations campaigns, including disinformation, fake news and the spread of conspiracy theories, the Council recognises that successful actions in this field require to be supported by a strategic communication, and by strengthening community resilience. A coordinated effort is therefore needed to better outline and explain the EU's main strategic objectives, communicate positive narrative and engage with third countries' audiences and to counter disinformation.

Expanding EU's role on the global counter-terrorism stage

21. Building upon the Strategic Compass for Security and Defence, the Council stresses the need for the EU and its Member States to reinforce their international engagement against terrorism and violent extremism, making full use of the instruments at their disposal in order to contribute to an adequate collective response to terrorism and violent extremism and ensure it matches their priorities and values, based on full respect for human rights and international law. While the nature of the threats necessarily imposes a global dimension to this engagement, priorities pursued by the EU and its Member States should primarily be guided by the reality of their security exposure. They should therefore endeavour to devote specific attention to their close neighbourhood, including the Sahel, North Africa, the Levant and the Eastern Mediterranean. Cooperation with the Western Balkans should be further strengthened, including through the continued implementation of the EU-Western Balkans Joint Action Plan on counter-terrorism. The EU should also maintain focus on specific theatres where the presence of international terrorist and violent extremist organisations might eventually pose a direct threat to the European security, including Central Asia and the Indo-Pacific region.

22. Strong and principled bilateral and multilateral engagement is a central feature of the EU's global counter-terrorism policy. In this framework, the Council stresses the need to seek and maintain intensive cooperation with strategic bilateral partners, recognizing the key importance of the EU political dialogues on counter-terrorism and security. It acknowledges the leading role played by the United Nations in this field and welcomes efforts made by the EU to

strengthen its strategic partnership with relevant UN bodies. In line with the agreed guiding principles reiterated also in the Strategic Compass, the Council furthermore stresses the need to deepen the mutually-reinforcing and beneficial strategic partnership with NATO, in the context of the implementation of the Warsaw (2016) and Brussels (2018) joint declarations, *inter alia* in the fields of resilience against terrorism and violent extremism, and capacity building of partner countries. It furthermore supports a more sustained EU engagement vis-à-vis international organisations involved in the fight against terrorism and violent extremism, including the OSCE, the Council of Europe, Interpol, and multi-stakeholder fora such as the EU Internet Forum and the Christchurch Call.

23. The Council recognises the need for the EU and its Member States to reinforce their coordination and develop a strategic approach aimed at reinforcing their collective ability to influence these organisations' strategic orientations. It welcomes the EU's successful bid to the co-chairmanship of the Global Counter-Terrorism Forum (GCTF) where the EU can help shape the agenda on international counter-terrorism policy and practices and promote EU values in the field of counter-terrorism. The Council notes that this should lead to greater support and strategic engagement towards this organisation as well as its 'inspired' institutions (the Global Community Engagement & Resilience Fund, the Hedayah Center and the International Institute for Justice & the Rule of Law). The EU should also remain heavily engaged within the Global Coalition against Da'esh, its working groups and the newly established Africa Focus Group, as well as in the Coalition for the Sahel, with a view to implement a coordinated, comprehensive approach to countering terrorism and violent extremism. This international engagement should also be guided by the need to foster synergies among various international, regional and national initiatives aiming at combatting terrorism and violent extremism, and avoid duplication of effort.

24. The Council welcomes the valuable contribution provided by the network of Counter-Terrorism/Security Experts deployed in selected EU delegations, noting that this network has allowed the EU to expand its global reach, its capability to develop more precise assessments of local situations, and to sustain bilateral and multilateral engagement. While this network has continued to expand over the recent past, the Council underlines the importance of ensuring its capacity be strengthened and its size increased further in order to be responsive to geopolitical developments and strategic needs. The Council welcomes the EEAS' recent efforts and reflections in this regard, including when it comes to the network's geographical scope, mandate, and its coordination with Member States' actions.

25. The Council also recalls the valuable contribution provided by the civilian CSDP Missions, within the framework of the EU's integrated approach and as stressed by the Civilian CSDP Compact, within their respective mandates, in strengthening the security and justice sectors in host countries and building their capacities to prevent and counter terrorism and violent extremism effectively and in compliance with the rule of law.

A more strategic use of EU CT sanctions regimes

26. The Council recalls that counter-terrorism sanctions are a powerful tool to support and implement the EU external policy on countering terrorism. It therefore welcomes greater use of these instruments in order to collectively support a resolute and ambitious EU action through new designations, when relevant and possible, which reflect the evolution of the threat and respond to the emergence of new terrorist actors.

Compliance of EU restrictive measures with international law, in particular international humanitarian law, human rights and fundamental freedoms, due process and the rule of law constitutes the cornerstone of the credibility and effectiveness of EU sanctions policy. In that perspective, the Council recalls that restrictive measures are targeted, carefully calibrated and proportionate to the objectives they seek to achieve. It recognizes that the role of sanctions must be preventive, and commits to fully take into account the evolving circumstances and the reality of the threat posed by the listed entities and individuals as part of regular reviews and update the listings accordingly. In this regard, the Council continues to welcome all measures taken in this direction including the significant contribution of the UN Office of the Ombudsperson which, since its establishment, has brought more fairness and transparency to the UN sanctions regime for Da'esh and al-Qaida.

The Council underscores the shared benefits resulting from coordination with other international actors, including the United Nations Security Council and third countries on sanction designations. Furthermore, it encourages further dialogue and enhanced efforts to ensure a good understanding of the EU's specific legal and procedural requirements, and prevent political instrumentalization of counter-terrorism sanctions.

Conclusions' implementation and follow-up

27. The Council expresses strong support to increased synergies between the internal and external dimensions of EU actions in the fight against terrorism and violent extremism. It also calls on a collective effort from all EU institutions and Member States to contribute to implementing the priorities and achieving the objectives set out above. These policy guidelines should especially be taken into account while defining future financial engagement with partner countries and international organisations. To this end, and in line with the objective set out in the Strategic Compass for Security and Defence, the Council welcomes the launch of a review, to be concluded by early 2023, of EU tools and programmes which contribute to building partners' capacities against terrorism, in order to increase their effectiveness.

28. The Council deems it necessary to regularly review these conclusions to ensure that political and strategic considerations guiding the EU external action against terrorism and violent extremism remain adjusted to the reality of the threat.

EUROPEAN COMMISSION

Euro exchange rates ([1])

29 June 2022

(2022/C 248/05)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,0517	CAD	Canadian dollar	1,3513
JPY	Japanese yen	143,53	HKD	Hong Kong dollar	8,2532
DKK	Danish krone	7,4392	NZD	New Zealand dollar	1,6871
GBP	Pound sterling	0,86461	SGD	Singapore dollar	1,4607
SEK	Swedish krona	10,6848	KRW	South Korean won	1 364,02
CHF	Swiss franc	1,0005	ZAR	South African rand	16,9295
ISK	Iceland króna	139,90	CNY	Chinese yuan renminbi	7,0382
NOK	Norwegian krone	10,3065	HRK	Croatian kuna	7,5285
BGN	Bulgarian lev	1,9558	IDR	Indonesian rupiah	15 612,61
CZK	Czech koruna	24,739	MYR	Malaysian ringgit	4,6272
HUF	Hungarian forint	394,28	PHP	Philippine peso	57,773
PLN	Polish zloty	4,6869	RUB	Russian rouble	
RON	Romanian leu	4,9419	THB	Thai baht	36,925
TRY	Turkish lira	17,4998	BRL	Brazilian real	5,5163
AUD	Australian dollar	1,5256	MXN	Mexican peso	21,1375
			INR	Indian rupee	83,0370

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

NOTICES FROM MEMBER STATES

Commission notice pursuant to Article 16(4) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community

Changes to public service obligations in respect of scheduled air services

(Text with EEA relevance)

(2022/C 248/06)

Member State	France
Route concerned	Aurillac – Paris (Orly)
Original date of entry into force of the public service obligation	1 June 2011
Date of entry into force of the changes	1 June 2023
Address where the text and any relevant information and/or documentation relating to the public service obligation can be obtained	Order of 1 June 2022 amending the public service obligation imposed on scheduled air services between Aurillac and Paris (Orly) NOR: TREA2215683A http://www.legifrance.gouv.fr/initRechTexte.do For further information please contact: Direction Générale de l'Aviation Civile DTA/SDS1 50 rue Henry Farman 75720 Paris Cedex 15 FRANCE Tel. +33 158094321

Commission notice pursuant to Article 16(4) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community

Changes to public service obligations in respect of scheduled air services

(Text with EEA relevance)

(2022/C 248/07)

Member State	France
Route concerned	Limoges (Bellegarde) – Paris (Orly)
Original date of entry into force of the public service obligation	4 August 2004
Date of entry into force of the changes	4 March 2023
Address where the text and any relevant information and/or documentation relating to the public service obligation can be obtained	Order of 1 June 2022 amending the public service obligation imposed on air services between Limoges and Paris (Orly) NOR: TREA2215686A http://www.legifrance.gouv.fr/initRechTexte.do For further information please contact: Direction Générale de l'Aviation Civile DTA/SDS1 50 rue Henry Farman 75720 Paris Cedex 15 FRANCE Tel. +33 158094321

V

(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMMON COMMERCIAL POLICY

EUROPEAN COMMISSION

Notice of initiation of an anti-dumping proceeding concerning imports of high tenacity yarn of polyesters originating in the People's Republic of China, limited to Zhejiang Hailide New Material Co. Ltd, and of initiation of a review of the anti-dumping measures on imports of high tenacity yarn of polyesters originating in the People's Republic of China

(2022/C 248/08)

The European Commission ('the Commission') has received a complaint pursuant to Article 5 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [1] ('the basic Regulation'), alleging that imports of high tenacity yarn of polyesters, originating in the People's Republic of China and produced by Zhejiang Hailide New Material Co. Ltd ('the exporting producer concerned'), are being dumped and are thereby causing or contributing to material injury [2] to the Union industry.

1. Complaint

The complaint was lodged on 16 May 2022 by The European Man-made Fibres Association ('CIRFS' or 'the complainant'). The complaint was made on behalf of the Union industry of high tenacity yarn of polyesters in the sense of Article 5(4) of the basic Regulation.

An open version of the complaint and the analysis of the degree of support by Union producers for the complaint are available in the file for inspection by interested parties. Section 6.6 of this Notice provides information about access to the file for interested parties.

2. Product under investigation

The product subject to this investigation is high tenacity yarn of polyesters not put up for retail sale, including monofilament of less than 67 decitex (excluding sewing thread and 'Z'-twisted multiple (folded) or cabled yarn, intended for the production of sewing thread, ready for dyeing and for receiving a finishing treatment, loosely wound on a plastic perforated tube) ('the product under investigation').

All interested parties wishing to submit information on the product scope must do so within 10 days of the date of publication of this Notice [3].

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[1] OJ L 176, 30.6.2016, p. 21.

[2] The general term 'injury' refers to material injury as well as to threat of material injury or material retardation of the establishment of an industry as set out in Article 3(1) of the basic Regulation.

[3] References to the publication of this Notice mean publication of this Notice in the *Official Journal of the European Union*.

3. **Existing measures**

The measures currently in force are definitive anti-dumping duties imposed by Commission Implementing Regulation (EU) 2017/325 ([4]) of 24 February 2017, as amended by Commission Implementing Regulation (EU) 2017/1159 ([5]) of 29 June 2017. Currently there is an ongoing expiry review ([6]) concerning these measures.

4. **Allegation of dumping**

The product allegedly being dumped is the product under investigation, originating in the People's Republic of China ('the country concerned'), currently classified under CN code ex 5402 20 00 (TARIC code 5402 2000 10). The CN and TARIC codes are given for information only, without prejudice to a subsequent change in the tariff classification. The scope of this investigation is subject to the definition of the product under investigation as contained in Section 2.

The complainant claimed that it is not appropriate to use domestic prices and costs in the People's Republic of China, due to the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation.

To substantiate the allegations of significant distortions, the complainant relied on the information contained in the country report produced by the Commission services on 20 December 2017 describing the specific market circumstances in the country concerned ([7]). In particular, the complainant claimed that the production and sale of the product under investigation appears to be affected by distortions as a consequence of State presence in general and more specific affecting the chemical sector, by distortions in the section on raw materials (used in the production of high tenacity yarn of polyesters i.e. purified terephthalic acid and mono-ethylene glycol), and distortions described in the chapters on general distortions of energy and labour.

As a result, in view of Article 2(6a)(a) of the basic Regulation, the allegation of dumping is based on a comparison of a constructed normal value on the basis of costs of production and sale reflecting undistorted prices or benchmarks, with the export price (at ex-works level) of the product under investigation when sold for export to the Union.

The dumping margin calculated on the basis of this comparison is significant for the exporting producer concerned.

In light of the information available, the Commission considers that there is sufficient evidence pursuant to Article 5(9) of the basic Regulation tending to show that, due to significant distortions affecting prices and costs, the use of domestic prices and costs in the country concerned is inappropriate, thus warranting the initiation of an investigation on the basis of Article 2(6a) of the basic Regulation.

The country report is available in the file for inspection by interested parties and on DG Trade's Internet: ([8]).

5. **Allegation of injury and causation**

The complainant has provided evidence that imports of the product under investigation from the exporting producer concerned have increased overall in absolute terms and in terms of market share.

The evidence provided by the complainant shows that the volume and the prices of the imported product under investigation by the exporting producer concerned have had, among other consequences, a negative impact on the level of prices charged and the quantities sold by the Union industry, resulting in substantial adverse effects on the financial situation of the Union industry, especially with regard to its level of profitability.

6. **Procedure**

Having determined, after informing the Member States, that the complaint has been lodged on behalf of the Union industry and that there is sufficient evidence to justify the initiation of a proceeding, the Commission hereby initiates an investigation pursuant to Article 5 of the basic Regulation.

([4]) OJ L 49, 25.2.2017, p. 6.
([5]) OJ L 167, 30.6.2017, p. 31.
([6]) OJ C 87, 23.2.2022, p. 2.
([7]) Commission Staff Working Document, on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, 20 December 2017, SWD(2017) 483 final/2, available at: https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf
([8]) Documents cited in the country report may also be obtained upon a duly reasoned request.

The investigation is limited in scope to the exporting producer concerned and any related company thereto. The exporting producer concerned obtained a zero anti-dumping duty rate following the investigation that led to the imposition of anti-dumping measures against imports of high tenacity yarns of polyesters originating in the People's Republic of China ([9]). This exporting producer was thus excluded from the scope of that proceeding including any subsequent reviews thereof. Another exporting producer, Hangzhou Zhanhong Chemical Fiber Co., Ltd, also received a zero anti-dumping duty rate in the investigation that led to the imposition of the above anti-dumping measures. However, it appears that this exporting producer ceased to exist. Should the Commission receive evidence to the contrary, Hangzhou Zhanhong Chemical Fiber Co., Ltd will be covered by the present investigation.

The investigation will determine whether the product under investigation originating in the country concerned and produced by the exporting producer concerned is being dumped and whether the dumped imports have caused or have contributed to injury to the Union industry.

If the conclusions are affirmative, the investigation will examine whether the imposition of measures would not be in the Union interest under Article 21 of the basic Regulation.

The Commission also draws the attention of the parties to the published Notice ([10]) on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations that may be applicable to this proceeding.

6.1. *Investigation period and period considered*

The investigation of dumping and injury will cover the period from 1 January 2021 to 31 December 2021 ('the investigation period'). The examination of trends relevant for the assessment of injury will cover the period from 1 January 2018 to the end of the investigation period ('the period considered').

6.2. *Comments on the complaint and the initiation of the investigation*

All interested parties wishing to comment on the complaint (including matters pertaining to injury and causality) or any aspects regarding the initiation of the investigation (including the degree of support for the complaint) must do so within 37 days of the date of publication of this Notice.

Any request for a hearing with regard to the initiation of the investigation must be submitted within 15 days of the date of publication of this Notice.

6.3. *Procedure for the determination of dumping*

The exporting producer ([11]) concerned is invited to participate in the Commission investigation.

6.3.1. *Investigating exporting producers*

In order to obtain information it deems necessary for its investigation, the Commission will send questionnaires to the exporting producer concerned and to the authorities of the People's Republic of China.

The exporting producer concerned has to fill in a questionnaire within 37 days from the date of publication of this Notice.

A copy of the above-captioned questionnaire for exporting producers is available in the file for inspection by interested parties and on DG Trade's Internet: https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2613

([9]) Council Implementing Regulation (EU) No 1105/2010 of 29 November 2010 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of high tenacity yarn of polyesters originating in the People's Republic of China and terminating the proceeding concerning imports of high tenacity yarn of polyesters originating in the Republic of Korea and Taiwan (OJ L 315, 1.12.2010, p. 1).

([10]) On the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations (OJ C 86, 16.3.2020, p. 6).

([11]) An exporting producer is any company in the country concerned which produces and exports the product under investigation to the Union market, either directly or via a third party, including any of its related companies involved in the production, domestic sales or exports of the product under investigation.

6.3.2. *Additional procedure with regard to the country concerned subject to significant distortions*

Subject to the provisions of this Notice, all interested parties are invited to make their views known, submit information and provide supporting evidence regarding the application of Article 2(6a) of the basic Regulation. Unless otherwise specified, this information and supporting evidence must reach the Commission within 37 days of the date of publication of this Notice.

In particular, the Commission invites all interested parties to make their views known on the inputs and the Harmonised System (HS) codes provided in the complaint, propose (an) appropriate representative country(ies) and provide the identity of producers of the product under investigation in those countries. This information and supporting evidence must reach the Commission within 15 days of the date of publication of this Notice.

Pursuant to point (e) of Article 2(6a) of the basic Regulation, the Commission will shortly after initiation inform parties to the investigation about the relevant sources, including, where appropriate, the selection of an appropriate representative third country that it intends to use for the purpose of determining normal value pursuant to Article 2(6a) by means of a note to the file for inspection by interested parties. Parties to the investigation will be given 10 days to comment on the note, in accordance with point (e) of Article 2(6a).

With the aim of finally selecting the appropriate representative third country, the Commission will examine whether those third countries have a similar level of economic development as that of the country concerned, whether there is production and sales of the product under investigation in those third countries and whether relevant data are readily available. Where there is more than one representative third country, preference will be given, where appropriate, to countries with an adequate level of social and environmental protection. According to the information available to the Commission, a possible appropriate representative third country is Turkey.

In the context of this exercise, the Commission invites the exporting producer concerned to provide information on the materials (raw and processed) and energy used in the production of the product under investigation within 15 days of the date of publication of this Notice. This information must be provided via TRON.tdi at the following address: https://tron.trade.ec.europa.eu/tron/tdi/form/AD690_INFO_ON_INPUTS_FOR_EXPORTING_PRODUCER_FORM TRON access information can be found in sections 6.6 and 6.8 below.

Furthermore, any submissions of factual information to value costs and prices pursuant to point (a) of Article 2(6a) of the basic Regulation must be filed within 65 days of the date of publication of this Notice. Such factual information should be taken exclusively from public sources which are readily available.

6.3.3. *Investigating unrelated importers* [12] [13]

Unrelated importers of the product under investigation from the People's Republic of China to the Union are invited to participate in this investigation.

In view of the potentially large number of unrelated importers involved in this proceeding and in order to complete the investigation within the statutory time limits, the Commission may limit to a reasonable number the unrelated importers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling will be carried out in accordance with Article 17 of the basic Regulation.

[12] This section covers only importers not related to exporting producers. Importers that are related to exporting producers have to fill in Annex I to the questionnaire for these exporting producers. In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

[13] The data provided by unrelated importers may also be used in relation to aspects of this investigation other than the determination of dumping.

In order to enable the Commission to decide whether sampling is necessary and, if so, to select a sample, all unrelated importers, or representatives acting on their behalf, are requested to provide the Commission with the information on their company(ies) requested in the Annex to this Notice within 7 days of the date of publication of this Notice.

In order to obtain information it deems necessary for the selection of the sample of unrelated importers, the Commission may also contact any known associations of importers.

If a sample is necessary, the importers may be selected based on the largest representative volume of sales of the product under investigation in the Union which can reasonably be investigated within the time available.

Once the Commission has received the necessary information to select a sample, it will inform the parties concerned of its decision on the sample of importers. The Commission will also add a note reflecting the sample selection to the file for inspection by interested parties. Any comment on the sample selection must be received within 3 days from the notification of the sample decision.

In order to obtain information it deems necessary for its investigation, the Commission will make available questionnaires to the sampled unrelated importers. Those parties must submit a completed questionnaire within 30 days from the date of the notification of the decision about the sample, unless otherwise specified.

A copy of the questionnaire for importers is available in the file for inspection by interested parties and on DG Trade's Internet: https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2613

6.4. *Procedure for the determination of injury and investigating Union producers*

A determination of injury is based on positive evidence and involves an objective examination of the volume of the dumped imports, their effect on prices on the Union market and the consequent impact of those imports on the Union industry. In order to establish whether the Union industry is injured, Union producers of the product under investigation are invited to participate in the Commission investigation.

In view of the large number of Union producers concerned and in order to complete the investigation within the statutory time limits, the Commission has decided to limit to a reasonable number the Union producers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling is carried out in accordance with Article 17 of the basic Regulation.

The Commission has provisionally selected a sample of Union producers. Details can be found in the file for inspection by interested parties. Interested parties are invited to comment on the provisional sample. In addition, other Union producers, or representatives acting on their behalf, who consider that there are reasons why they should be included in the sample must contact the Commission within 7 days of the date of publication of this Notice. All comments regarding the provisional sample must be received within 7 days of the date of publication of this Notice, unless otherwise specified.

All known Union producers and associations of Union producers will be notified by the Commission of the companies finally selected to be in the sample.

The sampled Union producers will have to submit a completed questionnaire within 30 days from the date of notification of the decision of their inclusion in the sample, unless otherwise specified.

A copy of the questionnaire for Union producers is available in the file for inspection by interested parties and on DG Trade's Internet: https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2613

6.5. *Procedure for the assessment of Union interest*

Should the existence of dumping and injury caused be established, a decision will be reached, pursuant to Article 21 of the basic Regulation, as to whether the adoption of anti-dumping measures would not be in the Union interest. Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations are invited to provide the Commission with information as to whether the imposition of measures is not in the Union interest. In order to participate in the investigation, the representative consumer organisations have to demonstrate that there is an objective link between their activities and the product under investigation.

Information concerning the assessment of Union interest must be provided within 37 days of the date of publication of this Notice unless otherwise specified. This information may be provided either in a free format or by completing a questionnaire prepared by the Commission. A copy of the questionnaires, including the questionnaire for users of the product under investigation, is available in the file for inspection by interested parties and on DG Trade's Internet: https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2613. The information submitted pursuant to Article 21 of the basic Regulation will only be taken into account if supported by factual evidence at the time of submission.

6.6. *Interested parties*

In order to participate in the investigation interested parties, such as exporting producers, Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations must demonstrate that there is an objective link between their activities and the product under investigation.

Exporting producers, Union producers, importers and representative associations who made information available in accordance to the procedures described in sections 6.3.1, 6.3.3, 6.4 and 6.5 above will be considered as interested parties if there is an objective link between their activities and the product under investigation.

Other parties will only be able to participate in the investigation as interested party from the moment they make themselves known, and provided that there is an objective link between their activities and the product under investigation. Being considered as an interested party is without prejudice to the application of Article 18 of the basic Regulation.

Access to the file available for inspection for interested parties is made via TRON.tdi at the following address: https://tron.trade.ec.europa.eu/tron/TDI. Please follow the instructions on that page to get access ([14]).

6.7. *Possibility to be heard by the Commission investigation services*

All interested parties may request to be heard by the Commission's investigation services.

Any request for a hearing must be made in writing and must specify the reasons for the request as well as a summary of what the interested party wishes to discuss during the hearing. The hearing will be limited to the issues set out by the interested parties in writing beforehand.

The timeframe for hearings is as follows:

— For any hearings to take place before the deadline for the imposition of provisional measures, a request should be made within 15 days from the date of publication of this Notice. The hearing will normally take place within 60 days of the date of publication of this Notice.

— After the stage of provisional findings, a request should be made within 5 days from the date of the disclosure of the provisional findings or of the information document. The hearing will normally take place within 15 days from the date of notification of the disclosure or the date of the information document.

— At the stage of definitive findings, a request should be made within 3 days from the date of the final disclosure. The hearing will normally take place within the period granted to comment on the final disclosure. If there is an additional final disclosure, a request should be made immediately upon receipt of this additional final disclosure. The hearing will then normally take place within the deadline to provide comments on this disclosure.

The outlined timeframe is without prejudice to the right of the Commission services to accept hearings outside the timeframe in duly justified cases and to the right of the Commission to deny hearings in duly justified cases. Where the Commission services refuse a hearing request, the party concerned will be informed of the reasons for such refusal.

In principle, hearings will not be used to present factual information which is not yet on file. Nevertheless, in the interest of good administration and to enable Commission services to progress with the investigation, interested parties may be directed to provide new factual information after a hearing.

([14]) In case of technical problems please contact the Trade Service Desk by Email: trade-service-desk@ec.europa.eu or by Tel. +32 22979797.

6.8. ***Instructions for making written submissions and sending completed questionnaires and correspondence***

Information submitted to the Commission for the purpose of trade defence investigations shall be free from copyrights. Interested parties, before submitting to the Commission information and/or data which is subject to third party copyrights, must request specific permission to the copyright holder explicitly allowing the Commission a) to use the information and data for the purpose of this trade defence proceeding and b) to provide the information and/or data to interested parties to this investigation in a form that allows them to exercise their rights of defence.

All written submissions, including the information requested in this Notice, completed questionnaires and correspondence provided by interested parties for which confidential treatment is requested shall be labelled '*Sensitive*' ([15]). Parties submitting information in the course of this investigation are invited to reason their request for confidential treatment.

Parties providing 'Sensitive' information are required to furnish non-confidential summaries of it pursuant to Article 19(2) of the basic Regulation, which will be labelled 'For inspection by interested parties'. Those summaries should be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence.

If a party providing confidential information fails to show good cause for a confidential treatment request or does not furnish a non-confidential summary of it in the requested format and quality, the Commission may disregard such information unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

Interested parties are invited to make all submissions and requests via TRON.tdi (https://tron.trade.ec.europa.eu/tron/TDI) including requests to be registered as interested parties, scanned powers of attorney and certification sheets. By using TRON.tdi or e-mail, interested parties express their agreement with the rules applicable to electronic submissions contained in the document 'CORRESPONDENCE WITH THE EUROPEAN COMMISSION IN TRADE DEFENCE CASES' published on the website of DG Trade: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148003.pdf. The interested parties must indicate their name, address, telephone and a valid e-mail address and they should ensure that the provided e-mail address is a functioning official business e-mail which is checked on a daily basis. Once contact details are provided, the Commission will communicate with interested parties by TRON.tdi or e-mail only, unless they explicitly request to receive all documents from the Commission by another means of communication or unless the nature of the document to be sent requires the use of a registered mail. For further rules and information concerning correspondence with the Commission including principles that apply to submissions via TRON.tdi and by e-mail, interested parties should consult the communication instructions with interested parties referred to above.

Commission address for correspondence:

European Commission
Directorate-General for Trade
Directorate G
Office: CHAR 04/039
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

Email: TRADE-AD690-HTYP-DUMPING@ec.europa.eu

TRADE-AD690-HTYP-INJURY@ec.europa.eu

7. **Schedule of the investigation**

The investigation will be concluded, pursuant to Article 6(9) of the basic Regulation within normally 13, but not more than 14 months of the date of the publication of this Notice. In accordance with Article 7(1) of the basic Regulation, provisional measures may be imposed normally not later than 7 months, but in any event not later than 8 months from the publication of this Notice.

([15]) A 'Sensitive' document is a document which is considered confidential pursuant to Article 19 of the basic Regulation and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). It is also a document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

In accordance with Article 19a of the basic Regulation, the Commission will provide information on the planned imposition of provisional duties 4 weeks before the imposition of provisional measures. Interested parties will be given 3 working days to comment in writing on the accuracy of the calculations.

In cases where the Commission intends not to impose provisional duties but to continue the investigation, interested parties will be informed, by means of an information document, of the non-imposition of duties 4 weeks before the expiry of the deadline under Article 7(1) of the basic Regulation.

Interested parties will be given 15 days to comment in writing on the provisional findings or on the information document, and 10 days to comment in writing on the definitive findings, unless otherwise specified. Where applicable, additional final disclosures will specify the deadline for interested parties to comment in writing.

8. **Review of the measures**

By Council Implementing Regulation (EU) No 1105/2010, a definitive anti-dumping duty was imposed on imports of high tenacity yarn of polyesters originating in the People's Republic of China, currently classified under CN code ex 5402 20 00 (TARIC code 5402 2000 10). The ad valorem duty rate for Zhejiang Hailide New Material Co. Ltd was 0 %.

In light of the report of the Appellate Body of the WTO in Mexico – Beef and Rice ([16]), the continued imposition of the measures imposed on Zhejiang Hailide New Material Co. Ltd by Council Implementing Regulation (EU) No 1105/2010 is no longer appropriate and Implementing Regulation (EU) No 1105/2010 should be amended accordingly. A review should thus be opened as regards Implementing Regulation (EU) No 1105/2010 in order to allow any amendment necessary in the light of the Mexico – Beef and Rice Appellate Body report.

Therefore, the Commission hereby initiates, pursuant to Article 2(3) of Regulation (EU) No 2015/476, a review of Implementing Regulation (EU) No 1105/2010.

9. **Submission of information**

As a rule, interested parties may only submit information in the timeframes specified in sections 5 and 6 of this Notice. The submission of any other information not covered by those sections, should respect the following timetable:

— Any information for the stage of provisional findings should be submitted within 70 days from the date of publication of this Notice, unless otherwise specified.

— Unless otherwise specified, interested parties should not submit new factual information after the deadline to comment on the disclosure of the provisional findings or the information document at the stage of provisional findings. After this deadline, interested parties may only submit new factual information if they can demonstrate that such new factual information is necessary to rebut factual allegations made by other interested parties and provided that such new factual information can be verified within the time available to complete the investigation in a timely manner.

— In order to complete the investigation within the mandatory deadlines, the Commission will not accept submissions from interested parties after the deadline to provide comments on the final disclosure or, if applicable, after the deadline to provide comments on the additional final disclosure.

10. **Possibility to comment on other parties' submissions**

In order to guarantee the rights of defence, interested parties should have the possibility to comment on information submitted by other interested parties. When doing so, interested parties may only address issues raised in the other interested parties' submissions and may not raise new issues.

Such comments should be made according to the following timeframe:

— Any comment on information submitted by other interested parties before the deadline of imposition of provisional measures should be made at the latest on day 75 from the date of publication of this Notice, unless otherwise specified.

([16]) Mexico — Definitive Anti-dumping Measures on Beef and Rice, Report of the Appellate Body, WT/DS295/AB/R, 29 November 2005.

— Comments on the information provided by other interested parties in reaction to the disclosure of the provisional findings or of the information document should be submitted within 7 days from the deadline to comment on the provisional findings or on the information document, unless otherwise specified.

— Comments on the information provided by other interested parties in reaction to the final disclosure should be submitted within 3 days from the deadline to comment on the final disclosure, unless otherwise specified. If there is an additional final disclosure, comments on the information provided by other interested parties in reaction to this disclosure should be made within 1 day from the deadline to comment on this disclosure, unless otherwise specified.

The outlined timeframe is without prejudice to the Commission's right to request additional information from interested parties in duly justified cases.

11. **Extension to time limits specified in this Notice**

Any extension to the time limits provided for in this Notice should only be requested in exceptional circumstances and will only be granted if duly justified upon good cause being shown.

In any event, any extension to the deadline to reply to questionnaires will be limited normally to 3 days, and as a rule will not exceed 7 days.

Regarding time limits for the submission of other information specified in the Notice of Initiation, extensions will be limited to 3 days unless exceptional circumstances are demonstrated.

12. **Non-cooperation**

In cases where any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of facts available, in accordance with Article 18 of the basic Regulation.

Where it is found that any interested party has supplied false or misleading information, the information may be disregarded and use may be made of facts available.

If an interested party does not cooperate or cooperates only partially and findings are therefore based on facts available in accordance with Article 18 of the basic Regulation, the result may be less favourable to that party than if it had cooperated.

Failure to give a computerised response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost. In this case the interested party should immediately contact the Commission.

13. **Hearing Officer**

Interested parties may request the intervention of the Hearing Officer for trade proceedings. The Hearing Officer reviews requests for access to the file, disputes regarding the confidentiality of documents, requests for extension of time limits and any other request concerning the rights of defence of interested parties and third parties as may arise during the proceeding.

The Hearing Officer may organise hearings and mediate between the interested party or parties and the Commission services to ensure that the interested parties' rights of defence are being fully exercised. A request for a hearing with the Hearing Officer should be made in writing and should specify the reasons for the request. The Hearing Officer will examine the reasons for the requests. These hearings should only take place if the issues have not been settled with the Commission services in due course.

Interested parties are invited to follow the timeframes set out in section 6.7 of this Notice also as regards interventions, including hearings, by the Hearing Officer. Any request must be submitted in good time and expeditiously so as not to jeopardise the orderly conduct of proceedings. To that effect, interested parties should request the intervention of the Hearing Officer at the earliest possible time following the occurrence of the event justifying such intervention. The Hearing Officer will examine the reasons for requests for interventions, the nature of the issues raised and the impact of those issues on the rights of defence, having due regard to the interests of good administration and the timely completion of the investigation.

For further information and contact details interested parties may consult the Hearing Officer's web pages on DG Trade's Internet: http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/

14. **Processing of personal data**

Any personal data collected in this investigation will be treated in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council ([17]).

A data protection notice that informs all individuals of the processing of personal data in the framework of Commission's trade defence activities is available on DG Trade's Internet: http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/

([17]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

ANNEX

☐	'Sensitive' version
☐	Version 'For inspection by interested parties'
(tick the appropriate box)	

ANTI-DUMPING PROCEEDING CONCERNING IMPORTS OF HIGH TENACITY YARNS OF POLYESTERS ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

INFORMATION FOR THE SELECTION OF THE SAMPLE OF UNRELATED IMPORTERS

This form is designed to assist unrelated importers in responding to the request for sampling information made in point 6.3.3 of the Notice of initiation.

Both the 'Sensitive' version and the version 'For inspection by interested parties' should be returned to the Commission as set out in the Notice of initiation.

1. **IDENTITY AND CONTACT DETAILS**

Supply the following details about your company:

Company name	
Address	
Contact person	
Email address	
Telephone	

2. **TURNOVER AND SALES VOLUME**

Indicate the total turnover in euros (EUR) of the company, the value in euros (EUR) and volume in tonnes for imports and resales on the Union market after importation from the People's Republic of China, during the investigation period, of the product under investigation as defined in the Notice of initiation.

	Volume in tonnes	Value in euros (EUR)
Total turnover of your company in euros (EUR)		
Imports of the product under investigation originating in the People's Republic of China		
Imports of the product under investigation (all origins)		
Resales on the Union market after importation from the People's Republic of China of the product under investigation		

3. **ACTIVITIES OF YOUR COMPANY AND RELATED COMPANIES** ([1])

Give details of the precise activities of the company and all related companies (please list them and state the relationship to your company) involved in the production and/or selling (export and/or domestic) of the product under investigation. Such activities could include but are not limited to purchasing the product under investigation, producing it under sub-contracting arrangements, or processing or trading it.

Company name and location	Activities	Relationship

4. **OTHER INFORMATION**

Please provide any other relevant information which the company considers useful to assist the Commission in the selection of the sample.

5. **CERTIFICATION**

By providing the above information, the company agrees to its possible inclusion in the sample. If the company is selected to be part of the sample, this will involve completing a questionnaire and accepting a visit at its premises in order to verify its response. If the company indicates that it does not agree to its possible inclusion in the sample, it will be deemed not to have cooperated in the investigation. The Commission's findings for non-cooperating importers are based on the facts available and the result may be less favourable to that company than if it had cooperated.

Signature of authorised official:

Name and title of authorised official:

Date:

([1]) In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

Notice of initiation of an expiry review of the anti-subsidy measures applicable to imports of certain coated fine paper originating in the People's Republic of China

(2022/C 248/09)

Following the publication of a Notice of impending expiry ([1]) of the anti-subsidy measures in force on the imports of certain coated fine paper originating in the People's Republic of China ('the PRC' or 'the country concerned'), the European Commission ('the Commission') has received a request for review pursuant to Article 18 of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union ([2]) ('the basic Regulation').

1. Request for review

The request was submitted on 31 March 2022 by Arctic Paper Grycksbo AB, Burgo Group SpA, Fedrigoni SpA, Lecta Group and Sappi Europe SA ('the applicants'). The request was made by the Union industry of certain coated fine paper in the sense of Article 10(6) of the basic Regulation.

An open version of the request and the analysis of the degree of support by Union producers for the request are available in the file for inspection by interested parties. Section 5.6 of this Notice provides information about access to the file for interested parties.

2. Product under review

The product subject to this review is coated fine paper, which is paper or paperboard coated on one or both sides (excluding kraft paper or kraft paperboard), in either sheets or rolls, and with a weight of 70 g/m^2 or more but not exceeding 400 g/m^2 and brightness of more than 84 (measured according to ISO 2470-1), ('the product under review').

The product under review does not include:

— Rolls suitable for use in web-fed presses. Rolls suitable for use in web-fed presses are defined as those rolls which, if tested according to the ISO test standard ISO 3783:2006 concerning the determination of resistance to picking – accelerated speed method using the IGT tester (electric model), give a result of less than 30 N/m when measuring in the cross-direction of the paper (CD) and a result of less than 50 N/m when measuring in the machine direction (MD).

— Multi-ply paper and multi-ply paperboard.

The product under review is currently falling under CN codes ex 4810 13 00, ex 4810 14 00, ex 4810 19 00, ex 4810 22 00, ex 4810 29 30, ex 4810 29 80, ex 4810 99 10 and ex 4810 99 80 (TARIC codes 4810 13 00 20, 4810 14 00 20, 4810 19 00 20, 4810 22 00 20, 4810 29 30 20, 4810 29 80 20, 4810 99 10 20 and 4810 99 80 20). These CN and TARIC codes are given for information only, without prejudice to their possible amendment at future steps of the proceeding.

3. Existing measures

The measures currently in force are definitive anti-subsidy duties imposed by Commission Implementing Regulation (EU) 2017/1187 ([3]).

4. Grounds for the review

The request is based on the grounds that the expiry of the measures would be likely to result in continuation or recurrence of subsidisation and recurrence of injury to the Union industry.

([1]) OJ C 398, 1.10.2021, p. 18.
([2]) OJ L 176, 30.6.2016, p. 55.
([3]) Commission Implementing Regulation (EU) 2017/1187 of 3 July 2017 imposing a definitive countervailing duty on imports of certain coated fine paper originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council (OJ L 171, 4.7.2017, p. 134).

4.1. ***Allegation of likelihood of continuation or recurrence of subsidisation***

The applicants have provided sufficient evidence that the producers of the product under review in the country concerned have benefitted and are likely to continue to benefit from a number of subsidies granted by the Government of the People's Republic of China and from regional and local governments in that country.

The applicants did not quantify precisely the current level of subsidisation for all subsidies. However, based on the evidence in the request, it appears that the level of subsidisation remains substantial and above *de minimis*.

The alleged subsidy practices consist, inter alia, of (i) direct transfer of funds; (ii) government revenue forgone or not collected; (iii) government provision of goods or services for less than adequate remuneration; and (iv) payments to a funding mechanism or the entrusting or directing of a private body to carry out one or more of the above functions. Amongst others, the applicants alleged the existence of preferential loans, grants, direct tax exemptions and government provision of land for less than adequate remuneration. Some of the alleged subsidy practices were already countervailed in the original investigation while some others are additional or new subsidies which were not examined in the original investigation.

The applicants allege that the measures described are subsidies since they involve a financial contribution from the Government of the country concerned or regional and local governments or any public bodies and confer a benefit to producers of the product under review. These subsidies are alleged to be specific as they are limited to certain enterprises and/or regions and/or they are contingent upon export performance. Therefore, they are alleged to be countervailable within the meaning of Article 4 of the basic Regulation.

In view of Article 18(2) of the basic Regulation, the Commission prepared a memorandum on sufficiency of evidence containing the Commission's assessment on all the evidence at its disposal and on the basis of which the Commission initiates this investigation. That memorandum can be found in the file for inspection by interested parties.

The Commission reserves the right to investigate other relevant subsidy practices which may be revealed during the course of the investigation.

4.2. ***Allegation of likelihood of recurrence of injury***

The applicants allege likelihood of recurrence of injury from the country concerned. In this respect the applicants have provided sufficient evidence that, should measures be allowed to lapse, the current import level of the product under review from the country concerned to the Union is likely to increase due to the existence of a substantial unused capacities in the country concerned. This is also due to the attractiveness of the European Union market in terms of size.

The applicants allege that the removal of injury has been mainly due to the existence of measures and that an increase of imports at subsidised prices from the country concerned would likely lead to a recurrence of injury to the Union industry should measures be allowed to lapse.

5. **Procedure**

Having determined, after consulting the Committee referred to in Article 25(1) of the basic Regulation, that sufficient evidence of a likelihood of subsidisation and injury exists to justify the initiation of an expiry review, the Commission hereby initiates a review in accordance with Article 18 of the basic Regulation.

The expiry review will determine whether the expiry of the measures would be likely to lead to a continuation or recurrence of subsidisation of the product under review originating in the country concerned and a continuation or recurrence of injury to the Union industry.

The Government of the country concerned has been invited for consultations in accordance with Article 10(7) of the basic Regulation.

The Commission also draws the attention of the parties to the published Notice ([4]) on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations that may be applicable to this proceeding.

The Commission further draws the attention of the parties to the separate on-going anti-dumping investigation covering the same product ([5]). The exporting producers, the Union industry, and all the interested parties in that anti-dumping investigation are invited to register separately for this investigation and to submit the relevant information according to the modalities and the timelines specified in this Notice without regard to the information possibly submitted in the context of the anti-dumping investigation. The information or comments submitted in the context of the anti-dumping investigation will not automatically be taken into account in this investigation, and parties will have to submit as a matter of principle all the information concerning this investigation separately in the context of this procedure.

5.1. *Review investigation period and period considered*

The investigation of a continuation or recurrence of subsidisation will cover the period of 1 January 2021 to 31 December 2021 ('the review investigation period'). The examination of trends relevant for the assessment of the likelihood of a continuation or recurrence of injury will cover the period starting on 1 January 2018 to the end of the review investigation period ('the period considered').

5.2. *Comments on the request and the initiation of the investigation*

All interested parties wishing to comment on the request (including matters pertaining to recurrence of injury and causality) or any aspects regarding the initiation of the investigation (including the degree of support for the request) must do so within 37 days of the date of publication of this Notice in the *Official Journal of the European Union* ([6]).

Any request for a hearing with regard to the initiation of the investigation must be submitted within 15 days of the date of publication of this Notice.

5.3. *Procedure for the determination of a likelihood of continuation or recurrence of subsidisation*

In an expiry review, the Commission examines exports that were made to the Union in the review investigation period and, irrespective of exports to the Union, considers whether the situation of the companies producing and selling the product under review in the country concerned is such that exports at subsidised prices to the Union would be likely to continue or recur if measures expire.

Therefore, all producers ([7]) of the product under review from the country concerned, including those that did not cooperate in the investigations leading to the measures in force, are invited to participate in the Commission investigation.

5.3.1. *Investigating producers in the country concerned*

In view of the potentially large number of producers in the country concerned involved in this expiry review and in order to complete the investigation within the statutory time limits, the Commission may limit the producers to be investigated to a reasonable number by selecting a sample (this process is also referred to as 'sampling'). The sampling will be carried out in accordance with Article 27 of the basic Regulation.

In order to enable the Commission to decide whether sampling is necessary, and if so, to select a sample, all producers, or representatives acting on their behalf, including the ones who did not cooperate in the investigation leading to the measures subject to the present review, are hereby requested to make themselves known and to provide the Commission with information on their companies within 7 days of the date of publication of this Notice. This information must be provided via TRON.tdi at: https://tron.trade.ec.europa.eu/tron/tdi/form/R776_SAMPLING_FORM_FOR_EXPORTING PRODUCER

([4]) On the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations (OJ C 86, 16.3.2020, p. 6).
([5]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2616
([6]) All references to the publication of this Notice will be references to publication of this Notice in the *Official Journal of the European Union*, unless otherwise specified.
([7]) A producer is any company in the country concerned which produces the product under review, including any of its related companies involved in the production, domestic sales or exports of the product under review.

Tron access information can be found in sections 5.6 and 5.9 below.

In order to obtain the information it deems necessary for the selection of the sample of producers, the Commission will also contact the authorities of the country concerned and may contact any known associations of producers in the country concerned.

If a sample is necessary, the producers will be selected based on the largest representative volume of production, sales or exports which can reasonably be investigated within the time available. All known producers, the authorities of the country concerned and associations of producers will be notified by the Commission, via the authorities of the country concerned if appropriate, of the companies selected to be in the sample.

Once the Commission has received the necessary information to select a sample of producers, it will inform the parties concerned of its decision whether they are included in the sample. The sampled producers will have to submit a completed questionnaire within 30 days from the date of notification of the decision of their inclusion in the sample, unless otherwise specified.

The Commission will add a note to the file for inspection by interested parties reflecting the sample selection. Any comment on the sample selection must be received within 3 days of the date of notification of the sample decision.

A copy of the questionnaire for producers in the country concerned is available in the file for inspection by interested parties and on DG Trade's Internet: ([8]).

Without prejudice to the possible application of Article 28 of the basic Regulation, companies that have agreed to their possible inclusion in the sample but are not selected to be in the sample will be considered to be cooperating.

5.3.2. *Investigating unrelated importers* ([9]) ([10])

Unrelated importers of the product under review from the country concerned to the Union, including those that did not cooperate in the investigation leading to the measures in force, are invited to participate in this investigation.

In view of the potentially large number of unrelated importers involved in this expiry review and in order to complete the investigation within the statutory time limits, the Commission may limit to a reasonable number the unrelated importers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). Sampling will be carried out in accordance with Article 27 of the basic Regulation.

In order to enable the Commission to decide whether sampling is necessary and, if so, to select a sample, all unrelated importers, or representatives acting on their behalf, including the ones who did not cooperate in the investigation leading to the measures subject to the present review, are hereby requested to make themselves known to the Commission. These parties must do so within 7 days of the date of publication of this Notice by providing the Commission with the information on their company(ies) requested in Annex to this Notice.

([8]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2617.

([9]) Only importers not related to exporting producers can be sampled. Importers that are related to exporting producers have to fill in the Annex to the questionnaire for these exporting producers. In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

([10]) The data provided by unrelated importers may also be used in relation to aspects of this investigation other than the determination of Union interest.

In order to obtain information it deems necessary for the selection of the sample of unrelated importers, the Commission may also contact any known associations of importers.

If a sample is necessary, the importers may be selected based on the largest representative volume of sales of the product under review from the country concerned in the Union which can reasonably be investigated within the time available. All known unrelated importers and associations of importers will be notified by the Commission of the companies selected to be in the sample.

The Commission will also add a note to the file for inspection by interested parties reflecting the sample selection. Any comment on the sample selection must be received within 3 days of the date of notification of the sample decision.

In order to obtain the information it deems necessary for its investigation, the Commission will make available questionnaires to the sampled unrelated importers. Those parties must submit a completed questionnaire within 30 days from the date of the notification of the sample selection, unless otherwise specified.

A copy of the questionnaire for unrelated importers is available in the file for inspection by interested parties and on DG Trade's Internet: ([11]).

5.4. *Procedure for the determination of a likelihood of a continuation or recurrence of injury and investigating Union producers*

In order to establish whether there is a likelihood of a continuation or recurrence of injury to the Union industry, the Commission invites Union producers of the product under review to participate in the investigation.

In view of the large number of Union producers involved in this expiry review and in order to complete the investigation within the statutory time limits, the Commission has decided to limit to a reasonable number the Union producers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling is carried out in accordance with Article 27 of the basic Regulation.

The Commission has provisionally selected a sample of Union producers. Details can be found in the file for inspection by interested parties.

Interested parties are hereby invited to comment on the provisional sample. In addition, other Union producers, or representatives acting on their behalf, that consider that there are reasons why they should be included in the sample must contact the Commission within 7 days of the date of publication of this Notice. All comments regarding the provisional sample must be received within 7 days of the date of publication of this Notice, unless otherwise specified.

The Commission will notify all known Union producers and/or associations of Union producers of the companies finally selected to be in the sample.

The sampled Union producers will have to submit a completed questionnaire within 30 days from the date of notification of the decision of their inclusion in the sample, unless otherwise specified.

A copy of the questionnaire for Union producers is available in the file for inspection by interested parties and on DG Trade's Internet: ([12]).

5.5. *Procedure for the assessment of Union interest*

Should the likelihood of continuation or recurrence of subsidisation and continuation or recurrence of injury be confirmed, a decision will be reached, pursuant to Article 31 of the basic Regulation, as to whether maintaining the countervailing measures would not be against the Union interest.

Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations are invited to provide the Commission with information on the Union interest.

([11]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2617
([12]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2617

Information concerning the assessment of Union interest must be provided within 37 days of the date of publication of this Notice unless otherwise specified. This information may be provided either in a free format or by completing a questionnaire prepared by the Commission.

A copy of the questionnaires, including the questionnaire for users of the product under review, is available in the file for inspection by interested parties and on DG Trade's Internet: ([13]). In any case, information submitted pursuant to Article 31 of the basic Regulation will only be taken into account if supported by factual evidence at the time of submission, which substantiates its validity.

5.6. *Interested parties*

In order to participate in the investigation interested parties, such as producers in the country concerned, Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations first have to demonstrate that there is an objective link between their activities and the product under review.

Producers in the country concerned, Union producers, importers and representative associations who made information available in accordance to the procedures described in sections 5.3.1, 5.3.2 and 5.4 will be considered as interested parties if there is an objective link between their activities and the product under review.

Other parties will only be able to participate in the investigation as interested party from the moment they make themselves known, and provided that there is an objective link between their activities and the product under review. Being considered as an interested party is without prejudice to the application of Article 28 of the basic Regulation.

Access to the file available for inspection for interested parties is made via Tron.tdi at the following address: https://tron.trade.ec.europa.eu/tron/TDI. Please follow the instructions on that page to get access ([14]).

5.7. *Other written submissions*

Subject to the provisions of this Notice, all interested parties are hereby invited to make their views known, submit information and provide supporting evidence. Unless otherwise specified, this information and supporting evidence must reach the Commission within 37 days of the date of publication of this Notice.

5.8. *Possibility to be heard by the Commission investigation services*

All interested parties may request to be heard by the Commission investigation services. Any request to be heard must be made in writing and must specify the reasons for the request as well as a summary of what the interested party wishes to discuss during the hearing. The hearing will be limited to the issues set out by the interested parties in writing beforehand.

In principle, hearings will not be used to present factual information which is not yet on file. Nevertheless, in the interest of good administration and to enable Commission services to progress with the investigation, interested parties may be directed to provide new factual information after a hearing.

5.9. *Instructions for making written submissions and sending completed questionnaires and correspondence*

Information submitted to the Commission for the purpose of trade defence investigations shall be free from copyrights. Interested parties, before submitting to the Commission information and/or data which is subject to third party copyrights, must request specific permission to the copyright holder explicitly allowing the Commission a) to use the information and data for the purpose of this trade defence proceeding and b) to provide the information and/or data to interested parties to this investigation in a form that allows them to exercise their rights of defence.

([13]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2617

([14]) In case of technical problems please contact the Trade Service Desk by Email: trade-service-desk@ec.europa.eu or by Tel. +32 22979797.

All written submissions, including the information requested in this Notice, completed questionnaires and correspondence provided by interested parties for which confidential treatment is requested shall be labelled 'Sensitive' ([15]). Parties submitting information in the course of this investigation are invited to reason their request for confidential treatment.

Parties providing 'Sensitive' information are required to furnish non-confidential summaries of it pursuant to Article 29(2) of the basic Regulation, which will be labelled 'For inspection by interested parties'. These summaries must be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence. If a party providing confidential information fails to show good cause for a confidential treatment request or does not furnish a non-confidential summary of it in the requested format and quality, the Commission may disregard such information unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

Interested parties are invited to make all submissions and requests via TRON.tdi (https://tron.trade.ec.europa.eu/tron/TDI) including scanned powers of attorney and certification sheets. By using TRON.tdi or email, interested parties express their agreement with the rules applicable to electronic submissions contained in the document 'CORRESPONDENCE WITH THE EUROPEAN COMMISSION IN TRADE DEFENCE CASES' published on the website of the Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148003.pdf. The interested parties must indicate their name, address, telephone and a valid email address and they should ensure that the provided email address is a functioning official business email which is checked on a daily basis. Once contact details are provided, the Commission will communicate with interested parties by TRON.tdi or email only, unless they explicitly request to receive all documents from the Commission by another means of communication or unless the nature of the document to be sent requires the use of a registered mail. For further rules and information concerning correspondence with the Commission including principles that apply to submissions via TRON.tdi and by email, interested parties should consult the communication instructions with interested parties referred to above.

Commission address for correspondence:

European Commission
Directorate-General for Trade
Directorate G
Office: CHAR 04/039
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

TRON.tdi: https://tron.trade.ec.europa.eu/tron/tdi

Email:

For subsidy aspects: TRADE-R776-CFP-SUBSIDY@ec.europa.eu

For injury and Union interest aspects: TRADE-R775-R76-CFP-INJURY@ec.europa.eu

6. **Schedule of the investigation**

The investigation shall normally be concluded within 12 months and in any event no later than 15 months from the date of the publication of this Notice, pursuant to Article 22(1) of the basic Regulation.

7. **Submission of information**

As a rule, interested parties may only submit information in the timeframes specified in section 5 of this Notice.

In order to complete the investigation within the mandatory deadlines, the Commission will not accept submissions from interested parties after the deadline to provide comments on the final disclosure or, if applicable, after the deadline to provide comments on the additional final disclosure.

([15]) A 'Sensitive' document is a document which is considered confidential pursuant to Article 29 of the basic Regulation and Article 12 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). It is also a document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

8. **Possibility to comment on other parties' submissions**

In order to guarantee the rights of defence, interested parties should have the possibility to comment on information submitted by other interested parties. When doing so, interested parties may only address issues raised in the other interested parties' submissions and may not raise new issues.

Comments on the information provided by other interested parties in reaction to the disclosure of the definitive findings should be submitted within 5 days from the deadline to comment on the definitive findings, unless otherwise specified. If there is an additional final disclosure, comments on the information provided by other interested parties in reaction to this further disclosure should be made within 1 day from the deadline to comment on this further disclosure, unless otherwise specified.

The outlined timeframe is without prejudice to the Commission's right to request additional information from interested parties in duly justified cases.

9. **Extension to time limits specified in this Notice**

Any extension to the time limits provided for in this Notice should only be requested in exceptional circumstances and will only be granted if duly justified. In any event, any extensions to the deadline to reply to questionnaires will be limited normally to 3 days, and as a rule will not exceed 7 days. Regarding time limits for the submission of other information specified in the Notice of initiation, extensions will be limited to 3 days unless exceptional circumstances are demonstrated.

10. **Non-cooperation**

In cases where any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, findings, affirmative or negative, may be made on the basis of facts available, in accordance with Article 28 of the basic Regulation.

Where it is found that any interested party has supplied false or misleading information, the information may be disregarded and use may be made of facts available.

If an interested party does not cooperate or cooperates only partially and findings are therefore based on facts available in accordance with Article 28 of the basic Regulation, the result may be less favourable to that party than if it had cooperated.

Failure to give a computerised response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost. The interested party should immediately contact the Commission.

11. **Hearing Officer**

Interested parties may request the intervention of the Hearing Officer for trade proceedings. The Hearing Officer reviews requests for access to the file, disputes regarding the confidentiality of documents, requests for extension of time limits and any other request concerning the rights of defence of interested parties and third parties as may arise during the proceeding.

The Hearing Officer may organise hearings and mediate between the interested party/-ies and Commissions services to ensure that the interested parties' rights of defence are being fully exercised. A request for a hearing with the Hearing Officer should be made in writing and should specify the reasons for the request. The Hearing Officer will examine the reasons for the requests. These hearings should only take place if the issues have not been settled with the Commission services in due course.

Any request must be submitted in good time and expeditiously so as not to jeopardise the orderly conduct of proceedings. To that effect, interested parties should request the intervention of the Hearing Officer at the earliest possible time following the occurrence of the event justifying such intervention. Where hearing requests are submitted outside the relevant timeframes, the Hearing Officer will also examine the reasons for such late requests, the nature of the issues raised and the impact of those issues on the rights of defence, having due regard to the interests of good administration and the timely completion of the investigation.

For further information and contact details interested parties may consult the Hearing Officer's web pages on DG Trade's Internet: http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/

12. **Possibility to request a review under Article 19 of the basic Regulation**

As this expiry review is initiated in accordance with the provisions of Article 18 of the basic Regulation, the findings thereof will not lead to the existing measures being amended but will lead to those measures being repealed or maintained in accordance with Article 22(3) of the basic Regulation.

If any interested party considers that a review of the measures is warranted so as to allow for the possibility to amend the measures, that party may request a review pursuant to Article 19 of the basic Regulation.

Parties wishing to request such a review, which would be carried out independently of the expiry review mentioned in this Notice, may contact the Commission at the address given above.

13. **Processing of personal data**

Any personal data collected in this investigation will be treated in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council ([16]).

A data protection notice that informs all individuals of the processing of personal data in the framework of Commission's trade defence activities is available on DG Trade's Internet: http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/

([16]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

ANNEX

☐	'Sensitive' version
☐	Version 'For inspection by interested parties'
(tick the appropriate box)	

EXPIRY REVIEW OF THE ANTI-SUBSIDY MEASURES APPLICABLE TO IMPORTS OF CERTAIN COATED FINE PAPER ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

INFORMATION FOR THE SELECTION OF THE SAMPLE OF UNRELATED IMPORTERS

This form is designed to assist unrelated importers in responding to the request for sampling information made in point 5.3.2 of the Notice of initiation.

Both the Sensitive version and the version For inspection by interested parties should be returned to the Commission as set out in the notice of initiation.

1. **IDENTITY AND CONTACT DETAILS**

Supply the following details about your company:

Company name	
Address	
Contact person	
Email address	
Telephone number	

2. **TURNOVER AND SALES VOLUME**

Indicate the total turnover in euros (EUR) of the company, the value in euros (EUR) and volume in tonnes for imports and resales on the Union market after importation from the People's Republic of China, during the review investigation period, of the product under review as defined in the Notice of initiation.

	Volume in tonnes	Value in euros (EUR)
Total turnover of your company in euros (EUR)		
Imports of the product under review originating in the People's Republic of China		
Imports of the product under review (all origins)		
Resales on the Union market after importation from the People's Republic of China of the product under review		

3. **ACTIVITIES OF YOUR COMPANY AND RELATED COMPANIES** ([1])

Give details of the precise activities of the company and all related companies (please list them and state the relationship to your company) involved in the production and/or selling (export and/or domestic) of the product under review. Such activities could include but are not limited to purchasing the product under review, producing it under sub-contracting arrangements, or processing or trading it.

Company name and location	Activities	Relationship

4. **OTHER INFORMATION**

Please provide any other relevant information which the company considers useful to assist the Commission in the selection of the sample.

5. **CERTIFICATION**

By providing the above information, the company agrees to its possible inclusion in the sample. If the company is selected to be part of the sample, this will involve completing a questionnaire and accepting a visit at its premises in order to verify its response. If the company indicates that it does not agree to its possible inclusion in the sample, it will be deemed not to have cooperated in the investigation. The Commission's findings for non-cooperating importers are based on the facts available and the result may be less favourable to that company than if it had cooperated.

Signature of authorised official:

Name and title of authorised official:

Date:

([1]) In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain coated fine paper originating in the People's Republic of China

(2022/C 248/10)

Following the publication of a Notice of impending expiry ([1]) of the anti-dumping measures in force on the imports of certain coated fine paper originating in the People's Republic of China ('the PRC' or 'the country concerned'), the European Commission ('the Commission') has received a request for review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([2]) ('the basic Regulation').

1. Request for review

The request was submitted on 31 March 2022 by Arctic Paper Grycksbo AB, Burgo Group SpA, Fedrigoni SpA, Lecta Group and Sappi Europe SA ('the applicants'). The request was made by the Union industry of certain coated fine paper in the sense of Article 5(4) of the basic Regulation.

An open version of the request and the analysis of the degree of support by Union producers for the request are available in the file for inspection by interested parties. Section 5.6 of this Notice provides information about access to the file for interested parties.

2. Product under review

The product subject to this review is coated fine paper, which is paper or paperboard coated on one or both sides (excluding kraft paper or kraft paperboard), in either sheets or rolls, and with a weight of 70 g/m^2 or more but not exceeding 400 g/m^2 and brightness of more than 84 (measured according to ISO 2470-1), ('the product under review').

The product under review does not include:

— Rolls suitable for use in web-fed presses. Rolls suitable for use in web-fed presses are defined as those rolls which, if tested according to the ISO test standard ISO 3783:2006 concerning the determination of resistance to picking – accelerated speed method using the IGT tester (electric model), give a result of less than 30 N/m when measuring in the cross-direction of the paper (CD) and a result of less than 50 N/m when measuring in the machine direction (MD).

— Multi-ply paper and multi-ply paperboard.

The product under review is currently falling under CN codes ex 4810 13 00, ex 4810 14 00, ex 4810 19 00, ex 4810 22 00, ex 4810 29 30, ex 4810 29 80, ex 4810 99 10 and ex 4810 99 80 (TARIC codes 4810 13 00 20, 4810 14 00 20, 4810 19 00 20, 4810 22 00 20, 4810 29 30 20, 4810 29 80 20, 4810 99 10 20 and 4810 99 80 20). These CN and TARIC codes are given for information only, without prejudice to their possible amendment at future steps of the proceeding.

3. Existing measures

The measures currently in force are definitive anti-dumping duties imposed by Commission Implementing Regulation (EU) 2017/1188 ([3]).

4. Grounds for the review

The request is based on the grounds that the expiry of the measures would be likely to result in recurrence of dumping and recurrence of injury to the Union industry.

([1]) OJ C 398, 1.10.2021, p. 16.
([2]) OJ L 176, 30.6.2016, p. 21.
([3]) Commission Implementing Regulation (EU) 2017/1188 of 3 July 2017 imposing a definitive anti-dumping duty on imports of certain coated fine paper originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of the Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 171, 4.7.2017, p. 168).

4.1. ***Allegation of likelihood of recurrence of dumping from the PRC***

The applicants claimed that it is not appropriate to use domestic prices and costs in the PRC, due to the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation.

To substantiate the allegations of significant distortions, the applicants relied on the information contained in the country report produced by the Commission services on 20 December 2017 describing the specific market circumstances in the PRC ([4]). In particular, the applicants referred to distortions such as state presence in general and more specific affecting the chemical sector and to the chapter on energy. In addition, the applicants relied on publicly available information, in particular the "Fourteenth Five-Year Plan for the National Economic and Social Development of the People's Republic of China and the Outline of the Long-term Goals for 2035. Finally, the applicants also relied on the Commission's findings in recent anti-dumping and anti-subsidy investigations ([5]).

As a result, in view of Article 2(6a)(a) of the basic Regulation, the allegation of recurrence of dumping from the PRC is based on a comparison of a constructed normal value on the basis of costs of production and sale reflecting undistorted prices or benchmarks in an appropriate representative country with the export price (at ex-works level) of the product under review when sold for export to Russia, Ukraine, India, Thailand, Canada, Japan, Indonesia, Malaysia and the United Kingdom, in view of the current absence of significant import volumes from the PRC to the Union.

On the basis of the above comparison, which shows dumping, the applicants allege that there is a likelihood of recurrence of dumping from the PRC.

In light of the information available, the Commission considers that there is sufficient evidence pursuant to Article 5(9) of the basic Regulation tending to show that, due to significant distortions affecting prices and costs, the use of domestic prices and costs in the country concerned is inappropriate, thus warranting the initiation of an investigation on the basis of Article 2(6a) of the basic Regulation.

The country report is available in the file for inspection by interested parties and on DG Trade's Internet: ([6]).

4.2. ***Allegation of likelihood of recurrence of injury***

The applicants allege likelihood of recurrence of injury from the country concerned. In this respect the applicants have provided sufficient evidence that, should measures be allowed to lapse, the current import level of the product under review from the country concerned to the Union is likely to increase due to the existence of a substantial unused capacities in the country concerned. This is also due to the attractiveness of the European Union market in terms of size.

The applicants allege that the removal of injury has been mainly due to the existence of measures and that an increase of imports at dumped prices from the country concerned would likely lead to a recurrence of injury to the Union industry should measures be allowed to lapse.

5. **Procedure**

Having determined, after consulting the Committee established by Article 15(1) of the basic Regulation, that sufficient evidence of a likelihood of dumping and injury exists to justify the initiation of an expiry review, the Commission hereby initiates a review in accordance with Article 11(2) of the basic Regulation.

([4]) Commission Staff Working Document, on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, 20 December 2017, SWD(2017) 483 final/2, available at: https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf

([5]) Commission Implementing Regulation (EU) 2020/492 of 1 April 2020 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ L 108, 6.4.2020, p. 1) and Commission Implementing Regulation (EU) 2021/328 of 24 February 2021 imposing a definitive countervailing duty on imports of continuous filament glass fibre products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council (OJ L 65, 25.2.2021, p. 1).

([6]) Documents cited in the country report may also be obtained upon a duly reasoned request.

The expiry review will determine whether the expiry of the measures would be likely to lead to a continuation or recurrence of dumping of the product under review originating in the country concerned and a continuation or recurrence of injury to the Union industry.

The Commission also draws the attention of the parties to the published Notice ([7]) on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations that may be applicable to this proceeding.

The Commission further draws the attention of the parties to the separate on-going anti-subsidy investigation covering the same product ([8]). The exporting producers, the Union industry, and all the interested parties in that anti-subsidy investigation are invited to register separately for this investigation and to submit the relevant information according to the modalities and the timelines specified in this Notice without regard to the information possibly submitted in the context of the anti-subsidy investigation. The information or comments submitted in the context of the anti-subsidy investigation will not automatically be taken into account in this investigation, and parties will have to submit as a matter of principle all the information concerning this investigation separately in the context of this procedure.

5.1. ***Review investigation period and period considered***

The investigation of a continuation or recurrence of dumping will cover the period from 1 January 2021 to 31 December 2021 ('the review investigation period'). The examination of trends relevant for the assessment of the likelihood of a continuation or recurrence of injury will cover the period from 1 January 2018 to the end of the review investigation period ('the period considered').

5.2. ***Comments on the request and the initiation of the investigation***

All interested parties wishing to comment on the request (including matters pertaining to recurrence of injury and causality) or any aspects regarding the initiation of the investigation (including the degree of support for the request) must do so within 37 days of the date of publication of this Notice in the *Official Journal of the European Union* ([9]).

Any request for a hearing with regard to the initiation of the investigation must be submitted within 15 days of the date of publication of this Notice.

5.3. ***Procedure for the determination of a likelihood of continuation or recurrence of dumping***

In an expiry review, the Commission examines exports that were made to the Union in the review investigation period and, irrespective of exports to the Union, considers whether the situation of the companies producing and selling the product under review in the country concerned is such that exports at dumped prices to the Union would be likely to continue or recur if measures expire.

Therefore, all producers ([10]) of the product under review from the country concerned, including those that did not cooperate in the investigation leading to the measures in force, are invited to participate in the Commission investigation.

5.3.1. *Investigating producers in the country concerned*

In view of the potentially large number of producers in the country concerned involved in this expiry review and in order to complete the investigation within the statutory time limits, the Commission may limit the producers to be investigated to a reasonable number by selecting a sample (this process is also referred to as 'sampling'). The sampling will be carried out in accordance with Article 17 of the basic Regulation.

([7]) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0316%2802%29

([8]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2617

([9]) All references to the publication of this Notice will be references to publication of this Notice in the *Official Journal of the European Union*, unless otherwise specified.

([10]) A producer is any company in the country concerned which produces the product under review, including any of its related companies involved in the production, domestic sales or exports of the product under review.

In order to enable the Commission to decide whether sampling is necessary, and if so, to select a sample, all producers, or representatives acting on their behalf, including the ones who did not cooperate in the investigation leading to the measures subject to the present review, are hereby requested to provide the Commission with information on their companies within 7 days of the date of publication of this Notice. This information must be provided via TRON.tdi at the following address: https://tron.trade.ec.europa.eu/tron/tdi/form/R775_SAMPLING_FORM_FOR_EXPORTING_PRODUCER Tron access information can be found in sections 5.6 and 5.9 below.

In order to obtain the information it deems necessary for the selection of the sample of producers, the Commission will also contact the authorities of the country concerned and may contact any known associations of producers in the country concerned.

If a sample is necessary, the producers will be selected based on the largest representative volume of production, sales or exports which can reasonably be investigated within the time available. All known producers in the country concerned, the authorities of the country concerned and associations of producers will be notified by the Commission, via the authorities of the country concerned if appropriate, of the companies selected to be in the sample.

Once the Commission has received the necessary information to select a sample of producers, it will inform the parties concerned of its decision whether they are included in the sample. The sampled producers will have to submit a completed questionnaire within 30 days from the date of notification of the decision of their inclusion in the sample, unless otherwise specified.

The Commission will add a note to the file for inspection by interested parties reflecting the sample selection. Any comment on the sample selection must be received within 3 days of the date of notification of the sample decision.

A copy of the questionnaire for producers in the country concerned is available in the file for inspection by interested parties and on DG Trade's Internet: ([11]).

Without prejudice to the possible application of Article 18 of the basic Regulation, companies that have agreed to their possible inclusion in the sample but are not selected to be in the sample will be considered to be cooperating.

5.3.2. *Additional procedure with regard to the PRC that is subject to significant distortions*

Subject to the provisions of this Notice, all interested parties are hereby invited to make their views known, submit information and provide supporting evidence regarding the application of Article 2(6a) of the basic Regulation. Unless otherwise specified, this information and supporting evidence must reach the Commission within 37 days of the date of publication of this Notice.

In particular, the Commission invites all interested parties to make their views known on the inputs and the Harmonised System (HS) codes provided in the request, propose (an) appropriate representative country(ies) and provide the identity of producers of the product under review in those countries. This information and supporting evidence must reach the Commission within 15 days of the date of publication of this Notice.

Pursuant to point (e) of Article 2(6a) of the basic Regulation, the Commission will, shortly after initiation, by means of a note to the file for inspection by interested parties, inform parties to the investigation about the relevant sources that it intends to use for the purpose of determining normal value in the PRC pursuant to Article 2(6a) of the basic Regulation. This will cover all sources, including the selection of an appropriate representative third country where appropriate. Parties to the investigation shall be given 10 days from the date at which that note is added to that file to submit comments.

According to the information available to the Commission, a possible representative third country for the PRC in this case is Indonesia. With the aim of finally selecting the appropriate representative third country, the Commission will examine whether there are countries with a similar level of economic development as the PRC, in which there is production and sales of the product under review and in which relevant data are readily available. Where there is more than one such country, preference will be given, where appropriate, to countries with an adequate level of social and environmental protection.

([11]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2616

With regard to the relevant sources, the Commission invites all producers in the PRC to provide information on the materials (raw and processed) and energy used in the production of the product under review within 15 days of the date of publication of this Notice. This information must be provided via TRON.tdi at the following address: https://tron.trade.ec.europa.eu/tron/tdi/form/R775_INFO_ON_INPUTS_FOR_EXPORTING_PRODUCER_FORM. Tron access information can be found in sections 5.6 and 5.9 below.

Furthermore, any submissions of factual information to value costs and prices pursuant to point (a) of Article 2(6a) of the basic Regulation must be filed within 65 days of the date of publication of this Notice. Such factual information should be taken exclusively from publicly available sources.

In order to obtain the information it deems necessary for its investigation with regard to the alleged significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation, the Commission will also make available a questionnaire to the Government of the PRC.

5.3.3. *Investigating unrelated importers* ([12]) ([13])

Unrelated importers of the product under review from the country concerned to the Union, including those that did not cooperate in the investigation leading to the measures in force, are invited to participate in this investigation.

In view of the potentially large number of unrelated importers involved in this expiry review and in order to complete the investigation within the statutory time limits, the Commission may limit to a reasonable number the unrelated importers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling will be carried out in accordance with Article 17 of the basic Regulation.

In order to enable the Commission to decide whether sampling is necessary and, if so, to select a sample, all unrelated importers, or representatives acting on their behalf, including the ones who did not cooperate in the investigation leading to the measures subject to the present review, are hereby requested to make themselves known to the Commission. These parties must do so within 7 days of the date of publication of this Notice by providing the Commission with the information on their company(ies) requested in the Annex to this Notice.

In order to obtain information it deems necessary for the selection of the sample of unrelated importers, the Commission may also contact any known associations of importers.

If a sample is necessary, the importers may be selected based on the largest representative volume of sales of the product under review from the country concerned in the Union that can reasonably be investigated within the time available. All known unrelated importers and associations of importers will be notified by the Commission of the companies selected to be in the sample.

The Commission will also add a note to the file for inspection by interested parties reflecting the sample selection. Any comment on the sample selection must be received within 3 days of the date of notification of the sample decision.

([12]) Only importers not related to producers in the country concerned can be sampled. Importers that are related to producers have to fill in Annex I to the questionnaire for these producers. In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

([13]) The data provided by unrelated importers may also be used in relation to aspects of this investigation other than the determination of dumping.

In order to obtain the information it deems necessary for its investigation, the Commission will make available questionnaires to the sampled unrelated importers. Those parties must submit a completed questionnaire within 30 days from the date of the notification of the sample selection, unless otherwise specified.

A copy of the questionnaire for unrelated importers is available in the file for inspection by interested parties and on DG Trade's Internet: ([14]).

5.4. *Procedure for the determination of a likelihood of a continuation or recurrence of injury and investigating Union producers*

In order to establish whether there is a likelihood of a continuation or recurrence of injury to the Union industry, the Commission invites Union producers of the product under review to participate in the investigation.

In view of the large number of Union producers involved in this expiry review and in order to complete the investigation within the statutory time limits, the Commission has decided to limit to a reasonable number the Union producers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling is carried out in accordance with Article 17 of the basic Regulation.

The Commission has provisionally selected a sample of Union producers. Details can be found in the file for inspection by interested parties.

Interested parties are hereby invited to comment on the provisional sample. In addition, other Union producers, or representatives acting on their behalf, including Union producers who did not cooperate in the investigation leading to the measures in force, that consider that there are reasons why they should be included in the sample must contact the Commission within 7 days of the date of publication of this Notice. All comments regarding the provisional sample must be received within 7 days of the date of publication of this Notice, unless otherwise specified.

The Commission will notify all known Union producers and/or associations of Union producers of the companies finally selected to be in the sample.

The sampled Union producers will have to submit a completed questionnaire within 30 days from the date of notification of the decision of their inclusion in the sample, unless otherwise specified.

A copy of the questionnaire for Union producers is available in the file for inspection by interested parties and on DG Trade's Internet: ([15]).

5.5. *Procedure for the assessment of Union interest*

Should the likelihood of continuation or recurrence of dumping and injury be confirmed, a decision will be reached, pursuant to Article 21 of the basic Regulation, as to whether maintaining the anti-dumping measures would not be against the Union interest.

Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations are invited to provide the Commission with information on the Union interest.

Information concerning the assessment of the Union interest must be provided within 37 days of the date of publication of this Notice, unless otherwise specified. This information may be provided either in a free format or by completing a questionnaire prepared by the Commission.

A copy of the questionnaires, including the questionnaire for users of the product under review, is available in the file for inspection by interested parties and on DG Trade's Internet: ([16]). In any case, information submitted pursuant to Article 21 of the basic Regulation will only be taken into account if supported by factual evidence at the time of submission, which substantiates its validity.

([14]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2616
([15]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2616
([16]) https://trade.ec.europa.eu/tdi/case_details.cfm?id=2616

5.6. ***Interested parties***

In order to participate in the investigation, interested parties, such as producers in the country concerned, Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations first have to demonstrate that there is an objective link between their activities and the product under review.

Producers in the country concerned, Union producers, importers and representative associations who made information available in accordance to the procedures described in sections 5.3.1, 5.3.3 and 5.4 will be considered as interested parties if there is an objective link between their activities and the product under review.

Other parties will only be able to participate in the investigation as interested party from the moment they make themselves known, and provided that there is an objective link between their activities and the product under review. Being considered as an interested party is without prejudice to the application of Article 18 of the basic Regulation.

Access to the file available for inspection for interested parties is made via Tron.tdi at the following address: https://tron.trade.ec.europa.eu/tron/TDI. Please follow the instructions on that page to get access ([17]).

5.7. ***Other written submissions***

Subject to the provisions of this Notice, all interested parties are hereby invited to make their views known, submit information and provide supporting evidence. Unless otherwise specified, this information and supporting evidence must reach the Commission within 37 days of the date of publication of this Notice.

5.8. ***Possibility to be heard by the Commission investigation services***

All interested parties may request to be heard by the Commission investigation services. Any request to be heard must be made in writing and must specify the reasons for the request as well as a summary of what the interested party wishes to discuss during the hearing. The hearing will be limited to the issues set out by the interested parties in writing beforehand.

In principle, hearings will not be used to present factual information which is not yet on file. Nevertheless, in the interest of good administration and to enable Commission services to progress with the investigation, interested parties may be directed to provide new factual information after a hearing.

5.9. ***Instructions for making written submissions and sending completed questionnaires and correspondence***

Information submitted to the Commission for the purpose of trade defence investigations shall be free from copyrights. Interested parties, before submitting to the Commission information and/or data which is subject to third party copyrights, must request specific permission to the copyright holder explicitly allowing the Commission a) to use the information and data for the purpose of this trade defence proceeding and b) to provide the information and/or data to interested parties to this investigation in a form that allows them to exercise their rights of defence.

All written submissions, including the information requested in this Notice, completed questionnaires and correspondence provided by interested parties for which confidential treatment is requested shall be labelled 'Sensitive' ([18]). Parties submitting information in the course of this investigation are invited to reason their request for confidential treatment.

([17]) In case of technical problems please contact the Trade Service Desk by Email: trade-service-desk@ec.europa.eu or by Tel. +32 22979797.

([18]) A 'Sensitive' document is a document which is considered confidential pursuant to Article 19 of the basic Regulation and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). It is also a document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

Parties providing 'Sensitive' information are required to furnish non-confidential summaries of it pursuant to Article 19(2) of the basic Regulation, which will be labelled 'For inspection by interested parties'. These summaries must be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence. If a party providing confidential information fails to show good cause for a confidential treatment request or does not furnish a non-confidential summary of it in the requested format and quality, the Commission may disregard such information unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

Interested parties are invited to make all submissions and requests via TRON.tdi (https://tron.trade.ec.europa.eu/tron/TDI) including requests to be registered as interested parties, scanned powers of attorney and certification sheets. By using TRON.tdi or email, interested parties express their agreement with the rules applicable to electronic submissions contained in the document 'CORRESPONDENCE WITH THE EUROPEAN COMMISSION IN TRADE DEFENCE CASES' published on the website of the Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148003.pdf. The interested parties must indicate their name, address, telephone and a valid email address and they should ensure that the provided email address is a functioning official business email which is checked on a daily basis. Once contact details are provided, the Commission will communicate with interested parties by TRON.tdi or email only, unless they explicitly request to receive all documents from the Commission by another means of communication or unless the nature of the document to be sent requires the use of a registered mail. For further rules and information concerning correspondence with the Commission including principles that apply to submissions via TRON.tdi and by email, interested parties should consult the communication instructions with interested parties referred to above.

Commission address for correspondence:

European Commission
Directorate-General for Trade
Directorate G
Office: CHAR 04/039
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

TRON.tdi: https://tron.trade.ec.europa.eu/tron/tdi

Email:

For dumping issues: TRADE-R775-CFP-DUMPING@ec.europa.eu

For injury and Union interest issues: TRADE-R775-R776-CFP-INJURY@ec.europa.eu

6. **Schedule of the investigation**

The investigation shall normally be concluded within 12 months and in any event no later than 15 months from the date of the publication of this Notice, pursuant to Article 11(5) of the basic Regulation.

7. **Submission of information**

As a rule, interested parties may only submit information in the timeframes specified in section 5 of this Notice.

In order to complete the investigation within the mandatory deadlines, the Commission will not accept submissions from interested parties after the deadline to provide comments on the final disclosure or, if applicable, after the deadline to provide comments on the additional final disclosure.

8. **Possibility to comment on other parties' submissions**

In order to guarantee the rights of defence, interested parties should have the possibility to comment on information submitted by other interested parties. When doing so, interested parties may only address issues raised in the other interested parties' submissions and may not raise new issues.

Comments on the information provided by other interested parties in reaction to the disclosure of the definitive findings should be submitted within 5 days from the deadline to comment on the definitive findings, unless otherwise specified. If there is an additional final disclosure, comments on the information provided by other interested parties in reaction to this further disclosure should be made within 1 day from the deadline to comment on this further disclosure, unless otherwise specified.

The outlined timeframe is without prejudice to the Commission's right to request additional information from interested parties in duly justified cases.

9. **Extension to time limits specified in this Notice**

Any extension to the time limits provided for in this Notice should only be requested in exceptional circumstances and will only be granted if duly justified. In any event, any extensions to the deadline to reply to questionnaires will be limited normally to 3 days, and as a rule will not exceed 7 days. Regarding time limits for the submission of other information specified in the Notice of initiation, extensions will be limited to 3 days unless exceptional circumstances are demonstrated.

10. **Non-cooperation**

In cases where any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, findings, affirmative or negative, may be made on the basis of facts available, in accordance with Article 18 of the basic Regulation.

Where it is found that any interested party has supplied false or misleading information, the information may be disregarded and use may be made of facts available.

If an interested party does not cooperate or cooperates only partially and findings are therefore based on facts available in accordance with Article 18 of the basic Regulation, the result may be less favourable to that party than if it had cooperated.

Failure to give a computerised response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost. The interested party should immediately contact the Commission.

11. **Hearing Officer**

Interested parties may request the intervention of the Hearing Officer in trade proceedings. The Hearing Officer reviews requests for access to the file, disputes regarding the confidentiality of documents, requests for extension of time limits and any other request concerning the rights of defence of interested parties and third parties as may arise during the proceeding.

The Hearing Officer may organise hearings and mediate between the interested party/-ies and Commissions services to ensure that the interested parties' rights of defence are being fully exercised. A request for a hearing with the Hearing Officer should be made in writing and should specify the reasons for the request. The Hearing Officer will examine the reasons for the requests. These hearings should only take place if the issues have not been settled with the Commission services in due course.

Any request must be submitted in good time and expeditiously so as not to jeopardise the orderly conduct of proceedings. To that effect, interested parties should request the intervention of the Hearing Officer at the earliest possible time following the occurrence of the event justifying such intervention. Where hearing requests are submitted outside the relevant timeframes, the Hearing Officer will also examine the reasons for such late requests, the nature of the issues raised and the impact of those issues on the rights of defence, having due regard to the interests of good administration and the timely completion of the investigation.

For further information and contact details interested parties may consult the Hearing Officer's web pages on DG Trade's Internet: http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/

12. **Possibility to request a review under Article 11(3) of the basic Regulation**

As this expiry review is initiated in accordance with the provisions of Article 11(2) of the basic Regulation, the findings thereof will not lead to the existing measures being amended but will lead to those measures being repealed or maintained in accordance with Article 11(6) of the basic Regulation.

If any interested party considers that a review of the measures is warranted so as to allow for the possibility to amend the measures, that party may request a review pursuant to Article 11(3) of the basic Regulation.

Parties wishing to request such a review, which would be carried out independently of the expiry review mentioned in this Notice, may contact the Commission at the address given above.

13. **Processing of personal data**

Any personal data collected in this investigation will be treated in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council ([19]).

A data protection notice that informs all individuals of the processing of personal data in the framework of Commission's trade defence activities is available on DG Trade's Internet: http://ec.europa.eu/trade/policy/accessing- markets/trade-defence/

([19]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

ANNEX

☐	'Sensitive' version
☐	Version 'For inspection by interested parties'
(tick the appropriate box)	

EXPIRY REVIEW OF THE ANTI-DUMPING MEASURES APPLICABLE TO IMPORTS OF CERTAIN COATED FINE PAPER ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

INFORMATION FOR THE SELECTION OF THE SAMPLE OF UNRELATED IMPORTERS

This form is designed to assist unrelated importers in responding to the request for sampling information made in point 5.3.3 of the Notice of initiation.

Both the Sensitive version and the version For inspection by interested parties should be returned to the Commission as set out in the notice of initiation.

1. **IDENTITY AND CONTACT DETAILS**

Supply the following details about your company:

Company name	
Address	
Contact person	
Email address	
Telephone number	

2. **TURNOVER AND SALES VOLUME**

Indicate the total turnover in euros (EUR) of the company, the value in euros (EUR) and volume in tonnes for imports and resales on the Union market after importation from the People's Republic of China, during the review investigation period, of the product under review as defined in the Notice of initiation.

	Volume in tonnes	Value in euros (EUR)
Total turnover of your company in euros (EUR)		
Imports of the product under review originating in the People's Republic of China		
Imports of the product under review (all origins)		
Resales on the Union market after importation from the People's Republic of China of the product under review		

3. **ACTIVITIES OF YOUR COMPANY AND RELATED COMPANIES** ([1])

Give details of the precise activities of the company and all related companies (please list them and state the relationship to your company) involved in the production and/or selling (export and/or domestic) of the product under review. Such activities could include but are not limited to purchasing the product under review, producing it under sub-contracting arrangements, or processing or trading it.

Company name and location	Activities	Relationship

4. **OTHER INFORMATION**

Please provide any other relevant information which the company considers useful to assist the Commission in the selection of the sample.

5. **CERTIFICATION**

By providing the above information, the company agrees to its possible inclusion in the sample. If the company is selected to be part of the sample, this will involve completing a questionnaire and accepting a visit at its premises in order to verify its response. If the company indicates that it does not agree to its possible inclusion in the sample, it will be deemed not to have cooperated in the investigation. The Commission's findings for non-cooperating importers are based on the facts available and the result may be less favourable to that company than if it had cooperated.

Signature of authorised official:

Name and title of authorised official:

Date:

([1]) In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

Notice of initiation of an interim review of the anti-dumping measures applicable to imports of high tenacity yarns of polyesters originating in the People's Republic of China

(2022/C 248/11)

The European Commission ('the Commission') has received a request for a partial interim review pursuant to Article 11(3) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([1]) ('the basic Regulation').

1. Request for review

The request was lodged on 1 April 2022 by the CIRFS - European Manmade Fibres Association ('the applicant') on behalf of the Union industry of high tenacity yarn of polyesters in the sense of Article 5(4) of the basic Regulation.

The review is limited in scope to the examination of dumping.

An open version of the request and the analysis of the degree of support by Union producers for the request are available in the file for inspection by interested parties. Section 5.4 of this Notice provides information about access to the file for interested parties.

2. Product under review

The product subject to this review is high tenacity yarn of polyesters not put up for retail sale, including monofilament of less than 67 decitex, (excluding sewing thread and 'Z'-twisted multiple (folded) or cabled yarn, intended for the production of sewing thread, ready for dyeing and for receiving a finishing treatment, loosely wound on a plastic perforated tube) ('the product under review'), currently falling under CN Code ex 5402 20 00 (TARIC code 5402 20 00 10). The CN and TARIC codes are given for information only without prejudice to a subsequent change in the tariff classification.

3. Existing measures

The measures currently in force are a definitive anti-dumping duty imposed by Commission Implementing Regulation (EU) 2017/325 ('the original investigation'), ([2]) as last amended by Commission Implementing Regulation (EU) 2017/1159 ([3]).

On 23 February 2022, the Commission published a Notice of initiation of an expiry review of the anti-dumping duty applicable to imports of high tenacity yarns of polyesters originating in the People's Republic of China ([4]). Pending the completion of the expiry review investigation, the measures continue to be in force.

4. Grounds for the review

The request is based on sufficient evidence provided by the applicant that, as far as dumping is concerned, the circumstances on the basis of which the existing measures were imposed have changed and that these changes are of a lasting nature.

These changes relate to the structure of the Chinese producers, the increase of capacity of the product under review in China ('the PRC' or 'the country concerned'), and the resulting massive overcapacity and decrease in export prices from the PRC.

([1]) OJ L 176, 30.6.2016, p. 21.

([2]) Commission Implementing Regulation (EU) 2017/325 of 24 February 2017 imposing a definitive anti-dumping duty on imports of of high tenacity yarns of polyesters originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 49, 25.2.2017, p. 6).

([3]) Commission Implementing Regulation (EU) 2017/1159 of 29 June 2017 amending Council Implementing Regulation (EU) No 1105/2010 and Commission Implementing Regulation (EU) 2017/325 as regards the definition of the product scope of the current anti-dumping measures concerning imports of high tenacity yarns of polyesters originating in the People's Republic of China, and providing for the possibility of repayment or remission of duties in certain cases (OJ L 167, 30.6.2017, p. 31).

([4]) OJ C 87, 23.2.2022, p. 2.

In line with the goals set out by the Chinese government for the domestic chemical fibre industry in its five-year plans, major developments took place in the PRC since the original investigation, which transformed the Chinese industry of the product under review. Since the original investigation, Chinese producers subject to measures have invested in new technologies, R&D and product development. They have also invested in the production of purified terephthalic acid ('PTA'), which is the main raw material to manufacture the product under review. Therefore, Chinese producers became independent from imports of PTA and transformed into integrated producers. Due to these major investments, Chinese producers of the product under review subject to measures have more than tripled their production capacities since the original investigation.

The domestic Chinese and global consumption did not increase in line with the increase in Chinese capacity, which has caused a decrease in the Chinese export price.

Therefore, the applicant alleges that the existing measures are no longer sufficient to counteract the dumping.

The applicant claimed that it is not appropriate to use domestic prices and costs in the PRC to determine normal value and recalculate dumping margins, due to the existence of significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation.

To substantiate the allegations of significant distortions, the applicant relied on the information contained in the country report produced by the Commission services on 20 December 2017 describing the specific market circumstances in the country concerned ([5]).

In light of the information available, the Commission considers that there is sufficient evidence pursuant to Article 5(9) of the basic Regulation tending to show that, due to significant distortions affecting prices and costs, the use of domestic prices and costs in the PRC is inappropriate, thus warranting the initiation of an investigation on the basis of Article 2(6a) of the basic Regulation.

The country report is available in the file for inspection by interested parties and on DG Trade's Internet: ([6]).

5. **Procedure**

Having determined, after informing the Member States, that sufficient evidence exists to justify the initiation of a partial interim review limited to the examination of dumping, the Commission hereby initiates a review in accordance with Article 11(3) of the basic Regulation. The purpose of the review is to establish the rate of dumping for the exporting producers.

The Commission also draws the attention of the parties to the published Notice ([7]) on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations that may be applicable to this proceeding.

5.1. ***Review investigation period***

The investigation will cover the period from 1 January 2021 to 31 December 2021 ('the review investigation period').

5.2. ***Comments on the request and the initiation of the investigation***

All interested parties wishing to comment on the request or any aspects regarding the initiation of the investigation (including the degree of support for the request) must do so within 37 days of the date of publication of this Notice in the *Official Journal of the European Union* ([8]).

Any request for a hearing with regard to the initiation of the investigation must be submitted within 15 days of the date of publication of this Notice.

([5]) Commission Staff Working Document, on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, 20 December 2017, SWD(2017) 483 final/2, available at: https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf

([6]) Documents cited in the country report may also be obtained upon a duly reasoned request.

([7]) On the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations (OJ C 86, 16.3.2020, p. 6).

([8]) All references to the publication of this Notice will be references to publication of this Notice in the *Official Journal of the European Union*, unless otherwise specified.

5.3. ***Procedure for the determination of dumping***

Exporting producers of the product under review from the country concerned, including those that did not cooperate in the investigation leading to the measures in force, are invited to participate in the Commission investigation.

5.3.1. *Investigating exporting producers in the country concerned*

In view of the potentially large number of exporting producers in the country concerned involved in this interim review and in order to complete the investigation within the statutory time limits, the Commission may limit the exporting producers to be investigated to a reasonable number by selecting a sample (this process is also referred to as 'sampling'). The sampling will be carried out in accordance with Article 17 of the basic Regulation.

In order to enable the Commission to decide whether sampling is necessary, and if so, to select a sample, all exporting producers, or representatives acting on their behalf, including the ones who did not cooperate in the investigation leading to the measures subject to the present review, are hereby requested to provide the Commission with information on their companies within 7 days of the date of publication of this Notice. This information must be provided via TRON.tdi at the following address: https://tron.trade.ec.europa.eu/tron/tdi/form/R771_SAMPLING_FORM_FOR_EXPORTING_PRODUCER Tron access information can be found in sections 5.4 and 5.7 below.

In order to obtain the information it deems necessary for the selection of the sample of exporting producers, the Commission will also contact the authorities of the country concerned and may contact any known associations of exporting producers in the country concerned.

If a sample is necessary, the exporting producers will be selected based on the largest representative volume of production, sales or exports, which can reasonably be investigated within the time available. All known exporting producers in the country concerned, the authorities of the country concerned and associations of exporting producers will be notified by the Commission, via the authorities of the country concerned if appropriate, of the companies selected to be in the sample.

Once the Commission has received the necessary information to select a sample of exporting producers, it will inform the parties concerned of its decision whether they are included in the sample. The sampled exporting producers will have to submit a completed questionnaire within 30 days from the date of notification of the decision of their inclusion in the sample, unless otherwise specified.

The Commission will add a note to the file for inspection by interested parties reflecting the sample selection. Any comment on the sample selection must be received within 3 days of the date of notification of the sample decision.

A copy of the questionnaire for exporting producers in the country concerned is available in the file for inspection by interested parties and on DG Trade's Internet: https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2612

Without prejudice to the possible application of Article 18 of the basic Regulation, companies that have agreed to their possible inclusion in the sample but are not selected to be in the sample will be considered to be cooperating.

5.3.2. *Additional procedure with regard to the country concerned that is subject to significant distortions*

Subject to the provisions of this Notice, all interested parties are hereby invited to make their views known, submit information and provide supporting evidence regarding the application of Article 2(6a) of the basic Regulation. Unless otherwise specified, this information and supporting evidence must reach the Commission within 37 days of the date of publication of this Notice.

In particular, the Commission invites all interested parties to make their views known on the inputs and the Harmonised System (HS) codes provided in the request, propose (an) appropriate representative country(ies) and provide the identity of exporting producers of the product under review in those countries. This information and supporting evidence must reach the Commission within 15 days of the date of publication of this Notice.

Pursuant to point (e) of Article 2(6a) of the basic Regulation, the Commission will, shortly after initiation, by means of a note to the file for inspection by interested parties, inform parties to the investigation about the relevant sources that it intends to use for the purpose of determining normal value in the country concerned pursuant to Article 2(6a) of the basic Regulation. This will cover all sources, including the selection of an appropriate representative third country where appropriate. Parties to the investigation shall be given 10 days from the date at which that note is added to that file to submit comments.

According to the information available to the Commission, a possible representative third country for the country concerned in this case is Turkey. With the aim of finally selecting the appropriate representative third country, the Commission will examine whether there are countries with a similar level of economic development as the country concerned, in which there is production and sales of the product under review and in which relevant data are readily available. Where there is more than one such country, preference will be given, where appropriate, to countries with an adequate level of social and environmental protection.

With regard to the relevant sources, the Commission invites all exporting producers in the country concerned to provide information on the materials (raw and processed) and energy used in the production of the product under review within 15 days of the date of publication of this Notice. This information must be provided via TRON.tdi at the following address: https://tron.trade.ec.europa.eu/tron/tdi/form/R771_INFO_ON_INPUTS_FOR_EXPORTING_PRODUCER_FORM . Tron access information can be found in sections 5.4 and 5.7 below.

Furthermore, any submissions of factual information to value costs and prices pursuant to point (a) of Article 2(6a) of the basic Regulation must be filed within 65 days of the date of publication of this Notice. Such factual information should be taken exclusively from publicly available sources.

In order to obtain the information it deems necessary for its investigation with regard to the alleged significant distortions within the meaning of point (b) of Article 2(6a) of the basic Regulation, the Commission will also make available a questionnaire to the Government of the country concerned.

5.3.3. *Investigating unrelated importers* ([9]) ([10])

Unrelated importers of the product under review from the PRC to the Union, including those that did not cooperate in the investigation leading to the measures in force, are invited to participate in this investigation.

In view of the potentially large number of unrelated importers involved in this interim review and in order to complete the investigation within the statutory time limits, the Commission may limit to a reasonable number the unrelated importers that will be investigated by selecting a sample (this process is also referred to as 'sampling'). The sampling will be carried out in accordance with Article 17 of the basic Regulation.

([9]) Only importers not related to producers in the country concerned can be sampled. Importers that are related to producers have to fill in Annex I to the questionnaire for these producers. In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

([10]) The data provided by unrelated importers may also be used in relation to aspects of this investigation other than the determination of dumping.

In order to enable the Commission to decide whether sampling is necessary and, if so, to select a sample, all unrelated importers, or representatives acting on their behalf, including the ones who did not cooperate in the investigation leading to the measures subject to the present review, are hereby requested to make themselves known to the Commission. These parties must do so within 7 days of the date of publication of this Notice by providing the Commission with the information on their company(ies) requested in the Annex to this Notice.

In order to obtain information it deems necessary for the selection of the sample of unrelated importers, the Commission may also contact any known associations of importers.

If a sample is necessary, the importers may be selected based on the largest representative volume of sales of the product under review from the PRC to the Union that can reasonably be investigated within the time available. All known unrelated importers and associations of importers will be notified by the Commission of the companies selected to be in the sample.

The Commission will also add a note to the file for inspection by interested parties reflecting the sample selection. Any comment on the sample selection must be received within 3 days of the date of notification of the sample decision.

In order to obtain the information it deems necessary for its investigation, the Commission will make available questionnaires to the sampled unrelated importers. Those parties must submit a completed questionnaire within 30 days from the date of the notification of the sample selection, unless otherwise specified.

A copy of the questionnaire for unrelated importers is available in the file for inspection by interested parties and on DG Trade's Internet: https://tron.trade.ec.europa.eu/investigations/case-view?caseId=2612

5.4. *Interested parties*

In order to participate in the investigation, interested parties, such as producers in the country/ies concerned, Union producers, importers and their representative associations, users and their representative associations, trade unions and representative consumer organisations first have to demonstrate that there is an objective link between their activities and the product under review.

Producers in the country concerned, Union producers, importers and representative associations who made information available will be considered as interested parties if there is an objective link between their activities and the product under review.

Other parties will only be able to participate in the investigation as interested party from the moment they make themselves known, and provided that there is an objective link between their activities and the product under review. Being considered as an interested party is without prejudice to the application of Article 18 of the basic Regulation.

Access to the file available for inspection for interested parties is made via Tron.tdi at the following address: https://tron.trade.ec.europa.eu/tron/TDI. Please follow the instructions on that page to get access ([11]).

5.5. *Other written submissions*

Subject to the provisions of this Notice, all interested parties are hereby invited to make their views known, submit information and provide supporting evidence. Unless otherwise specified, this information and supporting evidence must reach the Commission within 37 days of the date of publication of this Notice.

5.6. *Possibility to be heard by the Commission investigation services*

All interested parties may request to be heard by the Commission investigation services. Any request to be heard must be made in writing and must specify the reasons for the request as well as a summary of what the interested party wishes to discuss during the hearing. The hearing will be limited to the issues set out by the interested parties in writing beforehand.

([11]) In case of technical problems please contact the Trade Service Desk by Email: trade-service-desk@ec.europa.eu or by Tel. +32 22979797.

In principle, hearings will not be used to present factual information which is not yet on file. Nevertheless, in the interest of good administration and to enable Commission services to progress with the investigation, interested parties may be directed to provide new factual information after a hearing.

5.7. *Instructions for making written submissions and sending completed questionnaires and correspondence*

Information submitted to the Commission for the purpose of trade defence investigations shall be free from copyrights. Interested parties, before submitting to the Commission information and/or data which is subject to third party copyrights, must request specific permission to the copyright holder explicitly allowing the Commission a) to use the information and data for the purpose of this trade defence proceeding and b) to provide the information and/or data to interested parties to this investigation in a form that allows them to exercise their rights of defence.

All written submissions, including the information requested in this Notice, completed questionnaires and correspondence provided by interested parties for which confidential treatment is requested shall be labelled '*Sensitive*' ([12]). Parties submitting information in the course of this investigation are invited to reason their request for confidential treatment.

Parties providing 'Sensitive' information are required to furnish non-confidential summaries of it pursuant to Article 19(2) of the basic Regulation, which will be labelled 'For inspection by interested parties'. These summaries must be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence. If a party providing confidential information fails to show good cause for a confidential treatment request or does not furnish a non-confidential summary of it in the requested format and quality, the Commission may disregard such information unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

Interested parties are invited to make all submissions and requests via TRON.tdi (https://tron.trade.ec.europa.eu/tron/TDI) including requests to be registered as interested parties, scanned powers of attorney and certification sheets. By using TRON.tdi or email, interested parties express their agreement with the rules applicable to electronic submissions contained in the document 'CORRESPONDENCE WITH THE EUROPEAN COMMISSION IN TRADE DEFENCE CASES' published on the website of the Directorate-General for Trade: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148003.pdf. The interested parties must indicate their name, address, telephone and a valid email address and they should ensure that the provided email address is a functioning official business email which is checked on a daily basis. Once contact details are provided, the Commission will communicate with interested parties by TRON.tdi or email only, unless they explicitly request to receive all documents from the Commission by another means of communication or unless the nature of the document to be sent requires the use of a registered mail. For further rules and information concerning correspondence with the Commission including principles that apply to submissions via TRON.tdi and by email, interested parties should consult the communication instructions with interested parties referred to above.

Commission address for correspondence:

European Commission
Directorate-General for Trade
Directorate G
Office: CHAR 04/039
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

TRON. tdi: https://tron.trade.ec.europa.eu/tron/tdi

Email: TRADE-R771-HTYP@ec.europa.eu

6. **Schedule of the investigation**

The investigation shall normally be concluded within 12 months and in any event no later than 15 months from the date of the publication of this Notice, pursuant to Article 11(5) of the basic Regulation.

([12]) A 'Sensitive' document is a document which is considered confidential pursuant to Article 19 of the basic Regulation and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). It is also a document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

7. **Submission of information**

As a rule, interested parties may only submit information in the timeframes specified in section 5 of this Notice.

In order to complete the investigation within the mandatory deadlines, the Commission will not accept submissions from interested parties after the deadline to provide comments on the final disclosure or, if applicable, after the deadline to provide comments on the additional final disclosure.

8. **Possibility to comment on other parties' submissions**

In order to guarantee the rights of defence, interested parties should have the possibility to comment on information submitted by other interested parties. When doing so, interested parties may only address issues raised in the other interested parties' submissions and may not raise new issues.

Comments on the information provided by other interested parties in reaction to the disclosure of the definitive findings should be submitted within 5 days from the deadline to comment on the definitive findings, unless otherwise specified. If there is an additional final disclosure, comments on the information provided by other interested parties in reaction to this further disclosure should be made within 1 day from the deadline to comment on this further disclosure, unless otherwise specified.

The outlined timeframe is without prejudice to the Commission's right to request additional information from interested parties in duly justified cases.

9. **Extension to time limits specified in this Notice**

Any extension to the time limits provided for in this Notice should only be requested in exceptional circumstances and will only be granted if duly justified. In any event, any extensions to the deadline to reply to questionnaires will be limited normally to 3 days, and as a rule will not exceed 7 days. Regarding time limits for the submission of other information specified in the Notice of initiation, extensions will be limited to 3 days unless exceptional circumstances are demonstrated.

10. **Non-cooperation**

In cases where any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, findings, affirmative or negative, may be made on the basis of facts available, in accordance with Article 18 of the basic Regulation.

Where it is found that any interested party has supplied false or misleading information, the information may be disregarded and use may be made of facts available.

If an interested party does not cooperate or cooperates only partially and findings are therefore based on facts available in accordance with Article 18 of the basic Regulation, the result may be less favourable to that party than if it had cooperated.

Failure to give a computerised response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost. The interested party should immediately contact the Commission.

11. **Hearing Officer**

Interested parties may request the intervention of the Hearing Officer in trade proceedings. The Hearing Officer reviews requests for access to the file, disputes regarding the confidentiality of documents, requests for extension of time limits and any other request concerning the rights of defence of interested parties and third parties as may arise during the proceeding.

The Hearing Officer may organise hearings and mediate between the interested party/-ies and Commissions services to ensure that the interested parties' rights of defence are being fully exercised. A request for a hearing with the Hearing Officer should be made in writing and should specify the reasons for the request. The Hearing Officer will examine the reasons for the requests. These hearings should only take place if the issues have not been settled with the Commission services in due course.

Any request must be submitted in good time and expeditiously so as not to jeopardise the orderly conduct of proceedings. To that effect, interested parties should request the intervention of the Hearing Officer at the earliest possible time following the occurrence of the event justifying such intervention. Where hearing requests are submitted outside the relevant timeframes, the Hearing Officer will also examine the reasons for such late requests, the nature of the issues raised and the impact of those issues on the rights of defence, having due regard to the interests of good administration and the timely completion of the investigation.

For further information and contact details interested parties may consult the Hearing Officer's web pages on DG Trade's Internet: http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/

12. **Processing of personal data**

Any personal data collected in this investigation will be treated in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council ([13]).

A data protection notice that informs all individuals of the processing of personal data in the framework of Commission's trade defence activities is available on DG Trade's Internet: http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/

([13]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

ANNEX

☐	'Sensitive' version
☐	Version 'For inspection by interested parties'
(tick the appropriate box)	

ANTI-DUMPING PROCEEDING CONCERNING IMPORTS OF HIGH TENACITY YARNS OF POLYESTERS ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

INFORMATION FOR THE SELECTION OF THE SAMPLE OF UNRELATED IMPORTERS

This form is designed to assist unrelated importers in responding to the request for sampling information made in point 5.3.3 of the Notice of initiation.

Both the 'Sensitive' version and the version 'For inspection by interested parties' should be returned to the Commission as set out in the Notice of initiation.

1. **IDENTITY AND CONTACT DETAILS**

Supply the following details about your company:

Company name	
Address	
Contact person	
Email address	
Telephone	

2. **TURNOVER AND SALES VOLUME**

Indicate the total turnover in euros (EUR) of the company, the value in euros (EUR) and volume in tonnes for imports and resales on the Union market after importation from the People's Republic of China, during the review investigation period, of the product under review as defined in the notice of initiation.

	Volume in tonnes	Value in euros (EUR)
Total turnover of your company in euros (EUR)		
Imports of the product under review originating in the People's Republic of China		
Imports of the product under review (all origins)		
Resales on the Union market after importation from the People's Republic of China of the product under review		

3. **ACTIVITIES OF YOUR COMPANY AND RELATED COMPANIES** ([1])

Give details of the precise activities of the company and all related companies (please list them and state the relationship to your company) involved in the production and/or selling (export and/or domestic) of the product under review. Such activities could include but are not limited to purchasing the product under review, producing it under sub-contracting arrangements, or processing or trading it.

Company name and location	Activities	Relationship

4. **OTHER INFORMATION**

Please provide any other relevant information which the company considers useful to assist the Commission in the selection of the sample.

5. **CERTIFICATION**

By providing the above information, the company agrees to its possible inclusion in the sample. If the company is selected to be part of the sample, this will involve completing a questionnaire and accepting a visit at its premises in order to verify its response. If the company indicates that it does not agree to its possible inclusion in the sample, it will be deemed not to have cooperated in the investigation. The Commission's findings for non-cooperating importers are based on the facts available and the result may be less favourable to that company than if it had cooperated.

Signature of authorised official:

Name and title of authorised official:

Date:

([1]) In accordance with Article 127 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, two persons shall be deemed to be related if: (a) they are officers or directors of the other person's business; (b) they are legally recognised partners in business; (c) they are employer and employee; (d) a third party directly or indirectly owns, controls or holds 5 % or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they control a third person directly or indirectly; or (h) they are members of the same family (OJ L 343, 29.12.2015, p. 558). Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. In accordance with Article 5(4) of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, "person" means a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts (OJ L 269, 10.10.2013, p. 1).

Notice of re-opening of the anti-dumping investigation with regard to Commission Implementing Regulation (EU) 2017/763 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea following the judgement of the General Court of 2 April 2020 in Case T-383/17, as upheld by the Court of Justice in case C-260/20 P

(2022/C 248/12)

1. **Judgments**

In its judgement of 2 April 2020 ([1]) in Case T-383/17 *Hansol Paper v Commission* ('the judgement'), the General Court of the European Union ('the General Court') annulled Commission Implementing Regulation (EU) 2017/763 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea ('the regulation at issue') ([2]) insofar that it concerned the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd.) ('Hansol').

Hansol challenged the legality of the regulation at issue on a number of accounts. In one of its pleas in law, Hansol disputed the construction of certain normal values pursuant to Article 2(3) of the basic Regulation. In another plea in law, Hansol argued that the Commission had made a manifest error of assessment in the weighting of sales in the European Union to independent customers as compared with sales to related converters. Hansol claimed that this alleged calculation error distorted the calculation of the dumping margin and also, inter alia, the undercutting margin.

The General Court found that the Commission had infringed Article 2(1) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([3]) ('the basic Regulation') when determining that normal value should be constructed pursuant to Article 2(3) of that Regulation, for a product type sold by Hansol Artone Paper Co. Ltd., whereas there were representative domestic sales by Hansol Paper Co. Ltd. of the same product type. The General Court also found that the alleged weighting error was established and that the Commission should have taken into account the quantities sold by Schades Nordic, one of Hansol Group's related converters in the Union, to independent customers. The Commission had therefore infringed Article 2(11) of the basic Regulation as the calculations made by the Commission did not reflect the full extent of dumping practiced by Hansol. Moreover, the General Court held that this weighting error also affected the calculation of the undercutting margin, since the Commission had used the same weighting for that calculation. Lastly, the General Court found that the Commission had committed an error when applying Article 2(9) of the basic Regulation by analogy, when it deducted SG&A costs and a profit margin for the resales of the product concerned by the related selling entity in the EU, for the purposes of establishing the export price of that product in the context of the determination of the injury.

On 11 June 2020, the Commission asked the Court of Justice to set aside the judgement of the General Court by lodging an appeal (Case C-260/20 P). On 12 May 2022, the Second Chamber of the Court rejected the appeal and it upheld the findings of the General Court ([4]). The Court of Justice noted however that, contrary to what the General Court had found, the Commission did not err when applying Article 2(9) of the basic Regulation by analogy in this case. As a result, Commission Implementing Regulation (EU) 2017/763 was annulled insofar as it concerns Hansol.

2. **Consequences**

Article 266 TFEU provides that the Institutions must take the necessary measures to comply with the Courts' judgments. In case of annulment of an act adopted by the Institutions in the context of an administrative procedure, such as anti-dumping investigations, compliance with the General Court's judgement consists in the replacement of the annulled act by a new act, in which the illegality identified by the Court is eliminated ([5]).

([1]) ECLI:EU:T:2020:139.
([2]) OJ L 114, 3.5.2017, p. 3.
([3]) OJ L 176, 30.6.2016, p. 21.
([4]) ECLI:EU:C:2022:370.
([5]) Joined cases 97, 193, 99 and 215/86 Asteris AE and others and Hellenic Republic v Commission [1988] ECR 2181, paragraphs 27 and 28; and Case T-440/20 Jindal Saw v European Commission, EU:T:2022:318.

According to the case-law of the Court of Justice, the procedure for replacing the annulled act may be resumed at the very point at which the illegality occurred ([6]). That implies in particular that in a situation where an act concluding an administrative procedure is annulled, that annulment does not necessarily affect the preparatory acts, such as the initiation of the anti-dumping procedure. In a situation where for instance a regulation imposing definitive anti-dumping measures is annulled, that means that subsequent to the annulment, the anti-dumping proceeding is still open, because the act concluding the anti-dumping proceeding has disappeared from the Union legal order ([7]), except if the illegality occurred at the stage of initiation.

In the present case, the General Court annulled the regulation at issue for the first three reasons mentioned in the third paragraph under section 1.

The remaining findings and conclusions in the regulation at issue which were not contested, or which were contested but not examined by the General Court, remain valid and are not affected by this re-opening.

3. **Re-opening procedure**

In view of the above, the Commission decided to reopen the anti-dumping investigation on imports of certain lightweight thermal paper originating in the Republic of Korea that led to the adoption of the regulation at issue, insofar as it concerns Hansol. The re-opening of the original investigation resumes it at the point at which the irregularity occurred.

The purpose of the re-opening of the original investigation is to address the errors identified by the General Court, as upheld by the Court of Justice, and to assess whether the application of the rules as clarified by the General Court and Court of Justice warrants the re-imposition of the measures at the original or a revised level as from the date on which the regulation at issue originally entered into force.

Interested parties are hereby informed that future liability may emanate from the findings of this re-examination.

4. **Written submissions**

All interested parties, and in particular Hansol, are invited to make their views known, submit information and provide supporting evidence on issues pertaining to the re-opening of the investigation. Unless otherwise specified, this information and supporting evidence must reach the Commission within 20 days from the date of publication of this Notice in the *Official Journal of the European Union*.

5. **Possibility to be heard by the Commission investigation services**

All interested parties may request to be heard by the Commission investigation services. Any request to be heard should be made in writing and should specify the reasons for the request. For hearings on issues pertaining to the re-opening of the investigation, the request must be submitted within 15 days of the date of publication of this Notice in the *Official Journal of the European Union*. Thereafter, a request to be heard must be submitted within the specific deadlines set by the Commission in its communication with interested parties.

6. **Instructions for making written submissions and sending correspondence**

Information submitted to the Commission for the purpose of trade defence investigations shall be free from copyrights. Interested parties, before submitting to the Commission information and/or data which is subject to third party copyrights, must request specific permission to the copyright holder explicitly allowing the Commission a) to use the information and data for the purpose of this trade defence proceeding and b) to provide the information and/or data to interested parties to this investigation in a form that allows them to exercise their rights of defence.

([6]) Case C-415/96 Spain v Commission [1998] ECR I-6993, paragraph 31; Case C-458/98 P Industrie des Poudres Sphériques v Council [2000] I-8147, paragraphs 80 to 85; Case T-301/01 Alitalia v Commission [2008] II-1753, paragraphs 99 and 142; Joined Cases T-267/08 and T-279/08 Région Nord-Pas de Calais v Commission [2011] II-0000, paragraph 83.

([7]) Case C-415/96 Spain v Commission [1998] ECR I-6993, paragraph 31; Case C-458/98 P Industrie des Poudres Sphériques v Council [2000] I-8147, paragraphs 80 to 85.

All written submissions, including the information requested in this Notice, completed questionnaires and correspondence provided by interested parties for which confidential treatment is requested shall be labelled 'Sensitive' ([8]). Parties submitting information in the course of this investigation are invited to reason their request for confidential treatment. Parties providing 'Sensitive' information are required to furnish non-confidential summaries of it pursuant to Article 19(2) of the basic Regulation, which will be labelled 'For inspection by interested parties'. Those summaries should be sufficiently detailed to permit a reasonable understanding of the substance of the information submitted in confidence. If a party providing confidential information fails to show good cause for a confidential treatment request or does not furnish a non-confidential summary of it in the requested format and quality, the Commission may disregard such information unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

Interested parties are invited to make all submissions and requests via TRON.tdi (https://tron.trade.ec.europa.eu/tron/TDI) including requests to be registered as interested parties, scanned powers of attorney and certification sheets. By using TRON.tdi or e-mail, interested parties express their agreement with the rules applicable to electronic submissions contained in the document 'CORRESPONDENCE WITH THE EUROPEAN COMMISSION IN TRADE DEFENCE CASES' published on the website of DG Trade: http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148003.pdf. The interested parties must indicate their name, address, telephone and a valid e-mail address and they should ensure that the provided e-mail address is a functioning official business e-mail which is checked on a daily basis. Once contact details are provided, the Commission will communicate with interested parties by TRON.tdi or e-mail only, unless they explicitly request to receive all documents from the Commission by another means of communication or unless the nature of the document to be sent requires the use of a registered mail. For further rules and information concerning correspondence with the Commission including principles that apply to submissions via TRON.tdi and by e-mail, interested parties should consult the communication instructions with interested parties referred to above.

Commission address for correspondence:
European Commission
Directorate-General for Trade
Directorate G
Office: CHAR 04/039
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

Email: TRADE-AD629a-LWTP-REOPENING@ec.europa.eu

7. **Non-cooperation**

In cases where any interested party refuses access to or does not provide the necessary information within the time limits, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of facts available, in accordance with Article 18 of the basic Regulation.

Where it is found that any interested party has supplied false or misleading information, the information may be disregarded and use may be made of facts available.

If an interested party does not cooperate or cooperates only partially and findings are therefore based on facts available in accordance with Article 18 of the basic Regulation, the result may be less favourable to that party than if it had cooperated.

Failure to give a computerised response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost. In this case the interested party should immediately contact the Commission.

8. **Hearing Officer**

Interested parties may request the intervention of the Hearing Officer for trade proceedings. The Hearing Officer reviews requests for access to the file, disputes regarding the confidentiality of documents, requests for extension of time limits and any other request concerning the rights of defence of interested parties and third parties as may arise during the proceeding.

([8]) A 'Sensitive' document is a document which is considered confidential pursuant to Article 19 of the basic Regulation and Article 6 of the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). It is also a document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

The Hearing Officer may organise hearings and mediate between the interested party or parties and the Commission services to ensure that the interested parties' rights of defence are being fully exercised. A request for a hearing with the Hearing Officer should be made in writing and should specify the reasons for the request. The Hearing Officer will examine the reasons for the requests. These hearings should only take place if the issues have not been settled with the Commission services in due course.

Any request must be submitted in good time and expeditiously so as not to jeopardise the orderly conduct of proceedings. To that effect, interested parties should request the intervention of the Hearing Officer at the earliest possible time following the occurrence of the event justifying such intervention. The Hearing Officer will examine the reasons for requests for interventions, the nature of the issues raised and the impact of those issues on the rights of defence, having due regard to the interests of good administration and the timely completion of the investigation.

For further information and contact details interested parties may consult the Hearing Officer's web pages on DG Trade's Internet: http://ec.europa.eu/trade/trade-policy-and-you/contacts/hearing-officer/

9. **Processing of personal data**

Any personal data collected in this investigation will be treated in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council ([9]).

A data protection notice that informs all individuals of the processing of personal data in the framework of Commission's trade defence activities is available on DG Trade's Internet: http://ec.europa.eu/trade/policy/accessing-markets/trade-defence

10. **Information to customs authorities**

As of 1 July 2022, and pending the outcome of this re-examination, the final anti-dumping duty liability on imports of certain lightweight thermal paper weighing 65 g/m2 or less; in rolls of a width of 20 cm or more, a weight of the roll (including the paper) of 50 kg or more and a diameter of the roll (including the paper) of 40 cm or more ('jumbo rolls'); with or without a base coat on one or both sides; coated with a thermos-sensitive substance on one or both sides; and with or without a top coat, currently falling under CN codes ex 4809 90 00, ex 4811 90 00, ex 4816 90 00 and ex 4823 90 85 (TARIC codes: 4809 90 00 10, 4811 90 00 10, 4816 90 00 10, 4823 90 85 20), originating in the Republic of Korea and produced by the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd) is suspended.

Since the amount of final liability resulting from the re-examination is uncertain at this stage, the Commission requests national customs authorities to await the outcome of this investigation before deciding on any repayment claim concerning the anti-dumping duty annulled by the General Court with respect to the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd).

Consequently, the anti-dumping duty paid under Commission Implementing Regulation (EU) 2017/763 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea and produced by the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd) should not be repaid or remitted until the outcome of this investigation.

11. **Disclosure**

All interested parties which have been registered as such during the investigation leading to adoption of the regulation at issue will be informed of the essential facts and considerations on the basis of which the Commission intends to implement the abovementioned judgment in due time and will be given an opportunity to submit their views before a final decision is taken.

([9]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION POLICY

EUROPEAN COMMISSION

Prior notification of a concentration

(Case M.10778 – TA ASSOCIATES / CLEARLAKE / KOFAX)

Candidate case for simplified procedure

(Text with EEA relevance)

(2022/C 248/13)

1. On 23 June 2022, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ([1]).

This notification concerns the following undertakings:

— TA Associates Management L.P. ('TA Associates', U.S.A.),

— Clearlake Capital Group, L.P. ('Clearlake', U.S.A.),

— Kofax Parent Limited ('Kofax' or 'Target', U.S.A.) ultimately controlled by Thoma Bravo, L.P. (U.S.A).

TA Associates and Clearlake will acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of Kofax.

The concentration is accomplished by way of purchase of shares.

2. The business activities of the undertakings concerned:

— for TA Associates: private equity firm, active in business services, consumer, financial services, healthcare and technologies;

— for Clearlake: private investment firm, active in software and technology-enabled services, energy and industrials, food and consumer products;

— for Kofax: provider of intelligent automation software for digital workflow transformation to automate and improve business workflows by simplifying the handling of data and documents.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of the Merger Regulation. However, the final decision on this point is reserved.

Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 ([2]) it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. The following reference should always be specified:

M.10778 – TA ASSOCIATES / CLEARLAKE / KOFAX

([1]) OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation').
([2]) OJ C 366, 14.12.2013, p. 5.

Observations can be sent to the Commission by email, by fax, or by post. Please use the contact details below:

Email: COMP-MERGER-REGISTRY@ec.europa.eu

Fax +32 22964301

Postal address:

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