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ANNEX

ANNEX

to the

COMMUNICATION FROM THE COMMISSION

**Approval of the content of a draft for a COMMUNICATION FROM THE COMMISSION
Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements**

ANNEX

COMMUNICATION FROM THE COMMISSION - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

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1. INTRODUCTION

1.1. Purpose and structure of these Guidelines

1. These Guidelines[1] aim to provide legal certainty by assisting undertakings in the assessment of their horizontal cooperation agreements under the Union competition rules while ensuring an effective protection of competition. They also aim to make it easier for undertakings to cooperate in ways which are economically desirable and thereby, for example, contribute to the green and digital transitions and to fostering the resilience of the internal market[2].

2. The Guidelines set out the principles for the assessment of horizontal cooperation agreements and concerted practices under Article 101 of the Treaty on the Functioning of the European Union[*] (hereinafter referred to as 'Article 101') and provide an analytical framework for the most common types of horizontal cooperation agreements:

   – research and development agreements, including guidance on the application of Commission Regulation (EU) No […] of […] December 2022 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 (hereinafter referred to as '*R&D BER*') (Chapter 2),

   – production agreements including guidance on the application of Commission Regulation (EU) No […] of […] December 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (hereinafter referred to as '*Specialisation BER*') (Chapter 3),

   – purchasing agreements (Chapter 4),

   – commercialisation agreements (Chapter 5),

   – information exchange (Chapter 6),

   – standardisation agreements (Chapter 7),

   – standard terms (Chapter 8).

3. In addition, as the Commission is committed to the attainment of the objectives of the Green Deal for the European Union[3], these Guidelines provide guidance on how the most common horizontal cooperation agreements will be assessed under Article 101 when they pursue sustainability objectives (Chapter 9).

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[1] These Guidelines replace the Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1.

[2] See also the Communication 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, of 5 May 2021 COM(2021) 350 final.

[*] With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union ('the Treaty'). The two Articles are, in substance, identical. For the purposes of these Guidelines, references to Article 101 of the Treaty should be understood as references to Article 81 of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the Treaty will be used throughout these Guidelines.

[3] Communication from the Commission, the European Green Deal, COM (2019) 640 final.

4. Given the potentially large number of types and combinations of horizontal cooperation and market circumstances in which they may operate, it is difficult to provide specific guidance for every possible scenario. The Guidelines do not constitute a 'checklist' which can be applied mechanically. Each case must be assessed on the basis of its own facts.

5. These Guidelines apply to horizontal cooperation agreements concerning goods, services and technologies.

6. Horizontal cooperation agreements may combine different stages of cooperation, for example research and development ('R&D') and the production and/or commercialisation of its results. Such agreements are also covered by these Guidelines. When using these Guidelines for the analysis of such integrated cooperation, as a general rule, all the chapters pertaining to the different parts of the cooperation will be relevant. However, for the assessment of whether certain conduct will normally be considered a restriction of competition by object or by effect, what is set out in the chapter pertaining to that part of an integrated cooperation which can be considered its 'centre of gravity', prevails for the entire cooperation.

7. Two factors are in particular relevant for the determination of the centre of gravity of integrated cooperation: firstly, the starting point of the cooperation, and, secondly, the degree of integration of the different functions which are combined. Although it is not possible to provide a precise and definite rule that is valid for all cases and all possible combinations, according to the experience gathered it is possible to consider that in general:

   – the centre of gravity of a horizontal cooperation agreement involving both joint R&D and joint production of the results would be the joint R&D if the joint production will only take place if the joint R&D is successful. This means that the results of the joint R&D are decisive for the subsequent joint production. The guidance in the Chapter on R&D agreements prevails in this case. The outcome of the assessment of the centre of gravity would be different if the parties would have engaged in the joint production in any event, that is to say, irrespective of the joint R&D. This means that such agreements should instead be assessed as joint production agreements and the guidance in the Chapter on production agreements prevails. If the agreement provides for a full integration in the area of production and only a partial integration of some R&D activities, the centre of gravity of the cooperation would also be the joint production;

   – similarly, the centre of gravity of a horizontal cooperation agreement involving both specialisation and joint commercialisation of the results, would normally be the specialisation, as the joint commercialisation will only take place because of the cooperation in the specialisation activity;

   – the centre of gravity of a horizontal cooperation agreement involving joint production and joint commercialisation of the products, would normally be the joint production, as the joint commercialisation generally will only take place because of the cooperation in the main activity of joint production.

8. The centre of gravity test only applies to the relationship between the different chapters of these Guidelines, not to the relationship between different block exemption regulations. The scope of a block exemption regulation is defined by its own provisions. See Chapter 2 for agreements covered by the R&D BER and Chapter 3 for agreements covered by the Specialisation BER.

9. These Guidelines are structured as follows:

– The first Chapter is an introduction, that sets out the context in which Article 101 applies to horizontal cooperation agreements. This Chapter also provides information on the relationship between these Guidelines and other legislation and guidance affecting horizontal cooperation agreements.

– In Chapters 2 to 8, guidance is provided to facilitate the self-assessment under Article 101 for the most common horizontal cooperation agreements. Chapter 9 provides additional guidance in case these agreements pursue sustainability objectives. The guidance in Chapters 2 to 9 complements the more general guidance given in this introduction. It is therefore recommended to always read the introduction first and then refer to the specific chapters.

1.2. Applicability of Article 101 to horizontal cooperation agreements

1.2.1. Introduction

10. One of the objectives of Article 101 is to ensure that undertakings do not use horizontal cooperation agreements to prevent, restrict or distort competition on the market to the ultimate detriment of consumers.

11. Article 101 applies to undertakings and associations of undertakings. An undertaking is any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed[4]. An association of undertakings is a body through which undertakings of the same general type coordinate their conduct on the market[5]. This guidance applies to horizontal cooperation agreements between undertakings and decisions of associations of undertakings.

12. When a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking[6]. Companies that form part of the same undertaking are not considered to be competitors for the purposes of these Guidelines, even if they are both active on the same relevant product and geographic markets.

13. For the purpose of establishing liability for an infringement of Article 101(1), the Court of Justice has established that parent companies and their joint venture form a single economic unit and, therefore, a single undertaking as regards competition law and the relevant market(s), in so far as it is demonstrated that the parent companies of a joint venture exercise decisive influence over that joint venture[7]. Hence, when it

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[4] See for example, judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 72 and the case law cited there.

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

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

[7] Judgment of 26 September 2013, *EI du Pont de Nemours and Company*, C-172/12 P, EU:C:2013:601, paragraph 47 and judgment of 14 September 2017, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 71 and 76.

is demonstrated that the parents exercised decisive influence over the joint venture, the Commission will typically not apply Article 101(1) to agreements and concerted practices between the parent(s) and the joint venture concerning their activity in the relevant market(s) where the joint venture is active. Nevertheless, the Commission will typically apply Article 101(1) to agreements:

– between the parents to create the joint venture;

– between the parents to alter the scope of the joint venture;

– between the parents and the joint venture outside the product and geographic scope of the activity of the joint venture; and

– between the parents without involvement of the joint venture, even concerning the relevant market where the joint venture is active.

14. The fact that a joint venture and its parents are considered to form part of the same undertaking on a certain market does not prevent the parent companies from being independent on all other markets[8].

15. In order for Article 101 to apply to horizontal cooperation, there must be a form of coordination between competitors - in other words: an agreement between undertakings, a decision by an association of undertakings or a concerted practice.

Horizontal cooperation may take the form of ***an agreement****, whereby two or more undertakings have expressed the concurrence of wills to cooperate*[9]*.* ***A concerted practice*** *is a form of coordination between undertakings in which they have not reached an agreement but knowingly substitute the risks of competition through practical cooperation*[10]*. The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two*[11]*.*

16. The existence of an agreement, a concerted practice or decision by an association of undertakings does not in itself indicate that there is a restriction of competition within the meaning of Article 101(1). For ease of reference, unless otherwise stated, in these Guidelines the term 'agreement' also covers concerted practices and decisions of associations of undertakings.

17. Horizontal cooperation agreements can be entered into between actual or potential competitors. Two undertakings are treated as actual competitors if they are active on the same product market and geographical market. An undertaking is considered as a potential competitor of another undertaking if, in the absence of the agreement it is likely that the former, within a short period of time[12], would undertake the necessary

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[8] Judgment of 14 September 2017, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraph 79.

[9] See, for example, judgment of 13 July 2006, *Commission* v *Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37.

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

[11] Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 126 and the case-law cited there.

[12] What constitutes a 'short period of time' depends on the legal and economic context and the facts of the case at hand and, in particular, on whether the undertaking in question is a party to a horizontal cooperation agreement or a third party. Where it is analysed whether a party to an agreement should be considered a potential competitor of the other party, the Commission would normally consider a longer

additional investments or other necessary switching costs to enter the relevant market on which the latter is active. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient[13]. Where these Guidelines refer to competitors, both actual and potential competitors are intended, unless indicated otherwise.

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

– *If the undertaking has a firm intention and an inherent ability to enter the market within a short period of time and does not meet barriers to entry that are insurmountable[14];*

– *Whether the undertaking has taken sufficient preparatory steps to enable it to enter the market concerned;*

– *The real and concrete possibilities of the undertaking not yet active joining that market and competing with one or more of the other undertakings - the mere theoretical possibility to enter a market is not sufficient;*

– *The structure of the market and the economic and legal context within which it operates.*

– *The perception of the established undertaking is a factor that is relevant to the assessment of the existence of a competitive relationship between that party and an undertaking outside the market since, if the latter is perceived as a potential entrant to the market, it may, by reason merely that it exists, give rise to competitive pressure on the operator that is established in that market;*

– *The conclusion of an agreement between a number of undertakings, operating at the same level in the production chain, some of which had no presence in the market concerned[15].*

1.2.2. Analytical framework

18. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential[16] restrictive effects on competition.

19. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of

period to be a ‘short period of time’ than where the capacity of a third party to act as a competitive constraint on the parties to an agreement is analysed. For a third party to be considered a potential competitor, market entry would need to take place sufficiently fast so that the threat of potential entry is a constraint on the parties' and other market participants' behaviour. For these reasons, both the R&D and the Specialisation Block Exemption Regulations consider a period of not more than three years a ‘short period of time’.

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

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

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

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

Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition[17]. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3)[18]. If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void.

20. Article 101 does not apply where the anti-competitive conduct of undertakings is required either by national legislation, or by a national legal framework which precludes all scope for competitive activity for the undertakings involved[19]. In such situations, undertakings are precluded from engaging in autonomous conduct which might prevent, restrict or distort competition[20]. The fact that public authorities encourage a horizontal cooperation agreement does not mean that it is permissible under Article 101[21]. Undertakings remain subject to Article 101 if a national law merely encourages or makes it easier for them to engage in autonomous anti-competitive conduct. In certain cases, undertakings are encouraged by public authorities to enter into horizontal cooperation agreements in order to attain a public policy objective by way of self-regulation.

1.2.3. Assessment under Article 101(1)

1.2.3.1. Main competition concerns related to horizontal cooperation

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

22. Horizontal cooperation agreements may however also limit competition in several ways. The agreement may for instance lead to a loss of competition on the relevant market, risk collusion between the parties or give rise to anti-competitive foreclosure concerns.

1.2.3.2. Loss of competition on the relevant market

23. The potential effect of horizontal cooperation agreements may be the loss of competition between the parties to the agreement. Competitors can benefit from the reduction of competitive pressure that results from the agreement and may therefore

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17 See judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 95.

18 See judgment of 23 October 2003, *Van den Bergh Foods* v *Commission*, T-65/98, ECR 2003 II-04653, EU:T:2003:281, paragraph 107; judgment of 18 September 2001, *Métropole télévision (M6) and others* v *Commission*, Case T-112/99, ECR 2001 II-02459, EU:T:2001:215, paragraph 74; judgment of 2 May 2006, *O2* v *Commission*, T-328/03, ECR 2006 II-01231, EU:T:2006:116, paragraph 69 and further.

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

20 Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraph 54 and further.

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

find it profitable to increase their prices or adversely affect the other parameters of competition on the market.

24. For the competitive assessment of the agreement it is relevant whether:

- the parties to the agreement have high market shares;
- they are actual or potential competitors;
- the customers have sufficient possibilities of switching suppliers;
- competitors are likely to increase supply if prices increase, and
- one of the parties to the agreement is an important competitive force.

1.2.3.3. Risk of collusion

25. A horizontal cooperation agreement may also decrease the parties' decision-making independence and as a result increase the likelihood that they will coordinate their behaviour in order to reach a collusive outcome. However, it may also make coordination easier, more stable or more effective for parties that were already coordinating before, either by making the coordination more robust or by permitting them to achieve even higher prices. Horizontal cooperation can for instance lead to the disclosure of strategic information thereby increasing the likelihood of coordination among the parties within or outside the field of the cooperation. Moreover, parties may achieve significant commonality of costs (that is to say, the proportion of variable costs which the parties have in common), allowing them to more easily coordinate market prices and output.

26. For the competitive assessment of the agreement it is relevant whether:

- the parties to the agreement have high market shares;
- they are actual or potential competitors;
- the market characteristics are conducive to coordination;
- the area of cooperation accounts for a high proportion of the parties' variable costs in a given market; and
- the parties combine their activities in the area of cooperation to a significant extent. This could, for instance, be the case, where they jointly manufacture or purchase an important intermediate product or jointly manufacture or distribute a high proportion of their total output of a final product.

1.2.3.4. Foreclosure

27. Some horizontal cooperation agreements, for example production and standardisation agreements, may also give rise to anti-competitive foreclosure concerns. Through anti-competitive means, competitors would then be impeded from competing effectively, for example by denying them access to an important imput or blocking an important route to the market. An exchange of commercially sensitive information or data may also place unaffiliated competitors at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system.

1.2.4. *Restrictions of competition by object*

28. Certain types of cooperation between undertakings can be regarded, by their very nature as being harmful to the proper functioning of normal competition[22]. In such cases, it is not necessary to examine the actual or potential effects of the behaviour on the market, once its anti-competitive object has been established[23].

29. In order for a horizontal cooperation agreement to be regarded as having an anti-competitive object, it is sufficient that it has the *potential* to have a negative impact on competition. In other words, the agreement must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the internal market[24].

30. In order to find that an agreement has an anti-competitive object, there does not need to be a direct link between the agreement and consumer prices[25]. Article 101 is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such[26].

31. The concept of restriction of competition 'by object' can be applied to practices for which, after an individual and detailed examination, it is demonstrated that they present a sufficient degree of harm to competition[27].

32. In order to assess whether an agreement has an anti-competitive object, the following elements are taken into account:

– the content of the agreement,

– the objectives it seeks to attain,

– the economic and legal context of which it forms part.

33. When determining that legal and economic context, it is also necessary to take into consideration[28]:

– the nature of the goods or services affected,

– the real conditions of the functioning and structure of the market or markets in question[29].

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22 See, for example, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49-50.

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

24 Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 31.

25 Price is one of the parameters of competition, in addition to parameters such as output, product quality, product variety or innovation.

26 Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 38-39; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 125.

27 See judgment of 25 March 2021, *Sun* v *Commission*, C-586/16 P, EU:C:2021:241, paragraph 86.

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

34. Where the parties raise possible pro-competitive effects of the agreement, which should not only be demonstrated and relevant, but also specifically related to the agreement concerned and sufficiently significant, the Commission will take due account of this[30].

35. The parties' *intention* is not a necessary factor in determining whether an agreement has an anti-competitive object, but it may be taken into account[31].

1.2.5. Restrictive effects on competition

36. A horizontal cooperation agreement that does not in itself reveal a sufficient degree of harm to competition, can still have restrictive effects on competition. For a horizontal cooperation agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case, it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed[32]. Agreements can have restrictive effects by appreciably reducing competition between the undertakings that are parties to the agreement or between any one of them and third parties[33].

37. In order to assess whether an agreement has restrictive effects, the following elements are relevant:

- The nature and content of the agreement;
- the actual context in which the cooperation occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question[34];
- the extent to which the parties individually or jointly have or obtain some degree of market power and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power[35];

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

30 Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 103-107.

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

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

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

34 Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 116, and the case-law cited there.

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

– the restrictive effects on competition may be actual and potential, but they must, in any event, be sufficiently appreciable[36].

38. Sometimes undertakings conclude horizontal cooperation agreements as they would not be able to independently carry out the project or activity covered by the cooperation on the basis of objective factors, for instance, due to the limited technical capabilities of the parties. Such horizontal cooperation agreements will normally not give rise to restrictive effects on competition within the meaning of Article 101(1) unless the parties could have carried out the project with less stringent restrictions[37].

1.2.6. Ancillary restrictions

39. A horizontal cooperation agreement that is compliant with Article 101(1) may still restrict the commercial autonomy of the parties to that agreement. Such a so-called ‘ancillary restraint’ may in itself also be compliant with Article 101(1) if it is objectively necessary to implement the horizontal cooperation agreement and proportionate to the objectives thereof[38]. In such cases it is necessary to examine whether the agreement would be impossible to carry out in the absence of the restriction in question[39]. The fact that the operation or the activity at stake is simply more difficult to implement, or less profitable without the restriction concerned, does not make that restriction ‘objectively necessary’ and thus ancillary[40].

1.2.7. Assessment under Article 101(3)

40. The assessment of restrictions of competition by object or effect under Article 101(1) is only one side of the analysis. The other side, which is reflected in Article 101(3), is the assessment of the pro-competitive effects of restrictive agreements[41]. Where, in an individual case, a restriction of competition by object or by effect, within the meaning of Article 101(1), has been proven, Article 101(3) can be invoked as a defence. According to Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[42], the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of this provision. Therefore, the factual arguments and the evidence provided by the undertaking(s) must enable the Commission to arrive at the conviction that the agreement in question is sufficiently likely to give rise to pro-competitive effects[43].

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[36] Judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52.

[37] See also paragraph 18 of the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

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

[39] Judgment of 11 September 2014, *MasterCard* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91.

[40] Judgment of 11 September 2014, *MasterCard* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91.

[41] The general approach when applying Article 101(3) is presented in the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

[42] OJ L 1, 4.1.2003, p. 1.

[43] See, for example, judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraphs 93-95.

41. The application of the exception rule of Article 101(3) is subject to four cumulative conditions, two positive and two negative:

– the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains;

– the restrictions must be indispensable to the attainment of those objectives, that is to say, the efficiency gains;

– consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement. Hence, efficiencies only accruing to the parties to the agreement will not suffice. For the purposes of these Guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement[44]; and

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

42. The R&D BER and Specialisation BER are based on Article 101(3). They are based on the premise that the combination of complementary skills or assets can be the source of substantial efficiencies in R&D and specialisation agreements. This may also be the case for other types of horizontal cooperation agreements. The analysis of the efficiencies of an individual agreement under Article 101(3) is therefore to a large extent a question of identifying the complementary skills and assets that each of the parties brings to the agreement and evaluating whether the resulting efficiencies are such that the conditions of Article 101(3) are fulfilled.

Complementarities may arise from horizontal cooperation agreements in various ways. An R&D agreement may bring together different research capabilities and combine complementary skills and assets that may result in improved or new products and technologies being developed and marketed than would otherwise be the case. Other horizontal cooperation agreeements may allow parties to combine forces to design, produce and commercialise products or to jointly purchase products or services they may need for their operations.

43. Horizontal cooperation agreements that do not involve the combination of complementary skills or assets are less likely to lead to efficiency gains that benefit consumers. Such agreements may reduce duplication of certain costs, for instance because certain fixed costs can be eliminated. However, fixed cost savings are, in general, less likely to result in benefits to consumers than savings in, for instance, variable or marginal costs.

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

44. Agreements that are not capable of appreciably affecting trade between Member States (lack of effect on trade) or which do not appreciably restrict competition

[44] More detail on the concept of consumer is provided in paragraph 84 of the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

(agreements of minor importance) fall outside the scope of Article 101(1)[45]. The Commission has provided guidance on the lack of effect on trade in the Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (hereinafter '*Effect on Trade Guidelines*')[46], and on agreements of minor importance in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under 101(1) of the Treaty on the Functioning of the European Union (hereinafter '*De Minimis Notice*')[47]. These Guidelines are without prejudice to the Effect on Trade Guidelines and the De Minimis Notice, as well as any future Commission guidance in this respect.

45. 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) irrespective of the nature of the restrictions included in such agreements, thus applying also to agreements containing hardcore restrictions[48]. According to this presumption, horizontal cooperation agreements are in principle not capable of appreciably affecting trade between Member States when:

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

– the aggregate annual Union turnover of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million[49].

– In the case of agreements concerning the joint buying of products, the relevant turnover shall be the parties' combined purchases of the products covered by the agreement. The Commission may rebut the presumption if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.

46. As set out in the De Minimis Notice, horizontal cooperation agreements entered into by actual or potential competitors do not appreciably restrict competition within the meaning of Article 101(1) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement[50]. This general rule is subject to two exceptions. Firstly, as regards hardcore restrictions, Article 101(1) applies irrespective of the parties' market shares[51]. 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 competition[52]. Secondly, the 10% market share threshold is reduced to 5% where, in a relevant market,

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[45] See judgment of 13 December 2012, *Expedia,* C-226/11, EU:C:2012:795, paragraphs 16-17 and the case-law cited therein.

[46] OJ C 101, 27.4.2004, p. 81.

[47] OJ C 291, 30.8.2014, p. 1.

[48] Effect on Trade Guidelines, para 50.

[49] Effect on Trade Guidelines, para 52.

[50] De Minimis Notice, para 8.

[51] See judgment of 9 July 1969, *Völk* v *Vervaecke*, Case 5/69, EU:C:1969:35; judgment of 6 May 1971, *Cadillon* v *Höss*, Case 1/71, EU:C:1971:47 and judgment of 28 April 1998, *Javico* v *Yves Saint Laurent Parfums*, C-306/96, EU:C:1998:173, paragraphs 16-17.

[52] Judgment of 13 December 2012, *Expedia,* C-226/11, EU:C:2012:795, paragraph 37.

competition is restricted by the cumulative effect of parallel networks of agreements[53].

47. Furthermore, there is no presumption that horizontal agreements concluded by undertakings of which one or more has an individual market share exceeding 10% automatically fall within Article 101(1). Such agreements may still lack an appreciable effect on trade between Member States or they may not constitute an appreciable restriction of competition[54]. They therefore need to be assessed in their legal and economic context. These Guidelines include criteria for the individual assessment of such agreements

1.3. Relationship with other guidance and legislation

48. Agreements that are entered into between undertakings operating at a different level of the production or distribution chain, that is to say, vertical agreements, are in principle dealt with in Commission Regulation (EU) No …/2022 of XX April 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[55] (hereinafter referred to as '*Regulation (EU) No .../2022*' or '*VBER*') and the Communication from the Commission – Commission Notice – Guidelines on Vertical Restraints (hereinafter referred to as '*Vertical Guidelines*')[56]. However, to the extent that vertical agreements, for example, distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, vertical agreements between competitors fall under these Guidelines[57]. Should there be a need to also assess such agreements under the VBER and the Vertical Guidelines, this will be specifically stated in the relevant chapter of these Guidelines. In the absence of such a reference, only these Guidelines will be applicable to vertical agreements between competitors.

49. Where these Guidelines refer to the relevant market: the Commission Notice on the definition of relevant market for the purposes of Union competition law (hereinafter referred to as '*Market Definition Notice*') can provide guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues[58]. The relevant market for the purpose of applying Article 101 to horizontal cooperation agreements should therefore be defined on the basis of that guidance and any future guidance relating to the definition of relevant markets for the purposes of Union competition law.

50. Although these Guidelines contain references to cartels, they are not intended to give any guidance as to what does and does not constitute a cartel as defined by the

[53] De Minimis Notice, para 10.

[54] See judgment of 8 June 1995, *Langnese-Iglo* v *Commission*, T-7/93, EU:T:1995:98, paragraph 98.

[55] […]

[56] […]

[57] This does not apply where competitors enter into a non-reciprocal vertical agreement and (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. Such agreements are exclusively assessed under the VBER and the Vertical Guidelines (see Article 2(4) of the VBER).

[58] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

decisional practice of the Commission and the case-law of the Court of Justice of the European Union.

51. These Guidelines apply to the most common types of horizontal cooperation agreements irrespective of the level of integration they entail with the exception of operations constituting a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[59] (hereinafter referred to as the '*Merger Regulation*') as would be the case, for example, with joint ventures performing on a lasting basis all the functions of an autonomous economic entity ('full-function joint ventures')[60].

52. These Guidelines do not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law and exempted from Article 101(1) pursuant to Article 210a of Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products[61]. These Guidelines are without prejudice to the Guidelines the Commission will issue in accordance with Article 210a(5) of that Regulation. However, agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that do not meet the conditions of Article 210a, are subject to Article 101(1).

53. The assessment under Article 101 as described in these Guidelines is without prejudice to the possible parallel application of Article 102 of the Treaty to horizontal cooperation agreements[62].

54. These Guidelines are without prejudice to the interpretation the Court of Justice of the European Union may give to the application of Article 101 to horizontal cooperation agreements.

55. These Guidelines replace the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements[63] which were published by the Commission in 2011 and do not apply to the extent that sector specific rules apply as is the case for certain

[59] OJ L 24, 29.1.2004, p. 1.

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

[61] 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, as amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021, OJ L 435, 6.12.2021, p. 262.

[62] See judgment of 10 July 1990, *Tetra Pak I*, T-51/89, ECR 1990 II-00309, EU:T:1990:41, paragraph 25 and further.

[63] OJ C 11, 14.1.2011, p. 1.

agreements with regard to agriculture[64] or transport[65]. The Commission will continue to monitor the operation of the R&D BER and Specialisation BER and these Guidelines based on market information from stakeholders and national competition authorities and may revise these Guidelines in the light of future developments and of evolving insight.

2. RESEARCH AND DEVELOPMENT AGREEMENTS

2.1. Introduction

56. The purpose of this Chapter is to provide guidance on the scope and competitive assessment of R&D agreements.

57. R&D agreements vary in form and scope. They include outsourcing agreements for certain R&D activities, agreements covering the joint improvement of existing technologies and cooperation concerning the research, development and marketing of completely new products. The R&D cooperation may take the form of a cooperation agreement or of cooperation in a jointly controlled company[66]. This also includes cooperation between competitors in looser forms, such as technical cooperation in working groups.

58. R&D agreements may be concluded by large undertakings, SMEs[67], academic bodies or research institutes or any combination of them[68].

59. R&D cooperation may not only affect competition in existing product or technology markets, but also competition in innovation.

60. For the purpose of the R&D BER and this Chapter of the Guidelines, 'competition in innovation'[69] refers to R&D efforts for new products and/or technologies, that create their own new market[70] and to R&D poles, i.e. R&D efforts directed primarily towards a specific aim or objective arising out of the R&D agreement[71]. The specific aim or objective of an R&D pole cannot yet be defined as a product or a technology or involves a substantially broader target than a specific product or technology on a specific market.

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

[65] Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway**, O**J L 61, 5.3.2009, p. 1; Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices between liner shipping companies (consortia), OJ L 79, 25.3.2009, p. 1 and Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 256, 29.9.2009, most recently amended by Commission Regulation (EU) 2020/436 of 24 March 2020, OJ L 90, 25.3.2020, p. 1; Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2.

[66] See paragraphs 51 ('full-function joint ventures') and 13 ('liability for an infringement of Article 101(1)) of these Guidelines.

[67] 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.

[68] Including start-ups.

[69] See R&D BER, Article 1 paragraph 1(18) regarding the parties to the agreement and paragraph 1(19) regarding third parties.

[70] Article 1 paragraph 1(7) of the R&D BER.

[71] Article 1 paragraph 1(8) of the R&D BER.

61. The assessment of R&D agreements under Article 101(1) is covered by Section 2.3 of these Guidelines. R&D agreements may benefit from the safe harbour established by the R&D BER[72]. The block exemption is based on the consideration that – to the extent that R&D agreements are caught by Article 101(1) and fulfill the criteria set out in the R&D BER – they will typically fulfill the four conditions laid down in Article 101(3). Section 2.4 of these Guidelines describes the agreements covered by the R&D BER. The conditions for exempting R&D agreements are explained in Section 2.5 - Conditions for exemption. The hardcore and excluded restrictions described in Section 2.6 of these Guidelines aim at ensuring that only restrictive agreements that can reasonably be expected to fulfil the conditions of Article 101(3) benefit from the exemption provided for in Article 2 of the R&D BER.

62. The safe harbour applies as long as the benefit of the block exemption has not been withdrawn in an individual case by the Commission or the competition authority of a Member State ('NCA') pursuant to Article 29 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[73] (Section 2.7 of these Guidelines).

63. Where the safe harbour provided by the R&D BER does not apply to an R&D agreement, then it must be examined whether, in the individual case, the R&D agreement falls within the scope of Article 101(1) and if so whether the conditions of Article 101(3) are satisfied – this is described in Section 2.8 of these Guidelines while Section 2.9 sets out the relevant time of assessment.

2.2. Relevant markets

64. The Market Definition Notice provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues[74]. The relevant market for the purpose of applying Article 101 to R&D agreements should therefore be defined on the basis of that guidance or any future guidance relating to the definition of relevant markets for the purposes of Union competition law, as applicable.

65. Under the R&D BER, a relevant product or technology market is the market for the products or technologies capable of being improved, substituted or replaced by the contract products or technologies[75].

2.3. Assessment under Article 101(1)

2.3.1. Main competition concerns

66. R&D agreements can give rise to different competition concerns, in particular they can directly limit competition between the parties, lead to anti-competitive foreclosure of third parties or to a collusive outcome on the market.

67. Where R&D cooperation **directly limits or restricts competition between the parties or facilitates a collusive outcome on the market,** this may lead to higher prices, less choice for consumers or lower quality of products or technologies. This

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72 Commission Regulation (EU) No [..] of […] December 2022 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.

73 OJ L 1, 4.1.2003, p. 1.

74 Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03).

75 Article 1 paragraph 1(21) and 1(22) of the R&D BER.

could also lead to reduced or slowed-down innovation and thereby to worse or fewer products or technologies coming to the market. It can also lead to products or technologies reaching the market later than they otherwise would.

68. **Anti-competitive foreclosure of third parties** may arise in particular, when at least one party to the R&D agreement has the right to exclusive exploitation of the results of the R&D and at least one party has a significant degree of market power.

2.3.2. Restrictions of competition by object

69. Agreements relating to R&D restrict competition by object if their main purpose is not R&D, but to serve as a tool to engage in a cartel or in other by object infringements under Article 101(1), such as price fixing, output limitation, market allocation or restrictions of technical development.

70. An R&D agreement may restrict technical development when, instead of cooperating for promoting technical and economic progress, the parties use the R&D cooperation to (a) prevent or delay the market entry of products or technologies, (b) coordinate the characteristics of products or technologies which are not covered by the R&D agreement or (c) limit the potential of a jointly developed product or technology when they bring such a product or technology individually to the market.

2.3.3. Restrictive effects on competition

2.3.3.1. Introduction – agreements normally not restricting competition

71. Many R&D agreements do not fall under Article 101(1) when they are concluded by undertakings with complementary skills that would not otherwise have been able to conduct the R&D on their own.

72. Moreover, R&D cooperation between not competing undertakings[76] generally does not give rise to restrictive horizontal effects on competition.

73. The competitive relationship between the parties has to be analysed in the context of the affected existing markets[77] and in the context of innovation[78].

74. If, on the basis of objective factors, the parties would not be able to carry out the necessary R&D independently, the R&D agreement will normally not have restrictive effects on competition. A party may not be able to carry out the R&D independently, for instance, where it has limited technical capabilities or limited access to finance, skilled workers, technologies or other resources.

75. Outsourcing of previously captive R&D is a specific form of R&D cooperation. In such a scenario, the R&D is often carried out by specialised undertakings, research institutes or academic bodies, which are not active in the exploitation of the results. Normally, such agreements are combined with a transfer of know-how and/or an exclusive supply clause concerning the possible results. Due to the complementary nature of the cooperating parties (for instance regarding their skills or technologies) in such a scenario, such agreements do not usually give rise to restrictive effects on competition within the meaning of Article 101(1).

76. R&D cooperation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely gives rise to restrictive

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[76] For a definition, see Article 1 paragraph 1(20) of the R&D BER.

[77] Within the context of the R&D BER, see Article 1 paragraph 1(17) of the R&D BER.

[78] Within the context of the R&D BER, see Article 1 paragraph 1(18) of the R&D BER.

effects on competition within the meaning of Article 101(1). Those R&D agreements can however give rise to anti-competitive effects, for example if, as a result of the R&D agreement, competition at innovation level is appreciably reduced.

2.3.3.2. Market power

77. R&D agreements are only likely to give rise to restrictive effects on competition where the parties to the R&D cooperation have market power.

78. There is no absolute threshold above which it can be presumed that an R&D agreement creates or maintains market power and thus is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, R&D agreements between undertakings competing for existing products and/or technologies are covered by the exemption in the R&D BER provided that their combined market share does not exceed 25% on the relevant product and technology markets and that the other conditions for the application of the R&D BER are fulfilled.

79. The R&D BER also covers R&D agreements between undertakings competing in innovation. These agreements are covered by the exemption in the R&D BER provided that there are three or more competing R&D efforts[79], in addition to and comparable with those of the parties to the agreement. The other conditions for the application of the R&D BER will also have to be fulfilled. Subject to these conditions, an agreement between undertakings competing in innovation[80] would be unlikely to have restrictive effects in the internal market given that the parties will likely not be able to profitably maintain innovation below competitive levels for a longer period of time.

80. The stronger the combined position of the parties on existing markets and/or the lower the number of competing R&D efforts in addition to and comparable with those of the parties, the more likely it is that the R&D agreement can cause restrictive effects on competition[81].

2.3.3.3. R&D directed towards an improvement, substitution or replacement of existing products or technologies

81. If the R&D is directed at the **improvement** of existing products or technologies, possible effects concern the relevant market(s) for those existing products or technologies. Effects on prices, output, product quality, product variety or technical development in existing markets are, however, only likely if the parties together have a strong position, entry is difficult and there are only few other remaining

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[79] Article 1 paragraph 1(19) of the R&D BER defines a competing R&D effort as ‘an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage and which concerns: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement. These third parties must be independent from the parties to the R&D agreement.

[80] Article 1 paragraph 1(18) of the R&D BER defines an undertaking competing in innovation as ‘an undertaking that is not competing for an existing product and/or technology and that independently engages in or, in the absence of the R&D agreement, would be able and likely to independently engage in R&D efforts which concern: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement.

[81] This is without prejudice to the analysis of potential efficiency gains, including those that regularly exist in publicly co-funded R&D.

competitors. Furthermore, if the R&D only concerns a relatively minor input of a final product, foreclosure effects in those final products are, if any, very limited.

82. If the R&D is directed at the **substitution or replacement** of an existing product or technology, possible effects may concern the slowing down of the development of the replacing product or technology. This is in particular the case if the parties have market power on the existing product or technology market and they are also the only ones engaged in R&D for developing a replacement for that existing product or technology. A similar effect can occur if a major player in an existing market cooperates with a much smaller or a potential competitor who is just about to emerge with a product or technology and which may endanger the incumbent's position.

83. If the parties also include in their agreement the joint exploitation (e.g. production and/or the distribution) of the contract products or contract technologies, the effects on competition have to be examined more closely. In particular, if the parties are strong competitors, restrictive effects on competition in the form of increased prices or reduced output in existing markets are more likely. If, however, the joint exploitation is only done by means of licensing to third parties, restrictive effects such as foreclosure problems are unlikely.

2.3.3.4. R&D poles and R&D efforts directed at a product or technology creating a new market

84. R&D efforts which concern the R&D of new products or technologies, as well as R&D poles are captured by the concept of competition in innovation for the purpose of this Chapter.

85. A new product or technology does not merely improve, substitute or replace existing products or technologies. The demand for the new product or technology will, if emerging, create a new separate market.

86. R&D poles are R&D efforts directed primarily towards a specific aim or objective. The specific aim or objective of an R&D pole cannot yet be defined as a product or a technology or involves a substantially broader target than products or technologies on a specific market.

87. Effects on price and output on existing markets are rather unlikely for such R&D efforts at the time of the assessment of the R&D cooperation, as the R&D effort cannot yet be defined as aiming at a product or a technology. The analysis would therefore have to focus on possible restrictions of competition at innovation level concerning, for instance, the quality and variety of possible future products or technologies and/or the speed or level of innovation. Those restrictive effects can arise where two or more of the few undertakings independently engaging in (for example) the R&D of a new product (in particular when they are at a stage where they are near to launching the new product), start to cooperate instead of developing the new product separately. Such effects are typically the direct result of the cooperation between the parties.

88. Innovation may be restricted even by a pure R&D agreement. In general, however, R&D cooperation concerning new products or technologies or R&D poles is unlikely to give rise to restrictive effects on competition unless there is only a limited number of competing R&D efforts that remains in addition to those of the parties to the R&D cooperation.

2.4. Agreements covered by the R&D BER

89. The benefit of the exemption established by the R&D BER covers those R&D agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3)[82].

90. The R&D BER covers R&D agreements entered into between two or more parties which relate to the conditions under which those parties pursue[83]:

(a) joint R&D of contract products or contract technologies which includes or excludes joint exploitation of the results of that R&D; or

(b) paid-for R&D of contract products or contract technologies which includes or excludes joint exploitation of the results of that R&D; or

(c) joint exploitation of the results of R&D of contract products or contract technologies carried out pursuant to a prior agreement pursuing joint R&D (as defined in point (a) above) between the same parties; or

(d) joint exploitation of the results of R&D of contract products or contract technologies carried out pursuant to a prior agreement pursuing paid-for R&D (as defined in point (b) above) between the same parties.

91. The R&D BER draws a distinction between contract products or contract technologies:

(a) 'contract product'[84] means a product[85] arising out of the joint or paid-for R&D or produced or provided applying the contract technologies. This includes products obtained through an R&D pole as well as new products[86];

(b) 'contract technology'[87] means a technology or process arising out of the joint or paid-for R&D. This includes technologies or processes obtained through an R&D pole as well as new technologies or processes.

92. Under the R&D BER, the concept of 'research and development' means activities aimed at acquiring know-how relating to existing or new products, technologies or processes, the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results.

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82 Regulation (EEC) No 2821/71 empowers the Commission, in accordance with Article 101(3), to block exempt by regulation agreements which have as their object the R&D of products, technologies or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding intellectual property rights.

83 Article 1 paragraph 1(1) of the R&D BER.

84 Article 1 paragraph 1(6) of the R&D BER.

85 For the purpose of the R&D BER, 'product' means a good or a service, including both intermediary goods or services and final goods or services (Article 1 paragraph1(4) of the R&D BER).

86 For the purpose of the R&D BER, 'new product or technology' is a product, technology or process that does not yet exist at the time when the R&D agreement falling under Article 1 paragraph 1(1)(a) or (b) of the R&D BER is entered into and that will, if emerging, create its own new market and not improve, substitute or replace an existing product, technology or process (Article 1 paragraph 1(7) of the R&D BER).

87 Article 1 paragraph 1(5) of the R&D BER.

2.4.1. Distinction between 'joint R&D' and 'paid-for R&D' and concept of 'specialisation in the context of R&D'

93. The R&D BER distinguishes between 'joint R&D' and 'paid-for R&D'.

94. When the parties pursue **joint R&D**, their agreement can provide for one of the following ways in which the R&D activities are carrried out[88]:

(a) the R&D activities are carried out by a joint team, organisation or undertaking;

(b) the parties jointly entrust a third party with the R&D activities; or

(c) the parties allocate the activities between them by way of "specialisation in the context of R&D". This means that each of the parties is involved in the R&D activities and they divide the R&D work between them in any way that they consider most appropriate. This does not include paid-for R&D[89].

95. **Paid-for R&D** means R&D that is carried out by at least one party whereas at least one other party finances the R&D but does not carry out any of the R&D activities itself (the financing party).

96. The distinction between joint R&D and paid-for R&D in the R&D BER is relevant for the purpose of the calculation of market shares. For paid-for R&D, the parties will need to also include R&D agreements concluded by the financing party with third parties, with regard to the same contract products or contract technologies, for the purposes of calculating the combined market shares – see Section 2.5.4.2 below.

2.4.2. Joint exploitation of the R&D results and concept of specialisation in the context of joint exploitation

97. The R&D BER explicitly covers agreements that include the joint exploitation of the R&D results. Such agreements are, however, subject to specific provisions.

98. The **concept of 'exploitation of the results'** is rather wide and comprises the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such production or application[90].

99. Under the R&D BER, joint exploitation of the results of the R&D may only pertain to results which are:

(a) indispensable for the production of the contract products or the application of the contract technologies; and

(b) protected by intellectual property rights or constitute know-how.

100. Conversely, this means that, in order to benefit from the exemption in Article 2 of the R&D BER, the scope of an R&D agreement which includes joint exploitation cannot pertain to results which are not protected by intellectual property or know-how and which are not indispensable for the production of the contract products or the application of the contract technologies.

101. The joint exploitation of the results of joint or paid-for R&D can take place either in the context of the **original** R&D agreement or in the context of a **subsequent** agreement covering the joint exploitation of the results of a prior R&D agreement

[88] Article 1 paragraph 1(12) of the R&D BER.

[89] Article 1 paragraph 1 (13) of the R&D BER.

[90] Article 1 paragraph 1 (9) of the R&D BER.

between the same parties[91]. If the parties choose to carry out the joint exploitation of the results of a prior R&D agreement pursuant to a subsequent agreement, the prior R&D agreement must also meet the conditions of the R&D BER in order for the subsequent joint exploitation agreement to be covered by the exemption provided for in Article 2 of the R&D BER.

102. The R&D BER provides for **three different ways** in which the results of the R&D can be jointly exploited[92]:

(a) First, the exploitation can be carried out **together by the parties** in a joint team, a joint organisation or a joint undertaking;

(b) Second, the parties can **jointly entrust a third party** with the exploitation work;

(c) Lastly, the parties can allocate the work between them by way of **specialisation in the context of exploitation** which means that[93]:

(i) the parties allocate between them individual tasks such as production or distribution; or

(ii) they impose restrictions upon each other regarding the exploitation of the results such as restrictions in relation to certain territories, customers or fields of use; this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties.

103. Practices constituting specialisation in the context of exploitation will not be treated as hardcore restrictions[94]. In addition, where the parties specialise in the context of exploitation, they may limit access to the results for the purposes of such exploitation accordingly[95]. This means that an R&D agreement can, for instance, restrict the exploitation rights of the parties for certain territories, customers or fields of use. If the parties agree that each of them can distribute the contract products (and thus they have not opted for a joint distribution model and they have not agreed that only the party producing the contract products may distribute them), the parties charged with the production of the contract products by way of specialisation must be required to fulfil orders for supplies of the contract products from the other parties[96].

104. Lastly, as mentioned in Section 2.5.4 below, if the R&D agreement covers joint exploitation of the R&D results, the exemption under the R&D BER applies: (i) for the duration of the R&D and (ii) for an additional period of seven years after the contract products or contract technologies are first put on the market within the internal market[97].

2.4.3. Assignment or licensing of intellectual property rights

105. The exemption of the R&D BER also applies to agreements which include provisions on the assignment or licensing of intellectual property rights, provided

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[91] As covered by Article 1 paragraph 1(1)(c) and (1)(d) of the R&D BER.

[92] Article 1 paragraph 1(12) of the R&D BER.

[93] Article 1 paragraph 1(14) of the R&D BER.

[94] See Section 2.6 on Hardcore restrictions below, and Article 8 paragraph 3(c) of the R&D BER.

[95] Article 3 paragraph 4 of the R&D BER.

[96] Article 5 paragraph 2 of the R&D BER.

[97] See also Article 6 paragraph 4 of the R&D BER.

that those provisions do not constitute the primary object of the R&D agreement but are directly related to and necessary for the implementation of such agreements[98].

106. This exemption covers the assignment or licensing to one or more of the parties or to an entity which the parties establish to carry out the joint R&D, the paid-for R&D or the joint exploitation[99].

107. In these cases, the assignment or licensing will therefore be subject to the provisions of the R&D BER and not to those of the Technology Transfer Block Exemption Regulation[100]. However, in the context of R&D agreements, the parties can also determine the conditions for licensing of the results of the R&D to third parties. Such licence agreements are not covered by the R&D BER but may be covered by the block exemption in the Technology Transfer Block Exemption Regulation if the conditions set out therein are fulfilled[101].

2.5. Conditions for exemption under the R&D BER

2.5.1. Access to the final results

108. The first condition for benefiting from the exemption under the R&D BER is that all parties have full access to the final results of the R&D for two purposes[102]:

(a) for conducting further research; and

(b) for exploiting the results of the R&D.

109. According to the R&D BER, full access to the final results of the R&D shall also include any resulting intellectual property rights and know-how. It shall be granted as soon as the results of the R&D become available[103].

110. Depending on their capabilities and commercial needs, the parties may make unequal contributions to their R&D cooperation. Therefore, in order to reflect, and to make up for, the differences in the value or the nature of the parties' contributions, an R&D agreement may state that one party is to compensate another for obtaining access to the results for the purposes of further research or exploitation. Compensation is not mandatory, but if it is provided for in the R&D agreement then compensation must not be so high as to effectively impede full access to the results.

111. In order to qualify for an exemption under the R&D BER, the right of access to the results of the R&D **cannot be limited** if such access is required for conducting **further research**[104].

112. However, under certain circumstances, access to the results for **the purposes of exploitation may be restricted** and the R&D agreement may still benefit from

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[98] Article 2 paragraph 3 of the R&D BER.

[99] Article 2 paragraph 3 of the R&D BER.

[100] 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.. See also points 73 and 74 of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03 ('Technology Transfer Guidelines').

[101] Technology Transfer Guidelines, point 74.

[102] Article 3 of the R&D BER.

[103] Article 3 paragraph 1(a) of the R&D BER.

[104] Article 3 of the R&D BER only refers to the possibility of restricting access under certain circumstances for the purpose of exploitation which are set out in paragraphs 3 and 4 of Article 3 of the R&D BER.

exemption under the R&D BER. This is the case for R&D agreements with the following parties which may agree to confine their use of the results for the purposes of further research only (and therefore not for exploitation):

(a) research institutes;

(b) academic bodies; or

(c) undertakings which supply R&D as a commercial service without normally being active in the exploitation of the results[105].

113. In addition, access to the results for the purposes of exploitation may also be limited where the parties limit their rights of exploitation in accordance with the R&D BER, in particular where they specialise in the context of exploitation[106]. This means that the parties will be allowed to impose restrictions upon each other regarding the exploitation of the results (such as restrictions in relation to certain territories, customers or fields of use).

2.5.2. Access to pre-existing know-how

114. The second condition for benefitting from the exemption under the R&D BER refers to access to pre-existing know-how. This condition only applies to R&D agreements that exclude the joint exploitation of the R&D results and is limited to know-how that is indispensible for the exploitation of the R&D results[107].

115. Such agreements must stipulate that each party must be granted access to any pre-existing know-how of the other parties if this know-how is indispensable for the purposes of the party's exploitation of the results. This does not mean that the parties have to include all their pre-existing know-how within the scope of the R&D agreement. However, they will have to identify the know-how that is indispensable for exploiting the results. The R&D agreement may provide that the parties compensate each other for giving access to their pre-existing know-how. Such compensation must, however, not be so high as to effectively impede such access[108].

116. The condition to provide access to pre-existing know-how is without prejudice to the condition to provide full access to the results of the R&D set out in Article 3 of the R&D BER This means that a given R&D agreement may, under certain conditions, have to include provisions both as regards access to pre-existing know-how and as regards final results of the R&D, in order to benefit from the exemption.

2.5.3. Conditions linked to joint exploitation

117. The R&D BER includes two further conditions which concern the joint exploitation of the R&D results. As set out in Section 2.4.2, the scope of joint exploitation must be limited to R&D results that are protected by intellectual property rights or constitute know-how and which are indispensable for the production of the contract products or the application of the contract technologies.

118. Second, if the parties agree that each of them can distribute the contract products (and thus they have not opted for a joint distribution model and they have not agreed that only the party producing the contract products may distribute them), the parties

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[105] These could for instance be SMEs.

[106] See Article 1 paragraph 1(14) of the R&D BER for the definition of specialisation in exploitation and Section 2.4 of these Guidelines.

[107] See Article 4 of the R&D BER and Section 2.4.2 of these Guidelines.

[108] Article 4 paragraph 2 of the R&D BER.

charged with the production of the contract products by way of specialisation must be required to fulfil orders for supplies of the contract products from the other parties[109].

2.5.4. Thresholds, market shares and duration of exemption

119. It can in general be presumed for the application of Article 101(3) of the Treaty, that below a certain level of market power the positive effects of R&D agreements will outweigh any negative effects on competition[110].

120. The R&D BER relies on two metrics for capturing those R&D agreements that remain below a certain level of market power: (i) a market share threshold for undertakings competing for existing products and/or technologies; and (ii) a threshold for undertakings competing in innovation based on the existence of a minimum number of competing R&D efforts (three in addition to the one of the parties to the R&D agreement).

2.5.4.1. Undertakings competing for existing products and/or technologies and undertakings competing in innovation

121. In order to determine the competitive relationship between the parties, it is necessary to examine whether the parties could have been competing undertakings in the absence of the R&D agreement[111].

122. In general, agreements between undertakings competing for an existing product and/or technology and agreements between undertakings competing in innovation pose a greater risk to competition than agreements between undertakings not competing with each other. Agreements between not competing undertakings will only in rare instances give rise to horizontal restrictive effects on competition[112].

(a) Undertakings competing for an existing product and/or technology

123. For the purpose of the R&D BER, an 'undertaking competing for an existing product and/or technology' means an actual or a potential competitor:

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

(b) 'potential competitor' is defined as an undertaking that, in the absence of the R&D agreement, on realistic grounds and not just as a mere theoretical possibility would be likely to undertake, within not more than 3 years, the necessary additional investments or incur the necessary costs to supply a product or technology capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.

124. Potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the cooperation enables them to carry out the R&D activities. The decisive question is whether each party

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109 Article 5 paragraph 2 of the R&D BER.

110 Recital 5 of the R&D BER.

111 See also Section 2.3 of this Chapter on the assessment under Article 101(1).

112 Any vertical effects may need to be assessed in line with the Vertical Guidelines.

independently has the necessary means as regards assets, know-how and other resources[113].

125. R&D agreements covered by the R&D BER concerning existing products and/or technologies can for example take the following forms:

(a) An R&D agreement between two undertakings that already supply an existing product capable of being improved, substituted or replaced by the product arising from the R&D cooperation (actual competitors);

(b) An R&D agreement between (a) an undertaking that already supplies a product capable of being improved, substituted or replaced by the contract product (an actual competitor) and (b) an undertaking conducting R&D into a product and that would be likely to undertake the necessary additional investments to supply that product capable of being improved, substituted or replaced by the product arising from the R&D cooperation (contract product) on the relevant geographic market (potential competitor).

(b) Undertakings competing in innovation

126. For the purpose of the R&D BER, undertakings competing in innovation are undertakings that are not competing for an existing product and/or technology[114] and that independently engage, or in the absence of the R&D agreement would be able and likely to independently engage, in R&D efforts which concern:

(a) R&D of the same or likely substitutable new products and/or technologies as the one(s) covered by the R&D agreement; or

(b) R&D poles pursuing substantially the same aim or objective as the one(s) to be covered by the R&D agreement.

127. With regard to new products and/or technologies, if the R&D agreement concerns both new products and technologies, the parties shall assess whether they are undertakings competing both as regards the technology and the product that may be developed.

128. The assessment of likely substitutability of new products and/or technologies should focus on whether consumers, once the products and/or technologies enter the market, are likely to regard these new products and/or technologies as interchangeable or substitutable by reason of their characteristics[115], their projected prices and their intended use.

129. In order to be seen as competing, R&D poles must pursue substantially the same aim or objective as the one(s) to be covered by the R&D agreement. This shall be determined based on reliable information concerning, for example, the nature and scope of the R&D effort.

130. R&D agreements between undertakings competing in innovation covered by the R&D BER can for example take the following forms:

(a) an R&D agreement between (a) an undertaking developing a new product and (b) an undertaking developing the same or a likely substitute of such new product;

[113] See also Section 1.2.1 of these Guidelines.

[114] See Section 2.5.4.1 (a) above.

[115] This can also include the underlying technologies for the production of the new products.

(b) an R&D agreement between (a) an undertaking developing a new product and (b) an undertaking able and likely to independently engage (but not yet engaged) in the R&D of the same or a likely substitute of such new product;

(c) an R&D agreement between (a) an undertaking engaged in an R&D effort which concerns an R&D pole and (b) an undertaking engaged in an R&D pole pursuing substantially the same aim or objective;

(d) an R&D agreement between (a) an undertaking engaged in an R&D pole; and (b) an undertaking able and likely to independently engage (but not yet engaged) in an R&D pole pursuing substantially the same aim or objective.

(c) Not competing undertakings

131. The R&D BER defines 'not competing undertaking' as an undertaking that is neither an undertaking competing for an existing product and/or technology nor an undertaking competing in innovation. The parties to an R&D agreement would be considered as not competing undertakings in the case of, for example an undertaking engaged in R&D efforts for a product capable of being improved, substituted or replaced by the contract product and an undertaking conducting research in an R&D pole.

2.5.4.2. Agreements between undertakings competing for an existing product and/or technology

(a) Market share thresholds for undertakings competing for an existing product and/or technology

132. If two or more of the parties to the R&D agreement are competing undertakings for existing products and/or technologies, the exemption shall apply subject to a market share threshold of 25%, calculated at the time the R&D agreement is entered into. This threshold applies in the following way, depending on whether the R&D agreement involves joint R&D or a paid-for R&D[116]:

(a) for R&D agreements involving **joint R&D**, the combined market share of the parties to the agreement shall not exceed 25% on the relevant product and technology markets[117];

(b) for R&D agreements involving **paid-for R&D**, the same market share threshold of 25% applies but is extended not only to the financing party itself, but must also include all the parties with which the financing party has entered into R&D agreements with regard to the same contract products or contract technologies[118].

133. If the results of the joint or paid-for R&D are **not jointly exploited**, the exemption under the R&D BER applies for the duration of the R&D.

134. If, however, the results of the joint or paid-for R&D are **jointly exploited**, the parties will continue to benefit from the exemption for seven years from the time the contract products or contract technologies are first put on the market within the

[116] See Section 2.4.1 on the distinction between joint R&D and paid-for R&D. See also Article 1 paragraph 1(1) of the R&D BER.

[117] Article 6 paragraph 2(a) of the R&D BER.

[118] Article 6 paragraph 2(b) of the R&D BER. Such R&D agreements do not have to fall within the scope of the R&D BER.

internal market[119] if the market share threshold was met (i) at the time of entering into the agreement pursuing joint or paid-for R&D and which includes joint exploitation[120] or (ii) for those R&D agreements under which the parties pursue the joint exploitation of the results of a prior agreement[121], at the time of entering into such prior agreement[122].

135. After the end of the seven year-period referred to in Article 6 paragraph 4 of the R&D BER, the exemption continues to apply as long as the combined market share of the parties does not exceed 25% on the markets to which the contract products or contract technologies belong. This means that the parties would need to assess, at that moment in time, to which market the contract product or contract technologies belong and whether their combined market share does not exceed 25%. If the combined market share rises above 25% after the expiry of the seven year period, the exemption in the R&D BER continues to apply for two consecutive calendar years following the year in which the threshold was first exceeded[123].

(b) Calculation of market shares for existing product and technology markets

136. At the beginning of an R&D cooperation for an existing product and/or technology, the reference point is the existing market for products or technologies capable of being improved, substituted or replaced by the contract products or contract technologies.

137. If the R&D agreement aims at **improving, substituting** or **replacing existing** products or technologies, market shares can be calculated with reference to existing products or technologies that will be improved, substituted or replaced. If the replacement of an existing product or technology will be significantly different, market shares with reference to existing products or technologies may be less informative but can still be used as a proxy to assess the market position of the parties. Alternatively, if market sales values are not available, the market share calculation may be based on other reliable market information, including expenditure in R&D[124].

138. Under Article 7 paragraph 1(b) of the R&D BER, market shares must be calculated on the basis of data relating to the preceding calendar year[125]. For certain markets it may be necessary to calculate market shares on the basis of an average of the parties' market shares of the last three preceding calendar years. This may be relevant for instance when there are bidding markets and the market shares may significantly change (e.g. from 0% to 100%) from one year to another, depending on whether a party was successful or not in the bidding process. This may also be relevant for markets characterised by large, lumpy orders for which the market share of the previous calendar year may not be representative, for example, if no large order took place in the preceeding calendar year. Another situation in which it may be necessary

[119] Article 6 paragraph 4 of the R&D BER.
[120] As defined in Article 1 paragraph 1(1)(a)(ii) and (1)(b)(ii) of the R&D BER.
[121] As defined in Article 1 paragraph 1(1)/c) and (1)(d).
[122] As mentioned above in Section 2.4.2 of these Guidelines, the prior joint or paid-for R&D agreement also needs to meet the conditions to be exempted under the R&D BER.
[123] Article 6 paragraph 5 of the R&D BER.
[124] Article 7 paragraph 1 of the R&D BER.
[125] Article 7 paragraph 1(b) of the R&D BER provides that when the preceding calendar year is not representative of the parties' position in the relevant market(s), market shares shall be calculated on the basis of an average of the parties' market share data relating to the last three preceding calendar years.

to calculate market shares on the basis of an average of the last three preceding calendar years is when there is a supply or demand shock in the calendar year preceding the cooperation agreement.

139. When it comes to the metrics for the calculation of market shares, the R&D BER provides that the calculation of market shares shall be based on the market sales value. If sales value data are not available, estimates based on other reliable market information, including market sales volumes, expenditure in R&D or R&D capabilities, may be used to establish the market share of the parties.

140. For technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. An alternative approach is to calculate market shares on the technology market on the basis of sales of products or services incorporating the licensed technology on downstream product markets. Under that approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed[126].

2.5.4.3. Agreements for new products and/or technologies and R&D poles[127]

(a) Threshold for new products and/or technologies and R&D poles

141. If two or more of the parties to the R&D agreement are undertakings competing in innovation, the exemption shall apply if, at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable with the R&D efforts of the parties to the R&D agreement[128].

142. An R&D agreement between undertakings competing in innovation could also lead to results that the parties can agree to jointly exploit (the contract products or contract technologies). Whether or not the agreement includes such joint exploitation will have an impact on the duration of the exemption under the R&D BER.

143. If the results of the joint or paid-for R&D agreement concerning new products and/or technologies or R&D poles are **not jointly exploited** and the agreement meets the conditions for exemption under the R&D BER, the exemption applies **for the duration of the R&D**.

144. If, however, the results of the joint or paid-for R&D concerning new products and/or technologies or R&D poles **are jointly exploited**, the parties will continue to benefit from the exemption for seven years from the time the resulting contract products or contract technologies are first put on the market within the internal market[129]. This applies if the agreement meets the conditions for exemption under the R&D BER[130]:

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[126] See also Technology Transfer Guidelines for relevant elements for calculating market shares in technology markets.

[127] The R&D BER provides in Article 12 that for R&D agreements between undertakings competing in innovation, Article 1 paragraph 1(18) and Article 6 paragraph 3 of the R&D BER shall only apply to agreements that enter into force after 31 December 2022.

[128] Article 6 paragraph 3 of the R&D BER. If the R&D agreement concerns new products and new technologies, the exemption shall apply if, at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable to those of the parties to the R&D agreement at the technology level and at the product level.

[129] Article 6 paragraph 4 of the R&D BER.

[130] The conditions for exemption are described in Title III of the R&D BER and comprise, among other conditions, the threshold described in Article 6 paragraph 3 of the R&D BER.

(i) at the time of entering into the agreement pursing joint or paid-for R&D and which includes joint exploitation[131] or (ii) for those R&D agreements under which the parties pursue the joint exploitation of the results of a prior agreement[132], at the time of entering into such prior agreement[133].

145. After the end of the seven year period, the parties should be able to calculate their market shares on the markets of the resulting contract product or contract technology. The exemption will therefore continue to apply only as long as the combined market share of the parties does not exceed 25% on the markets to which the contract products or contract technologies belong[134]. If the combined market share rises above 25% after the expiry of the seven year-period, the exemption in the R&D BER continues to apply for two consecutive calendar years following the year in which the threshold was first exceeded[135].

(b) Assessment of the existence of competing and comparable R&D efforts

146. For an R&D cooperation concerning innovation to be exempted, the relevant threshold is based on the existence of three **competing** and **comparable** R&D efforts.

147. It follows from the definition of competing R&D efforts in Article 1 paragraph 1(19) of the R&D BER[136] that the following elements need to be considered for identifying **competing R&D efforts**:

(a) whether the R&D efforts concern R&D of the same or likely substitutable new products and/or technologies or R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement;

(b) whether there are third parties already engaged in the R&D efforts or able and likely to independently engage in such efforts; and

(c) whether those third parties are independent from the parties to the R&D agreement.

148. First, when it comes to the question of whether the **R&D efforts concern the same or likely substitutable** new products and/or technologies or R&D poles pursuing **substantially the same aim or objective** this can be answered in the same way as for the assessment of undertakings competing in innovation set out in Section 2.5.4.1 above.

149. Second, competing R&D efforts can be those in which the **third parties are already engaged**, alone or in cooperation with other third parties. This means that the R&D effort can be pursued either on an individual basis by one third party or jointly by a number of different third parties. A competing R&D effort can also refer to those

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131 As defined in Article 1 paragraph 1(1)(a)(ii) and (1)(b)(ii) of the R&D BER.

132 As defined in Article 1 paragraph 1(1)(c) and (1)(d) of the R&D BER.

133 As mentioned above in Section 2.4.2 of these Guidelines, the prior joint or paid-for R&D agreement also needs to meet the conditions to be exempted under the R&D BER.

134 Article 6 paragraph 5 of the R&D BER.

135 Article 6 paragraph 5 of the R&D BER.

136 'competing R&D effort' means an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage, and which concerns: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement; These third parties must be independent from the parties to the R&D agreement.

efforts in which a third party **is able and likely to engage individually**. Whether a third party is able and likely to individually engage in R&D of the same or likely substitutable new products and/or technologies or R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement can be determined on the basis of the third partys access to relevant financial and human resources, its intellectual property, know-how or other specialised assets or its previous R&D efforts.

150. Third, the question of whether the R&D efforts are pursued **by third parties which are independent** from the parties to the R&D agreement is meant to only include in the assessment such R&D efforts in which the parties to the R&D agreement are not involved.

151. When it comes to the **assessment of comparability of competing R&D efforts** with those of the parties to the R&D agreement, the R&D BER sets out that it shall be made on the basis of reliable information concerning elements such as (i) the size, stage and timing of the R&D efforts, (ii) third parties' (access to) financial and human resources, their intellectual property, know-how or other specialised assets, their previous R&D efforts and (iii) the third parties' capability and likelihood to exploit directly or indirectly possible results of their R&D efforts on the internal market[137].

152. The criteria have to be applied based on a case-by-case approach balancing the factors speaking in favour and those speaking against comparability. The aim of this balancing exercise is ultimately to establish that the competing R&D efforts impose a competitive constraint on the parties to the R&D agreement.

153. The first set of elements to assess the comparability are **linked to the R&D efforts themselves**. They concern the size, stage and timing of the R&D effort. This means, for instance, that if a third party's competing R&D efforts have at least the same or similar size or are at a similar or more advanced stage of development than the R&D effort covered by the R&D agreement, they may impose a competitive constraint and this would speak in favour of comparability. Likewise, when it comes to timing, for example, a third party R&D effort that is six to eight years from market entry compared to an R&D effort of the parties to the R&D agreement that is one year from market entry may not be comparable.

154. The second set of elements are **linked to the capability of the third party (or parties) pursuing the R&D effort.** This concerns their (access to) financial and human resources, their intellectual property, know-how or other specialised assets or their previous R&D efforts. These elements are relevant for determining whether the resources and capabilities backing up the R&D efforts of third parties are comparable and therefore likely to have at least a similar development pace and outcome and thereby impose a competitive constraint. For example, a third party's R&D effort may not be comparable if it lacks significantly the financial and human resources to pursue similar R&D efforts. Likewise, a third party's previous successful experience in similar R&D projects as the one to be covered by the R&D agreement would speak in favour of comparability. Furthermore, in certain sectors, similar access to

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[137] Article 7 paragraph 2 of the R&D BER. For third parties able and likely to engage in competing R&D efforts, only the second and third sets of elements would be relevant for the assessment of comparability.

and/or ownership of relevant intellectual property rights (e.g. patents) or relevant know-how by the third party may also speak in favor of comparability.

155. The third set of **elements are linked to the exploitation of the results.** This refers to the third parties' capability and likelihood (i.e. incentives to remain engaged to bring the results to the market) of exploiting possible results of the R&D effort on the internal market. This means, for instance, that R&D efforts that are likely to be exploited only outside of the EU with no prospect of reaching the internal market may not be comparable to the R&D efforts subject to the R&D agreement for which the results would be placed on the market in the internal market.

2.5.4.4. Agreements between not competing undertakings

156. Where the parties to the R&D agreement are **not competing undertakings**, the parties are not subject to any threshold[138]. If the R&D results are **not jointly exploited**, the R&D agreement is exempted for the entire duration of the R&D.

157. If the R&D results are **jointly exploited**, the exemption continues to apply for seven years as of the moment the contract products or contract technologies are first put on the market within the internal market.

158. After the expiry of the seven year period, the parties should be able to calculate their market shares on the markets of the resulting contract product or contract technology. The exemption will continue to apply only as long as the combined market share of the parties does not exceed 25% on the markets to which the contract products or contract technologies belong. If the combined market share rises above 25% on one of these markets after the expiry of the seven year period, the exemption in the R&D BER continues to apply for two consecutive calendar years following the year in which the threshold was first exceeded[139].

2.6. Hardcore and excluded restrictions

2.6.1. Hardcore restrictions

159. Article 8 of the R&D BER contains a list of hardcore restrictions. These are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to the market and to consumers. R&D agreements that include one or more hardcore restrictions are excluded as a whole from the scope of the exemption provided for by R&D BER.

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

2.6.1.1. Restriction of the freedom of the parties to carry out other R&D efforts

161. Article 8 paragraph 1 of the R&D BER excludes from the exemption R&D agreements that entail restrictions of the parties' freedom to carry out R&D independently or in cooperation with third parties, either:

(a) in a field unconnected with that to which the R&D agreement relates, or

[138] Article 6 paragraph 1 of the R&D BER.
[139] Article 6 paragraph 5 of the R&D BER.

(b) in the field to which the R&D agreement relates or in a connected field after the completion of the R&D.

162. In other words, the parties to an R&D agreement must at all times be free to carry out R&D efforts in unconnected fields from the ones covered by the R&D agreement. The parties must also, after the completion of the R&D covered by the R&D agreement, remain free to carry out R&D efforts in the field to which the R&D agreement relates or in a connected field. Otherwise, the R&D agreement will not benefit from the exemption under the R&D BER.

2.6.1.2. Limitation of output or sales and price fixing

163. Article 8 paragraph 2 of the R&D BER excludes from the exemption R&D agreements entailing limitations of output or sales. When competitors agree to limit how much each of them may produce or sell, this is normally a serious restriction of competition. However, the setting of production targets is not to be treated as a hardcore restriction where the joint exploitation of the results includes the joint production of the contract products[140]. Likewise, the setting of sales targets is not to be treated as a hardcore restriction where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies and is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party[141]. This also applies to practices constituting specialisation in the context of exploitation[142] and certain non-compete obligations[143].

164. Under Article 8 paragraph 3 of the R&D BER, the fixing of prices when selling products or the fixing of license fees when licensing technologies to third parties are also hardcore restrictions. However, the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies and is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party, is not to be treated as a hardcore restriction.

2.6.1.3. Active and passive sales restrictions

165. Article 8 paragraphs 4, 5 and 6 of the R&D BER concern active and passive sales restrictions. With regard to R&D agreements, **passive sales** are defined in Article 1 paragraph 1(24) of the R&D BER as sales in response to unsolicited requests from individual customers, including delivery of products to the customer or customers, without having initiated the sale through actively targeting the particular customer, customer group or territory; passive sales include sales resulting from participating in private or public procurement tenders.

166. Active sales refers to all forms of selling other than passive sales, including:

(a) actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising or promotion, offline or online, for instance by means of print or digital media, including online media,

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140 Article 8 paragraph 2(a) of the R&D BER.

141 Article 8 paragraph 2(b) of the R&D BER.

142 Article 8 paragraph 2(c) of the R&D BER. See for the definition of specialisation in the context of exploitation, Article 1 paragraph 1(14) of the R&D BER and Section 2.4.2 of these Guidelines.

143 Article 8 paragraph 2(d) of the R&D BER.

price comparison tools or advertising on search engines targeting customers in specific territories or customer groups;

(b) offering on a website language options different than the ones commonly used on the territory in which the distributor is established;

(c) offering a website with a domain name corresponding to a territory other than the one in which the distributor is established.

167. Article 8 paragraph 4 of the R&D BER removes the exemption of the R&D BER for R&D agreements containing passive sales restrictions. This covers any passive sale restriction as regards (a) the territory or (b) the customers where or to whom the parties may passively sell the contract products or license the contract technologies, but excludes the requirement to exclusively license the results to another party. The reason for this latter exception lies in the explicit possibility afforded to the parties that only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties[144].

168. Article 8 paragraph 5 of the R&D BER removes the exemption of the R&D BER for R&D agreements containing certain active sales restrictions. This is the case regarding a requirement not to make any, or to limit active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation.

169. This means that active sales must not be restricted between the parties, unless the parties allocate territories or customers to one of them following a specialisation in the context of exploitation[145].

2.6.1.4. Other hardcore restrictions

170. The R&D BER includes two further hardcore restrictions. First, if the parties allocated territories between them or otherwise allocated customers by way of specialisation in the context of exploitation, it is a hardcore restriction to require one party to refuse to meet demand from customers allocated to the other party, if such customers would market the contract products or license the contract technologies in other territories within the internal market[146].

171. Second, the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market is also a hardcore restriction[147].

2.6.2. Excluded restrictions

172. Article 9 of the R&D BER excludes certain obligations found in R&D agreements from the exemption provided by the R&D BER. These are obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions of Article 101(3). Unlike hardcore restrictions covered by Article 8 of the R&D BER, the excluded restrictions do not remove the benefit of the block exemption for the entire

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[144] As per the definition of specialisation in the context of exploitation set out in Article 1 paragraph 1(14) of the R&D BER.

[145] See definition of the specialisation in the context of exploitation in Article 1 paragraph 1(14) of the R&D BER.

[146] Article 8 paragraph 6 of the R&D BER.

[147] Article 8 paragraph 7 of the R&D BER.

R&D agreement. This is, however, the case only if the restriction in question can be severed from the rest of the agreement. If the restriction is severable, the remainder of the agreement continues to benefit from the exemption under the R&D BER.

173. Excluded restrictions are subject to an individual assessment under Article 101. There is no presumption that excluded restrictions fall within the scope of Article 101(1) or fail to satisfy the conditions in Article 101(3).

174. The first excluded restriction is an obligation not to challenge the validity of intellectual property rights which the parties hold in the internal market:

(a) after completion of the R&D for intellectual property rights which are relevant to the R&D; or

(b) after the expiry of the R&D agreement for intellectual property rights which protect the results of the R&D[148].

175. The reason for excluding such obligations from the benefit of the block exemption is that parties that have the relevant information to identify an intellectual property right that was granted in error should not be prevented from bringing a challenge as regards the validity of such intellectual property rights. For such restriction it cannot be generally presumed that the conditions of Article 101(3) are fulfilled and the parties will therefore need to self-asses such restrictions. However, provisions allowing for the termination of the R&D agreement if one of the parties challenges the validity of intellectual property rights which are relevant for the R&D agreement or that protect the R&D results are not excluded restrictions.

176. The second excluded restriction is an obligation not to grant licences to third parties to produce the contract products or to apply the contract technologies. This means that the parties should, in principle, be free to grant licenses to third parties. An exception applies where R&D agreements provide for the exploitation of the results of the joint R&D or paid-for R&D by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.

2.7. Withdrawal of the benefit of the R&D BER

177. The Commission may withdraw the benefit of the R&D BER pursuant to Article 29(1) of Regulation (EC) No 1/2003, if it finds that, in a particular case, an R&D agreement to which the exemption provided for in the R&D BER applies, nevertheless has certain effects that are incompatible with Article 101(3). Moreover, if, in a particular case, such an agreement has effects that are incompatible with Article 101(3) in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the NCA may also withdraw the benefit of the R&D BER in respect of that territory, 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, who therefore have no power to withdraw the benefit of the R&D BER, unless the court concerned is a designated competition authority of a Member State pursuant to Article 35 of Regulation (EC) No 1/2003.

178. The Commission and the NCAs may withdraw the benefit of the R&D BER, in particular, where:

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148 Article 9 paragraph 1(a) of the R&D BER.

(a) the existence of an R&D agreement substantially restricts the scope for third parties to carry out R&D in the field(s) of the contract products, contract technologies or R&D poles; his could be due, for example, to the limited available research capacity;

(b) the existence of the R&D agreement substantially restricts the access of third parties to the market for the contract products or contract technologies; his could be due, for example, to the particular structure of supply;

(c) the parties do not exploit the results of the joint or paid-for R&D vis-à-vis third parties without any objectively valid reason;

(d) the contract products or contract technologies are not subject in the whole or a substantial part of the internal market to effective competition from products or technologies considered by users as equivalent in view of their characteristics, price and intended use.

179. Pursuant to Article 29(1) of Regulation (EC) No 1/2003, the Commission may withdraw the benefit of the R&D BER 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 the R&D BER in a particular case, without prejudice to the application of the rules on case allocation and assistance within the European Competition Network ('ECN')[149], and without prejudice to their own withdrawal power 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 with a view to deciding whether or not to withdraw the benefit of R&D BER. 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 R&D BER to reach a timely conclusion on whether the conditions for a withdrawal in the specific case are fulfilled.

180. 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 the R&D BER Union-wide, in that it may withdraw the benefit of the R&D BER in respect of R&D agreements restricting competition on a relevant geographic market which is wider than the territory of a single Member State, whereas NCAs may only withdraw the benefit of the Regulation in relation to the territory of their respective Member State.

181. 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 has the competence to withdraw the benefit of the R&D BER in relation to an R&D 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 in that Article 29(1) of Regulation (EC) No 1/2003 also empowers the Commission to withdraw the benefit of the R&D BER in relation to a national or regional market, provided the R&D agreement at hand may affect trade between Member States.

182. Where several separate national or regional markets are concerned, several competent NCAs can withdraw the benefit of the R&D BER in parallel.

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

183. It follows from the wording of Article 29(1) of Regulation (EC) No 1/2003 that, where the Commission withdraws the benefit of the R&D BER, it has the burden of proving, firstly, that the respective R&D agreement has appreciable anti-competitive effects making it fall within the scope of Article 101(1) of the Treaty. Secondly, it must prove that the agreement has effects that are incompatible with Article 101(3) of the Treaty, which means that it fails to fulfil at least one of the four conditions of Article 101(3) of the Treaty. Pursuant to Article 29(2) of Regulation (EC) No 1/2003, the same requirements apply where an NCA withdraws the benefit of the R&D BER in respect of its Member State. In particular, as regards the burden of proving that the second requirement is fulfilled, Article 29 of Regulation (EC) No 1/2003 requires the competent NCA to substantiate that at least one of the four conditions of Article 101(3) of the Treaty is not met[150].

184. If the requirements of Article 29(1) of Regulation (EC) No 1/2003 are fulfilled, the Commission may withdraw the benefit of the R&D BER in an individual case. Such a withdrawal, and its requirements, as set out in the previous paragraphs, must be distinguished from the findings in 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, as done in previous Commission decisions[151].

185. If the Commission withdraws the benefit of the R&D BER pursuant to Article 29(1) of Regulation (EC) No 1/2003, it has to take into account that the withdrawal can only have ex nunc effects, i.e. the exempted status of the agreements concerned will remain unaffected for the period preceding the date at 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.

2.8. Assessment under Article 101(3) of R&D agreements falling outside the scope of the R&D BER

186. There is no presumption that R&D agreements falling outside the scope of the R&D BER fall within the scope of Article 101(1) nor that they would fail to satisfy the conditions of Article 101(3). Such R&D agreements require an individual assessment under Article 101.

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150 The requirement under Article 29 of Regulation (EC) No 1/2003 regarding the burden of proof of the competent NCA follows from the situation in which the R&D BER does not apply and an undertaking invokes Article 101(3) in an individual case. In such a situation, the undertaking has the burden of proof pursuant to Article 2 of Regulation (EC) No 1/2003 to show that all four conditions of Article 101(3) 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.

151 The Commission has used its power to withdraw the benefit of one of the previously applicable block exemption regulations in the Commission decisions of 25 March 1992 (interim measures), and of 23 December 1992 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 the Commission decisions of 4 December 1991 (interim measures), and of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 – *Eco System/Peugeot*.

187. Such individual assessment starts with the question whether the agreement would restrict competition within the meaning of Article 101(1)[152]. If so, undertakings would need to assess whether the R&D agreement fulfils the conditions of Article 101(3).

2.8.1. Efficiency gains

188. Many R&D agreements – with or without joint exploitation of possible results – bring about efficiency gains by combining complementary skills and assets, thus resulting in improved or new products and technologies being developed and marketed more rapidly than would otherwise be the case. R&D agreements may also lead to a wider dissemination of knowledge, which may trigger further innovation. R&D agreements may also give rise to cost reductions and reduce dependencies on a too limited number of suppliers of certain technologies, products and services. These efficiency gains can contribute to a resilient internal market.

2.8.2. Indispensability

189. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an R&D agreement do not fulfil the criteria of Article 101(3). In particular, the hardcore restrictions listed in Article 8 of the R&D BER[153] are less likely to meet the indispensability criterion in an individual assessment.

2.8.3. Pass-on to consumers

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

191. In general, it is more likely that an R&D agreement will bring about efficiency gains that benefit consumers if the R&D agreement results in the combination of complementary skills and assets. The parties to an agreement may, for instance, have different research capabilities.

192. If the parties' skills and assets are very similar, the most important effect of the R&D agreement may be the elimination of part or all of the R&D of one or more of the parties. This would eliminate (fixed) costs for the parties to the agreement but would be unlikely to lead to benefits which would be passed on to consumers.

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

2.8.4. No elimination of competition

194. The criteria of Article 101(3) cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products or, technologies in question.

[152] See also Section 2.3 of these Guidelines.

[153] See also Section 2.6 of these Guidelines on hardcore restrictions.

2.9. Time of the assessment

195. The assessment of restrictive agreements under Article 101 is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts.

196. The exception under Article 101(3) applies as long as the four cumulative conditions set out in Article 101(3) are fulfilled, and ceases to apply when that is no longer the case. When applying the four cumulative criteria under Article 101(3), it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restrictions required to make and recoup an efficiency-enhancing investment. Article 101 cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be made to implement the agreement can thus lead to the agreement falling outside Article 101(1) or fulfilling the conditions of Article 101(3), as the case may be, for the period of time needed to recoup the investment. Should the invention resulting from the investment benefit from any form of exclusivity granted to the parties under rules specific to the protection of intellectual property rights, the recoupment period for such an investment will generally be unlikely to exceed the exclusivity period established under those rules.

197. In some cases the restrictive agreement is an irreversible event. Once the restrictive agreement has been implemented, the *ex ante* situation cannot be re-established. In such cases the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation.

198. For instance, in the case of an R&D agreement whereby each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may objectively be technically and economically impossible to revive a project once it has been abandoned. If at that point in time, the agreement is compatible with Article 101, for instance because a sufficient number of third parties have competing R&D efforts, the parties' agreement to abandon their individual projects remains compatible with Article 101(1), even if at a later point in time the third party projects fail.

199. However, the prohibition of Article 101(1) may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If, for example, in addition to joint R&D, the agreement provides for joint exploitation, Article 101 may apply to that part of the agreement if, due to subsequent market developments, the agreement gives rise to restrictive effects on competition and does not (any longer) satisfy the conditions of Article 101(3) taking due account of *ex ante* sunk investments.

2.10. Example

200. R&D agreements between undertakings competing in innovation

Example 1

Situation: Companies A and B have each independently made significant investments in R&D to develop a new miniaturised electronic component that will neither improve nor replace existing ones, and the demand for which will create its own new market, if successful. Companies A and B have developed early prototypes. They now agree to join those R&D efforts by setting up a joint venture to complete the R&D, focusing only on one of the two R&D efforts (the R&D part of the agreement) and to produce the new component (the joint exploitation part of the

agreement), which will be sold back to Companies A and B, in order for them to commercialise the new component separately (the 'R&D agreement').

There are no other companies that are currently developing the same or a substitutable electronic component, or that are able and likely to independently engage in R&D efforts to develop the same or a substitutable component.

Analysis: The miniaturised electronic component is an entirely new product and an analysis should be made of whether the R&D agreement restricts competition on the internal market within the meaning of Article 101(1). Furthermore, an assessment should be done of whether the R&D agreement is covered by the R&D BER.

At the time the R&D agreement is entered into, Companies A and B are the only two undertakings engaged (or able and likely to engage) in R&D efforts concerning the new component. They would each have been able to pursue the R&D of the new component independently and to bring the new component to market. Through the joint venture, Companies A and B will now focus on one R&D effort, instead of engaging in two separate ones. Therefore, the R&D agreement may well have restrictive effects within the meaning of Article 101, caused by the reduction of the number of R&D efforts and thereby of the number of products that are likely to reach the market.

If the agreement leads to a restriction of competition, the parties would need to determine whether they can be exempted under the R&D BER. However, the R&D agreement between Companies A and B does not meet the conditions for exemption. In particular, the threshold for agreements between undertakings competing in innovation is not met as there are no other competing R&D efforts (Article 6 paragraph 3 of the R&D BER). As a result, an individual assessment is required to determine whether the R&D agreement meets the requirements under Article 101(3).

Under Article 101(3), while the R&D agreement could potentially give rise to efficiency gains in the form of bringing a new product forward quicker, the R&D agreement would eliminate the only competitive constraint of the parties at innovation level. As a result, this would likely lead to a loss of innovation and to higher downstream prices. The R&D agreement would likely create a duopoly in the future market for new miniaturised electronic components. Such a duopoly would be characterised by a high degree of commonality of costs and possible exchange of commercially sensitive information between the parties since their joint venture will manufacture for the only sellers of the new component, Companies A and B. There may therefore also be a serious risk of anti-competitive coordination leading to a collusive outcome in the new market. Although some of those concerns could be remedied if the parties committed to license know-how or intellectual property rights for manufacturing the new component to third parties on reasonable terms, it seems unlikely that this could remedy all concerns and fulfil the conditions of Article 101(3). Therefore, the R&D agreement is unlikely to be exempted under Article 101(3).

201. R&D agreements between undertakings competing for an existing product and/or technology

Example 2

Situation: Company A has a 51% market share on a market encompassing its blockbuster medicine. A small company, Company B, is engaged in pharmaceutical R&D, in the production of active pharmaceutical ingredients ("APIs") and in the

production of generic medicines. Company B has invented a process that makes it possible to produce the API of Company A's blockbuster medicine in a more economic fashion. Company B has filed a patent application for this process (process patent). Company A's compound (API) patent of the blockbuster medicine expires in a little less than three years; thereafter there will remain a number of process patents relating to the medicine. Company B considers that the new, more efficient process developed by it would not infringe the existing process patents of Company A and would allow the production of a generic version of the blockbuster medicine once Company A's API patent has expired. Company B would be likely to either produce the product itself or license the process to interested third parties, for example, to other generic producers or to Company A.

Before concluding its research and development in this area, Company B enters into an agreement with Company A, in which Company A makes a financial contribution to the R&D project being carried out by Company B on condition that it acquires an exclusive licence for any of Company B's process patents related to the production of the API of Company A's blockbuster medicines.

There are two other independent R&D efforts developing a process for the production of the API of the blockbuster medicine which would not infringe Companies A's or B's process patents, but it is not yet clear whether they will reach industrial production.

Analysis: The process covered by Company B's patent application merely improves an existing production process. Company A is active on the market for the existing technology (the production process) as well as on the market for the existing product (the blockbuster medicine). Company B is a potential competitor at the technology level. If Company B were to exploit the process patent, then it would likely be able to enter the product market with, for example, a generic product. Therefore, Companies A and B are potential competitors for the product market of which the blockbuster medicine forms part. The agreement is not exempted under the R&D BER since at least with regard to the product market, Company A's market share is above 25%. Therefore, an individual assessment must be conducted.

Company A has market power on the existing market of which the blockbuster medicine forms part. Whilst that market power would decrease significantly with the actual market entry of generic competitors, the exclusive licence of the process patent makes the process developed by Company B unavailable to third parties and is thus liable to delay generic entry (not least as the product is still protected by a number of process patents belonging to Company A). Since it is unclear whether the two other R&D efforts currently working on an non-infringing alternative to Company A's process patent would reach industrial production, Company B's process patent is the only credible route to launch generic products that could compete with Company A's blockbuster medicine. Consequently, the agreement restricts competition within the meaning of Article 101(1). The cost savings obtained through the new production process for Company A are not sufficient to outweigh the restriction of competition. In the absence of other competitors in the product market, such as generic producers, it is unlikely that the production cost savings would be passed on to consumers. Moreover, an exclusive licence is not indispensable to obtain such savings. Therefore, the agreement is unlikely to fulfil the conditions of Article 101(3).

202. Research partnership

Example 3

Situation: Companies A, B and C are leading players in renewable energy technologies. They plan to set up a research partnership, which will define an R&D agenda setting a long-term common vision regarding the development of new renewable energy technologies and improvement of the existing ones, which would be implemented in a series of separate R&D projects.

This agenda would constitute an R&D collaboration and would be formalised in a memorandum of understanding (MoU), which sets out the objectives, terms and conditions of the collaboration including governance mechanisms and monitoring arrangements. Thus, the MoU establishes a framework for cooperation within which specific R&D collaboration projects will be carried out in support of the agreed long-term agenda.

Analysis: This type of research partnership might involve competing undertakings in either the development of or the implementation of these technologies or both. However, if the nature of the research partnership is limited to a broad agenda setting, this type of collaboration is not likely to be problematic.

Moreover, if the research partnership addresses a challenge that no single company can address and requires the mobilisation of multiple actors, it would be facilitating innovation that otherwise would not take place and thus would represent a contribution to technical and economic progress.

While such research partnership would be unlikely to rise competition concerns, the individual R&D cooperation agreements would need to be analysed independently.

3. PRODUCTION AGREEMENTS

3.1. Introduction

203. The purpose of this Chapter is to provide guidance on the scope and the competitive assessment of production agreements that fall under Article 101(1) and that either (a) benefit from the Specialisation BER (Section 3.4); or (b) fall outside the scope of the Specialisation BER and must be assessed under Articles 101(1) and (3) (Section 3.5).

204. Production agreements vary in form and scope. They can provide that production is carried out by only one party or by two or more parties. Undertakings can produce jointly by way of a joint venture, that is to say, a jointly controlled company operating one or several production facilities, or by looser forms of cooperation in production such as subcontracting agreements.

205. These Guidelines apply to all forms of joint production agreements and horizontal subcontracting agreements[154].

206. Subcontracting agreements refers to agreements where one party (the 'contractor') entrusts to another party (the 'subcontractor') the production of a product. Horizontal subcontracting agreements are concluded between undertakings operating in the same product market irrespective of whether they are actual or potential competitors. Horizontal subcontracting agreements comprise unilateral and reciprocal specialisation agreements as well as other horizontal subcontracting agreements.

207. Unilateral specialisation agreements are agreements between two or more parties which are active on the same product market, by virtue of which a party or parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party or parties, which agrees to produce and supply those products to the party or parties that cease or refrain from producing them;

208. Reciprocal specialisation agreements are agreements between two or more parties which are active on the same product market and by virtue of which two or more parties, on a reciprocal basis, agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply these productsto the party or parties that cease or refrain from producing them.

209. These Guidelines also apply to other horizontal subcontracting agreements. This includes subcontracting agreements with a view to expanding production, in which the contractor does not at the same time cease or limit its own production of the product.

3.2. Relevant markets

210. A production agreement will affect the markets directly concerned by the cooperation, that is to say, the markets to which the products manufactured under the

[154] Vertical subcontracting agreements are not covered by these Guidelines. Vertical subcontracting agreements are concluded between companies operating at different levels of the market. They fall within the scope of the Guidelines on Vertical Restraints and, subject to certain conditions, may benefit from the Block Exemption Regulation on Vertical Restraints. In addition, they may be covered by the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, OJ C 1, 3.1.1979, p. 2 ('the Subcontracting Notice').

production agreement belong. These markets will be defined according to the Market Definition Notice[155]. A production agreement can also have spill-over effects in markets upstream, downstream or neighbouring the market directly concerned by the cooperation (the 'spill-over markets')[156]. The spill-over markets are likely to be relevant if the markets are interdependent and the parties have a strong position on the spill-over market.

3.3. Assessment under Article 101(1)

211. The assessment of a specialisation agreement starts with the question whether the agreement contains restrictions of competition falling within the scope of Article 101(1). If that is the case:

(a) first, the assessment will focus on whether the specialisation agreement can benefit from the exemption of the Specialisation BER;

(b) second, if the agreements falls outside the scope of the Specialisation BER, an individual assessment of the agreement would be necessary to determine whether the specialisation agreement fulfils the conditions of Article 101(3).

3.3.1. Main competition concerns

212. Production agreements can raise different competition concerns, such as:

(a) A direct limitation of competition between the parties;

(b) The coordination of the parties' competitive behaviour as suppliers; or

(c) An anti-competitive foreclosure of third parties in a related market.

213. Production agreements can lead to a **direct limitation of competition between the parties**. Production agreements, and in particular production joint ventures[157], may lead the parties to directly align (i) output levels, (ii) quality, (iii) the price at which the joint venture sells its products, or (iv) other competitively important parameters (e.g. innovation, sustainability). This may restrict competition even if the parties sell the products independently.

214. Production agreements may also result in **coordination of the parties' competitive behaviour as suppliers,** that is to say, a **collusive outcome,** leading to (i) higher prices, (ii) reduced output, (iii) reduced product quality, (iv) reduced product variety or (v) reduced innovation. This can happen, subject to:

(a) the parties having market power; and

(b) the existence of market characteristics conducive to such coordination, in particular:

(i) when the production agreement increases the parties' commonality of costs (that is to say, the proportion of variable costs which the parties have in common) to a degree which enables them to achieve a collusive outcome, or

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

156 Article 2(5), first paragraph of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

157 See paragraphs 51 ('full-function joint ventures') and 13 ('liability for an infringement of Article 101(1)) of these Guidelines.

(ii) if the agreement involves an exchange of commercially sensitive information that can lead to a collusive outcome.

215. Production agreements may furthermore lead to **anti-competitive foreclosure of third parties in a related market** (for example, in a downstream market relying on inputs from the market in which the production agreement takes place). Such competition concerns could materialise irrespective of whether the parties to the agreement are competitors on the market in which the cooperation takes place. However, for this kind of foreclosure to have anti-competitive effects, at least one of the parties must have a strong market position in the market where the risks of foreclosure are assessed.

216. *Example*. By gaining enough market power, parties engaging in joint production in an upstream market may be able to raise the price of a key component (or input) for a market downstream. Thereby, they could use the joint production to raise the costs of their rivals downstream and marginalise them or, ultimately, force them off the market. This would, in turn, increase the parties' market power downstream, which could enable them to sustain prices above the competitive level or otherwise harm consumers.

3.3.2. Restrictions of competition by object

217. Generally, agreements which involve (a) price-fixing, (b) limiting output or (c) sharing markets or customers restrict competition by object.

218. However, in the context of production agreements, this does not apply where:

(a) the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that the other parameters of competition (for example, prices) are not eliminated; or

(b) a production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that the restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place.

219. In these two cases, the production agreements which include these restrictions will have to be assessed to determine whether they are likely to give rise to restrictive effects on competition within the meaning of Article 101(1). These restrictions and the production agreements will not be assessed separately, but in the light of the overall effects on the market of the entire production agreement.

3.3.3. Restrictive effects on competition

220. Whether the possible competition concerns that production agreements can give rise to are likely to materialise in a given case depends on several variables. These variables determine the likely effects of a production agreement on competition and thereby the applicability of Article 101(1). These variables include:

(a) the characteristics of the market in which the agreement takes place;

(b) the nature of the cooperation;

(c) the market coverage of the cooperation; and

(d) the products concerned by the cooperation.

221. Whether a production agreement is likely to give rise to restrictive effects on competition depends on the situation that would prevail in the absence of the agreement with all its alleged restrictions.

222. Factors such as whether the parties to the agreement are close competitors, whether the customers have limited possibilities of switching suppliers, whether competitors are unlikely to increase supply if prices increase, and whether one of the parties to the agreement is an important competitive force, are all relevant for the competitive assessment of the agreement.

223. **Production agreements which also involve commercialisation functions** (e.g. joint distribution or marketing). These agreements carry a higher risk of restrictive effects on competition than pure joint production agreements. Joint commercialisation brings the cooperation closer to the consumer and usually involves the joint setting of prices and sales, that is to say, practices that carry the highest risks for competition.

224. However, joint distribution agreements for products which have been jointly produced are generally less likely to restrict competition than stand-alone joint distribution agreements.

225. Also, a joint distribution agreement that is necessary for the joint production agreement to take place in the first place is less likely to restrict competition than if it were not necessary for the joint production.

226. **Production agreements unlikely to have restrictive effects**. Certain production agreements are not likely to have restrictive effects:

227. Production agreements between undertakings which compete on markets on which the cooperation occurs are not likely to have restrictive effects on competition if the *production agreement gives rise to a new market*,[158] that is to say, if the agreement enables the parties to launch a new product, which, on the basis of objective factors, the parties would otherwise not have been able to do (for example, due to the parties' technical capabilities);

228. Production agreements are not likely to lead to a direct limitation of competition between the parties, a collusive outcome or anti-competitive foreclosure is not likely to occur if the *parties to the agreement do not have market power* in the market on which a restriction of competition is assessed. It is only market power that can enable the parties to the agreement to profitably maintain prices above the competitive level, or profitably maintain output, product quality or variety below what would be dictated by competition.

3.3.3.1. Market power

229. The starting point for the analysis of market power is (a) the individual and combined market share of the parties. This will normally be followed by (b) the concentration ratio and the number of players in the market and by (c) dynamic factors such as potential entry, and changing market shares, as well as (d) other factors relevant to the assessment of market power.

(a) Market shares

158 For the purpose of this Chapter, 'new market' should be understood in a broader sense than in the context of R&D agreements covered by Chapter 2 (see, for example, paragraph 60).

230. Undertakings are unlikely to have market power below a certain level of market share.

231. **Specialisation BER**. The market share threshold under the Specialisation BER is established at 20 %. Specialisation agreements[159] are covered by the Specialisation BER if they are concluded between parties with a combined market share not exceeding 20 % in the relevant market or markets, provided that the other conditions for the application of the Specialisation BER are fulfilled.

232. **Safe harbour**. For horizontal subcontracting agreements, which fall outside the definition of specialisation agreement of the Specialisation BER (Article Article 1 paragraph 1(a)), it is, in most cases, unlikely that market power exists, if the parties to the agreement have a combined market share not exceeding 20 %. In any event, horizontal subcontracting agreements in which the parties' combined market share does not exceed 20 % are likely to fulfil the conditions of Article 101(3).

233. **Market share above 20 %.** If the parties' combined market share exceeds 20 %, the restrictive effects have to be analysed. Overall the risk that a production agreement may increase the incentives of the parties to the agreement to increase their prices (and/or decrease quality and range) is more likely the higher the combined market shares of the parties.

(b) Market concentration ratio

234. Generally, a production agreement is more likely to lead to restrictive effects on competition in a concentrated market than in a market which is not concentrated. A production agreement in a concentrated market may increase the risk of a collusive outcome even if the parties only have a moderate combined market share.

235. However, a combined market share of the parties moderately higher than 20 % does not necessarily imply a highly concentrated market. A combined market share of the parties of slightly more than 20 % may occur in a market with a moderate concentration.

(c) Dynamic factors

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

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

237. The number and intensity of links (for example, other cooperation agreements) between the competitors in the market are also relevant to the assessment of the parties' market power.

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

[159] Article 1.1. of the Specialisation BER.

3.3.3.2. Direct limitation of competition between the parties

239. Competition between the parties to a production agreement can be directly limited in various ways. For example:

(a) The parties to a production joint venture could, for instance, limit the output of the joint venture compared to what the parties would have brought to the market if each of them had decided their output on their own.

(b) If the main product characteristics are determined by the production agreement this could also eliminate key dimensions of competition between the parties and, ultimately, lead to restrictive effects on competition.

(c) A joint venture charging a high transfer price to the parties to the production agreement would increase the input costs for the parties, which could lead to higher downstream prices. Competitors may find it profitable to increase their prices as a response, thereby contributing to price increases in the relevant market.

240. In addition, in some industries where production is the main economic activity, even a pure production agreement can in itself eliminate key dimensions of competition, thereby directly limiting competition between the parties to the agreements.

3.3.3.3. Collusive outcome and anti-competitive foreclosure

241. The likelihood of a collusive outcome depends on the parties' market power (see Section 3.3.3.1) as well as the characteristics of the relevant market. A collusive outcome can result in particular (but not only) from commonality of costs or an exchange of information brought about by the production agreement.

242. A production agreement can also lead to an anti-competitive foreclosure: (a) by increasing the undertakings' market power; or (b) by increasing their commonality of costs; or (c) if it involves the exchange of commercially sensitive information.

(a) Commonality of costs

243. A production agreement between parties with market power can have restrictive effects on competition if it increases their commonality of costs to a level which enables them to collude (for example, agreeing on prices or other competition parameters) or to foreclose third parties in spill-over markets.

244. Commonality of costs refers to the proportion of variable costs which the parties of the agreement have in common. The relevant costs are the variable costs of the product with respect to which the parties to the production agreement compete.

245. A production agreement is more likely to lead to a collusive outcome or to foreclosure if prior to the agreement the parties already have a high proportion of variable costs in common, as the additional increment brought by the production costs of the products subject to the agreement can tip the balance towards a collusive outcome. Conversely, even if the initial level of commonality of costs is low, if the increment (brought by the production costs of the products subject to the agreement) is large, the risk of a collusive outcome or foreclosure may be high.

246. Commonality of costs increases the risk of a collusive outcome or foreclosure only if production costs constitute a large proportion of the variable costs concerned.

(a) A scenario where commonality of costs can lead to a collusive outcome could be where the parties agree on the joint production of an intermediate product

which accounts for a large proportion of the variable costs of the final product with respect to which the parties compete downstream. The parties could use the production agreement to increase the price of that common important input for their products in the downstream market. This would weaken competition downstream and would be likely to lead to higher final prices. The profit would be shifted from downstream to upstream to be then shared between the parties through the joint venture.

(b) Similarly, commonality of costs increases the anti-competitive foreclosure risks of a horizontal subcontracting agreement where the input which the contractor purchases from the subcontractor accounts for a large proportion of the variable costs of the final product with which the parties compete.

247. However, the commonality of costs is less likely to increase the risk of a collusive outcome where the cooperation concerns products which require costly commercialisation; for example, new or heterogeneous products requiring expensive marketing or high transport costs.

(b) Exchanges of information

248. A production agreement can give rise to restrictive effects on competition if it involves an exchange of commercially strategic information that can lead to a collusive outcome or anti-competitive foreclosure.

249. Whether the exchange of information in the context of a production agreement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 6 of these Guidelines. Any negative effects arising from those exchanges of information will not be assessed separately but in the light of the overall effects of the production agreement.

250. The production agreement would be more likely to meet the criteria of Article 101(3) if the information exchange does not exceed the sharing of data necessary for the production of the products subject to the agrement, even if the information exchange had restrictive effects on competition within the meaning of Article 101(1). In this case the efficiency gains stemming from producing jointly are likely to outweigh the restrictive effects of the coordination of the parties' conduct.

251. The production agreement would be less likely to meet the criteria of Article 101(3) if the information exchange went beyond what was necessary for producing jointly, for example information related to prices and sales.

3.4. Agreements covered by the Specialisation BER

252. The Specialisation BER establishes a safe harbour, subject to certain conditions, for certain production agreements, which are referred to as 'specialisation agreements'.

253. The benefit of the exemption of the Specialisation BER is limited to those specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3).

3.4.1. Specialisation agreements

254. Specialisation agreements comprise the following types of horizontal production agreements: unilateral specialisation agreements, reciprocal specialisation agreements and joint production agreements and they concern the manufacture of goods or the preparation of services.

255. **Unilateral specialisation agreements**. The key elements of these agreements, as defined in Article 1 paragraph 1(a)(i) of the Specialisation BER, are:

(a) They involve two or more parties; and

(b) The parties to the agreements are already active on the same product market; and

(c) The agreement concerns the same products; and

(d) A party or parties agree to fully or partly cease or refrain from producing certain products and purchase them from the other party or parties; and

(e) A different party or parties agree to produce and supply those products to the other party or parties that cease or refrain from producing them.

256. The definition of unilateral specialisation agreements does not require: (i) the parties to be active on the same geographic market; or (ii) the party or parties that cease or refrain from producing certain products to reduce capacity (e.g. sale of factories, closure of production lines, etc.), as it is sufficient if they reduce their production volumes.

257. **Reciprocal specialisation agreements**. The key elements of these agreements, as defined in Article 1 paragraph 1(a)(ii) of the Specialisation BER, are:

(a) They involve two or more parties; and

(b) The parties to the agreements are already active on the same product market; and

(c) The agreement concerns different products; and

(d) Two or more parties, on a reciprocal basis, fully or partly agree to cease or refrain from producing certain but different products and to purchase these products from the other parties; and

(e) Such other parties agree to produce and supply those products to the parties that cease or refrain from producing them.

258. The definition of reciprocal specialisation agreements does not require: (i) the parties to be active on the same geographic market, or (ii) the parties that cease or refrain from producing certain but different products to reduce capacity (e.g. sale of factories, closure of production lines, etc.), as it is sufficient if they reduce their production volumes.

259. **Joint production agreements**. The key elements of these agreements, as defined in Article 1 paragraph 1(a)(iii) of the Specialisation BER, are:

(a) They involve two or more parties; and

(b) The parties produce certain products jointly (see Section 3.4.3).

260. The definition of joint production agreements does not require: (i) the parties to be already active on the same product market; or (ii) a party or parties to cease or refrain from producing any products.

3.4.2. Other provisions in specialisation agreements

261. The Specialisation BER also exempts certain provisions which may be included in specialisation agreements.

262. **Provisions on the assignment or licensing of intellectual property rights to one or more of the parties** (Article 2 paragraph 3 of the Specialisation BER). These provisions benefit from the exemption foreseen in Article 2 of the Specialisation BER if they meet two cumulative conditions:

(a) They do not constitute the primary object of the specialisation agreement; and

(b) They are directly related to and necessary for the implementation of such agreement.

263. **Provisions on supply or purchase obligations** (Article 2 paragraph 4 and recital 11 of the Specialisation BER). The Specialisation BER establishes that unilateral and reciprocal specialisation agreements will only be exempted where they provide for supply and purchase obligations. In such case, these obligations may be exclusive or not (recital 11 of the Specialisation BER].

264. With regard to exclusive supply or purchase obligations, Article 2 paragraph 4 of the Specialisation BER establishes that the exemption will apply to specialisation agreements whereby the parties accept an exclusive purchase or an exclusive supply obligation.

(a) An exclusive supply obligation, as defined in Article 1 paragraph 1(j) of the Specialisation BER, means an obligation not to supply the specialisation products (as defined in Article 1 paragraph 1(c) of the Specialisation BER) to a competing undertaking other than a party or parties to the agreement. Therefore, an exclusive supply obligation does not prevent the parties from supplying the specialisation products to third parties that are not competing undertakings.

(b) An exclusive purchase obligation, as defined in Article 1 paragraph 1(k) of the Specialisation BER, means an obligation to purchase the specialisation products only from a party or parties to the agreement.

265. Other provisions included in specialisation agreements that constitute ancillary restraints will also benefit from the exemption foreseen in Article 2 of the Specialisation BER as long as the conditions defined under Union case law[160] are met.

3.4.3. Joint distribution and the concept of 'joint' under the Specialisation BER

266. The Specialisation BER defines the concept of 'joint' in the context of distribution. Joint distribution may be part of a specialisation agreement and it may benefit from the exemption of the Specialisation BER if the distribution activities are carried out in one of the following two ways:

(a) Distribution is carried out by a joint team, organisation or undertaking, or

(b) Distribution is undertaken by a third party distributor that meets three cumulative conditions:

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

i) It is jointly appointed by the parties to the specialisation agreement; and

ii) It is appointed on an exclusive or non-exclusive basis; and

iii) It is not an actual or potential competitor of the parties to the specialisation agreement.

267. The exemption provided for in the Specialisation BER also applies[161] to specialisation agreements where the parties (a) parties jointly distribute the specialisation products and (b) do not independently sell them.

268. The Specialisation BER also uses the concept of 'joint' in the definition of 'joint production agreements' (Article 1 paragraph 1(a)(iii) of the Specialisation BER). However, the term 'joint' is not defined in the context of production. Therefore, under the Specialisation BER, joint production make take any form.

3.4.4. Services under the Specialisation BER

269. Specialisation agreements benefiting from the exemption of the Specialisation BER may also concern the preparation of services. The preparation of services refers to activities upstream of the provision of services to customers (Article 1 paragraph 1(e) of the Specialisation BER). For example, a specialisation agreement for the creation of a platform through which a service will be provided could be considered an agreement concerning the preparation of services.

270. However, as explained in recital 9 of the Specialisation BER, the provision of services is outside the scope of the Specialisation BER, except in the context of distribution in which the parties provide the services prepared under the specialisation agreement.

3.4.5. Competing undertakings: actual or potential competitors

271. Under the Specialisation BER (Article 1 paragraph 1(i)), competing undertakings would be considered: (a) actual competitors if they are active on the same relevant market; or (b) potential competitors if, in the absence of the production agreement, they would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary costs to enter the relevant market.

272. Potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because a specialisation agreement enables them to carry out certain production activities. The decisive question is whether each party independently has the necessary means to do so.

3.4.6. Market share threshold and duration of the exemption

3.4.6.1. Market share threshold

273. Under Article 3 of the Specialisation BER, specialisation agreements will benefit from the exemption if the following market share thresholds are met:

(a) The parties' combined market share does not exceed 20 % in the relevant market or markets concerned by the specialisation agreement, provided that the other conditions for exemption under the Specialisation BER are fulfilled.

[161] Articles 2 paragraph 4(b) and 1 paragraph 1(l) of the Specialisation BER.

(b) When the specialisation products are intermediary products and one or more of the parties fully or partly use those products captively for the production of certain downstream products, which the parties also sell, the exemption of the Specialisation BER is conditional upon:

i) The parties' combined market share not exceeding 20 % on the relevant market(s) to which the specialisation product belong(s); and

ii) The parties' combined market share not exceeding 20 % on the relevant market(s) to which the downstream products belong(s). Under the Specialisation BER, a 'downstream product' is defined as a product for which a specialisation product is used as an input by one or more of the parties and which is sold by those parties on the market (Article 1 paragraph 1(g)).

3.4.6.2. Calculation of market shares

274. Under Article 4 of the Specialisation BER, market shares must be calculated on the basis of data relating to the preceding calendar year.

275. For certain markets it may be necessary to calculate market shares on the basis of an average of the parties' market shares of the last three preceding calendar years. This may be relevant for instance when there are bidding markets and the market shares may significantly change (e.g. from 0% to 100%) from one year to another, depending on whether a party was successful or not in the bidding process. This may also be relevant for markets characterised by large, lumpy orders for which the market share of the previous calendar year may not be representative, for example, if no large order took place in the preceeding calendar year. Another situation in which it may be necessary to calculate market shares on the basis of an average of the last three preceding calendar years is when there is a supply or demand shock in the calendar year preceding the cooperation agreement.

276. When it comes to the metrics for the calculation of market shares, the Specialisation BER provides that the calculation of market shares shall be based on the sales value. If sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties.

277. For the purpose of the Specialisation BER, the term' undertaking' and 'party' shall include their respective 'connected undertakings', as defined in Article 1 paragraph 2. According to Article 4 paragraph 3 of the Specialisation BER, the market share held by the parties to the specialisation agreement and their connected undertaking shall be apportioned equally to each undertaking having the following rights or powers:

(a) the power to, directly or indirectly, exercise more than half the voting rights,

(b) the power to, directly or indirectly, appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(c) the right to, directly or indirectly, manage the undertaking's affairs.

3.4.6.3. Duration of the exemption

278. The exemption of the Specialisation BER does not have a specific duration. The exemption is applicable for the duration of the specialisation agreement as long as the market share thresholds are met.

279. The Specialisation BER foresees that when the combined market share of the parties rises above 20 % in at least one of the markets concerned by the specialisation agreement, the exemption will continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.

3.4.7. Hardcore restrictions in the Specialisation BER

3.4.7.1. Hardcore restrictions

280. Article 5 of the Specialisation BER contains a list of hardcore restrictions. Hardcore restrictions are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to the market and to consumers. Specialisation agreements that include one or more hardcore restrictions are excluded as a whole from the scope of the exemption provided for by the Specialisation BER.

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

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

(b) the limitation of output or sales; and

(c) the allocation of markets or customers.

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

3.4.7.2. Exceptions

283. Article 5 of the Specialisation BER also contains several exceptions to the hardcore restrictions. Specialisation agreements that include these provisions can still be exempted if the other conditions for exemption under the Specialisation BER are fulfilled.

(a) Fixing of prices: in the context of joint distribution, the Specialisation BER allows the fixing of prices charged to immediate customers (Article 5 paragraph 1, second paragraph).

(b) Limitation of output or sales:

i) In the context of unilateral or reciprocal specialisation agreements, the Specialisation BER allows provisions on the agreed amount of products that (i) a party or parties would cease to manufacture or prepare and/or that (ii) a party or parties would manufacture or prepare for the other party or parties (Article 5 paragraph 2 second paragraph (a));

ii) In the context of joint production agreements, the Specialisation BER allows provisions on setting capacity and production volumes of the parties concerning the specialisation products (Article 5 paragraph 2 second paragraph (b));

iii) In the context of joint distribution, the Specialisation BER allows provisions setting sales targets regarding the specialisation products (Article 5 paragraph 2 second paragraph (c)).

3.4.8. Withdrawal of the benefit of the Specialisation BER

284. Articles 6 and 7 of the Specialisation BER foresee that the Commission and the NCAs may withdraw the benefit of the Specialisation BER pursuant to the provisions of Article 29(1) and Article 29(2) of Regulation (EC) No 1/2003 respectively, in particular where:

(a) the relevant market is very concentrated, and

(b) competition is already weak, in particular because of (i) the individual market positions of other market participants or (ii) the links between other market participants created by parallel specialisation agreements.

285. The guidelines provided for the withdrawal of the benefits of the R&D BER also apply to the withdrawal of the benefits of the Specialisation BER (see Section 2.7 of these Guidelines).

3.5. Assessment under Article 101(3) of production agreements falling outside the scope of the Specialisation BER

286. There is no presumption that production agreements falling outside the scope of the Specialisation BER fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). Such production agreements require an individual assessment.

287. The individual assessment of such production agreements starts with the question whether the agreement would restrict competition within the meaning of Article 101(1)[162]. If so, undertakings would need to assess whether the production agreement fulfils the conditions of Article 101(3).

3.5.1. Efficiency gains

288. Production agreements may provide efficiency gains by:

(a) enabling undertakings to save costs that otherwise they would duplicate;

(b) helping undertakings to improve product quality if they put together their complementary skills and know-how;

(c) enabling undertakings to increase product variety, which they could not have afforded, or would not have been able to achieve, otherwise;

(d) enabling undertakings to improve production technologies or launch new products (such as sustainable products), which they would otherwise not have been able to do (for example, due to the parties' technical capabilities);

(e) incentivising and enabling undertakings to adapt their production capacities to a sudden surge in demand or drop in supply of certain products, leading to a risk of shortages;

(f) addressing shortages and disruptions in the supply chain in critical sectors of the economy, allowing the parties to reduce dependencies on a too limited number of suppliers of certain products, services and technologies;

[162] Section 2.3 of these Guidelines.

(g) enabling undertakings to produce at lower costs if the cooperation enables the parties to increase production where marginal costs decline with output, that is to say, by economies of scale; and

(h) providing cost savings by means of economies of scope, if the agreement allows the parties to increase the number of different types of products.

289. These efficiency gains can contribute to a resilient internal market.

3.5.2. Indispensability

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

3.5.3. Pass-on to consumers

291. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition, for example in the form of lower prices or better product quality or variety.

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

293. If the parties to the production agreement achieve savings in their variable costs they are more likely to pass them on to consumers than if they reduce their fixed costs.

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

3.5.4. No elimination of competition

295. The criteria of Article 101(3) cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the cooperation belong and in any possible spill-over markets.

3.6. Mobile infrastructure sharing agreements

296. In this Section, the Commission provides guidance regarding a specific type of production agreement concering mobile infrastructure – mobile infrastructure sharing agreements[163]. Connectivity networks are at the foundation of a digital economy and society, of relevance to virtually all businesses and consumers. Mobile network operators often cooperate to increase the cost-effectiveness of their network roll-out[164].

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

[164] The regulatory framework in electronic communications sets out the possibilities of mobile infrastructure sharing in certain very specific circumstances. For example, this can be the case for less dense areas where replication is impracticable and end-users risk being deprived of digital connectivity.

297. Mobile infrastructure sharing agreements are an illustration of specialisation agreements which concern the joint preparation of services. In mobile infrastructure sharing agreements, mobile network operators agree to share some infrastructure elements. This can include sharing their basic site infrastructure such as masts, cabinets, antennas or power supplies ("passive sharing" or "site sharing"). Mobile network operators can also share the Radio Access Network ("RAN") equipment at the sites such as base transceiver stations or controller nodes ("active RAN sharing") or their spectrum, such as frequency bands ("spectrum sharing")[165].

298. The Commission recognises potential benefits from mobile infrastructure sharing agreements arising from cost reductions or quality improvements. Cost reductions, for example related to rollout and maintenance, may benefit consumers in terms of lower prices. Better quality of services or a wider variety of products and services can stem, for example, from faster roll-out of new networks and technologies, wider coverage or denser network grids. Mobile infrastructure sharing may also allow the emergence of competition that would not otherwise exist[166]. The Commission has also generally found that mobile network operators can benefit from large efficient networks by entering into mobile infrastructure sharing agreements without the need for consolidation through mergers.

299. The Commission considers that mobile infrastructure sharing agreements, including a possible spectrum sharing, would in principle not be restrictive of competition by object within the meaning of Article 101(1), unless they serve as a tool to engage in a cartel.

300. Mobile infrastructure sharing agreements can, however, give rise to restrictive effects on competition. They may limit infrastructure competition that would take place absent the agreement[167]. Reduced infrastructure competition may in turn limit competition at wholesale as well as at retail level. This is because more limited competition at the infrastructure level may affect parameters such as the number and location of sites, timing of the sites' rollout, as well as the amount of capacity installed at each site, which, in turn, can affect quality of service and prices.

See the conditions set out in Article 61(4) of the Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (EECC) under which Member States shall ensure that their competent authorities have the power to impose on undertakings obligations in relation to the sharing of passive infrastructure or obligations to conclude localised roaming access agreements as well as exceptionally on active sharing. See also the Commission recommendation on a common Union toolbox for reducing the cost of deploying very high capacity networks and ensuring timely and investment-friendly access to 5G radio spectrum, to foster connectivity in support of economic recovery from the COVID-19 crisis in the Union.

165 Finally, besides sharing the RAN part of their network the mobile network operators can also share some nodes of their respective core networks such as mobile switching centres and mobile management entities.

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

167 The effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking. See Judgment in Case T-328/03 *O2 (Germany)* v *Commission* ECLI: EU:T:2006:116, para 68.

301. Mobile infrastructure sharing agreements may also de facto reduce the parties' decision making independence and limit the parties' ability and incentives to engage in infrastructure competition with each other. For instance, this could be due to some technical,[168] contractual or financial terms of the agreement[169]. Information exchanges between the parties may also be problematic from a competition perspective, especially when they exceed what is strictly necessary for the mobile infrastructure sharing agreement to function.

302. While the competitive assessment under Article 101 must always be conducted on a case-by-case basis[170], broad principles can be given as guidance to conduct such an assessment for the different types of mobile infrastructure sharing agreements:

(a) Passive sharing is unlikely to give rise to restrictive effects on competition, as long as the network operators maintain a significant degree of independence and flexibility in defining their business strategy, the characteristics of their services and network investments;

(b) Active RAN sharing agreements may be more likely to give rise to restrictive effects on competition. This is because, compared to passive sharing, active RAN sharing likely involves more extensive cooperation on network elements that are likely to affect not only coverage but also independent deployment of capacity;

(c) Spectrum sharing agreements (also referred to as 'spectrum pooling') are a more far-reaching cooperation and may restrict the parties' ability to differentiate their retail and/or wholesale offers even further and directly limit competition between them[171]. While competent authorities shall not prevent the sharing of radio spectrum in the conditions attached to the rights of use for radio spectrum,[172] these agreements must be examined cautiously under Article 101[173].

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168 Mobile infrastructure sharing agreements could lead to situations where a party is holding back the other party. For example, a party is unable to deploy certain technology in an area served by the other party.

169 For example, in case of geographical split, when network upgrades are charged by one party to the other one at a price that is higher than the underlying incremental costs.

170 Judgment in Case T-328/03 *O2 (Germany)* v *Commission* ECLI: EU:T:2006:116, paras 65 to 71.

171 It should be noted that the term 'Spectrum Sharing' in this Section concerns only the type of infrastructure sharing agreement in which two or more mobile network operators use as a shared resource ("i.e. pooling") their respective spectrum holdings in one or more spectrum bands. However, the considerations regarding spectrum sharing are without prejudice to other types of spectrum sharing for instance between non-competitors (including between mobile network operators and non-mobile network operators) which use the same spectrum bands in a dynamic way thereby fostering the efficient use of such a scarce resource and new opportunities for 5G deployment. Furthermore, the term 'Spectrum Sharing' in this section should not be confused with the so called 'Dynamic Spectrum Sharing', which is a technology that permits the dynamic allocation of the capacity resources of a mobile operator in a specific spectrum band, to enable the simultaneous operation of more than one mobile technology generations, such as 3G, 4G and 5G, on this spectrum band.

172 See the provisions in Article 47(2) of the EECC under which the competent authorities of the Member States shall not prevent the sharing of radio spectrum in the conditions attached to the rights of use for radio spectrum. Further, the competent authorities, when attaching conditions to individual rights of use for radio spectrum, may provide for the possibilities: (a) sharing passive or active infrastructure; (b) commercial roaming access agreements; (c) joint roll-out of infrastructures for the provision of networks or services which rely on the use of radio spectrum.

173 For example, a mobile infrastructure sharing agreement between two mobile operators having stable combined market shares of 90% and covering the whole territory of a Member State, all technologies

303. In conducting the assessment of whether a mobile infrastructure sharing agreement may have restrictive effects on competition, a variety of factors are relevant, including:

(a) the type and depth of sharing (including the degree of independence retained by the network operators);[174]

(b) the scope of shared services and shared technologies, the duration and the structure put in place by the agreements;

(c) the geographic scope and the market coverage of the mobile infrastructure sharing agreement (for example, the population coverage and whether the agreement concerns densely populated areas);[175]

(d) the market structure and characteristics (market shares of the parties, amount of spectrum held by the parties, closeness of competition between the parties, number of operators outside the agreement and extent of competitive pressure exerted by them, barriers to entry, etc.).

304. Whilst not automatically meaning compliance with Article 101, in order for a mobile infrastructure sharing agreement to be considered, *prima facie*, as being unlikely to have restrictive effects under Article 101, it would have to comply, as a minimum, with the following:

(a) Operators control and operate their own core network and no technical, contractual, financial or other disincentives exist preventing the operators to individually/unilaterally deploy their infrastructure, upgrade and innovate should they wish to do so;

(b) Operators maintain independent retail and wholesale operations (technical, commercial and other decision making independence). This includes the freedom of operators to set prices for their services, to determine the product/bundle parameters, to follow independent spectrum strategies and to differentiate their services based on quality and other parameters;

(c) Operators do not exchange more information than is strictly necessary for the mobile infrastructure sharing to operate and necessary barriers to information exchange have been put in place.

305. Non-compliance of the mobile infrastructure sharing agreement with these minimum conditions gives an indication that the mobile infrastructure sharing agreement is likely to have restrictive effects under Article 101.

3.7. Examples

306. Direct limitation of competition

(2G-5G) and with spectrum sharing will warrant an in-depth investigation with presumably a high probability of identifying restrictive effects on the market to the ultimate detriment of consumers. However, under certain circumstances (for example if the agreement is limited only to sparsely populated areas), such agreements may not have such restrictive effects.

[174] Commission decision of 16 July 2003, T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag COMP/38.369, recital 12; Commission Decision of 30 April 2003, *O2 UK Limited / T-Mobile UK Limited (‘UK Network Sharing Agreement’)* (COMP/ 38.370), recital 11.

[175] See the Body of European Regulators for Electronic Communications (BEREC) common position on mobile infrastructure sharing of 13 June 2019, Section 4.2. Active sharing. See, for example, also Commission decision of 6 March 2020, *Vodafone Italia/TIM/INWIT JV* (M.9674) and accompanying press release: Mergers: INWIT /Telecom Italia, Vodafone (europa.eu).

Example 1

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

Analysis: The Specialisation BER does not apply to this example because the combined market share of the parties exceeds 20% in the relevant market for product X. Therefore, an individual assessment of the production agreement would be required.

If Companies A and B share all or most of their variable costs, this production agreement could lead to a direct limitation of competition between them. It may lead the parties to limit the output of the joint venture compared to what they would have brought to the market if each of them had decided their output on their own. In light of the limited constraints that competitors will exercise in terms of capacity, this reduced output could lead to higher prices.

Therefore, it is likely that the production joint venture of Companies A and B would give rise to restrictive effects on competition within the meaning of Article 101(1) on the market of product X.

The replacement of two smaller old production plants by a new one may lead the joint venture to increase output at lower prices to the benefits of consumers. However, the production agreement could only meet the criteria of Article 101(3) if the parties provided substantiated evidence that the efficiency gains would be substantial, and likely to be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

307. Collusive outcomes

Example 2

Situation: Two suppliers, Companies A and B, form a production joint venture with respect to product Y. Companies A and B have, respectively, a 15% and 10% market share on the market for product Y. There are 3 other players on the market: Company C with a market share of 30%, Company D with 25% and Company E with 20%. Company B already has a joint production plant with Company D. Product Y is homogeneous, the underlying technology is simple and suppliers have very similar variable costs.

Analysis: The market is characterised by very few players with similar market shares and variable production costs. Co-operation between Companies A and B would add an additional link in the market, *de facto* increasing the concentration in the market, as it would also link Company D to Companies A and B. This co-operation is likely to increase the risk of a collusive outcome and thereby likely to give rise to

restrictive effects on competition within the meaning of Article 101(1). The criteria of Article 101(3) could only be fulfilled in the presence of significant efficiency gains which are passed on to consumers to such an extent that they would outweigh the restrictive effects on competition. However, in this example, given the homogeneous features of product Y and the simplicity of its underlying technology, this appears unlikely.

308. Anti-competitive foreclosure

Example 3

Situation: Companies A and B set up a production joint venture for the intermediate product X which covers their entire production of X. Intermediate product X is the key input into the production of downstream product Y and there is no other product that can be used as an input instead. The production costs of X account for 70% of the variable costs of the final product Y with respect to which Companies A and B compete downstream. Companies A and B each have a share of 20% on the market for Y, there is limited entry and the market shares have been stable over time. In addition to covering their own demand for X (captive use), both Companies A and B each have a market share of 40% on the market for X (sales to third parties). There are high barriers to entry on the market for X and existing producers are operating near full capacity. On the market for Y, there are two other significant suppliers, each with a 15% market share, and several smaller competitors. This agreement generates fixed cost savings, in the form of reduction of headquarter costs, leading to economies of scale for the joint venture.

Analysis: The Specialisation BER does not apply to this example because the combined market share of the parties exceeds 20% both in the market of the intermediate product X and in the market for the downstream product Y. Therefore, an individual assessment of the production agreement would be required.

By virtue of the production joint venture, Companies A and B would be able to largely control supplies of the essential input X to their competitors in the downstream market for Y. This would give Companies A and B the ability to raise their rivals' costs by artificially increasing the price of X, or by reducing the output. This could foreclose the competitors of Companies A and B in the market for Y. Because of the likely anti-competitive foreclosure downstream, this agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The economies of scale generated by the production joint venture are unlikely to outweigh the restrictive effects on competition and therefore this agreement would most likely not meet the criteria of Article 101(3).

309. Production agreement as market allocation

Example 4

Situation: Companies A and B each manufacture both products X and Y, which belong to separate product markets. Company A's market share of X is 30% and of Y is 10%. Company B's market share of X is 10% and of Y is 30%. To achieve economies of scale in production, Companies A and B conclude a reciprocal specialisation agreement under which Company A will only produce X and Company B only Y. They do not cross-supply the products to each other so that Company A only sells X and Company B sells only Y. The parties claim that by specialising in this way they save fixed costs to a significant extent due to the

economies of scale and that by focusing on only one product, they will improve their production technologies, which will lead to better quality products.

Analysis: The Specialisation BER does not apply because the combined market share of the parties exceeds 20% in each of the product markets X and Y. Moreover, the agreement entered into between Companies A and B falls outside the definition of reciprocal specialisation agreement under the Specialisation BER, since there are no cross-supplies (i.e. there is no agreement to purchase products X and Y from Companies B and A respectively, who agree to produce and supply them). Therefore, an individual assessment of the production agreement would be required.

With regard to its effects on competition in the market, this production agreement allocates the markets of products X and Y among the parties. Therefore, this agreement restricts competition by object. Because the claimed efficiencies in the form of reduction in fixed costs and improving production technology are only linked to the market allocation, they are unlikely to outweigh the agreement's restrictive effects, and therefore the agreement would not meet the criteria of Article 101(3). In any event, if Company A or B believes that it would be more efficient to focus on only one product, it can simply take the unilateral decision to only produce X or Y without at the same time agreeing that the other company will focus on producing the respective other product.

310. Information exchange

Example 5

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

Companies A and B decide that it would be more efficient if Company A stopped transporting Z from Member State X to southern Europe and if Company B stopped transporting Z from Member State Y to northern Europe although, at the same time, they are keen on retaining their existing customers. To do so, Companies A and B intend to enter into a swap agreement which allows them to purchase an agreed annual quantity of Z from the other party's plant with a view to selling the purchased Z to those of their customers which are located closer to the other party's plant. In order to calculate a purchase price which does not favour one party over the other and which takes due account of the parties' different production costs and

different savings on transport costs, and in order to ensure that both parties can achieve an appropriate margin, they agree to disclose to each other their main costs with regard to Z (that is to say, production costs and transport costs).

Analysis: The fact that Companies A and B – who are competitors – swap parts of their production does not in itself give rise to competition concerns. However, the agreement also provides for the exchange of the parties' production and transport costs with regard to Z. Moreover, Companies A and B have a strong combined market position in a fairly concentrated market for a homogenous commodity product. Therefore, due to the extensive information exchange on a key parameter of competition with regard to Z, it is likely that the swap agreement between Companies A and B will give rise to restrictive effects on competition within the meaning of Article 101(1) as it can lead to a collusive outcome. Even though the agreement will give rise to significant efficiency gains in the form of cost savings for the parties, the restrictions on competition generated by the agreement are not indispensable for their attainment. The parties could achieve similar cost savings by agreeing on a price formula which does not entail the disclosure of their production and transport costs. Consequently, in its current form the swap agreement does not fulfil the criteria of Article 101(3).

4. PURCHASING AGREEMENTS

4.1. Introduction

311. This Chapter focuses on agreements concerning the joint purchase of products by several undertakings together. Joint purchasing can be carried out through a jointly controlled company, by a company in which different undertakings hold non-controlling stakes, by a cooperative or a cooperative of cooperatives, by a contractual arrangement or by even looser forms of cooperation, for example one purchaser or negotiator representing a group of purchasers (collectively referred to as 'joint purchasing arrangements').

312. Joint purchasing arrangements can be found in a variety of economic sectors and involve the pooling of purchasing activities. They may consist of pooling actual purchases through the joint purchasing arrangement. They can also be limited to jointly negotiating the purchase price, certain elements of the price, or other terms and conditions, while leaving the actual purchases, pursuant to the jointly negotiated price and terms and conditions, to its individual members. A joint purchasing arrangement may also engage in additional activities such as joint distribution, quality control and warehousing, avoiding duplication of delivery costs. Depending on the sector, the purchaser may consume the products or use them as inputs for their own activities, for example energy or fertilisers. Groups of potential licensees can also joinly negotiate licencing agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups). In the distribution sector, purchasers may simply resell the products, such as for example fast moving consumer goods, consumer electronics or other consumer goods. The latter groups of purchasers

consisting of independent retailers, retail chains or retailer groups are usually referred to as 'retail alliances'[176].

313. Joint purchasing arrangements usually aim at the creation of a degree of buying power vis-à-vis large suppliers, that individual members of the joint purchasing arrangement would not attain if they acted separately instead of jointly. Their assessment is, therefore, mainly focussed on the purchasing market where the joint purchasing arrangement accumulates the buyer power of its members and negotiates with or purchases from suppliers. Buying power of a joint purchasing arrangement can lead to lower prices, more variety or better quality products or services for consumers. Undertakings can also engage in joint purchasing arrangements when it allows them to prevent shortages or address disruptions in the production of certain products, thus avoiding supply chain interruptions. However, buying power may, under certain circumstances, also give rise to competition concerns as set out below under 4.2.3.

314. Joint purchasing arrangements may involve both horizontal and vertical agreements. In such cases a two-step analysis is necessary. First, the horizontal agreements between the competing undertakings engaging in joint purchasing or the decisions adopted by the association of undertakings have to be assessed according to the principles described in these Guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, a further assessment will be necessary to examine the relevant vertical agreements between the joint purchasing arrangement and an individual member thereof and between the joint purchasing arrangement and suppliers. The latter assessment will follow the rules of the Block Exemption Regulation on Vertical Restraints and the Guidelines on Vertical Restraints. Vertical agreements not covered by the Vertical Block Exemption Regulation are not presumed to be illegal but require individual examination.

4.2. Assessment under Article 101(1)

4.2.1. Main competition concerns

315. Purchasing agreements may lead to restrictive effects on competition on the upstream purchasing and/or downstream selling market or markets, such as increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other possible purchasers.

4.2.2. Restrictions of competition by object

316. Joint purchasing arrangements normally do not amount to a restriction of competition by object if they truly concern joint purchasing, that is to say if the joint purchasing arrangement involves collective negotiation and conclusion of an agreement, on behalf of its members, with any given supplier of one or more trading terms. Such arrangements need to be distinguished from buyer cartels, that is to say agreements or concerted practices between two or more purchasers aimed at,

(a) coordinating those purchasers' individual competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase prices or parts

[176] See Colen, L., Bouamra-Mechemache. Z., Daskalova, V., Nes, K., Retail alliances in the agricultural and food supply chain, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720, JRC120271.

thereof (including agreements fixing wages or not to pay a price for a product) or other trading conditions, the allocation of purchase quotas, the sharing of markets and suppliers, and

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

317. Buyer cartels have as their object the distortion of the process of competition in the internal market[177] contrary to Article 101(1)(a)[178]. In a buyer cartel, purchasers coordinate their behaviour among themselves in view of their individual interaction with the supplier on the purchasing market. If purchasers deal individually with suppliers, they should make their own purchasing decisions independently of each other without removing strategic uncertainty among themselves through agreements and concerted practices or artificially increasing transparency regarding their future behaviour on the market. This is clearly not the case when purchasers first fix the purchase price among themselves and each of the purchasers subsequently negotiates and purchases individually from the supplier.

318. A buyer cartel may also exist when purchasers agree to exchange commercially sensitive information among themselves about their individual purchasing intentions or negotiations with suppliers, outside any genuine joint purchasing arrangement that interacts collectively, on behalf of its members, with suppliers[179]. This concerns, in particular, exchanges between purchasers about purchase prices (maximum prices, minimum discounts and other aspects of prices) to be paid, terms and conditions, sources of supply (both in terms of suppliers and territories), volumes and quantities, quality or other parameters of competition (for example timing, delivery and innovation).

319. The following non-exhaustive list of factors may help undertakings to assess that the agreement to which they are party, together with other purchasers, does not amount to a buyer cartel. These factors have to be assessed on a case-by-case basis:

(a) the joint purchasing arrangement has made it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them. This does not require the joint purchasing arrangement to disclose the exact identity of its members, in particular where they are small- or medium-sized undertakings interacting with large suppliers. However, indirect knowledge of the joint purchasing arrangement on the side of suppliers, for example through third parties or press reports, will likely not be considered sufficient[180].

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177 Judgment of 7 November 2019, *Campine,* T-240/17, EU:T:2019:778, paragraph 297.

178 See judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37; judgment of 13 December 2006, *French Beef*, joined cases T-217/03 and T-245/03, EU:T:2006:391, paragraph 83 and following.

179 See Chapter 6 on exchange of information and, in particular, Section 6.2.6, which also applies to exchanges of commercially sensitive information between purchasers.

180 However, secrecy is not a requirement for finding a buyer cartel. The Commission sanctioned buyer cartels that did not operate entirely secretly but at least started in a relative transparent way. See Commission Decision 2003/600/EC of 2 April 2003, French Beef, OJ L 209, 19.8.2003, p. 12.

(b) the parties to the joint purchasing arrangement have defined the form of their cooperation, its scope and its functioning in a written agreement so that its compliance with Article 101(1) can be verified ex-post and checked against the actual operation of the joint purchasing arrangement. However, a written agreement cannot shield the arrangement from competition law scrutiny.

320. A buyer cartel, provided that it affects trade between Member States, constitutes by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition[181]. Therefore, the assessment of buyer cartels, contrary to that of joint purchasing arrangements, does not require a definition of the relevant market(s), consideration of the market position of the purchasers on the upstream purchasing market nor whether they are competing on the downstream selling market.

321. Joint purchasing arrangements can also lead to a restriction of competition by object if they serve as a tool to engage in a disguised cartel, that is to say, an agreement between purchasers fixing prices, limitating output or sharing markets or customers on the downstream selling market or markets.

322. A joint purchasing arrangement among a group of purchasers that aims at excluding an actual or potential competitor from the same level of the selling market qualifies as a collective boycott and also amounts to a restriction of competition by object.

4.2.3. Restrictive effects on competition

323. Joint purchasing arrangements, whereby purchasers interact jointly with suppliers through the arrangement, must be analysed in their legal and economic context with regard to their actual and likely effects on competition. The analysis of the restrictive effects on competition generated by a joint purchasing arrangement must cover the negative effects on both the purchasing market or markets, where the joint purchasing arrangement interacts with suppliers, and the selling market or markets, where the parties to the joint purchasing arrangement may compete as sellers.

324. In general, however, joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets.

325. Certain contractual restrictions imposed on the members of a joint purchasing arrangement may not restrict competition pursuant to Article 101(1) and even have beneficial effects on competition when they are limited to what is objectively necessary to ensure the arrangement's proper functioning and exercise its buying power in relation to suppliers[182]. This applies, for example, to a prohibition for parties to a joint purchasing arrangement from participating in other competing arrangements to the extent that this could jeopardise its operations and buying power. Conversely, exclusive purchasing obligations, whereby the members of a joint purchasing arrangement are obliged to purchase all or most of their requirements through the arrangement, may have negative effects on competition and require an assessment in the light of the overall effects of the joint purchasing arrangement.

[181] Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 37.
[182] See judgment of 15 December 1994, *Gøttrup*-Klim, C-250/92, EU:C:1994:413, paragraph 34.

4.2.3.1. Relevant markets

326. There are two markets which may be affected by joint purchasing arrangements. First, the market or markets with which the joint purchasing arrangement is directly concerned, that is to say, the relevant purchasing market or markets where the parties negotiate with or purchase from suppliers. Secondly, the selling market or markets, that is to say, the market or markets downstream where the parties to the joint purchasing arrangement are active as sellers.

327. The definition of relevant purchasing markets follows the principles described in the Market Definition Notice and any future guidance relating to the definition of relevant markets for the purposes of Union competition law and is based on the concept of substitutability to identify competitive constraints. The only difference from the definition of 'selling markets' is that substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words, the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. Those alternatives could be analysed, for instance, by examining the suppliers' reaction to a small but non-transitory price decrease. Once the market is defined, the market share can be calculated as the percentage of the purchases by the parties out of the total sales of the purchased product or products in the relevant market.

328. If the parties are, in addition, competitors on one or more selling markets, those markets are also relevant for the assessment. The selling markets have to be defined by applying the methodology described in the Market Definition Notice and any future guidance relating to the definition of relevant markets for the purposes of Union competition law.

4.2.3.2. Market power

329. There is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.

330. A market share above that threshold in one or both markets does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. A joint purchasing arrangement with a combined market share above that threshold requires a detailed assessment of its effects on the market involving, but not limited to, factors such as market concentration, an assessment of profit margins and of possible countervailing power of strong suppliers.

331. If the parties to the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that they may harm competition upstream, which may ultimately also cause competitive harm to consumers further downstream. For example, jointly exercised buying power may harm investment incentives and force suppliers to reduce the range or quality of products they

produce. This may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply

332. The risk that a joint purchasing arrangement could discourage investments or innovations benefitting consumers may be larger for large purchasers that jointly account for a large proportion of purchases – in particular when dealing with small suppliers. Such suppliers may be particularly vulnerable for a reduction in profits by a joint purchasing arrangement with a significant market share on the purchasing market or markets, especially when small suppliers have made specific investments for supplying the members of a joint purchasing arrangement. Restrictive effects on competition are less likely to occur if suppliers have a significant degree of countervailing seller power (which does not necessarily amount to dominance) on the purchasing market or markets, for example, because they sell products or services that purchasers need to have in order to compete on the downstream selling market or markets

333. For instance, an agreement between the members of a joint purchasing arrangement to no longer purchase products from certain suppliers because such products are unsustainable whereas the purchasing arrangement wants to buy only sustainable products, may lead to a restriction of competition in terms of price and choice. In view of its content, objectives and legal and economic context[183], such an agreement does not in principle have the object to exclude suppliers producing unsustainable products from the purchasing market. In those circumstances, the restrictive effects on competition of a joint purchasing arrangement to purchase only sustainable products should be assessed taking into account, in particular, the nature of the products, the market position of the purchasers and the market position of suppliers. In this context, it will be relevant to consider whether the suppliers concerned have customers other that those that are party to the joint purchasing arrangement (including customers in other markets) or can easily decide to start also producing sustainable products

334. Buying power of the parties to the joint purchasing arrangement may also be used to foreclose competing purchasers from the purchasing market by limiting their access to efficient suppliers and requires an assessement of the arrangement's restrictive effects on competition. This is most likely if there are only a limited number of suppliers and there are barriers to entry on the supply side of the upstream purchasing market. Conversely, a joint purchasing arrangement among a group of purchasers that aims at excluding an actual or potential competitor from the same level of the selling market qualifies as a collective boycott and amounts to a restriction of competition by object.

335. If the parties to a joint purchasing arrangement are actual or potential downstream competitors, their incentives for price competition on the downstream selling market or markets may be considerably reduced when they purchase a significant part of their products together. First, if the parties together hold a significant degree of market power on the selling market or markets (which does not necessarily amount to dominance), the lower purchase prices achieved by the joint purchasing arrangement may be less likely to be passed on to consumers. Second, the higher the combined market share of purchasers on the downstream selling market, the greater the risk that coordination of upstream purchasing may also lead to coordination of

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183 See Section 1.2.4 above.

downstream selling. This risk is particularly high if the joint purchasing arrangement limits (or disincentivizes) the ability of its members to independently purchase additional volumes of the input in the purchasing market, either through or outside the joint purchasing arrangement. An obligation on the members of a joint purchasing arrangement to purchase all or most of their requirements through the arrangement requires an assessment of the restrictive effects on competition. Such assessment takes account of, in particular, the extent of the obligation, the market share of the joint purchasing arrangement on the selling market and the degree of concentration of suppliers on the purchasing market and whether such obligation is necessary in order to ensure a sufficiently strong negotiation position of the arrangement towards strong suppliers.

336. In the analysis of whether the parties to a joint purchasing arrangement have buying power, the number and intensity of links (for example, other purchasing agreements) between competitors in the purchasing market are relevant.

337. However, if competing purchasers that cooperate are not active on the same relevant selling market (for example, retailers which are active in different geographic markets and cannot be regarded as potential competitors), the joint purchasing arrangement is less likely to have restrictive effects on competition in the selling market. Such joint purchasing arrangement with members that are not active on the same selling market may, however, more likely lead to restrictive effects on competition if they have such a significant position in the purchasing markets that it may harm the competitive process for other players in the purchasing markets (for example by significantly harming investment incentives upstream).

4.2.3.3. Collusive outcome

338. Joint purchasing arrangements may lead to a collusive outcome if they facilitate the coordination of the parties' behaviour on the selling market where they are actual or potential competitors. This can be the case, in particular, if the market structure in the selling market is conducive to collusion (for example because the market is concentrated and displays a significant degree of transparency). A collusive outcome is also more likely if the joint purchasing arrangement includes a significant number of undertakings in the selling market and extends beyond the mere joint negotiation of purchasing terms and conditions (for example by fixing the purchasing volumes of its members), thereby limiting significantly the scope for the parties to the arrangement to compete on the selling market.

339. Collusion can also be facilitated if the parties achieve a high degree of commonality of costs through joint purchasing, provided the parties have market power in the selling market and the market characteristics are conducive to coordination.

340. Restrictive effects on competition are more likely if the parties to the joint purchasing arrangement have a significant proportion of their variable costs in the selling market in common. This is, for instance, the case if retailers, which are active in the same relevant retail market or markets, jointly purchase a significant amount of the products they offer for resale. It may also be the case if competing manufacturers and sellers of a final product jointly purchase a high proportion of their input together.

341. The implementation of a joint purchasing arrangement may require the exchange of commercially sensitive information such as purchase prices (or part thereof) and volumes. The exchange of such information may facilitate coordination with regard

to sales prices and output and thus lead to a collusive outcome on the selling markets. Spill-over effects from the exchange of commercially sensitive information can be minimised, for example, where data is collated by the joint purchasing arrangement which does not pass on the information to the parties thereto by putting in place technical or practical measures to protect its confidentiality. Moreover, the participation of an undertaking in several joint purchasing arrangements should not lead to anti-competitive exchanges of information or other types of coordination between the different purchasing arrangements.

342. Any effects on competition arising from the exchange of commercially sensitive information will be assessed in the light of the overall effects of the joint purchasing arrangement provided that such exchanges are necessary for the functioning of the joint purchasing arrangement. Whether the exchange of information in the context of a joint purchasing arrangement is likely to lead to restrictive effects on competition should also be assessed according to the guidance given in Chapter 6. If the information exchange does not exceed the sharing of data necessary for the joint purchasing of the products by the parties to the joint purchasing arrangement, then even if the information exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to meet the criteria of Article 101(3) than if the exchange goes beyond what was necessary for the joint purchasing.

343. When negotiating terms and conditions with suppliers, a joint purchasing arrangement may threaten suppliers to abandon negotiations or to stop purchasing temporarily unless they are offered better terms or lower prices. Such threats are typically part of a bargaining process and may involve collective action by purchasers when a joint purchasing arrangement conducts the negotiations. Strong suppliers may use similar threats to stop negotiating or supplying products in their bargaining with purchasers. Such threats do not usually amount to a restriction of competition by object and any negative effects arising from such collective threats will not be assessed separately but in the light of the overall effects of the joint purchasing arrangement. An example of such bargaining threats concerns temporary stops by the members of a retail alliance in ordering certain products, selected by each of the members individually for its own shops, from a supplier during their negotiations about terms and conditions for their future supply agreement[184]. Such temporary stops may result in the products selected by the individual members of the alliance being unavailable on the retailers' shelves for a limited period of time, namely until the retail alliance and the supplier have agreed on the terms and conditions of future supplies.

4.3. Assessment under Article 101(3)

4.3.1. Efficiency gains

344. Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on

[184] Temporary stops by retailers in orders of certain products from suppliers should be distinguished from so-called 'delisting', that is to say a measure whereby a retailer permanently removes certain products of a supplier from its assortment and gives up the associated space on its shelves.

the market. Such qualitative efficiencies can benefit consumers, by reducing dependencies and avoiding shortages through more resilient supply chains and contributing to a more resilient internal market.

4.3.2. Indispensability

345. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a purchasing agreement do not meet the criteria of Article 101(3). An obligation to purchase or negotiate exclusively through the joint purchasing arrangement may, in certain cases, be indispensable to achieve the necessary degree of buying power or volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

4.3.3. Pass-on to consumers

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

347. Normally, companies have an incentive to pass-on at least part of a reduction in variable costs to their own customers. The higher profit margin resulting from variable cost reductions provides companies with a significant commercial incentive to expand output through price reductions. However, the members of a joint purchasing arrangement that together hold significant market power on the selling market or markets, may be less inclined to pass on variable cost reductions to consumers. Moreover, pure reductions in fixed costs (such as lump-sum payments by suppliers) may be unlikely to be passed-on to consumers, as they normally do not provide companies with an incentive to expand output. A careful assessment of the specific joint purchasing arrangement is therefore required to assess whether it generates an economic incentive to expand output and thus pass-on cost reductions or efficiencies[185]. Finally, lower sales prices for consumers are particularly unlikely if the joint purchasing arrangement limits (or disincentivizes) the ability of its members to independently purchase additional volumes either through or outside the joint purchasing arrangement. In fact, joint purchasing arrangements that limit the independent ordering of additional volumes by its members provide an incentive to raise sales prices. This is because jointly limiting the purchase of inputs may also have the effect of limiting the volume of sales in the selling market or markets.

4.3.4. No elimination of competition

348. The criteria of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. That assessment has to cover both purchasing and selling markets.

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[185] E.g., while a rebate may have the contractual *form* of a lump-sum payment, it may effectively be contingent on the buyer reaching certain expected sales targets when the contract is renegotiated the following year.

4.4. Examples

349. Buyer cartel

Example 1

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

Analysis: The five recycling undertakings are all party to a buyer cartel. They are each negotiating and purchasing individually from the collectors of mobile phones. There is no joint purchasing arrangement involved that represents the buyers jointly in the negotiations with or the purchase from the collectors. Irrespective of the relatively small market share that the recycling undertakings have on the purchasing market for electronic waste, the agreement between them qualifies as a by object restriction of competition and requires no market definition nor any assessment of its potential effects on the market.

350. Joint negotiation by a European retail alliance

Example 2

Situation: A European retail alliance, having as its members seven large retail chains, each from a different Member State, jointly negotiates with a large brand manufacturer of confectionery products some additional terms and conditions for their future supply agreement. The alliance has a market share of no more than 18% on each relevant purchasing market for confectionary and each of its members has a market share of between 15% and 20% on the retail markets in their respective Member State. The negotiations cover in particular an additional rebate from the manufacturer's normal list price in return for certain promotional services covering the seven Member States in which the members of the alliance are active on the selling market. Both sides drive a hard bargain to get the best possible deal. At some point during the negotiations the retail alliance threatens and subsequently decides to temporarily stop ordering certain products from the manufacturer to increase the pressure. In implementing this decision, each member of the alliance decides individually which products from the manufacturer it stops ordering during the deadlock in the negotiations. Eventually, after another round of negotiations, the manufacturer and the alliance agree on the additional rebate that will apply to the subsequent individual purchases by its members and they restart their orders of the entire range of products from the manufacturer.

Analysis: The European retail alliance qualifies as a joint purchasing arrangement even if it jointly only negotiates certain terms and conditions with the manufacturer on behalf of its members based on which they individually purchase their required quantities. The national retail chains that are members of the alliance are not active on the same selling markets. Therefore, the joint purchasing arrangement is less

likely to have restrictive effects on competition downstream to the extent that they face sufficient competitive pressure from competing retailers. Any negative effects on competition for manufacturers upstream from the additional rebate (for instance in terms of innovation by suppliers) have to be assessed in the light of the overall effects of the joint purchasing arrangement. The temporary stopping of orders does not appear to harm consumers in the short term, insofar as they have other competing retailers where they can purchase the same products or substitutable products, and may benefit consumers in the long term through lower prices.

351. Joint purchasing by small undertakings with moderate combined market shares

Example 3

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

Analysis: The retailers have a moderate market position on the purchasing and the selling markets. Furthermore, the cooperation brings about some economies of scale. Even though the retailers achieve a high degree of commonality of costs, they are unlikely to have market power on the selling market due to the market presence of Undertakings A and B, which are both individually larger than the joint purchasing arrangement. Consequently, the retailers are unlikely to coordinate their behaviour and reach a collusive outcome. The formation of the joint purchasing arrangement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

352. Commonality of costs and market power on the selling market

Example 4

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

Analysis: It is likely that this purchasing agreement would give the parties the ability to coordinate their behaviour on the selling market, thereby leading to a collusive outcome. The parties have market power on the selling market, given the few much smaller competitors in that market, and the purchasing agreement gives rise to a significant commonality of costs. Moreover, market entry is unlikely. The incentive for the parties to coordinate their behaviour would be reinforced if their cost structures were already similar prior to concluding the agreement. Moreover, similar

margins of the parties would further increase the risk of a collusive outcome. This agreement also creates the risk that by the parties' withholding demand and, consequently, as a result of reduced quantity, downstream selling prices would increase. Hence, the purchasing agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even though the agreement is very likely to give rise to efficiency gains in the form of cost savings, due to the parties' significant market power on the selling market, these are unlikely to be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore, the purchasing agreement is unlikely to fulfil the criteria of Article 101(3).

353. Parties active in different geographic markets

Example 5

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

Analysis: The joint purchasing arrangement will be able to compete with the other existing major buyers on the purchasing market. The selling markets are much smaller (in turnover and geographic scope) than the Union-wide purchasing market and in those markets some of the members of the arrangement may have market power. Even if the members of the joint purchasing arrangement have a combined market share of more than 15% on the purchasing market, the parties are unlikely to coordinate their conduct and collude on the selling markets since they are neither actual nor potential competitors on the downstream markets. They are also likely to pass on the reduced prices insofar as they face significant competition on the selling markets. Consequently, the joint purchasing arrangement is not likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

354. Information exchange

Example 6

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

have six competitors in the purchasing and selling markets, two of which have a market share of 20%.

Analysis: Since there is no direct information exchange between the parties, the transfer of the information necessary for the purchases through the joint purchasing arrangement is unlikely to lead to a collusive outcome. Consequently, the information exchange is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

5. COMMERCIALISATION AGREEMENTS

5.1. Introduction

355. Commercialisation agreements involve cooperation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have a widely varying scope, depending on the commercialisation functions which are covered by the cooperation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.

356. An important category of those more limited agreements is distribution agreements. The VBER and the Vertical Guidelines generally cover distribution agreements unless the parties to the agreement are actual or potential competitors. If competitors agree to distribute their substitute products (in particular if they do so on different geographic markets) there is a risk in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome. This can be true both for reciprocal and non-reciprocal agreements between competitors, which thus have to be assessed, first, according to the principles set out in this Chapter. If that assessment leads to the conclusion that cooperation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. That second step of the assessment should be based on the principles set out in the Vertical Guidelines.

357. The only exception to the two-step process mentioned in the previous paragraph is in case of non-reciprocal distribution agreements between competitors where (a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, or, (b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services that are covered by the VBER[186], to which these Guidelines do not apply. Paragraph 48 provides additional guidance on the general relationship between these Guidelines with the VBER and the Vertical Guidelines.

358. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another type of cooperation upstream, such as joint production or joint purchasing. When analysing commercialisation agreements combining different

[186] Article […] of the Block Exemption Regulation on Vertical Restraints.

stages of cooperation it is necessary to undertake the assessment in accordance with paragraphs 6-7.

359. Specific rules apply to the commercialisation of agricultural products. Article 101 does not apply to (i) the commercialisation of agricultural products through recognised Producer Organisations and Associations of Producer Organisations[187] and (ii) to certain commercialisation agreements that do not concern prices of joint sales and are concluded among farmers and among their associations[188], subject to specific conditions laid out in these rules. In addition there are specific provisions for the commercialisation of raw milk[189].

5.2. Assessment under Article 101(1)

5.2.1. Main competition concerns

360. Commercialisation agreements can lead to restrictions of competition in several ways. First, and most obviously, commercialisation agreements may lead to price fixing.

361. Secondly, commercialisation agreements may also facilitate output limitations, because the parties may decide on the volume of products to be put on the market, therefore restricting supply.

362. Thirdly, commercialisation agreements may become a means for the parties to divide the markets or to allocate orders or customers, for example in cases where the parties' production plants are located in different geographic markets or when the agreements are reciprocal.

363. Finally, commercialisation agreements may also lead to an exchange of strategic information relating to aspects within or outside the scope of the cooperation or to commonality of costs – in particular with regard to agreements not encompassing price fixing – which may result in a collusive outcome.

5.2.2. Restrictions of competition by object

364. First, commercialisation agreeements lead to a restriction of competition by object if they serve as a tool to engage in a disguised cartel. In any case, commercialisation agreements involving price fixing, output limitations or market partitioning are therefore likely to restrict competition by object.

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

366. That assessment does not change if the agreement is non-exclusive (that is to say, where the parties are free to sell individually outside the agreement), as long as it can

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[187] Article 152 (1a) of the Regulation (EU) 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agriculture, as amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021.

[188] Article 209 of the same regulation.

[189] Article 149 of the same regulation.

be concluded that the agreement will lead to a coordination of the prices charged by the parties to all or part of their customers.

367. Similarly, output limitations are an important competition concern that can arise from commercialisation agreements. Where the parties to the agreement decide jointly on the quantity of the products to be marketed, the available supply of the contractual products could be reduced, which increases their price. Any party to the agreement should in principle independently decide to increase or reduce its output to meet market demand. The risk of output limitations is more limited in case of non-exclusive commercialisation agreements, as long as the parties remain free and actually available to serve individually any additional demand and provided that the agreement will not lead to a coordination of the supply policy of the parties.

368. Another specific competition concern related to commercialisation arrangements between parties which are active in different geographic markets or vis-à-vis different categories of customers is that they can be an instrument of market partitioning. If the parties use a reciprocal commercialisation agreement to distribute each other's products in order to eliminate actual or potential competition between them by deliberately allocating markets or customers, the agreement is likely to have as its object a restriction of competition. If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It is necessary, however, to assess whether the non-reciprocal agreement constitutes the basis for a mutual understanding to avoid entering each other's markets.

5.2.3. Restrictive effects on competition

369. A commercialisation agreement that is not restrictive by object, can still have restrictive effects on competition, to be verified in accordance with the elements mentioned in paragraph 37. The following clarifications can be added with specific respect to anti-competitive effects in commercialisation agreements.

370. To evaluate the possible restrictive effects of a commercialisation agreement, the competitive relationship between the parties in the relevant product and geographic market or markets directly concerned by the cooperation (that is to say, the market or markets to which the products subject to the agreement belong) have to be defined. In a commercialisation agreement, generally the main affected market is the market where the parties to the agreement will jointly commercialise the contractual products. However, as a commercialisation agreement in one market may also affect the competitive behaviour of the parties in neighbouring markets which are closely related to the market directly concerned by the cooperation, any such neighbouring markets also need to be defined. The neighbouring markets may be horizontally or vertically related to the market where the cooperation takes place.

371. In cases where they are not restrictive by object, commercialisation agreements between competitors will generally only have restrictive effects on competition if the parties have some degree of market power, to be assessed also taking into account any possible countervailing buyer power. In this respect, in commercialisation agreements the parties pool (part of) their market-related activities, in direct relation with their customers. In case of joint market power there is therefore in general a relevant degree of probability that the parties have the capacity to raise prices or reduce output, product quality, product variety or innovation. The direct relation to customers increases the risk of anti-competitive effects of the agreement.

372. A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the cooperation, for example, because of the costs involved.

373. The key issue in assessing a reciprocal commercialisation agreement is whether the agreement in question is objectively necessary for the parties to enter each other's markets. If it is, the agreement does not create competition problems of a horizontal nature. However, if the agreement reduces the decision-making independence of one of the parties with regard to entering the other parties' market or markets by limiting its incentives to do so, it is likely to give rise to restrictive effects on competition. The same reasoning applies to non-reciprocal agreements, where the risk of restrictive effects on competition is, however, less pronounced.

5.2.3.1. Collusive outcome

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

375. The likelihood of a collusive outcome depends on the parties' market power and the characteristics of the relevant market. Commonality of costs can only increase the risk of a collusive outcome if the parties have market power and if the commercialisation costs constitute a large proportion of the variable costs related to the products concerned. This is, for example, not the case for homogeneous products for which the highest cost factor is production. Commonality of commercialisation costs increases the risk of a collusive outcome if the commercialisation agreement concerns products which entail costly commercialisation, for example, high distribution or marketing costs. Consequently, agreements concerning only joint advertising or joint promotion can also give rise to restrictive effects on competition if those costs constitute a significant cost factor.

376. Joint commercialisation generally involves the exchange of sensitive commercial information, particularly on marketing strategy and pricing. In most commercialisation agreements, some degree of information exchange is required in order to implement the agreement. It is therefore necessary to verify whether the information exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the cooperation. Any negative effects arising from the information exchange will not be assessed separately but in the light of the overall effects of the agreement.

377. In any case, the likely restrictive effects on competition of information exchange in the context of commercialisation agreements will depend on the characteristics of the market and the data shared, and should be assessed in the light of the general guidance given in Chapter 6.

5.2.3.2. Cooperation that generally does not raise concerns

378. As already mentioned above in paragraph 367, commercialisation agreements between competitors can generally have restrictive effects on competition if the parties have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15% in the market where they jointly commercialize the contractual products. In any event, if the parties' combined market share does not exceed 15%, it is likely that the conditions of Article 101(3) are fulfilled.

379. If the parties' combined market share is greater than 15%, it is not possible to presume that their agreement will not have restrictive effects and thus the likely impact of the joint commercialisation agreement on the market must be assessed.

5.3. Assessment under Article 101(3)

5.3.1. Efficiency gains

380. Commercialisation agreements can give rise to significant efficiency gains. The efficiencies to be taken into account when assessing whether a commercialisation agreement fulfils the criteria of Article 101(3) will depend on the nature of the activity and the parties to the cooperation. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and unless this integration will generate substantial efficiencies. Joint distribution can generate significant efficiencies, stemming from economies of scale or scope, especially for smaller producers or groups of independent retailers, for instance in case they take advantage of new distribution platforms in order to compete with global or major operators. Joint distribution can in particular be relevant for attaining environmental objectives, provided that these are certain, quantifiable and documented. Commercialisation agreements can also contribute to a resilient internal market and generate efficiencies benefiting consumer by reducing dependencies and/or mitigating shortages and disruptions in supply chains.

381. In addition, the efficiency gains must not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency gain within the meaning of Article 101(3).

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

5.3.2. Indispensability

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

5.3.3. *Pass-on to consumers*

384. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the commercialisation agreement. This can happen in the form of lower prices or better product quality or variety. The higher the market power of the parties, however, the less likely it is that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition. Where the parties have a combined market share of below 15%, it is likely that any demonstrated efficiency gains generated by the agreement will be sufficiently passed on to consumers.

5.3.4. *No elimination of competition*

385. The criteria of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the cooperation belong and in possible spill-over markets.

5.4. Bidding consortia

386. The term bidding consortium refers to a situation where two or more parties cooperate to submit a joint bid in a public or private procurement competition[190].

387. For the purpose of this Section, bidding consortia have to be distinguished from bid rigging (or collusive tendering), that refers to illegal agreements between economic operators, with the aim of distorting competition in award procedures. Bid-rigging is one of the most serious form of restrictions by object and may assume various forms, such as fixing the content of their tenders beforehand (especially the price) in order to influence the outcome of the procedure, refraining from submitting a tender, allocating the market based on geography, contracting authority or the subject of the procurement or setting up rotation schemes for a number of procedures. The aim of all these practices is to enable a predetermined tenderer to secure a contract while creating the impression that the procedure is genuinely competitive[191]. From a competition point of view bid rigging is a form of cartel that consists in the manipulation of a tender procedure for the award of a contract[192].

388. Bid-rigging generally does not involve joint participation in the tender process. It is typically rather a hidden or tacit agreement between potential participants to coordinate their apparent individual decisions with respect to the participation in the tender process. However, in some cases the distinction between bid-rigging and legitimate forms of joint bidding is not straightforward, in particular in cases of

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[190] Cooperation in bidding can be realized either through subcontracting, where the official bidder agrees, in case of adjudication, to subcontract part of the activity to one or more other parties, or through a consortium, where all consortium partners participate jointly to the tender process, normally with a specific legal entity for the purposes of the tender process. From a public procurement perspective, the difference between subcontracting and a consortium is that, in the first case, the lead contractor may not have to disclose immediately the names of its subcontractors, while in a consortium the names of the consortium members are immediately declared to the tender authority. From a competition law perspective, subcontracting and consortia both constitute joint bidding. In this Section the term bidding consortium will be used for simplicity.

[191] Commission's *Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground*, OJ C 91, 18.3.2021, p. 1.

[192] Judgment of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, C-450/19, EU:C:2021:10, paragraph 35.

subcontracting. For example, cases where two tenderers cross-subcontract one another may be potential indication of collusion, given that such subcontracting agreements usually allow the parties to know each other's financial offer, thus calling into question the parties' independence in formulating their own tenders. However, there is not a general presumption that subcontracting by the successful tenderer to another tenderer in the same procedure constitutes collusion among the economic operators concerned and the parties concerned may demonstrate the opposite[193].

389. Bidding consortium agreements can involve a significant degree of integration of resources and activities of the parties, in particular when forms of joint production are included in the contractual activity, for the purpose of participating in the tender procedure. In situations where the joint commercialisation is merely ancillary to the main integration of the parties in the production process, the centre of gravity of the agreement lies in the production activity and the competitive assessment must be carried out in accordance with the rules applicable to the relevant cooperation, that is joint production. In this case, price fixing for the contract products or services is generally not considered a restriction by object and a by effect assessment will be necessary (see above, paragraph 216 on production agreements).

390. However, in principle consortium agreements that mainly or exclusively include joint commercialisation have to be considered as commercialisation agreements and therefore have to be assessed in accordance with the principles set out in the present Chapter.

391. A joint bidding consortium agreement – irrespective of its legal qualification – does not restrict competition if it allows the undertakings involved to participate in projects that they would not be able to undertake individually. As the parties to the consortium agreements are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1). This can be the case of undertakings that produce different services that are complementary for the purposes of participation in the tender. Another possibility is when the undertakings involved, although all active in the same markets, cannot carry out the contract individually, for example due to the size of the contract or its complexity.

392. The assessment of whether the parties can each compete in a tender individually, thus being competitors, depends firstly on the requirements included in the tender rules. However, the mere theoretical possibility of carrying out the contractual activity alone does not automatically make the parties competitors: there must be a realistic assessment of whether an undertaking will be capable of completing the contract on its own, considering the specific circumstances of the case, such as the size and abilities of the undertaking, and its present and future capacity assessed in light of the evolution of the contractual requirements.

393. In cases of calls for tenders where it is possible to submit bids on parts of the contract (lots), undertakings that have the capacity to bid on one or more lots – but assumedly not for the whole tender – have to be considered competitors. In similar situations the collaboration is often justified by the fact that the cooperation in the consortium agreement would allow the parties to bid for the complete contract and this would give the possibility to offer a combined rebate for the complete contract. However,

[193] Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, OJ C 91, 18.3.2021, p. 1, Section 5.6.

this does not change the fact that in principle the parties are competitors for at least part of the tender and the possible efficiencies achieved with a joint bid on the complete tender have to be assessed on the basis of the principles of Article 101(3).

394. If it is not possible to exclude that the parties to the consortium agreement could each compete individually in the tender (or if there are more parties to a consortium agreement than necessary), the joint bid may restrict competition. The restriction can be by object or by effects, depending on the content of the agreement and on the specific circumstances of the case (see paragraphs 360-375 above).

395. In any event, a consortium agreement between competitors can fulfil the criteria of Article 101(3). Generally a specific and concrete assessment will be necessary, on the basis of various elements such as the parties' position in the relevant market, the number and the market position of the other participants to the tender, the content of the consortium agreement, the products or services involved and the market conditions.

396. In terms of efficiencies, these can take the form of lower prices, but also of better quality, wider choice or faster realization of the products or services concerned by the call for tenders. In addition, all the other criteria of Article 101(3) need to be fulfilled (indispensability, pass-on to consumers and no elimination of competition). In tender procedures these are often interlinked: the efficiency gains of a joint bid through a consortium agreement are more easily passed on to consumers – in the form of lower prices or better quality of the offer – if competition with regard to the tender is not eliminated, and other relevant competitors take part in the bidding procedure.

397. In essence, the criteria of Article 101(3) can be fulfilled if the joint participation to the tender allows the parties to submit an offer that is more competitive than the offers they would have submitted alone – in terms of prices and/or quality – and the benefits in favour of the consumers and the contracting entity outweigh the restrictions to competition. Efficiencies must be passed on to consumers and will not be sufficient to meet the criteria of Article 101(3) if they only benefit the parties to the joint bidding consortium agreement.

5.5. Examples

398. Joint commercialisation necessary to enter a market

Example 1

Situation: Four undertakings providing laundry services in a large city close to the border of another Member State, each with a 3% market share of the overall laundry market in that city, agree to create a joint marketing arm for the selling of laundry services to institutional customers (that is to say, hotels, hospitals and offices), whilst keeping their independence and freedom to compete for local, individual clients. In view of the new segment of demand (the institutional customers) they develop a common brand name, a common price and common standard terms including, inter alia, a maximum period of 24 hours before deliveries and schedules for delivery. They set up a common call centre where institutional clients can request their collection and/or delivery service. They hire a receptionist (for the call centre) and several drivers. They further invest in vans for dispatching, and in brand promotion, to increase their visibility. The agreement does not fully reduce their individual infrastructure costs (since they are keeping their own premises and still compete with each other for the individual local clients), but it increases their economies of scale

and allows them to offer a more comprehensive service to other types of clients, which includes longer opening hours and dispatching to a wider geographic coverage. In order to ensure the viability of the project, it is indispensable that all four of them enter into the agreement. The market is very fragmented, with no individual competitor having more than 15% market share.

Analysis: Although the joint market share of the parties is below 15%, the fact that the agreement involves price fixing means that Article 101(1) could apply. However, to the extent that the parties would not have been in a position to enter the market for providing laundry services to institutional customers, either individually or in cooperation with a fewer number of parties than the four currently taking part in the agreement, the agreement would not create competition concerns, irrespective of the price-fixing restriction, which in this case can be considered as indispensable to the promotion of the common brand and the success of the project.

399. Commercialisation agreement by more parties than necessary to enter a market

Example 2

Situation: The same facts as in Example 1, paragraph 398, apply with one main difference: in order to ensure the viability of the project, the agreement could have been implemented by only three of the parties (instead of the four actually taking part in the cooperation).

Analysis: Although the joint market share of the parties is below 15%, the fact that the agreement involves price fixing and could have been carried out by fewer than the four parties means that Article 101(1) applies. The agreement thus needs to be assessed under Article 101(3). The agreement gives rise to efficiency gains as the parties are now able to offer improved services for a new category of customers on a larger scale (which they would not otherwise have been able to service individually). In the light of the parties' combined market share of below 15%, it is likely that they will sufficiently pass-on any efficiency gains to consumers. It is further necessary to consider whether the restrictions imposed by the agreement are indispensable to achieve the efficiencies and whether the agreement eliminates competition. Given that the aim of the agreement is to provide a more comprehensive service (including dispatch, which was not offered before) to an additional category of customers, under a single brand with common standard terms, the price fixing can be considered as indispensable to the promotion of the common brand and, consequently, the success of the project and the resulting efficiencies. Additionally, taking into account the market fragmentation, the agreement will not eliminate competition. The fact that there are four parties to the agreement (instead of the three that would have been strictly necessary) allows for increased capacity and contributes to simultaneously fulfilling the demand of several institutional customers in compliance with the standard terms (that is to say, meeting maximum delivery time terms). As such, the efficiency gains are likely to outweigh the restrictive effects arising from the reduction of competition between the parties and the agreement is likely to fulfil the conditions of Article 101(3).

400. Joint internet platform – 1

Example 3

Situation: A number of small specialty shops throughout a Member State join an electronic web-based platform for the promotion, sale and delivery of gift fruit baskets. There are a number of competing web-based platforms. By means of a

monthly fee, they share the running costs of the platform and jointly invest in brand promotion. Through the webpage, where a wide range of different types of gift baskets are offered, customers order (and pay for) the type of gift basket they want to be delivered. The order is then allocated to the specialty shop closest to the address of delivery. The shop individually bears the costs of composing the gift basket and delivering it to the client. It reaps 90% of the final price, which is set by the web-based platform and uniformly applies to all participating specialty shops, whilst the remaining 10% is used for the common promotion and the running costs of the web-based platform. Apart from the payment of the monthly fee, there are no further restrictions for specialty shops to join the platform, throughout the national territory. Moreover, specialty shops having their own company website are also able to (and in some cases do) sell gift fruit baskets on the internet under their own name and thus can still compete among themselves outside the cooperation. Customers purchasing over the web-based platform are guaranteed same day delivery of the fruit baskets and they can also choose a delivery time convenient to them.

Analysis: Although the agreement is of a limited nature, since it only covers the joint selling of a particular type of product through a specific marketing channel (the web-based platform), since it involves price-fixing, it is likely to restrict competition by object. The agreement therefore needs to be assessed under Article 101(3). The agreement gives rise to efficiency gains such as greater choice and higher quality service and the reduction of search costs, which benefit consumers and are likely to outweigh the restrictive effects on competition the agreement brings about. Given that the specialty stores taking part in the cooperation are still able to operate individually and to compete one with another, both through their shops and the internet, the price-fixing restriction could be considered as indispensable for the promotion of the product (since when buying through the web-based platform consumers do not know where they are buying the gift basket from and do not want to deal with a multitude of different prices) and the ensuing efficiency gains, as well as considering the common online branding. In the absence of other restrictions, the agreement fulfils the criteria of Article 101(3). Moreover, as other competing web-based platforms exist and the parties continue to compete with each other, through their shops or over the internet, competition will not be eliminated.

401. Joint internet platform – 2

Example 4

Situation: A number of small independent bookstores create an electronic web-based platform, which will promote, sell and deliver the books, which are available in their stores. The bookstores cover a substantial region bordering several Member States. Each bookstore pays an annual fee, which is destined to cover the costs of running and promoting the platform. The fee is calculated based on a fixed percentage of each bookstore's annual sales on the platform up to a maximum amount. This maximum amount is agreed annually and is based on the running costs of the platform incurred during the previous year. For the initial period of 3 years, the percentage is fixed at 10% of annual sales but there is an understanding among the members that as the business grows they will likely be able to reduce the contributions. The bookstores agree to negotiate an arrangement with a delivery company for same-day delivery of the books ordered online. Because of the number of bookstores involved in the venture, the delivery company is able to guarantee same-day delivery. A price for this delivery service is agreed and includes the cost of

packaging the items. There is no arrangement between the individual bookstores regarding the online price for their books, that is communicated by each bookstore to the platform only and no information is exchanged between the bookstores regarding future prices or promotions. The price of the books online is generally the same as that charged in-store (and, the additional amount for postage and packing agreed with the delivery company). Admission to the platform is open to all independent stores upon payment of the annual fee. There are several other similar web-based platforms providing a similar service in the same region. No individual platform has more than 15% of the market in any one region.

Analysis: Since the agreement involves the setting of the price for packing and delivery of orders, as well as a fee based on a percentage of the retail prices, Art. 101(1) may be applicable. The parties provide evidence that the benefits of the negotiated agreement – including the same-day delivery clause – would not have been made available to each bookstore individually. In addition, because of the agreement there is a noticeable increase in book-sales – both online and in-store. It seems clear that these benefits could not have been achieved without the agreement. Since there are several other platforms with similar market shares operating in the same region, competition is not eliminated and the agreement does not create competition concerns.

402. Sales joint venture

Example 5

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

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

403. Non-poaching clause in agreement on outsourcing of services

Example 6

Situation: Undertakings A and B are competing providers of cleaning services for commercial premises. Both have a market share of 15%. There are several other competitors with market shares between 10 and 15%. A has taken the (unilateral)

decision to only focus on large customers in the future as servicing large and small customers has proved to require a somewhat different organisation of the work. Consequently, Undertaking A has decided to no longer enter into contracts with new small customers. In addition, Undertakings A and B enter into an outsourcing agreement whereby Undertaking B would directly provide cleaning services to Undertaking A's existing small customers (which represent 1/3 of its customer base). At the same time, Undertaking A is keen not to lose the customer relationship with those small customers. Hence, Undertaking A will continue to keep its contractual relationships with the small customers but the direct provision of the cleaning services will be done by Undertaking B. In order to implement the outsourcing agreement, Undertaking A will necessarily need to provide Undertaking B with the identities of Undertaking A's small customers which are subject to the agreement. As Undertaking A is afraid that Undertaking B may try to poach those customers by offering cheaper direct services (thereby bypassing Undertaking A), Undertaking A insists that the outsourcing agreement contain a 'non-poaching clause'. According to that clause, Undertaking B may not contact the small customers falling under the outsourcing agreements with a view to providing direct services to them. In addition, Undertakings A and B agree that Undertaking B may not even provide direct services to those customers if Undertaking B is approached by them. Without the 'non-poaching clause' Undertaking A would not enter into an outsourcing agreement with Undertaking B or any other undertaking.

Analysis: The outsourcing agreement removes Undertaking B as an independent supplier of cleaning services for Undertaking A's small customers as they will no longer be able to enter into a direct contractual relationship with Undertaking B. Therefore, Article 101(1) may apply. However, those customers only represent 1/3 of Undertaking A's customer base, that is to say, 5% of the market. They will still be able to turn to Undertaking A and Undertaking B's competitors, which represent 70% of the market. Hence, the outsourcing agreement will not enable Undertaking A to profitably raise the prices charged to the customers subject to the outsourcing agreement. In addition, the outsourcing agreement is not likely to give rise to a collusive outcome as Undertakings A and B only have a combined market share of 30% and they are faced with several competitors that have market shares similar to Undertaking A's and Undertaking B's individual market shares. Moreover, the fact that servicing large and small customers is somewhat different minimises the risk of spill-over effects from the outsourcing agreement to Undertaking A's and Undertaking B's behaviour when competing for large customers. Consequently, the outsourcing agreement is not likely to give rise to restrictive effects on competition and may be exempted under Article 101(3).

404. Media Distribution Platform

Example 7

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

active, is a young market with a general expectation of significant growth potential. The price for watching a video will be determined centrally by the joint venture, that will also coordinate prices for the acquisition of video-on-demand licenses in the upstream market.

Analysis: Considering their size on the national TV market and their large library of audiovisual rights, both A and B could launch a video-on-demand platform separately. Therefore, they are potential competitors in the nascent video-on-demand consumer market. Moreover, the agreement involves price fixing and as a consequence Article 101(1) applies. The restriction of competition appears substantial, as price competition between the two broadcasters will be eliminated. Moreover, also pricing for video-on-demand licenses will be coordinated. These competition restrictions will be appreciable, considering the activities and dimension of the undertakings involved. As for the application of article 101(3), the benefits resulting from an increased range of video-on-demand offers and a simplified navigation through contents do not appear to outweigh the negative effects for competition. In particular, the restrictions do not appear necessary to achieve the mentioned efficiencies, as these could be obtained also with an open platform and a purely technical cooperation. In conclusion, the agreement does not appear to fulfil the criteria of Article 101(3).

405. Bidding consortia

Example 8

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

Analysis: As Undertaking A and B could each compete individually in the tenders, Article 101(1) applies and the joint participation may restrict competition. The agreement therefore needs to be assessed under Article 101(3). According to the result of the previuos tender procedure where the parties competed separately, it appears that a joint offer would be more competitive than the individual offers, in terms of pricing and of range of products offered, in particular optional products. The consortium agreement appears to be objectively necessary for the parties involved to submit really competitive offers in the tender procedures, compared with the offers presented by the other participants. Competition in the tenders is not eliminated as at least two other relevant competitors will take part in the bidding procedure. This implies that the efficiency gains of the joint offer could benefit the contracting entity and finally consumers. Therefore, the agreement appears to fulfil the criteria of Article 101(3).

6. INFORMATION EXCHANGE

6.1. Introduction

406. The purpose of this Chapter is to guide undertakings and associations in the competitive assessment of information exchange[194]. Information exchange can take various forms and can occur in different contexts.

407. Exchange of information for the purposes of this Chapter includes the exchange of (i) raw and unorganised digital content that will need processing in order to make it useful (raw data); (ii) pre-processed data, that has already been prepared and validated; (iii) data that has been manipulated in order to produce meaningful information, of any form as well as (iv) any other type of information, including non-digital information. It includes physical information sharing and data sharing between actual or potential competitors[195]. In this Chapter, the term 'information' covers all of the above-mentioned types of data and information.

408. Information can be directly exchanged between competitors (in the form of a unilateral disclosure or in a bi- or multilateral exchange), or indirectly by or through a third party (such as a service provider, platform, online tool or algorithm), common agency (for example, a trade association), a market research organisation, or through suppliers or retailers. This Chapter applies both to direct and indirect forms of information exchange.

409. Information exchange can be part of another type of horizontal cooperation agreement. The implementation of such horizontal cooperation agreement may require the exchange of commercially sensitive information. In such a case it will be necessary to verify whether the exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the cooperation. Any negative effect arising from such exchanges will not be assessed separately but in the light of the overall effects of the horizontal cooperation agreement. If the information exchange does not exceed what is necessary for the legitimate cooperation between competitors, then even if the exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to meet the criteria of Article 101(3) than if the exchange goes beyond what is necessary to enable the cooperation. When information exchange in itself forms the main objective of the cooperation, the assessment of the exchange should take place according to the guidance provided in this Chapter.

410. Information exchange may also be part of an acquisition process. In such cases, depending on the circumstances, the exchange may be subject to the rules of the Merger Regulation[196]. Any conduct restricting competition that is not directly related

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

[195] The term data sharing is used to describe all possible forms and models underpinning data access and transfer between undertakings. It includes data pools, where data holders group together to share data resources.

[196] Article 4(1) and Article 7(1) of Regulation No 139/2004. See also judgment of 22 September 2021, *Altice Europe* v *Commission*, T-425/18, not yet published, EU:T:2021:607, paragraph 239.

to and necessary for the implementation of the acquisition of control remains subject to Article 101 of the Treaty.

411. Information exchange may also stem from regulatory initiatives. Even though undertakings may be encouraged or obliged to share certain information and data in order to comply with Union or government requirements, Article 101(1) continues to apply. In practice, this means that those subject to regulatory requirements must not use these requirements as a means to infringe Article 101(1). They should restrict the extent of the information exchange to what is required on the basis of the applicable regulation and they may have to implement precautionary measures in case commercially sensitive information is exchanged.

An EU regulation may, for example, foresee for information exchange between those subject to the regulation in order to obviate or reduce the need for animal testing and/or to reduce research costs. Such exchanges are subject to the application of Article 101(1). Undertakings participating in exchanges foreseen by regulation must therefore not give out commercially sensitive information that reveals their market strategy or technical information that goes beyond the requirements of the regulation. Undertakings may be able to reduce the frequency of the exchange in order to make the information less commercially sensitive. Where possible, aggregated information or ranges should be used in order to avoid exchange of individual or more detailed figures. The use of an independent third party service provider ('a trustee') that receives individual information from several sources on the basis of non-disclosure agreements and subsequently collates, checks and aggregates this into a composite return that does not give the possibility of deducing individual figures may also be considered by undertakings.

6.2. Assessment under Article 101(1)

6.2.1. Introduction

412. Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries[197], thereby making markets more efficient. In recent years, notably data sharing has gained importance and has become essential to inform decision making through the use of big data analytics and machine learning techniques[198]. Moreover, undertakings may improve their internal efficiency through benchmarking against each other's best practices. Exchanging information may also help undertakings to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand, etc. The sharing of information of the same type or of complementary nature may enable firms to develop new or better products or services or to train algorithms on a broader, more meaningful basis. Furthermore, exchanges of information may directly benefit consumers by reducing their search costs and improving choice.

413. As indicated in paragraph 15, an information exchange can only be addressed under Article 101(1) if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. As set out in paragraph 15, the concept of a concerted practice implies, in addition to the participating undertakings concerting

[197] Economic theory on information asymmetries deals with the study of decisions in transactions where one party has more information than the other.

[198] Data sharing is also encouraged in the European Strategy for Data.

with each other, subsequent conduct on the market and a relationship of cause and effect between the two[199]. In case an exchange of commercially sensitive information between competitors takes place in preparation of an anti-competitive agreement, this suffices to prove the existence of a concerted practice within the meaning of Article 101(1). In that regard, it is not necessary to show that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market[200]. In addition, there is a presumption that undertakings that take part in a concerted practice and that remain active on the market take account of the information exchanged with their competitors in determining their conduct on the market[201].

414. The main principle of competition is that each undertaking determines independently its economic conduct on the relevant market. This principle does not prevent undertakings from adapting themselves intelligently to the existing or anticipated conduct of their competitors or to customary conditions existing in the market. Undertakings should however avoid exchanges of information that have the object or effect to give rise to conditions of competition which do not correspond to the normal conditions of the relevant market. This is the case if the exchange either influences the conduct on the market of an actual or potential competitor or reveals to such a competitor the conduct which another competitor has decided to follow itself or contemplates adopting on the market[202].

415. In this Section, first the two main competition concerns related to information exchange are set out (Section 6.2.2). Then, more guidance is provided on the relevance of the nature of the information that is exchanged for the assessment under Article 101(1) (Section 6.2.3), and the characteristics of the exchange itself (Section 6.2.4), as well as the characteristics of the market (Section 6.2.5). Two dedicated sections deal with restrictions of competition by object (Section 6.2.6) and by effect (Section 6.2.7).

6.2.2. Main competition concerns related to information exchange[203]

6.2.2.1. Collusive outcome

416. By artificially increasing transparency between competitors in the market, the exchange of commercially sensitive information can facilitate coordination of undertakings' competitive behaviour and result in restrictions of competition. This

[199] See, judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 39-40; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 126

[200] Judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 135.

[201] Judgment of 10 November 2017, *ICAP and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 57; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51, and judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 127.

[202] Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 27 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 32-33.

[203] The use of the term 'main competition concerns' means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

applies in particular where the exchange underpins another anti-competitive arrangement[204].

417. An exchange of commercially sensitive information *in itself* may allow undertakings to reach a common understanding on the terms of coordination which can lead to a collusive outcome on the market. The exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis, undertakings can then reach a common understanding on their behaviour on the market, even without an explicit agreement on coordination[205].

418. The exchange of commercially sensitive information can also be used as a method to increase the *internal stability* of an anti-competitive agreement or concerted practice on the market. Information exchange can make the market sufficiently transparent to allow the colluding undertakings to monitor to a sufficient degree whether other undertakings are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This can either enable undertakings to achieve a collusive outcome on markets where they would otherwise not have been able to do so, or it can increase the stability of a collusive outcome already present on the market.

The use of algorithms by competitors may, for example, increase the risk of a collusive outcome in the market[206]*. Algorithms can allow competitors to increase market transparency, to detect price deviations in real time and to make punishment mechanisms more effective. On the other hand, for algorithmic collusion to be possible, in addition to the specific design of the algorithms, some structural market conditions are required, such as a high frequency of interactions, limited buyer power and the presence of homogenous products/services.*

419. Finally, information exchange can also be used as a method to increase the *external stability* of an anti-competitive agreement or concerted practice on the market. Exchanges that make the market sufficiently transparent can allow colluding undertakings to monitor where and when other undertakings are attempting to enter the market, thus allowing the colluding undertakings to target the new entrant. Both exchanges of present and past information can create such a monitoring mechanism.

6.2.2.2. Anti-competitive foreclosure

420. Apart from facilitating collusion, an information exchange can also lead to anti-competitive foreclosure on the same market where the exchange takes place or on a related market[207].

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[204] Judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 134; judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, Case C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 281.

[205] See, for example, judgment of 7 November 2019, *Campine and Campine Recycling* v *Commission*, T-240/17, EU:T:2019:778, paragraph 305.

[206] Algorithmic collusion must be distinguished from the so-called 'collusion by code', that refers to the deliberate application by competitors of common behavioural coordination algorithms. Collusion by code is typically a cartel and therefore it is a restriction of competition by object, irrespective of the market conditions and of the information exchanged.

[207] With regard to foreclosure concerns that vertical agreements can give rise to, see paragraphs […] of the Guidelines on Vertical Restraints.

421. Foreclosure on the same market can occur when the exchange of commercially sensitive information places competitors that do not take part in the exchange at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system. This type of foreclosure is possible if the information concerned is of strategic importance and the exchange covers a significant part of the relevant market. This can for instance be the case in data sharing initiatives, where the data shared is of strategic importance, represents a large part of the market and third parties' access is prevented[208]. Such initiatives also do not facilitate the entry of new operators on to the market.

422. It cannot be excluded that information exchange may also lead to anti-competitive foreclosure of third parties in a related market. For instance, vertically integrated companies that exchange information in an upstream market may gain market power and collude to raise the price of a key component for a market downstream. Thereby, they could raise the costs of their rivals downstream, which could result in anti-competitive foreclosure in the downstream market. In addition, undertakings that use non-transparent and discriminatory terms of access to shared information may limit third parties in their ability to detect trends for potential new products on related markets.

6.2.3. The nature of the information exchanged

6.2.3.1. Commercially sensitive information

423. Article 101(1) applies if an exchange of commercially sensitive information is likely to influence the commercial strategy of competitors. This is the case if information, once exchanged, reduces uncertainty regarding one or several competitors' future or recent actions in the market and regardless of whether the undertakings involved in the exchange obtain some benefit from their cooperation. It often concerns information that is important for an undertaking to protect in order to maintain or improve its competitive position in the market(s). Information on pricing is, for instance, commercially sensitive, but Article 101(1) also applies if the exchange does not have a direct effect on the prices paid by end users[209]. The fact that the information exchanged may be incorrect or misleading in itself does not eliminate the risk that it may influence the conduct of competitors on the market[210].

424. Information that has been considered to be particularly commercially sensitive and the exchange of which was qualified as a by object restriction, include the following:

The exchange with competitors of an undertaking's pricing and pricing intentions[211];

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[208] The judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraphs 57-58 highlights the importance of analysing the underlying market structure in order to establish whether the risk of foreclosure is likely.

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

[210] Judgment of 15 December 2016, *Philips and Philips France* v *Commission,* T-762/14, EU:T:2016:738, paragraph 91.

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

The exchange with competitors of an undertaking's current and future production capacities [212];

The exchange with competitors of an undertaking's intended commercial strategy[213];

The exchange with competitors of an undertaking's arrangements relating to current and future demand[214];

The exchange with competitors of an undertaking's future sales[215];

The exchange with competitors of an undertaking's current state and its business strategy[216];

The exchange with competitors of future product characteristics which are relevant for consumers[217];

The exchange with competitors of information concerning positions on the market and strategies at auctions for financial products[218].

6.2.3.2. Public information

425. 'Genuinely public' information is information that is generally equally accessible (in terms of costs of access) to all competitors and customers[219]. As the information is publicly accessible, it may have lost its commercially sensitive nature. In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101[220]. The fact that information is genuinely public may decrease the likelihood of a collusive outcome on the market to the extent that non-coordinating undertakings, potential competitors, as well as customers may be able to constrain potential restrictive effects on competition[221].

426. For information to be genuinely public, obtaining it should not be more costly for customers and undertakings that do not participate in the exchange than for the undertakings exchanging the information. Competitors would normally not choose to exchange information that they can collect from the market at equal ease, and hence,

212 Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraphs 85 and 96; judgment of 15 December 2016, *Philips and Philips France* v *Commission,* T-762/14, EU:T:2016:738, paragraph 104.

213 judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 98.

214 Judgment of 9 September 2015, *Samsung SDI and Others* v *Commission*, T-84/13, EU:T:2015:611, paragraph 51.

215 judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 96.

216 Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 70.

217 Commission Decision of 8 July 2021 in Case AT40178 *Car Emissions*, recitals 84, 107 and 124-126.

218 Commission Decision of 20 May 2021 in Case AT.40324 *European Government Bonds*, recital 94.

219 This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs.

220 Judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98, T-212/98 to T-214/98, ECR 2003 II-03275, EU:T:2003:245, paragraph 1154. This may not be the case if the exchange underpins a cartel.

221 Assessing barriers to entry and countervailing 'buyer power' in the market would be relevant for determining whether outsiders to the information exchange system would be able to jeopardise the outcomes expected from coordination. However, increased transparency to consumers may either decrease or increase scope for a collusive outcome because with increased transparency to consumers, as price elasticity of demand is higher, pay-offs from deviation are higher but retaliation is also harsher.

in practice, exchanges of genuinely public information are unlikely. In contrast, even if the information exchanged between competitors is considered to be '*in the public domain'*, it is not genuinely public if the costs involved in collecting the information deter other undertakings and customers from doing so[222]. A possibility to gather the information in the market, for example to collect it from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors[223].

A typical example of genuinely public information is the advertising by petrol stations of their current pricing information for consumers and nearby competitors alike. In the absence of an anti-competitive agreement or concerted practice, such advertising benefits consumers as it facilitates the comparison between petrol stations before they fill up their cars, even if the advertising also allows competitors to become aware of the prices charged by their nearby competitors.

In case the owners of the petrol stations would start an exchange of real-time pricing information solely amongst themselves, the assessment under Article 101(1) is likely to be different. The pricing data exchanged by the owners is not genuinely public, as in order to obtain the same information in a different way one would necessarily incur substantial time and transport costs. In fact, one would have to travel constantly to collect the prices advertised on the board of petrol stations spread all over the country. The costs for this are potentially high, so that the information in practice could not be obtained, but for the information exchange. Moreover, the exchange is systematic and covers the entire relevant market, on which there are only a few competitors present and new entrants are unlikely. The exchange is likely to create a climate of mutual certainty between the competitors as to their pricing policy and is thereby likely to facilitate a collusive outcome.

427. Even if there is public availability of information (for example, information published by regulators), an additional information exchange by competitors may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market. In that case, it is the incremental information exchanged that could be critical to tip the market balance towards a collusive outcome.

In a certain sector, it may for instance be public knowledge that the costs of supplies are rising. At bilateral meetings or during meetings of the relevant trade association, this phenomenon may be brought up by participants. While competitors may refer to the rising costs of supplies – as it is public knowledge –, they cannot jointly evaluate the rising costs if this reduces uncertainty regarding an individual competitor's future or recent actions on the market[224]. A competitor must independently determine the policy which it intends to adopt on the internal market. This entails that each competitor independently has to decide what its response will be to the rising costs of supplies.

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222 Moreover, the fact that the parties to the exchange have previously communicated the data to the public (for example through a daily newspaper or on their websites) does not imply that a subsequent non-public exchange would not infringe Article 101(1).

223 See judgment of 12 July 2001, *Tate & Lyle and Others* v *Commission*, T-202/98, T-204/98 and T-207/98, ECR 2001 II-02035, EU:T:2001:185, paragraph 60.

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

6.2.3.3. Aggregated/individualised information and data

428. The commercially sensitive nature of information depends also on the usefulness it has to competitors. Depending on the circumstances, the exchange of raw data may be less commercially sensitive than an exchange of data that was already processed into meaningful information. Similarly, raw data may be less commercially sensitive than aggregated data, while it may allow undertakings to obtain more efficiencies by exchanging it. At the same time, the exchange of genuinely aggregated information where the recognition of individualised company level information is sufficiently difficult or uncertain, is much less likely to lead to a restriction of competition than exchanges of company level information.

429. Collection and publication of aggregated market information (such as sales data, data on capacities, on costs of inputs and components) by a trade association or market intelligence firm may benefit competitors and customers alike by saving costs and by allowing them to get a clearer overall picture of the economic situation of a sector. Such information collection and publication may allow individual competitors to make better-informed choices in order to adapt efficiently their individual competitive strategy to the market conditions. More generally, unless it takes place between a relatively small number of undertakings with a sufficiently large market share, the exchange of aggregated information is unlikely to give rise to a restriction of competition. Conversely, the exchange of individualised information may facilitate a common understanding on the market and punishment strategies by allowing the coordinating undertakings to more effectively single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated information and data may facilitate a collusive outcome in markets with specific characteristics. Namely, members of a very tight and stable oligopoly exchanging aggregated information who detect a market price below a certain level could automatically assume that someone has deviated from the collusive outcome and take market-wide retaliatory steps. In other words, in order to keep collusion stable, undertakings in a very tight and stable oligopoly may not always need to know who deviated, it may be enough to learn that 'someone' deviated.

6.2.3.4. The age of the information

430. In many industries, information becomes historic relatively quickly and thus loses its commercially sensitive nature. The exchange of historic information is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' intended conduct or to provide a common understanding on the market[225]. In principle, the older the information, the less useful it tends to be for timely detection of deviations and thus as a credible threat of prompt retaliation[226]. However, this requires a case by case assessment of the relevance of the information[227].

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225 The collection of historic data can also be used to convey a sector association's input to or analysis of a review of public policy.

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

227 In its judgment of 12 July 2019, Sony and Sony Electronics v Commission, T-762/15, EU:T:2019:515, paragraph 127, the General Court considered that in the circumstances of the case, knowledge of past

431. Whether information is historic depends on the specific characteristics of the relevant market, the frequency of purchase and sales negotiations in the industry, and the age of the information typically relied on in the industry for the purposes of business decisions. For example, information can be considered as historic if it is several times older than the average length of the pricing cycles or the contracts in the industry if the latter are indicative of price re-negotiations. On the other hand, the exchange of current information may have restrictive effects on competition, especially if this exchange serves to artificially increase the transparency between the undertakings rather than towards the consumers.

For example, if undertakings typically rely on data about consumer preferences (purchases or other choices) over the last year in order to optimise their brands' strategic business decisions, information covering this period will generally be more commercially sensitive than older data. The information over the last year is then not considered 'historic'.

6.2.4. The characteristics of the exchange

6.2.4.1. Unilateral disclosures

432. A situation where only one undertaking discloses commercially sensitive information to its competitor(s), who accept(s) it, can constitute a concerted practice[228]. Such disclosure could occur, for example, through posts on websites, (chat) messages, emails, phone calls, input in a shared algorithmic tool, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors commercially sensitive information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all its competitors and increases the risk of limiting competition and of collusive behaviour[229].

For example, participation in a meeting[230] where an undertaking discloses its pricing plans to its competitors is likely to be caught by Article 101(1), even in the absence of an explicit agreement to raise prices[231]. In the same vein, introducing a pricing rule in a shared algorithmic tool (for instance, the lowest price on the relevant online platform(s) or shop(s) +5%, or the price of one competitor -5%), is also likely to be caught by Article 101(1), even in the absence of an explicit agreement to align future pricing.

auction results was highly relevant information for competitors, both for monitoring purposes and with a view to future contracts.

228 See judgment of 15 March 2000, *Cimenteries CBR* v *Commission*, T-25/95 and others, ECR 2000 II-00491, EU:T:2000:77, paragraph 1849.

229 See Opinion of Advocate General Kokott of 19 February 2009, *T-Mobile Netherlands and Others*, Case C-8/08, EU:C:2009:110, paragraph 54.

230 See judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.

231 See judgment of 12 July 2001, *Tate & Lyle and Others* v *Commission*, T-202/98, T-204/98 and T-207/98, ECR 2001 II-02035, EU:T:2001:185, paragraph 54.

On the other hand, the dispatch of an email message to personal mailboxes does not in itself indicate that the recipients ought to have been aware of the content of that message[232]*. It may, in the light of other objective and consistent indicia, justify the presumption that the recipients were aware of the content, but those recipients must still have the opportunity to rebut that presumption*[233]*.*

433. When an undertaking receives commercially sensitive information from a competitor (be it in a meeting, by phone, electronically or as input in an algorithmic tool), it will be presumed to take account of such information and adapt its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such information[234] or reports it to the administrative authorities.

434. Where an undertaking makes a unilateral announcement that is also genuinely public, for example through a post on a publically accessible website, a statement in public or in a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1)[235]. However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded. As explained in paragraph 426, giving genuinely public information and data can help customers to make informed choices. These efficiencies are however less likely if the information concerns future intentions that may not materialise and do not bind the undertaking towards its customers[236].

A unilateral public announcement referring to future intentions relating to pricing, for example, will not bind the undertaking making the announcement towards its customers but can give important signals concerning an undertaking's intended strategy on the market to its competitors. This will in particular be the case if the information is sufficiently specific. Such announcements therefore tend to bring no efficiencies benefiting the consumers but can facilitate collusion.

Unilateral public announcements may also be indicative of an underlying anti-competitive agreement or concerted practice. On a market where there are only few competitors present and high barriers to entry exist, undertakings that continuously publicize information without apparent benefit for consumers (for instance information on R&D costs, costs of adaptations to environmental requirements, etc.) may – in the absence of another plausible explanation – be engaged in an infringement of Article 101(1). The unilateral public announcements can be used in order to implement or monitor their collusive arrangements. Whether such infringement is indeed found will depend on the entire body of evidence available.

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232 Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 39-40.

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

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

235 See judgment of 5 October 2020, *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, not yet published, EU:T:2020:458, paragraphs 263-267.

236 See, for instance, Commission Decision of 7 July 2016, Case AT.39850 *Container Shipping*, recitals 40-43.

6.2.4.2. Indirect information exchange and exchanges in mixed vertical/horizontal relations

435. Exchanges of commercially sensitive information between competitors can take place via a third party (for instance a third party service provider, including a platform or third party optimisation tool provider), a common agency (for instance a trade organisation), via one of their suppliers or customers[237], or via a shared algorithm (together referred to as the 'third party'). The main competition concern is that the exchange may reduce uncertainty about the actions of competitors and thus lead to a collusive outcome on the market. The collusion in such cases is either facilitated or enforced via the third party. Depending on the facts of the case, the competitors and the third party may both be held liable for such collusion. There is nothing in the wording of Article 101(1) to indicate that the prohibition laid down in this provision is directed only at parties to agreements or concerted practices which are active on the markets affected by those agreements or practices[238].

436. In case of an indirect exchange of commercially sensitive information, a case by case analysis of the role of each participant is required to establish whether the exchange concerns an anti-competitive agreement or concerted practice and who bears liability for the collusion. This assessment will notably have to take into account the level of awareness of the suppliers or recipients of the information regarding the exchanges between other recipients or suppliers of information and the third party.

Several circumstances can be distinguished:

Certain indirect information exchanges are referred to as hub-and-spoke agreements. In such cases, a common supplier or manufacturer acts as a hub in order to relay information to different retailers but it may also be that a retailer facilitates coordination between multiple suppliers or manufacturers. An online platform can also act as hub in case it facilitates, coordinates or enforces anti-competitive practices among the users of its platform services.

Online platforms may for example, enable information exchanges between platform users to secure certain margins or price levels. Platforms may also be used to impose operational restrictions on the system preventing platform users from offering lower prices or other advantages to final customers. Other indirect information exchanges may involve reliance between (potential) competitors on a shared optimisation algorithm that would take business decisions based on commercially sensitive data-feeds from various competitors, or the implementation in the relevant automated tools, of aligned/coordinated features or mechanisms of optimisation. Whilst using publically available data to feed algorithmic software is legal, the aggregation of sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to horizontal collusion.

A common agency, such as a trade association, may also facilitate exchanges between its members.

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[237] While guidance on the assessment of vertical distribution arrangements is available in the VBER and VBER Guidelines, under certain circumstances vertical distribution arrangements may be used for horizontal collusion.

[238] Judgment of 10 November 2017, *ICAP and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 103; judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraphs 27, 34-35.

437. An undertaking that indirectly receives or transmits commercially sensitive information may be held liable for an infringement of Article 101(1). This may be the case on the condition that the undertaking that received or transmitted the information was aware of the anti-competitive objectives pursued by its competitors and the third party and intended to contribute to them by its own conduct. This would apply, if the undertaking expressly or tacitly agreed with the third party provider sharing that information with its competitors or when it intended, through the intermediary of the third party, to disclose commercially sensitive information to its competitors. In addition, the condition would be met if the undertaking receiving or transmitting the information could reasonably have foreseen that the third party would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed. On the other hand, the condition is not met when the third party has used an undertaking's commercially sensitive information and, without informing that undertaking, passed this on to its competitors[239].

438. Similarly, a third party that transmits commercially sensitive information may also be held liable for such infringement if it intended to contribute by its own conduct to the common objectives pursued by all the participants to the agreement and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or could reasonably have foreseen this and was prepared to take the risk[240].

6.2.4.3. Frequency of the exchange of information

439. Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In unstable markets, more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets. In markets with long-term contracts (which are indicative of infrequent purchase and sales negotiations) a less frequent exchange of information would normally be sufficient to achieve a collusive outcome. By contrast, infrequent exchanges may not be sufficient to achieve a collusive outcome in markets with short-term contracts indicative of frequent re-negotiations[241]. In general, the frequency at which information needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and aggregation of such information[242]. As a result of the growing importance of real-time data for businesses' ability to viably compete, the highest competitive advantage is obtained by the automated real-time information exchange.

6.2.4.4. The measures put in place to limit and/or control how data is used

440. Undertakings that want to (or need to) exchange information can put measures in place to restrict the access to information and/or control how information is used[243].

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239 Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 30; judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 30.

240 Judgment of 10 November 2017, *ICAP and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 100.

241 For example, infrequent contracts could decrease the possibility of retaliation.

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

243 Such obligations may already stem from the General Data Protection Regulation, OJ L 119, 4.5.2016, p. 1, in case personal data is included in the exchange.

Such measures may prevent that commercially sensitive information can influence a competitor's behaviour.

Undertakings can for instance use clean teams to receive and process information. A clean team generally refers to a restricted group of individuals from an undertaking that are not involved in the day-to-day commercial operations and are bound by strict confidentiality protocols with regard to the commercially sensitive information. A clean team can for instance be used in the implementation of another horizontal cooperation agreement to ensure that the information provided for the purposes of such cooperation is provided on a need-to-know basis and in an aggregated manner.

Participants to a data pool should in principle only have access to their own information, and the final, aggregated, information of other participants. Technical and practical measures can ensure that a participant is unable to obtain commercially sensitive information from other participants. The management of a data pool can for instance be given to an independent third party that is subject to strict confidentiality rules as regards the information received from participants in the data pool. Those who manage a data pool should also ensure that only information is collected that is necessary for the implementation of the legitimate purpose of the data pool.

6.2.4.5. Access to information and data collected

441. In situations where the information exchanged is strategic for competition and covers a significant part of the relevant market – but does not pose a risk of collusive outcome – , the conditions of access to this information form an important element to assess possible foreclosure effects. The exchange of such strategic information may be permissible only if the information is made accessible in a non-discriminatory manner, to all undertakings active in the relevant market. If such accessibility were not guaranteed, some of the competitors would be placed at a disadvantage, since they would have less information, which would also not facilitate the entry of new operators on to the market[244].

442. This can be particularly the case in data sharing initiatives, where the data shared in a data pool represents a large part of the market. When the data shared represents a valuable asset to compete in the market, competitors who are denied access (or granted access on less favourable terms only) might be foreclosed from the market. The assessment under Article 101(1) will depend on elements such as the nature of the data shared, the conditions of the data sharing agreement and the access requirements, as well as the market position of the relevant parties. Assuming that the data pool is not liable to a collusive outcome, some form of open membership or access to the data pool would limit the risk of anti-competitive foreclosure. The assessment should consider that foreclosure effects from a refusal to grant access to a data pool can be significant, in particular where there is a high degree of market and data concentration, and if the data pooled yields an important competitive advantage in serving not only the relevant market, but also neighbouring markets.

6.2.5. Market characteristics

443. The likelihood that an information exchange results in collusion or foreclosure depends on the market characteristics. The exchanges may also affect these market

[244] Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 60.

characteristics. Relevant market characteristics in this respect include, among others, the level of transparency in a market, the number of undertakings present, the existence of barriers to entry, the homogeneous nature of the product or service concerned by the exchange, the homogeneous nature of the undertakings involved[245] and the stability of demand and supply conditions on the market[246].

444. It is easier to reach a common understanding on the terms of coordination and to monitor deviations on a market in which only a few undertakings are present. If a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if a market is fragmented, the dissemination and information exchange between competitors may be neutral, or even positive, for the competitive nature of the market[247].

445. A market that is very transparent can facilitate collusion by enabling undertakings to reach a common understanding on the terms of coordination, and by increasing the internal and external stability of collusion[248].

446. Collusive outcomes are also more likely where the demand and supply conditions on the market are relatively stable[249]. Volatile demand, substantial internal growth by some undertakings in the market, or frequent entry by new undertakings, may indicate that the current situation is not sufficiently stable for coordination to be likely[250], or may require more frequent exchanges to have an effect on competition.

447. Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one undertakings to gain a major advantage over its rivals. For a collusive outcome to be sustainable, the reactions of outsiders, such as current and potential competitors not participating in the coordination, as well as customers, should not be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.

6.2.6. Restriction of competition by object

448. An information exchange will be considered a restriction by object when the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the

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245 When undertakings are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination because their incentives are more aligned.

246 It should be noted that this is not a complete list of relevant market characteristics. There may be other characteristics of the market that are important in the setting of certain information exchanges.

247 See judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 58 and the case law mentioned there.

248 See also, paragraph 452.

249 See judgment of 27 October 1994, *Deere* v *Commission*, T-35/92, EU:T:1994:259, paragraph 78.

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

market[251]. In assessing whether an exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the content, its objectives and the legal and economic context in which the information exchange takes place[252]. When determining that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question[253].

449. From the examples given in paragraph 424, it is clear that there is no direct connection required between the information exchanged and consumer prices for the exchange to constitute a by object restriction. In order to establish whether there is an infringement by object, the decisive criterion is the nature of the contacts, not their frequency[254].

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

However, once the undertakings start exchanging information regarding the development of future products there is a risk that such exchanges may influence the competitors' behaviour in the market. This exchange may lead competitors to reach a common understanding not to market products which are more environmentally friendly than required by law. Such coordination affects the parties' behaviour in the market and restricts consumer choices and competition on the product characteristics. It will therefore be considered a restriction of competition by object.

450. An information exchange may be considered as a cartel if it is aimed at coordinating the competitive behaviour or at influencing the relevant parameters of competition on the market between two or more competitors. An information exchange constitutes a cartel if it is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors. Exchanges of information that constitute cartels not only infringe Article 101(1), but,

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[251] Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 100. See also: judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 122; and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41.

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

[253] Judgment of 26 September 2018, *Philips and Philips France* v *Commission*, C-98/17 P, EU:C:2018:774, paragraph 35.

[254] Judgment of 7 November 2019, *Campine and Campine Recycling* v *Commission*, T-240/17, EU:T:2019:778, paragraph 308.

in addition, are very unlikely to fulfil the conditions of Article 101(3). An information exchange may also facilitate the implementation of a cartel by enabling undertakings to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.

6.2.7. Restrictive effects on competition

451. An information exchange that does not constitute a restriction by object, may still have restrictive *effects* on competition.

452. As is indicated in paragraph 37, the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. In this assessment, the Commission will compare the actual or potential effects of the information exchange on the current condition of the market to the situation that would be in place in the absence of that specific information exchange[255]. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation.

453. For the asssessment of the possible restrictive effects, the nature of the information that is exchanged (see Section 6.2.3), the characteristics of the exchange (see Section 6.2.4) and the market characteristics (see Section 6.2.5) are relevant[256].

454. For an information exchange to be likely to have restrictive effects on competition, the undertakings involved in the exchange have to cover a sufficiently large part of the relevant market. Otherwise, the competitors that are not participating in the exchange could constrain any anti-competitive behaviour of the undertakings involved.

455. What constitutes ‘a sufficiently large part of the market’ cannot be defined in the abstract and will depend on the specific facts of each case and the type of exchange in question. Where an information exchange takes place in the context of another type of horizontal cooperation agreement, any such exchange that does not go beyond what is necessary for its implementation will usually not give rise to restrictive effects on competition when the market coverage is below the market share thresholds set out in the relevant chapter of these Guidelines, the relevant block exemption regulation[257] or the *De Minimis Notice* pertaining to the type of agreement in question[258].

456. An information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. Exchanges of information in tight oligopolies are more likely to

[255] Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 76.

[256] Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 54.

[257] Exchanges of information in the context of an R&D agreement, if they do not exceed what is necessary for implementation of the agreement, can benefit from the safe harbour of 25% set out in the R&D BER. For the Specialisation BER, the relevant safe harbour is 20%.

[258] See Section 1.2.8.

cause restrictive effects on competition than in less tight oligopolies, and are not likely to cause such restrictive effects on competition in very fragmented markets.

6.3. Assessment under Article 101(3)

6.3.1. Efficiency gains[259]

457. Information exchange may lead to efficiency gains, depending on the market characteristics. Undertakings can, for example, become more efficient if they benchmark their performance against the best practices in the industry. Information exchange may also contribute to a resilient market by enabling undertakings to respond to changes in demand and supply quicker and allow them to mitigate internal and external risks of supply chain disruptions or vulnerabilities. It may benefit consumers and undertakings alike by giving insights on the relative qualities of products, for instance through the publication of best-selling lists or price comparison data. Information exchange that is genuinely public can thus benefit consumers by helping them to make a more informed choice (and reducing their search costs). Similarly, public information exchange about current input prices can lower search costs for undertakings, which would normally benefit consumers through lower final prices.

458. Exchange of consumer data between undertakings in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another undertakings. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.

6.3.2. Indispensability

459. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). To fulfil the condition of indispensability, the parties will need to prove that the nature of the information and the context in which the exchange takes place do not involve any risks to unfettered competition that are dispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains.

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

6.3.3. Pass-on to consumers

460. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused

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[259] The discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

by an information exchange. The lower the market power of the parties involved in the information exchange, the more likely it is that the efficiency gains would be passed on to consumers to an extent that outweighs the restrictive effects on competition.

6.3.4. No elimination of competition

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

6.4. Examples

Example 1

Situation: The luxury hotels in the capital of country A operate in a tight, non-complex and stable oligopoly, with largely homogenous cost structures, which constitute a separate relevant market from other hotels. They directly exchange individual information about current occupancy rates and revenues. In this case, from the information exchanged the parties can directly deduce their actual current prices.

Analysis: Unless it is a disguised means of exchanging information on future intentions, this exchange of information would not constitute a restriction of competition by object because the hotels exchange present data and not information on intended future prices or quantities. However, the information exchange would give rise to restrictive effects on competition within the meaning of Article 101(1) because knowing the competitors' actual current prices would be likely to facilitate coordination of their competitive behaviour. It would be most likely used to monitor deviations from the collusive outcome. The information exchange increases transparency in the market as even though the hotels normally publish their list prices, they also offer various discounts to the list price resulting from negotiations or for early or group bookings, etc. Therefore, the incremental information that is non-publicly exchanged between the hotels is commercially sensitive. This exchange is likely to facilitate a collusive outcome on the market because the parties involved constitute a tight, non-complex and stable oligopoly involved in a long-term competitive relationship (repeated interactions). Moreover, the cost structures of the hotels are largely homogeneous. Finally, neither consumers nor market entry can constrain the incumbents' anti-competitive behaviour as consumers have little buyer power and barriers to entry are high. It is unlikely that in this case the parties would be able to demonstrate any efficiency gains stemming from the information exchange that would be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore it is unlikely that the conditions of Article 101(3) can be met.

Example 2

Situation: Three large undertakings with a combined market share of 80% in a stable, non-complex, concentrated market with high barriers to entry, frequently exchange non-public information directly between themselves about a substantial fraction of their individual costs. The undertakings claim that they do this to benchmark their performance against their competitors and thereby intend to become more efficient.

Analysis: This information exchange does not in principle constitute a restriction of competition by object. Consequently, its effects on the market need to be assessed. Because of the market structure, the fact that the information exchanged relates to a large proportion of the undertakings' variable costs, the individualised form of presentation of the data, and its large coverage of the relevant market, the information exchange is likely to facilitate a collusive outcome and thereby gives rise to restrictive effects on competition within the meaning of Article 101(1). It is unlikely that the criteria of Article 101(3) are fulfilled because there are less restrictive means to achieve the claimed efficiency gains, for example by way of a third party collecting, anonymising and aggregating the data in some form of industry ranking. Finally, in this case, since the parties form a very tight, non-complex and stable oligopoly, even the exchange of aggregated data could facilitate a collusive outcome in the market. However, this would be very unlikely if this exchange of information happened in a non-transparent, fragmented, unstable, and complex market.

Example 3

Situation: There are five producers of fresh bottled carrot juice in the relevant market. Demand for this product is very unstable and varies from location to location in different points in time. The juice has to be sold and consumed within one day from the date of production. The producers agree to establish an independent market research company that on a daily basis collects current information about unsold juice in each point of sale, which it publishes on its website the following week in a form that is aggregated per point of sale. The published statistics allow producers and retailers to forecast demand and to better position the product. Before the information exchange was put in place, the retailers had reported large quantities of wasted juice and therefore had reduced the quantity of juice purchased from the producers; that is to say, the market was not working efficiently. Consequently, in some periods and areas there were frequent instances of unmet demand. The information exchange system, which allows better forecasting of oversupply and undersupply, has significantly reduced the instances of unmet consumer demand and increased the quantity sold in the market.

Analysis: Even though the market is quite concentrated and the data exchanged is recent and strategic, it is not very likely that this exchange would facilitate a collusive outcome because market demand is unstable. Even if the exchange creates some risk of giving rise to restrictive effects on competition, by better aligning supply and demand and, hence, reducing waste it is likely to result in efficiencies. The information is exchanged in a public and aggregated form, which carries lower anti-competitive risks than if it were non-public and individualised. The information exchange therefore does not go beyond what is necessary to correct the market failure. Therefore, it is likely that this information exchange meets the criteria of Article 101(3).

Example 4

Situation: There are several producers of essential products present on a market that is frequently hit by shortages of supply. In order to improve supply and increase production in the most effective and expedient manner, the industry association proposes to gather data and model demand and supply for the essential products concerned. In addition, they would gather data to identify production capacity, existing stocks and potential to optimise the supply chain. A consultancy firm would

assist the association with collecting the data and aggregating it in a model, subject to non-disclosure agreements concluded with every producer. Aggregated data would be fed back to the producers with the aim of rebalancing and adapting their individual capacity utilisation, production and supply.

Analysis: the data gathered is commercially sensitive and, if exchanged between the producers, would be capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market. In addition, producers that are not members of the industry association may be placed at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system.

In order to avoid the risk of collusion, several measures could be taken. If an exchange of commercially sensitive information between the producers is absolutely required beyond the information that would be collected ans shared in aggregated form by the industry association and the consultancy (for instance, to jointly identify where to best switch production or increase capacity), such exchanges would need to be strictly limited to what is indispensable for effectively achieving the aims. Any information and exchanges with regard to the project would need to be well documented to ensure the transparency of the interactions. Participants would need to commit to avoid any discussion of prices or any coordination on other issues that are not strictly necessary for achieving the aims. The project should also be limited in time so that the exchanges immediately cease once the risk of shortages stops being a sufficiently urgent threat to justify the cooperation. Only the consultant would receive the commercially sensitive data and be charged with aggregating it. The foreclosure concerns could be alleviated if the project would be open to every manufacturer that produces the relevant product, regardless of whether they are a member of the relevant industry association.

7. STANDARDISATION AGREEMENTS

7.1. Introduction

462. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, value chain due dilligence processes, services or methods may comply[260]. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard as well as agreements setting out sustainability standards. While sustainability standards have similarities with standardisation agreements addressed in this Chapter, they also have features that are atypical for, or less pronounced in, those standardisation agreements. Relevant guidance for such sustainability standards is therefore provided in Chapter 9.

[260] Standardisation can take place in different ways ranging from the adoption of consensus based standards by recognised international, European or national standards bodies, through consensus based technical specifications developed by consortia and fora, to agreements between independent undertakings.

463. The preparation and production of technical standards as part of the execution of public powers are not covered by these Guidelines[261]. The European standardisation organisations recognised under Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation[262] are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102[263]. Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these Guidelines.

7.2. Relevant markets

464. Standardisation agreements may produce their effects on four possible markets, which will be defined according to the Market Definition Notice and any future guidance relating to the definition of relevant markets for the purposes of Union competition law. First, standard development may have an impact on the product or service market or markets to which the standard or standards relates. Second, where the standard development involves the development or selection of technology or where the rights to intellectual property are marketed separately from the products to which they relate, the standard can have effects on the relevant technology market[264]. Third, the market for standard development may be affected if different standard development bodies or agreements exist. Fourth, where relevant, a distinct market for testing and certification may be affected by standard development.

7.3. Assessment under Article 101(1)

7.3.1. Main competition concerns

465. Standardisation agreements usually produce significant positive economic effects[265], for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, security, provide information and ensure interoperability and compatibility (thus increasing value for consumers).

466. Participants in standardisation are not necessarily competitors. Standard development can, however, in specific circumstances where competitors are involved, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. As further explained below, this can occur through three main channels, namely (i)

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[261] See judgment of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraph 92.

[262] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council

[263] See judgment of 12 May 2010, *EMC Development* v *Commission*, T-432/05, EU:T:2010:189.

[264] See Chapter 2 on R&D agreements as well as the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014, p. 3, paragraphs 20 to 26) ("*Technology Transfer Guidelines*") which address aspects of market definition that are of particular importance in the field of technology rights licensing. For an example of market definition in accordance with such Guidelines, see Commission Decision in Case AT.39985, *Motorola - Enforcement of GPRS standard essential patents*, recitals 184-220.

[265] See also paragraph 501.

reduction in price competition, (ii) foreclosure of innovative technologies and (iii) exclusion of, or discrimination against, certain undertakings by prevention of effective access to the standard.

467. First, if undertakings were to engage in anti-competitive discussions in the context of standard development, this could reduce or eliminate price competition in the markets concerned or limit or control production, thereby facilitating a collusive outcome on the market[266].

468. Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen or developed and the standard has been set, some technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring that a particular technology is used exclusively for a standard can have the effect of hindering the development and diffusion of other technolgoies. Prevent the development of other technologies by obliging the members of the standard development organisation to exclusively use a particular standard, may lead to the same effect. The risk of limitation of innovation is increased if one or more undertakings are unjustifiably excluded from the standard development process.

469. In the context of standards involving intellectual property rights ('IPR')[267], three main groups of undertakings with different interests in standard development can be distinguished in the abstract. Firstly, there are upstream-only undertakings that solely develop and market technologies. This can also include undertakings that acquire technologies with the purpose to licensing these. Their only source of income is the licensing revenue and their incentive is to maximise their royalties. Secondly, there are downstream-only undertakings that solely manufacture products or offer services based on technologies developed by others and that do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce royalties. Finally, there are integrated undertakings that both develop technology protected by IPR and sell products for which they would need a licence. These undertakings have mixed incentives. On the one hand, they could draw licensing revenue from their own IPR. On the other hand, they may have to pay royalties to other undertakings holding IPR essential to the standard relevant for their own products. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other undertakings or use their IPR defensively. In addition, undertakings may also value their IPRs through methods other than royalties. In practice, many undertakings use a mix of these business models.

470. Third, standardisation may lead to anti-competitive results by preventing certain undertakings from obtaining effective access to the results of the standard development process (that is to say, the specification and/or the essential IPR for implementing the standard). If an undertaking is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect. A system where

[266] Depending on the circle of participants in the standard-development process, restrictions can occur either on the supplier or on the purchaser side of the market for the standardised product.

[267] In the context of this Chapter, IPR in particular refers to patent(s) (excluding non-published patent applications). However, in case any other type of IPR in practice gives the IPR holder control over the use of the standard the same principles should be applied.

potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard[268] since it allows the participants to identify which technologies are covered by IPR and which are not. Intellectual property laws and competition laws share the same objectives[269] of promoting consumer welfare and innovation as well as an efficient allocation of resources. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro- competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard development, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways, for example by refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive[270] royalty fees thereby preventing effective access to the standard ("hold-up"). The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a FRAND royalty fee or using dilatory strategies ("hold-out").

471. However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis[271].

7.3.2. Restrictions of competition by object

472. Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers of the incumbent product collude to exclude new technology from an already existing standard[272] would fall into this category.

473. Any agreements to reduce competition by using the disclosure of most restrictive licensing terms prior to the adoption of a standard as a cover to jointly fix prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object[273].

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268 If also accompanied by a FRAND commitment. See paragraphs 482-484.

269 See Technology Transfer Guidelines, paragraph 7.

270 High royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled. See for example judgment of 14 February 1978, *United Brands*, Case 27/76, EU:C:1978:22.

271 See Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, recitals 221-270.

272 See for example Commission Decision in Case IV/35.691, *Pre-insulated pipes*, recital 147, where part of the infringement of Article 101 consisted in 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions'.

273 This paragraph should not prevent ex ante disclosures of most restrictive licensing terms for standard essential patents by individual IPR holders or of a maximum accumulated royalty rate by all IPR holders as described in paragraph 500. It also does not prevent patent pools created in accordance with the principles set out in Section IV.4 of the Technology Transfer Guidelines or the decision to license IPR essential to a standard on royalty-free terms as set out in this Chapter.

7.3.3. Restrictive effects on competition

7.3.3.1. Agreements normally not restrictive of competition

474. Standardisation agreements which do not restrict competition by object must be analysed in their legal and economic context, including by taking account of the nature of the goods or services affected, the real conditions of the functioning and the structure of the market or markets in question, with regard to their actual and likely effect on competition. In the absence of market power[274], a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards.

475. For those standard development agreements which risk creating market power, paragraphs 477-483 set out the conditions under which such agreements would normally fall outside the scope of Article 101(1).

476. The non-fulfilment of any or all of the principles set out in this Section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate a self-assessment to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard development and that competition within and between those models is a positive aspect of a market economy. Therefore, standard development organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 477-483.

477. Where participation in standard development is **unrestricted** and the **procedure** for adopting the standard in question is **transparent**, standardisation agreements which contain **no obligation to comply**[275] with the standard and **provide access** to the standard on **fair, reasonable and non-discriminatory (FRAND) terms** will normally not restrict competition within the meaning of Article 101(1).

478. In particular, to ensure **unrestricted participation** the rules of the standard-development organisation would need to provide that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard development organisations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard.

479. With respect to **transparency**, the relevant standard development organisation would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.

480. Furthermore, the standard development organisation's rules would need to ensure **effective access** to the standard on **fair, reasonable and non discriminatory terms**[276].

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[274] See also Chapter 1 Introduction. As regards market shares see also paragraph 498.

[275] See also paragraph 490 in this regard.

[276] For example effective access should be granted to the specification of the standard.

481. In the case of a standard involving IPR, **a clear and balanced IPR policy**[277], **adapted to the particular industry** and the needs of the standard development organisation in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard development organisation.

482. In order to **ensure effective access** to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')[278]. That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard development process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller. It should be noted that FRAND can also cover royalty-free licensing.

483. Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This is relevant for (i) enabling the industry to make an informed choice of technology to be included in a standard [279] and (ii) assisting in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on reasonable endeavours to identify IPR reading on the potential standard[280] and to update the disclosure as the standard develops. With respect to patents, the IPR disclosure should include at least the patent number or patent application number. If this information is not yet publicly available, then it is also

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[277] As specified in paragraphs 482 and 483. See also the European Commission Communication COM (2017) 712 on Setting out the EU approach to Standard Essential Patents.

[278] See judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 53: '*In those circumstances, and having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU*'. See also Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, paragraph 417: '*In view of the standardisation process that led to the adoption of the GPRS standard and Motorola's voluntary commitment to license the Cudak SEP on FRAND terms and conditions, implementers of the GPRS standard have a legitimate expectation that Motorola will grant them a licence over that SEP, provided they are not unwilling to enter into a licence on FRAND terms and conditions'*.

[279] Conversely, a 'patent ambush' occurs when an undertaking taking part in the standard-development process intentionally hides the fact that it holds essential patents over the standard being developed, and starts asserting such patents only after the standard has been agreed and other undertakings are therefore "locked in" to using it. When a 'patent ambush' occurs during the standard development process, this undermines confidence in the standard development process, given that an effective standard development process is a precondition to technical development and the development of the market in general to the benefit of consumers. See, for example, Commission Decision of 9 december 2009 in Case COMP/38.636 – *RAMBUS*, OJ C 30, 6.2.2010, p. 17.

[280] To obtain the sought after result a good faith disclosure does not need to go as far as to require participants to compare their IPR against the potential standard and issue a statement positively concluding that they have no IPR reading on the potential standard.

sufficient if the participant declares that it is likely to have IPR claims over a particular technology without identifying specific IPR claims or applications for IPR (so-called blanket disclosure)[281]. Except for this case, blanket disclosure would be less likely to enable the industry to make an informed choice of technology and to ensure effective access to the standard. Participants should also be encouraged to update their disclosures at the time of adoption of a standard, in particular if there are any changes which may have an impact on the essentiality or validity of their IPRs. Since the risks with regard to effective access are not the same in the case of a standard development organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.

484. FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees[282]. At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky. Thiscan ensure continued incentives to contribute the best available technology to the standard.

485. Compliance with Article 101 by the standard development organisation does not require the standard development organisation to verify whether licensing terms of participants fulfil the FRAND commitment[283]. Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.

486. In case of a dispute, the assessment of whether fees charged for access to IPR in the standard development context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR[284]. The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products which is unrelated to the patented technology[285]. In general, there are various methods

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[281] Participants are encouraged to complete their disclosure information when the patent number and/or patent application numbers become publicly available.

[282] See also judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 71, according to which an action for infringement may constitute an abuse of a dominant position within the meaning of Article 102 if it is brought against a willing licensee without complying with the procedural steps set out by the Court in its Judgment.

[283] Standard development organisations are not involved in the licencing negotiations or resultant agreements.

[284] See judgment of 14 February 1978, *United Brands*, Case 27/76, EU:C:1978:22, paragraph 250; see also judgment of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 142.

[285] European Commission Communication COM(2017) 712 on Setting out the EU approach to Standard Essential Patents, page 7.

available for the assessment[286], and in practice, more than one method is often used to account for shortcomings of a particular method and cross-check the result[287]. It may be possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the industry has developed the standard (*ex ante*) with the value/royalty of the next best available alternative (*ex-ante*) or with the value/royalty charged after the industry has been locked in (*ex post*). This assumes that the comparison can be made in a consistent and reliable manner[288].

487. An independent expert assessment could also be obtained for the objective centrality and essentiality of the relevant IPR to the standard at issue. In an appropriate case, it may also be possible to refer to *ex ante* disclosures of licensing terms, including the individual or aggregate royalties for relevant IPR, in the context of a specific standard development process. Similarly, it may be possible to compare the licensing terms in agreements of the IPR holder with other implementers of the same standard. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These methods assume that the comparison can be made in a consistent and reliable manner and are not the result of undue exercise of market power. Another method consists in determining, first, an appropriate overall value for all relevant IPR and, second, the portion attributable to a particular IPR holder. These Guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive or discriminatory under Article 102.

488. However, it should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts or alternative methods of dispute resolution[289].

7.3.3.2. Effects based assessment for standardisation agreements

489. The assessment of each standardisation agreement must take into account the likely effects of the standard on the markets concerned. In analysing standardisation agreements, the characteristics of the sector and industry shall be taken into consideration. The following considerations apply to all standardisation agreements that depart from the principles as set out in paragraphs 477-483.

(a) Voluntary nature of the standard

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[286] In principle, cost-based methods may not be the best adapted because they impose the difficulty of assessing the costs attributable to the development of a particular patent or groups of patents and may distort the incentives to innovate.

[287] The methods described here are not exclusive and other methods reflecting the same spirit of the described methods can be used to determine FRAND rates. See also Chryssoula Pentheroudakis, Justus A. Baron (2017) Licensing Terms of Standard Essential Patents. A Comprehensive Analysis of Cases. JRC Science for Policy Report. EUR 28302 EN; doi:10.2791/193948.

[288] See judgment of 13 July 1989, *Tournier*, C-395/87, EU:C:1989:319, paragraph 38; judgment of 13 July 1989, *Lucazeau and Others* v *SACEM and Others*, Cases 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 33.

[289] If both parties agree, disputes over what are FRAND terms for the SEPs can be determined also by an independent third party, i.e., an arbitrator. See, for example, judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 68 and Commission Decision of 29 April 2014 in Case AT. 39939, *Samsung - Enforcement of UMTS standard essential patents*, recital 78.

490. Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard development organisation remain free to develop alternative standards or products that do not comply with the agreed standard[290]. For example, if the standard development agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object[291]. In the same vein, standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns than more comprehensive standards in particular if the standard does not involve any essential IPR.

(b) Access to the standard

491. The assessment whether the agreement restricts competition will also focus on access to the standard. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible for all members or third parties (that is to say, non-members of the relevant standard development organisation) this may foreclose or segment markets and is thereby likely to restrict competition. Competition is likewise likely to be restricted where the result of a standard is only accessible on discriminatory or excessive terms for members or third parties. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.

492. As regards standard development agreements with **different types of IPR disclosure models** from the ones described in paragraph 483, it would have to be assessed on a case by case basis whether the disclosure model in question (for example a disclosure model not requiring but only encouraging IPR disclosure) guarantees effective access to the standard. Standard development agreements providing for the disclosure of information regarding characteristics and value-added of each IPR to a standard and, thereby, increasing transparency to parties involved in the development of a standard will not, in principle, restrict competition within the meaning of Article 101(1).

(c) Participation in the development of the standard

493. If participation in the standard development process is open, this will lower the risks of a likely restrictive effect on competition that would have resulted from excluding certain undertakings from the ability to influence the choice and elaboration of the standard[292].

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290 See Commission Decision in Case IV/29/151, *Philips/VCR* , recital 23: '*As these standards were for the manufacture of VCR equipment, the parties were obliged to manufacture and distribute only cassettes and recorders conforming to the VCR system licensed by Philips. They were prohibited from changing to manufacturing and distributing other video cassette systems ... This constituted a restriction of competition under Article 85(1)(b)*'.

291 See Commission Decision in Case IV/29/151, *Philips/VCR*, recital 23.

292 In Commission Decision in Case IV/31.458, *X/Open Group*, the Commission considered that even if the standards adopted were made public, the restricted membership policy had the effect of preventing non-members from influencing the results of the work of the group and from getting the know-how and technical understanding relating to the standards which the members were likely to acquire. In addition, non-members could not, in contrast to the members, implement the standard before it was adopted (see paragraph 32). The agreement was therefore in these circumstances seen to constitute a restriction under Article 101(1).

494. Open participation can be achieved by allowing all competitors and/or relevant stakeholders in the market affected by the standard to take part in developing and choosing the standard. .

495. The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard development process.

496. However, in certain situations, restricting participation may not have restrictive effects on competition within the meaning of Article 101(1), for instance: (i) if there is competition between several standards and standard development organisations, (ii) if in the absence of a restriction on the participants[293] it would not have been possible to adopt the standard or such adoption would have been unlikely[294] or (iii) if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard.

497. In certain situations the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are kept informed and consulted on the work in progress[295]. Recognised procedures for the collective representation of stakeholders (e.g. consumers) may be envisaged. The more stakeholders can influence the process leading to the selection of the standard and the more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders.

(d) Market shares

498. To assess the effects of a standard development agreement, the market shares of the goods, services or technologies based on the standard should be taken into account. It might not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry. In cases where undertakings contributing technology to the standard are vertically integrated, the relevant market shares of the undertakings having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard (since the undertakings participating in developing the standard would in most cases have an interest in implementing the standard)[296]. However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in development and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition.

(e) Discrimination

499. Any standard development agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For

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[293] Such restriction may materialise via the exclusion of stakeholders from the standardisation agreement or via a more limited participant status.

[294] Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Article 101(3).

[295] See Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*.

[296] See paragraph 464.

example, if a standard development organisation explicitly excludes upstream only undertakings (that is to say, undertakings not active on the downstream production market), this could lead to an exclusion of potentially better upstream technologies.

(f) *Ex ante* disclosure of royalty rates

500. Standard development agreements providing for the ex ante disclosure of most restrictive licensing terms for standard essential patents by individual IPR holders or of a maximum accumulated[297] royalty rate by all IPR holders will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard development organisation's IPR policy choose to provide for IPR holders to individually disclose prior to the adoption of the standard their most restrictive licensing terms, including the maximum royalty rates or maximum accumulated royalty rate to be charged, this will normally not lead to a restriction of competition within the meaning of Article 101(1)[298]. Such *ex ante* unilateral disclosures of most restrictive licensing terms or maximum accumulated royalty rate would be one way to enable the parties involved in the development of a standard to take an informed decision based on the disadvantages and advantages of different alternative technologies.

7.4. Assessment under Article 101(3)

7.4.1. Efficiency gains

501. Standardisation agreements frequently give rise to significant efficiency gains. For example, Union wide standards may facilitate market integration and allow undertakings to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different undertakings and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality. Standards also play an important role for innovation. They can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing undertakings to build on top of agreed solutions. These efficiency gains can contribute to a resilient internal market.

502. To achieve efficiency gains in the case of standardisation agreements, the information necessary to apply the standard must be effectively available to those wishing to enter the market[299].

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[297] In order to increase the transparency of the potential costs for implementing a standard, standard development organisations could take an active role in disclosing total maximum stack of royalty for the standard. Similar to the concept of a patent pool, IPR holders can share the total royalty stack.

[298] Any unilateral or joint ex ante disclosure of most restrictive licensing terms should not serve as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies which is a restriction of competition by object.

[299] See Commission Decision of 15 December 1986 in Case IV/31.458, *X/Open Group*, recital 42: '*The Commission considers that the willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption*'.

503. Dissemination of a standard can be enhanced by marks or logos certifying compliance thereby providing certainty to customers. Agreements for testing and certification go beyond the primary objective of defining the standard and would normally constitute a distinct agreement and market.

504. While the effects on innovation must be analysed on a case-by-case basis, standards creating compatibility on a horizontal level between different technology platforms are considered to be likely to give rise to efficiency gains.

7.4.2. Indispensability

505. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by a standardisation agreement or standard terms do not fulfil the criteria of Article 101(3).

506. The assessment of each standardisation agreement must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other[300].

507. Participation in standard development should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation[301]. Alternatively, any restrictive effects of restricted participation should be otherwise removed or lessened[302], In addition, a restriction on the participants could be outweighed by efficiencies under Article 101(3) if the adoption of the standard would have been heavily delayed by aprocess open to all competitors .

508. As a general rule, standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical interoperability and compatibility or a certain level of quality. In cases where having only one technological solution would benefit consumers or the economy at large, that standard should, be set on a non-discriminatory basis. Technology neutral standards can, in certain circumstances, lead to larger efficiency gains. Including substitute IPR[303] as essential parts of a standard while at the same time forcing the users of the standard to pay for more IPR than technically necessary would go beyond what is necessary to achieve any identified efficiency gains. In the same vein, including

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300 In Commission Decision in Case IV/29/151, *Philips/VCR*, compliance with the VCR standards led to the exclusion of other, perhaps better systems. Such exclusion was particularly serious in view of the pre-eminent market position enjoyed by Philips '*... [R]restrictions were imposed upon the parties which were not indispensable to the attainment of these improvements. The compatibility of VCR video cassettes with the machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment*' (recital 31).

301 See Commission Decision of 15 December 1986 in Case IV/31.458, *X/Open Group*, recital 45: '*[T]he aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed.*' See also Commission Decision in Case 39.416, *Ship Classification*, paragraph 36: '*the Commitments strike an appropriate balance between maintaining demanding criteria for membership of IACS on the one hand, and removing unnecessary barriers to membership of IACS on the other hand. The new criteria will ensure that only technically competent CSs are eligible to become member of IACS, thus preventing that the efficiency and quality of IACS' work is unduly impaired by too lenient requirements for participation in IACS. At the same time, the new criteria will not hinder CSs, who are technically competent and willing to do so from joining IACS*'.

302 See paragraph 477 above on ensuring that stakeholders are kept informed and consulted on the work in progress if participation is restricted.

303 Technology which is regarded by users or licensees as interchangeable with or substitutable for another technology, by reason of the characteristics and intended use of the technologies.

substitute IPR as essential parts of a standard and limiting the use of that technology to that particular standard (that is to say, exclusive use) could limit inter-technology competition and would not be necessary to achieve the efficiencies identified.

509. Restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable.

510. In a similar vein, standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. The exclusivity can, however, be justified for a certain period of time, for example by the need to recoup significant start-up costs[304] . The standardisation agreement should in that case include adequate safeguards to mitigate possible risks to competition resulting from exclusivity. This concerns, inter alia, the certification fee which needs to be reasonable and proportionate to the cost of the compliance testing.

7.4.3. Pass on to consumers

511. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by a standardisation agreement. A relevant part of the analysis of likely pass-on to consumers is which procedures are used to guarantee that the interests of the users of standards and end consumers are protected. Where standards facilitate technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers.

7.4.4. No elimination of competition

512. Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a *de facto* industry standard[305]. In the latter case, competition may be eliminated if third parties are foreclosed from effective access to the standard.

7.5. Examples

513. Setting standards competitors cannot satisfy

Example 1

Situation: A standard development organisation sets and publishes safety standards that are widely used by the relevant industry. Most competitors of the industry take

[304] In this context, see Commission Decision of 29 November 1995 in Cases IV/34.179, 34.202, 216, *Dutch Cranes (SCK and FNK)*, recital 23: '*The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85(1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services*'.

[305] *De facto* standardisation refers to a situation where a (legally non-binding) standard, is, in practice, used by most of the industry.

part in the development of the standard. Prior to the adoption of the standard, a new entrant has developed a product which is technically equivalent in terms of the performance and functional requirements and which is recognised by the technical committee of the standard development organisation. However, the technical specifications of the safety standard are, without any objective justification, drawn up in such a way as to not allow for this or other new products to comply with the standard.

Analysis: This standardisation agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) and is unlikely to meet the criteria of Article 101(3). The members of the standards development organisation have, without any objective justification, set the standard in such a way that products of their competitors which are based on other technological solutions cannot satisfy it, even though they have equivalent performance. Hence, this standard, which has not been set on a non-discriminatory basis, will reduce or prevent innovation and product variety. It is unlikely that the way the standard is drafted will lead to greater efficiency gains than a neutral one.

514. Non-binding and transparent standard covering a large part of the market

Example 2

Situation: A number of consumer electronics manufacturers with substantial market shares agree to develop a new standard for a product to follow up the DVD.

Analysis: Provided that (a) the manufacturers remain free to produce other new products which do not conform to the new standard, (b) participation in the standard developmentis unrestricted and transparent, and (c) the standardisation agreement does not otherwise restrict competition, Article 101(1) is not likely to be infringed. If the parties agreed to only manufacture products which conform to the new standard, the agreement would limit technical development, reduce innovation and prevent the parties from selling different products, thereby likely creating restrictive effects on competition within the meaning of Article 101(1).

515. Standardisation agreement without IPR disclosure

Example 3

Situation: A private standard developmentorganisation active in standardisation in the ICT (information and communication technology) sector has an IPR policy which neither requires nor encourages disclosures of IPR which could be essential for the future standard. The standard development organisation took the conscious decision not to include such an obligation in particular considering that in general all technologies potentially relevant for the future standard are covered by many IPR. Therefore the standard development organisation considered that an IPR disclosure obligation would, on the one hand, not lead to the benefit of enabling the participants to choose a solution with no or little IPR and, on the other, would lead to additional costs in analysing whether the IPR would be potentially essential for the future standard. However, the IPR policy of the standard development organisation requires all participants to make a commitment to license any IPR that might read on the future standard on FRAND terms. The IPR policy allows for opt-outs if there is specific IPR that an IPR holder wishes to put outside the blanket licensing commitment. In this particular industry there are several competing private standard development organisations. Participation in the standard development organisation is open to anyone active in the industry.

Analysis: In many cases, an IPR disclosure obligation would be pro-competitive by increasing competition between technologies ex ante. In general, such an obligation allows the members of a standard development organisation to factor in the amount of IPR reading on a particular technology when deciding between competing technologies (or even to, if possible, choose a technology which is not covered by IPR). The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. However, in this particular context, all available technologies seem to be covered by IPR, and even many IPR. Therefore, any IPR disclosure would not have the positive effect of enabling the members to factor in the amount of IPR when choosing technology since regardless of what technology is chosen, it can be presumed that there is IPR reading on that technology. The agreement is unlikely to give rise to any negative effects on competition within the meaning of Article 101(1).

8. STANDARD TERMS

8.1. Definitions

516. In certain industries undertakings use standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing undertakings (‘standard terms’)[306]. Such standard terms are covered by these Guidelines to the extent that they establish standard conditions of sale or purchase of goods or services between competitors and consumers (and not the conditions of sale or purchase between competitors) for substitute products. When such standard terms are widely used within an industry, the conditions of purchase or sale used in the industry may become *de facto* aligned[307]. Examples of industries in which standard terms play an important role are the banking (for example, bank account terms) and insurance sectors.

517. Standard terms elaborated individually by an undertaking solely for its own use when contracting with its suppliers or customers are not horizontal agreements and are therefore not covered by these Guidelines.

8.2. Relevant markets

518. As regards standard terms, the effects are, in general, felt on the downstream market where the undertakings using the standard terms compete by selling their product to their customers.

8.3. Assessment under Article 101(1)

8.3.1. Main competition concerns

519. Standard terms can give rise to restrictive effects on competition by limiting product choice and innovation. If a large part of an industry adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer-power), customers might have no option other than to accept the conditions in the standard terms. However, the risk of limiting choice

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[306] Such standard terms might cover only a very small or a large part of the clauses contained in the final contract.

[307] This refers to a situation where (legally non-binding) standard terms in practice are used by most of the industry and/or for most aspects of the product/service thus leading to a limitation or even lack of consumer choice.

and innovation is only likely in cases where the standard terms define the scope of the end-product. As regards classical consumer goods, standard terms of sale generally do not limit innovation of the actual product or product quality and variety.

520. In addition, depending on their content, standard terms might risk affecting the commercial conditions of the final product. In particular, there is a serious risk that standard terms relating to price would restrict price competition.

521. Moreover, if the standard terms become industry practice, access to them might be vital for entry into the market. In such cases, refusing access to the standard terms could risk causing anti-competitive foreclosure. As long as the standard terms remain effectively open for use for anyone that wishes to have access to them, they are unlikely to give rise to anti-competitive foreclosure.

8.3.2. Restriction of competition by object

522. Agreements that use standard terms as part of a broader restrictive agreement aimed at excluding actual or potential competitors also restrict competition by object. An example would be where a trade association does not allow a new entrant access to its standards terms, the use of which is vital to ensure entry to the market.

523. Any standard terms containing provisions which directly influence the prices charged to customers (that is to say, recommended prices, rebates, etc.) would constitute a restriction of competition by object.

8.3.3. Restrictive effects on competition

524. The establishment and use of standard terms must be assessed in the appropriate economic context and in the light of the situation on the relevant market in order to determine whether the standard terms at issue are likely to give rise to restrictive effects on competition.

525. As long as participation in the actual establishment of standard terms is **unrestricted** for the competitors in the relevant market (either by participation in the trade association or directly), and the established standard terms are **non-binding** and **effectively accessible** for anyone, such agreements are not likely to give rise to restrictive effects on competition (subject to the caveats set out in paragraphs 527-531).

526. Effectively accessible and non-binding standard terms for the sale of consumer goods or services (on the presumption that they have no effect on price) thus generally do not have any restrictive effect on competition since they are unlikely to lead to any negative effect on product quality, product variety or innovation. There are, however, two general exceptions where a more in-depth assessment would be required.

527. First, standard terms for the sale of consumer goods or services where the standard terms define the scope of the product sold to the customer, and where therefore the risk of limiting product choice is more significant, could give rise to restrictive effects on competition within the meaning of Article 101(1) where their common application is likely to result in a *de facto* alignment. This could be the case when the widespread use of the standard terms *de facto* leads to a limitation of innovation and product variety on the market. For instance, this may arise where standard terms in insurance contracts limit the customer's practical choice of key elements of the contract, such as the standard risks covered. Even if the use of the standard terms is not compulsory, they might undermine the incentives of the competitors to compete

on product diversification. This could be overcome by opening the possibility to insurers to also include risks other than standard risks in their insurance contracts.

528. When assessing whether there is a risk that the standard terms are likely to have restrictive effects by way of a limitation of product choice, factors such as existing competition on the market should be taken into account. For example if there is a large number of smaller competitors, the risk of a limitation of product choice would seem to be less than if there are only a few bigger competitors[308]. The market shares of the undertakings participating in the establishment of the standard terms might also give a certain indication of the likelihood of uptake of the standard terms or of the likelihood that the standard terms will be used by a large part of the market. However, in this respect, it is not only relevant to analyse whether the standard terms elaborated are likely to be used by a large part of the market, but also whether the standard terms only cover part of the product or the whole product (the less extensive the standard terms, the less likely that they will lead, overall, to a limitation of product choice). Moreover, in cases where in the absence of the establishment of the standard terms it would not have been possible to offer a certain product, there would not be likely to be any restrictive effect on competition within the meaning of Article 101(1). In that scenario, product choice is increased rather than decreased by the establishment of the standard terms.

529. Secondly, even if the standard terms do not define the actual scope of the end-product they might be a decisive part of the transaction with the customer for other reasons. An example would be online shopping where customer confidence is essential (for example, in the use of safe payment systems, a proper description of the products, clear and transparent pricing rules, flexibility of the return policy, etc). As it is difficult for customers to make a clear assessment of all those elements, they tend to favour widespread practices and standard terms regarding those elements could therefore become a *de facto* standard with which undertakings would need to comply to sell in the market. Even though non- binding, those standard terms would become a *de facto* standard, the effects of which are very close to a binding standard and need to be analysed accordingly.

530. If the use of standard terms is binding, there is a need to assess their impact on product quality, product variety and innovation (in particular if the standard terms are binding on the entire market).

531. Moreover, should the standard terms (binding or non-binding) contain any terms which are likely to have a negative effect on competition relating to prices (for example terms defining the type of rebates to be given), they would be likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

8.4. Assessment under Article 101(3)

8.4.1. Efficiencies

532. The use of standard terms can entail economic benefits such as making it easier for customers to compare the conditions offered and thus facilitate switching between undertakings. Standard terms might also lead to efficiency gains in the form of savings in transaction costs and, in certain sectors (in particular where the contracts

[308] If previous experience with standard terms on the relevant market shows that the standard terms did not lead to lessened competition on product differentiation, this might also be an indication that the same type of standard terms elaborated for a neighbouring product will not lead to a restrictive effect on competition.

are of a complex legal structure), facilitate entry. Standard terms may also increase legal certainty for the contract parties. These efficiency gains can contribute to a resilient internal market.

533. The higher the number of competitors on the market, the greater the efficiency gain of facilitating the comparison of conditions offered.

8.4.2. Indispensability

534. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by standard terms do not fulfil the criteria of Article 101(3). It is generally not justified to make standard terms binding and obligatory for the industry. The possibility cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them.

8.4.3. Pass on to consumers

535. Both the risk of restrictive effects on competition and the likelihood of efficiency gains increase with the undertakings' market shares and the extent to which the standard terms are used. Hence, it is not possible to provide any general 'safe harbour' within which there is no risk of restrictive effects on competition or which would allow the presumption that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition.

536. However, certain efficiency gains generated by standard terms, such as increased comparability of the offers on the market, facilitated switching between providers, and legal certainty of the clauses set out in the standard terms, are necessarily beneficial for the consumers. As regards other possible efficiency gains, such as lower transaction costs, it is necessary to make an assessment on a case-by-case basis and in the relevant economic context whether these are likely to be passed on to consumers.

8.4.4. No elimination of competition

537. Standard terms used by a majority of the industry might create a *de facto* industry standard. In such a case, competition may be eliminated if third parties are foreclosed from effective access to the standard.. However, if the standard terms only concern a limited part of the product or service, competition is not likely to be eliminated.

8.5. Examples

538. Non-binding and open standard terms used for contracts with end-users

Example 1

Situation: A trade association for electricity distributors establishes non-binding standard terms for the supply of electricity to end-users. The establishment of the standard terms is made in a transparent and non-discriminatory manner. The standard terms cover issues such as the specification of the point of consumption, the location of the connection point and the connection voltage, provisions on service reliability as well as the procedure for settling the accounts between the parties to the contract (for example, what happens if the customer does not provide the supplier with the readings of the measurement devices). The standard terms do not cover any issues relating to prices, that is to say, they contain no recommended prices or other clauses related to price. Any undertaking active within the sector is free to use the standard

terms as it sees fit. About 80 % of the contracts concluded with end-users in the relevant market are based on these standard terms.

Analysis: These standard terms are not likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even if they have become industry practice, they do not seem to have any appreciable negative impact on prices, product quality or variety.

539. Standard terms used for contracts between undertakings

Example 2

Situation: Construction undertakings in a certain Member State come together to establish non-binding and open standard terms and conditions for use by a contractor when submitting a quotation for construction work to a client. A form of quotation is included together with terms and conditions suitable for building or construction. Together, the documents create the construction contract. Clauses cover such matters as contract formation, general obligations of the contractor and the client and non-price related payment conditions (for example, a provision specifying the contractor's right to give notice to suspend the work for non-payment), insurance, duration, handover and defects, limitation of liability, termination, etc. These standard terms would often be used between undertakings, one active upstream and one active downstream.

Analysis: These standard terms are not likely to have restrictive effects on competition within the meaning of Article 101(1). There would normally not be any significant limitation in the customer's choice of the end-product, namely the construction work. Other restrictive effects on competition do not seem likely. Indeed, several of the clauses above (handover and defects, termination, etc.) would often be regulated by law.

540. Standard terms facilitating the comparison of different undertakings' products

Example 3

Situation: A national association for the insurance sector distributes non-binding standard policy conditions for house insurance contracts. The conditions give no indication of the level of insurance premiums, the amount of the cover or the excesses payable by the insured. They do not impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed and do not require the policyholders to obtain cover from the same insurer for different risks. While the majority of insurance undertakings use standard policy conditions, not all their contracts contain the same conditions as they are adapted to each client's individual needs and therefore there is no de facto standardisation of insurance products offered to consumers. The standard policy conditions enable consumers and consumer organisations to compare the policies offered by the different insurers. A consumer association is involved in the process of laying down the standard policy conditions. They are also available for use by new entrants, on a non-discriminatory basis.

Analysis: These standard policy conditions relate to the composition of the final insurance product. If the market conditions and other factors would show that there might be a risk of limitation in product variety as a result of insurance undertakings using such standard policy conditions, it is likely that such possible limitation would be outweighed by efficiencies such as facilitation of comparison by consumers of

conditions offered by insurance undertakings. Those comparisons in turn facilitate switching between insurance undertakings and thus enhance competition. Furthermore the switching of providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process could, in certain instances, increase the likelihood of those efficiencies which do not automatically benefit the consumers being passed on. The standard policy conditions are also likely to reduce transaction costs and facilitate entry for insurers on a different geographic and/or product markets. Moreover, the restrictions do not seem to go beyond what is necessary to achieve the identified efficiencies and competition would not be eliminated. Consequently, the criteria of Article 101(3) are likely to be fulfilled.

9. SUSTAINABILITY AGREEMENTS

9.1. Introduction

541. This Chapter focuses on the assessment of agreements between competitors that pursue one or more sustainability objectives ('sustainability agreements').

542. Sustainable development is a core principle of the Treaty on European Union and a priority objective for the Union's policies[309]. The Commission committed to implement the United Nation's sustainable development goals[310]. In line with this commitment, the European Green Deal sets out a growth strategy that aims to transform the Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases from 2050 onwards and where economic growth is decoupled from resource use[311].

543. In broad terms, sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development[312]. The notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), elimintating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutrious food, ensuring animal welfare, etc.[313].

309 Article 3 TEU.

310 The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015..

311 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions. The European Green Deal COM/2019/640 final.

312 See for example, UN Resolution 66/288 adopted by the General Assembly on 27 July 2012

313 The 2030 UN Agenda for Sustainable Development identifies 17 Sustainable Development Goals (including, for example, Goal 7: ensure access to affordable, reliable, sustainable and modern energy; Goal 9: build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; Goal 13: take urgent action to combat climate change and its impacts); and 169 targets (including, for example, Target 9.1: develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all; and Target 13.1: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries).

544. Competition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.

545. However, a concern related to sustainable development is that individual production and consumption decisions can have negative effects ("negative externalities"), for example on the environment, that are not sufficiently taken into account by the economic operators or consumers that cause them. Such market failures can be mitigated or cured by collective actions, for example through public policies, sector specific regulations or cooperation agreements between undertakings that foster sustainable production or consumption.

546. Where market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ("ETS") and taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public policies and regulations.

547. Sustainability objectives can be pursued with different types of cooperation agreements, including those addressed in the preceding chapters of these Guidelines. Agreements that pursue sustainability objectives are not a distinct type of cooperation agreements. The term 'sustainability agreement' used in these Guidelines refers in general to any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation. Where a sustainability agreement concerns a type of cooperation described in any of the preceding chapters of these Guidelines, its assessment will be governed by the principles and considerations set out in those chapters, while taking into account the specific sustainability objective pursued.

548. Sustainability agreements only raise competition concerns under Article 101(1) if they entail serious restrictions of competition in the form of restrictions by object, or produce appreciable negative effects on competition contrary to Article 101(1). When sustainability agreements infringe Article 101(1), they can still be justified under Article 101(3), if the four conditions of that provision are met. Detailed guidance on the assessment of these conditions is provided for in the Commission Guidelines on the application of Article 101(3)[314]. Agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective[315]. However,

[314] Commission Guidelines on the application of Article 81(3) of the Treaty ('Article 101(3) Guidelines'), OJ C 101, 27.4.2004, p. 97.

[315] The Treaty expressly provides exceptions from the application of the competition rules only for the purpose of pursuing a service of general economic interest under Article 106(2) of the Treaty and for the attainment of the objectives of the common agricultural policy pursuant to Article 42 of the Treaty. See also the cases in which the Court of Justice has acknowledged that restrictions which are inherent to the legitimate objectives pursued by certain professions may escape the prohibition of Article 101(1) if the consequential restrictive effects on competition are inherent in the pursuit of those objectives (see judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98; and judgment of 16 July 2006, *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492).

restrictions that are ancillary to a sustainability agreement which is compliant with Article 101(1), will also fall outside the scope of that provision[316].

549. This Chapter provides additional guidance on assessing these conditions, in particular by clarifying when sustainability benefits can be taken into account as qualitative or quantitative efficiency gains in the assessment under Article 101(3).

550. This Chapter is structured in the following way: Section 9.2 sets out examples of sustainability agreements that are unlikely to raise any competition concerns because they neither restrict competition by object, nor have any appreciable effect on competition and thus fall outside the scope of Article 101(1); Section 9.3 provides guidance on specific aspects of the assessment of sustainability agreements under Article 101(1) and focuses on the most typical sustainability agreements which set sustainability standards. Section 9.4 focuses on specific aspects of the assessment of sustainability agreements under Article 101(3). Section 9.5. considers the consequences of the involvement of public authorities in the conclusion of sustainability agreements. Finally, Section 9.7 provides an assessment of hypothetical examples of sustainability agreements.

9.2. Sustainability agreements not raising competition concerns

551. Not all sustainability agreements between competitors are caught by Article 101. Where such agreements do not affect parameters of competition, such as price, quantity, quality, choice or innovation, they are not capable of raising competition law concerns. The following examples are illustrative and not exhaustive.

552. First, agreements that do not concern the economic activity of competitors, but their internal corporate conduct, will generally fall outside the scope of Article 101. Competitors may seek to increase the overall reputation of the industry of being environmentally responsible and for this purpose agree, for example, on measures to eliminate single-use plastics in their business premises, not to exceed certain ambient temperature in buildings, or to limit the number of printed materials per day.

553. Second, agreements on the creation of a database containing information about suppliers that have sustainable value chains, use sustainable production processes and provide sustainable inputs, or distributors selling products in a sustainable manner, without requiring the parties to purchase from those suppliers or to sell to those distributors, will in general not raise competition concerns under Article 101.

554. Third, agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental footprint of their consumption, without such campaigns amounting to joint advertising of particular products, are also generally incapable of raising competition concerns under Article 101.

9.3. Assessment of sustainability agreements under Article 101(1)

9.3.1. Principles

555. When sustainability agreements affect one or more parameters of competition, they may need to be assessed under Article 101(1).

556. Sustainability agreements that correspond to one of the types of cooperation agreements addressed in the preceding chapters of these Guidelines, will be assessed

[316] See above Section 1.2.6.

under Article 101(1) as described in those chapters. For example, an agreement between competitors to jointly develop a production technology that reduces energy consumption must be assessed according to the principles set out in Chapter 2 (R&D agreements). An agreement to share infrastructure with a view to reducing the environmental footprint of a production process must be assessed under the principles set out in Chapter 3 (Production agreements).

557. An agreement between competitors to jointly purchase products having a limited environmental footprint as an input for their production, or to only purchase from suppliers observing certain sustainability principles, must be assessed in line with the principles set out in Chapter 4 (Purchasing agreements)[317].

558. Similarly, sustainability agreements that take the form of R&D or specialisation agreements are covered by the respective block exemption regulations if the conditions for an exemption set out in those regulations are met.

559. The fact that an agreement genuinely pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1)[318].

560. In this regard, when parties claim that an agreement, which appears to pursue price fixing, market or customer allocation, limitation of output or innovation, actually pursues a sustainability objective, they will have to bring forward all facts and evidence demonstrating that the agreement genuinely pursues such objective and is not used to disguise a by object restriction of competition. If the evidence allows to establish that the agreement indeed pursues a genuine sustainability objective, its effects on competition will have to be assessed[319].

9.3.2. Sustainability standardisation agreements

9.3.2.1. Definition and characteristics

561. In order to contribute to sustainable development, competitors may wish to agree to phase out, withdraw, or, in some cases, replace non-sustainable products (e.g. fossil fuels such as oil and coal, plastics) and processes (e.g. gas flaring) with sustainable ones. Competitors may also wish to agree to harmonise packaging materials to facilitate recycling or harmonise packaging sizes (and hence product content) to reduce waste. Competitors may also wish to agree on purchasing production inputs only if the purchased products are manufactured in a sustainable manner. Similarly, competitors may wish to agree on certain conditions improving animal welfare (e.g. agreed standards to provide animals with more space). For these purposes, competitors may agree to adopt and comply with certain sustainability standards. Such agreements are referred to as 'sustainability standardisation agreements' or 'sustainability standards' in this Chapter.

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[317] See above Section 4.2.3.2.

[318] In order to determine whether an agreement between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition '*by object*' within the meaning of Article 101(1), regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. See judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, para 53.

[319] In principle, the evidence demonstrating the pursuit of a sustainability objective should be such as to justify a reasonable doubt as to the anti-competitive object of the agreement. The pursuit of the sustainability objective should not however be uncertain. See by analogy judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paras 107-108.

562. Sustainability standardisation agreements specify the requirements that producers, traders, manufacturers, retailers or service providers in a supply chain may have to meet in relation to possibly a wide range of sustainability metrics such as the environmental impacts of production[320]. Sustainability standardisation agreements usually provide rules, guidelines or characteristics for products and production methods on such sustainability metrics and are sometimes referred to as sustainability systems. They are often private initiatives and can range from codes of conduct set unilaterally by undertakings, to civil society organization driven standards and multi-stakeholder initiatives that involve undertakings across the entire value chain[321]. These Guidelines cover only sustainability standards developed by competitors or in which competitors participate, including quality marks or labels.

563. Sustainability standardisation agreements have similarities with the standardisation agreements addressed in Chapter 7. However, they also have features that are atypical for, or less pronounced in, those standardisation agreements.

564. First, the adoption of a sustainability standard may often lead to establishing a green label, logo or brand name for products that meet certain minimum requirements. The use of such label, logo or brand name in principle obliges the adopters to comply with the standard. These undertakings can make use of the label/logo/brand name as long as they meet the sustainability conditions, and they will lose the use of the label/logo/brand name when they no longer meet these requirements.

565. Second, the cost of adhering to, and complying with, a sustainability standard can be high, particularly if changes to existing production or trading processes are required to comply with the sustainability standard. Therefore, adhering to a sustainability standard may lead to an increase in production or distribution costs and consequently to an increase in the price of the products sold by the parties.

566. Third, unlike technical standards, which ensure interoperability and encourage competition between technologies from different undertakings in the standard development process, the questions of interoperability and compatibility between technologies are generally irrelevant for sustainability standards.

567. Fourth, many sustainability standards are process, management or performance based. This means that, unlike many technical standards, sustainability standards often prescribe a goal to be met without imposing any specific technologies or production methods. Adopters of sustainability standards may commit to the target but will remain free to decide on the use of a particular technology or production process to attain that target.

9.3.2.2. Main competition concerns

568. Sustainability standardisation agreements often have positive effects on competition. They contribute to a sustainable development and therefore may enable the development of new products or markets, increase product quality or improve supply or distribution conditions. In particular, by providing information about sustainability matters (e.g. via labels), sustainability standards empower consumers to make

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320 See for example, United Nations Forum on Sustainability Standards, https://unfss.org/home/objective-of-unfss.

321 See for example, United Nations Conference on Trade and Development, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, https://unctad.org/system/files/official-document/ditctabinf2020d5_en.pdf.

informed purchase decisions and therefore play a role in the development of markets for sustainable products. Lastly, sustainability standards can also level the playing field between producers that are subject to different regulatory requirements.

569. In some circumstances, however, sustainability standards may also restrict competition. This can occur in three main ways: through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors[322].

9.3.2.3. Restriction by object

570. Sustainability standards that do not genuinely pursue a sustainability objective but cover up price fixing, market or customer allocation, limitations of output or limitations of quality or innovation, restrict competition by object.

571. In particular, an agreement between competitors on how to translate increased costs resulting from the adoption of a sustainability standard into increased sale prices towards their customers restricts competition by object. Similarly, an agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object.

9.3.2.4. Restrictive effects on competition

(a) Soft safe harbour

572. Where an agreement does not qualify as a restriction by object, it can infringe Article 101(1) only if it produces an appreciable negative effect on competition. However, sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition and will fall outside Article 101(1) if the following cumulative conditions are met:

First, the procedure for developing the sustainability standard is transparent and all interested competitors can participate in the process leading to the selection of the standard[323].

Second, the sustainability standard should not impose on undertakings that do not wish to participate in the standard an obligation - either directly or indirectly - to comply with the standard[324].

Third, participating undertakings should remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement (e.g. they may decide to use more sustainable ingredients in their final product than the standard may require).

Fourth, the parties to the sustainability standard should not exchange commercially sensitive information that is not necessary for the development, the adoption or the modification of the standard.

[322] See paragraphs 467-470.
[323] See paragraph 479.
[324] In other words, undertakings in the sector that do not wish to comply with the standard should remain free and should not be hindered from continuing to supply the market and consumers with products that meet legal requirements but do not meet the additional requirements created by the new sustainability standard.

Fifth, effective and non-discriminatory access to the outcome of the standardisation procedure should be ensured. This should include effective and non-discriminatory access to the requirements and the conditions for obtaining the agreed label or for the adoption of the standard at a later stage by undertakings that have not participated in the standard development process.

Sixth, the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market[325].

Seventh, there should be a mechanism or a monitoring system in place to ensure that undertakings that adopt the sustainability standard indeed comply with the requirements of the standard.

573. These conditions ensure that the sustainability standard does not foreclose innovative alternative standards, nor exclude or discriminate against other undertakings and ensures an effective access to the standard. The condition not to exchange unnecessary commercially sensitive information ensures that the standard setting procedure is not used to facilitate collusion or limit competition between the parties. As pointed out in paragraph 565 above, sustainability standards may often lead to price increase. However, where the standard is adopted by undertakings representing a significant part of the market, significant economies of scale may be achieved, allowing undertakings to preserve the previous price level or to apply only an insignificant price increase.

574. Failure to comply with one or more of these conditions does not create a presumption that the agreement restricts competition within the meaning of Article 101(1). However, if some of these conditions are not met, it will be necessary to assess, in particular, whether and to what extent the agreement is likely to - or actually does - lead to an appreciable negative effect on competition. Different models for standardisation efforts may exist and undertakings are free to put in place rules and procedures that do not violate competition rules whilst being different from those described in paragraph 572 above.

(b) Need to assess the effects of the agreement

575. To assess the effects of a sustainability standard, the market coverage of the products incorporating the standard should be taken into account. Sustainability standards may lack appreciable anti-competitive effects because there exists sufficient competition from alternative sustainability labels/standards and/or from products produced and distributed conventionally (i.e. outside the labels/standards). The market coverage of the agreement in question may be insufficient to distort competition to an appreciable extent, because of actual competition from alternative labels and/or products produced and distributed conventionally. Even if the market coverage of the agreement is significant, the restraining effect of potential competition may still be sufficient, in particular in cases where the sustainability agreement is limited to establishing a label, leaving the participating firms free to also operate outside the label. If this is the case, consumers will have the choice of buying products that bear the label, or products, possibly made by the same undertakings, that do not comply

325 Competition policy is concerned with price increases that result from a restriction of competition and not price increases that merely reflect an increase in the quality of products. However, in practice it is very difficult to distinguish price increases that result solely from increase in quality from price increases which are also due to the restriction of competition. Therefore, where the price increase or the quality reduction is significant the effects of the agreement will have to be assessed.

with the label, and hence competition is unlikely to be restricted[326]. In cases where a standardisation agreement is likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation, the parties to the agreement may seek to rely on Article 101(3).

9.4. Assessment of sustainability agreements under Article 101(3)

576. Any sustainability agreement that infringes Article 101(1), can be exempted under Article 101(3), if the parties to the agreement prove that the four cumulative conditions of that provision are satisfied.

9.4.1. Efficiency gains

577. The first condition of Article 101(3) requires that the agreement in question contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress. In essence, it requires that the agreement contributes to objective efficiencies, understood in broad terms, as encompassing not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation[327]. It therefore allows for a broad spectrum of sustainability benefits resulting from the use of specific ingredients, technologies, production processes to be taken into account as efficiency gains.

578. For example, sustainability agreements can produce efficiencies, such as the use of cleaner production or distribution technologies, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc. They can also avoid supply chain disruptions, reduce the time it takes to bring sustainable products to the market and can help to improve consumer choice by facilitating the comparison of products. These efficiency gains can contribute to a resilient internal market.

579. These efficiencies will need to be substantiated and cannot simply be assumed[328]. They also need to be objective, concrete and verifiable. For instance, if the claimed efficiency consists of product improvement, the parties have to demonstrate the exact characteristics of the product improvement. If the claimed benefit is for example the reduction of water contamination, the parties have to explain how exactly the agreement contributes to the reduction of water contamination and provide an estimate of the size of the claimed benefit[329].

9.4.2. Indispensability

580. For the purposes of these Guidelines, it is appropriate to deal with the third condition under Article 101(3) i.e. that of indispensability, before the second condition i.e. that of consumer fair share. The reason for this is that the analysis of consumer fair share

[326] Agreements between competitors that do not contain by object restrictions may also benefit from the safe harbour provided by the De Minimis Notice, on condition, if the agreement is concluded between competitors, that the aggregate market share of the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement. See the 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 (De Minimis Notice), OJ C 291, 30.08.2014, p. 13.

[327] See also paragraphs 48-72 of the Article 101(3) Guidelines.

[328] See also paragraphs 50-58 of the Article 101(3) Guidelines.

[329] See for example, Commission Recommendation (EU) 2021/2279 of 15 December 2021 on the use of the Environmental Footprint methods to measure and communicate the life cycle environmental performance of products and organisations, OJ L 471, 30.12.2021, p. 1.

should not include the effects of any restrictions that do not meet the indispensability condition and that are thus prohibited by Article 101[330].

581. According to the third condition of Article 101(3), the restrictive agreement must not impose restrictions, that are not indispensable to the attainment of the benefits brought about by the agreement. To satisfy this condition, the parties to the agreement need to demonstrate that their agreement as such, and each of the restrictions of competition it entails, are reasonably necessary for the claimed sustainability benefits to materialise and that there are no other economically practicable and less restrictive means of achieving them[331].

582. In principle, each undertaking should decide for itself how to pursue sustainability benefits, and insofar consumers value these benefits, the market would reward good decisions and punish bad ones. Where there is demand for sustainable products, cooperation agreements are not indispensable for the attainment of sustainability benefits themselves. They may also, however, be indispensable for reaching the sustainability goal in a more cost efficient way.

583. Public policy and regulations often take care of negative externalities. They typically aim to do so by imposing rules, requiring collective actions, which ensure efficient market outcomes that account for the sustainability implications of individual actions[332]. Therefore, where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved. This is because the legislator has already decided that each undertaking alone is required to achieve the goal[333]. In such circumstances, cooperation agreements may be indispensable only for reaching the goal in a more cost efficient way.

584. There may be other instances where, due to market failures, sustainability benefits cannot be achieved if left to the free interplay of market forces or can be achieved more cost efficiently if undertakings cooperate. For example, a sustainability agreement may be necessary to avoid free-riding on the investments required to promote a sustainable product and to educate consumers (overcoming the so-called "first mover disadvantages").

585. In this context, a restrictive agreement may also be necessary to achieve economies of scale, in particular to reach a sufficient scale to cover the fixed costs of setting up, operating and monitoring the label. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement[334]. If the agreement obliges the parties not to operate outside of the label or standard, the parties will need to prove why merely establishing a label or standard will not be sufficient to obtain the efficiencies. Usually, it is sufficient that the agreement defines the sustainability standard as a common minimum standard, thereby leaving room for participating undertakings to

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[330] See in particular paragraph 39 of the Article 101(3) Guidelines.

[331] See in particular paragraphs 73-82 of the Article 101(3) Guidelines.

[332] For example, environmental regulation pursues this through taxes, prohibitions, or subsidies.

[333] If the undertakings are bound by a cap-and-trade system, such as the EU ETS system, it must be considered that any reduction of pollution and corresponding decrease in use of emission allowances from a given undertaking or sector will free up these allowances, resulting in a zero net effect on pollution absent a reduction of emission allowances (waterbed effect).

[334] See in particular paragraph 80 of the Article 101(3) Guidelines

individually apply a higher sustainability standard than the commonly agreed standard.

586. An agreement may also be necessary in cases where the parties can show that the consumers in the relevant market find it difficult, due to, for example, lack of sufficient knowledge or information about the product itself or the consequences of its use, to objectively balance the future benefits they obtain from an agreement, against the immediate harm they suffer from the same agreement and that, as a result, they overestimate the importance of the immediate effect. For example, consumers may not be able to appreciate future benefits in the form of improved quality and innovation, if the immediate effect is a price increase of the product.

587. As a general rule, the obligations imposed by sustainability agreements should not go beyond what is necessary to achieve the aim of the agreement.

9.4.3. Pass on to consumers

588. The second condition of Article 101(3) requires that consumers receive a fair share of the claimed benefits. The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement[335]. Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral[336]. Therefore, sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements.

589. In many instances, it might be obvious that either the sustainability benefits are unrelated to the consumers in the relevant market or that they would not be significant enough to compensate for the harm in the relevant market. Conversely, there might be instances where the competitive harm is clearly insignificant compared to the potential benefits, obviating the need for a detailed assessment. However, there may also be cases in which a detailed assessment cannot be avoided.

9.4.3.1. Individual use value benefits

590. Consumer benefits typically derive from the consumption or the use of the products covered by the agreement under assessment. These benefits may take the form of improved product quality or product variety resulting from qualitative efficiencies, or materialise in the form of price decrease as a result of cost efficiencies. Such benefits may result also from the consumption of a sustainable product in the same way as they result from the consumption of any other product. These benefits can be referred to as "individual use value benefits" as they result from the use of the product and directly improve the consumers' experience with the product in question.

591. For example, consuming vegetables grown with the help of organic fertilizers may have better taste and/or be healthier for consumers than vegetables produced with non-organic fertilizers. Similarly, replacing plastic with more durable materials in a variety of products may increase the longevity of the products in question. In these circumstances, consumers enjoy a greater quality by the mere fact of consuming the product in question. These are typical qualitative efficiencies that may be brought

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[335] This includes producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession

[336] See paragraph 85 of the Article 101(3) Guidelines, see also judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 72.

about by a restrictive agreement and may outweigh the harm caused by the price increase (due to the agreed use of more expensive sustainable materials), or the reduction in choice (due to the agreed non-use of a non-sustainable product). If the benefits are significant enough to outweigh the harm caused by the price increase or reduced choice, they will compensate the consumers harmed by the same agreement and will thus meet the second condition of Article 101(3).

592. In the examples above, along with the individual use value benefits, the agreements in question may be accompanied by positive effects external to the consumers (positive externalities). Positive externalities are present when negative externalities, such as pollution, soil erosion, etc. are reduced. These positive externalities that may be enjoyed by the society today or in the future, may not have been possible in the absence of the restrictive agreement in question. These positive externalities are distinct from the individual use value benefits enjoyed by the consumers in the relevant market (see Section 9.4.3.3).

593. Agreements designed to reduce packaging may also reduce production and distribution costs and ultimately, the price of the product. For example, an agreement between competitors to provide concentrated detergent liquid in reduced size bottles may reduce the cost for materials, transport and storage. Similarly, agreements designed to share infrastructure or distribution transport services with competitors may reduce the parties' costs and thus, the final product price. Indeed, the harm of such agreements, may consist of reduced consumers' choice, but the benefit of the lower price may outweigh the harm resulting from the limitation in choice or even from the reduced quality of the services or products[337]. The same agreements may also have positive externalities consisting of a reduced negative impact on the environment (see Section 9.4.3.3 below).

9.4.3.2. Individual non-use value benefits

594. Consumers' benefits from sustainability agreements may not only comprise direct benefits from the use of a sustainable product but also indirect benefits, resulting from the consumers' appreciation of the impact of their sustainable consumption on others. In particular, some consumers may value their consumption of a sustainable product more than the consumption of a non-sustainable product because the sustainable product has less negative impact on others than the non-sustainable one.

595. For example, consumers may opt for a particular washing liquid not because it cleans better but because it contaminates less the water. Similarly, consumers may be ready to pay a higher price for furniture made from wood that is grown and harvested sustainably not because of the better quality of the furniture but because consumers want to stop de-forestation and loss of natural habitats. In the same vein, drivers may opt for using more expensive fuel not because it is of higher quality and better for their vehicles, but because it pollutes less.

596. In these circumstances, the consumers' use experience with the product is not directly improved. Nevertheless, consumers are ready to pay a higher price for a sustainable product or limit their consumption choice by not using a non-sustainable variant of the product, in order for society or future generations to benefit. Hence,

[337] Reductions in marginal or variable costs are more likely to be relevant to the assessment of efficiencies, than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers.

indirect, non-use value benefits accrue to consumers within the relevant market via their personal/individual valuation of the effect on others, including on non-users outside the relevant market.

597. Consumers who are ready to pay more for such products perceive them to be of a higher quality, precisely because of the benefits accruing to others. Therefore, from an economic perspective, such indirect qualitative benefits are not different from the usual quality-enhancing benefits that increase the direct use value of a product, discussed above in Section 9.4.3.1. Measurement of such indirect, non-use value benefits can be undertaken by investigating the consumers' willingness to pay, for instance, through customer surveys.

598. There may be a difference between what consumers state to be their preferences and what their purchasing behaviour suggests to be their preferences. This may indicate that the stated preferences over-estimate or on the contrary, under-estimate the true preferences. To mitigate such biases related to hypothetical choices in surveys, the surveys need to provide useful and appropriate context. In addition, the questions posed may need to take into account societal norms, consumer knowledge and habits, or expectations about the behaviour of others.

599. More generally, to discharge with their burden of proof under Article 101(3), the parties to an agreement need to provide cogent evidence demonstrating the actual preferences of consumers. Parties to the agreement should avoid superimposing their own preferences on consumers.

600. In the assessment of the consumers' willingness to pay, it is not necessary that the willingness of each and every consumer in the relevant market is assessed. It is sufficient for the purpose of the investigation that the assessment is based on a representative fraction of all consumers in the relevant market[338].

9.4.3.3. Collective benefits

601. Section 9.4.3.2. refers to individual non-use value benefits which are limited to voluntary (altruistic) choices of individual consumers. However, not all negative externalities can be cured through voluntary, individual actions of consumers. As the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group, a collective action, such as a cooperation agreement, may be needed to internalise negative externalities and bring about sustainability benefits to a larger group of the society[339]. For example, consumers may be unwilling to pay a higher price for a product produced with a green but costly technology. To ensure that the benefits related to the use of that green technology materialise, an agreement to phase out the polluting technology may be necessary. These benefits are referred to as 'collective benefits' as they occur irrespective of the consumers' individual appreciation of the product and objectively can accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries.

338 Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 72.

339 The market failure in such situations is typically consists in the fact that non-sustainable consumption exerts negative externalities on others. These externalities (such as emissions) are not fully internalised by individual purchasers and therefore overprovided. Similarly, the market failure can consist of positive externalities from sustainable consumption which consumers exert on each other. These are underprovided by the free market for essentially the same reason.

602. Although the balancing of negative effects with the benefits resulting from restrictive agreements is normally made within the relevant market to which the agreement relates, where two markets are related, efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same[340].

603. By analogy, where consumers in the relevant market substantially overlap with, or are part of the beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered[341].

604. For example, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel is used. To the extent that a substantial overlap of consumers (the drivers in this example) and the beneficiaries (citizens) can be established, the sustainability benefits from cleaner air are in principle relevant for the assessment and can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered. Conversely, consumers may buy clothing made of sustainable cotton that reduces chemicals and water use on the land where it is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, there is likely no substantial overlap between the consumers of the clothing and the beneficiaries of these environmental benefits that occur only in the area where the cotton is grown. Therefore, it is unlikely that these collective benefits would accrue to the consumers in the relevant market. To the extent that consumers are willing to pay more if their clothing is made of sustainably grown cotton, the local environmental benefits can be taken into account as individual non-value benefits for the consumers of the clothing (see Section 9.4.3.2).

605. For collective benefits to materialise, the market coverage of the agreement may often need to be significant. If, for example, only two out of ten washing machine producers agree to abandon the more polluting variants, then the agreement will unlikely be able to prevent free-riding and hence will unlikely sufficiently reduce pollution, since self-interested consumers could still purchase the polluting variants from one or more of the remaining suppliers[342].

606. For collective benefits to be taken into account, parties should be able to:

(a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur;

(b) define clearly the beneficiaries;

(c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and

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340 Paragraph 43 of the Article 101(3) Guidelines; see also judgment of 27 September 2006, *GlaxoSmithKline Services and Others* v *Commission*, T-168/01, EU:T:2006:265, paragraphs 248 and 251; judgment of 11 September 2014, *MasterCard Inc*, C-382/12 P, EU:C:2014:2201, paragraph 242; Commission decision of 23 May 2013 in Case AT.39595 *Air Canada/United Airlines/Lufthansa* ('STAR alliance').

341 Consumers can be compensated through one type of sustainability benefits or through a combination of individual and collective benefits, see Section 9.4.3.4.

342 However, in this example not only the potential benefit of the agreement is limited due to insufficient coverage, but also the potential competitive harm (for essentially the same reasons).

(d) demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market.

607. Evidence for collective benefits based on public authorities' reports or on the reports prepared by recognized academic organisations may be of a particular value for this assessment.

608. When there is no data available allowing for a quantitative analysis of the benefits involved, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. The current experience with measuring and quantifying collective benefits remains scarce. The Commission will be able to provide further guidance on this matter after accumulating experience in dealing with concrete cases, which could allow the development of methodologies of assessment.

9.4.3.4. Any or all types of benefits

609. In every case, the parties to the sustainability agreement are free to bring forward evidence and arguments to support claims for any of the three types of consumer benefits or for all of them. The parties' choice may depend on the specificity of the case and the robustness of the available evidence. In some cases, showing only individual use value benefits may be enough to satisfy the conditions of Article 101(3), whereas in other cases, the individual non-use value benefits, or the collective benefits will suffice. In other cases, a combination of two, or all three types of benefits may be possible.

9.4.4. No elimination of competition

610. According to the fourth condition of Article 101(3) the agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question. In essence, the condition ensures that some degree of residual competition will always remain on the market concerned by the agreement, regardless of the extent of the benefits.

611. This last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important aspect of competition. For instance, if the agreement eliminates competition on quality or variety, but competition on price is also an important parameter for competition in the industry concerned and is not restricted, this condition can still be satisfied.

612. Moreover, if competitors compete with a range of differentiated products, all in the same relevant market, the elimination of competition for one or more of the variants of the product does not necessarily mean that competition in the relevant market is eliminated.

613. Similarly, if competitors decide not to use a particular polluting technology or a particular non-sustainable ingredient in the production of their products, competition between the competitors will not be eliminated if they continue to compete on price and/or quality of the final product.

614. Finally, elimination of competition for a limited period of time, which has no impact on the development of competition after this period elapses, will not be an obstacle to meeting this condition. For example, an agreement between competitors to temporarily limit the production of one variant of a product, containing a non-sustainable ingredient, in order to introduce in the market a sustainable substitute for

it, aimed at creating consumer awareness about the properties of the new product, will satisfy the last condition of competition.

9.5. Involvement of public authorities

615. The involvement of governmental or local authorities in the process of conclusion of sustainability agreements, or the knowledge of those authorities of the existence of such agreements, is not in itself a reason to consider such agreements compatible with the competition rules. Such involvement or knowledge on the part of public authorities does not release the parties to the sustainability agreement from liability for an infringement of Article 101(1). Similarly, if acts of public authorities merely encourage, or make it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101(1)[343].

616. However, the parties to a sustainability agreement that restricts competition will not be held liable for competition law infringements if they have been compelled or required by public authorities to conclude the agreement or where the public authorities reinforce the effect of the agreement[344].

9.6. Examples

617. An agreement that benefits from the soft safe harbour

Example 1

Situation: Breakfast cereal is sold in attractive colourful cardboard boxes. Over the years, these boxes have become bigger, not because the content has increased, but merely to make them look more attractive and promising to consumers. This is a profitable marketing strategy, because consumers often purchase breakfast cereals spontaneously, and the bigger size gives the impression of being the better buy. Because all producers have followed this strategy, it has not had a significant effect on their market shares. However, it has led to an excess of around 15% in the packaging material used for their products.

Prevent Waste, a non-governmental organisation, has criticised the 'empty box' strategy of the breakfast cereal producers as wasteful and harmful for the environment, using more natural resources than it is necessary for the efficient production and distribution of these products. In response, the breakfast cereal producers, organised in their trade organisation have agreed to limit the excess packaging of their products. They have collectively agreed to limit the excess to no more than 3% to ensure that cereal boxes are still easy to use and have made their decision public. The producers have implemented the agreement since the beginning of the year and it covers 100% of the market. As a result, packaging costs, which make up 6% of the wholesale price, have decreased by around 10%. This has led to a decrease of around 0.5% in the wholesale price of breakfast cereals and a 0-0.5% decrease in the retail price.

Analysis: Competitors agree on an element that impacts the price of the product, but they do so in a transparent manner, allowing everyone to adopt the approach withouth imposing an obligation to do so. There is no exchange of sensitive information and compliance with the decision is easy to monitor. In addition, cereal

[343] Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraph 56.

[344] Judgment of 12 December 2013, *Soa Nazionale Costruttori*, C-327/12, EU:C:2013:827, paragraph 38; judgment of 5 December 2006, *Cipolla and Others*, C-94/04, EU:C:2006:758, paragraph 47.

producers remain free to further reduce their own packaging if they so wish. Moreover, the agreement to limit excess packaging has a very small and even downward effect on the price of breakfast cereals, does not affect competition between the cereal producers on the main parameters of price, quality and innovation, and only affects competition on marketing to a very limited extent (in view of the apparently limited impact of the box 'oversizing' strategy). The agreement therefore meets the conditions of the safe harbour and is thus not caught by Article 101(1). The agreement actually improves the outcome for consumers, by eliminating costly excess packaging strategies which have little impact on competition.

618. An agreement having no appreciable effect on competition

Example 2

Situation: Fair Tropical Fruits, a non-governmental organisation, together with a number of fruit traders, have set up a label for fair-traded tropical fruits (the "FTF" label). In order to use the label, firms trading in tropical fruits must guarantee that the fruits in question comes from farms where certain minimum conditions as regards safe use of pesticides, are respected. These firms remain free to also trade fruits under other labels. Fair Tropical Fruits has set up a monitoring system to certify that the products sold under the FTF label comply with the minimum conditions. The conditions for participation and the methodology and results of the monitoring system are available on the website of Fair Tropical Fruits. The fruits sold under the FTF label are more expensive than other tropical fruits traded.

The FTF label has been introduced EU-wide and a number of large traders use the label and have signed the agreement to respect the label's minimum conditions. The label has quickly become popular with certain consumers. Depending on the type of tropical fruit and the geographic market concerned, market shares for fruits sold in the EU under the label now range from 2.6% for pineapples to 14.7% for mangoes. The remainder of the market is supplied by the same traders operating outside the label and by other traders not party to the agreement.

Analysis: The higher price of the fruits sold under the FTF label, may require assessing the effects of the agreement. However, in view of the modest market shares of the products covered by the agreement in the various markets in the EU, the significant market shares held by, and competition from, other labels and conventional products, the fact that participation in the FTF label is on a voluntary and non-exclusive basis and that the licence to use the label is dependent only on respecting certain minimum conditions, the agreements to establish and license the label are unlikely to lead to appreciable negative effects. The agreements are thus not caught by Article 101(1). The agreements may actually widen the choice available to consumers, by enabling them to identify products which have 'fair trade' characteristics.

619. An agreement unlikely to restrict competition under Article 101(1) and/or likely to satisfy the condition under Article 101(3).

Example 3

Situation: In response to the findings of research into the recommended levels of fat in certain processed food conducted by a government-funded think tank in a Member State, several major manufacturers of processed foods in that same Member State agree, through formal discussions at an industry trade association, to set recommended fat levels for the products. Together, the parties represent 70% of

sales of the products within the Member State. The parties' initiative will be supported by a national advertising campaign funded by the think tank highlighting the dangers of a high fat content in processed foods.

Analysis: Although the fat levels are recommendations and therefore voluntary, as a result of the wide publicity resulting from the national advertising campaign, the recommended fat levels are likely to be implemented by all manufacturers of the processed foods in the Member State. It is therefore likely to become a de facto maximum fat level in the processed foods. Consumer choice across the product markets could therefore be reduced. However, the parties will be able to continue to compete with regard to a number of other characteristics of the products, such as price, product size, quality, taste, other nutritional and salt content, balance of ingredients, and branding. Moreover, competition regarding the fat levels in the product offering may increase where parties seek to offer products with the lowest levels. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, even if the agreement is found to have an appreciable negative effect on competition under Article 101(1) – because consumers are deprived of the choice of having high level fat food - the benefits for consumers in terms of value of information received and beneficial health effects are likely to outweigh the harm and the agreement is likely to satisfy the conditions of Article 101(3).

620. An agreement restricting competition under Article 101(1) and failing to satisfy the conditions of Article 101(3).

Example 4

Situation: All of the major furniture producers in a particular market agree to introduce a "green tree" label for furniture made of sustainably grown wood. Currently, the law does not impose any sustainability standards for wood. The parties have agreed to apply the new standard, which requires that at least 30% of the wood used in furniture should be grown sustainably, within 3 years. After that period, all furniture produced by the parties to the agreement will have to comply with the agreed standard and will be labelled with the 'green tree' label. The parties remain free to produce furniture that respects (even) higher standards under other labels. Some of the producers already do this. The agreed sustainability standard slows down but does not stop the reduction of forested areas and the degradation of their biodiversity. For this reason, non-governmental organisations have criticised the label for 'being too little, too late'.

The furniture producers that are party to the agreement have a combined market share of 85%. Currently, around 80% of the parties' total sales consist of furniture made from wood that is not grown and harvested sustainably. The remaining 15% of the market is held by smaller manufacturers selling under other sustainability labels. Studies commissioned by the furniture producers from third party consultants estimate that compliance with the 'green tree' label standard will increase the cost of wood by on average 40% and that this will increase the cost of producing the furniture, for which wood is the main component, by on average 20%. Production costs make up on average 60% of the final price, the remaining 40% being distribution costs. It can be expected that the increase in the final price of the furniture will be on average 12%.

A separately published study, indicates that, on average, consumers are willing to pay 5% more for furniture produced to the 'green tree' standard, as compared to

non-sustainable wooden furniture. This research is based on surveying consumers about their willingness to pay for furniture made from wood which meets the 'green tree' standard and on a choice experiment involving different purchase options for furniture of varying standards and prices.

Analysis: In view of the market coverage of the agreement and the significant price increase, the agreement is likely to infringe Article 101(1). The possible efficiencies, in the form of improved sustainability in the growing and harvesting of wood, are unlikely to lead to benefits for consumers that outweigh the expected price increase: the study of consumers' willingness to pay shows that, on average, consumers value the improved sustainability conditions considerably less (at 5% of the final price) than the expected price increase of 12%. In addition, it seems unlikely that the agreement is indispensable to raise sustainability standards for the cultivation of wood. This is shown by the fact that some of the parties to the agreement and other furniture producers already use higher standards and labels. In other words, it is not clear why the agreement is necessary in order to raise sustainability standards and why individual action by each furniture producer would not enable them to raise standards in a similar way or - as a result of competitive pressure - in an even better way. The agreement therefore does not fulfil at least two of the conditions of Article 101(3) and thus cannot benefit from the exception to the prohibition under Article 101(1).

621. An agreement restricting competition under Article 101(1) and satisfying the conditions of Article 101(3).

Examples: 5

Producers of washing machines currently produce a range of machines, from the latest models, which are technically more advanced, to older models that are technically less advanced. While the older, less advanced models use more electricity and water, they are cheaper to produce and are sold at lower prices than the more recent and technically advanced models. In accordance with an EU regulation, all models are classified into eight energy efficiency categories, from A to H, and labelled accordingly.

Innovation in the industry is focussed on further improving the energy efficiency of new models. However, the washing machine producers also feel that they have a responsibility to try to reduce the energy consumption of their machines in other ways. They have therefore agreed to phase out the production and sale of washing machines in categories F to H, the older and least energy-efficient models. These older models are also the least water-efficient.

The agreement includes all the producers and therefore covers almost 100% of the market. It provides that the production and sale of washing machines in categories F to H will be phased out within two years. These models currently make up around 35% of all sales in the market. While all the participating producers already produce some models in categories A to E, and therefore none of them will lose all of their current sales, each producer will be affected differently, depending on its current range of models. It is thus likely that competition between the producers will be affected. In addition, the phasing out of categories F to H will reduce the choice of machines available to consumers and increase the average purchase cost. For the average purchaser of a washing machine in categories F to H, the price of the machine will increase by between €40 and €70.

Before implementing the agreement to phase out categories F to H, the industry has tried to shift demand away from these categories using advertising campaigns. Studies have shown that the lack of success of these campaigns is due to the fact that many consumers find it difficult to balance the positive impact of future reductions in their electricity and water bills against the negative impact of the immediate increase in the purchase price of the machine.

These studies also show that the buyers of washing machines in fact benefit considerably from the phasing out of categories F to H. The average buyer of a washing machine will recoup the increase in the purchase price within one to two years, in the form of lower electricity and water costs. The overwhelming majority of consumers, including those that use their machine less frequently, will recoup the increase in the purchase price within four years. Given that the average life expectancy for machines in categories A to E is at least five years, the consumers, as a group, benefit from the agreement. This net benefit is further increased, for all users of washing machines, by the environmental benefits resulting from the collective reduction in the use of electricity and water. The reduction in electricity consumption leads to less pollution from electricity production and this benefits consumers, to the extent that the pollution-related market failure is not already addressed by other regulatory instruments (e.g. the European Emissions Trading System, which caps carbon emissions). The reduction in water consumption leads to less water pollution. As users of washing machines make up the overwhelming majority of the overall population, a share of these environmental benefits accrues to the consumers in the relevant market that are affected by the agreement.

Analysis: Although the agreement is likely to have appreciable negative effects and be caught by Article 101(1), it is also likely to fulfil the conditions of Article 101(3). In particular: (i) as a result of the agreement, the average washing machine becomes more energy- and water-efficient, (ii) this could not have been achieved with a less restrictive agreement, for instance with a collective advertising campaign or label, (iii) consumers in the relevant market benefit as a result of the individual economic benefits and the collective environmental benefits, and (iv) competition is not eliminated, as the agreement only affects the scope of the range of models, being one parameter of competition, and not other parameters, on which competition can and does take place.