

**Competition rules relating to horizontal cooperation agreements****Communication pursuant to Article 5 of Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) of the Treaty to categories of agreements, decisions and concerted practices modified by Regulation (EEC) No 2743/72**

(2000/C 118/03)

(Text with EEA relevance)

The Commission invites all interested parties to send their comments on the following texts:

- draft Commission Regulation (EC) on the application of Article 81(3) of the EC Treaty to categories of research and development agreements,
- draft Commission Regulation (EC) on the application of Article 81(3) of the EC Treaty to categories of specialisation agreements,
- draft Guidelines on the Applicability of Article 81 to horizontal cooperation.

These comments should be sent to the Commission not later than one month after the date of the publication in the *Official Journal of the European Communities*. They should not contain any business secrets or other confidential information. Comments should be sent to the following address:

European Commission  
Competition Directorate-General  
Directorate for Competition Policy, Coordination, International Affairs and Relations with other Institutions  
Rue de la Loi/Wetstraat 200  
B-1049 Brussels

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### Commission Regulation on the application of Article 81(3) of the EC Treaty to categories of research and development agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices<sup>(1)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1(b) thereof,

Having published a draft of this Regulation<sup>(2)</sup>,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 81(1) which have as their object the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding intellectual property rights.

(2) Article 163(2) of the Treaty calls upon the Community to encourage undertakings, including small and medium sized undertakings, in their research and technological development activities of high quality, and to support their efforts to cooperate with one another. Pursuant to Council Decision 65/1999/EC of 22 December 1998 concerning the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the fifth framework programme of the European Community (1998 to 2002)<sup>(3)</sup> and Commission Regulation (EC) No 996/1999 of 11 May 1999 on the implementation of Council Decision 1999/65/EC concerning the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the fifth framework programme of the European Community (1998-2002)<sup>(4)</sup>, indirect research and technological development (RTD) actions supported under the fifth framework programme of the European Community are required to be carried out cooperatively.

(3) Agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 81(1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 81(1) and should therefore not be excluded from this Regulation.

(4) Pursuant to Regulation (EEC) No 2821/71, the Commission has in particular adopted Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of research and development agreements<sup>(5)</sup>, as last amended by Regulation (EC) No 2236/97<sup>(6)</sup>. This Regulation will expire on 31 December 2000.

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

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

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

<sup>(1)</sup> OJ L 285, 29.12.1971, p. 46.

<sup>(2)</sup> OJ C 118, 27.4.2000, p. 3.

<sup>(3)</sup> OJ L 26, 1.2.1999, p. 26.

<sup>(4)</sup> OJ L 122, 12.5.1999, p. 9.

<sup>(5)</sup> OJ L 53, 22.2.1985, p. 5.

<sup>(6)</sup> OJ L 306, 11.11.1997, p. 12.

- (8) For the application of Article 81(3) by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.
- (9) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).
- (10) Cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of know-how between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of complementary know-how, and by rationalising the manufacture of the products or application of the processes arising out of the research and development.
- (11) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms such as manufacture, the exploitation of intellectual property rights that substantially contribute to technical or economic progress, or the marketing of new products.
- (12) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services or the reduction of prices brought about by new or improved processes.
- (13) In order to attain the benefits and objectives described above it is appropriate to extend the benefit of this Regulation also to ancillary agreements which do not constitute the primary object of, but are directly related to and necessary for the implementation of research and development agreements.
- (14) To justify the restrictions of competition which are exempted, the joint exploitation should relate to products or processes for which the use of the results of the research and development is decisive, and all parties should have access to the results of the work. However, where academic bodies or research institutes participate in research and development and are not interested in the industrial exploitation of the results, they may agree to use the results of research and development solely for the purpose of further research.
- (15) The exemption granted under this Regulation must be limited to research and development agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. It is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products or services capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into.
- (16) In order to guarantee the maintenance of effective competition during joint exploitation of the results, it is necessary to provide that the block exemption will cease to apply if the parties' combined shares of the market for the products arising out of the joint research and development become too great. It should be provided that the exemption will continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilisation of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the investments involved.
- (17) This Regulation should not exempt restrictions which are not indispensable to attain the positive effects mentioned above. In principle certain severe anti-competitive restraints such as limitations on the freedom of parties to carry out research and development in a field unconnected to the agreement, the fixing of prices, limitations on output or sales, allocation of markets or customers, and limitations on effecting passive sales for the contract products in territories reserved for other parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.
- (18) The market share limitation, the non-exemption of certain agreements, and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.
- (19) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption.

- (20) Agreements between undertakings which are not competing manufacturers of products capable of being improved or replaced by the results of the research and development will only eliminate effective competition in research and development in exceptional circumstances. It is therefore appropriate to enable such agreements to benefit from the block exemption irrespective of market share and to address such exceptional cases by way of withdrawal of the benefit of this Regulation.
- (21) As research and development agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, it is appropriate to fix the period of validity of the Regulation at 10 years.
- (22) This Regulation is without prejudice to the application of Article 82 of the Treaty.
- (23) In accordance with the principle of primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,

HAS ADOPTED THIS REGULATION:

#### Article 1

##### Scope

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to agreements entered into between two or more undertakings which relate to the conditions under which those undertakings pursue:
- (a) joint research and development of products or processes and joint exploitation of the results of that research and development;
- (b) joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same undertakings; or
- (c) joint research and development of products or processes excluding joint exploitation of the results.

This exemption shall apply to the extent that such agreements (hereinafter referred to as research and development

agreements) contain restrictions of competition falling within the scope of Article 81(1).

2. The exemption provided for in paragraph 1 shall also apply to provisions contained in research and development agreements which do not constitute the primary object of, but are directly related to and necessary for their implementation, such as an obligation not to carry out independently or together with third parties research and development in the field to which the agreement relates or in a closely connected field during the execution of the agreement.

This does, however, not apply to provisions which have the same object or effect as the restrictions of competition enumerated in Article 5(1).

#### Article 2

##### Conditions for exemption

1. The exemption provided for in Article 1 shall apply subject to the conditions set out in paragraphs 2 to 5.
2. All the parties have access to the results of the work. However, research institutes or academic bodies may agree to confine their use of the results for the purposes of further research.
3. Where the agreement provides only for joint research and development, each party must be free to exploit the results of the joint research and development and any pre-existing know-how necessary therefor independently.
4. Any joint exploitation must relate to results which are protected by intellectual property rights which substantially contribute to technical or economic progress and the results must be decisive for the manufacture of the contract products or the application of the contract processes.
5. Undertakings charged with manufacture by way of specialisation in production must be required to fulfil orders for supplies from all the parties, except where the agreement also provides for joint distribution.

#### Article 3

##### Market share limit and duration

1. Where the participating undertakings are not competing manufacturers of products capable of being improved or replaced by the contract products, the exemption provided for in Article 1 shall apply for the duration of the research and development and, where the results are jointly exploited, for five years from the time the contract products are first put on the market within the common market.

2. Where two or more of the participating undertakings are competing manufacturers of products capable of being improved or replaced by the contract products, the exemption provided for in Article 1 shall apply for the period referred to in paragraph 1 only if at the time the agreement is entered into, the participating undertakings do not have a combined market share which exceeds 25 % of the relevant market for the products capable of being improved or replaced by the contract products.

3. After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the participating undertakings do not have a combined market share which exceeds 25 % of the relevant market for the contract products.

#### Article 4

#### Definitions

For the purposes of this Regulation the following terms shall have the following meaning:

1. 'participating undertakings' are:

- (a) undertakings party to the agreement;
- (b) their respective connected undertakings;

2. 'connected undertakings' are:

(a) undertakings in which a party to the agreement, directly or indirectly:

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

— has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

— parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

— one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties;

3. 'research and development' of products or processes means the acquisition of know-how and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;

4. a 'product' means goods and/or a service, including both intermediary goods and/or services and final goods and/or services;

5. a 'contract process' means a technology or process arising out of the research and development;

6. a 'contract product' means a product arising out of the research and development or manufactured or provided applying the contract processes;

7. 'exploitation of the results' means the manufacture, selling, distribution or promotion of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;

8. 'intellectual property rights' includes industrial property rights, copyright and neighbouring rights;

9. 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how includes information which is indispensable for the manufacture of the contract products or the application of the contract processes; 'identified' means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

10. research and development, or exploitation of the results, are carried out 'jointly' where the work involved is:

— carried out by a joint team, organisation or undertaking,

— jointly entrusted to a third party, or

— allocated between the parties by way of specialisation in research, development, or exploitation;

11. 'competing manufacturers' are undertakings that are actual or potential producers of products capable of being improved or replaced by the contract products.

#### Article 5

##### Agreements not covered by the exemption

1. The exemption provided for in Article 1 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the freedom of the participating undertakings to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the research and development relates or, after its completion, in the field to which it relates or in a connected field;
- (b) the prohibition to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the common market and which are relevant to the research and development or, after the expiry of the agreement, the validity of intellectual property rights which the parties hold in the common market and which protect the results of the research and development;
- (c) the limitation of output or sales;
- (d) the fixing of prices;
- (e) the restriction of the customers that the participating undertakings may serve, after the end of five years from the time the contract products are first put on the market within the common market;
- (f) the prohibition to make passive sales for the contract products in territories reserved for other parties;
- (g) the prohibition to put the contract products on the market or to pursue an active sales policy for them in territories within the common market that are reserved for other parties after the end of five years from the time the contract products are first put on the market within the common market;
- (h) the requirement not to grant licences to third parties to manufacture the contract products or to apply the contract processes where the exploitation by the parties themselves of the results of the joint research and development is not provided for or does not take place;
- (i) the requirement to refuse to meet demand from users or resellers in their respective territories who would market the contract products in other territories within the common market; or

(j) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the European Community by another party or with its consent.

2. Paragraph 1 does not apply to:

- (a) the setting of production targets where the exploitation of the results includes the joint production of the contract products;
- (b) the setting of sales targets and the fixing of prices charged to immediate customers where the exploitation of the results includes the joint distribution of the contract products.

#### Article 6

##### Calculation of market shares

For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (c) for the purpose of the calculation of market shares, the market share held by the undertakings referred to in Article 4(2)(e) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 4(2)(a);
- (d) if the market share referred to in Article 3(3) is initially not more than 25 % but subsequently rises above this level without exceeding 30 %, the exemption provided for in Article 1 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded;
- (e) if the market share referred to in Article 3(3) is initially not more than 25 % but subsequently rises above 30 %, the exemption provided for in Article 1 shall continue to apply for one calendar year following the year in which the level of 30 % was first exceeded;
- (f) the benefit of letters (d) and (e) may not be combined so as to exceed a period of two calendar years.

*Article 7***Withdrawal**

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest, it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where:

- (a) the existence of the agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere;
- (b) because of the particular structure of supply, the existence of the agreement substantially restricts the access of third parties to the market for the contract products;
- (c) without any objectively valid reason, the parties do not exploit the results of the joint research and development;
- (d) the contract products are not subject in the whole or a substantial part of the common market to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use;

- (e) the existence of the agreement would eliminate effective competition in research and development on a particular market.

*Article 8***Decisions and concerted practices**

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings and concerted practices.

*Article 9***Transition period**

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

*Article 10***Duration of Regulation**

This Regulation shall enter into force on 1 January 2001. It shall apply until 31 December 2010.

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

Done at Brussels, . . .

*For the Commission*

. . .

*Member of the Commission*

**Draft Commission Regulation on the application of Article 81(3) of the EC Treaty to categories of specialisation agreements**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices <sup>(1)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1(c) thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas

- (1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 81(1) which have as their object specialisation, including agreements necessary for achieving it.
- (2) Pursuant to Regulation (EEC) No 2821/71, the Commission has in particular adopted Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of specialisation agreements <sup>(3)</sup>, as last amended by Regulation (EC) No 2236/97 <sup>(4)</sup>. This Regulation will expire on 31 December 2000.
- (3) A new regulation must meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need as far as possible to simplify administrative supervision and the legislative framework. Below a certain level of market power it can, in general, be presumed that the positive effects of specialisation agreements will outweigh any negative effects on competition.
- (4) Regulation (EEC) No 2821/71 requires the exempting regulation of the Commission (a) to define the categories of agreements, decisions and concerted practices to which it applies, (b) to specify the restrictions or clauses which

may, or may not, appear in the agreements, decisions and concerted practices, and (c) to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

- (5) It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics based approach which assesses the impact of agreements on the relevant market.
- (6) For the application of Article 81(3) by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.
- (7) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).
- (8) Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Agreements on specialisation in the provision of services can also be said to generally give rise to similar improvements. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.
- (9) Such advantages can arise equally from agreements whereby one participant gives up the manufacture of certain products or provision of certain services in favour of another participant ('unilateral specialisation'), from agreements whereby each participant gives up the manufacture of certain products or provision of certain services in favour of another participant ('reciprocal specialisation') and from agreements whereby the participants undertake to jointly manufacture certain products or provide certain services ('joint production').

<sup>(1)</sup> OJ L 285, 29.12.1971, p. 46.

<sup>(2)</sup> OJ C 118, 27.4.2000, p. 3.

<sup>(3)</sup> OJ L 53, 22.2.1985, p. 1.

<sup>(4)</sup> OJ L 306, 11.11.1997, p. 12.

- (10) As unilateral specialisation agreements between non-competitors may benefit from the block exemption provided by Commission Regulation (EC) No 2790/1999<sup>(5)</sup>, it is appropriate to limit the coverage of unilateral specialisation in this Regulation to agreements between competitors.
- (11) It is appropriate to include all agreements entered into between undertakings relating to the conditions under which they specialise in the production of goods and/or services. The block exemption should also apply to ancillary agreements which do not constitute the primary object of, but are directly related to and necessary for the implementation of specialisation agreements and to certain related purchasing and marketing agreements.
- (12) To ensure that the benefits of specialisation will materialise without one party leaving the market downstream of production, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations. These obligations can be, but do not have to be of an exclusive nature.
- (13) It can be presumed that, where the participating undertakings' share of the relevant market does not exceed 20 %, specialisation agreements of the category defined in this Regulation will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, while allowing consumers a fair share of the resulting benefits.
- (14) This Regulation should not exempt restrictions which are not indispensable to attain the positive effects mentioned above. In principle certain severe anti-competitive restraints relating to the fixing of prices, limitation of output or sales, and allocation of markets or customers should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.
- (15) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.
- (16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption.
- (17) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the participating undertakings, it is appropriate to fix the period of validity of the Regulation at 10 years.
- (18) This Regulation is without prejudice to the application of Article 82 of the Treaty.
- (19) In accordance with the principle of primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation.

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Scope**

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the following agreements entered into between two or more undertakings and which relate to the conditions under which those undertakings specialise in the production of products:

- (a) unilateral specialisation agreements, by virtue of which one party agrees to cease production of certain products or to refrain from producing these products and to purchase them from a competitor, while the competitor agrees to produce and supply these products; or
- (b) reciprocal specialisation agreements, by virtue of which two or more parties on a reciprocal basis accept to cease or refrain from producing certain but different products and to purchase these products from the other parties, who accept to supply them; or
- (c) joint production agreements, by virtue of which two or more parties agree to produce certain products jointly.

This exemption shall apply to the extent that such agreements (hereinafter referred to as specialisation agreements) contain restrictions of competition falling within the scope of Article 81(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall also apply to provisions contained in specialisation agreements, which do not constitute the primary object of, but are directly related to and necessary for their implementation, such as those concerning the assignment or use of intellectual property rights.

<sup>(5)</sup> OJ L 336, 29.12.1999, p. 21.

This does, however, not apply to provisions which have the same object or effect as the restrictions of competition enumerated in Article 4(1).

#### Article 2

##### **Related purchasing and marketing agreements**

The exemption provided for in Article 1 shall also apply to related purchasing or marketing agreements whereby:

- (a) the parties accept an exclusive purchase and/or exclusive supply obligation in the context of Article 1(1)(a), (b) and (c); or
- (b) the parties provide for joint distribution or distribution by a third party on an exclusive or non-exclusive basis in the context of Article 1(1)(c), provided that the third party is not a competitor of the parties in the relevant market.

#### Article 3

##### **Market share limit**

Articles 1 and 2 shall apply on condition that the participating undertakings do not have a combined market share which exceeds 20 % of the relevant market.

#### Article 4

##### **Agreements not covered by the exemption**

1. The exemption provided for in Article 1 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the fixing of prices,
- b) the limitation of output or sales, or
- c) the allocation of markets or customers.

2. Paragraph 1 does not apply to:

- (a) provisions on the agreed amount of products in the context of Article 1(1)(a) and (b) or the setting of the capacity and production volume of a production joint venture in the context of Article 1(1)(c).
- (b) the fixing of prices that a production joint venture charges to its immediate customers, provided that the joint venture also carries out the distribution of these products so that the price fixing by the joint venture is the effect of integrating the various functions.

#### Article 5

##### **Definitions**

For the purposes of this Regulation the following terms shall have the following meaning:

1. 'participating undertakings' are
  - (a) undertakings party to the agreement;
  - (b) their respective connected undertakings;
2. 'connected undertakings' are
  - (a) undertakings in which a party to the agreement, directly or indirectly:
    - has the power to exercise more than half the voting rights, or
    - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
    - has the right to manage the undertaking's affairs;
  - (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
  - (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
  - (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
  - (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
    - parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
    - one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties;
3. a 'product' is goods and/or a service, including both intermediary goods and/or services and final goods and/or services, with the exception of distribution and rental services;

4. 'production' is the manufacture of goods or the provision of services and includes production by way of subcontracting;
5. the 'relevant market' is the relevant product and geographic market(s) to which the products, which are the subject matter of a specialisation agreement, belong;
6. a 'competitor' is an undertaking that is an actual or potential competitor on the relevant market;
7. 'exclusive supply obligation' means an obligation not to supply a competitor with the product to which the specialisation agreement relates;
8. 'exclusive purchase obligation' means an obligation to purchase the product to which the specialisation agreement relates only from the party which agrees to supply it.

#### Article 6

##### Calculation of market shares

For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (c) for the purpose of the calculation of market shares, the market share held by the undertakings referred to in Article 5(2)(e) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 5(2)(a);
- (d) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above this level without exceeding 25 %, the exemption provided for in Article 1 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded;
- (e) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 1 shall continue to apply for one calendar year following the year in which the level of 25 % was first exceeded;
- (f) the benefit of letters (d) and (e) may not be combined so as to exceed a period of two calendar years.

#### Article 7

##### Withdrawal

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest, it finds in a particular case that an agreement exempted by this Regulation nevertheless has effects which are incompatible with the conditions set out in Article 81(3) of the Treaty, and in particular where:

- (a) the agreement is not yielding significant results in terms of rationalisation or consumers are not receiving a fair share of the resulting benefit; or
- (b) the products which are the subject of the specialisation are not subject in the common market or a substantial part thereof to effective competition from identical products or products considered by users to be equivalent in view of their characteristics, price and intended use.

#### Article 8

##### Decisions and concerted practices

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings and concerted practices.

#### Article 9

##### Transition period

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

#### Article 10

##### Duration of Regulation

This Regulation shall enter into force on 1 January 2001. It shall apply until 31 December 2010.

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

Done at Brussels, ...

For the Commission

...

Member of the Commission

## Draft guidelines on the applicability of Article 81 to horizontal cooperation

### 1. INTRODUCTION

#### 1.1. PURPOSE

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

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

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

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

5. Until the adoption of these guidelines two notices and two block exemption regulations provided guidance for the assessment of horizontal cooperation under Article 81<sup>(1)</sup>.

<sup>(1)</sup> Notice on agreements, decisions and concerted practices in the field of cooperation between enterprises (OJ C 75, 29.7.1968, p. 3).  
Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, as amended by Commission Regulation (EEC) No 151/93.

Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of research and development agreements, as amended by Commission Regulation (EEC) No 151/93 (OJ L 53, 22.2.1985, p. 5, OJ L 21, 29.1.1993, p. 8).

Notice concerning the assessment of cooperative joint ventures under Article 81 (OJ C 43, 16.2.1993, p. 2).

The notices covered certain legal forms of agreements such as the notice on joint ventures or — as the 1968 notice on cooperation agreements — dealt with certain types of cooperation falling outside Article 81. Regulations (EEC) No 417/85 and (EEC) No 418/85 exempted certain forms of specialisation and R & D agreements.

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

7. The purpose of these guidelines is to provide an analytical framework for the most common types of horizontal cooperation. This framework is primarily based on criteria that help to analyse the economic context of a cooperation agreement. Economic criteria such as the market power of the parties and other factors relating to the market structure, form a key element of the assessment of the market impact likely to be caused by a cooperation and therefore for the assessment under Article 81. Given the enormous variety in types and combinations of horizontal cooperation and market circumstances in which they operate, it is impossible to provide specific answers for every possible scenario. The present analytical framework based on economic criteria will nevertheless assist businesses in assessing the compatibility of an individual cooperation agreement with Article 81.

8. The guidelines do not only replace the abovementioned notices in the field of horizontal cooperation, but also cover a wider range of the most common types of horizontal agreements. They form a complement to the block exemption regulations on R & D and specialisation.

#### 1.2. SCOPE OF THE GUIDELINES

9. These guidelines cover agreements or concerted practices<sup>(2)</sup> entered into between two or more companies operating at the same level(s) in the market, e.g. at the same level of production or distribution. Within this context the focus is on cooperation between competitors. The term

<sup>(2)</sup> Any reference hereafter to agreements is meant to include concerted practices.

'competitors' as used in these guidelines includes both actual <sup>(3)</sup> and potential <sup>(4)</sup> competitors.

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

11. Agreements that are entered into between companies operating at a different level of the production or distribution chain, i.e. vertical agreements, are in principle excluded from these guidelines and dealt with in the guidelines <sup>(5)</sup> and block exemption regulation <sup>(6)</sup> on vertical restraints. 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, these agreements have to be assessed according to the principles described in the present guidelines. This does not exclude the additional application of the guidelines on vertical restraints

<sup>(3)</sup> A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). However, when supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, to make additional investments, to take strategic decisions or to incur time delays, a company will not be treated as a competitor but as a potential competitor (see below). See Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, points 20 to 23).

<sup>(4)</sup> A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm would undertake the necessary additional investments or other changes necessary so that it could enter the relevant market in response to a small and permanent increase in relative prices. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient (see Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, point 24); see also the Commission's Thirteenth Report on Competition Policy, No 55; see Case Elopak/Metal Box-Odin, OJ 1990 L 209/15).

<sup>(5)</sup> Guidelines on vertical restraints

<sup>(6)</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21.

to these agreements to assess the vertical restraints included in such agreements <sup>(7)</sup>.

12. Agreements may combine different levels of cooperation, for example R & D and the production of its results. Unless they fall under the merger control regulation, these agreements are covered by the guidelines. The centre of gravity of the cooperation determines which section of the present guidelines applies to the agreement in question. In the determination of the centre of gravity, account is taken in particular of two factors: (i) the starting point of the cooperation, and (ii) the degree of integration of the different functions which are being combined. Cooperation involving both joint R & D and joint production of the results would thus normally be covered in the section on 'Agreements on Research and Development', as the joint production will only take place if the joint R & D is successful. This implies that the results of the joint R & D are decisive for production. The R & D agreement can thus be regarded as the starting point of the cooperation. This assessment would change if the agreement would foresee a full integration in the area of production and only a partial integration of some R & D activities. In this case, the possible anti-competitive effects and economic benefits of the cooperation would largely relate to the joint production, and the agreement would therefore be examined according to the principles set out in the section on 'production agreements'. More complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation in varying ways are not covered by the guidelines. The assessment of each individual area of cooperation within an alliance may be carried out with the help of the corresponding chapter in the guidelines. However, complex arrangements must also be analysed in their totality. Due to the variety of areas an alliance may combine, it is impossible to give general guidance for such an overall assessment. Alliances or other forms of cooperation that primarily declare intentions are impossible to assess under the competition rules as long as they lack a precise scope.

13. The criteria set out in the guidelines apply to cooperation concerning both products and services <sup>(8)</sup>. However, the guidelines do not apply to the extent that sector-specific

<sup>(7)</sup> The delineation between horizontal and vertical agreements will be further developed in the chapters on joint purchasing (Chapter 4) and joint commercialisation (Chapter 5).

<sup>(8)</sup> In the following, the meaning of the term 'products' or 'goods' shall include services as well.

rules apply, as is the case for transport or insurance<sup>(9)</sup>. Operations that come under the merger control regulation<sup>(10)</sup> are also not the subject of the present guidelines.

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

15. The assessment under Article 81 as described in these guidelines is without prejudice to the possible parallel application of Article 82 of the EC Treaty to horizontal cooperation agreements. Furthermore, these guidelines are without prejudice to the interpretation that may be given by the Court of First Instance and the Court of Justice of the European Communities in relation to the application of Article 81 to horizontal cooperation agreements.

<sup>(9)</sup> Council Regulation 26/62 (OJ 1962, 30/993) (agriculture); Council Regulation (EEC) No 1017/68 (OJ, 1968, L 175, p. 1) (transport by rail road and inland waterway); Council Regulation (EEC) No 4056/86 (OJ, 1986, L 378, p. 4) (maritime transport); Council Regulation (EEC) No 3975/87 (OJ, 1987, L 374, p. 1) (air transport) as amended by Council Regulation (EEC) No 1284/91 (OJ, 1991, L 122, p. 2) and Council Regulation (EEC) No 2410/92 (OJ, 1992, L 240, p. 18); Council Regulation (EEC) No 3976/87 (OJ, 1987, L 374, p. 9) (air transport) as amended by Council Regulation (EEC) No 2411/92 (OJ, 1992, L 240, p. 19); Commission Regulation (EEC) No 1617/93 (OJ, 1993, L 155, p. 18) (Block exemption concerning joint planning and coordination of schedules, joint operations, consultation on passenger and cargo tariffs on scheduled air services and slot allocation at airports) as amended by Commission Regulation (EEC) No 1523/96 (OJ, 1996, L 190, p. 11) and Commission Regulation (EEC) No 1083/99 (OJ, 1999, L 131, p. 27); Council Regulation (EEC) No 479/92 (OJ, 1992, L 55, p. 3) (Liner shipping companies); Commission Regulation (EC) No 870/95 (OJ, 1995, L 89, p. 7) (Block exemption covering certain agreements between liner shipping companies); Council Regulation (EEC) No 1534/91 (OJ, 1991, L 143, p. 1) (insurance sector); Commission Regulation (EEC) No 3932/92 (OJ, 1992, L 398, p. 7) (Block exemption covering certain agreements in the insurance sector).

<sup>(10)</sup> Council Regulation (EEC) No 4064/89, OJ L 395, 30.12.1989; corrected version OJ L 257, 21.9.1990; as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ L 180, 9.7.97; corrigendum in OJ L 40, 13.2.1997, p. 17.

### 1.3. BASIC PRINCIPLES FOR THE ASSESSMENT UNDER ARTICLE 81

#### 1.3.1. Article 81(1)

16. Article 81(1) applies to horizontal cooperation agreements which have as their object or effect the prevention, restriction or distortion of competition<sup>(11)</sup>.

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

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

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

#### *Nature of the agreement*

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

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

<sup>(11)</sup> Any reference hereafter to restrictions of competition is meant to include the prevention and distortion of competition.

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

#### *Agreements that do not fall under Article 81(1)*

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

- cooperation between non-competitors,
- cooperation between competing companies that can not independently carry out the project or activity covered by the cooperation,
- cooperation concerning an activity far removed from the marketing level.

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

#### *Agreements that almost always fall under Article 81(1)*

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

25. This does, however, not apply if such a provision is necessary for the functioning of an otherwise non-restrictive or exemptable agreement. An example would be a production joint venture which also markets the jointly manufactured goods. It is inherent to the functioning of such a joint venture that decisions on output and prices are taken jointly by the parties to such an agreement. In this case, the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market following the framework described below to determine the applicability of Article 81(1).

#### *Agreements that may fall under Article 81(1)*

26. Agreements that do not belong to the above-mentioned categories need further analysis in order to decide whether they fall under Article 81(1). The analysis has to include market-related criteria such as the market position of the parties and other structural factors.

#### **Market power and market structure**

27. The starting point for the analysis is the position of the parties in the markets affected by the cooperation. This determines whether or not they are likely to maintain, gain or increase market power through the cooperation, i.e. have the ability to cause negative market effects on prices, output, innovation or the variety or quality of goods and services. To carry out this analysis the relevant market(s) have to be defined by using the methodology of the market definition notice of the Commission<sup>(12)</sup>. Where specific types of markets are concerned such as purchasing or technology markets, these guidelines will provide additional guidance.

28. If the parties together have a weak market position<sup>(13)</sup>, a restrictive effect of the cooperation is unlikely and no further analysis is required. Given the variety of cooperation types and the different effects they may cause in different market situations, it is impossible to give a general market share threshold above which sufficient market power for causing restrictive effects can be assumed.

29. In addition to the combined market shares, the parties' individual market shares must be taken into account. A high combined market share normally cannot be seen as indicating a restrictive effect on competition in the market if one of two parties has only insignificant market shares.

<sup>(12)</sup> See Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

<sup>(13)</sup> In determining the market share of a party in a given market account must be taken of the undertakings which are connected to the parties (see Article 4(1) of the draft block exemption regulation on research and development).

30. Where the combined market position is strong and the addition of market shares not insignificant, the market concentration, i.e. the position and number of competitors, may have to be taken into account as an additional factor to assess the impact of the cooperation on market competition. As an indicator the Herfindahl-Hirshman Index ('HHI'), which sums up the squares of the individual market shares of all competitors<sup>(14)</sup>, can be used: With an HHI below 1 000 the market concentration can be characterised as low, between 1 000 and 1 800 as moderate and above 1 800 as high.

31. Depending on the market position of the parties and the concentration in the market, other factors such as the stability of market shares over time, entry barriers and the likelihood of market entry, the countervailing power of buyers/suppliers or the nature of the products (for example homogeneity, maturity) have to be considered as well. Where an impact on competition in innovation is likely and can not be assessed adequately on the basis of existing markets, specific factors to analyse these impacts may have to be taken into account (see Chapter 3, R & D agreements).

### 1.3.2. **Article 81(3)**

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

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

— allows consumers a fair share of the resulting benefit,

and does not

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

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

### **Economic benefits**

33. The first condition requires that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress. As

<sup>(14)</sup> A market consisting of four firms with shares of 30 %, 25 %, 25 % and 20 %, has a HHI of 2 550 (900+625+625+400) pre-cooperation. If the first two market leaders would cooperate, the HHI would change to 4 050 (3025+625+400) post-cooperation. The HHI post-cooperation is decisive for the assessment of the possible market effects of a cooperation.

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

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

### **Fair share for the consumers**

35. Economic benefits have to favour not only the parties to the agreement, but also the consumers. Generally, the transmission of the benefits to the consumers will depend on the intensity of competition within the relevant market. Competitive pressure will normally ensure that cost-savings are being passed on by way of lower prices or that companies have an incentive to bring new products to the market as quickly as possible. Therefore, if sufficient competition which effectively constrains the parties to the agreement is maintained on the market, the competitive process will normally ensure that the consumers receive a fair share of the economic benefits.

### **Indispensability**

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

### **No elimination of competition**

37. One of the key elements for the assessment under Article 81(3) is the question whether or not competition is likely to be eliminated. The analysis can be carried out on the basis of the assessment of market power and market structures under Article 81(1). The only difference is that under Article 81(3) a higher degree of market power is permitted provided that significant efficiencies are generated which outweigh the anti-competitive effects. The absolute limit for exemption is the elimination of effective competition. Even considerable efficiency gains cannot justify the elimination of effective competition. This is effectively the point at which the parties are or would be likely to become dominant.

### **Block exemption regulations for R & D and specialisation**

38. Under certain conditions the criteria of Article 81(3) can be assumed to be fulfilled for specified categories of agreements. This is in particular the case for R & D and production agreements where the combination of complementary skills or assets can be the source of substantial efficiencies. These guidelines should be seen as a complement to the revised block exemption regulations on R & D and specialisation which replace Regulation (EEC) No 417/85 and Regulation No 418/85. The block exemption regulations exempt most common forms of agreements in the fields of production/specialisation up to a market share threshold of 20 % and in the field of R & D up to a market share threshold of 25 % provided that the agreements fulfil the conditions for application of the block exemption and do not contain 'hard core' restrictions ('black clauses') that render the block exemption inapplicable.

#### 1.4. STRUCTURE OF THE FOLLOWING CHAPTERS ON TYPES OF COOPERATION

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

## **2. AGREEMENTS ON RESEARCH AND DEVELOPMENT**

### 2.1. DEFINITION

40. Research and development (R & D) agreements may vary in form and scope. They range from outsourcing certain R & D activities to the joint improvement of existing technologies or to a cooperation concerning the research, development and marketing of completely new products. They may take the form of a cooperation agreement or of a jointly controlled company. This chapter applies to all forms of R & D agreements including related agreements concerning the production or commercialisation of the R & D results provided that the cooperation's centre of gravity lies in R & D <sup>(15)</sup>.

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

<sup>(15)</sup> With the exception of mergers and joint ventures which fall under the merger regulation.

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

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

### 2.2. RELEVANT MARKETS

44. The key to defining the relevant market when assessing the effects of an R & D agreement is to identify those products, technologies or R & D efforts, that will act as a competitive constraint on the parties. At one end of the spectrum of possible situations, the innovation may result in a product (or technology) which competes in an existing product (or technology) market. This is the case with R & D directed towards slight improvements or variations, such as new models of certain products. Here, possible effects concern the market for existing products. At the other end, innovation may result in an entirely new product which creates its own new market (for example, a new vaccine for a previously incurable disease). In such a case, existing markets are only relevant if they are somehow related to the innovation in question. Consequently, and if possible, the effects of the cooperation on innovation have to be assessed. However, most of the cases probably concern situations in between these two extremes, i.e. situations in which innovation efforts may create products (or technology) which, over time, replace existing ones (for example, CDs which have replaced records). A careful analysis of those situations may have to cover both, existing markets and the impact of the agreement on innovation.

### **Existing markets**

#### a) Product markets

45. When the cooperation concerns R & D for the improvement or refinement of existing products, these existing products including its close substitutes form the relevant market concerned by the cooperation <sup>(16)</sup>.

<sup>(16)</sup> For market definition see the Commission notice on the definition of the relevant market.

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

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

#### b) *Technology markets*

48. R & D cooperation may not only concern products but also technology. When rights to intellectual property are marketed separately from the products concerned to which they relate, the relevant technology market has to be defined as well. Technology markets consist of the intellectual property that is licensed and its close substitutes, i.e. other technologies which customers would substitute at comparable costs. The methodology for defining technology markets follows the same principles as product market definition<sup>(17)</sup>. The parties' position in the market for existing technology is a relevant assessment criterion where the R & D cooperation concerns the significant improvement of existing technology or a new technology that is likely to replace the existing technology. Here the same considerations apply as described above under 'existing product markets'.

#### **Competition in innovation (R & D efforts)**

49. R & D cooperation may not, or may not only, affect competition in existing markets, but competition in innovation.

<sup>(17)</sup> See Commission notice on market definition; see also, for example, merger case M 269, 'Shell/Montecatini', OJ L 332, 22.12.1994, pp.48 to 70.

This is the case where cooperation concerns the development of new products/technology which either may, if emerging, one day replace existing ones or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand. The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analysing actual or potential competition in existing product/technology markets. In this respect, two scenarios can be distinguished, depending on the nature of the innovative process in a given industry.

50. In the first scenario, which is for instance present in the pharmaceutical industry, the process of innovation is structured in a way that it is possible at an early stage to identify R & D poles. R & D poles are R & D efforts directed towards a certain new product or technology, and the substitutes for that R & D, i.e. R & D aimed at developing substitutable products or technology for those developed by the cooperation and having comparable access to resources as well as a similar timing. In this case, it can be analysed if after the agreement there will be a sufficient number of R & D poles left. The starting point of the analysis is the R & D of the parties. Then credible competing R & D poles have to be identified. In order to assess the credibility of competing poles, the following aspects have to be taken into account: the nature, scope and size of possible other R & D efforts, their access to financial and human resources, know-how/patents, or other specialised assets as well as their timing and their capability to exploit possible results. R & D pole is not a credible competitor if it can not be regarded as a close substitute for the parties' R & D effort from the viewpoint of, for instance, access to resources or timing.

51. In the second scenario, the innovative efforts in an industry are not clearly structured so as to allow the identification of R & D poles. In this situation, the Commission would, absent exceptional circumstances, not try to assess the impact of a given R & D cooperation on innovation in such a scenario, but would limit its assessment to product and/or technology markets which are related to the R & D cooperation in question.

### 2.3. ASSESSMENT UNDER ARTICLE 81(1)

#### 2.3.1. Nature of the agreement

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

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

53. Moreover, R & D cooperation between non-competitors does generally not restrict competition<sup>(18)</sup>. The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If the parties are not able to carry out the necessary R & D independently, there is no competition to be restricted. This can apply, for example, to firms bringing together complementary skills, technologies and other resources. The issue of potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the cooperation enables them to carry out the R & D activities. The decisive question is whether each party independently has the necessary means as to assets, know-how and other resources.

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

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

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

56. Cooperation that does not truly concern R & D, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, falls under Article 81(1). However, an R & D agreement which includes the joint marketing of possible future results is not necessarily restrictive of competition.

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

57. R & D agreements that cannot be assessed from the outset as clearly non-restrictive may fall under Article 81(1)<sup>(19)</sup> and have to be analysed in their economic context.

<sup>(18)</sup> An R & D cooperation between non-competitors can however produce foreclosure effects under Article 81(1) if it relates to an exclusive exploitation of results and if it is concluded between firms, one of which has significant market power with respect to key technology.

<sup>(19)</sup> Pursuant to Article 4 (2)(3) of Council Regulation No 17/62, agreements which have as their sole object joint research and development need not to, but may, be notified to the Commission.

This applies to R & D cooperation which is set up at a stage rather close to the market launch and which is agreed between companies that are competitors on either existing product/technology markets or on innovation markets.

#### 2.3.2. **Market power and market structures**

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

#### ***Block exemption***

59. Absent hard core restrictions it can be assumed that R & D cooperation agreements bring about economic benefits. Under these conditions it appears reasonable to block exempt such agreements which result in a restriction of competition up to a market share threshold indicating, at best, a limited degree of market power. Therefore, the revised Regulation exempts different forms of R & D agreements which do not include hard core restrictions (see Article 5) and provided that the combined market share of the parties in the affected existing market(s) does not exceed 25 %.

#### ***R & D agreements falling outside the block exemption***

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

61. If the R & D is directed at the improvement or refinement of existing products/technology possible effects concern the relevant market(s) for these existing products/technology. Effects on prices, output and/or innovation in existing markets are, however, only likely if the parties together have a

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

62. If the R & D is directed at an entirely new product (or technology) which creates its own new market, price and output effects on existing markets are rather unlikely. The analysis has to focus on possible restrictions of innovation concerning, for instance, the quality and variety of possible future products/technology or the speed of innovation. Those restrictive effects can arise where two or more of the few firms engaged in the development of such a new product, start to cooperate at a stage where they are each independently rather near to the launch of the product. In such a case, innovation may be restricted even by a pure R & D agreement. In general, however, R & D cooperation concerning entirely new products is pro-competitive. This principle does not change significantly, if the joint exploitation of the results, even joint marketing, is involved. Indeed, the issue of joint exploitation in these situations is only relevant where foreclosure from key technologies play a role. Those problems would, however, not arise where the parties grant licences to third parties.

63. Most R & D agreements will lie somewhere in between the two situations described above. They may therefore have effects on innovation as well as repercussions on existing markets. Consequently, both the existing market and the effect on innovation may be of relevance for the assessment with respect to the parties' combined positions, concentration ratios, number of players/innovators and entry conditions. In some cases there can be restrictive price/output effects on existing markets and a negative impact on innovation by means of slowing down the speed of development. For instance, if significant competitors on an existing technology market cooperate to develop a new technology which may one day replace existing products, this cooperation is likely to have restrictive effects if the parties have significant market power on the existing market (which would give an incentive to

exploit it), and if they also have a strong position with respect to R & D. A similar effect can occur, if the major player in an existing market cooperates with a much smaller or even potential competitor who is just about to emerge with a new product/technology which may endanger the incumbent's position.

64. Agreements may also fall outside the block exemption irrespective of the market power of the parties. This applies for instance to agreements which restrict access of a party to the results of the work because they do not, as a general rule, promote technical and economic progress by increasing the dissemination of technical knowledge between the parties<sup>(20)</sup>. The block exemption provides for a specific exception to this general rule in the case of academic bodies or research institutes which are not active in the industrial exploitation of the results of research and development<sup>(21)</sup>. Nevertheless, it should be noted that agreements containing exclusive access rights may, where they fall under Article 81(1), meet the criteria for exemption under Article 81(3), particularly where exclusive access rights are economically indispensable in view of the market, risks and scale of the investment required to exploit the results of the research and development.

## 2.4. ASSESSMENT UNDER ARTICLE 81(3)

### 2.4.1. Economic benefits

65. Most R & D agreements with or without joint exploitation of possible results, bring about economic benefits by means of cost savings and cross fertilisation of ideas and experience, thus resulting in improved or new products and technologies being developed more rapidly than would otherwise be the case. Some of those benefits can be assumed to be caused by R & D cooperation. Therefore a block exemption is justified. If considerable market power is created or increased by the cooperation, the parties have to demonstrate significant benefits in carrying out R & D, a quicker launch of new products/technology or other efficiencies.

### 2.4.2. Indispensability

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

<sup>(20)</sup> See Article 2(2) of draft block exemption regulation.

<sup>(21)</sup> See Article 2(2) of draft block exemption regulation.

### 2.4.3. No elimination of competition

67. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products (or technologies) in question. Thus, dominance on existing markets and with respect to innovation must not be created or increased. For innovation this is the case, for example, if the agreement combines the only two existing poles of research.

#### *Time of the assessment and duration of the exemption*

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

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

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

### 2.5. EXAMPLES

#### 71. Example 1

**Situation:** There are two major companies on the European market for the manufacture of existing electronic components: A (30 %) and B (30 %). They have each made significant investment in the R & D necessary to develop miniaturised electronic components and have developed early prototypes. They now agree to pool these R & D efforts by setting up a joint venture to complete the R & D and produce the components, which will be sold back to the parents, who will commercialise them separately. The remainder of the market consists of small firms without sufficient resources to undertake the necessary investments.

**Analysis:** Miniaturised electronic components, while likely to compete with the existing components in some areas, are essentially a new technology and an analysis must be made of the poles of research destined towards this future market. If the joint venture goes ahead then only one route to the necessary manufacturing technology will exist, whereas it would appear likely that A and B could reach the market individually with separate products. While the agreement could have advantages in bringing a new technology forward quicker, it also reduces variety and creates a commonality of costs between the parties. Furthermore, the possibility for the parties to exploit their strong position on the existing market must be taken into account. Since they would face no competition at the R & D level, their incentives to pursue the new technology at a high pace could be severely reduced. Although some of these concerns could be remedied by requiring the parties to license key know-how for manufacturing miniature components to third parties on reasonable terms, it may not be possible to remedy all concerns and fulfil the conditions for an exemption.

#### 72. Example 2

**Situation:** A small research company A which does not have its own marketing organisation has discovered and patented a pharmaceutical substance based on new technology that will revolutionise the treatment of a certain disease. Company A enters into an R & D agreement with a large pharmaceutical producer B of products that have so far been used for treating the disease. Company B lacks any similar R & D programme. For the existing products company B has a market share of around 75 % in all EU countries, but patents are expiring over the next five-year period. There exist two other poles of research at approximately the same stage of development using the same basic new technology. Company B will provide considerable funding and know-how for product development, as well as future access to the market. Company B is granted a license for the exclusive production and distribution

of the resulting product for the duration of the patent. It is expected that the parties could jointly bring the product to market in five to seven years.

*Analysis:* The product is likely to belong to a new relevant market. The parties bring complementary resources and skills to the cooperation, and the probability of the product coming to market increases substantially. Although Company B is likely to have considerable market power on the existing market, this power will be decreasing shortly and the existence of other poles of research are likely to eliminate any incentive to reduce R & D efforts. The exploitation rights during the remaining patent period are likely to be necessary for Company B to make the considerable investments needed and Company A has no own marketing resources. The agreement is therefore unlikely to restrict competition.

### 73. Example 3

*Situation:* Two engineering companies that produce vehicle components, agree to set up a joint venture to combine their R & D efforts to improve the production and performance of an existing component. They also pool their existing technology licensing businesses in this area, but will continue to manufacture separately. The two companies have market shares in Europe of 15 % and 20 % on the OEM product market. There are two other major competitors together with several in-house research programmes by large vehicle manufacturers. On the worldwide market for the licensing of technology for these products they have shares of 20 % and 25 %, measured in terms of revenue generated, and there are two other major technologies. The product cycle for the component is typically two to three years. In each of the last five years one of the major firms has introduced a new version or upgrade.

*Analysis:* Since neither company's R & D effort is aimed at a completely new product, the markets to consider are for the existing components and for the licensing of relevant technology. Although their existing R & D programmes broadly overlap, the reduced duplication through the cooperation could allow them to spend more on R & D than individually. Several other technologies exist and the parties' combined market share on the OEM market does not bring them into a dominant position. Although their presence on the technology market, at 45 %, is close to dominance, there are competing technologies and the vehicle manufacturers, who do not currently licence their technology, are also potential entrants on this market thus constraining the ability of the parties to raise price. As described, the joint venture is likely to benefit from an exemption.

## 3. PRODUCTION AGREEMENTS (INCLUDING SPECIALISATION AGREEMENTS)

### 3.1. DEFINITION

74. Production agreements may vary in form and scope. They may take the form of joint production through a joint venture<sup>(22)</sup>, i.e. a jointly controlled company that runs one or several production facilities, or can be carried out by means of specialisation or subcontracting agreements whereby one party agrees to carry out the production of a certain product.

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

76. Subcontracting agreements are vertical agreements. They are therefore, to the extent that they contain restrictions of competition, covered by the block exemption regulation and the guidelines on vertical restraints. There are however two exceptions to this rule: Subcontracting agreements between competitors<sup>(23)</sup>, and subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor<sup>(24)</sup>.

77. Subcontracting agreements between competitors are covered by these guidelines<sup>(25)</sup>. Guidance for the assessment of subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor is given in a separate Notice<sup>(26)</sup>.

<sup>(22)</sup> As indicated above, joint ventures which fall under the merger regulation are not the subject of these guidelines. Full-function joint ventures below Community dimension will only be assessed as cooperation by the Commission if spill-over effects are likely to be caused. The assessment under Article 81 will then be limited to the spill-over effects.

<sup>(23)</sup> Article 2(4) of the block exemption regulation on vertical restraints.

<sup>(24)</sup> Article 2(3) of the block exemption regulation on vertical restraints. See also guidelines on vertical restraints, point 28, which notes that subcontracting arrangements between non-competitors under which the buyer provides specifications to the supplier which merely describe the goods or services to be supplied are covered by the block exemption regulation on vertical restraints.

<sup>(25)</sup> If a subcontracting agreement between competitors stipulates that the contractor will cease production of the product to which the agreement relates, the agreement constitutes a unilateral specialisation agreement which is covered, subject to certain conditions, by the specialisation block exemption regulation.

<sup>(26)</sup> Notice concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EC Treaty, (OJ) C 1, 3.1.1979, p. 2).

### 3.2. RELEVANT MARKETS

78. In order to assess the competitive relationship between the co-operating parties, the relevant product and geographic market(s) directly concerned by the cooperation (i.e. the market(s) to which products subject to the agreement belong) must first be defined. Secondly, a production agreement in one market may also affect the competitive behaviour of the parties in a market which is downstream or upstream or a neighbouring market closely related to the market directly concerned by the cooperation<sup>(27)</sup> (so-called 'spill-over markets'). However, spill-over effects only occur if the cooperation in one market necessarily results in the coordination of competitive behaviour in another market, i.e. if the markets are linked by interdependencies, and if the parties are in a strong position on the spill-over market.

### 3.3. ASSESSMENT UNDER ARTICLE 81(1)

#### 3.3.1. Nature of the agreement

79. The main source of competition problems that can possibly arise from production agreements is the coordination of the parties' competitive behaviour as suppliers. This type of competition problems arises where the cooperating parties are actual or potential competitors on at least one of these relevant market(s), i.e. on the markets directly concerned by the cooperation and/or on possible spill-over markets. Foreclosure problems and other negative effects towards third parties may also arise, but are less frequent in the context of production agreements<sup>(28)</sup>.

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

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

81. Production agreements between non-competitors are not normally caught by Article 81(1)<sup>(29)</sup>. This is also true for agreements whereby inputs or components which have so far been manufactured for own consumption (captive production) are purchased from a third party, unless there are indications

<sup>(27)</sup> As also referred to in Article 2(4) of the merger regulation.

<sup>(28)</sup> They are not caused by a competitive relationship between the parties, but by a very strong market position of at least one of the parties (for example, on an upstream market for a key component, which enables the parties to raise the costs of their rivals in a downstream market) in the context of a more vertical or complementary relationship between the cooperating parties.

<sup>(29)</sup> They may only fall under Article 81(1) if foreclosure problems arise.

that the company which so far has only produced for own consumption could have entered the merchant market for sales to third parties without incurring significant additional costs or risks in response to small, permanent changes in relative market prices.

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

83. Secondly, an effect on the parties' competitive behaviour as market suppliers is highly unlikely if the parties have a small proportion of their total costs in common. For instance, a low degree of commonality in total costs can be assumed, where two or more companies agree to specialise or to jointly produce an intermediate product which only accounts for a small proportion of the production costs of the final product and, consequently, the total costs. A low degree of commonality of total costs can also be assumed where the parties jointly manufacture a final product, but only a small proportion as compared to the total output of the final product. Even if a significant proportion is jointly manufactured, the degree of commonality of total costs may nevertheless be low or moderate, if the cooperation concerns heterogeneous products which require a costly marketing.

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

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

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

— where a production joint venture sets the sales prices for the manufactured products when the joint venture also carries out the distribution of these products so that the price fixing by the joint venture is the effect of integrating the various functions<sup>(30)</sup>.

<sup>(30)</sup> A production joint venture which also carries out joint distribution is, however, in most of the cases a full-function joint venture (see footnote 23 for the assessment of these joint ventures).

In both scenarios the agreement on output or prices will be assessed together with the other effects of the joint venture on the market in order to determine the applicability of Article 81(1).

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

85. Production agreements that cannot be characterised as clearly restrictive or non-restrictive on the basis of the above factors may fall under Article 81(1) <sup>(31)</sup> and have to be analysed in their economic context. This applies to cooperation agreements between competitors which create a significant degree of commonality of costs, but do not involve hard core restrictions as described above.

### 3.3.2. Market power and market structures

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

#### **Block exemption**

87. Most common types of production agreements can be assumed to cause some economic benefits in the form of economies of scale or scope or better production technologies unless they are an instrument for price fixing, output restriction or market and customer allocation. These benefits outweigh a limited degree of market power. It is therefore reasonable to block exempt production agreements which result in a restriction of competition up to a certain market share threshold. Therefore, agreements concerning unilateral or reciprocal specialisation as well as joint production are block exempted (revised Regulation on specialisation) provided that they do not contain hard core restrictions (see Article 4) and that they are concluded between parties with a combined market share not exceeding 20 % in the relevant market(s). The block exemption also applies to related purchasing and distribution agreements (see Article 2).

#### **Production agreements falling outside the block exemption**

88. Agreements falling outside the block exemption require a more detailed analysis. The starting point again is the market position of the parties. This will normally be followed by the concentration ratio and the number of players as well as by other factors as described in Chapter 1.

<sup>(31)</sup> Pursuant to Article 4(2)(3) of Council Regulation No 17, agreements which have as their sole object specialisation in the manufacture of products need, under certain conditions, not to be notified to the Commission. They may, however, be notified.

89. Usually the analysis will only involve the relevant market(s) directly concerned by the cooperation. Under certain circumstances, e.g. if the parties have a very strong combined position on upstream or downstream markets or on markets otherwise closely related to the markets directly concerned by the cooperation, these spill-over markets may however have to be analysed as well. This applies in particular to cooperation in upstream markets by firms which also enjoy a strong combined market position further downstream.

#### *Market position of the parties, concentration ratio, number of players and other structural effects*

90. If the parties' combined market share is larger than 20 %, the likely impact of the production agreement on the market must be assessed. In this respect market concentration as well as market shares will be a significant factor. The higher the combined market share of the parties, the higher the concentration in the market concerned. However, a moderately higher market share than allowed for in the block exemption does not necessarily imply a high concentration ratio. For instance, a combined market share of the parties of slightly more than 20 % may occur in a market with a moderate concentration (HHI below 1 800). In such a scenario a restrictive effect is unlikely. In a more concentrated market, however, a market share of more than 20 % is likely to cause a competition restriction (see also example 1 (point 99)). The picture may nevertheless change, if the market is very dynamic with new participants entering the market and market positions changing permanently.

91. For joint production, network effects, i.e. links between a significant number of competitors, can also play an important role. In a concentrated market the creation of an additional link may tip the balance and make collusion in this market likely, even if the parties have a significant, but still moderate combined market share (see example 2 (point 100)).

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

#### *Cooperation in upstream markets*

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

- foreclosure problems (see example 3 (point 102)) provided that the parties have a strong position on the relevant input market (non-captive use) and that switching between captive and non-captive use would not occur in the presence of a small but permanent relative price increase for the product in question,
- spill-over effects (see example 4 (point 104)) provided that the input is an important component of costs and that the parties have a strong position in the downstream market for the final product.

#### *Specialisation agreements*

94. Reciprocal specialisation agreements with market shares beyond the threshold of the block exemption will almost always fall under Article 81(1) and have to be examined carefully because of the risk of market partitioning (see example 5 (point 105)).

### 3.4. ASSESSMENT UNDER ARTICLE 81(3)

#### 3.4.1. **Economic benefits**

95. For agreements falling under the block exemption, the existence of economic benefits can be assumed. For those agreements not covered by the block exemption the parties have to demonstrate improvements of production or other efficiencies. Efficiencies that only benefit the parties or cost savings that are caused by output reduction or market allocation cannot be taken into account.

#### 3.4.2. **Indispensability**

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

#### 3.4.3. **No elimination of competition**

97. The effects on competition have to be analysed on the market to which the products subject to the cooperation belong and on possible spill-over markets. Production agreements which bring about efficiencies, but involve parties with significant market power require a detailed analysis as to the assessment of whether or not effective competition is likely to be eliminated in the market. The analysis has to include the factors described under the point 'market power and market

structures'. Efficiencies and other relevant benefits can justify even a significant restriction of competition in the market provided that effective competition is not eliminated and the creation or strengthening of a dominant position is excluded.

### 3.5. EXAMPLES

#### ***Joint production***

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

#### 99. Example 1

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

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

#### 100. Example 2

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

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

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

#### 102. Example 3

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

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

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

#### 104. Example 4

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

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

### **Specialisation**

#### 105. Example 5

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

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

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

## **4. PURCHASING AGREEMENTS**

### **4.1. DEFINITION**

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

107. Purchasing agreements are often concluded by small and medium-sized enterprises to achieve similar volumes and discounts as their bigger competitors. These agreements between small and medium-sized enterprises are therefore normally pro-competitive. Even if a moderate degree of market power is created, this may be outweighed by economies of scale provided the parties really bundle volume. Joint buying occurs in many sectors; most frequently it seems to occur in the retail sector.

108. Joint purchasing may involve both horizontal and vertical agreements. These agreements have first to be assessed according to the principles described in the present guidelines. If this assessment leads to the conclusion that a cooperation between competitors in the area of purchasing would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included agreements concluded with suppliers or retailing members. This assessment should be based on the principles set out in the guidelines on vertical restraints<sup>(32)</sup>, for instance as regards the list of hardcore restrictions which are unlikely to be exempted in vertical agreements.

109. An example would be an association formed by a group of retailers for the joint purchasing of products. The agreement to set up the association and the conditions under which it engages in joint purchasing would be examined under the present guidelines. The resulting vertical agreements, between the association and an individual member, or between the association and an outside supplier, are covered, up to a certain limit, by the block exemption for vertical restraints<sup>(33)</sup>. Those agreements falling outside the vertical block exemption will not be presumed to be illegal but may need individual examination.

#### 4.2. RELEVANT MARKETS

110. There are two markets which may be affected by joint buying: first, the market(s) directly concerned by the cooperation, i.e. the relevant purchasing market(s); secondly, the selling market(s), i.e. the market(s) downstream where the participants of the joint purchasing arrangement are active as sellers.

111. The definition of relevant purchasing markets follows the principles described in the Commission notice on market definition and is based on the concept of substitutability to identify competitive constraints. The only difference to the definition of 'selling markets' is that substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words: the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. These could be analysed for instance by examining the suppliers' reaction to a small but lasting price decrease. If the market is defined, the market share can be calculated as the percentage which the purchases for the parties concerned account for out of the total sales of the purchased product or service in the relevant market.

#### 112. Example 1

A group of car manufacturers agree to buy product X jointly. Their combined purchases of X account for 270 units. All the

sales of X to car manufacturers account for 900 units. However, X is also sold to manufacturers of other products than cars. All sales of X account for 1 800 units. Then the (purchasing) market share of the group is 15 %.

113. If the parties are in addition competitors on one or more selling markets, these markets are also relevant for the assessment. Restrictions of competition on these markets are more likely if the parties will achieve market power by coordinating their behaviour and if the parties have a significant proportion of their total costs in common. This is, for instance, the case if retailers which are active in the same relevant retail market(s) jointly purchase a significant amount of the products they offer for resale. It may also be the case if competing manufacturers and sellers of a final product jointly purchase a high proportion of their input together. The selling markets have to be defined by applying the methodology laid down in the Commission Notice on market definition.

#### 4.3. ASSESSMENT UNDER ARTICLE 81(1)

##### 4.3.1. Nature of the agreement

##### 4.3.1.1. **Agreements that do not come under Article 81(1)**

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

115. In most cases, joint buying will be agreed between companies that are competitors on both the purchase and the selling market (see 4.3.1.3).

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

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

<sup>(32)</sup> Guidelines on vertical restraints

<sup>(33)</sup> Article 2(2) of Commission Regulation (EC) No 2790/1999.

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

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

#### 4.3.2. Market power and market structures

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

#### *Interdependencies between purchasing and selling market(s)*

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

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

121. Secondly, power on the selling markets may be created or increased through buying power which is used to foreclose competitors or to raise rivals' costs. Significant buying power by one group of customers may lead to foreclosure of

competing buyers by limiting their access to efficient suppliers. It can also cause cost increases for its competitors because suppliers will try to recover price reductions for one group of customers by increasing prices for other customers (for example, rebate discrimination by suppliers of retailers). This is only possible if the suppliers of the purchasing markets also have a certain degree of market power. In both cases, competition in the selling markets can be further restricted by buying power.

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

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

#### 4.4. ASSESSMENT UNDER ARTICLE 81(3)

##### 4.4.1. Economic benefits

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

##### 4.4.2. Indispensability

125. Purchasing agreements can not be exempted if they impose restrictions that are not indispensable to the attainment of the above mentioned benefits. An obligation to exclusively buy through the cooperation can in certain cases be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

#### 4.4.3. No elimination of competition

126. Joint buying agreements can never be exempted if they afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. This assessment has to cover buying and selling markets. The combined market shares of the parties can be regarded as a starting point. It then needs to be evaluated whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as countervailing power of suppliers on the purchasing markets or potential for market entry in the selling markets. A dominant position on either the buying or selling market excludes exemption under Article 81(3).

#### 4.5. EXAMPLES

##### 127. Example 2

**Situation:** Two manufacturers, A and B, decide to jointly buy component X. They are competitors on their selling market. Together their purchases represent 35 % of the total sales of X in the EEA, which is assumed to be the relevant geographic market. There are six other manufacturers (competitors of A and B on their selling market) accounting for the remaining 65 % of the purchasing market; one having 25 %, the others account for significantly less. The supply side is rather concentrated with six suppliers of component X, two with 30 % market share each, and the rest between 10 and 15 % (HHI of 2 300 to 2 500). On their selling market, A and B achieve a combined market share of 35 %.

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

##### 128. Example 3

**Situation:** 15 small retailers conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation which accounts

for roughly 50 % of each retailer's total costs. The retailers can buy more than the minimum volume through the organisation, but they may also buy outside the cooperation. They have a combined market share of 20 % on each the purchasing and the selling market. A and B are their two large competitors, A has a 25 % share on each of the markets concerned, B has 35 %. The remaining smaller competitors have also formed a buying group. The 15 retailers achieve economies by combining a significant amount of volume and buying tasks.

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

##### 129. Example 4

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

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

##### 130. Example 5

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

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

## 5. COMMERCIALISATION AGREEMENTS

### 5.1. DEFINITION

131. The agreements covered in this section involve cooperation between competitors in the selling, distribution or promotion of their products. These agreements can have a largely varying scope, depending on the marketing functions which are being covered by the cooperation. At the one end of the spectrum, there is joint selling that leads to a joint determination of all commercial aspects related to the sale of the product including price. At the other end, there are more limited agreements that only address one specific marketing function, such as distribution, service, or advertising.

132. The most important of these more limited agreements would seem to be distribution agreements. These agreements are generally covered by Block Exemption Regulation (EC) No 2790/1999 and the Guidelines on Vertical Restraints unless the parties are actual or potential competitors. In this case, Block Exemption Regulation (EC) No 2790/1999 only covers non-reciprocal vertical agreements between competitors, if (a) the buyer, together with its connected undertakings, has an annual turnover not exceeding EUR 100 million, or (b) the supplier is a manufacturer and a distributor of goods and the buyer is a distributor who is not also a manufacturer of goods competing with the contract goods, or (c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services<sup>(34)</sup>. If competitors agree to distribute their products on a reciprocal basis there is a possibility in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to collusion. The same is true for non-reciprocal agreements between competitors exceeding a certain size. These agreements have thus first to be assessed according to the principles set out below. If this assessment leads to the conclusion that a cooperation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. This assessment should be based on the principles set out in the guidelines on vertical restraints<sup>(35)</sup>, for instance as regards the list of hardcore restrictions which are unlikely to be exempted in vertical agreements.

<sup>(34)</sup> Article 2(4) of Commission Regulation (EC) No 2790/1999.

<sup>(35)</sup> Guidelines on vertical restraints

133. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another cooperation. This can be for instance the case as regards joint production or joint purchasing. These agreements will be dealt with as in the assessment of those types of cooperation.

### 5.2. RELEVANT MARKETS

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

### 5.3. ASSESSMENT UNDER ARTICLE 81(1)

#### 5.3.1. Nature of the agreement

##### 5.3.1.1. **Agreements that do not come under Article 81(1)**

135. The commercialisation agreements covered by this section only fall under the competition rules if the parties to the agreements are competitors. If the parties clearly do not compete with regard to the products or services covered by the agreement, the agreement cannot be restrictive of competition. This also applies if a cooperation in commercialisation is objectively necessary to allow one party to enter a market it could not have entered individually, for example because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to mount a credible tender for projects that they would not be able to fulfil, or would not have bid for, individually. As they are therefore not potential competitors for the tender, there is no restriction of competition.

##### 5.3.1.2. **Agreements that almost always come under Article 81(1)**

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

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

#### 5.3.1.3. Agreements that may come under Article 81(1)

138. For commercialisation arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost structure of the commercialisation, a significant input to the parties' final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties' final cost.

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

#### 5.3.2. Market power and market structure

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

141. Commercialisation agreements between competitors which do not involve price fixing are only subject to Article 81(1) if the parties to the agreement have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined

market share of below 15 %. In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

142. If the parties' combined market share is larger than 15 %, the likely impact of the joint commercialisation agreement on the market must be assessed. In this respect market concentration, as well as market shares will be a significant factor. The more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information <sup>(36)</sup>.

#### 5.4. ASSESSMENT UNDER ARTICLE 81(3)

##### 5.4.1. Economic benefits

143. The efficiencies to be taken into account when assessing whether a joint commercialisation agreement can be exempted will depend upon the nature of the activity. Price fixing can generally not be justified, unless it is objectively necessary for the integration of other marketing functions, and this integration will generate substantial efficiencies. The size of the efficiencies generated depends *inter alia* on the importance of the joint marketing activities for the overall cost structure of the product in question. Joint distribution is thus more likely to generate significant efficiencies for producers of widely distributed consumer goods than for producers of industrial products which are only bought by a limited number of users.

144. In addition, the claimed efficiencies should not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency that would make an agreement exemptable.

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

<sup>(36)</sup> The exchange of sensitive and detailed information which takes place in an oligopolistic market might as such be caught by Article 81(1). The Judgements of 28 May 1998 in the 'Tractor' Cases (C-8/958 P: New Holland Ford and C-7/95 P: John Deere) and of 11 March 1999 in the 'Steel Beams' Cases (T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94) provide useful clarification in this respect.

#### 5.4.2. Indispensability

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

#### 5.4.3. No elimination of competition

147. Joint commercialisation agreements can never be exempted if they enable the parties to eliminate competition in respect of a substantial part of the products in question. In making this assessment, the combined market shares of the parties can be regarded as a starting point. One then needs to evaluate whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as the potential for market entry. Arrangements between competitors who have a combined market share equivalent to dominance will not normally fulfil the conditions of Article 81(3).

### 5.5. EXAMPLES

#### 148. Example 1

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

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

*Analysis:* The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement can not be considered as having market power. However, the integration of the marketing and distribution appears to provide significant efficiencies which are of benefit to customers both in terms of improved service, and lower costs. The question is therefore whether the agreement is exemptable under Article 81(3). To answer this question it must be established whether the price fixing is objectively necessary for the integration of the other marketing functions. In this case, the price fixing can be regarded as necessary, as the clients (large retail chains) do not want to deal with a multitude of prices. It is also necessary, as the aim (a

common brand) can only be achieved credibly if all aspects of marketing, including price, are standardised. As the parties do not have market power and the agreement creates significant efficiencies it is compatible with Article 81.

#### 149. Example 2

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

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

#### 150. Example 3

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

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

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

## 6. AGREEMENT ON STANDARDS

### 6.1. DEFINITION

151. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply<sup>(37)</sup>. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard.

152. Not covered by these guidelines are standards related to the provision of professional services, such as rules of admission to a liberal profession.

### 6.2. RELEVANT MARKETS

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

### 6.3. ASSESSMENT UNDER ARTICLE 81(1)

154. Agreements to set standards<sup>(38)</sup> may be either concluded between private undertakings or set under the aegis of public bodies or bodies having been entrusted with the operation of services of general economic interest, such as the standards bodies recognised under Directive 98/34/EC<sup>(39)</sup>. The involvement of such bodies is subject to the obligations of

<sup>(37)</sup> Standardisation can take different forms, ranging from the adoption of national consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between single companies. Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.

<sup>(38)</sup> Pursuant to Article 4(2)(3) of Council Regulation No 17, agreements which have as their sole object the development or the uniform application of standards and types need not to, but may, be notified to the Commission.

<sup>(39)</sup> Directive 98/34/EC of the European Parliament and of the Council on 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, pp. 37 to 48).

Member States regarding the preservation of non distorted competition in the Community.

#### 6.3.1. Nature of the agreement

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

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

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

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

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

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

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

159. The existence of a restriction of competition in standardisation agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardisation agreements may restrict competition where they prevent the parties from either developing alternative standards or commercialising products that do not comply with the standard. Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.

### 6.3.2. Market power and market structures

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

## 6.4. ASSESSMENT UNDER ARTICLE 81(3)

### 6.4.1. Economic benefits

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

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

### 6.4.2. Indispensability

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

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

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

### 6.4.3. No elimination of competition

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

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

## 6.5. EXAMPLES

### 168. Example 1

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

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

#### 169. Example 2

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

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

#### 170. Example 3

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

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

## 7. ENVIRONMENTAL AGREEMENTS

### 7.1. DEFINITION

171. Environmental agreements<sup>(40)</sup> are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set forth in Article 174 of the EC Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations<sup>(41)</sup>. This excludes agreements that trigger pollution abatement as a by-product of other measures.

172. Environmental agreements may set forth standards on the environmental performance of products (inputs or outputs), or production processes<sup>(42)</sup>. Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.

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

### 7.2. RELEVANT MARKETS

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

<sup>(40)</sup> The term 'agreement' is used in the sense defined by the Court of Justice of the European Community in the case law on Article 81. It does not necessarily correspond to the definition of an 'agreement' in Commission documents dealing with environmental issues such as the Communication on environmental agreements COM(96) 561 final of 27.11.1996.

<sup>(41)</sup> For instance, a national agreement phasing out a pollutant or waste identified as such in relevant community directives may not be assimilated to a collective boycott on a product which circulates freely in the community.

<sup>(42)</sup> To the extent that some environmental agreements could be assimilated to standardisation, the same assessment principles for standardisation apply to them.

### 7.3. ASSESSMENT UNDER ARTICLE 81(1)

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

#### 7.3.1. Nature of the agreement

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

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

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

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

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

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

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

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

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

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

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

### 7.4. ASSESSMENT UNDER ARTICLE 81(3)

#### 7.4.1. Economic benefits

184. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the EC Treaty as well as in Community environmental action plans<sup>(43)</sup>, provided such agreements are compatible with competition rules<sup>(44)</sup>.

185. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs<sup>(45)</sup>.

<sup>(43)</sup> Vth Environmental Action Programme (OJ C 138, 17.5.1993, p. 1); European Parliament and Council Decision No 2179/98/EC of 24.9.1998 (OJ L 275, 10.10.1998, p. 1).

<sup>(44)</sup> Communication on environmental agreements COM(96) 561 final of 27.11.1996, points 27 to 29 and Article 3(1)(f) of European Parliament and Council Decision No 2179/98/EC. The Communication includes a 'checklist for environmental agreements' identifying the elements that should generally be included in such an agreement.

<sup>(45)</sup> This is consistent with the requirement to take account of the potential benefits and costs of action or lack of action set forth in Article 174(3) and Article 7(d) of European Parliament and Council Decision No 2179/98/EC.

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

#### 7.4.2. Indispensability

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

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

#### 7.4.3. No elimination of competition

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

## 7.5. EXAMPLES

### 190. Example

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

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

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