Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements

[DRAFT]
CMA174

1. Contents

1. Introduction and purpose of this guidance

1.1 This guidance (Guidance) explains how the CMA applies competition law and, in particular, the Chapter I prohibition in the Competition Act 1998 (CA98) to horizontal agreements. Horizontal agreements are agreements entered into between actual or potential competitors. This Guidance describes the application of the Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022 (SABEO) and the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022 (R&D BEO), which came into force on 1 January 2023.[1] It is intended to help businesses assess certain categories of horizontal agreements and establish whether they benefit from the block exemptions provided by SABEO and R&D BEO, or otherwise comply with competition law.

1.2 This Guidance also aims to clarify how competition law applies to other common types of horizontal agreement which are not covered by the SABEO and R&D BEO and therefore to make it easier for businesses to cooperate in ways which are economically desirable, including the pursuit of environmental sustainability objectives.

1.3 CA98 prohibits agreements and concerted practices between undertakings (eg businesses)[2] and decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction or distortion of competition within the UK and which may affect trade within the UK. This is known as the Chapter I prohibition. A prohibited agreement is void[3] and not enforceable.[4] It may also lead to a financial penalty or to damages being awarded to third parties.

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[1] The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022 (legislation.gov.uk) and The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022 (legislation.gov.uk). Before the UK's withdrawal from the EU, Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements and Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements applied in the UK. The EU regulations were retained in UK law when the transition period for the withdrawal of the UK from the EU came to an end on 31 December 2020. The SABEO and R&D BEO replace the two retained EU Regulations that expired on 31 December 2022.

[2] See paragraphs 3.6 to 3.10 for guidance on the circumstances when a natural or legal person constitutes an 'undertaking' for the purpose of CA98.

[3] Section 2(4) CA98.

[4] If only certain provisions in a horizontal agreement are prohibited under Chapter I and they are capable of being severed from the rest of the agreement, then the remainder of the agreement may be enforceable. The ordinary rules of severance will apply. The rules on severance are outside the scope of this guidance. The relevant principles were considered by the Supreme Court in the context of the common law doctrine of restraint of trade in *Egon Zehnder Ltd v Tillman* [2019] UKSC 32 (see, in particular, paragraphs 85 to 87).

1.4 For ease of reference, unless otherwise stated, the term 'agreement' in this Guidance also covers other forms of cooperation, including concerted practices and decisions of associations of undertakings. Similarly, where this Guidance uses the term 'restriction' or its other forms in the context of considering a restriction of competition, it also covers a prevention or distortion of competition, unless stated otherwise.

1.5 There are many situations where horizontal agreements that restrict competition can be beneficial to consumers and are exempt from the Chapter I prohibition where they meet the conditions for exemption specified in Section 9(1) CA98 (Section 9 exemption). Where a category of agreements is likely to meet the conditions for Section 9 exemption, such agreements may be subject to a block exemption. The block exemptions in the SABEO and R&D BEO (together, the Horizontal Block Exemption Orders (HBEOs)) apply to exempt certain categories of horizontal agreements, subject to those agreements meeting certain conditions set out in the HBEOs. The effect of the HBEOs therefore is to provide an automatic exemption from the Chapter I prohibition to all agreements that meet the conditions of the HBEOs.

1.6 By automatically exempting horizontal agreements that meet specified conditions, the HBEOs avoid placing on businesses the unnecessary burden of scrutinising a large number of essentially benign agreements. The HBEOs also help to ensure that the CMA is able to concentrate resources on other matters giving rise to significant competition concerns.

1.7 Where an agreement does not meet the conditions for block exemption set out in the HBEOs, it may still be exempt from the Chapter I prohibition, but the parties would need to scrutinise the agreement to see if it fulfils the Section 9 exemption.

1.8 This Guidance sets out the principles for the assessment of horizontal agreements under the Chapter I prohibition and provides an analytical framework for the most common types of horizontal agreements.

1.9 This Guidance is relevant to both existing and new horizontal agreements. It replaces the European Commission's Guidelines on Horizontal Cooperation Agreements.[5] Horizontal cooperation takes place in potentially a large number of different forms and types and in a variety of market circumstances. It is not therefore possible to provide specific guidance for every possible scenario.

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[5] EC (2011) Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. Although this guidance uses the term 'horizontal agreement', where the EU's 2011 guidelines use the term 'horizontal cooperation agreement', the CMA considers these terms have the same meaning, and may be used interchangeably.

The principles set out in this Guidance should be applied with due consideration for the specific circumstances of each case and each agreement must be assessed in the light of its own facts.

1.10 The Guidance is without prejudice to the case law of the UK courts and retained EU case law (to the extent relevant and binding)[6] that is relevant to the application of the Chapter I prohibition to horizontal agreements. The CMA will keep under review the application and effectiveness of the HBEOs in achieving their policy and operational objectives, especially with regard to developments in the UK market that would impact their operation and may revise this Guidance in light of future developments and evolving experience.

1.11 The remainder of this Guidance is structured as follows:

- Part 2: legal framework;
- Part 3: overview of the assessment of horizontal agreements;
- Part 4: research and development agreements;
- Part 5: production agreements;
- Part 6: purchasing agreements;
- Part 7: commercialisation agreements;
- Part 8: information exchange;
- Part 9: standardisation agreements; and
- Part 10: standard terms [and
- Part 11: environmental sustainability].

1.12 Parts 4 to 10 provide guidance on the assessment under the Chapter I prohibition of common types of horizontal agreement. [Part 11 provides additional guidance on assessing these agreements (and any other type of

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[6] Guidance on the functions of the CMA after the end of the Transition Period (CMA125). For further information on the concept of 'retained EU law' under the Withdrawal Act, please refer to the public paper prepared by the House of Commons Library: 'The status of 'retained EU Law'. In particular, section 60A(2)(b) CA98 provides that the CMA and UK Courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. In accordance with section 6(3) to 6(6) of the European Union (Withdrawal) Act 2018, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the Court of Justice of the EU laid down up until 31 December 2020. In accordance with section 60A(3) CA98, in determining any such question, the CMA must also have regard to any relevant decision or statement of the European Commission made before the end of the Transition Period and not withdrawn.

horizontal agreement) where they genuinely pursue environmental sustainability objectives, irrespective of the form of cooperation]. The guidance in Parts 4 to 11 complements the more general guidance on the assessment of horizontal agreements provided in Part 3.

1.13 Where an agreement that pursues one or more environmental sustainability objectives (ie a sustainability agreement) concerns a type of cooperation between competitors described in any of the Parts 3 to 10 of this Guidance, its assessment should be governed by the principles and considerations set out in those Parts, while also taking into account where relevant the guidance provided in Part 11 for the particular type of agreement being considered.

1.14 In this Guidance, we use a number of defined terms and abbreviations:

Block exemption	An exemption for particular categories of agreement from the Chapter I prohibition.
CA98	Competition Act 1998.
Chapter I prohibition	The prohibition on anti-competitive agreements contained in Part I, Chapter I of the Competition Act 1998.
Chapter II prohibition	The prohibition on abuse of a dominant position contained in Part I, Chapter II of the Competition Act 1998.
HBEO(s)	The SABEO and R&D BEO.
R&D BEO	The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022.
Retained EU case law	Any principles laid down by, and any decisions of, the Court of Justice of the European Union, as they have effect in EU law immediately before 31 December 2020, subject to certain exceptions, as those principles and decisions are modified by or under domestic law from time to time.
SABEO	The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022.

Section 9 exemption	Section 9(1) CA98 which sets out the conditions for an agreement to be exempt from the Chapter I prohibition.
TFEU	Treaty on the Functioning of the European Union.
Undertaking	Any natural or legal person (or other entity) engaged in economic activity (eg companies, firms, partnerships, sole traders, public entities), regardless of its legal status and the way it is financed.
VABEO	The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022.
VABEO Guidance	CMA Guidance on the Vertical Agreements Block Exemption Order 2022.

2. Legal Framework

2.1 This Part gives a brief overview of the Chapter I prohibition and the exemption regime on which basis the HBEOs have been made.

2.2 This part is structured as follows:

(a) The Chapter I prohibition

(b) The Section 9 exemption

(c) Block exemption

The Chapter I prohibition

2.3 Competition law is designed to protect businesses and consumers from anti-competitive behaviour.

2.4 The law prohibits arrangements which restrict or distort competition in order to deliver open, dynamic markets and enhanced productivity, innovation and value for customers. To this end, the CA98 prohibits:

(a) agreements which prevent, restrict or distort competition (Chapter I prohibition); and

(b) conduct which constitutes an abuse of a dominant position (Chapter II prohibition).

2.5 The Chapter I prohibition prohibits agreements or concerted practices between undertakings or decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the UK, and which may affect trade within the UK.

2.6 The objective of the Chapter I prohibition is to ensure that undertakings do not use agreements to prevent, restrict or distort competition on the market to the ultimate detriment of consumers. It is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.[7]

2.7 The Chapter I prohibition only applies where agreements have as their object or effect an appreciable restriction of competition within the UK or a part of it. In applying the Chapter I prohibition, the CMA's focus will be on the effect on

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

competition, as in practice it is very unlikely that an agreement which appreciably restricts competition within the UK does not also affect trade within the UK.

2.8 The effect of an agreement has to be assessed in its context, including where the agreement might combine with others to have a cumulative effect on competition.[8] An agreement cannot be isolated from its context and the existence of similar contracts can be taken into account insofar as all the contracts of that type as a whole are such as to restrict competition.[9] Where there is a network of similar agreements concluded by the same supplier, the assessment of the effects of that network on competition applies to all the individual agreements making up the network.[10]

2.9 In some circumstances businesses can benefit from an exemption from the Chapter I prohibition. The following sub-sections set out the framework for the application of the Section 9 exemption and block exemptions.

The Section 9 exemption

2.10 The CA98 provides that some agreements that restrict competition are exempt from the Chapter I prohibition where they satisfy certain conditions.

2.11 Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition.[11] Broadly, the agreement must contribute to clear efficiencies. Second, it must provide a fair share of the resulting benefits to consumers. Third, the restrictions on competition that it provides for must be no more than

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[8] Judgment of 12 December 1967, *SA Brasserie de Haecht v Consorts Wilkin-Janssen* 23/67, EU:C:1967:54, paragraph 415; judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 14.

[9] Judgment of 12 December 1967, *SA Brasserie de Haechtv Consorts Wilkin-Janssen*, 23/67, EU:C:1967:54, paragraph 415; judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 14.

[10] Judgment of 8 June 1995, *Langnese-Iglo GmbH v European Commission*, T-7/93, EU:T:1995:98 , paragraph 129;
Judgment of 8 June 1995, *Schöller Lebensmittel GmbH & Co. KG v European Commission*, T-9/93, EU:T:1995:99, paragraph 95.

[11] The cumulative conditions in section 9(1) CA98 that must be met in full are that the agreement:
(a) Contributes to:
(i) improving production or distribution, or
(ii) promoting technical or economic progress,
while allowing consumers a fair share of the resulting benefit; and
(b) does not:
(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

the minimum that is necessary to enable consumers to gain these benefits. Fourth, it must not give the parties to the agreement the opportunity to eliminate competition from a substantial part of the relevant market.

2.12 An agreement that satisfies the conditions set out in the Section 9 exemption is exempt from the Chapter I prohibition from the moment that the conditions in the Section 9 exemption are satisfied and for as long as that remains the case. The parties involved in such an agreement do not need to seek any authorisation from the CMA. They need to satisfy themselves, based on a self-assessment, that the agreement fulfils the conditions for the Section 9 exemption.

2.13 We set out further details on the application of the Section 9 exemption to horizontal agreements at paragraphs 3.41 to 3.47 below.

Block exemption

2.14 Under the CA98, the Secretary of State may make a 'block' exemption order that exempts from the Chapter I prohibition any particular categories of agreement which the CMA considers are likely to satisfy the conditions for exemption under Section 9(1). This allows companies to have confidence that, if their agreement meets the conditions of the block exemption, it is legal under the Chapter I prohibition, without needing to scrutinise that agreement against each of the conditions in the Section 9 exemption. The benefits of such a block exemption include reducing the burden of assessing compliance with UK competition law for the parties to the agreement.

2.15 An agreement that falls within a category specified in a block exemption (and that satisfies the conditions specified in the block exemption) will not be prohibited under the Chapter I prohibition and is enforceable by the parties to the agreement. The parties to the agreement need to satisfy themselves that the agreement meets the conditions set out in the block exemption and be in a position to prove that the agreement benefits from the block exemption. In the case of horizontal agreements, the relevant block exemptions are those provided by the HBEOs.

2.16 Where an agreement has as its object or effect an appreciable restriction of competition but does not fall within the terms of the relevant HBEO, consideration will need to be given by the parties to the following questions:

(a) Should it be amended so as to bring it within the terms of the HBEOs?

(b) Does it fulfil the conditions for exemption under Section 9(1)?

2.17 Neither the Section 9 exemption nor the HBEOs exempt agreements from the application of provisions equivalent to the Chapter I prohibition in the laws of other jurisdictions, such as Article 101 of the TFEU in the EU.[12]

2.18 Further details on the application of the Chapter I prohibition and the HBEOs to horizontal agreements are provided in the remainder of this Guidance.

[12] Although competition laws in other jurisdictions may contain their own exemptions from their prohibitions on anti-competitive conduct.

3. Overview of the assessment of horizontal agreements

3.1 This Guidance applies to horizontal agreements concerning goods, services and technologies.[13] This Part gives an overview of the various steps in the assessment of horizontal agreements under the Chapter I prohibition and the HBEOs and cross-refers to the relevant sections of this Guidance where those matters are addressed in more detail.

Assessing agreements that combine different stages of cooperation

3.2 Horizontal agreements may combine different stages of cooperation, for example, research and development ('R&D') and the production and/or commercialisation of its results. Such agreements are also covered by this Guidance.

3.3 When using this Guidance for the analysis of agreements that integrate different stages of cooperation ('integrated cooperation'), as a general rule, all the sections relating to the different aspects of the cooperation will be relevant. However, for the purposes of this Guidance, integrated cooperation can be considered to have a 'centre of gravity'. When assessing whether integrated cooperation will normally be considered a restriction of competition by object or by effect, the section of this Guidance relating to the cooperation's centre of gravity prevails for the entire cooperation.

3.4 Two factors are particularly relevant for determining the centre of gravity of integrated cooperation: firstly, the starting point of the cooperation, and, secondly, the degree of integration of the different functions which are combined. Although assessment under the Chapter I prohibition should be conducted on a case-by-case basis and it is not possible to provide a precise and definite rule that applies to all cases and all possible combinations, in general:

— the centre of gravity of a horizontal agreement involving both joint R&D and joint production of the results would be the joint R&D if the joint production would only take place in circumstances where the joint R&D was successful. This means that the results of the joint R&D are decisive for the subsequent joint production. The guidance in the Part on R&D agreements (Part 4) therefore prevails in such a case. The outcome of the assessment of the centre of gravity would be different

[13] In this Guidance, goods, services and technologies will be referred to collectively as 'products', unless the context suggests otherwise.

if the parties would have engaged in the joint production in any event, that is, irrespective of the joint R&D. If that were the case, such agreements should instead be assessed as joint production agreements and the guidance in the Part on production agreements (Part 5) prevails. If the agreement provides for a full integration in the area of production and only a partial integration of some R&D activities, the centre of gravity of the cooperation would also be the joint production;

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

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

3.5 The centre of gravity test only applies to the relationship between the different Parts of this Guidance, not to the relationship between different block exemption orders. The scope of a block exemption order is defined by its own provisions, such that the R&D BEO and SABEO may each apply to different forms of cooperation within an agreement if that cooperation meets the conditions of each. For further details, see Part 4 for agreements covered by the R&D BEO and Part 5 for agreements covered by the SABEO.

Applicability of the Chapter I prohibition to horizontal agreements

Introduction

Undertakings

3.6 The Chapter I prohibition applies to undertakings and associations of undertakings. An undertaking is any natural or legal person (or other entity) engaged in economic activity (eg companies, firms, partnerships, sole traders, public entities) regardless of its legal status and the way it is financed.[14] An association of undertakings is a body through which undertakings of the same

[14] See, for example, judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraphs 29 and 36; judgment of 12 July 1984, *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11; and judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 53 and the case-law cited.

general type represent and defend their interests on the market.[15] This Guidance applies to horizontal agreements and concerted practices between undertakings and decisions by associations of undertakings.

3.7 The Chapter I prohibition does not apply to agreements between undertakings which form part of a single economic unit or entity, as they form part of the same undertaking.[16] Companies that form part of the same undertaking are not considered to be competitors for the purposes of this Guidance, even if they are both active on the same relevant product and geographic markets.

3.8 In the context of agreements between parents and their joint venture, when it is demonstrated that the parents exercised decisive influence over the joint venture, the CMA will typically not apply the Chapter I prohibition to agreements and concerted practices between the parent(s) and the joint venture concerning their activity in the relevant market(s) where the joint venture is active.

3.9 Nevertheless, the CMA may apply the Chapter I prohibition to agreements:

- between the parents to create the joint venture;
- between the parents to alter the scope of the joint venture;
- between the parents and the joint venture outside the product and geographic scope of the activity of the joint venture; and
- between the parents without involvement of the joint venture, even concerning the relevant market where the joint venture is active.

3.10 The fact that a joint venture and its parents are considered to form part of the same undertaking on a certain market or in a certain context does not prevent the parent companies from being independent on all other markets.[17]

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[15] In the sense of the judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 76, and the Opinion of Advocate General Léger delivered on 10 July 2001, *Wouters*, C-309/99, EU:C:2001:390, paragraph 61. The concept of an 'association of undertakings' has been found to apply, for example, to trade associations and professional regulatory bodies.

[16] See, for example, judgment of 24 October 1996, *Viho*, C-73/95 P, EU:C:1996:405 (in particular paragraph 51) in which the Court of Justice held that the European Commission had been correct to reject a complaint that Parker's distribution agreements concluded with its wholly-owned subsidiary infringed Article 101 of the TFEU. In addition, in the context of mergers, Schedule 1, paragraph 1(1) CA98 also provides that the Chapter I prohibition does not apply to certain agreements that a merger or joint venture within the merger provisions of the Enterprise Act 2002. That is, the Chapter I prohibition does not apply to an agreement which results or would result in any two enterprises 'ceasing to be distinct enterprises' for the purposes of Part 3 of the Enterprise Act.

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

Agreements, concerted practices and decisions

3.11 In order for the Chapter I prohibition to apply to horizontal cooperation, there must be a form of coordination between competitors. In other words, there must be an agreement or concerted practice between two or more undertakings, or a decision by an association of undertakings.

3.12 An 'agreement' refers to where two or more undertakings have expressed the concurrence of wills to cooperate.[18] A 'concerted practice' is a form of coordination between undertakings in which they have not reached an agreement but knowingly substitute the risks of competition through practical cooperation.[19] The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two.[20]

3.13 The existence of an agreement, a concerted practice or decision by an association of undertakings does not in itself indicate that there is a restriction of competition within the meaning of the Chapter I prohibition.

3.14 As noted above and for ease of reference, where in this Guidance the term 'agreement' is used it also covers concerted practices and decisions of associations of undertakings, unless otherwise stated.

Actual and potential competitors

3.15 Horizontal agreements can be entered into between actual or potential competitors. The Chapter I prohibition applies to agreements restricting potential competition as well as actual competition.[21]

3.16 Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market. An undertaking is considered as a potential competitor of another undertaking if, absent the agreement, the former would on realistic grounds[22] and not just as a mere theoretical possibility be likely to, within a short period of time, undertake the necessary

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[18] See, for example, judgment of 13 July 2006, *Commission* v *Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37.
[19] See, for example, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26 and judgment of 31 March 1993, *Wood Pulp*, C-89/85, C-104/85, C-114/85, C-116/85, C- 117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 63.
[20] Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126 and the case law cited.
[21] See for example *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4, paragraph 91, and the case law cited.
[22] See for example judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 36 and judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 21.

additional investments or other necessary switching costs to enter the relevant market on which the latter is active.[23] This assessment has to be based on realistic grounds, having regard to the structure of the market and the economic and legal context in which it operates; [24] the mere theoretical possibility to enter a market is not sufficient.[25]

3.17 There must be real and concrete possibilities for that undertaking to enter the market. Conversely, there is no need to demonstrate with certainty that the undertaking will in fact enter the market concerned and, a fortiori, that it will be capable, thereafter, of retaining its place there.[26]

3.18 Where this Guidance refers to 'competitors', it refers to both actual and potential competitors, unless indicated otherwise.

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

— If the undertaking has a firm intention and an inherent ability to enter the market within a short period of time and does not meet barriers to entry that are insurmountable.[27] Evidence of an undertaking's firm intention may in some markets include, for example, evidence of initiatives to market a relevant product, measures to obtain necessary licences (where applicable) or legal steps to challenge an incumbent's patents (where applicable).[28]

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[23] See, for example, judgment of 14 April 2011, *Visa Europe Ltd and Visa International Service*, T-461/07, EU:T:2011:181, paragraph 189.
[24] See for example judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 39.
[25] Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 37 and 38.
[26] Judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 21; judgment of 30 January 2020 *Generics (UK),* C-307/18, ECLI:EU:C:2020:52, paragraphs 36-39.
[27] The existence of a patent cannot, as such, be regarded as such an insurmountable barrier. See judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 46-51.
[28] See judgment of 30 January 2020, *Generics (UK),* C-307/18, EU:C:2020:52, paragraph 44; *GSK v CMA* [2021] CAT 9, paragraph 13. There is no requirement, however, for an undertaking to have taken any or all of these steps. For example, an undertaking may be a potential competitor before it has obtained a necessary licence (*GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4, paragraph 158, citing the judgment of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, paragraph 171 (a judgment which – after the end of the period for the implementation of the UK's withdrawal from the European Union – was upheld by the Court of Justice in the judgment of 25 March 2021, Lundbeck v Commission, C-591/16, EU:C:2021:243, paragraph 83). See also *GSK v CMA* [2021] CAT 9, paragraph 13, citing the judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 44). An undertaking may also be a potential competitor before it has obtained saleable finished product (judgment of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, paragraphs 308-310 and 321-322. See also judgment of 8 September 2016, *Sun Pharmaceuticals and Ranbaxy v Commission*, T-460/13, EU:T:2016:453, paragraph 162, a judgment which – after the end of the period for the implementation of the UK's withdrawal from the European Union – was upheld

— If the undertaking has taken sufficient preparatory steps to enable it to enter the market concerned.[29]

3.20 The perception of the established undertaking is a factor that is relevant to the assessment of the existence of a competitive relationship between that undertaking and an undertaking outside the market since, if the latter is perceived as a potential entrant to the market, it may, by reason merely that it exists, give rise to competitive pressure on the operator that is established in that market.[30] The conclusion of an agreement between a number of undertakings operating at the same level in the production chain may also indicate that the undertakings are potential competitors.[31]

Analytical framework

3.21 Typically, the following steps will be relevant in assessing horizontal agreements:

(a) A horizontal agreement will fall within the scope of the Chapter I prohibition if there is an agreement between undertakings which may affect trade within the UK and which has as its object or effect an appreciable prevention, restriction or distortion of competition within the UK.[32] See paragraph 3.25 below onwards and the Part(s) of this Guidance that apply to the type of agreement in question.

(b) In the case of certain R&D and specialisation agreements, where such agreements fall within the scope of the Chapter I prohibition, the agreement may nonetheless benefit from the block exemption provided by the HBEOs, with the effect that the agreement is exempt from the Chapter I prohibition. See Part 4 for agreements covered by the R&D BEO and Part 5 for agreements covered by the SABEO.

(c) Agreements which fall within the Chapter I prohibition and do not meet the conditions of the R&D BEO or SABEO may also benefit from exemption from the Chapter I prohibition if they fulfil the conditions of the Section 9

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by the Court of Justice in *Sun Pharmaceuticals and Ranbaxy v Commission*, C-568/16, EU:C:2021:241, paragraph 44).

[29] Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 43.

[30] Judgment of 14 April 2011, *Visa Europe and Visa International Service v Commission*, T-461/07, EU:T:2011:181, paragraph 169.

[31] See for example, judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 36-58, in particular, paragraph 55.

[32] The Chapter I prohibition prohibits both actual and potential anti-competitive effects. See for example judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 77, and judgment of 23 November 2006, *Asnef-Equifax v Asociación de Usuarios de Servcicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 50.

exemption. See paragraph 3.41 onwards and the Part(s) of this Guidance that apply to the agreement in question.

3.22 The Chapter I prohibition only applies to agreements implemented, or intended to be implemented, in the UK.[33] However, an agreement between parties located outside the UK may still be found to infringe UK competition law if the agreement is implemented, or intended to be implemented, in the UK and has as its object or effect the restriction of competition within the UK. Such an agreement will need to fall within the terms of the relevant HBEO in order to benefit from the block exemption provided by the relevant HBEO.

3.23 The Chapter I prohibition will not apply to certain forms of agreement, such as where there is a lack of effect on trade or where the agreement is of minor importance.[34] See paragraph 3.48 onwards for further information on horizontal agreements that generally fall outside the scope of the Chapter I prohibition, and paragraph 3.55 onwards on the relationship between this Guidance and other guidance and legislation, including on the agreements to which Chapter I prohibition may not apply because of the provisions of other legislation.

3.24 An agreement which is prohibited by the Chapter I prohibition will be void and unenforceable.

Assessment under the Chapter I prohibition

3.25 Horizontal agreements can lead to substantial benefits, including sustainability benefits, in particular if they combine complementary activities, skills or assets. Horizontal cooperation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety and launch innovation faster. Similarly, horizontal cooperation can be a means to address shortages and disruptions in supply chains or reduce dependencies on certain products[35] and technologies.

Main competition concerns related to horizontal cooperation

3.26 Horizontal agreements may, however, limit competition in several ways. The agreement may, for instance, lead to a loss of competition on the relevant

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[33] Section 2(3) CA98. Note that the UK government has committed to amending the Chapter I prohibition so that it can apply to agreements, concerted practices and decisions which are implemented outside of the UK, depending on the effects of the conduct within the UK. See: Department for Business, Energy, and Industrial Strategy (2022), *Reforming competition and consumer policy: government response.*

[34] See paragraphs 3.48-3.52 for further information on when an agreement is of minor importance.

[35] As explained at paragraph 3.1, footnote 13, the notion of 'products' includes goods, services and technologies (unless the context suggests otherwise).

market or a risk of collusion between the parties, or the agreement may give rise to anti-competitive foreclosure concerns.

Loss of competition on the relevant market

3.27 The potential effect of horizontal agreements may be the loss of competition between the parties to the agreement. Competitors can benefit from the reduction of competitive pressure that results from the agreement and may therefore find it profitable to increase their prices or adversely affect the other parameters of competition on the market.

3.28 For the competitive assessment of the potential loss of competition, it is relevant whether:

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

Risk of collusion

3.29 Horizontal agreements - even when the terms of such agreements are not themselves restrictive - can create a context in which more harmful coordination is more likely to occur. For instance, harmful coordination may be easier, more stable or more effective for parties that were already coordinating before entering into the agreement. Such agreements may also afford parties mechanisms and opportunities for communication (which may, for instance, lead to the disclosure of competitively sensitive information)[36] or result in greater symmetries and commonalities in cost structure (that is, the proportion of variable costs which the parties have in common) allowing them to coordinate market prices and output more easily.

3.30 For the competitive assessment of the risk of collusion, it is relevant whether:

- the parties to the agreement have high market shares;

[36] Information that that reduces competitive uncertainty in the market and is capable of influencing the competitive strategy of other undertakings is sometimes described as ‘commercially sensitive’ or ‘strategic’ or ‘competitively sensitive’ information. This Guidance uses the expression ‘competitively sensitive information’. See Part 8 on Information Exchange.

— they are actual or potential competitors;

— the market characteristics are conducive to coordination;

— the area of cooperation accounts for a high proportion of the parties' variable costs in a given market; and

— the parties combine their activities in the area of cooperation to a significant extent. This could, for instance, be the case, where they jointly manufacture or purchase an important intermediate product or jointly manufacture or distribute a high proportion of their total output of a final product.

Foreclosure

3.31 Some horizontal agreements, for example, production and standardisation agreements, may also give rise to anti-competitive foreclosure concerns. Competitors may be impeded through anti-competitive means from competing effectively, for example, by being denied access to an important input or by being blocked from an important route to the market. The exchange of certain types of information or data may also place undertakings that are not party to the agreement at a significant competitive disadvantage as compared to the undertakings that are.

Restrictions of competition by object

3.32 Restrictions of competition by object within the meaning of the Chapter I prohibition refer to agreements which, by their very nature, are harmful to the proper functioning of competition.[37] In that regard, certain types of cooperation between undertakings reveal a sufficient degree of harm to competition that there may be no need to examine their effects.[38]

3.33 The following elements are taken into account in assessing whether an agreement has an anti-competitive object:

— the content of the agreement;

— the objectives it seeks to attain; and

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

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[37] Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.
[38] Judgment of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49.

3.34 When determining that legal and economic context, it is also necessary to take into consideration:[39]

— the nature of the products affected; and

— the real conditions of the functioning and structure of the market or markets in question.[40]

3.35 Any possible pro-competitive effects of the agreement that the parties' raise are to be taken into account as part of the assessment of the context of the agreement for the purposes of its characterisation as a restriction by object, where those effects are demonstrated and relevant, specifically related to the agreement concerned, and sufficiently significant.[41]

3.36 The parties' *intention* is not a necessary factor in determining whether an agreement has an anti-competitive object, but it may be taken into account.[42] An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim.[43]

Restrictive effects on competition

3.37 A horizontal agreement that does not in itself reveal a sufficient degree of harm to competition can still have restrictive *effects* on competition. For a horizontal agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case, it is necessary to assess competition within the actual context in which it would

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[39] For agreements that have been held that they constitute particularly serious breaches of the competition rules, such as a price-fixing cartel or market sharing agreements, the analysis of the legal and economic context may be limited to what is strictly necessary in order to establish the existence of a restriction by object. See judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, paragraph 29 and judgment of 27 April 2017, *FSL v Commission*, C-469/15 P, EU:C:2017:308, paragraph 107.

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

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

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

[43] See, for example, judgment of 8 November, *NV IAZ International Belgium and others v Commission of the European Communities*, Joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraphs 22-25 and judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21.

occur if that agreement had not existed.[44] Agreements can have restrictive effects by appreciably reducing competition between the undertakings that are parties to the agreement or between any one of them and third parties.[45]

3.38 The following elements are relevant to assessing whether an agreement has restrictive effects:

— The nature and content of the agreement;

— the actual context in which the cooperation occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products affected, and the real conditions of the functioning and the structure of the market or markets in question;[46]

— the extent to which the parties individually or jointly have or obtain some degree of market power and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power;[47] and

— both actual and potential restrictive effects on competition must be sufficiently appreciable.[48]

3.39 Sometimes undertakings conclude horizontal agreements as they would not be able to independently carry out the project or activity covered by the cooperation on the basis of objective factors, for instance, due to the limited technical capabilities of the parties. Such horizontal agreements will normally not give rise to restrictive effects on competition within the meaning of the

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

[45] Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 88 and judgment of 23 November 2006, *Asnef-Equifax v Asociación de Usuarios de Servcicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 51.

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

[47] Market power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time. The degree of market power normally required for a finding of an infringement under the Chapter I prohibition is less than the degree of market power required for a finding of dominance under the Chapter II prohibition, where a substantial degree of market power is required.

[48] Judgment of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52.

Chapter I prohibition unless the parties could have carried out the project or activity with less stringent restrictions on their cooperation.[49]

'Ancillary' restrictions

3.40 The Chapter I prohibition will not apply to a restriction in a horizontal agreement where such a restriction is necessary and directly related to a main operation or activity covered by the agreement, provided that the main operation or activity is in itself not anti-competitive. Such a so-called 'ancillary restraint' may not fall within the scope of the Chapter I prohibition if it is objectively necessary to implement that main operation or activity covered by the agreement and proportionate to the objectives of that main operation or activity.[50] In such cases it is necessary to examine whether the agreement would be impossible to carry out absent the restriction in question.[51] The fact that the operation or the activity covered by the agreement would be more difficult to implement, or less profitable without the restriction concerned, does not in itself make that restriction objectively necessary and thus ancillary.[52]

Assessment under the Section 9 exemption

3.41 The assessment of restrictions of competition by object or effect under the Chapter I prohibition is only one step of the analysis. Another step is the assessment of the efficiencies generated by the restrictive agreements within the framework of the Section 9 exemption.[53]

3.42 Where, in an individual case, there is a restriction of competition by object or by effect within the meaning of the Chapter I prohibition, the parties to the agreement can invoke the Section 9 exemption as a defence. The burden of proof under the Section 9 exemption rests on the undertaking(s) invoking the

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[49] See also paragraph 18 of the European Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, to which the CMA will have regard as a relevant statement in accordance with section 60A CA98. See further paragraph 1.10, footnote 6 on Section 60A CA98.

[50] Judgment of 11 September 2014, *MasterCard* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89. In accordance with section 60A CA98, to the extent that there is inconsistency between the European Commission's Ancillary Restraints Notice, OJ 2005 C56/24, and the principles laid down by the Court of Justice before the end of the Transition Period, the CMA will act with a view to securing that there is no inconsistency between the principles the CMA applies and the principles laid down by the Court of Justice, so far as applicable immediately before the end of the Transition Period.

[51] Judgment of 11 September 2014, *MasterCard* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See also the judgment of 4 July 2018 of the Court of Appeal in the joined cases of *Sainsburys v MasterCard; AAM v MasterCard; Sainsbury's v Visa* [2018] EWCA Civ, paragraph 59 (issue not considered on appeal).

[52] See for example the judgment of 11 September 2014, *MasterCard* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91.

[53] The general approach when applying the Section 9 exemption is presented in the European Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, paragraph 97, to which the CMA will have regard in accordance with section 60A CA98.

benefit of this provision.[54] Cogent empirical evidence is necessary to carry out the required evaluation of any claimed efficiencies for the purposes of fulfilling the conditions of the Section 9 exemption.[55] It is sufficient if the arguments and evidence provided by the undertaking(s) enable the CMA to conclude that the agreement in question is sufficiently likely to give rise to any such efficiencies.[56]

3.43 For the Section 9 exemption to apply the following conditions must all be fulfilled:

- the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress. In this guidance, the attainment of these objectives will generally be referred to as 'efficiencies';
- consumers must receive a fair share of the resulting benefits, that is, the efficiencies, including qualitative efficiencies, attained by the indispensable restrictions must be sufficiently passed on to consumers so that consumers are at least compensated for the restrictive effects of the agreement. Hence, efficiencies that only accrue to the parties to the agreement will not suffice. For the purposes of this Guidance, the concept of 'consumers' includes all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers;[57]
- the restrictions must be indispensable to the attainment of the efficiencies; and
- the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.

3.44 The assessment of horizontal agreements under the Section 9 exemption is made within the actual context in which they occur[58] and based on the facts existing at any given point in time.[59] The assessment is sensitive to material

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[54] Section 9(2) CA98.
[55] See the judgment of the Supreme Court in *Sainsbury's v Visa and Sainsbury's Mastercard* [2020] UKSC 24, in particular paragraph 116
[56] See, for example, judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraphs 93-95.
[57] More detail on the concept of consumer is provided in paragraph 84 of the European Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, (2004), p. 97, which the CMA will have regard for in accordance with section 60A CA98.
[58] See judgment of 17 September 1985, *Ford*, 25/84 and 26/84, EU:C:1985:340.
[59] In *Sainsbury's v Visa and Sainsbury's v Mastercard* [2020] UKSC 24, paragraphs 109-138, the Supreme Court held that the standard of proof under the Section 9 exemption is the civil standard of balance of probabilities.

changes in the facts. The Section 9 exemption applies provided that the four conditions above are fulfilled and ceases to apply when that is no longer the case.[60]

3.45 When applying the Section 9 exemption it is necessary to take into account the investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

3.46 The R&D BEO and SABEO are based on the Section 9 exemption. They are based on the premise that the combination of complementary skills or assets can be the source of substantial efficiencies in R&D and specialisation agreements. Such efficiencies may also result from other types of horizontal agreements and will be relevant to any individual assessment of the application of the Section 9 exemption. The analysis of the efficiencies of an individual agreement under the Section 9 exemption is therefore to a large extent a question of identifying the complementary skills and assets that each of the parties brings to the agreement and evaluating whether the resulting efficiencies are such that the conditions of the Section 9 exemption are fulfilled.

3.47 Complementarities may arise from horizontal agreements in various ways. An R&D agreement may bring together different research capabilities and combine complementary skills and assets that may result in improved or new products and technologies being developed and marketed than would otherwise be the case. Other horizontal agreements may allow parties to combine forces to design, produce and commercialise products or to jointly purchase products or services they may need for their operations. Horizontal agreements that do not involve the combination of complementary skills or assets are less likely to lead to efficiencies that benefit consumers. Such agreements may reduce duplication of certain costs, for instance, because certain fixed costs can be eliminated. However, fixed cost savings are, in general, less likely to result in benefits to consumers than savings in, for instance, variable or marginal costs.

Horizontal agreements that generally fall outside the scope of the Chapter I prohibition

Agreements that lack effect on trade and agreements of minor importance

3.48 The Chapter I prohibition applies only where an agreement brings about an appreciable restriction of competition within the UK and affects trade within

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[60] An agreement that falls within the Chapter I prohibition might fall outside that prohibition over time following a change in circumstance (and vice versa). See for example *Passmore v Morland plc* [1999] 3 All ER 1005.

the UK.[61] Agreements that do not have as their object or effect an appreciable restriction of competition within the UK or that are not capable of affecting trade within the UK do not fall within the scope of the Chapter I prohibition.[62]

3.49 In determining whether an agreement has an appreciable effect on competition for the purposes of the Chapter I prohibition, the CMA will have regard to the European Commission's approach as set out in its Notice on Agreements of Minor Importance (also known as the De Minimis Notice).[63]

3.50 The European Commission's De Minimis Notice states that horizontal agreements entered into by actual or potential competitors do not appreciably restrict competition if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement.[64] This general rule does not apply to agreements that restrict competition by object, irrespective of the parties' market shares.[65] This is because an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect, an appreciable restriction on competition.[66] The CMA will also not apply the 10% threshold to agreements containing any of the restrictions listed as 'hardcore' restrictions in any block exemption orders[67] or retained EU block exemption regulations, as such restrictions generally constitute restrictions by object.[68]

3.51 Where, in a relevant market, competition is restricted by the cumulative effect of parallel networks of agreements, the 10% market share threshold is reduced to 5%.[69]

3.52 There is no presumption that horizontal agreements that do not restrict competition by object and where the parties' aggregate market share exceeds 10% automatically fall within the Chapter I prohibition. Such agreements may

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[61] See for example *North Midland Construction v OFT* [2011] CAT 14, paragraphs 35–63.
[62] See for example *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paragraphs 149–150, and P&*S Amusements v Valley House Leisure* [2006] EWHC 1510 (Ch), paragraphs 20-26. See also CMA decisions eg Online resale price maintenance in the light fittings sector, CMA decision of 3 May 2017, paragraphs 4.156–4.157 and 4.166; Cleanroom laundry services and products, CMA decision of 14 December 2017, paragraph 5.167; Nortriptyline tablets (market sharing), CMA decision of 4 March 2020, paragraphs 6.172–6.173
[63] *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union*, OJ C 291, (2014) (the 'De Minimis Notice'), paragraph 1, which the CMA will have regard for in accordance with section 60A CA98.
[64] De Minimis Notice, paragraph 8.
[65] See *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paragraphs 149-150.
[66] See by analogy the judgment of 13 December 2012, *Expedia,* C-226/11, EU:C:2012:795, paragraph 37.
[67] For the purposes of section 6 CA98.
[68] De Minimis Notice, paragraph 13.
[69] De Minimis Notice, paragraph 10.

still lack an effect on trade within the UK or they may not constitute an appreciable restriction of competition.[70] They therefore need to be assessed in their legal and economic context. This Guidance includes criteria for the individual assessment of such agreements.

Conduct required by law

3.53 The Chapter I prohibition does not apply to the anti-competitive agreement or conduct of undertakings to the extent it is made or done to comply with a legal requirement (for instance, it is required by UK legislation)[71] or UK legislation precludes all scope for competitive activity for the undertakings involved.[72] Nonetheless, the fact that public authorities encourage a horizontal agreement does not mean that it is permissible under the Chapter I prohibition.[73] Undertakings also remain subject to the Chapter I prohibition if a national law merely encourages or makes it easier for them to engage in anti-competitive conduct.[74]

Agreements excluded by the CA98

3.54 Certain types of agreement are excluded from the scope of the Chapter I prohibition as a result of being listed in the Schedules 1, 2 and 3 CA98, for example, agreements to the extent they result in a merger or joint venture falling within the merger provisions of the Enterprise Act 2002,[75] and in relation to agricultural products, certain agreements between 'recognised producer organisations' or 'recognised associations of producers organisations'.[76]

Relationship with other guidance and legislation

3.55 Agreements that are entered into between undertakings operating at a different level of the supply chain, that is, vertical agreements, are addressed in the VABEO and the VABEO Guidance. However, to the extent that vertical

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[70] See judgment of 8 June 1995, *Langnese-Iglo v Commission*, T-7/93, EU:T:1995:98, paragraph 98.
[71] See Schedule 3, paragraph 5 CA98.
[72] See judgment of 14 October 2010, *Deutsche Telekom*, C-280/08 P, EU:C:2010:603, paragraphs 80-81. The courts have interpreted this exception narrowly; see, for example, judgment of 29 October 1980, *Van Landewyc*k, 209 to 215 and 218/78, EU:C:1980:248, paragraphs 130–134; judgment of 11 November 1997, *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33 and further.
[73] See, for example, judgment of 13 December 2006, *FNCBV and Others v Commission,* T- 217/03 and T-245/03, EU:T:2006:391, paragraph 92.
[74] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 82.
[75] That is, the Chapter I prohibition does not apply to an agreement which results or would result in any two enterprises 'ceasing to be distinct enterprises' for the purposes of Part 3 of the Enterprise Act.
[76] See Schedule 3, paragraph 9 CA98.

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, where a vertical agreement between competitors is reciprocal or does not meet one of the conditions listed in Article 3(5)(a) to (d) of the VABEO, such agreements between competitors should be assessed by reference to this Guidance. Should there be a need to also assess such agreements under the VABEO and VABEO Guidance, this will be specifically stated in this Guidance. Absent such a reference in this Guidance, only this Guidance will be applicable to vertical agreements between competitors.

3.56 Where this Guidance refers to the relevant market, the CMA's Guidance on Market Definition provides guidance on the rules, criteria and evidence which the CMA has regard to when considering market definition issues.[77] The relevant market for the purpose of applying the Chapter I prohibition to horizontal agreements should therefore be defined having regard to that guidance and any future guidance relating to the definition of relevant markets for the purposes of UK competition law.

3.57 This Guidance applies to common types of horizontal cooperation irrespective of the level of integration they entail, except for certain types of agreement that are specifically excluded from its scope or from the scope of the Chapter I prohibition (as described above).

3.58 The assessment under the Chapter I prohibition as described in this Guidance is without prejudice to the possible parallel application of the Chapter II prohibition to horizontal agreements.[78]

[77] OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997, which is a statement of the European Commission for the purpose of section 60A CA98.

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

4. Research and Development Agreements

Introduction

4.1 The purpose of this Part is to provide guidance on the scope and competitive assessment of research and development ('R&D')[79] agreements.

4.2 R&D agreements vary in form and scope. They include outsourcing agreements for certain research and development activities, agreements covering the joint improvement of existing technologies and cooperation concerning the research, development and marketing of completely new products. The research and development cooperation may take the form of a cooperation agreement or of cooperation in a jointly controlled company.[80] This also includes cooperation between competitors in looser forms, such as technical cooperation in working groups.

4.3 R&D agreements may be concluded by large undertakings, SMEs,[81] start-ups, academic bodies or research institutes or any combination of them.

4.4 Research and development cooperation may not only affect competition in existing product or technology markets, but also competition in innovation.

4.5 For the purpose of the R&D BEO and this Part of this Guidance, 'competition in innovation'[82] refers to research and development efforts for new products and/or technologies, that create their own new market[83] and to R&D clusters, ie research and development efforts directed primarily towards a specific aim or objective arising out of the R&D agreement.[84] The specific aim or objective of an R&D cluster cannot yet be defined as a product or a technology or it involves a substantially broader target than a specific product or technology on a specific market.

4.6 The assessment of R&D agreements under the Chapter I prohibition is covered by paragraphs 4.11 - 4.36 of this Guidance. R&D agreements may benefit from the exemption established by the R&D BEO. The block

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[79] In the rest of this Part, references to the terms 'R&D' or 'research and development' reflect the use of those terms in the R&D BEO.
[80] See paragraphs 3.8 and 3.40 of this Guidance.
[81] As defined in the Companies Act 2006 (accounts and reports) (companies qualifying as small-sized under Section 382 of the Companies Act 2006 (legislation.gov.uk) and companies qualifying as medium-sized under Section 465 of the Companies Act 2006 (legislation.gov.uk) (and any future amendments).
[82] See article 8(10) of the R&D BEO regarding the parties to the agreement (the definition of 'an undertaking competing in innovation') and see article 8(10) regarding third parties (the definition of 'competing R&D effort') and article 8(5)(b) (definition of third parties that are able independently to engage in a research and development effort as set out in that article 8(5)(b)).
[83] Article 2(2)(b) of the R&D BEO.
[84] Article 2(1) of the R&D BEO (definition of R&D cluster).

exemption is based on the consideration that – to the extent that R&D agreements are caught by the Chapter I prohibition and fulfil the criteria set out in the R&D BEO – they will typically fulfil the four conditions laid down in the Section 9 exemption. Paragraphs 4.37 - 4.55 of this Guidance describes the types of agreements covered by the R&D BEO. The conditions for exempting R&D agreements are explained in paragraphs 4.56 - 4.135. The hardcore and excluded restrictions described in paragraphs 4.109 - 4.135 of this Guidance aim to ensure that only those restrictive R&D agreements (that is those which would otherwise be caught by the Chapter I prohibition) that can reasonably be expected to fulfil the conditions of the Section 9 exemption, benefit from the exemption provided for in Article 3 of the R&D BEO.

4.7 The exemption provided for in the R&D BEO applies as long as the benefit of the block exemption has not been cancelled in an individual case by the CMA (see paragraphs 4.141 - 4.146 of this Guidance).

4.8 Where an R&D agreement does not benefit from the exemption provided by the R&D BEO, then an assessment must be made as to whether, in the individual case, the R&D agreement falls within the scope of the Chapter I prohibition and, if so, whether the conditions of the Section 9 exemption are satisfied – this is described in paragraphs 4.152 - 4.160 of this Guidance, while paragraphs 4.161 - 4.165 sets out the relevant time of assessment of the R&D agreement, including, in particular, the relevant time for conducting an assessment under the Section 9 exemption.

Relevant markets

4.9 The CMA's Guidance on Market Definition provides guidance on the rules, criteria and evidence to which the CMA has regard when considering market definition issues.[85] That guidance will not be further explained in this Part and should be taken into account in assessing market definition.[86]

4.10 Under the R&D BEO, a relevant product or technology market is the market for the products or technologies capable of being improved, substituted or replaced by the contract products or technologies.[87]

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[85] OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997, which is a statement of the European Commission for the purpose of section 60A CA98.

[86] Any future guidance relating to market definition for the purposes of UK competition law, as applicable, will also be taken into account.

[87] Article 8(10) of the R&D BEO (definitions of 'relevant product market' and 'relevant technology market').

Assessment under the Chapter I prohibition

Main competition concerns

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

4.12 Where R&D cooperation **directly limits or restricts competition between the parties or facilitates a collusive outcome on the market,** this may lead to higher prices, less choice for consumers or lower quality of products or technologies. This could also lead to reduced or slowed-down innovation and thereby to worse or fewer products or technologies coming to the market. It can also lead to products or technologies reaching the market later than they otherwise would.

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

Restrictions of competition by object

4.14 Agreements relating to R&D restrict competition by object if their main purpose is not R&D, but to serve as a tool to engage in a cartel or in other by object infringements under the Chapter I prohibition, such as price-fixing, output limitation, market allocation or restrictions of technical development.

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

Restrictive effects on competition

Introduction – agreements normally not restricting competition

4.16 Many R&D agreements do not fall under the Chapter I prohibition when they are concluded by undertakings with complementary skills that would not otherwise have been able to conduct the R&D on their own.

4.17 If, on the basis of objective factors, the parties would not be able to carry out the necessary R&D **independently**, the R&D agreement will normally not have restrictive effects on competition. A party may not be able to carry out the R&D independently, for instance, where it has limited technical capabilities or limited access to finance, skilled workers, technologies or other resources. A restriction of competition does not arise in such a case because there would only have been one research and development effort/resulting products coming to market, so the R&D cooperation does not change the number of such efforts/products.

4.18 Moreover, R&D cooperation between not competing undertakings[88] generally does not give rise to restrictive horizontal effects on competition.

4.19 The competitive relationship between the parties has to be analysed in the context of the affected existing markets[89] and in the context of innovation.[90]

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

4.21 Agreements relating to 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 the Chapter I prohibition. 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 the Chapter I prohibition and should therefore be included within the scope of the R&D BEO.

4.22 R&D cooperation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing generally does not give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. Those R&D agreements can, however, give rise to anti-

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[88] For a definition of 'not competing undertakings', see article 8(9) of the R&D BEO.

[89] Within the context of the R&D BEO, see article 8(10) of the R&D BEO (definitions of 'actual competitor' and 'potential competitor').

[90] Within the context of the R&D BEO, see article 8(10) of the R&D BEO (definition of 'an undertaking competing in innovation').

competitive effects, for example if, as a result of the R&D agreement, competition at the innovation level is appreciably reduced.

Market power

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

4.24 There is no absolute threshold above which it can be presumed that an R&D agreement creates or maintains market power and thus is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. However, R&D agreements between undertakings that are actual or potential competitors in relation to the products and/or technologies that arise out of the R&D agreement are covered by the exemption in the R&D BEO provided that their combined market share does not exceed 25% on the relevant product and technology markets and that the other conditions for the application of the R&D BEO are fulfilled.

4.25 The R&D BEO also covers R&D agreements between undertakings competing in innovation. These agreements are covered by the exemption in the R&D BEO provided that there are three or more (i) competing R&D efforts,[91] comparable with those of the parties to the agreement or (ii) third parties that are able independently to engage in relevant research and development efforts. The other conditions for the application of the R&D BEO will also have to be fulfilled. Subject to these conditions, an agreement between undertakings competing in innovation[92] would be unlikely to have restrictive effects in the UK given that the parties will likely not be able to profitably maintain innovation below competitive levels for a longer period of time.

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[91] Article 8(10) of the R&D BEO defines a 'competing R&D effort', in relation to an R&D agreement, as 'a research and development effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely independently to engage, and which concerns— (a) research and development of a product or technology which is the same as, or likely to be substitutable for, one that would be covered by the R&D agreement; or (b) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement, and does not include any research and development effort in which any of the parties to the R&D agreement is also engaged (including as a financing party)'.

[92] Article 8(10) of the R&D BEO defines an undertaking competing in innovation, in relation to an R&D agreement, as 'an undertaking which independently engages in, or, in the absence of the agreement, would be able and likely independently to engage in research and development efforts which concern—

(a) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or

(b) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement.

4.26 The stronger the combined position of the parties on existing markets and/or the lower the number of competing R&D efforts comparable with those of the parties or third parties that are able independently to engage in relevant research and development efforts, the more likely it is that the R&D agreement can cause restrictive effects on competition.[93]

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

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

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

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

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[93] This is without prejudice to the analysis of potential efficiencies, including those that regularly exist in publicly co-funded R&D, that would be relevant to any considerations of the scope for an individual exemption under Section 9 in the event that an R&D agreement did not benefit from exemption under the R&D BEO (see further paragraph 4.154)

R&D clusters and research and development efforts directed at a product or technology creating a new market

4.30 Research and development efforts which concern the research and development of new products or technologies, as well as R&D clusters are captured by the concept of competition in innovation for the purpose of this Part.

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

4.32 R&D clusters are research and development efforts directed primarily towards a specific aim or objective. The specific aim or objective of an R&D cluster cannot be defined as a product or a technology or involves a substantially broader target than products or technologies on a specific market.

4.33 The concerns that may arise in relation to such agreements that are focused on innovation are about a loss of dynamic competition. Dynamic competition describes a situation where firms that are making efforts or investments (for example through research and development) that may eventually lead to their entry or expansion are motivated by the opportunity to win new sales and profits. Dynamic competition is important because it drives innovation by increasing the likelihood of new products being made available. Under the influence of dynamic competition, firms that may not compete today seek to innovate (including through research and development) to develop new products or services. There is a link here to future competition because the threat of this 'future' competition also motivates incumbents in markets to improve their current products to try to mitigate the risk of losing future profits to potential entrants, which has a benefit for consumers in the shorter term. Ultimately therefore dynamic competition is a key driver for the wider evolution of competition in many markets[94] and creates future benefits for consumers through better products and keener prices. Dynamic competition therefore needs to be protected to ensure that consumers can reap the benefits associated with innovation.

4.34 Effects on price and output on existing markets are somewhat unlikely for such research and development efforts at the time of the assessment of the

[94] This is particularly the case in markets where the process of entering takes place over a long time and involves significant costs or risks, or where key aspects of competition are set during the investment phase, for example. Examples of industries may include digital platforms or pharmaceutical markets, both of which involves years of investment without any guarantee of future success.

R&D cooperation, as the R&D effort cannot yet be defined as aiming at a product or a technology.

4.35 The analysis of R&D agreements that are focused on innovation would therefore have to focus on possible restrictions of competition at the innovation stage concerning, for instance, the quality and variety of possible future products or technologies and/or the speed or level of innovation. Those restrictive effects can arise where two or more of the few undertakings independently engaging in (for example) the R&D of a new product (in particular, when they are at a stage where they are near to launching the new product), start to cooperate instead of developing the new product separately. Such effects are typically the direct result of the cooperation between the parties.

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

Agreements covered by the R&D BEO

4.37 The benefit of the exemption established by the R&D BEO covers those R&D agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of the Section 9 exemption.

4.38 Under the R&D BEO, the concept of 'research and development' means activities aimed at acquiring know-how relating to existing or new products, technologies or processes; the carrying out of theoretical analysis, systematic study or experimentation, including experimental production; technical testing of products or processes; the establishment of the facilities necessary for these activities; and the obtaining of intellectual property rights for the results of those activities.[95]

4.39 For the purposes of the R&D BEO an R&D agreement is an agreement entered into between two or more parties which relates to the conditions under which those parties pursue:[96]

[95] Article 2(1) of the R&D BEO.
[96] Article 3(2) of the R&D BEO.

(a) joint research and development, including cases where the agreement concerned also provides for joint exploitation of the results of that research and development,

(b) paid-for research and development, including cases where the agreement concerned also provides for joint exploitation of the results of that research and development,

(c) joint exploitation of the results of research and development carried out under a prior agreement falling within paragraph (a) between the same parties, or

(d) joint exploitation of the results of research and development carried out under a prior agreement falling within paragraph (b) between the same parties.

4.40 The R&D BEO draws a distinction between contract products or contract technologies:

(a) 'contract product'[97] means (a) a product[98] arising out of the joint or paid-for research and development to which the R&D agreement relates or (b) a product produced or provided applying a contract technology. This includes products obtained through an R&D cluster as well as new products;[99]

(b) 'contract technology'[100] means a technology or process arising out of the joint or paid-for research and development to which the R&D agreement relates. This includes technologies or processes obtained through an R&D cluster as well as new technologies or processes.

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

4.41 The R&D BEO distinguishes between 'joint' research and development and 'paid-for research and development.

4.42 When the parties pursue **joint research and development**, their agreement can provide for one of the following ways in which the research and development activities are carried out:[101]

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[97] Article 2(1) of the R&D BEO.

[98] For the purpose of the R&D BEO, 'product' means a good or a service, including both intermediate goods or services and final goods or services (article 2(1) of the R&D BEO).

[99] For the purpose of the R&D BEO, a 'new' product or technology is a product, technology or process that does not exist at the time when the R&D agreement falling under article 3(2)(a) or (b) of the R&D BEO is entered into and that will, if emerging, create its own new market and not improve, substitute or replace an existing product, technology or process (article 2(2)(b) of the R&D BEO).

[100] Article 2(1) of the R&D BEO.

[101] Article 2(1) of the R&D BEO (see the definition of 'joint').

(a) the research and development work involved is carried out by the parties to an R&D agreement through a joint team, organisation or undertaking;

(b) the parties jointly entrust the work involved to a third party; or

(c) the parties allocate the work involved by way of 'specialisation relating to research and development'. This means that each of the parties is involved in the research and development activities to which the R&D agreement relates and they divide the research and development work involved in those activities between them in the way that they consider most appropriate. This does not include paid-for research and development.[102]

4.43 **Paid-for research and development** means research and development that is carried out by at least one party to an agreement and financed by at least one 'financing party'.[103] A 'financing party' finances the research and development concerned but does not carry out any of the research and development activities itself.[104]

4.44 The distinction between joint research and development and paid-for research and development in the R&D BEO is relevant for the purpose of the calculation of market shares. For paid-for research and development, the parties will also need to include R&D agreements concluded by the financing party with third parties, with regard to the same contract products or contract technologies, for the purposes of calculating the combined market shares – see paragraph 4.80 below.

Joint exploitation of the results and concept of specialisation relating to joint exploitation

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

4.46 The *'*exploitation of the results' is a rather wide concept that comprises the production or distribution of a contract product or the application of a contract technology; or the assignment or licensing of intellectual property rights or the communication of know-how required for that production or application.[105]

4.47 Under the R&D BEO, joint exploitation of the results may only pertain to results which are:

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[102] Article 2(1) of the R&D BEO.
[103] Article 2(1) of the R&D BEO.
[104] Article 2(1) of the R&D BEO.
[105] Article 2(1) of the R&D BEO. See also article 3(4) for the definition as it applies to article 3(2).

(a) indispensable for the production of the contract product(s) or the application of the contract technology(ies); and

(b) protected by intellectual property rights or constitute know-how.[106]

4.48 Accordingly, this means that, in order to benefit from the block exemption in the R&D BEO, the scope of an R&D agreement which includes joint exploitation cannot pertain to results which are not protected by intellectual property or know-how and which are not indispensable for the production of the contract product(s) or the application of the contract technology(ies).

4.49 The joint exploitation of the results of joint or paid-for research and development can take place either in the context of the **original** R&D agreement or in the context of a **subsequent** agreement covering the joint exploitation of the results of a prior R&D agreement between the same parties.[107] If the parties choose to carry out the joint exploitation of the results of a prior R&D agreement pursuant to a subsequent agreement, the prior R&D agreement must have met the conditions of the R&D BEO in order for the subsequent joint exploitation agreement to be covered by the exemption provided for in the R&D BEO.[108]

4.50 The R&D BEO provides for **three different ways** in which the results can be jointly exploited.[109]

(a) First, the exploitation work can be carried **out together by the parties to the R&D agreement** through a joint team, organisation or undertaking;

(b) Second, the parties to the R&D agreement can jointly entrust a third party with the exploitation work;

(c) Lastly, the parties to the R&D agreement can allocate the work between them by way of **specialisation relating to exploitation**, which means that:[110]

(i) the parties allocate between them individual tasks such as production or distribution of a contract product, or

(ii) they impose restrictions upon one or more of each other regarding the exploitation of the results, such as restrictions in relation to certain geographical areas, customers or fields of use,

this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties.

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[106] Article 7(2) of the R&D BEO.

[107] As covered by article 3(2)(c) and (d) of the R&D BEO.

[108] Article 8(7)(a) of the R&D BEO.

[109] Article 2(1) of the R&D BEO (see definition of 'joint).

[110] Article 2(1) of the R&D BEO.

4.51 Practices constituting specialisation relating to exploitation will not be treated as hardcore restrictions.[111] In addition, where the parties specialise in relation to exploitation, they may limit access to the results for the purposes of such exploitation accordingly.[112] This means that an R&D agreement can, for example, restrict the exploitation rights of the parties for certain geographical areas, customers or fields of use. If the parties to the R&D agreement agree that each of them can distribute the contract products (and thus they have not opted for a joint distribution model and they have not agreed that only the party producing the contract products may distribute them), the parties charged with the production of the contract products by way of specialisation must be required to fulfil orders for supplies of the contract products from the other parties to the R&D agreement.[113]

4.52 Lastly, as set out further in paragraphs 4.82, 4.92 and 4.107 below, if the R&D agreement covers joint exploitation of the results, the exemption under the R&D BEO applies: (i) for the duration of the R&D and (ii) for an additional period of seven years after the time the contract product or contract technology are first put on the market within the United Kingdom.[114]

Assignment or licensing of intellectual property rights

4.53 The exemption of the R&D BEO also applies to R&D agreements which include provisions on the assignment or licensing of intellectual property rights, provided that those provisions do not constitute the primary object of the R&D agreement but are directly related to and necessary for the implementation of such agreements.[115]

4.54 This exemption covers the assignment or licensing of intellectual property rights to one or more of the parties or to an entity which the parties establish to carry out the joint research and development, the paid-for research and development or the joint exploitation.[116]

4.55 In these cases, the assignment or licensing of intellectual property rights will therefore be subject to the provisions of the R&D BEO and not to those of the

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[111] See section on Hardcore restrictions below (paragraphs 4.109 – 4.129), in particular article 10(2)(c) of the R&D BEO. Relevant practices are likely to include those set out in article 10(1)(b), (d), (e) and (f) of the R&D BEO.
[112] Article 5(3)(c) of the R&D BEO.
[113] Article 7(3) of the R&D BEO.
[114] See article 8(6)(b) and 8(7) and of the R&D BEO.
[115] Article 3 (3) of the R&D BEO.
[116] Article 3(3) of the R&D BEO.

retained Technology Transfer Block Exemption Regulation.[117] However, in the context of R&D agreements, the parties can also determine the conditions for licensing of the results to third parties. Such licence agreements are not covered by the R&D BEO but may be covered by the block exemption in the retained Technology Transfer Block Exemption Regulation, if the conditions set out in that Regulation are met.[118]

Conditions for exemption under the R&D BEO

Access to the final results

4.56 The first condition for benefiting from the exemption under the R&D BEO is that the R&D agreement must provide for all parties to have access[119] to the final results of the joint or paid-for research and development for two purposes:[120]

(a) for conducting further research and development;

(b) and for exploiting the results.

4.57 Under the R&D BEO, access to the final results must also include access to any resulting intellectual property rights and know-how.[121] It must be granted as soon as reasonably practicable after the final results become available.[122] It is for parties to determine what form these rights should take for these purposes, provided that they are sufficient to provide access for further research and exploitation.

4.58 Depending on their capabilities and commercial needs, the parties may make unequal contributions to their R&D cooperation. In order to reflect, and to make up for, any differences in the value or the nature of the parties'

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[117] Retained Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements and accompanying guidelines (the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03 ('Technology Transfer Guidelines'), or any future block exemption relating to technology transfer agreements that may be adopted in the UK (and any future accompanying guidelines).See points 73 and 74 of the Technology Transfer Guidelines.

[118] Retained Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements and accompanying guidelines (the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03, point 74.

[119] 'Access' is defined to mean, as a minimum, the right to use the results, intellectual property rights or know-how, See article 2(2)(a) of the R&D BEO. The reference to 'as a minimum' makes it clear that, if the parties agree, further rights may also be included in the R&D agreement in order to meet this access requirement, such as the assignment of intellectual property rights.

[120] Article 5 of the R&D BEO.

[121] Article 5(2)(a) of the R&D BEO.

[122] Article 5(1)(b) of the R&D BEO.

contributions, an R&D agreement may state that one party is to compensate another for obtaining access to the results for the purposes of further research and development or exploitation of the results. Compensation is not mandatory, but if it is provided for in the R&D agreement, then compensation must not be so high as to effectively prevent access to the results.

4.59 In order to qualify for an exemption under the R&D BEO, the right of access to the results **cannot be limited** if such access is required for conducting **further research.**[123]

4.60 However, under certain circumstances, access to the results for **the purposes of exploitation may be restricted** and the R&D agreement may still benefit from exemption under the R&D BEO. This is the case for R&D agreements with the following parties who may agree to confine their use of the results for the purposes of further research only (and therefore not for exploitation):

(a) research institutes;

(b) academic bodies; or

(c) undertakings which supply research and development as a commercial service without normally being active in the exploitation of the results of research and development.[124]

4.61 In addition, access to the results for the purposes of exploitation may also be limited where the parties limit their rights of exploitation in accordance with the R&D BEO and, in particular where the R&D agreement provides for specialisation relating to exploitation, limiting access to the results for the purposes of that exploitation accordingly.[125] This means that the parties will be allowed to impose restrictions upon each other regarding the exploitation of the results (such as restrictions in relation to certain geographical locations, customers or fields of use).

Access to pre-existing know-how

4.62 The second condition for benefitting from the exemption under the R&D BEO is access to pre-existing know-how. This condition only applies to R&D

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[123] Article 5 of the R&D BEO only refers to the possibility of restricting access under certain circumstances for the purpose of exploitation. These are set out in article 5(3)(b) and (c) of the R&D BEO.

[124] These could for instance be SMEs. See also article 5(4) of the R&D BEO for the definition of 'exploitation of results of research and development'.

[125] See article 2(1) of the R&D BEO for the definition of specialisation relating to exploitation and paragraphs 4.41 - 4.52 of this Guidance.

agreements that do not provide for the joint exploitation of the results and is limited to know-how that is indispensable for the exploitation of the results.[126]

4.63 Such agreements must provide that each party be granted access to any pre-existing know-how of the other parties if this know-how is indispensable for the purposes of the party's exploitation of the results. This does not mean that the parties have to include all their pre-existing know-how within the scope of the R&D agreement. However, they will have to identify the know-how that is indispensable for exploiting the results. The R&D agreement may provide that the parties compensate each other for giving access to their pre-existing know-how. Such compensation must, however, not be so high as to effectively prevent such access.[127]

4.64 The condition relating to the provision of access to pre-existing know-how is without prejudice to the condition to provide full access to the results of the R&D set out in article 5 of the R&D BEO. This means that a given R&D agreement may, under certain conditions, have to include provisions both as regards access to pre-existing know-how and as regards final results, in order to benefit from the exemption.

Conditions linked to joint exploitation

4.65 The R&D BEO includes two further conditions which concern the joint exploitation of the results. As set out in paragraphs 4.45 - 4.52, the scope of joint exploitation must be limited to results that are protected by intellectual property rights or constitute know-how and which are indispensable for the production of the contract product(s) or the application of the contract technology(ies).

4.66 Second, if the parties agree that each of them can distribute the contract products (and thus they have not opted for a joint distribution model and they have not agreed that only the party producing the contract products may distribute them), the parties charged with the production of the contract products by way of specialisation relating to exploitation must be required to fulfil orders for supplies of the contract products from the other parties.[128]

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[126] See article 6 of the R&D BEO and paragraphs 4.45-4.52 of this Guidance.
[127] Article 5(2) of the R&D BEO.
[128] Article 7(3) of the R&D BEO.

Thresholds, market shares and duration of exemption

4.67 In applying the Section 9 exemption, it can in general be presumed that, below a certain level of market power, the positive effects of R&D agreements will outweigh any negative effects on competition.

4.68 The R&D BEO relies on two metrics for capturing those R&D agreements that remain below a certain level of market power: (i) a market share threshold for actual and potential competitors in relation to the products and/or technologies that arise out of the R&D agreement; and (ii) a threshold for undertakings competing in innovation based on the existence of a minimum number of competing R&D efforts/third parties able to engage in the relevant research and development (three in addition to that of the parties to the R&D agreement).

Actual and potential competitors in relation to the products and/or technologies arising out of the R&D agreement and undertakings competing in innovation

4.69 In order to determine the competitive relationship between the parties, it is necessary to examine whether the parties could have been competing undertakings in the absence of the R&D agreement.[129]

4.70 In general, agreements between actual or potential competitors in relation to the products and/or technologies arising out of the agreement and agreements between undertakings competing in innovation pose a greater risk to competition than agreements between undertakings not competing with each other. Agreements between not competing undertakings will only in rare instances give rise to horizontal restrictive effects on competition.[130]

Actual or potential competitors in relation to an existing product and/or technology

4.71 For the purpose of the R&D BEO, actual and potential competitors are defined as follows:

(a) 'actual competitor' is defined, in relation to a contract product or contract technology, as an undertaking that is supplying an existing product, technology or process capable of being improved, substituted or replaced

[129] See also paragraphs 4.11 - 4.36 of this Part on the assessment under the Chapter I prohibition.

[130] Any vertical effects may need to be assessed in line with the VABEO Guidance

by the contract product or the contract technology on the relevant geographic market;[131] whereas

(b) 'potential competitor' is defined, in relation to a contract product or contract technology, as an undertaking that, in the absence of the R&D agreement relating to the contract product or contract technology, on realistic grounds and not just as a mere theoretical possibility, would be likely to undertake, within not more than three years, the necessary additional investments or incur the necessary costs to supply a product or technology capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.[132]

4.72 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 research and development activities. The decisive question is whether each party independently has the necessary means as regards assets, know-how and other resources. The CMA may consider a range of evidence concerning potential competition. Potential competition may be considered more likely where a party has the incentive and ability to enter; has well-developed plans or has already taken significant steps towards entry; where incumbent parties are taking action in anticipation of its entry; or where it has a past history of entry into related markets. The evidence to be provided by the parties could include internal information such a board minutes as well as publicly available information such as press releases.[133]

4.73 R&D agreements covered by the R&D BEO concerning actual or potential competitors in relation to products and/or technologies arising out of the agreement can for example take the following forms:

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

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

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[131] Article 8(10) of the R&D BEO.

[132] Article 8(10) of the R&D BEO.

[133] For the approach generally to assessing potential competition, see paragraphs 3.15 - 3.20 of this Guidance.

substituted or replaced by the product arising from the R&D cooperation (contract product) on the relevant geographic market (potential competitor).

Undertakings competing in innovation

4.74 For the purpose of the R&D BEO, undertakings competing in innovation are undertakings which independently engage, or in the absence of the R&D agreement would be able and likely independently to engage, in research and development efforts which concern:

(a) research and development of a new product or technology which is the same as or likely to be substitutable for a new product and/or technology that would be covered by the R&D agreement; or

(b) An R&D cluster pursuing an aim or objective which is the same or substantially the same as one that would be covered by the R&D agreement.

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

4.76 The assessment of likely substitutability of new products and/or technologies should focus on whether consumers, once the products and/or technologies enter the market, are likely to regard these new products and/or technologies as interchangeable or substitutable by reason of their characteristics,[134] their projected prices and their intended use.

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

4.78 R&D agreements between undertakings competing in innovation covered by the R&D BEO can for example take the following forms:

(a) an R&D agreement between (a) an undertaking developing a new product and (b) an undertaking developing the same product or a product that is likely to be substitutable for such a new product;

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

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

likely to be substitutable for such a new product;

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

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

Not competing undertakings

4.79 The R&D BEO defines 'not competing undertaking' as an undertaking that is neither an 'actual competitor' nor a 'potential competitor' in relation to a product and/or technology arising out of the agreement nor an undertaking competing in innovation.[135] The parties to an R&D agreement would be considered as not competing undertakings in the case of, for example an undertaking engaged in research and development efforts for a product capable of being improved, substituted or replaced by the contract product and an undertaking conducting research into an R&D cluster.

Agreements between actual or potential competitors in relation to a product and/or technology arising out of the agreement

Market share thresholds for actual or potential competitors in relation to a product and/or technology arising out of the agreement

4.80 If two or more of the parties to the R&D agreement are actual or potential competitors in relation to products and/or technologies arising out of the agreement,[136] the exemption shall apply subject to a market share threshold of 25%, calculated at the time the R&D agreement is entered into. This threshold applies in the following way, depending on whether the R&D agreement involves joint research and development or a paid-for research and development.[137]

(a) for R&D agreements involving **joint research and development**, the combined market share of the parties to the agreement must not exceed 25% on the relevant product or technology market;[138]

(b) for R&D agreements involving **paid-for research and development**, the same market share threshold of 25% applies but is extended not

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[135] See Article 8(9) of the R&D BEO.

[136] Article 8(1)(b) sets out the relevant provision for R&D agreements which relate to more than one contract product or contract technology.

[137] See paragraphs 4.41- 4.55 on the distinction between joint R&D and paid-for R&D.

[138] Article 8(2)(a) of the R&D BEO.

only to the financing party itself, but must also include all the undertakings with which the financing party has entered into R&D agreements with regard to the same contract product or contract technology.[139]

4.81 If the results of the joint or paid-for R&D are **not jointly exploited**, the exemption under the R&D BEO applies for the duration of the research and development.[140]

4.82 If, however, the results of the joint or paid-for research and development are **jointly exploited** and the agreement meets the conditions for exemption under the R&D BEO, the parties will continue to benefit from the exemption for seven years after the time a resulting contract product or contract technology is first put on the market within the United Kingdom, or if more than one contract product or contract technology is put on the market within the United Kingdom, after the time the first of them is put on the market.[141] This applies if the parties were not competing undertakings or the relevant market share threshold was met either (i) at the time of entering into the agreement pursuing joint or paid-for research and development which also provides for joint exploitation;[142] or (ii) for those R&D agreements under which the parties pursue the joint exploitation of the results of a prior agreement,[143] at the time of entering into such prior agreement.[144]

4.83 After the end of the seven year-period referred to in article 8(6)(b) and (7) of the R&D BEO, the exemption continues to apply on condition that the combined market share of the parties to the R&D agreement does not exceed 25% of any market to which a contract product or contract technology belongs.[145] This means that the parties would need to assess, at that moment in time, to which market a contract product or contract technology belongs and whether their combined market share in that market does not exceed 25%. If the combined market share rises above this 25% threshold after the end of the seven year period, the exemption in the R&D BEO continues to apply for two consecutive calendar years following the year in which the threshold was first exceeded.[146]

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[139] Article 8(2)(b) of the R&D BEO. Such R&D agreements do not have to fall within the scope of the R&D BEO.
[140] Article 8(6)(a) of the R&D BEO.
[141] Article 8 (6)(b) and (7) of the R&D BEO.
[142] Article 8 8(6)(b) of the R&D BEO.
[143] Article 8(7) of the R&D BEO.
[144] As mentioned above in paragraphs 4.45 - 4.52 of this Guidance, the prior joint or paid-for R&D agreement also needs to meet the conditions to be exempted under the R&D BEO.
[145] Article 8(8) of the R&D BEO.
[146] Article 11(2) of the R&D BEO.

Calculation of market shares for existing product and technology markets

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

4.85 If the R&D agreement aims at **improving, substituting** or **replacing existing** products or technologies, market shares can be calculated with reference to existing products or technologies that will be improved, substituted or replaced. If the replacement of an existing product or technology will be significantly different, market shares with reference to existing products or technologies may be less informative but can still be used as a proxy to assess the market position of the parties. Alternatively, if market sales values are not available, the market share calculation may be based on other reliable market information, including expenditure in R&D.[147]

4.86 Under article 8(1)(b) of the R&D BEO, market shares must be calculated on the basis of data and information relating to the preceding calendar year.[148] For certain markets it may be necessary to calculate market shares on the basis of an average of the parties' market shares of the last three preceding calendar years. This may be relevant for instance when there are bidding markets and the market shares may significantly change (e.g. from 0% to 100%) from one year to another, depending on whether a party was successful or not in the bidding process. This may also be relevant for markets characterised by large, lumpy orders for which the market share of the previous calendar year may not be representative, for example, if no large order took place in the preceding calendar year. Another situation in which it may be necessary to calculate market shares on the basis of an average of the last three preceding calendar years is when there is a supply or demand shock in the calendar year preceding the cooperation agreement.

4.87 When it comes to the metrics for the calculation of market shares, the R&D BEO provides that the calculation of market shares is to be based on the market sales value. As noted in paragraph 4.85 above, if sales value data are not available, estimates based on other reliable market information, including

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[147] Article 9(1) of the R&D BEO.

[148] Article 8(1)(b) of the R&D BEO provides that the market share of an undertaking is to be calculated on the basis of data relating to the calendar year preceding that in which the calculation is being made, or, where that calendar year is not representative of the undertaking's position in the relevant market, calculated as an average of the undertaking's market shares for the three calendar years preceding that in which the calculation is being made.

market sales volumes, expenditure in R&D or R&D capabilities, may be used to establish the market share of the parties.

4.88 For technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. An alternative approach is to calculate market shares on the technology market on the basis of sales of products or services incorporating the licensed technology on downstream product markets. Under that approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed.[149]

Agreements for new products and/or technologies and R&D clusters[150]

Threshold for new products and/or technologies and R&D clusters

4.89 If two or more of the parties to the R&D agreement are undertakings competing in innovation,[151] the exemption will apply if, at the time the R&D agreement is entered into, there are three or more:

(a) competing R&D efforts comparable with the research and development efforts of the parties to the R&D agreement; or

(b) third parties who are able independently to engage in relevant research and development comparable efforts.[152]

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[149] See also Retained Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements and accompanying guidelines (the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03) for relevant elements for calculating market shares in technology markets (or any future guidelines relating to technology transfer agreements that may be adopted in the United Kingdom).

[150] The R&D BEO provides in article 11(1) that for R&D agreements between undertakings competing in innovation, article 8(3) and (4) of the R&D BEO only apply to agreements that enter into after 1 January 2024. Also, article 8(8) has effect in relation to R&D agreements entered into before that date as if for the words from "neither" to the end there were substituted "paragraph (1) does not apply to the agreement".

[151] Article 8(3) and (4) of the R&D BEO sets out the relevant provisions for R&D agreements which relate to more than one new product or technology, or more than one aim or objective would be covered by the R&D agreement.

[152] Article 8(3) and (4) of the R&D BEO. If the R&D agreement concerns new products and new technologies, the exemption will apply if, at the time the R&D agreement is entered into, there are three or more of the following:
(a) competing R&D efforts comparable with those of the parties to the R&D agreement, or
(b) third parties that are able independently to engage in a research and development effort which concerns—
(i) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or
(ii) an R&D cluster pursuing an aim or objective which is the same or substantially the same as an aim or objective that would be covered by the R&D agreement.

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

4.91 If the results of the joint or paid-for R&D agreement concerning new product(s) and/or technology(ies) or R&D cluster(s) are **not jointly exploited** and the agreement meets the conditions for exemption under the R&D BEO, the exemption applies **for the duration of the research and development**.

4.92 If, however, the results of the joint or paid-for research and development concerning new product(s) and/or technology(ies) or R&D cluster(s) **are jointly exploited**, the parties will continue to benefit from the exemption for seven years after the time a resulting contract product or contract technology is first put on the market within the United Kingdom or, if more than one contract product or contract technology is put on the market within the United Kingdom, after the time the first of them is put on the market.[153] This applies if the agreement meets the conditions for exemption under the R&D BEO:[154](i) at the time of entering into an agreement pursing joint or paid-for research and development and which also provides for joint exploitation;[155] or (ii) for those R&D agreements under which the parties pursue the joint exploitation of the results of research and development of a prior agreement,[156] at the time of entering into such prior agreement.[157]

4.93 After the end of the seven year period, the parties should be able to calculate their market shares on the markets of the resulting contract product or contract technology. The exemption will therefore continue to apply only on condition that the combined market share of the parties does not exceed 25% on the markets to which a contract product or contract technology belong.[158] If the combined market share rises above this 25% threshold after the end of the seven year period, the exemption in the R&D BEO continues to apply for two consecutive calendar years following the year in which the threshold was first exceeded.[159]

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[153] Article 8(6)(b) and article 8(7) of the R&D BEO.
[154] The conditions are specified in articles 5 to 8, 10 and 12 of the R&D BEO and, accordingly, comprise, among other conditions, the threshold described in article 8(4) of the R&D BEO.
[155] As defined in article 2(2) (a) and (b) of the R&D BEO.
[156] As defined in article 2 (2) (c) and (d) of the R&D BEO.
[157] As mentioned above in paragraphs 4.45-4.52 of this Guidance, the prior joint or paid-for R&D agreement also needs to meet the conditions to be exempted under the R&D BEO.
[158] Article 8(5)(b) and 6 of the R&D BEO.
[159] Article 8(7) of the R&D BEO.

Assessment of the existence of 'competing R&D efforts' and of third parties that are able independently to engage in a relevant research and development effort

4.94 In order for a research and development cooperation concerning innovation to be exempted, it is necessary to show that such R&D agreements will not bring together the only players who could independently conduct the R&D effort that is the subject matter of the agreement. The relevant threshold is therefore based on the existence of three or more (i)'competing R&D efforts' that are comparable with those of the parties to the R&D agreement or (ii) third parties that are able independently to engage in a relevant research and development effort.

'Competing R&D efforts'

4.95 According to the definition of 'competing R&D effort' in article 8(10) of the R&D BEO[160] the following elements need to be considered when identifying 'competing R&D efforts':

(a) whether the R&D efforts[161] concern research and development of the same or likely substitutable new products and/or technologies or R&D clusters pursuing the same or substantially the same aim or objective as the ones to be covered by the R&D agreement;

(b) whether there are third parties already engaged in the R&D efforts; and

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

4.96 First, as regards the question of whether the **R&D efforts concern the same or likely substitutable** new products and/or technologies or R&D clusters pursuing **substantially the same aim or objective,** this can be answered in the same way as for the assessment of undertakings competing in innovation set out in paragraphs 4.74 - 4.78 above.

4.97 Secondly, competing R&D efforts are those in which the **third parties are already engaged**, alone or in cooperation with other third parties. This means

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[160] 'Competing R&D effort' means a research and development effort in which a third party engages, alone or in cooperation with other third parties, and which concerns: (a) the research and development of a new product or technology which is the same, or likely substitutable for, a new product or technology that would be covered be covered by the R&D agreement; or (b) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement This does not include any research and development effort in which any of the parties to the R&D agreement is also engaged (including as a financing party).

[161] References to 'R&D efforts' are to efforts relevant to the definition of 'competing R&D efforts'. References to 'research and development efforts' are to such efforts not in relation to the definition of 'competing R&D efforts'.

that the R&D effort can be pursued either on an individual basis by one third party or jointly by a number of different third parties.

4.98 Thirdly, as regards the question of whether the R&D efforts are pursued **by third parties which are independent** from the parties to the R&D agreement, only such R&D efforts in which the parties to the R&D agreement are not involved should be included in the assessment.

4.99 The **assessment of comparability of competing R&D efforts** with those of the parties to the R&D agreement, must be made on the basis of reliable information[162] concerning factors such as (i) the size, stage and timing of the R&D efforts, (ii) third parties' (access to) financial and human resources, their intellectual property, know-how or other specialised assets, their previous R&D efforts and (iii) the ability of the third party or parties and the likelihood of exploiting directly or indirectly possible results of their R&D efforts in the United Kingdom.[163]

4.100 These factors provide an indication of how parties may demonstrate ability. However, they are not cumulative requirements, such that, if one or more cannot be shown, it does not prevent the block exemption provided by the R&D BEO applying. Furthermore, additional factors can be taken into consideration where appropriate and where based on reliable information. The factors should be applied on a case-by-case basis, weighing up the evidence in order to assess comparability. The aim of this weighing up exercise is ultimately to establish that the competing R&D efforts impose a competitive constraint on the parties to the R&D agreement.

4.101 The first set of factors to assess the comparability of competing R&D efforts is **linked to the R&D efforts themselves**. They concern the size, stage and timing of the R&D effort. This means, for example, that if a third party's competing R&D efforts have at least the same or similar size or are at a similar or more advanced stage of development than the R&D effort covered by the R&D agreement, this would be indicative of comparability and that they may impose a competitive constraint. Similarly, in relation to timing, a third

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[162] This could include, for example:
(a) a press release regarding a new R&D project;
(b) a business plan which is publicly available (for example, a business looking for funding, particularly public funding, may have a business plan available on its website or through funding platforms;
(c) information in the trade press or at trade exhibitions; or
(d) evidence supporting the existence of low barriers to entry.
Internal research or analysis by a party deciding whether to proceed with research and development, or to enter into an R&D agreement, in relation to how successful it may be and what the competitive landscape may look like, including who else may be operating or thinking of innovating in the same area, may be used for the assessment if it is based on reliable information, for example third party market reports, research or data which consider factors such as the scope for innovation in a sector and possible participants in that innovation.

[163] Article 9(3) of the R&D BEO.

party R&D effort that is for example, six to eight years from market entry compared to an R&D effort of the parties to the R&D agreement that is one year from market entry may not be comparable.

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

4.103 The third set of factors is **linked to the exploitation of the results.** This refers to the third parties' capability and likelihood of exploiting possible results of the R&D effort in the United Kingdom. This means, for instance, that R&D efforts that are likely to be exploited only outside of the United Kingdom with no prospect of reaching the United Kingdom may not be comparable to the R&D efforts subject to the R&D agreement for which the results would be placed on the market in the United Kingdom.

Third parties that are able independently to engage in a relevant[164] research and development effort

4.104 There may be some situations[165] in which there is a lack of publicly available information about research and development efforts in which parties are already engaged, ie 'competing R&D efforts', which may mean that the parties cannot identify three 'competing R&D efforts'. However, the condition in article

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[164] That is of the kind specified in article 8(5)(b), specifically research and development efforts which concern—
(a) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or
(b) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement.

[165] This will not be the case in all situations. For example, start-ups may need to publish business plans to secure financing. Some sectors may have elements of transparency, for example, pharmaceutical firms may provide visibility on their work at trial stage; and in the digital sphere there may some transparency about emerging industry trends.

5 of the R&D BEO can alternatively be met if the parties are able to identify sufficient third parties (in addition to or instead of those who are already engaging in 'competing R&D efforts') who have the *ability* to engage independently in relevant similar research and development efforts (even if there is no evidence that they are currently doing so).[166] As noted in paragraph 4.33 above, the concern in relation to R&D agreements that are focused on innovation is to protect dynamic competition. Competition concerns should not arise where the parties can identify sufficient third parties who have the ability, based on the factors below, to engage in such relevant research and development efforts.

4.105 Under article 8(5)(b) of the R&D BEO[167] the following elements need to be considered when identifying such parties, namely:

(a) As with the test for 'competing R&D efforts', whether these efforts would concern research and development of the same or likely substitutable new products and/or technologies or R&D clusters pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement, can be answered in the same way as for the assessment of undertakings competing in innovation and specifically in paragraphs 4.74 - 4.78 above;

(b) Article 8(5)(b) applies to third parties who are able to engage independently in such efforts, not third parties that are **already** engaged, alone or in cooperation with other third parties, in such efforts. The R&D effort can be pursued either on an individual basis by one third party or jointly by a number of different third parties.

(c) Whether a third party is able to individually engage in R&D of the same or likely substitutable new products and/or technologies or R&D clusters pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement can be determined on the basis of objective factors, about which information is likely to be in the public domain.

(d) These factors are similar to those set out above in relation to 'competing R&D efforts' above, namely, factors such as (i) the availability of financial and human resources to the third party or parties, their intellectual property rights, know-how or other relevant assets, and their previous R&D efforts and (ii) the ability of the third party or parties to exploit directly or indirectly possible results of their

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[166] It is often the case that parties proposing to enter into an R&D agreement have already developed an understanding of the sector and may therefore be aware of the industry they operate in and of which competitors would be able to pursue certain types of projects.

[167] Article 8(5)(b) provides that these are third parties that are able independently to engage in a research and development effort which concerns—

(a) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or

(b) an R&D cluster pursuing an aim or objective which is the same or substantially the same as an aim or objective that would be covered by the R&D agreement.

R&D efforts in the United Kingdom.[168]

(e) However, no assessment of actual R&D efforts is required and accordingly factors such as size, stage and timing of the R&D effort are not relevant here. Instead an assessment is needed only of those third parties who may have the right resources or expertise to be able to engage in relevant research and development efforts.[169] This should be capable of being evidenced. That evidence could include the following[170]:

(i) a press release regarding a new R&D project;

(ii) a business plan which is publicly available (for example, a business looking for funding, particularly public funding, may have a business plan available on its website or through funding platforms;

(iii) information in the trade press or at trade exhibitions; and

(iv) evidence supporting the existence of low barriers to entry; and

(f) whether those third parties are independent from the parties to the R&D agreement. This means that only such research and development efforts in which the parties to the R&D agreement would not be involved should be included in the assessment.[171]

Agreements between not competing undertakings

4.106 Where the parties to the R&D agreement are **not competing undertakings**, the parties are not subject to any threshold. If the results are **not jointly exploited** and the agreement meets the conditions for exemption under the R&D BEO, the R&D agreement is exempted for the entire duration of the research and development.

4.107 If the results are **jointly exploited**, the exemption continues to apply for seven years after the time the resulting contract product(s) or contract technology(ies) are first put on the market within the United Kingdom.

4.108 After the end of the seven year period, the parties should be able to calculate their market shares on the markets of the resulting contract product or contract technology. The exemption will continue to apply only on condition that the combined market share of the parties does not exceed 25% on any

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[168] As with 'competing R&D efforts', these factors are a positive way of demonstrating ability, however, they are not conclusive, that is, as they are examples, if one or more cannot be shown, it does now prevent the block exemption applying.

[169] See article 9(3)(b) of the R&D BEO.

[170] Internal research or analysis by a party deciding whether to proceed with research and development, or to enter into an R&D agreement, in relation to how successful it may be and what the competitive landscape may look like, including who else may be operating or thinking of innovating in the same area, may be used for the assessment if it is based on reliable information, for example third party market reports, research or data which consider factors such as the scope for innovation in a sector and possible participants in that innovation.

[171] See article 8(5)(b) of the R&D BEO.

market to which a contract product or contract technology belongs.[172] If the combined market share rises above this 25% threshold after the expiry of the seven year period, the exemption in the R&D BEO continues to apply for two consecutive calendar years following the year in which the threshold was first exceeded.[173]

Hardcore and excluded restrictions

Hardcore restrictions

4.109 This part considers the condition of the R&D BEO that an R&D agreement must not contain any of the hardcore restrictions listed in article 10 of the R&D BEO in order to benefit from the block exemption provided by the R&D BEO.

4.110 Not complying with this condition (as defined in article 10(1) of the R&D BEO) will have the effect of cancelling the block exemption in relation to a particular agreement.[174]

4.111 This part considers:

(a) General principles relating to the hardcore restrictions

(b) Summary of the hardcore restrictions and exceptions.

General principles

4.112 Article 10 of the R&D BEO contains a list of hardcore restrictions. These are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to the market and to consumers. R&D agreements that include one or more hardcore restrictions are excluded as a whole from the scope of the exemption provided for by R&D BEO.[175]

4.113 Hardcore restrictions under article 10 of the R&D BEO are generally restrictions of competition by object which fall within the Chapter I prohibition.[176] Restrictions of competition by object within the meaning of the Chapter I prohibition are agreements which, by their very nature, have the potential to prevent, restrict or distort competition.[177] In that regard, certain

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[172] Article 8(7) of the R&D BEO.
[173] Article 11(2) of the R&D BEO.
[174] Article 11(1) of the R&D BEO.
[175] Article 11(1) of the R&D BEO.
[176] *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union*, OJ C 291, (2014) (the 'De Minimis Notice), page 4, which the CMA will have regard for in accordance with section 60A CA98.
[177] Judgment of 4 June 2009, *T-Mobile Netherlands*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.

types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[178]

4.114 However, the concept of a hardcore restriction for the purposes of the R&D BEO is not necessarily the same as a restriction by object for the purposes of the Chapter I prohibition[179] Hardcore restrictions correspond to a category of restrictions under the R&D BEO for which it is presumed that they generally result in harm to competition so that an R&D agreement containing such a hardcore restriction cannot benefit from the block exemption provided by the R&D BEO. It must then be examined individually to determine whether it has the object or effect of restricting competition and if so whether it can benefit individually from the application of the Section 9 exemption.

4.115 In the light of the above, the CMA will adopt the following approach when assessing an R&D agreement:

(a) Where a hardcore restriction within the meaning of article 10 of the R&D BEO is included in an R&D agreement, this agreement is likely to fall within the Chapter I prohibition.[180]

(b) The inclusion of a hardcore restriction in an agreement will have the effect of cancelling the benefit of the block exemption provided by the R&D BEO in relation to that agreement.

(c) An agreement that includes a hardcore restriction within the meaning of article 10 of the R&D BEO is unlikely to fulfil the conditions of the Section 9 exemption.

4.116 An undertaking may demonstrate efficiencies which fulfil the conditions of the Section 9 exemption in a particular case and the CMA will carefully consider these efficiencies in any investigations under the CA98. For this purpose, when seeking to demonstrate that all the conditions of the Section 9 exemption are fulfilled, the undertaking should substantiate that efficiencies are likely and that these efficiencies are likely to result from including the hardcore restriction in the agreement. Where this is the case, the negative impact on competition that is likely to result from including the hardcore restriction in the agreement should be assessed before making an ultimate

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[178] Judgment of 11 September 2014, *Groupement des Cartes Bancaires*, C-67/13, EU:C:2014:2204, paragraph 49.

[179] See by analogy *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 29 in which the Court of Appeal held that 'to say that a restriction is a hardcore restriction for the purposes of Regulation 330/2010 is not the same as saying that it is a restriction by object for the purposes of Article 101(1)'.

[180] Hardcore restrictions do not necessarily fall within the scope of the Chapter I prohibition.

assessment of whether the conditions of the Section 9 exemption are fulfilled (see further paragraphs 3.41 - 3.47)

Summary of hardcore restrictions

4.117 The hardcore restrictions listed in article 10 of the R&D BEO can be grouped into the following categories:

(a) restrictions of the freedom of the parties to carry out other R&D efforts,

(b) limitations of output or sales and the fixing of prices,

(c) active and passive sales restrictions; and

(d) other hardcore restrictions.

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

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

4.119 Article 10(1)(a) of the R&D BEO excludes from the exemption R&D agreements that entail restrictions of the parties' freedom to carry out R&D independently or in cooperation with third parties, either:

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

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

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

Limitation of output or sales and price-fixing

4.121 Article 10(1)(b) of the R&D BEO excludes from the exemption R&D agreements entailing limitations of output or sales. When competitors agree to limit how much each of them may produce or sell, this is normally a serious restriction of competition. However, the setting of production targets is not to be treated as a hardcore restriction where the joint exploitation of the results

includes the joint production of the contract products.[181] Likewise, the setting of sales targets is not to be treated as a hardcore restriction where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies and is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party.[182] This also applies to practices constituting specialisation relating to exploitation[183] and certain non-compete obligations.[184]

4.122 Under article 10(1)(c) of the R&D BEO, the fixing of prices when selling products or the fixing of licence fees when licensing technologies to third parties are also hardcore restrictions. However, the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies and is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party, is not to be treated as a hardcore restriction.[185]

Active and passive sales restrictions

4.123 As far as geographical area and customer group restrictions are concerned, the general rule is that the buyer should be allowed to approach individual customers actively ('active' sales) and to respond to unsolicited requests from individual customers ('passive' sales).[186] Article 10 (1)(d), (e) and (f) of the R&D BEO concern active and passive sales restrictions. With regard to R&D agreements, **passive sales** are defined in article 10(5) of the R&D BEO.[187]

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[181] Article 10(2)(a) of the R&D BEO.

[182] Article 10(2)(b) of the R&D BEO.

[183] Article 10(2)(c) of the R&D BEO. For the definition of specialisation relating to exploitation, see article 1 paragraph 1(14) of the R&D BER and paragraphs 4.45-4.52 of this Guidance.

[184] Article 10(2)(d) of the R&D BEO.

[185] Article 10(3) of the R&D BEO.

[186] The VABEO Guidance (paragraph 8.34).

[187] "Passive sales" means—

(a) sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without the sale having been initiated through advertising actively targeting the particular customer group or geographical area,

(b) general advertising or promotion that reaches customers in other distributors' geographical areas or customer groups (whether exclusive or not) but which is a reasonable way to reach customers not in those other distributors' geographical areas or customer groups (whether exclusive or not), for instance to reach customers in a supplier's own geographical area, in that, for example, it would be attractive for the buyer to incur the costs of the general advertising or promotion concerned even if it would not reach customers in other distributors' geographical areas or customer groups (whether exclusive or not), or

(c) participating in a public procurement exercise undertaken in accordance with the Defence and Security Public Contracts Regulations 2011, the Public Contracts Regulations 2015), the Concession Contracts Regulations 2016(**187**) or the Utilities Contracts Regulations 2016.

4.124 Active sales are defined in article 10(5) of the R&D BEO.[188]

4.125 Article 10(1)(d) of the R&D BEO removes the exemption of the R&D BEO for R&D agreements containing passive sales restrictions. This covers any passive sales restriction as regards (a) the geographical area where or (b) the customers to whom the parties may passively sell the contract products or license the contract technologies, but excludes the requirement to exclusively license the results to another party.[189] The reason for this latter exception lies in the explicit possibility afforded to the parties that only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties.[190]

4.126 Article 10(1)(e) of the R&D BEO removes the exemption of the R&D BEO for R&D agreements containing the imposition of certain active sales restrictions. This is the case regarding a requirement not to make any, or to limit active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated by the parties to one of the parties by way of specialisation relating to exploitation.

4.127 This means that active sales must not be restricted between the parties, unless the parties allocate geographical areas or customers to one of them following a specialisation relating to exploitation.[191]

4.128 If the parties allocated geographical areas between them or otherwise allocated customers by way of specialisation relating to exploitation, it is a hardcore restriction to require one party to refuse to meet demand from customers allocated to the other party, if such customers would market the

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[188] "Active sales" means—

(a) actively targeting customers by for instance calls, e-mails, letters, visits or other direct means of communication,

(b) targeted advertising and promotion, by means of print or digital media, offline or online, including online media, digital comparison tools or advertising on search engines targeting customers in specific geographical areas or customer groups,

(c) advertisement or promotion that is only attractive for the buyer if it (in addition to reaching other customers) reaches a specific group of customers or customers in a specific geographical area (and is considered active selling to that customer group or customers in that geographical area),

(d) offering on a website language options different to the ones commonly used in the geographical area in which the distributor is established, or

(e) using a domain name corresponding to a geographical area other than the one in which the distributor is established.

[189] Article 10(4) of the R&D BEO.

[190] As per the definition of 'specialisation relating to exploitation' set out in article 2(1) of the R&D BEO.

[191] See definition of the specialisation relating to exploitation in article 2(1) of the R&D BEO.

contract products or license the contract technologies in another geographical area within the United Kingdom.[192]

Other hardcore restrictions

4.129 The imposition of a requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the United Kingdom is also a hardcore restriction.[193]

Excluded restrictions

4.130 This part considers the condition of the R&D BEO that an R&D agreement must not contain any excluded restrictions.[194] Not complying with this condition will have the effect of cancelling the block exemption in relation to that specific provision in the agreement.

General principles relating to the excluded restrictions

4.131 As set out in article 13 of the R&D BEO, the remainder of the agreement continues to benefit from the block exemption in the R&D BEO, provided that the excluded restriction is capable of being severed from the rest of the agreement. If the restriction is not severable, the block exemption is cancelled in respect of that agreement. The ordinary rules on severance will apply.[195]

4.132 Excluded restrictions are those obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions for exemption under the Section 9 exemption. There is no presumption that the excluded restrictions specified in article 12 of the R&D BEO fall within the scope of the Chapter I prohibition or otherwise fail to fulfil the conditions for exemption under Section 9(1). The exclusion of these obligations means only that they are subject to an individual assessment under the Chapter I prohibition on a case-by-case basis.

Summary of excluded restrictions and exceptions

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[192] Article 10(1)(f) of the R&D BEO.
[193] Article 10(1)(g) of the R&D BEO.
[194] Article 12 of the R&D BEO.
[195] The rules on severance are outside the scope of this guidance. The relevant principles were considered by the Supreme Court in the context of the common law doctrine of restraint of trade in *Egon Zehnder Ltd v Tillman* [2020] AC 154 (see, in particular, paragraphs 85 to 87).

4.133 The excluded restrictions are listed in article 12 of the R&D BEO. The first excluded restriction is an obligation not to challenge the validity of intellectual property rights which the parties hold in any part of the United Kingdom:

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

(b) after the expiry of the R&D agreement for intellectual property rights which protect the results of the R&D.[196]

4.134 The reason for excluding such obligations from the benefit of the block exemption is that parties that have the relevant information to identify an intellectual property right that was granted in error should not be prevented from bringing a challenge as regards the validity of such intellectual property rights. For such a restriction it cannot be generally presumed that the conditions of the Section 9 exemption are fulfilled and the parties will therefore need to self-asses such a restriction. However, provisions allowing for the termination of the R&D agreement if one of the parties challenges the validity of intellectual property rights which are relevant for the R&D agreement or that protect the R&D results are not excluded restrictions.[197]

4.135 The second excluded restriction is an obligation not to grant licences to third parties to produce the contract products or to apply the contract technologies. This means that the parties should, in principle, be free to grant licences to third parties. An exception applies where R&D agreements provide for the exploitation of the results of the joint R&D or paid-for R&D by at least one of the parties and such exploitation takes place in the United Kingdom.[198]

Obligation to provide information to the CMA (article 14 of the R&D BEO)

4.136 Article 14(1) of the R&D BEO requires any person[199] to supply the CMA with such information as it may request in connection with an R&D agreement to which that person is a party. This allows the CMA to monitor agreements and

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[196] Article 12(2)(a) and (b) of the R&D BEO.

[197] Article 12(3) of the R&D BEO.

[198] Article 12(5) of the R&D BEO sets out further detail, namely that: For the purposes of paragraph 12.4, the exploitation takes place in the United Kingdom if it involves—

(a) distribution of the contract product to customers (including third party distributors) in the United Kingdom,
(b) production of the contract product or the application of the contract technology within the United Kingdom; or
(c) the assignment or licensing of intellectual property rights, or the communication of know-how, required for the production of the contract product or the application of the contract technology, to a third party in the United Kingdom.

[199] Under section 59(1) (interpretation) CA98, 'person', in addition to the meaning given by the Interpretation Act 1978, includes any undertaking.

to require parties to provide information, for example, if a complaint is made about the agreement.

4.137 The CMA will make requests for information in writing. They must be complied with within ten working days, or within such longer period of working days as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing.

4.138 If the request is not complied with without reasonable excuse, the CMA has the power to cancel the block exemption for any specialisation agreement to which the request relates (article 14(2) of the R&D BEO) subject to: (a) giving notice in writing of its proposal; and (b) considering any representations made to it.

4.139 In appropriate cases, the CMA will seek to give recipients advance notice of information requests, and where it is practical and appropriate to do so, the CMA may send the information request in draft. The CMA can then take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The time frame for comment on the draft will depend on the particular circumstances of the case, including the nature and scope of the request.

4.140 The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases[200], which the CMA will have regard to when exercising the power in article 14(1) of the R&D BEO.

Cancellation of the R&D BEO

4.141 Not complying with the conditions imposed by articles 5, 6, 7, 8(2), (5), (7) or (8)[201] or 10 of the R&D BEO will have the effect of cancelling the block exemption in relation to the particular R&D agreement concerned. The CMA may also cancel the block exemption in relation to a particular R&D agreement (article 15 of the R&D BEO) and for failure to comply (without

[200] CMA8: Guidance on the CMA's investigation procedures in Competition Act 1998 cases.
[201] The cancellation of the block exemption in respect of an R&D agreement for breach of the condition imposed by article 8(8) is subject to article 11(2).

reasonable excuse) with the obligation to provide information (article 14 of the R&D BEO).

Breach of any of the conditions in articles 5, 6, 7, 8(2), (5), (7) or (8) or 10

4.142 Failure to comply with any of these conditions as applicable will result in the block exemption being cancelled in relation to all of the R&D agreement concerned. This means that the R&D agreement will no longer benefit from the block exemption provided by the R&D BEO and the undertakings must ensure that the agreement does not infringe the Chapter I prohibition, as appropriate, by removing any relevant infringing provision; by including provision(s) to meet the conditions of articles 5, 6 or 7 of the R&D BEO; or by ensuring their agreement fulfils the conditions for Section 9 exemption.

Cancellation of the block exemption in individual cases

4.143 Under section 6(6)(c) CA98, a block exemption order may provide that, if the CMA considers that a particular agreement is not an exempt agreement, it may cancel the block exemption in respect of that agreement. This is to ensure that the R&D BEO is only available for those agreements that satisfy the conditions for Section 9 exemption.

4.144 The CMA may cancel the block exemption in relation to a particular R&D agreement in two situations:

(a) if the CMA considers that a particular R&D agreement is not one which is exempt from the Chapter I prohibition because the Section 9(1) exemption applies to it (article 15 of the R&D BEO); or

(b) in case of a failure to comply with the obligation imposed by article 14(1) without reasonable excuse (article 14(2) of the R&D BEO), ie not providing the CMA with the information it requires.

4.145 Before cancelling the block exemption, the CMA will first give notice in writing of its proposal to those persons whom it can reasonably identify as being parties to the relevant R&D agreement.[202] This notice should state the facts on which the CMA bases its request, decision or proposal and its reasons for making it. The CMA must consider any representations made to it.

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[202] Or, where it is not reasonably practicable for the CMA to give such notice, by publishing its proposal in (i) the register maintained by the CMA under rule 20 of the CMA's rules set out in the Schedule to the CA98 (CMA's Rules) Order 2014; (ii) the London, Edinburgh and Belfast Gazettes; (iii) at least one national daily newspaper; and (iv) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal, stating the facts on which the CMA bases the proposal, and its reasons for making it. See article 16(b) of the R&D BEO.

4.146 A cancellation decision can only have 'ex nunc' effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the cancellation becomes effective.

Duration of the R&D BEO

4.147 The R&D BEO applies from 1 January 2023 and will cease to have effect at the end of 31 December 2035.

4.148 A transitional provision also ensures that the Chapter I prohibition does not apply for 2 years to pre-existing agreements which immediately before 1 January 2023 satisfied the conditions for exemption provided for in Commission Regulation (EU) No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, but which do not otherwise satisfy the conditions for exemption provided for in the R&D BEO (article 17 of the R&D BEO).

4.149 An additional transitional provision ensures that the new test for undertakings competing in innovation only applies in relation to R& D agreements entered into on or after 1 January 2024.[203] Before this time the test for not competing undertakings would apply.

4.150 Article 19 of the R&D BEO provides that the Secretary of State must, from time to time, carry out a review of the R&D BEO and publish a report[204] on the conclusions of the review. The first report must be published before the end of the period of five years, beginning with the day on which the R&D BEO comes into force. Subsequent reports must be published at intervals not exceeding five years.

4.151 The CMA also has the power by virtue of section 8(3) CA98 to recommend variation or revocation of a block exemption order if, in its opinion, such a course would be appropriate. Where industry participants or public authorities call for an earlier review by the CMA, they will need to explain why the block

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[203] Article 17(1) of the R&D BEO. An R&D agreement falling within article3(2)(c) or (d) which is entered into on or after 1st January 2024 is to be treated as having been entered into before that date for the purposes of this transitional provision, if the research and development to which it relates was carried out under a prior agreement falling within article 3(2)(a) or (b) between the same parties which was entered into before that date (article 17(2) of the R&D BEO).

[204] The report must in particular—

(a) set out the objectives intended to be achieved by the regulatory system established by the R&D BEO

(b) assess the extent to which those objectives are achieved; and

(c) assess whether those objectives remain appropriate, and, if so, the extent to which they could be achieved with a system that imposes less regulation.

exemption needs reviewing and the detriment that will arise in the absence of a review.

Assessment of R&D agreements falling outside the scope of the R&D BEO

Introduction

4.152 There is no presumption that R&D agreements falling outside the scope of the R&D BEO fall within the scope of the Chapter I prohibition nor that they would fail to satisfy the conditions of the Section 9 exemption. Such R&D agreements require an individual assessment under the Chapter I prohibition.

4.153 Such individual assessment starts with the question whether the agreement would restrict competition within the meaning of the Chapter I prohibition.[205] If so, undertakings would need to assess whether the R&D agreement fulfils the conditions of the Section 9 exemption.

Efficiencies

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

Indispensability

4.155 Restrictions that go beyond what is necessary to achieve the efficiencies generated by an R&D agreement do not fulfil the conditions of the Section 9 exemption. In particular, the hardcore restrictions listed in article 10 of the R&D BEO[206] are less likely to meet the indispensability criterion in an individual assessment. However, there may be limited circumstances in which such restrictions may nonetheless fulfil the conditions of the Section 9 exemption. By way of example, while giving access to the results of the R&D for the purposes of exploitation is important. exclusive access rights may

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[205] See also paragraphs 4.11 - 4.36 of this Guidance.

[206] See also paragraphs 4.109 - 4.129 of this Guidance on hardcore restrictions.

nonetheless fulfil the conditions of the Section 9 exemption, including where such exclusive rights are genuinely economically indispensable in view of the market, risks and scale of the investment required to exploit the results of the research and development.

Pass-on to consumers

4.156 Efficiencies attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the R&D agreement. For example, the benefits arising out of the introduction of new or improved products on the market must outweigh any restrictive effects on competition, for example, price increases.

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

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

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

No elimination of competition

4.160 The conditions of the Section 9 exemption cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products or, technologies in question.

Time of the assessment

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

4.162 The exception under the Section 9 exemption applies as long as the four cumulative conditions set out in the Section 9 exemption are fulfilled and ceases to apply when that is no longer the case. When applying the four cumulative conditions under the Section 9 exemption, it is necessary to take

into account the initial sunk investments made by any of the parties and the time needed and the restrictions required to make and recoup an efficiency-enhancing investment. The Chapter I prohibition cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be made to implement the agreement can thus lead to the agreement falling outside the Chapter I prohibition or fulfilling the conditions of the Section 9 exemption, as the case may be, for the period of time needed to recoup the investment. Should the invention resulting from the investment benefit from any form of exclusivity granted to the parties under rules specific to the protection of intellectual property rights, the recoupment period for such an investment will generally be unlikely to exceed the exclusivity period established under those rules.

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

4.164 For instance, in the case of an R&D agreement under the terms of which each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may objectively be technically and economically impossible to revive a project once it has been abandoned. If at that point in time, the agreement does not breach the Chapter I prohibition, for instance because a sufficient number of third parties have competing R&D efforts, the parties' agreement to abandon their individual projects does not breach the Chapter I prohibition, even if at a later point in time some or all of the third party projects fail.

4.165 However, the Chapter I prohibition may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If, for example, in addition to joint R&D, the agreement provides for joint exploitation, the Chapter I prohibition may apply to that part of the agreement if, due to subsequent market developments, the agreement gives rise to restrictive effects on competition and does not (any longer) satisfy the conditions of the Section 9 exemption taking due account of *ex ante* sunk investments.

Examples

R&D agreements between undertakings competing in innovation

Example 1

Situation: Companies A and B have each independently made significant investments in R&D to develop a new miniaturised electronic component that will neither improve nor replace existing ones, and the demand for which will create its

own new market, if successful. Companies A and B have developed early prototypes. They now agree to join those R&D efforts by setting up a joint venture to complete the R&D, focusing only on one of the two R&D efforts (the R&D part of the agreement) and to produce the new component (the joint exploitation part of the agreement), which will be sold back to Companies A and B, in order for them to commercialise the new component separately (the 'R&D agreement').

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

Analysis: The miniaturised electronic component is an entirely new product and an analysis should be made of whether the R&D agreement restricts competition in the United Kingdom within the meaning of the Chapter I prohibition. Furthermore, an assessment should be done of whether the R&D agreement is covered by the R&D BEO.

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

If the agreement leads to a restriction of competition within the meaning of the Chapter I prohibition, the parties would need to determine whether they can be exempted under the R&D BEO. However, the R&D agreement between Companies A and B does not meet the conditions for exemption. In particular, the threshold for agreements between undertakings competing in innovation is not met as there are no other competing R&D efforts or any third parties able to engage in relevant R&D efforts (article 8(5) of the R&D BEO). As a result, an individual assessment is required to determine whether the R&D agreement meets the requirements of the Section 9 exemption.

Under the Section 9 exemption, while the R&D agreement could potentially give rise to efficiencies in the form of bringing a new product forward more quickly, the R&D agreement would eliminate the only competitive constraint of the parties at innovation level. As a result, this would likely lead to a loss of innovation and to higher downstream prices. The R&D agreement would likely create a duopoly in the future market for new miniaturised electronic components. Such a duopoly would be characterised by a high degree of commonality of costs and possible exchange of competitively sensitive information between the parties since their joint venture will manufacture for the only sellers of the new component, Companies A and B. There may therefore also be a serious risk of anti-competitive coordination leading to a

collusive outcome in the new market. Although some of those concerns could be remedied if the parties committed to license know-how or intellectual property rights for manufacturing the new component to third parties on reasonable terms, it seems unlikely that this could remedy all concerns and fulfil the conditions of the Section 9 exemption. Therefore, the R&D agreement is unlikely to be exempted under the Section 9 exemption.

R&D agreements between actual and potential competitors in relation to a product and/or technology arising out of the agreement

Example 2

Situation: Company A has a 51% market share on a market encompassing its blockbuster medicine. A small company, Company B, is engaged in pharmaceutical R&D, in the production of active pharmaceutical ingredients ("APIs") and in the production of generic medicines. Company B has invented a process that makes it possible to produce the API of Company A's blockbuster medicine in a more economic fashion. Company B has filed a patent application for this process (process patent). Company A's compound (API) patent of the blockbuster medicine expires in a little less than three years; thereafter there will remain a number of process patents relating to the medicine. Company B considers that the new, more efficient process developed by it would not infringe the existing process patents of Company A and would allow the production of a generic version of the blockbuster medicine once Company A's API patent has expired. Company B would be likely to either produce the product itself or license the process to interested third parties, for example, to other generic producers or to Company A. Before concluding its research and development in this area, Company B enters into an agreement with Company A, in which Company A makes a financial contribution to the R&D project being carried out by Company B on condition that it acquires an exclusive licence for any of Company B's process patents related to the production of the API of Company A's blockbuster medicines. There are two other independent research and development efforts developing a process for the production of the API of the blockbuster medicine which would not infringe Companies A's or B's process patents, but it is not yet clear whether they will reach industrial production.

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

that market power would decrease significantly with the actual market entry of generic competitors, the exclusive licence of the process patent makes the process developed by Company B unavailable to third parties and is thus liable to delay generic entry (not least as the product is still protected by a number of process patents belonging to Company A).

Since it is unclear whether the two other R&D efforts currently working on a non-infringing alternative to Company A's process patent would reach industrial production, Company B's process patent is the only credible route to launch generic products that could compete with Company A's blockbuster medicine. Consequently, the agreement restricts competition within the meaning of the Chapter I prohibition. The efficiencies relating to cost savings obtained through the new production process for Company A are not sufficient to outweigh the restriction of competition. In the absence of other competitors in the product market, such as generic producers, it is unlikely that the production cost savings would be passed on to consumers. Moreover, an exclusive licence is not indispensable to obtain such savings. Therefore, the agreement is unlikely to fulfil the conditions of the Section 9 exemption

Research partnerships

Example 3
Situation: Companies A, B and C are leading players in renewable energy technologies. They plan to set up a research partnership, which will define an R&D agenda setting a long-term common vision regarding the development of new renewable energy technologies and improvement of the existing ones, which would be implemented in a series of separate R&D projects.

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

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

Moreover, if the research partnership addresses a challenge that no single company can address and requires the mobilisation of multiple actors, it would be facilitating innovation that otherwise would not take place. As such, it would not only represent

a contribution to technical and economic progress, but it may not restrict competition that would have taken place absent the partnership.

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

5. Production Agreements

Introduction

5.1 The purpose of this Part is to provide guidance on the competitive assessment of production agreements under the Chapter I prohibition. Such agreements may benefit from the block exemption provided by the SABEO (see paragraph 5.55 onwards). However, where they fall outside the scope of the SABEO, they may nonetheless be exempt from the Chapter I prohibition if they fulfil the conditions of the Section 9 exemption (paragraph 5.122 onwards). This Part also provides guidance on mobile infrastructure sharing agreements, a particular type of production agreement (paragraph 5.131 onwards).

5.2 Production agreements vary in form and scope. Such agreements may provide, for example, that production is carried out by only one party or by multiple parties. Parties may produce jointly through a joint venture (that is, through a jointly controlled company operating one or more production facilities) or by looser forms of cooperation in production such as subcontracting agreements.

5.3 This Guidance applies to all forms of joint production agreements and horizontal subcontracting agreements.[207]

5.4 Subcontracting agreements refer to the type of production agreement where one party (the 'contractor') entrusts to another party (the 'subcontractor') the production of a product.[208] Horizontal subcontracting agreements are concluded between undertakings operating in the same product market as regards the product or products that are the subject of the agreement irrespective of whether they are actual or potential competitors. Horizontal subcontracting agreements include unilateral and reciprocal specialisation agreements as well as other horizontal subcontracting agreements.

5.5 Specialisation agreements are a particular type of production agreement that may benefit from the exemption established by the SABEO. Specialisation agreements include unilateral specialisation agreements which are agreements between two or more undertakings active on the same product market by virtue of which a party or parties wholly or partly gives up the

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[207] Vertical subcontracting agreements are not covered by this Guidance. Vertical subcontracting agreements are concluded between companies operating at different levels of the market. They fall within the scope of the VABEO Guidance and, subject to certain conditions, may benefit from the VABEO.

[208] In relation to the application of the SABEO, please refer to article 2 of the SABEO for the definition of 'product'.

production of a product and purchases it from the other party or parties to the agreement.

5.6 Specialisation agreements also include reciprocal specialisation agreements which are agreements between two or more undertakings active on the same product market by virtue of which the parties agree on a reciprocal basis that each party will wholly or partly give up the manufacture of a particular but different product, and purchase the product concerned from the other party or parties involved in the reciprocal arrangement.

5.7 In relation to the application of the SABEO, both unilateral and reciprocal specialisation agreements are defined in article 3(2) of the SABEO and described in more detail at paragraphs 5.58 - 5.60 of this Guidance.

5.8 This Guidance also applies to other horizontal subcontracting agreements. This includes subcontracting agreements with a view to expanding production, in which a contractor entrusts a subcontractor with producing a product, while the contractor does not at the same time cease or limit its own production of the product.

Relevant markets

5.9 The CMA's Guidance on Market Definition provides guidance on the rules, criteria and evidence to which the CMA has regard when considering market definition issues.[209] That guidance will not be further explained here and should be taken into account when assessing market definition. A production agreement will affect the markets directly concerned by the agreement, that is, the markets to which the products manufactured or prepared under the production agreement belong.

5.10 A production agreement can also have effects in markets that are upstream, downstream or neighbouring the market directly concerned by the agreement.

Assessment under the Chapter I prohibition

5.11 This part considers what is typically the first step in the competitive assessment of a production agreement, which is establishing whether the agreement contains restrictions of competition falling within the scope of the Chapter I prohibition. If a production agreement does not fall within the

[209] OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997, which is a statement of the European Commission for the purpose of section 60A CA98.

scope of the Chapter I prohibition, there is no need to consider whether it benefits from exemption.

5.12 If a production agreement does fall within the scope of the Chapter I prohibition:

(a) first, the assessment will focus on whether it is a specialisation agreement that can benefit from the exemption of the SABEO (paragraph 5.55 onwards).

(b) second, if the agreement does not meet the legal conditions of the SABEO, an individual assessment of the agreement will be necessary to determine whether the specialisation agreement fulfils the conditions of the Section 9 exemption (paragraph 5.122 onwards).

5.13 There is no presumption that production agreements that do not fulfil the conditions of the SABEO fall within the scope of the Chapter I prohibition or fail to satisfy the conditions of the Section 9 exemption. Such production agreements require an individual assessment.

Main competition concerns

5.14 Production agreements can raise different competition concerns.

5.15 Production agreements can lead to a **direct limitation of competition between the parties**. Production agreements, and in particular production joint ventures,[210] may lead the parties to directly align (a) output levels, (b) quality, (c) the price at which the joint venture sells its products, or (d) other competitively important parameters (for example, innovation, sustainability). This may restrict competition even if the parties sell the products independently.

5.16 Production agreements may also result in **coordination of the parties' competitive behaviour as suppliers,** and a **collusive outcome**, leading to (a) higher prices, (b) reduced output, (c) reduced product quality, (d) reduced product variety or (e) reduced innovation.

5.17 The parties' ability to coordinate their behaviour leading to such outcomes will depend on:

(a) the parties having market power; and

[210] See paragraphs 3.8 - 3.10- for guidance in the context of agreements between parents and their joint venture.

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

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

(ii) if the agreement involves an exchange of competitively sensitive information.

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

5.19 For example, if parties engaging in joint production in an upstream market gain sufficient market power, they may be able to raise the price of a key component (or input) for a market downstream. The parties could in such circumstances use the joint production to raise the costs of their rivals downstream and marginalise them or, ultimately, exclude them from the market. This would, in turn, increase the parties' market power downstream, which might enable them to sustain prices above the competitive level or otherwise harm consumers.

Restrictions of competition by object

5.20 Generally, agreements which involve (a) price-fixing, (b) limiting output or (c) allocating markets or customers restrict competition by object within the meaning of the Chapter I prohibition.

5.21 However, in the context of production agreements, such agreements will not restrict competition by object where:

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

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

5.22 In these two cases, the production agreements that include these restrictions will have to be assessed to determine whether they are likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. These restrictions and the related production agreements will not be assessed separately from each other, but in the light of the overall effects on the market of the entire production agreement.

Restrictive effects on competition

Relevant factors

5.23 Whether the possible competition concerns that production agreements can give rise to are likely to materialise in a given case depends on several factors. These factors determine the likely effects of a production agreement on competition and thereby the applicability of the Chapter I prohibition. These factors include:

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

(b) the nature of the cooperation envisaged by the agreement;

(c) the market coverage of the agreement; and

(d) the products concerned by the agreement.

5.24 Whether a production agreement is likely to give rise to restrictive effects on competition depends on the situation that would prevail absent the agreement with all its restrictive provisions.

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

Production agreements which also involve commercialisation functions (for example, joint selling, distribution or marketing)

5.26 These agreements carry a higher risk of restrictive effects on competition than production agreements without such commercialisation functions. Joint commercialisation brings the cooperation closer to the consumer and may involve, for example, the joint setting of prices, allocating markets or customers, or output limitation, that is, practices that carry high risks for competition.

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

Production agreements unlikely to have restrictive effects

5.28 Certain production agreements are less likely to have restrictive effects:

(a) Production agreements are less likely to have restrictive effects on competition if the production agreement gives rise to a new market,[211] that is, if the agreement enables the parties to launch a new product that, on the basis of objective factors, the parties would otherwise not have been able to do (for example, due to the parties' technical capabilities and access to finance, skilled workers, technologies or other resources).

(b) Production agreements are less likely to lead to a direct limitation of competition between the parties if the parties to the agreement do not have market power in the market on which a restriction of competition is assessed. Typically, it is market power that can enable the parties to the agreement to profitably maintain prices above the competitive level, or profitably maintain output, product quality or variety below what would be dictated by competition.

Market power

5.29 The CMA's Guidance on Market Power provides guidance on how the CMA will assess whether undertakings possess market power.[212] That guidance will not be further explained here and should be taken into account in assessing market power. The starting point for the analysis of market power is the individual and combined market share of the parties (see paragraphs 5.30

[211] For the purpose of this Part, 'new market' should be understood in a broader sense than in the context of R&D agreements covered by Part 4 (see, for example, paragraph 4.5 of this Guidance).
[212] OFT 415, Assessment of Market Power.

- 5.33). This will normally be followed by the concentration ratio and the number of players in the market (see paragraphs 5.34 - 5.35) and by dynamic factors such as potential entry and changing market shares (see paragraph 5.36), as well as other factors relevant to the assessment of market power (see paragraph 5.37 - 5.38).

Market shares

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

5.31 Under the SABEO, the market share threshold is set at 20%. Specialisation agreements,[213] including certain integrated commercialisation functions such as joint distribution, can be exempted by the SABEO if they are concluded between parties with a combined market share not exceeding 20% in the relevant market or markets, provided that the other conditions for the application of the SABEO are fulfilled (paragraph 5.55 onwards).

5.32 So far as concerns horizontal subcontracting agreements that fall outside the definition of specialisation agreement of the SABEO, if the parties to the agreement have a combined market share not exceeding 20%, it is, in most cases, unlikely that market power will exist. In any event, horizontal subcontracting agreements in which the parties' combined market share does not exceed 20% are likely to fulfil the conditions of the Section 9 exemption.

5.33 If the parties' combined market share exceeds 20%, any restrictive effects of the agreement have to be analysed. The risk that a production agreement may increase the parties' incentives to increase their prices (and/or decrease quality and range) is increased the higher the combined market shares of the parties.

Market concentration ratio

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

5.35 However, the fact that the parties' combined market share is moderately higher than 20% does not necessarily imply a highly concentrated market. A

[213] As defined in Article 2 of the SABEO.

combined market share of the parties of slightly more than 20% may occur in a market with a moderate concentration.

Dynamic factors

5.36 Even if the market shares of the parties to the agreement and the levels of market concentration are high, the risks of restrictive effects on competition may still be low if the market is dynamic. Dynamic markets are typically those which are growing and/or evolving and in which competition revolves around bringing new and innovative products to market.

Other factors relevant for the assessment of market power

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

5.38 In addition, where a party with market power in one market enters into an agreement with a potential entrant to that market (for example, a supplier of the same product in a neighbouring geographic market or a supplier in a related product market), that agreement can potentially increase the market power of the incumbent.

5.39 This can lead to restrictive effects on competition if actual competition in the incumbent's market is already weak and the threat of entry is a major source of competitive constraint.

Direct limitation of competition between the parties

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

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

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

(c) A joint venture charging a high transfer price to the parties to the production agreement would increase the input costs for the parties, which could lead to higher downstream prices. Competitors may find it

profitable to increase their prices in response, thereby contributing to price increases in the relevant market.

5.41 In addition, in some industries where production is the main economic activity, even a pure production agreement (for example, a production agreement without commercialisation functions) can in itself eliminate key dimensions of competition, thereby directly limiting competition between the parties to the agreements.

Collusive outcome and anti-competitive foreclosure

5.42 The likelihood of a collusive outcome depends on the parties' market power (see paragraph 5.29 onwards above) as well as the characteristics of the relevant market. A collusive outcome can result in particular (but not only) from commonality of costs or an exchange of information brought about by the production agreement.

5.43 A production agreement can also lead to an anti-competitive foreclosure by increasing the undertakings' market power, by increasing their commonality of costs, or if it involves the exchange of competitively sensitive information.

Commonality of costs

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

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

5.46 A production agreement is more likely to lead to a collusive outcome or to foreclosure if prior to the agreement the parties already have a high proportion of variable costs in common,[214] as the increment in commonality of production costs caused by the production costs of the products subject to the agreement can tip the balance towards a collusive outcome. Conversely, even if the initial level of commonality of costs is low, if the increment in commonality caused by the production costs of the products subject to the agreement is large, the risk of a collusive outcome or foreclosure may still be high.

[214] The level at which variable costs in common are considered high will vary depending on the industry involved.

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

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

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

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

Exchanges of information

5.51 A production agreement can give rise to restrictive effects on competition if it involves an exchange of competitively sensitive information.

5.52 Whether the exchange of information in the context of a production agreement is likely to lead to restrictive effects on competition should be assessed according to Part 8 of this Guidance. Any negative effects arising from those exchanges of information will not be assessed separately, but in the light of the overall effects of the production agreement.

5.53 The production agreement would be more likely to fulfil the conditions of the Section 9 exemption if the information exchanged did not exceed what was necessary to produce the products subject to the agreement, even if the information exchange had restrictive effects on competition within the meaning of the Chapter I prohibition. In this case, the efficiencies stemming from producing jointly would be likely to outweigh the restrictive effects of the coordination of the parties' conduct.

5.54 The production agreement would be less likely to meet the conditions of the Section 9 exemption if the information exchange went beyond what was necessary for producing jointly, for example, information related to prices and sales (though it should be noted that other considerations apply where a production agreement involves the joint distribution of the jointly produced products, see paragraphs 5.21 - 5.22 of this Guidance).

Agreements covered by the SABEO

5.55 The SABEO establishes an exemption from the Chapter I prohibition, subject to certain conditions, for certain production agreements, which are referred to in the SABEO as 'specialisation agreements'.[215]

5.56 The benefit of the exemption of the SABEO is limited to those specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of the Section 9 exemption.

Specialisation agreements

5.57 The exemption in the SABEO applies to the following specialisation agreements: unilateral specialisation agreements, reciprocal specialisation agreements and joint production agreements, each of which is defined in article 3(2) of the SABEO.

Unilateral specialisation agreements

5.58 'Unilateral specialisation agreement' is defined in the SABEO as meaning an agreement:

(a) entered into between two or more undertakings which are active on the same product market; and

(b) by virtue of which:

(i) one or more of the parties agree that they will, wholly or partly, cease or refrain from producing a particular product and will purchase the product concerned from the other party or parties; and

(ii) the other party or parties agree to produce the product concerned and supply it to the party or parties who (wholly or partly) cease or refrain from producing it.

[215] As defined in article 2 of the SABEO.

Reciprocal specialisation agreements

5.59 'Reciprocal specialisation agreement' is defined in the SABEO as meaning an agreement:

(a) entered into between two or more undertakings which are active on the same product market; and

(b) by virtue of which:

(i) two or more of the parties agree, on a reciprocal basis, that they will, wholly or partly, cease or refrain from producing a particular, but different, product and will purchase the product concerned from the other party or parties involved in the reciprocal arrangement; and

(ii) in each case the other party or parties agree to produce the product concerned and supply it to the party or parties that (wholly or partly) cease or refrain from producing it.

5.60 The definitions of 'unilateral specialisation agreement' and 'reciprocal specialisation agreement' do not require the parties to be active on the same geographic market. Similarly, they do not require the party or parties that cease or refrain from producing a particular product to reduce capacity (for example, by selling factories, closing production lines, etc), as it is sufficient for the party or parties to reduce their production volumes.

Joint production agreements

5.61 'Joint production agreement' is defined in the SABEO as meaning an agreement:

(a) entered into between two or more undertakings which are already active on the same product market or which wish to enter a product market by way of the agreement concerned; and

(b) by virtue of which two or more of the parties agree to produce a particular product jointly (see paragraphs 5.70 - 5.73 of this Part for guidance on the meaning of 'joint' in the context of production).

5.62 The definition of 'joint production agreement' does not require the parties to be already active on the same product market, or that a party or parties ceases or refrains from producing any products.

Other provisions in specialisation agreements

5.63 The exemption in the SABEO also extends to specialisation agreements which include certain provisions set out below.

Specialisation agreements with provisions on the assignment or licensing of intellectual property rights to one or more of the parties (article 3(3) of the SABEO)

5.64 Specialisation agreements which include provisions relating to the assignment or licensing of intellectual property rights to one or more of the parties benefit from the exemption in the SABEO if the provisions meet two cumulative conditions:

(a) they do not constitute the primary object of the specialisation agreements; and

(b) they are directly related to and necessary for the implementation of the specialisation agreements

Specialisation agreements with provisions on supply or purchase obligations

5.65 In order to ensure that the benefits of specialisation will materialise without one party leaving the market downstream of production entirely, unilateral and reciprocal specialisation agreements will only be exempted where they provide for supply and purchase obligations.[216] The definitions of each type of agreement provide for supply and purchase obligations, for example, under a unilateral specialisation agreement, the party or parties that wholly or partly cease or refrain from producing a product will **purchase** the product from the other party or parties, and the other party or parties agree to **supply** the party or parties that wholly or partly cease or refrain from producing the product.

5.66 Article 3(4)(a) of the SABEO establishes that the exemption will apply to specialisation agreements even if the parties accept as part of the agreement an exclusive purchase or exclusive supply obligation.

5.67 An 'exclusive supply obligation' in relation to a specialisation agreement, is defined in article 3(5) of the SABEO as meaning an obligation not to supply any of the specialisation products (as defined in article 2(1) of the SABEO) to a competing undertaking who is not a party to the agreement. Therefore, an exclusive supply obligation does not prevent the parties from supplying the

[216] Please see the definitions of 'unilateral specialisation agreement' and 'reciprocal specialisation agreement' in articles 3(2)(a) and (3)(2)(b) of the SABEO.

specialisation products to third parties who are not competing undertakings (as defined in article 2(1) of the SABEO).

5.68 An 'exclusive purchase obligation' in relation to a specialisation agreement is defined in article 3(5) of the SABEO as meaning an obligation to purchase any of the specialisation products only from one or more of the parties to the agreement.

5.69 Other provisions included in specialisation agreements that constitute ancillary restraints will also benefit from the exemption of the SABEO provided that the conditions defined under case law[217] are met (see paragraph 3.40)

Joint distribution and the concept of 'joint' under the SABEO

5.70 Specialisation agreements that include provisions for joint distribution may also benefit from the exemption under the SABEO.

5.71 Article 3(4)(b) of the SABEO establishes that the exemption under the SABEO will apply to a specialisation agreement even if the obligations under the agreement relating to the purchase or supply of any of the specialisation products include provisions under which the parties distribute any of the specialisation products jointly and do not sell them independently.

5.72 Joint distribution[218] can be part of a specialisation agreement and can benefit from the exemption of the SABEO if the distribution is:

(a) carried out by the parties to a specialisation agreement through a joint team, organisation or undertaking, or

(b) undertaken by a third party distributor jointly appointed by the parties to a specialisation agreement on an exclusive or non-exclusive basis, provided that the third party distributor is not a competing undertaking.

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

[218] Article 2(1) of the SABEO provides that 'joint', in relation to distribution means (other than in the expression 'joint team, organisation or undertaking') activities where the work involved is—

(a) carried out by the parties to a specialisation agreement through a joint team, organisation or undertaking, or

(b) undertaken by a third party distributor jointly appointed by the parties to a specialisation agreement on an exclusive or non-exclusive basis, provided that the third party distributor is not a competing undertaking,

and references to distributing a specialisation product 'jointly' are to be construed accordingly.

5.73 The SABEO also uses the concept of 'joint' in the definition of 'joint production agreement' (article 3(2)(c) of the SABEO and paragraphs 5.61 - 5.62 of this Guidance), which may also benefit from the exemption under the SABEO. However, unlike for joint distribution, the term 'joint' is not defined in the context of production. Therefore, provided that it fulfils the other criteria of the SABEO, to benefit from the exemption under the SABEO, joint production may take any form.

Services under the SABEO

5.74 Specialisation agreements benefiting from the exemption of the SABEO may also concern the preparation of services.[219]

5.75 The 'preparation of services' refers to activities upstream of the provision of services to customers (article 2(1) of the SABEO). For example, a specialisation agreement for the creation of a platform through which a service will be provided could be considered an agreement concerning the preparation of services.

5.76 However, the provision of services (as opposed to their preparation) is outside the scope of the SABEO, except in the context of distribution in which the parties provide the services prepared under the specialisation agreement.

Subcontracting under the SABEO

5.77 Parties to a specialisation agreement benefiting from the exemption of the SABEO may subcontract their production under the specialisation agreement, while continuing to benefit from the exemption.[220]

Competing undertakings: actual or potential competitors

5.78 Under article 2(1) of the SABEO, a competing undertaking in relation to a specialisation agreement means:

(a) an undertaking that is active on the same relevant market as a party to the agreement, or

[219] Please refer to the definitions of 'product', 'production' and 'preparation of services' in article 2(1) of the SABEO.

[220] In relation to joint production agreements as well as to unilateral specialisation agreements and reciprocal specialisation agreements (the definitions of which refer to the term 'produce' and 'producing'), 'production' is defined in article 2 of the SABEO as 'the manufacture of goods or the preparation of services, including by way of subcontracting, and 'produce' and related expressions are to be construed accordingly'.

(b) an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within not more than three years, the necessary additional investments or other necessary costs to enter a relevant market.

5.79 Potential competition has to be assessed on a realistic basis. For instance, parties cannot meet the definition of a competing undertaking under the SABEO simply because a specialisation agreement enables them to carry out certain production activities. The decisive question is whether each party independently has the means necessary to do so.

5.80 The assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context within which it operates.[221] This means that the mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for that party to enter the market without any insurmountable barriers to entry. Conversely, there is no need to demonstrate with certainty that that party will in fact enter the market concerned and, a fortiori, that it will be capable, thereafter, of retaining its place there.

Market share threshold under the SABEO

5.81 This section considers the condition in article 5 of the SABEO that in order to benefit from the block exemption provided in the SABEO the combined market share of the parties must not exceed 20% of any relevant market.

5.82 If the parties' combined market share exceeds the market share threshold (in article 5(1) of the SABEO), the block exemption will be cancelled in relation to the particular agreement. However, if the parties' combined market share does not exceed 20% at the time the agreement is entered into, but subsequently rises above that level, cancellation will be subject to the grace period in article 5(3) of the SABEO, which is explained at paragraph 5.94 of this Guidance.

Market share threshold

5.83 Under article 5 of the SABEO, specialisation agreements may benefit from the exemption if the parties' combined market share does not exceed 20% of any 'relevant market' provided that the other conditions for exemption under the SABEO are fulfilled.

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[221] For the approach generally to assessing potential competition, see paragraphs 3.15 - 3.20 of this Guidance.

5.84 'Relevant market', in relation to a specialisation agreement, means:

(a) a relevant product and geographic market to which one or more of the specialisation products belongs, and

(b) where any of the specialisation products is an intermediate product which one or more of the parties use wholly or partly as an input for their own production of a downstream product[222] a relevant product and geographic market to which the downstream product belongs.

5.85 When the specialisation product is an intermediate product that one or more of the parties use, wholly or partly, as an input for their own production of a downstream product, the exemption of the SABEO is **also** conditional on the parties' share on the relevant market to which the downstream product belongs not exceeding 20%.[223] In such a case, the exemption is conditional on the parties' combined market share not exceeding 20% of either:

(i) the relevant market to which the specialisation product belongs; or

(ii) the relevant market to which the downstream product belongs.

5.86 Merely looking at the parties' market share at the level of the intermediate product would ignore the potential risk of foreclosing or increasing the price of inputs for competitors at the level of the downstream products.

Calculation of market shares

5.87 Article 6 of the SABEO sets out rules for applying and calculating the market share thresholds.

5.88 When it comes to the metrics for the calculation of market shares, article 6(1)(a) of the SABEO provides that the calculation of market shares will be based on market sales value data. If such data is not available, estimates based on other reliable market information, such as market sales volumes, should be used to establish the market share of the parties.

5.89 Under article 6(1)(b) of the SABEO, the market share of a party must be calculated on the basis of data relating to the preceding calendar year.

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[222]Article 2 of the SABEO defines 'downstream product' as 'a product for which a specialisation product is used as an input by one or more parties to a specialisation agreement and which is subsequently sold by the party or parties concerned on the market'.

[223] See article 5(1) of the SABEO and the definition of 'relevant market' in Article 2 of the SABEO.

5.90 Where the preceding calendar year is not representative of a party's position in the relevant market, the market share of a party should be calculated as an average of that party's market shares for the three preceding calendar years. This may be relevant for instance for bidding markets where the market shares may significantly change (for example, from 0% to 100%) from one year to another, depending on whether a party was successful or not in the bidding process. This may also be relevant for markets characterised by large, lumpy orders in which the market share of the previous calendar year may not be representative, for example, if no large order took place in the preceding calendar year. Another situation in which it may be necessary to calculate market shares on the basis of an average of the last three preceding calendar years is when there is a supply or demand shock in the calendar year preceding the specialisation agreement.

5.91 For the purpose of the SABEO, the terms 'undertaking' and 'party' include their respective 'connected undertakings', as defined in article 2(3).

5.92 Article 6(2) of the SABEO provides that, in applying the market share threshold, the market share held by the undertakings referred to in paragraph (e) of the definition of 'connected undertakings'[224] shall be apportioned equally to each undertaking having the following rights or powers, directly or indirectly:

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

(b) the power to appoint more than half the members of the board of directors, or if there is no such board, the equivalent body or bodies, responsible for the management of the undertaking, or

(c) the right to manage the undertaking's affairs.

Duration of the exemption

5.93 The exemption of the SABEO is applicable for the duration of the specialisation agreement provided that the market share thresholds are met and the other conditions for exemption are fulfilled.

5.94 Article 5(3) of the SABEO provides that where the combined market share of the parties does not exceed the 20% threshold at the time the specialisation agreement is entered into, but subsequently rises above that level, the block

[224] That is, the market share of undertakings in which the rights or powers listed in paragraph (a) of the definition of 'connected undertakings' are (i) jointly held by two or more parties to a specialisation agreement or their respective connected undertakings, or (ii) are jointly held by one or more of the parties to the specialisation agreement or one or more of their connected undertakings and one or more third parties).

exemption will be cancelled in relation to the agreement, but only with effect from the end of a period of two consecutive calendar years following the year in which the 20% market share threshold concerned was first exceeded.

Hardcore restrictions in the SABEO

5.95 This part considers the condition of the SABEO that a specialisation agreement must not contain any of the hardcore restrictions listed in article 7 of the SABEO in order to benefit from the block exemption provided by the SABEO.

5.96 Not complying with this condition (as defined in article 7(1) of the SABEO) will have the effect of cancelling the block exemption in relation to a particular agreement.[225]

5.97 This part considers:

(a) General principles relating to the hardcore restrictions

(b) Summary of hardcore restrictions

(c) Exceptions

General principles

5.98 Article 7 of the SABEO contains a list of hardcore restrictions. These are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to the market and to consumers. Specialisation agreements that include one or more hardcore restrictions are excluded as a whole from the scope of the exemption provided for by the SABEO.[226]

5.99 Hardcore restrictions under article 7(1) of the SABEO are generally restrictions of competition by object which fall within the Chapter I prohibition.[227] Restrictions of competition by object within the meaning of the Chapter I prohibition are agreements which, by their very nature, have the potential to prevent, restrict or distort competition.[228] In that regard, certain types of coordination between undertakings reveal a sufficient degree of harm

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[225] Article 7(3) of the SABEO.
[226] Article 7(3) of the SABEO.
[227] See European Commission Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final, page 4, which guidance is a statement of the European Commission for the purpose of section 60A CA98, to which the CMA will have regard for the purpose of identifying restrictions of competition by object.
[228] Judgment of 4 June 2009, *T-Mobile Netherlands*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.

to competition that it may be found that there is no need to examine their effects.[229]

5.100 However, the concept of a hardcore restriction for the purposes of the SABEO is not necessarily the same as a restriction by object for the purposes of the Chapter I prohibition.[230] Hardcore restrictions correspond to a category of restrictions under the SABEO for which it is presumed that they generally result in harm to competition so that a specialisation agreement containing such a hardcore restriction cannot benefit from the block exemption provided by the SABEO. It must then be examined individually to determine whether it has the object or effect of restricting competition and if so whether it can benefit individually from the application of the Section 9 exemption.

5.101 In the light of the above, the CMA will adopt the following approach when assessing a specialisation agreement:

(a) Where a hardcore restriction within the meaning of article 7 of the SABEO is included in a specialisation agreement, this agreement is likely to fall within the Chapter I prohibition.[231]

(b) The inclusion of a hardcore restriction in an agreement will have the effect of cancelling the benefit of the block exemption provided by the SABEO in relation to that agreement.

(c) An agreement that includes a hardcore restriction within the meaning of article 7 of the SABEO is unlikely to fulfil the conditions of the Section 9 exemption.

5.102 An undertaking may demonstrate efficiencies which fulfil the conditions of the Section 9 exemption in a particular case and the CMA will carefully consider these efficiencies in any investigations under the CA98. For this purpose, when seeking to demonstrate that all the conditions of the Section 9 exemption are fulfilled, the undertaking should substantiate that efficiencies are likely and that these efficiencies are likely to result from including the hardcore restriction in the agreement. Where this is the case, the negative impact on competition that is likely to result from including the hardcore restriction in the agreement should be assessed before making an ultimate

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[229] Judgment of 11 September 2014, *Groupement des Cartes Bancaires*, C-67/13, EU:C:2014:2204, paragraph 49.

[230] See by analogy *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 29 in which the Court of Appeal held that 'to say that a restriction is a hardcore restriction for the purposes of Regulation 330/2010 is not the same as saying that it is a restriction by object for the purposes of Article 101(1)'.

[231] Hardcore restrictions do not necessarily fall within the scope of the Chapter I prohibition.

assessment of whether the conditions of the Section 9 exemption are fulfilled (see paragraphs 3.41 - 3.47)

Summary of hardcore restrictions

5.103 The hardcore restrictions listed in article 7 of the SABEO can be grouped into the following categories:

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

(b) limiting output or sales; and

(c) allocating markets or customers.

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

Exceptions

5.105 Article 7 of the SABEO also provides that certain restrictions will not be treated as hardcore restrictions. Specialisation agreements that include these restrictions can still be exempted under the SABEO if the other conditions for exemption under the SABEO are fulfilled.

5.106 A specialisation agreement may still benefit from the block exemption where it includes the following restrictions:

(a) If the specialisation agreement has as its object the fixing of prices charged to immediate customers in the context of joint distribution (article 7(1)(a) of the SABEO).

(b) In the context of limiting output or sales, if the specialisation agreement includes:

(i) In the case of unilateral or reciprocal specialisation agreements, provisions agreeing the amount of products a party or parties (i) are to cease or refrain from producing, or (ii) are to produce for the other party or parties to the specialisation agreement (article 7(2)(a) of the SABEO);

(ii) In the case of joint production agreements, provisions which relate to setting capacity and production volumes for any of the specialisation products (article7(2)(b) of the SABEO);

(iii) In the context of joint distribution, provisions setting sales targets for any of the specialisation products (article 7(2)(c) of the SABEO).

Obligation to provide information to the CMA (article 8 of the SABEO)

5.107 Article 8(1) of the SABEO requires any person[232] to supply the CMA with such information as it may request in connection with a specialisation agreement to which that person is a party. This allows the CMA to monitor agreements and to require parties to provide information, for example, if a complaint is made about the agreement.

5.108 The CMA will make requests for information in writing. They must be complied with within ten working days, or within such longer period of working days as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing. If the request is not complied with without reasonable excuse, the CMA has the power to cancel the block exemption for any specialisation agreement to which the request relates (article 8(2) of the SABEO) subject to: (a) giving notice in writing of its proposal; and (b) considering any representations made to it.

5.109 In appropriate cases, the CMA will seek to give recipients advance notice of information requests, and where it is practical and appropriate to do so, the CMA may send the information request in draft. The CMA can then take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The time frame for comment on the draft will depend on the particular circumstances of the case, including the nature and scope of the request.

5.110 The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, which the CMA will have regard to when exercising the power in article 8(1) SABEO.

[232] Under section 59(1) (interpretation) CA98, 'person', in addition to the meaning given by the Interpretation Act 1978, includes any undertaking.

Cancellation of the SABEO

5.111 Not complying with the conditions imposed by articles 5[233] or 7 of the SABEO will have the effect of cancelling the block exemption in relation to the particular specialisation agreement concerned.

5.112 The CMA may also cancel the block exemption in relation to a particular specialisation agreement (article 9 of the SABEO) and for failure to comply (without reasonable excuse) with the obligation to provide information (see paragraph 5.108 above) (article 8 of the SABEO).

Breach of any of the conditions in articles 5 or 7 of the SABEO

5.113 Failure to comply with either of the two conditions will result in the block exemption being cancelled in relation to all of the specialisation agreement concerned. This means that the specialisation agreement will no longer benefit from the block exemption provided by the SABEO and the undertakings must ensure that the agreement does not infringe the Chapter I prohibition, as appropriate, either by removing any relevant infringing provision or by ensuring their agreement fulfils the conditions for Section 9 exemption.

Cancellation of the block exemption in individual cases

5.114 Under section 6(6)(c) CA98, a block exemption order may provide that, if the CMA considers that a particular agreement is not an exempt agreement, it may cancel the block exemption in respect of that agreement. This is to ensure that the SABEO is only available for those agreements that satisfy the conditions for the Section 9 exemption.

5.115 The CMA may cancel the block exemption in relation to a particular specialisation agreement in two situations:

(a) if the CMA considers that a particular specialisation agreement is not one which is exempt from the Chapter I prohibition because the Section 9 exemption applies to it (article 9 of the SABEO); or

(b) in case of a failure to comply with the obligation imposed by article 8(1) without reasonable excuse (article 8(2) of the SABEO), ie not providing the CMA with the information it requires.

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[233] The cancellation of the block exemption in respect of a specialisation agreement for breach of the condition imposed by article 5(1) is subject to article 5(3) of the SABEO.

5.116 Before cancelling the block exemption, the CMA will first give notice in writing of its proposal to those persons whom it can reasonably identify as being parties to the relevant specialisation agreement.[234] This notice should state the facts on which the CMA bases its request, decision or proposal and its reasons for making it. The CMA must consider any representations made to it.

5.117 A cancellation decision can only have 'ex nunc' effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the cancellation becomes effective.

Duration of the SABEO

5.118 The SABEO applies from 1 January 2023 and will cease to have effect at the end of 31 December 2035.

5.119 A transitional provision also ensures that the Chapter I prohibition does not apply for 2 years to pre-existing agreements which immediately before 1 January 2023 satisfied the conditions for exemption provided for in Commission Regulation (EU) No 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, but which do not satisfy the conditions for exemption provided for in the SABEO (article 11 of the SABEO).

5.120 Article 13 of the SABEO provides that the Secretary of State must, from time to time, carry out a review of the SABEO and publish a report[235] on the conclusions of the review. The first report must be published before the end of the period of five years, beginning with the day on which the SABEO comes into force. Subsequent reports must be published at intervals not exceeding five years.

5.121 The CMA also has the power by virtue of section 8(3) CA98 to recommend variation or revocation of a block exemption order if, in its opinion, such a course would be appropriate. Where industry participants or public authorities call for an earlier review by the CMA, they will need to explain why the block

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[234] Or, where it is not reasonably practicable for the CMA to give such notice, by publishing its proposal in (i) the register maintained by the CMA under rule 20 of the CMA's rules set out in the Schedule to the CA98 (CMA's Rules) Order 2014; (ii) the London, Edinburgh and Belfast Gazettes; (iii) at least one national daily newspaper; and (iv) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal, stating the facts on which the CMA bases the proposal, and its reasons for making it. See Article 10(b) of the SABEO.

[235] The report must in particular—
(a) set out the objectives intended to be achieved by the regulatory system established by the SABEO
(b) assess the extent to which those objectives are achieved, and
(c) assess whether those objectives remain appropriate, and, if so, the extent to which they could be achieved with a system that imposes less regulation.

exemption needs reviewing and the detriment that will arise in the absence of a review.

Assessment under the Section 9 exemption of production agreements which do not meet the legal conditions of the SABEO

Introduction

5.122 Where a restrictive agreement does not meet the conditions of the SABEO and has an appreciable impact on competition,[236] it may nonetheless be exempt from the Chapter I prohibition if it fulfils the conditions for the Section 9 exemption. Such an agreement is valid and enforceable from the moment the conditions of the Section 9 exemption are fulfilled and for as long as that remains the case.

5.123 This part of the Guidance provides an overview of the relevant factors for the assessment of production agreements under the Section 9 exemption.

Efficiencies

5.124 Production agreements may provide efficiencies by:

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

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

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

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

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

(f) addressing shortages and disruptions in the supply chain in critical sectors of the economy, thereby allowing the parties to reduce

[236] See paragraphs 3.48 - 3.52 of the Introduction Part of this Guidance.

dependencies on a limited number of suppliers of certain products, services and technologies;

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

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

Indispensability

5.125 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a production agreement do not fulfil the criteria of the Section 9 exemption. For instance, restrictions imposed in a production agreement on the parties' competitive conduct with regard to output outside the cooperation will normally not be considered to be indispensable. Similarly, setting prices jointly will not be considered indispensable if the production agreement does not also involve joint commercialisation.

Pass-on to consumers

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

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

5.128 Efficiencies that only benefit the parties or cost savings that are caused by output reduction or market allocation are not sufficient to meet the criteria of the Section 9 exemption.

5.129 Moreover, the stronger the market power of the parties, the less likely they will pass on the efficiencies to consumers to an extent that would outweigh the restrictive effects on competition.

No elimination of competition

5.130 The criteria of the Section 9 exemption cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the agreement belong and in any related markets.

Mobile infrastructure sharing agreements

5.131 This section provides guidance on mobile infrastructure sharing agreements,[237] a specific type of production agreement. This section applies to the extent that such agreements do not fall within the scope of the SABEO. Connectivity networks are the foundation of a digital economy and society, and are of relevance to virtually all businesses and consumers. Mobile network operators often cooperate to increase the cost-effectiveness of their network roll-out.[238]

5.132 Mobile infrastructure sharing agreements are an illustration of specialisation agreements which concern the joint preparation of services. In mobile infrastructure sharing agreements, mobile network operators agree to share some infrastructure elements. This can include mobile network operators:

(a) sharing their basic site infrastructure such as masts, cabinets, antennas or power supplies ('Passive Sharing' or 'Site Sharing'),

(b) sharing the Radio Access Network ('RAN') equipment at the sites such as base transceiver stations or controller nodes ('Active RAN Sharing'), or

(c) sharing their spectrum, such as frequency bands ('Spectrum Sharing').[239]

5.133 There are potential benefits from mobile infrastructure sharing agreements arising from cost reductions and quality improvements. Cost reductions, for example related to rollout and maintenance, may benefit consumers in terms of lower prices. Consumers may also benefit from better quality of services or a wider variety of products and services, which can stem, for example, from faster roll-out of new networks and technologies, wider coverage or denser network grids. Mobile infrastructure sharing may also allow the emergence of

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

[238] The regulatory framework in electronic communications sets out the possibility of mobile infrastructure sharing in certain very specific circumstances In particular, in specific circumstances set out in section 74A of the Communications Act 2003, Ofcom has the power to impose by way of an 'access-related' condition on undertakings (i)obligations in relation to the sharing of passive infrastructure or (ii) obligations to conclude localised roaming access agreements (as well as exceptionally on active infrastructure sharing, if (i) and (ii) do not appear sufficient to address the situation). A wholesale roaming access agreement can also be imposed by Ofcom in specified circumstances by way of a spectrum licence condition (section 9(4)(ca) and (7A) of the Wireless Telegraphy Act 2006.

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

competition that would not otherwise exist.[240] Mobile network operators can benefit from large efficient networks by entering into mobile infrastructure sharing agreements without the need for consolidation through mergers (See paragraph 3.54 in respect of the application of the Chapter I prohibition to agreements falling within the merger provisions of the Enterprise Act 2002)

5.134 The CMA considers that mobile infrastructure sharing agreements, including possible spectrum sharing, would in principle not be restrictive of competition by object within the meaning of the Chapter I prohibition, unless they serve as a tool to engage in a cartel.

5.135 Mobile infrastructure sharing agreements can, however, give rise to restrictive effects on competition. They may limit infrastructure competition that would take place absent the agreement.[241] Reduced infrastructure competition may in turn limit competition at wholesale as well as at retail level. This is because more limited competition at the infrastructure level may affect parameters such as the number and location of sites, timing of the sites' rollout, as well as the amount of capacity installed at each site, which, in turn, can affect quality of service and prices.

5.136 Mobile infrastructure sharing agreements may also de facto reduce the parties' decision-making independence and limit the parties' ability and incentives to engage in infrastructure competition with each other. For instance, this could be due to some technical,[242] contractual or financial terms of the agreement.[243]

5.137 Whether an exchange of information in the context of a mobile infrastructure sharing agreement is likely to lead to restrictive effects on competition should be assessed according to Part 8 of this Guidance. Any negative effects arising from those exchanges of information will not be assessed separately but in the light of the overall effects of the agreement. The agreement is more likely

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

[241] The effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking. See judgment of 2 May 2006, Case *O2 (Germany)* v *Commission*, T-328/03, EU:T:2006:116, paragraph 68.

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

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

to fulfil the criteria of the Section 9 exemption if the information exchanged does not exceed what is necessary for the agreement to function, even if the information exchange had restrictive effects on competition within the meaning of the Chapter I prohibition.

5.138 While the Chapter I competitive assessment must always be conducted on a case-by-case basis,[244] broad principles can be given as guidance to conduct such an assessment for the different types of mobile infrastructure sharing agreements:

(a) Passive Sharing[245] is less likely to give rise to restrictive effects on competition, provided that the network operators maintain a significant degree of independence and flexibility in defining their business strategy, the characteristics of their services and network investments;[246]

(b) Active RAN Sharing agreements[247] may be more likely to give rise to restrictive effects on competition. This is because, compared to passive sharing, active RAN sharing likely involves more extensive cooperation on network elements that are likely to affect not only coverage but also independent deployment of capacity;

(c) Spectrum Sharing agreements (also referred to as 'spectrum pooling')[248] are a more far-reaching cooperation and may restrict the parties' ability to differentiate their retail and/or wholesale offers even further and directly limit competition between them.[249] These agreements must be examined

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[244] Judgment in judgment of 2 May 2006, *O2 (Germany)* v *Commission*, T-328/03, EU:T:2006:116, paragraphs 65-71.

[245] See paragraph 5.132(a) for an explanation of what Passive Sharing involves.

[246] It should be noted that the term 'Passive Sharing' in this Part does not concern the type of agreement in which a mobile network operator transfers ownership of its basic site infrastructure such as masts, cabinets, antennas or power supplies or outsources the operation of such infrastructure to a third party (which is not a competing mobile network operator),including where the third party subsequently enters into arrangements with other mobile network operators to allow them to use that infrastructure. In the event that the mobile network operator whose infrastructure is the subject of the agreement has no control over the terms under which mobile network operators gaining access to the infrastructure are able to use that infrastructure, such arrangements are typically less likely to raise competition concerns. By contrast, competition concerns might arise, for example, where the arrangements between the third party and the mobile network operators created a risk of co-ordination between the mobile network operator whose infrastructure is the subject of the agreement and the mobile network operators gaining access to the infrastructure, through the third party.

[247] See paragraph 5.132(b) for an explanation of what Active RAN Sharing involves.

[248] See paragraph 5.132(c) for an explanation of what Spectrum Sharing involves.

[249] It should be noted that the term 'Spectrum Sharing' in this Part concerns only the type of infrastructure sharing agreement in which two or more mobile network operators use as a shared resource ('i.e. pooling') their respective spectrum holdings in one or more spectrum bands. However, the considerations regarding spectrum sharing are without prejudice to other types of spectrum sharing for instance between non-competitors (including between mobile network operators and non-mobile network operators) which use the same spectrum bands in a dynamic way thereby fostering the efficient use of such a scarce resource and new opportunities for 5G

cautiously to determine whether they fall within the scope of the Chapter I prohibition.[250]

5.139 In order to establish whether a mobile infrastructure sharing agreement may have restrictive effects on competition, it is necessary to assess competition within the actual context in which it would occur if that agreement had not existed (see paragraph 3.37)

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

(a) The nature and content of the agreement, including any provisions as to how costs are shared;

(b) the type and depth of sharing (including the degree of independence retained by the network operators);[251]

(c) the extent to which the network operators would have had incentives to invest in network quality in the geographic areas covered by the agreement in the absence of the agreement;

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

(e) the geographic scope and the market coverage of the mobile infrastructure sharing agreement (for example, the population coverage and whether the agreement concerns densely populated areas);[252]

(f) the market structure and characteristics (market shares of the parties, amount of spectrum held by the parties, closeness of competition

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deployment. Furthermore, the term 'Spectrum Sharing' in this Part should not be confused with the so called 'dynamic spectrum sharing', which is a technology that permits the dynamic allocation of the capacity resources of a mobile operator in a specific spectrum band, to enable the simultaneous operation of more than one mobile technology generations, such as 3G, 4G and 5G, on this spectrum band.

[250] For example, a mobile infrastructure sharing agreement between two mobile operators having stable combined market shares of 90% and covering the whole territory of a Member State, all technologies (2G-5G) and with spectrum sharing will warrant an in-depth investigation with presumably a high probability of identifying restrictive effects on the market to the ultimate detriment of consumers. However, under certain circumstances (for example if the agreement is limited only to sparsely populated areas), such agreements may not have such restrictive effects.

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

[252] See, for example, European Commission decision of 6 March 2020, *Vodafone Italia/TIM/INWIT JV* (M.9674) and accompanying press release.

between the parties, number of operators outside the agreement and extent of competitive pressure exerted by them, barriers to entry, etc.).

5.141 In order for a mobile infrastructure sharing agreement to be considered, as being unlikely to have restrictive effects it would have to comply, as a minimum, with a number of factors (although complying with those factors does not automatically mean that the mobile infrastructure agreement would fall outside the scope of the Chapter I prohibition). The factors are as follows:

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

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

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

5.142 If the mobile infrastructure sharing agreement does not comply with these minimum conditions that gives an indication that the mobile infrastructure sharing agreement is likely to have restrictive effects within the meaning of the Chapter I prohibition.

5.143 The assessment of restrictions of competition by object or effect under the Chapter I prohibition is only one step of the analysis. If the mobile infrastructure sharing agreement is likely to have restrictive effects within the meaning of the Chapter I prohibition, it may nonetheless benefit from exemption if it generates efficiencies and satisfies the requirements of the Section 9 exemption (see paragraphs 3.41 - 3.47)

Examples

Direct limitation of competition in a specialisation agreement

Example 1

Situation: Companies A and B, two suppliers of product X, decide to close their own current old production plants and build a new larger and more efficient production

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

Analysis: The SABEO does not apply to this example because the combined market share of the parties exceeds 20% in the relevant market for product X. Therefore, an individual assessment of the production agreement would be required. If Companies A and B share all or most of their variable costs, this production agreement could lead to a direct limitation of competition between them. It may lead the parties to limit the output of the joint venture compared to what they would have brought to the market if each of them had decided their output on their own. In light of the limited constraints that competitors will exercise in terms of capacity, this reduced output could lead to higher prices. Therefore, it is likely that the production joint venture of Companies A and B would give rise to restrictive effects on competition within the meaning of the Chapter I prohibition on the market of product X. The replacement of two smaller old production plants by a new one may lead the joint venture to increase output at lower prices to the benefits of consumers. However, the production agreement could meet the criteria of the Section 9 exemption if the parties provided substantiated evidence of efficiencies generated by the agreement that are likely to be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

Collusive outcomes

Example 2

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

Analysis: The market is characterised by very few players with similar market shares and variable production costs. Co-operation between Companies A and B would add an additional link in the market, de facto increasing the concentration in the market, as it would also link Company D to Company A as well as to Company B. The change in market structure resulting from the co-operation may facilitate the potential for collusion. If such collusion occurred it would be likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. In such circumstances the criteria of the Section 9 exemption could only be fulfilled in the presence of significant efficiency gains which are passed on to consumers to such an extent that they would outweigh the restrictive effects on competition. However, in this example, given the homogeneous features of product Y and the simplicity of its underlying technology, this appears unlikely.

Anti-Competitive foreclosure

Example 3

Situation: Companies A and B set up a production joint venture for the intermediate product X which covers their entire production of X. Intermediate product X is the key input into the production of downstream product Y and there is no other product that can be used as an input instead. The production costs of X account for 70% of the variable costs of the final product Y with respect to which Companies A and B compete downstream. Companies A and B product each have a share of 20% on the market for Y, there is limited entry and the market shares have been stable over time. In addition to covering their own demand for X (captive use), both Companies A and B each have a market share of 40% on the market for X (sales to third parties).

There are high barriers to entry on the market for X and existing producers are operating near full capacity. On the market for Y, there are two other significant suppliers, each with a 15% market share, and several smaller competitors. This agreement generates fixed cost savings, in the form of reduction of headquarter costs, leading to economies of scale for the joint venture.

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

By virtue of the production joint venture, Companies A and B would be able to control around 80% of the supplies of the essential input X to their competitors in the downstream market for Y. This would give Companies A and B the ability to raise their rivals' costs by artificially increasing the price of X, or by reducing the output. This could foreclose the competitors of Companies A and B in the market for Y. Because of the likely anti-competitive foreclosure downstream, this

agreement is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. The economies of scale generated by the production joint venture are unlikely to outweigh the restrictive effects on competition and therefore this agreement would most likely not meet the conditions of the Section 9 exemption.

Production agreement as market allocation

Example 4

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

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

With regard to its effects on competition in the market, this production agreement allocates the markets of products X and Y between the two parties. Therefore, this agreement restricts competition by object. Because the claimed efficiencies in the form of reduction in fixed costs and improving production technology are only linked to the market allocation, they are unlikely to outweigh the agreement's restrictive effects, and therefore the agreement would not meet the criteria of the Section 9 exemption. In any event, if Company A or B believes that it would be more efficient to focus on only one product, it can simply take the unilateral decision to only produce X or Y without at the same time agreeing that the other company will focus on producing the other product.

Information Exchange

Example 5

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

Companies A and B decide that it would be more efficient if Company A stopped transporting Z from Scotland to England and if Company B stopped transporting Z from England to Scotland although, at the same time, they are keen on retaining their existing customers. To do so, Companies A and B intend to enter into a swap agreement which allows them to purchase an agreed annual quantity of Z from the other party's plant with a view to selling the purchased Z to those of their customers which are located closer to the other party's plant. In order to calculate a purchase price which does not favour one party over the other and which takes due account of the parties' different production costs and different savings on transport costs, and in order to ensure that both parties can achieve an appropriate margin, they agree to disclose to each other their main costs with regard to Z (that is to say, production costs and transport costs).

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

production and transport costs. Consequently, in its current form the swap agreement does not fulfil the criteria of the Section 9 exemption.

6. Purchasing Agreements

Introduction

6.1 This Part focuses on purchasing agreements, by which the CMA means agreements concerning multiple undertakings jointly negotiating with and purchasing from suppliers.

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

6.3 Joint purchasing can be carried out through various forms, such as through a jointly controlled company, by a company in which different undertakings hold non-controlling stakes, by a cooperative or a cooperative of cooperatives, by a contractual arrangement or by even looser forms of cooperation, for example, one purchaser or negotiator representing a group of purchasers. In this Guidance, we refer to those various forms collectively as 'joint purchasing arrangements'.

6.4 As set out further in this Part, joint purchasing agreements may, under certain circumstances, give rise to competition concerns. For example, joint purchasing arrangements can increase buying power vis-à-vis suppliers which individual members of the joint purchasing arrangement would not attain if they acted separately instead of jointly. Assessment of joint purchasing arrangements is, therefore, mainly focussed on the purchasing market where the joint purchasing arrangement accumulates the buying power of its members and negotiates with or purchases from suppliers. The buying power

of a joint purchasing arrangement can lead to lower prices, more variety or better-quality products for consumers. Undertakings may also participate in joint purchasing arrangements to allow them to prevent shortages or address disruptions in the production of certain products, thus avoiding supply chain interruptions.

6.5 A joint purchasing arrangement may involve both horizontal and vertical agreements. In such cases, a two-step analysis is necessary. First, the horizontal agreements between the competing undertakings engaging in joint purchasing should be assessed according to the principles described in this Guidance.

6.6 If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to horizontal competition concerns, a further assessment will be necessary to examine the relevant vertical agreements between the joint purchasing arrangement and an individual member of it and between the joint purchasing arrangement and suppliers. This assessment should follow the rules of the VABEO and the VABEO Guidance. Vertical agreements not covered by the VABEO are not presumed to be illegal but require individual examination.

Assessment under the Chapter I prohibition

Main competition concerns

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

Restrictions of competition by object

6.8 Joint purchasing arrangements normally do not amount to a restriction of competition by object if they truly concern joint purchasing, that is, if the joint purchasing arrangement involves a common organisation acting on behalf of its members to collectively negotiate and/or conclude an agreement with any given supplier of one or more trading terms.

6.9 Such arrangements need to be distinguished from arrangements that do not truly concern joint purchasing, such as buyer cartels, which are agreements between two or more purchasers aimed at coordinating how they will behave individually towards suppliers (rather than jointly through a common organisation acting on their behalf), by:

(a) coordinating those purchasers' individual competitive behaviour on the market or influencing the relevant parameters of competition through, for example, fixing or coordinating purchase prices or other aspects of prices (including agreements fixing wages or not to pay a price for a product) or other trading conditions, allocating purchase quotas, and sharing markets and suppliers, and

(b) influencing those purchasers' individual negotiations with or individual purchases from suppliers through, for example, coordinating the purchasers' price negotiation strategies or exchanging competitively sensitive information on the status of such negotiations with suppliers.

6.10 Buyer cartels have as their object the distortion of the process of competition contrary to the Chapter I prohibition.[253] Other forms of joint purchasing arrangements will not necessarily restrict competition by object, although they may still give rise to competition concerns.

6.11 In a buyer cartel, purchasers coordinate their behaviour among themselves in view of their individual interaction with the supplier on the purchasing market. If a purchaser deals individually with a supplier, it should make its own purchasing decisions independently of other purchasers and without removing strategic uncertainty between itself and others or without artificially increasing transparency regarding its future behaviour on the market. This is clearly not the case when purchasers first fix the purchase price among themselves and each purchaser subsequently negotiates and purchases individually from the supplier.

6.12 A buyer cartel may also exist when purchasers agree to exchange competitively sensitive information among themselves about their individual purchasing intentions or negotiations with suppliers, outside any genuine joint purchasing arrangement that interacts with suppliers on behalf of its members collectively.[254] Such a cartel may exist where the purchasers exchange information about, in particular, purchase prices (including maximum prices, minimum discounts and other aspects of prices), terms and conditions, sources of supply (both in terms of suppliers and territories), volumes and

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

[254] See further Part 8 on exchange of information and, in particular, paragraphs 8.47 - 8.50, which also apply to exchanges of competitively sensitive information between purchasers.

quantities, quality or other parameters of competition (for example, timing, delivery and innovation). [255]

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

(a) It is made clear to suppliers that the joint purchasing arrangement involves joint negotiation and that it binds its members on the terms and conditions of their individual purchases or involves purchasing jointly for them. This does not require there to be disclosure of the exact identity of the members of the joint purchasing arrangement, in particular where they are small- or medium-sized undertakings interacting with large suppliers. However, suppliers' knowledge of the joint purchasing arrangement obtained indirectly, for example, through third parties or press reports, is not likely to be considered sufficient to demonstrate that the joint purchasing arrangement has been made clear to the supplier.

(b) the parties to the joint purchasing arrangement have defined the form of their cooperation, its scope and its functioning in a written agreement,[256] so that its compliance with the Chapter I prohibition can be verified after the event and so it can be checked against the actual operation of the joint purchasing arrangement. A written agreement cannot, however, shield the arrangement from competition law scrutiny.

6.14 Provided that it affects trade within the UK and given its anticompetitive object, a buyer cartel constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition.[257] Therefore, unlike for joint purchasing arrangements, assessing buyer cartels does not require a definition of the relevant market(s), consideration of the market position of the purchasers on the upstream purchasing market, or consideration of whether the purchasers compete on the downstream selling market.

6.15 In addition to potentially acting as buyer cartels, joint purchasing arrangements may also lead to a restriction of competition by object if they serve as a tool to engage in a cartel on the downstream market(s) or related

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[255] However, secrecy is not a requirement for finding a restriction of competition by object, and agreements in the public domain may restrict competition by object. See for example judgment of 20 November 2008, *Beef Industry Development Society*, C-209/07, EU:C:2008:643, in which the Court of Justice concluded that the cooperation in that case, which had not been concluded in secret, had the object of restricting competition.

[256] Such an agreement may take various forms, such as statutes or by-laws.

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

markets, that is, an agreement between purchasers fixing prices, limiting output or sharing markets or customers on the downstream selling market(s) or related markets.

6.16 A joint purchasing arrangement among a group of purchasers that aims at excluding an actual or potential competitor from competing with the members of the joint purchasing arrangement is likely to qualify as a collective boycott and to amount to a restriction of competition by object.

Restrictive effects on competition

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

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

6.19 Certain contractual restrictions imposed on the members of a joint purchasing arrangement may not restrict competition under the Chapter I prohibition and may even have beneficial effects on competition when they are limited to what is objectively necessary to ensure the arrangement's proper functioning and exercise its buying power in relation to suppliers.[258] This may apply, for example, to a prohibition for parties to a joint purchasing arrangement from participating in other competing arrangements to the extent that this could jeopardise the joint purchasing arrangement's operations and buying power.[259] Conversely, exclusive purchasing obligations, whereby the members of a joint purchasing arrangement are obliged to purchase all or most of their requirements through the arrangement, may have negative effects on competition and require an assessment in the light of the overall effects of the joint purchasing arrangement.

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[258] See judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413, paragraph 34.
[259] See judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413, paragraph 34.

Relevant markets

6.20 The CMA's Guidance on Market Definition provides guidance on the rules, criteria and evidence to which the CMA has regard when considering market definition issues.[260] That guidance will not be further explained in this Part and should serve as the basis for assessing market definition. This Guidance only deals with specific issues that arise in the context of horizontal agreements.

6.21 Joint purchasing arrangements may affect the market or markets with which the joint purchasing arrangement is directly concerned, that is, the relevant purchasing market or markets where the parties negotiate with or purchase from suppliers. They may also affect the market or markets downstream where the parties to the joint purchasing arrangement are active as sellers, as well as other related markets.

6.22 In relation to the upstream purchasing market, once the market is defined, the market share can be calculated as the percentage of the purchases by the parties out of the total sales of the purchased product or products in the relevant market.

6.23 If the parties are, in addition, competitors in one or more downstream selling markets, those markets are also relevant for the assessment. In defining the downstream selling markets, regard should be had to the methodology described in the CMA's Guidance on Market Definition[261] and any future guidance relating to the definition of relevant markets for the purposes of UK competition law.

Market power

6.24 There is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. However, in most cases, it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the downstream selling market or markets. In any event, if the parties' combined market shares do not exceed 15% on both the

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[260] OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997, which is a statement of the European Commission for the purpose of section 60A CA98.

[261] OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997, which is a statement of the European Commission for the purpose of section 60A CA98.

purchasing and the selling market or markets, it is likely that the conditions of the Section 9 exemption are fulfilled.

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

6.26 If the parties to the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that they may harm competition upstream, which may ultimately also cause competitive harm to consumers further downstream. For example, jointly exercised buying power may harm investment incentives, discourage innovation and force suppliers to reduce the range or quality of products they produce. This may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply.

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

6.28 Buying power of the parties to the joint purchasing arrangement may also be used to foreclose competing purchasers from the purchasing market by limiting their access to efficient suppliers. Such foreclosure is most likely if there are only a limited number of suppliers and there are barriers to entry on the supply side of the upstream purchasing market. In relation to the downstream selling market, as considered above in paragraph 6.16, a joint purchasing arrangement among a group of purchasers that aims at excluding an actual or potential competitor from the same level of the selling market

qualifies as a collective boycott and amounts to a restriction of competition by object.

6.29 If the parties to a joint purchasing arrangement are actual or potential downstream competitors, their incentives for price competition on the downstream selling market or markets may be considerably reduced when they purchase a significant part of their products together. For example, the higher the combined market share of purchasers on the downstream selling market, the greater the risk that coordination of upstream purchasing may also lead to coordination of downstream selling. This risk is particularly high if the joint purchasing arrangement limits (or disincentivises) the ability of its members to purchase additional volumes of the input independently in the purchasing market, either through or outside the joint purchasing arrangement. An obligation on the members of a joint purchasing arrangement to purchase all or most of their requirements through the arrangement requires an assessment of its restrictive effects on competition to assess compliance with the Chapter I prohibition. Such assessment takes account of, in particular, the extent of the obligation, the market share of the joint purchasing arrangement on the selling market and the degree of concentration of suppliers on the purchasing market, and whether such an obligation is necessary in order to ensure a sufficiently strong negotiation position of the arrangement towards strong suppliers.

6.30 It is also the case that, where the parties together hold a significant degree of market power on the selling market or markets, the lower purchase prices achieved by the joint purchasing arrangement may be less likely to be passed on to consumers.

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

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

Collusive outcome

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

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

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

6.36 The implementation of a joint purchasing arrangement may require the exchange of competitively sensitive information such as purchase prices (or components or elements of such purchase prices) and volumes. The exchange of such information may restrict competition. Potential restrictive effects from the exchange of competitively sensitive information can be minimised, for example, by ensuring that such information is only disclosed to those with sole responsibility for the joint purchasing arrangement, and not to the purchasers, and through limiting access by putting in place technical or practical measures to protect its confidentiality. Moreover, undertakings should not use membership of different joint purchasing arrangements to disclose competitively sensitive information or facilitate other types of coordination between the different purchasing arrangements.

6.37 Any effects on competition arising from the exchange of competitively sensitive information within a joint purchasing arrangement should be assessed in the light of the overall effects of the joint purchasing arrangement provided that such exchanges are necessary for the functioning of the joint

purchasing arrangement. Whether the exchange of information in the context of a joint purchasing arrangement is likely to lead to restrictive effects on competition should also be assessed according to the guidance given in Part 8 on Information Exchange. If the information exchange does not exceed the data sharing that is necessary for the joint purchasing by the parties to the joint purchasing arrangement, then even if the information exchange has restrictive effects on competition within the meaning of the Chapter I prohibition, the agreement is more likely to meet the criteria of the Section 9 exemption than if the exchange goes beyond what was necessary for the joint purchasing.

6.38 When negotiating terms and conditions with suppliers, a joint purchasing arrangement may threaten suppliers to abandon negotiations or to stop purchasing temporarily unless they are offered better terms or lower prices. Such threats may be part of a bargaining process and may involve collective action by purchasers when a joint purchasing arrangement conducts the negotiations. Suppliers in a strong market position may use similar threats to stop negotiating or supplying products in their bargaining with purchasers. Such threats made collectively by joint purchasing groups do not usually amount to a restriction of competition by object, although they may in some cases give rise to negative effects. Any such negative effects arising from such collective threats should not be assessed separately but should be assessed in the light of the overall effects of the joint purchasing arrangement. An example of such bargaining threats concerns temporary stops by the members of a retail alliance in ordering certain products, selected by each of the members individually for its own shops, from a supplier during their negotiations about terms and conditions for their future supply agreement.[262] Such temporary stops may result in the products selected by the individual members of the alliance being unavailable on the retailers' shelves for a limited period of time, namely until the retail alliance and the supplier have agreed on the terms and conditions of future supplies.

6.39 Such temporary stops should be distinguished from, for example, a joint purchasing agreement that aims to exclude an actual or potential competitor from competing with the members of the joint purchasing arrangement. As stated at paragraph 6.16 above, such conduct is likely to qualify as a collective boycott and amount to a restriction of competition by object.

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

Assessment under the Section 9 exemption

Efficiencies

6.40 If a purchasing agreement is found to restrict competition within the meaning of the Chapter I prohibition, the next step is to determine the efficiencies produced by that agreement and to assess whether those efficiencies outweigh the restrictive effects on competition. Joint purchasing arrangements can give rise to significant efficiencies. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiencies by leading suppliers to innovate and introduce new or improved products on the market. Such qualitative efficiencies can benefit consumers by reducing dependencies and avoiding shortages through more resilient supply chains and contributing to a more resilient market.

Indispensability

6.41 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a purchasing agreement do not meet the criteria of the Section 9 exemption. An obligation to purchase or negotiate exclusively through the joint purchasing arrangement may, in certain cases, be indispensable to achieve the necessary degree of buying power or volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

Pass-on to consumers

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

6.43 Normally, companies have an incentive to pass-on at least part of a reduction in variable costs to their own customers. The higher profit margin resulting from variable cost reductions typically provides companies with a significant commercial incentive to expand output through price reductions. However, the members of a joint purchasing arrangement that together hold significant

market power on the selling market or markets may be less inclined to pass on variable cost reductions to consumers. Moreover, pure reductions in fixed costs (such as lump-sum payments by suppliers) may be unlikely to be passed-on to consumers, as they normally do not provide companies with an incentive to expand output. A careful assessment of the specific joint purchasing arrangement is therefore required to assess whether it generates an economic incentive to expand output and thus pass-on cost reductions or efficiencies.[263] Finally, lower sales prices for consumers are particularly unlikely if the joint purchasing arrangement limits (or disincentivises) the ability of its members to purchase additional volumes independently either through or outside the joint purchasing arrangement. In fact, joint purchasing arrangements that limit the independent purchase of additional volumes by its members may provide an incentive to raise sales prices. This is because jointly limiting the purchase of inputs may also have the effect of limiting the volume of sales in the selling market or markets.

No elimination of competition

6.44 The criteria of the Section 9 exemption cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. That assessment should cover both purchasing and selling markets.

Examples

Example of a buyer cartel

Example 1

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

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

Analysis: The five recycling undertakings are all party to a buyer cartel. They are each negotiating and purchasing individually from the collectors of mobile phones. There is no joint purchasing arrangement involved that represents the buyers jointly in the negotiations with or the purchase from the collectors. Irrespective of the relatively small market share that the recycling undertakings have on the purchasing market for used mobile phones, the agreement between them qualifies as a by object restriction of competition and requires no market definition or assessment of its potential effects on the market.

Example of a joint negotiation by a retail alliance

Example 2

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

Analysis: The retail alliance qualifies as a joint purchasing arrangement even if it jointly only negotiates certain terms and conditions with the manufacturer on behalf of its members based on which they individually purchase their required quantities.

The retail chains that are members of the alliance are not active on the same selling markets. Therefore, the joint purchasing arrangement is less likely to have restrictive effects on competition downstream to the extent that they face sufficient competitive pressure from competing retailers. Any negative effects on competition for manufacturers upstream from the additional rebate (for instance, in terms of innovation by suppliers) have to be assessed in the light of the overall effects of the

joint purchasing arrangement. The temporary stopping of orders does not appear to harm consumers in the short term, insofar as they have other competing retailers where they can purchase the same products or substitutable products, and may benefit consumers in the long term through lower prices.

Example of joint purchasing by small undertakings with moderate combined market share

Example 3

Situation: 150 small retailers conclude an agreement to form a joint purchasing arrangement. They are obliged to purchase a minimum volume through the arrangement, which accounts for roughly 50% of each retailer's total costs. The retailers can purchase more than the minimum volume through the arrangement, and they each may also purchase independently outside the cooperation. They have a combined market share of 23% on both the purchasing and the selling markets.

Undertaking A and Undertaking B are two large competitors of the members of the joint purchasing arrangement. Undertaking A has a 25% share on both the purchasing and selling markets; Undertaking B has a 35% share on both the purchasing and selling markets. There are no barriers which would prevent the remaining smaller competitors from also forming a joint purchasing arrangement. The 150 retailers achieve substantial cost savings by virtue of purchasing jointly through the joint purchasing arrangement.

Analysis: The retailers have a moderate market share on the purchasing and the selling markets. Furthermore, the cooperation brings about some economies of scale. Even though the retailers achieve a high degree of commonality of costs, they are unlikely to have market power on the selling market due to the presence of Undertakings A and B, which are both individually larger than the joint purchasing arrangement. As a result, the retailers are unlikely to restrict competition through coordinating their behaviour. The formation of the joint purchasing arrangement is therefore unlikely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition.

Example of commonality of costs and market power on the selling market

Example 4

Situation: Two supermarket chains conclude an agreement to jointly purchase products which account for roughly 80% of their variable costs. On the relevant purchasing markets for the different categories of products, the parties have combined market shares between 25% and 40%. On the relevant selling market,

they have a combined market share of 60% and there are four other significant retailers each with a 10% market share. Market entry is not likely.

Analysis: It is likely that this purchasing agreement would give the parties the ability to restrict competition through coordinating their behaviour on the selling market. The parties have market power on the selling market (given the few and much smaller competitors in that market) and the purchasing agreement gives rise to significant commonality of costs. Moreover, market entry is unlikely. The incentive for the parties to coordinate their behaviour would be reinforced if their cost structures were already similar prior to concluding the agreement. Moreover, the parties having similar margins could further increase the risk that the parties would coordinating their behaviour. This agreement also creates the risk that the parties withhold demand on the purchasing market and as a result increase prices on the downstream market, given the reduced quantities available on the downstream market. Therefore, the purchasing agreement is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition.

Even though the agreement is very likely to give rise to efficiencies in the form of cost savings, due to the parties' significant market power on the selling market, these are unlikely to be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore, the purchasing agreement is unlikely to fulfil the conditions for Section 9 exemption.

Example of parties active in different geographic markets

Example 5

Situation: Six large retailers, which are each based in different UK regions, form a joint purchasing arrangement to buy Product A jointly. The parties are allowed to purchase other similar branded products outside the cooperation. Moreover, five of them also offer similar private label products. The members of the joint purchasing arrangement have a combined market share of approximately 22% on the relevant purchasing market, which is nationwide. In the purchasing market, there are three other large buyers of similar size. Each of the parties to the joint purchasing arrangement has a market share between 20% and 30% on the selling markets on which they are active and which are regional markets. None of them is active in a region where another member of the group is active. The parties are not potential entrants to each other's markets.

Analysis: The joint purchasing arrangement will be able to compete with the other existing major buyers on the purchasing market. The selling markets are much smaller (in turnover and geographic scope) than the nationwide purchasing market and in those markets some of the members of the arrangement may have market

power. Even if the members of the joint purchasing arrangement have a combined market share of more than 15% on the purchasing market, the parties are unlikely to coordinate their conduct and collude on the selling markets since they are neither actual nor potential competitors on the downstream markets. They are also likely to pass on the reduced prices insofar as they face significant competition on the selling markets. Consequently, the joint purchasing arrangement is not likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition.

Example of information exchange

Example 6

Situation: Three competing manufacturers, A, B and C, participate in a joint purchasing arrangement in which they entrust an independent third party to negotiate with suppliers on their behalf for purchasing product Z. Manufacturers A, B and C use product Z for producing the final product, X. Z is not a significant cost factor for producing X.

The independent third party does not compete with the parties on the selling market for X. All information necessary for the purchases (for example, quality specifications, quantities, delivery dates, maximum purchase prices) is only disclosed to the third party, not to the other manufacturers. The joint purchasing arrangement agrees purchasing prices with the suppliers.

Manufacturers A, B and C have a combined market share of 30% on each of the purchasing and selling markets. They have six competitors in the purchasing and selling markets, two of which have a market share of 20%.

Analysis: Since there is no direct information exchange between the parties, the transfer of the information necessary for the purchases through the joint purchasing arrangement is unlikely to restrict competition within the meaning of the Chapter I prohibition.

7. Commercialisation Agreements

Introduction

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

7.2 An important category of those more limited agreements is distribution agreements. Where actual or potential competitors enter into agreements to distribute their substitutable products (for example, where they do so on different geographic markets), there is a risk in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome. This can be true both for reciprocal and non-reciprocal agreements between competitors.

7.3 The VABEO and VABEO Guidance provide guidance on distribution agreements (and other agreements, such as franchising agreements) between undertakings operating at different levels of the supply chain. However, where such agreements are between competitors, they should generally be assessed, first, according to the principles set out in the present Part. If that assessment leads to the conclusion that the agreement between competitors in the area of distribution would in principle not restrict competition, a further assessment will be necessary to examine the vertical restrictions included in such agreements. That second step of the assessment should be based on the principles set out in the VABEO Guidance, which provides guidance on agreements entered into by undertakings operating at different levels of the supply chain.

7.4 The exception to the two-step process mentioned in the previous paragraph is in the case of a distribution agreement entered into between competing undertakings that is non-reciprocal[264] and meets one of the conditions in

[264] Non-reciprocal means, for instance, that where one manufacturer becomes the distributor of the products of another manufacturer, the latter does not become a distributor of the products of the first manufacturer. See further VABEO guidance, paragraph 6.17.

article 3(5)(a) to (d) of the VABEO.[265] In that case, the distribution agreement should be assessed not by reference to this Guidance, but by reference to the VABEO Guidance, including to determine whether it benefits from block exemption provided by the VABEO.[266] Paragraph 3.55 provides additional guidance on the general relationship between this Guidance and the VABEO and VABEO Guidance.

7.5 A further distinction should be drawn between on the one hand agreements where parties agree only on joint commercialisation and on the other agreements where the commercialisation is related to another type of cooperation upstream, such as joint production or joint purchasing. When analysing commercialisation agreements combining different types of cooperation, it is necessary to undertake the assessment in accordance with paragraphs 3.3 - 3.5 above.

Assessment under the Chapter I prohibition

Main competition concerns

7.6 Commercialisation agreements can lead to restrictions of competition in several ways. First, commercialisation agreements may lead to price-fixing.

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

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

7.9 Finally, commercialisation agreements may also lead to an exchange of competitively sensitive information relating to aspects within or outside the scope of the cooperation or relating to commonality of costs which may restrict competition.

7.10 However, commercialisation agreements are normally not likely to give rise to competition concerns if they are objectively necessary to allow one party to

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[265] Article 3(5)(a)-(d) of the VABEO identifies four forms of non-reciprocal vertical agreement between competitors that, by exception, can benefit from the block exemption provided by the VABEO. These are typically scenarios where the supplier is mainly active on the upstream market but also has some activities in the retail market. Such circumstances are sometimes referred to as 'dual distribution' arrangements.

[266] For further guidance on such vertical agreements between competitors and on 'dual distribution', see VABEO Guidance, paragraph 6.13 onwards.

enter a market it could not have entered individually or with a more limited number of parties than are party to the agreement, for example, because it has limited technical capabilities or limited access to finance, skilled workers, technologies or other resources.

Restrictions of competition by object

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

7.12 Price-fixing is one of the major competition concerns arising from commercialisation agreements between competitors. Joint selling agreements and other forms of commercialisation agreements that include joint pricing generally lead to competitors coordinating their pricing policy. Such agreements may eliminate price competition between the parties on substitutable products. Such agreements are therefore likely to restrict competition by object.

7.13 That assessment does not change even if the agreement is non-exclusive (that is, where the parties are free to sell independently outside the agreement) in the event that the agreement will lead to a coordination of the prices charged by the parties to all or part of their customers.

7.14 Similarly, output limitations are another important competition concern that can arise from commercialisation agreements. Any party to the agreement should in principle decide independently of others whether or not to increase or reduce its output to meet market demand. However, certain commercialisation agreements may restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Where the parties to the agreement decide jointly on the quantity of the products to be marketed, the available supply of those products could be reduced, which may increase their price.

7.15 The risk of output limitations is more limited in the case of non-exclusive commercialisation agreements in circumstances where the parties remain free and in fact available to serve individually any additional demand and provided that the parties determine their output outside of the agreement independently of each other.

7.16 A further competition concern arising from commercialisation agreements, specifically between parties which are active in different geographic markets or in relation to different categories of customers, is that such agreements may be used as an instrument to partition markets or allocate customers. If

the parties use a reciprocal commercialisation agreement to distribute each other's products in order to eliminate actual or potential competition between them by deliberately allocating markets or customers, the agreement is likely to have as its object a restriction of competition. If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It is necessary, however, to assess whether the non-reciprocal agreement includes or results in a mutual understanding that the parties should avoid entering each other's markets or competing for each other's customers.

Restrictive effects on competition

7.17 A commercialisation agreement that does not restrict competition by object can still have restrictive effects on competition. Such effects should be analysed by reference to the factors mentioned in paragraphs 3.37 - 3.39.

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

7.19 In cases where they do not restrict competition by object, commercialisation agreements between competitors will generally only have restrictive effects on competition if the parties have some degree of market power. Such market power should be assessed by also taking into account any possible countervailing buyer power. In this respect, in commercialisation agreements, the parties pool their activities that directly relate to their customers. Where the parties have joint market power, in general, it is more likely that the parties have the capacity to raise prices or reduce output, product quality, product variety or innovation. The fact that commercialisation agreements lead to parties pooling their activities that directly relate to customers increases the risk of anti-competitive effects of the agreement.

7.20 When assessing reciprocal commercialisation agreements, whether the agreement in question is objectively necessary for the parties to enter each other's markets should be considered. If it is, the agreement is not likely to create horizontal competition concerns. However, if the agreement reduces the decision-making independence of one or more of the parties with regard

to entering the other parties' market or markets by limiting its incentives to do so, it is likely to give rise to restrictive effects on competition. The same reasoning applies to non-reciprocal agreements, although the risk of restrictive effects on competition is less pronounced.

Collusive outcome

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

7.22 The likelihood of a collusive outcome depends on the parties' market power and the characteristics of the relevant market. Commonality of costs can increase the risk of a collusive outcome if the parties have market power and if the commercialisation costs constitute a large proportion of the variable costs related to the products concerned. This is, for example, less likely to be the case for products for which the parties' highest costs arise from production. Commonality of commercialisation costs increases the risk of a collusive outcome if the commercialisation agreement concerns costly commercialisation, for example, high distribution or marketing costs. As a result, agreements concerning only joint advertising or joint promotion can also give rise to restrictive effects on competition if those costs constitute a significant proportion of the parties' costs.

7.23 Joint commercialisation may involve some exchange of competitively sensitive information, particularly on marketing strategy and pricing. In most commercialisation agreements, some degree of information exchange is required to implement the agreement. It is therefore necessary to consider whether the information exchange can restrict competition between the parties within and outside the agreement. Any negative effects arising from the information exchange will not be assessed separately but in the light of the overall effects of the agreement.

7.24 The likely restrictive effects on competition of information exchange in the context of commercialisation agreements will depend on the characteristics of

the market and the information shared, and should be assessed by reference to the guidance in Part 8 on Information Exchange.

Agreements that generally do not raise competition concerns

7.25 As mentioned in paragraph 7.19 above, commercialisation agreements between competitors will generally only restrict competition by effect if the parties have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15% in the market where they jointly commercialise the products that are the subject of the agreement. In any event, if the parties' combined market share does not exceed 15%, it is likely to fulfil the conditions of the Section 9 exemption.

7.26 If the parties' combined market share is greater than 15%, it is possible that the commercialisation may have restrictive effects, and as a result the likely impact of the commercialisation agreement on the market must be assessed.

Assessment under the Section 9 exemption

Efficiencies

7.27 Commercialisation agreements may give rise to significant efficiencies. The efficiencies to be taken into account when assessing whether a commercialisation agreement fulfils the criteria of the Section 9 exemption will depend on the nature of the activity and the parties to the cooperation.

7.28 Joint distribution agreements can generate significant efficiencies stemming from economies of scale or scope, especially for smaller producers or groups of independent retailers, for instance, where they take advantage of new distribution platforms in order to compete with larger operators. Joint distribution agreements can in particular be relevant for attaining environmental sustainability objectives. Commercialisation agreements can also generate efficiencies benefiting consumers by reducing dependencies or mitigating shortages and disruptions in supply chains.

7.29 In order to fulfil the conditions of the Section 9 exemption, any efficiencies should not be savings that result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. For example, a reduction in transport costs that results only from customer allocation and without any integration of the logistical system should not be regarded as an efficiency gain within the meaning of the Section 9 exemption.

7.30 The parties to the agreement must demonstrate any efficiencies. An important element in this respect would be the parties' contribution of significant capital, technology or other assets. Cost savings through reduced duplication of resources and facilities may also be relevant. However, if the joint commercialisation represents no more than a sales agency without any investment, it is unlikely to fulfil the conditions of the Section 9 exemption.

7.31 Price-fixing is generally unlikely to fulfil the conditions of the Section 9 exemption unless it is indispensable for the integration of other marketing functions (as to which see paragraph 7.32) and unless that integration will generate substantial efficiencies.

Indispensability

7.32 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a commercialisation agreement do not fulfil the criteria of the Section 9 exemption. This question of indispensability is especially important for those agreements involving price-fixing or market sharing, which will only under exceptional circumstances be considered indispensable.

Pass-on to consumers

7.33 Efficiencies attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the commercialisation agreement. This pass-on can happen through, for example, lower prices or better product quality or variety. The higher the market power of the parties, however, the less likely it is that efficiencies will be passed on to consumers to an extent that outweighs the restrictive effects on competition. Where the parties to an agreement have a combined market share of below 15% in the market where they jointly commercialise the products that are the subject of the agreement, it is likely that any demonstrated efficiencies generated by the agreement will be sufficiently passed on to consumers.

No elimination of competition

7.34 An agreement will not fulfil the criteria of the Section 9 exemption if it affords the parties the possibility of eliminating competition in respect of a substantial part of the products in question. This should be analysed by reference to the relevant market to which the products that are the subject of the agreement belong and also in possible related markets.

Bidding consortia

Introduction

7.35 The CMA uses the term 'bidding consortium' to refer to a situation where two or more parties cooperate to submit a joint tender (eg a joint bid) in a public or private procurement competition.

7.36 Cooperation in tendering may happen, for example, through subcontracting, where the official tenderer agrees to subcontract part of the tender activity to one or more other parties, or through a consortium, where all consortium partners participate jointly in the tender process, normally through a specific entity for the purposes of the tender. From a competition law perspective, subcontracting and consortia both constitute joint bidding. In this Part, the CMA also refers to such cooperation as a 'bidding consortium'.

Distinction between bidding consortia and bid-rigging/collusive tendering

7.37 For the purpose of this section, bidding consortia are distinguished from bid-rigging (or collusive tendering), which refers to illegal agreements between undertakings with the aim of distorting competition in tenders.

7.38 Bid-rigging and collusive tendering are some of the most serious form of restrictions of competition by object.[267] They may assume various forms, such as participants in a tender colluding to fix the content of their tenders (especially the price) before the tender in order to influence the outcome of the tender, agreeing to refrain from submitting a tender bid, agreeing to allocate the market based on geography, customer or the subject of the tender or setting up rotation schemes for a number of procedures. The aim of all these practices is create the impression that the procedure is genuinely competitive while acting in a way that restricts competition.

7.39 Bid-rigging generally does not involve joint participation in the tender process through, for instance, submitting a joint tender through a specific entity. Rather, bid-rigging typically refers to a hidden or tacit agreement between potential tenderer to coordinate their seemingly independent decisions with

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[267] It is well established that bid-rigging and collusive tendering amount to an infringement of the Chapter I prohibition. For example, in *Apex Asphalt*, the CAT upheld the finding by the CMA's predecessor, the Office of Fair Trading ('OFT'), in *West Midland Roofing Contractors* that cover bidding amounts to an infringement of the Chapter I prohibition (see *West Midland Roofing Contractors*, OFT decision of 17 March 2004; *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4). Cover bidding (also known as cover pricing) is a form of collusive tendering in which a supplier or bidder submits a price for a contract that is not intended to win the contract; rather, it is a price that has been decided upon in conjunction with another supplier or bidder that wishes to win the contract: *West Midland Roofing Contractors*, OFT decision of 17 March 2004, paragraph 18.

respect to the participation in the tendering process.[268] One aspect of this practice is that the customer is deceived as to the extent of competition.[269]

7.40 However, in some cases the distinction between bid-rigging and legitimate forms of joint bidding is not straightforward, in particular, in cases of subcontracting. For example, cases where two tenderers enter into reciprocal subcontracts may raise competition concerns, given that such subcontracting agreements may mean the parties disclose to each other information related to their respective tenders, thus calling into question the parties' independence in formulating their own tenders. However, there is no general presumption that the successful tenderer subcontracting to an unsuccessful tenderer in the same tendering process raises competition concerns.

Bidding consortia and joint commercialisation

7.41 Bidding consortium agreements may involve significant integration of the parties' resources and activities for the purpose of participating in a tendering process, in particular when the bidding consortium agreement includes forms of joint production. Where an agreement includes both joint commercialisation and joint production, and the joint commercialisation is merely ancillary to the production, the centre of gravity of the agreement lies in the production and the agreement should be assessed in accordance with the guidance applicable to the joint production. In the context of joint production, price-fixing for the contract products will not necessarily be considered a restriction by object, and an assessment of the agreement's restrictive effects may be necessary (see above, paragraph 5.21).

7.42 However, in principle, bidding consortium agreements that mainly or exclusively include joint commercialisation should be considered as commercialisation agreements and assessed in accordance with the principles set out in the present Part.

Assessment of bidding consortia under the Chapter I prohibition

7.43 The Chapter I prohibition applies to agreements restricting potential competition as well as actual competition. Although bidding consortia need to

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[268] However, while bid-rigging typically refers to a hidden or tacit agreement, secrecy is not a necessary requirement for finding that an agreement restricts competition by object. See, for example, judgment of 20 November 2008, *Beef Industry Development Society*, C-209/07, EU:C:2008:643, in which the Court of Justice concluded that the cooperation in that case, which had not been concluded in secret, had the object of restricting competition.

[269] See, for example, judgment of 11 July 2013, *Team Relocations NV and others v European Commission*, T-204/08 and T-212/08, EU:T:2011:286, paragraph 13. See also, for example, *Apex Asphalt and Paving Co Limited v OFT*, [2005] CAT 4, paragraphs 208, 209, 250 and 251.

be considered individually, a bidding consortium agreement is normally not likely to give rise to competition concerns if it allows the undertakings involved to participate in contracts that they would not be able to undertake individually. In such a case, as the parties to the bidding consortium agreements are therefore not potential competitors for implementing the relevant contract, there is no restriction of competition within the meaning of the Chapter I prohibition. This may be the case where the parties produce different products that are complementary for the purposes of participation in the tender, or where the parties, although all active in the same markets, cannot carry out the contract individually, for example, due to its size or complexity.

7.44 The assessment of whether the parties can each compete in a tender process individually, and are competitors for the purpose of the relevant tender process, depends firstly on the requirements that the customer has included in the tender rules. However, the mere theoretical possibility that each party could carry out the contract alone does not automatically make the parties competitors: there must be a realistic assessment of whether an undertaking will be capable of completing the contract on its own, considering the specific circumstances of the case, such as the party's size and capabilities, and its present and future capacity assessed in light of the evolution of the contractual requirements.

7.45 In cases of calls for tenders where it is possible to submit tenders on parts of the contract (that is, by lots), undertakings that have the capacity to bid on one or more lots – but not for the whole tender – should be considered competitors for the purpose of the relevant contract. A bidding consortium is less likely to restrict competition where it would allow the parties to tender for the whole contract (rather than parts of it) as that might result in a rebate being offered by the bidding consortium for the whole contract. The resultant lowering of the overall price might offset any potential loss of competition. However, this does not change the fact that in principle the parties are competitors for at least part of the tender process such that the agreement may fall within the Chapter I prohibition and, where it does, any possible efficiencies achieved with a joint tender would have to be assessed based on the principles of the Section 9 exemption.

7.46 If it is not possible to exclude the possibility that the parties to the bidding consortium agreement could each compete individually in the tender or if there are more parties to a consortium agreement than is necessary to compete in the tender, the joint bid is more likely to restrict competition. Such a restriction may restrict competition by object or by effect, depending on the content of the agreement and the specific circumstances of the case (see paragraphs 7.11 - 7.26 above).

Assessment of bidding consortia under the Section 9 exemption

7.47 A bidding consortium agreement between competitors may fulfil the criteria of the Section 9 exemption. Generally, an assessment should consider, for example, the parties' position in the relevant market, the number and the market position of the other participants to the tender, the content of the agreement, and the products involved and the market conditions.

7.48 In terms of efficiencies, these can take the form of lower prices, or better quality, wider choice or faster realisation of the products that are the subject of the tender.

7.49 In addition, the other criteria of the Section 9 exemption need to be fulfilled, that is, indispensability, pass-on to consumers and no elimination of competition. In tender procedures these are often interlinked: the efficiencies of a joint tender through a bidding consortium agreement are more easily passed on to consumers – in the form of lower prices or better quality of the offer – if competition with regard to the tender is not eliminated, and other relevant competitors can take part in the tender process.

7.50 The criteria of the Section 9 exemption may be fulfilled if the bidding consortium agreement allows the parties to submit a tender that is more competitive than the tenders they would have submitted independently – in terms of prices and/or quality – and the benefits to consumers and the customer outweigh the restrictions to competition. Efficiencies must be passed on to consumers and will not be sufficient to meet the criteria of the Section 9 exemption if the bidding consortium agreement only benefits its parties.

Examples

Example of joint commercialisation necessary to enter a market

Example 1

Situation: Four undertakings providing laundry services in a large city, each with a 3% market share of the overall laundry market in that city, agree to create a joint marketing arm for the selling of laundry services to institutional customers (that is, hotels, hospitals and offices), while keeping their independence and freedom to compete for other local, individual clients.

For the new segment of demand (the institutional customers), they develop a common brand name, a common price and common standard terms including, among other things, a maximum period of 24 hours before deliveries and schedules for delivery. They set up a common call centre where institutional clients can request

their collection and/or delivery service. They hire a receptionist (for the call centre) and several drivers. They further invest in vans for dispatching, and in brand promotion to increase their visibility.

The agreement does not fully reduce their individual infrastructure costs because they are keeping their own premises and still compete with each other for the individual local clients, but it increases their economies of scale and allows them to offer a more comprehensive service to other types of clients, which includes longer opening hours and dispatching to a wider geographic coverage. In order to ensure the viability of the project, it is indispensable that all four of them enter into the agreement. The market is very fragmented, with no individual competitor having more than 15% market share.

Analysis: Although the joint market share of the parties is below 15%, the fact that the agreement involves a common price, ie price-fixing, means that the Chapter I prohibition could apply.

However, to the extent that the parties could not have entered the market for providing laundry services to institutional customers either individually or in cooperation with fewer parties than the four currently taking part in the agreement, the agreement would not create competition concerns, irrespective of the price-fixing restriction, provided that the price-fixing is necessary and proportionate to the promotion of the common brand and the success of the project.

Example of commercialisation agreement by more parties than necessary to enter a market

Example 2

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

Analysis: The Chapter I prohibition applies to the agreement between the four parties, because the agreement involves price-fixing, ie a common price, and because (unlike Example 1) it could have been carried out by fewer than the four parties. The agreement thus needs to be assessed under the Section 9 exemption, even though the parties' joint market share is below 15%.

The agreement gives rise to efficiencies as the parties are now able to offer improved services for a new category of customers on a larger scale (which they would not otherwise have been able to service individually). In the light of the parties' combined market share of below 15%, it is likely that they will sufficiently pass-on

any efficiencies to consumers. It is further necessary to consider whether the restrictions imposed by the agreement are indispensable to achieve the efficiencies and whether the agreement eliminates competition.

Given that the aim of the agreement is to provide a more comprehensive service (including dispatch which was not offered before) to an additional category of customers, under a single brand with common standard terms, the price-fixing can be considered as indispensable to the promotion of the common brand and, consequently, the success of the project and the resulting efficiencies.

Additionally, taking into account the market fragmentation, the agreement will not eliminate competition. The fact that there are four parties to the agreement (instead of the three that would have been strictly necessary) allows for increased capacity and contributes to simultaneously fulfilling the demand of several institutional customers in compliance with the standard terms (that is, meeting maximum delivery time terms).

As such, the efficiencies are likely to outweigh the restrictions on competition between the parties and the agreement is likely to fulfil the conditions of the Section 9 exemption.

Example of a joint online platform – 1

Example 3

Situation: A number of small specialty shops join an online platform for the promotion, sale and delivery of gift fruit baskets. There are a number of competing online platforms. By charging a monthly fee, they share the running costs of the platform and jointly invest in brand promotion.

Through the webpage, where a wide range of different types of gift baskets are offered, customers order (and pay for) the type of gift basket they want to be delivered. The order is then allocated to the specialty shop closest to the address of delivery. The shop individually bears the costs of composing the gift basket and delivering it to the client. It is paid 90% of the final price, which is set by the online platform and uniformly applies to all participating specialty shops, whilst the remaining 10% is used for the common promotion and the running costs of the online platform.

Apart from the payment of the monthly fee, there are no further restrictions for specialty shops to join the platform throughout the UK. Moreover, specialty shops with their own company website are also able to (and in some cases do) sell gift fruit baskets online under their own name and thus can still compete among themselves outside the cooperation.

Customers purchasing over the online platform are guaranteed same day delivery of the fruit baskets and they can also choose a delivery time convenient to them.

Analysis: Although the scope of agreement is limited, since it only covers the joint selling of a particular type of product through a specific marketing channel (the online platform), it involves price-fixing. As a result, it is likely to restrict competition by object.

The agreement therefore needs to be assessed under the Section 9 exemption. The agreement gives rise to efficiencies, such as greater choice, higher quality service and reduced search costs, which benefit consumers and are likely to outweigh the restrictions on competition the agreement brings about. Given that the specialty stores taking part in the cooperation are still able to operate individually and to compete one with another, both through their shops and the internet, the price-fixing restriction may be considered as indispensable for the promotion of the product (since when buying through the online platform consumers do not know where they are buying the gift basket from and do not want to deal with a multitude of different prices) and the ensuing efficiencies, as well as considering the common online branding. Absent other restrictions, the agreement fulfils the criteria of the Section 9 exemption. Moreover, as other competing online platforms exist and the parties continue to compete with each other through their shops or over the internet, competition will not be eliminated.

Example of a joint online platform – 2

Example 4

Situation: A number of small independent bookstores create an online platform, which will promote, sell and deliver the books which are available in their stores. The bookstores cover a substantial area covering several regions.

Each bookstore pays an annual fee, which is intended to cover the costs of running and promoting the platform. The fee is calculated based on a fixed percentage of each bookstore’s annual sales on the platform up to a maximum amount. This maximum amount is agreed annually and is based on the running costs of the platform incurred during the previous year. For the initial period of 3 years, the percentage is fixed at 10% of annual sales, but there is an understanding among the members that, as the business grows, they are likely to be able to reduce the contributions.

The bookstores agree to negotiate an arrangement with a delivery company for same-day delivery of the books ordered online. As a result of the number of bookstores involved in the venture, the delivery company is able to guarantee same-

day delivery. A price for this delivery service is agreed and includes the cost of packaging the items.

There is no arrangement between the individual bookstores regarding the online price for their books: that is communicated by each bookstore to the platform only and no information is exchanged between the bookstores regarding future prices or promotions. The price of the books online is generally the same as that charged in-store (and the additional amount for postage and packing is agreed by the bookstores with the delivery company). There is evidence that the benefits of the negotiated agreement – including the same-day delivery clause – would not have been made available to each bookstore individually. There is also evidence that, as a result of the agreement, there is a material increase in book sales

Admission to the platform is open to all independent stores upon payment of the annual fee. There are several other similar online platforms providing a similar service covering the same geographic area. No individual platform has more than 15% of the market in any one region.

Analysis: Since the agreement involves the setting of the price for packing and delivery of orders, as well as a fee based on a percentage of the retail prices, the Chapter I prohibition may apply. The agreement therefore needs to be assessed under the Section 9 exemption.

The parties provided evidence that the benefits of the negotiated agreement – including the same-day delivery clause – would not have been made available to each bookstore individually. In addition, because of the agreement there is a material increase in book sales. As a result, it is likely that these benefits could not have been achieved without the agreement. Since there are several other platforms with similar market shares operating in the same geographic area, competition is not eliminated and the agreement is unlikely to create competition concerns.

Example of sales joint venture

Example 5

Situation: Undertakings A and B produce bicycle tyres. They have a combined market share of 14% on the UK-wide market for bicycle tyres. They decide to set up a sales joint venture for marketing the tyres to bicycle producers and agree to sell all their production through the joint venture. The production and transport infrastructure remains separate within each party.

The parties claim considerable efficiencies stem from the agreement. Such gains mainly relate to increased economies of scale, through being able to fulfil the demands of their existing and potential new customers and better competing with

imported tyres produced in other countries. The joint venture negotiates the prices and allocates orders to the closest production plant to rationalise transport costs when delivering to the customer.

Analysis: The Chapter I prohibition is capable of applying to the agreement to create the joint venture, assuming that the agreement does not result in the two enterprises ceasing to be distinct.[270] In this case, the agreement restricts competition by object because it involves customer allocation and the setting of prices by the joint venture. The agreement therefore needs to be assessed under the Section 9 exemption, even though the combined market share of the parties is below 15%.

The claimed efficiencies deriving from the agreement do not result from the integration of economic activities or from common investment. The joint venture would have a very limited scope and would only serve as an interface for allocating orders to the production plants. It is therefore unlikely that any efficiencies would be passed on to consumers to such an extent that they would outweigh the restriction on competition brought about by the agreement. Thus, the conditions of the Section 9 exemption would not be fulfilled.

Media Distribution Platform

Example 6

Situation: TV broadcaster A and TV broadcaster B, both active mainly in the free-to-air TV market, create a joint venture for the launch of a new online video-on-demand platform, on which consumers can, subject to a charge, watch films or series produced by each of them or by third parties which have licensed to one of the two TV broadcasters the relevant rights. The relevant market is assessed as nationwide. TV broadcaster A's group has a market share of around 25% in free-to-air TV market and TV broadcaster B has a market share of about 15%. There are two other large broadcasters with market shares between 10% and 15% and a series of smaller broadcasters. The price for watching each video will be determined centrally by the joint venture, which will also coordinate prices for acquiring video-on-demand licenses in the upstream market.

Analysis: Considering their size on the nationwide TV market and their large library of audio-visual rights, both TV broadcasters A and B could launch new video-on-demand platforms separately. Therefore, they are potential competitors in the video-on-demand consumer market.

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[270] See paragraph 3.7. The Chapter I prohibition does not apply to an agreement resulting in a merger or joint venture within the merger provisions of the Enterprise Act 2002, that is, an agreement which results or would result in any two enterprises 'ceasing to be distinct enterprises' for the purposes of Part 3 of the Enterprise Act.

Moreover, the agreement to create the joint venture involves price-fixing and as a result the Chapter I prohibition applies, assuming that the agreement does not result in the two enterprises ceasing to be distinct.[271] The restriction of competition appears substantial, as price competition between the two broadcasters will be eliminated. Moreover, TV broadcasters A and B will coordinate pricing for video-on-demand licenses. These competition restrictions will be appreciable, considering the activities and the size and market shares of the undertakings involved.

As for the application of the Section 9 exemption, the benefits resulting from an increased range of video-on-demand offers and a simplified navigation through contents is unlikely to outweigh the restriction on competition arising from the price-fixing. In particular, the restriction does not appear necessary to achieve the mentioned efficiencies, as these could also be obtained, for example, with an open platform and purely technical cooperation. In conclusion, the agreement does not appear to fulfil the criteria of the Section 9 exemption.

Bidding Consortia

Example 7

Situation: Undertakings A and B are competing providers of specialised medical products for hospitals. They decide to enter into a consortium agreement to submit joint bids in a series of tender processes, organised by the national health system, for the provision of a set of plasma-derived medicinal products to public hospitals.

The criterion for awarding contracts is the most economically advantageous tender, taking into account a balance between price and quality. In particular, additional points are awarded for bids that include a series of optional products.

Both Undertakings A and B could each compete in the tender process individually based on the requirements included in the tender rules. Both Undertakings A and B have already competed individually in one of the relevant tender processes, which was awarded to another participant as both their individual tenders were inferior in terms of price and quality, in particular because of a limited offer of optional products. In general, there are at least two other participants to the tender processes in question.

Analysis: As Undertaking A and B could each compete individually in the tender processes, the Chapter I prohibition applies, and the joint participation may restrict competition.

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[271] See paragraph 3.7. The Chapter I prohibition does not apply to an agreement resulting in a merger or joint venture within the merger provisions of the Enterprise Act 2002, that is, an agreement which results or would result in any two enterprises 'ceasing to be distinct enterprises' for the purposes of Part 3 of the Enterprise Act.

The agreement therefore needs to be assessed under the Section 9 exemption. In light of the result of the previous tender process, where the parties competed separately, a joint tender may be more competitive than the individual offers in terms of pricing and of range of products offered, in particular optional products. The consortium agreement appears to be objectively necessary for the parties involved to submit competitive offers in the tender procedures, compared with the offers presented by the other participants. Competition in the tenders is not eliminated as at least two other relevant competitors will take part in the bidding procedure. This implies that the efficiencies of the joint tender could benefit the client and ultimately consumers. Therefore, the agreement is likely to fulfil the criteria of the Section 9 exemption.

8. Information Exchange

Introduction

Overview

8.1 The purpose of this part is to guide undertakings and associations of undertakings in the competitive assessment of information exchange.[272]

8.2 Information exchange can take various forms and can occur in different contexts. In some markets, information sharing has increased in importance in recent years as the use of big data analytics and machine learning techniques has become increasingly important to decision making.[273]

8.3 Depending on the circumstances, the exchange of information can be pro-competitive or competitively neutral (and therefore fall outside the scope of the Chapter I prohibition entirely) or it can restrict competition (and fall within the scope of the Chapter I prohibition), in which case it will only be permitted if the exchange generates sufficient relevant efficiencies (such that the Section 9 exemption applies).

8.4 While some information exchanges are prohibited, information exchange is a common feature of many competitive markets and it can often be beneficial for consumers. For example, information exchange may:

(a) solve problems caused by information asymmetries,[274] thereby making markets more efficient;

(b) enable undertakings to improve their internal efficiency through benchmarking against each other's best practices;

(c) help undertakings to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand, etc;

(d) enable the development of new or better products or services (for example by allowing algorithms to work more effectively); or

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[272] In so far as the information exchanged constitutes in whole or in part personal data, this Guidance is without prejudice to UK law on data protection. No provision of this Guidance should be applied or interpreted in such a way as to diminish or limit the right to the protection of personal data.

[273] Data sharing is also encouraged in the UK's National Data Strategy. See section 6 'Availability: ensuring data is appropriately accessible'.

[274] Economic theory on information asymmetries deals with the study of decisions in transactions where one party has more information than the other.

(e) provide benefit directly to consumers by reducing their search costs and improving choice.

Structure of this Part

8.5 The remainder of this section (paragraphs 8.8 - 8.13) sets out the types of 'information' and the types of 'exchange' that are covered by this part and the approach to assessing information exchanges that take place alongside or as part of other agreements.

8.6 Paragraphs 8.14 - 8.84 discusses the assessment of whether an information exchange falls within the Chapter I prohibition:

(a) Paragraphs 8.18 - 8.26 set out the two main competition concerns stemming from information exchanges, namely: (i) the reduction of competitive uncertainty and enabling/strengthening collusive outcomes; and (ii) anti-competitive foreclosure.

(b) Paragraphs 8.27 - 8.50 discuss the nature of information exchanged, noting which types of information are likely to be considered 'competitively sensitive'.

(c) Paragraphs 8.51- 8.67 discuss the characteristics of the exchange, noting which types of exchange are more likely to give rise to competition concerns.

(d) Paragraphs 8.68 - 8.72 discuss how market characteristics might impact upon the assessment.

(e) Paragraphs 8.73 - 8.84 discuss restrictions by object and effect respectively.

8.7 Paragraphs 8.85 - 8.91 discuss the application of the Section 9 exemption to information exchanges.

Meaning of 'information' and 'exchange'

8.8 This Part applies to all forms of horizontal information exchange, both direct exchanges (whether unilateral or bi- or multilateral) and indirect exchanges. through a third party (such as a service provider, platform, online tool or algorithm), common agency (for example, a trade association), a market research organisation, or via upstream suppliers or downstream retailers. Whilst this Part does not cover information exchanges in a vertical context, it does cover certain indirect horizontal exchanges which have a vertical element (see paragraphs 8.57 - 8.61).

8.9 This part also applies to all types of information, including: (i) raw and unorganised digital content that will need processing in order to make it useful (raw data); (ii) pre-processed data, that has already been prepared and validated; (iii) data that has been manipulated in order to produce meaningful information, of any form; and (iv) any other type of information, including non-digital information. It includes physical information sharing and data sharing between actual or potential competitors.[275] In this part, the term 'information' covers all of the above-mentioned types of data and information.

Information exchanges and other agreements

8.10 When information exchange in itself forms the main objective of the cooperation (including in scenarios where there is no formal agreement between the participants in the exchange), the assessment of the exchange should take place in accordance with the guidance provided in this part.

8.11 When information exchanges form part of another horizontal agreement, it will be necessary to assess whether the exchange can restrict competition with regard to the parties' activities within and outside the field of cooperation. Any negative effect arising from such exchanges will not be assessed separately but in the light of the overall effects of the horizontal agreement.

8.12 Information exchanges may form an integral part of a cartel, in which case they will not be considered separately from the cartel agreement. In some cases, information exchanges may occur as part of the pattern of conduct involved in a cartel, in which case they may be viewed as forming part of a single and continuous infringement (alternatively, a single and repeated infringement) where the practices at issue are interlinked in terms of pursuing a common anti-competitive objective.

8.13 Information exchange may also be part of a merger process. Any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition of control remains subject to the Chapter I prohibition.

[275] The term data sharing is used to describe all possible forms and models underpinning data access and transfer between undertakings. It includes data pools, where data holders group together to share data resources.

Assessment under the Chapter I prohibition

Introduction

8.14 As indicated in paragraph 3.12, an information exchange only falls within the scope of the Chapter I prohibition if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. As set out in paragraph 3.12, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two.[276] In addition, there is a presumption that undertakings that take part in a concerted practice and that remain active on the market take account of the information exchanged with their competitors in determining their conduct on the market.[277] Where an exchange of competitively sensitive information between competitors takes place in preparation of an anti-competitive agreement, this suffices to prove the existence of a concerted practice. It is not necessary to show that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market.[278]

8.15 A key principle of competition is that each undertaking should determine independently its economic conduct on the relevant market. This principle does not prevent undertakings from adapting themselves intelligently to the existing or anticipated conduct of their competitors or to customary conditions existing in the market. Undertakings should however avoid exchanges of information that have the object or effect of giving rise to conditions of competition which do not correspond to the normal conditions of the relevant market. This is the case if the exchange either influences the conduct on the market of an actual or potential competitor or reveals to such a competitor the conduct which another competitor has decided to follow itself or contemplates adopting on the market.[279]

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[276] See, judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 39-40; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 126.

[277] Judgment of 10 November 2017, *ICAP and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 57; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51, and judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 127.

[278] Judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 135.

[279] Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 27 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 32-33. See also *Balmoral v CMA* [2017] CAT 23, paragraph 38, upheld on appeal, *Balmoral v CMA* [2019] EWCA Civ 162, paragraph 17.

8.16 The Chapter I prohibition does not apply to exchanges of information between competitors which are required by law. However, the Chapter I prohibition continues to apply if a regulatory requirement merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, rather than requiring it.[280] In practice, this means that those subject to regulatory requirements must take care to ensure that any information exchange which they engage in pursuant to the regulatory requirement but which is not strictly required by law does not infringe the Chapter I prohibition. They should restrict the extent of the information exchange to what is required on the basis of the applicable regulation and they may have to implement precautionary measures if competitively sensitive information is exchanged.[281]

8.17 A regulation may, for example, require information exchange between those subject to the regulation in order to obviate or reduce the need for animal testing and/or to reduce research costs. To the extent that the undertakings subject to the regulation retain discretion as to how they comply with that requirement, any information exchanges they engage in will be subject to the application of the Chapter I prohibition. Undertakings may be able to take a number of measures, while still complying with the regulation, to ensure that the information exchange does not infringe the Chapter I prohibition. For example, it may be possible to limit the information exchange to only non-sensitive information. Where possible, aggregated information or ranges should be used in order to avoid exchange of individual or more detailed figures. The use of an independent third party service provider ('a trustee') that receives individual information from several sources on the basis of non-disclosure agreements and subsequently collates, checks and aggregates this into a composite return that does not give the possibility of deducing individual figures may also be considered by undertakings. The timing of exchanges could also be carefully thought through to ensure that they are not more frequent than necessary.

Main competition concerns related to information exchange[282]

Reducing competitive uncertainty and enabling/strengthening collusive outcomes

8.18 By artificially increasing transparency between competitors in the market, the exchange of competitively sensitive information can restrict competition by reducing competitive uncertainty in the market.

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[280] See paragraph 3.53 above on conduct required by law.

[281] See paragraphs 8.27 - 8.30 below on the concept of competitively sensitive information.

[282] The use of the term 'main competition concerns' means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

8.19 The exchange of competitively sensitive information may restrict competition even if the exchange does not lead to a stable collusive outcome between the participants. For example, certain information exchanges may be designed to slow expected price declines rather than establish a specific new (stable) price.[283]

8.20 In some cases, an exchange of competitively sensitive information *in itself* may allow undertakings to reach a common understanding on the terms of coordination which can lead to a collusive outcome on the market. The exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis, undertakings can then reach a common understanding on their behaviour on the market, even without an explicit agreement on coordination.[284]

8.21 The exchange of competitively sensitive information can also be used as a method to increase the *internal stability* of an anti-competitive agreement or concerted practice on the market.[285] Information exchange can make the market sufficiently transparent to allow the colluding undertakings to monitor to a sufficient degree whether other undertakings are deviating from the collusive outcome, and thus to know when to retaliate. Monitoring mechanisms can involve both exchanges of present and past data.[286] Such monitoring can either enable undertakings to achieve a collusive outcome on markets where they would otherwise not have been able to do so, or it can increase the stability of a collusive outcome already present on the market.

8.22 The use of algorithms by competitors may, for example, increase the risk of a collusive outcome in the market.[287] The use of pricing algorithms may result in firms collecting detailed data concerning their competitors. This may allow them to detect price deviations in real time which may in turn make

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[283] See *Lexon v CMA* [2021] CAT 5.
[284] See, for example, judgment of 7 November 2019, *Campine and Campine Recycling* v *Commission*, T- 240/17, EU:T:2019:778, paragraph 305.
[285] In the CMA decision on *Online sales of posters and frames*, Case 50223, August 2016, two parties entered into a horizontal price-fixing cartel for posters and frames sold on Amazon's UK website. They supported the implementation of this cartel agreement using automated repricing software which monitored and adjusted their prices to ensure neither party undercut the other.
[286] Judgment of 26 January 2017, *Duravit and Others* v *Commission*, C-609/13 P, EU:C:2017:46, paragraph 134; judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 281.
[287] Algorithmic collusion must be distinguished from the so-called 'collusion by code', that refers to the deliberate application by competitors of common behavioural coordination algorithms. Collusion by code is typically a cartel and therefore it is a restriction of competition by object, irrespective of the market conditions and of the information exchanged. See also the CMA's research and analysis papers 'Pricing algorithms research, collusion and personalised pricing' dated 8 October 2018 and 'Algorithms: How they can reduce competition and harm consumer' dated 19 January 2021.

punishment mechanisms more effective. Using automated algorithmic pricing systems could increase the predictability of competitors' pricing behaviour. In addition, rapid changes to prices made possible by automated pricing systems could allow competitors to send signals or to test their competitors' responses to price changes very quickly. However, for algorithmic collusion to be possible, in addition to the specific design of the algorithms, some structural market conditions are generally required, such as a high frequency of interactions, limited buyers and the presence of homogenous products/services.

8.23 Finally, information exchange can also be used as a method to increase the *external stability* of an anti-competitive agreement or concerted practice on the market. Exchanges that make the market sufficiently transparent can allow colluding undertakings to monitor where and when other undertakings are attempting to enter the market, thus allowing the colluding undertakings to target the new entrant. Both exchanges of present and past information can create such a monitoring mechanism.

Anti-competitive foreclosure

8.24 An information exchange can also lead to anti- competitive foreclosure on the same market where the exchange takes place or on a related market.[288]

8.25 Foreclosure on the same market can occur when the exchange of information places competitors that do not take part in the exchange at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system (for example in a data sharing initiative). This type of foreclosure is possible if the data shared is of strategic importance, represents a large part of the market and third parties' access is prevented.[289] Such initiatives also do not facilitate the entry of new operators on to the market.

8.26 In some cases, information exchange may also lead to anti-competitive foreclosure of third parties in a related market. For instance, vertically integrated companies that exchange information in an upstream market may gain market power and collude to raise the price of a key component for a market downstream. As a result, they could raise the costs of their rivals downstream, which could lead to anti-competitive foreclosure in the downstream market. In addition, undertakings that use non-transparent and

[288] With regard to foreclosure concerns that vertical agreements can give rise to, see paragraphs 10.13-10.14 of the Guidelines on Vertical Restraints.

[289] The judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraphs 57-58 highlights the importance of analysing the underlying market structure in order to establish whether the risk of foreclosure is likely.

discriminatory terms of access to shared information may limit third parties in their ability to detect trends for potential new products on related markets.

The nature of the information exchanged

Overview: competitively sensitive information

8.27 The Chapter I prohibition applies if an exchange of information is likely to reduce competitive uncertainty in a market and is capable of influencing the competitive strategy of other undertakings.[290] The Chapter I prohibition applies regardless of whether the undertakings involved in the exchange obtain some benefit from their cooperation

8.28 Information that reduces competitive uncertainty in the market and is capable of influencing the competitive strategy of other undertakings is sometimes described as 'commercially sensitive' or 'strategic' or 'competitively sensitive' information. This guidance uses the expression 'competitively sensitive information'. Competitively sensitive information often concerns information that is important for an undertaking to protect in order to maintain or improve its competitive position in the market(s). Information on pricing is, for instance, very often competitively sensitive, but information can be competitively sensitive even if it does not directly concern pricing or does not have a direct effect on the prices paid by end users.[291]

8.29 Whether information is competitively sensitive typically depends upon the usefulness of that information to the recipient undertakings in setting their competitive strategy. Information that has been considered to be particularly competitively sensitive and the exchange of which was qualified as a by object restriction in previous authority infringement decisions and judgments, include the following:

(a) The exchange with competitors of an undertaking's pricing and pricing intentions;[292]

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[290] See CMA Decision dated 4 March 2020 in *Nortriptyline Tablets, Information Exchange*, Case 50507.2, paragraph 1.8, upheld on appeal in *Lexon v CMA* [2021] CAT 5, see also the discussion on the legal framework at paragraphs 186 to 187.

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

[292] See, for instance judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 96; judgment of 15 December 2016, *Philips and Philips France* v *Commission,* T-762/14, EU:T:2016:738, paragraphs 134-136. It is not necessary for the information to relate directly to prices. Exchanges concerning information that forms a decisive element of the price to be paid by the

(b) The exchange with competitors of an undertaking's current and future production capacities;[293]

(c) The exchange with competitors of an undertaking's intended commercial strategy;[294]

(d) The exchange with competitors of an undertaking's arrangements relating to current and future demand;[295]

(e) The exchange with competitors of an undertaking's future sales;[296]

(f) The exchange with competitors of an undertaking's current state and its business strategy;[297]

(g) The exchange with competitors of publicly available current / past pricing data where the context of the disclosure provided valuable reassurance as to future conduct;[298]

(h) The exchange with competitors of elements of a potential entrant's launch plans;[299]

8.30 The following sections discuss how certain characteristics of the information being exchanged may affect whether or not the information is likely to be competitively sensitive.

Genuinely public information and publicly available information

8.31 'Genuinely public' information is information that is readily accessible (in terms of costs of access) to all competitors and customers.[300] As the information is

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end user may also amount to a restriction by object. See, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37.

[293] Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraphs 85 and 96; judgment of 15 December 2016, *Philips and Philips France* v *Commission,* T-762/14, EU:T:2016:738, paragraph 104.

[294] Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 98. See also the CAT's finding in *Lexon v CMA* [2021] CAT 5 at paragraphs 119 and 128 that a statement by an undertaking that its 'strategy hasn't changed at all' constituted an object infringement in the circumstances of that case.

[295] Judgment of 9 September 2015, *Samsung SDI and Others* v *Commission*, T-84/13, EU:T:2015:611, paragraph 51.

[296] Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 96.

[297] Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 70.

[298] See *Lexon v CMA* [2021] CAT 5, paragraph 162.

[299] See *Lexon v CMA* [2021] CAT 5, paragraph 115(7).

[300] This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs.

publicly and readily accessible, the receipt of such information is unlikely to influence the recipient undertaking's competitive strategy (as the recipient may be expected to have already taken such information into account when deciding its future actions). It is therefore unlikely to be considered competitively sensitive. In general, exchanges of genuinely public information are therefore also unlikely to constitute an infringement of the Chapter I prohibition.[301] Publishing information and data such that it is 'genuinely public' can lead to efficiencies in some circumstances. For example publication may help customers make informed choices and can reduce search costs. However, in some markets publishing information (in particular information concerning future intended conduct) may facilitate tacit coordination – this is discussed further at paragraph 8.55 below.

8.32 For information to be genuinely public, obtaining it should not be more costly for customers and undertakings that do not participate in the exchange than for the undertakings exchanging the information. Competitors would normally not choose to exchange information that they can collect from the market at equal ease, and hence, in practice, exchanges of genuinely public information are unlikely.

8.33 Information exchanged between competitors need not be 'private' or 'confidential' (for example subject to restrictions on disclosure) for it to be competitively sensitive:

(a) It may be the case that information exchanged between competitors is regarded as more reliable than information available from other sources and it may therefore affect competitive decision making. For example, it may be the case that an undertaking claims it could obtain information relating to its competitor's prices from its customers, yet it may regard as *more reliable* information it receives directly from that competitor. This might particularly be the case if the customer had an incentive to try to 'play off' different suppliers against each other.[302] Similarly, some exchanges may allow competitors to become aware of the relevant information more simply, rapidly and directly than they would via the market.[303]

(b) Further, even if information is undoubtedly '*in the public domain'*, it will nevertheless not be considered 'genuinely public' if the costs involved in collecting the information would deter other undertakings and

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[301] Judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98, T- 212/98 to T-214/98, EU:T:2003:245, paragraph 1154. This may not be the case if the exchange underpins a cartel.
[302] See *Lexon v CMA* [2022] CAT 5, paragraphs 200 to 201.
[303] See judgment of 12 July 2001, *Tate & Lyle and Others* v *Commission*, T-202/98, T-204/98 and T- 207/98, EU:T:2001:185, paragraph 60. See also *Lexon v CMA* [2022] CAT 5, paragraph 187(7).

customers from doing so.[304]

8.34 A typical example of genuinely public information is the advertising by petrol stations of their current pricing information for consumers and nearby competitors alike. For any individual competitor this limited set of data available to it is 'genuinely public'. Although in any particular locality it may be the case that there may only be a few competitors present and new entry is unlikely, information exchange through this form of advertising is not likely to be problematic. In the absence of an anti-competitive agreement or concerted practice, such advertising benefits consumers as it facilitates the comparison between petrol stations before they fill up their cars. even though the advertising also allows competitors to become aware of the prices charged by their nearby competitors.

8.35 However, if the petrol station owners started a comprehensive exchange of real-time pricing information with competitors then it is unlikely that the data they exchanged would be considered 'genuinely public' unless it was made freely available to all via publication. That is because, in the absence of publication, in order to obtain the same information through alternative means it would be necessary to incur substantial time and transport costs. In fact, one would have to travel constantly to collect the prices advertised on the board of petrol stations spread all over the country. The costs for this are potentially high, so that the information in practice could not be obtained, but for the information exchange.

8.36 The assessment of this exchange under the Chapter I prohibition would therefore likely depend significantly upon whether the exchanged information was published or exchanged only between the petrol stations owners.

8.37 If the data were not published then the detailed and wide-ranging pricing data exchanged by the owners would not be genuinely public. Moreover, the exchange would be systematic and would cover the entire relevant market. Taking account of the fact that there may be few competitors present and new entry is unlikely, the exchange would be likely to create a climate of mutual certainty between the competitors as to their pricing policy and would as a result be likely to facilitate a collusive outcome.

8.38 In contrast, if the data were made freely available to consumers (eg via an App which allowed them easily to compare prices) then it might help

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[304] See, for instance, judgment of 14 March 2013, *Dole Food Company and Dole Germany* v *Commission*, T-588/08, EU:T:2013:130, paragraphs 291-295.

consumers shop around, which could in turn encourage petrol station owners to compete more intensely to attract customers.

8.39 Even if a certain type of information is publicly available (for example, information published by regulators), an incremental information exchange by competitors of the same or similar type of information may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market. In addition, in certain circumstances the exchange of information might tip the market balance towards a collusive outcome.

8.40 In a certain sector, it may for instance be public knowledge that the costs of supplies are rising. At bilateral meetings or during meetings of the relevant trade association,this phenomenon may be brought up by participants. While competitors may refer to the rising costs of supplies – as this is genuinely public information–, they should not discuss the detail of these cost increases with each other e.g. by seeking to assess the implications of them for individual firms or discussing their responses to these price rises – if this would reduce uncertainty regarding an individual competitor's future or recent actions on the market.[224] A competitor must independently determine the policy which it intends to adopt on the internal market. Each competitor must independently decide its response to the rising costs of supplies.

Aggregated/individualised information and data

8.41 Depending on the circumstances, the exchange of raw data may be less competitively sensitive (and therefore less likely to restrict competition) than the exchange of data that has already been processed into meaningful information. At the same time, the exchange of processed information may allow undertakings to obtain greater efficiencies than they would achieve by exchanging raw data. However, the exchange of processed information which is genuinely aggregated such that the recognition of individualised company level information is sufficiently difficult or uncertain may allow undertakings to obtain the relevant efficiencies with a significantly reduced risk of restricting competition.

8.42 Collection and publication of aggregated market information (such as sales data, data on capacities and data on costs of inputs and components) by a trade association or market intelligence firm may benefit competitors and customers alike by saving costs and by allowing them to get a clearer overall picture of the economic situation of a sector. Such information collection and publication may allow individual competitors to make better-informed choices in order to adapt efficiently their individual competitive strategy to the market conditions. More generally, unless it takes place between a relatively small

number of undertakings with a sufficiently large market share, the exchange of aggregated information is unlikely to give rise to a restriction of competition.

8.43 Conversely, the exchange of individualised information may facilitate a common understanding on the market and punishment strategies by allowing the coordinating undertakings more effectively to single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated information and data may restrict competition in markets with specific characteristics. For example, if members of a very tight and stable oligopoly had achieved a collusive outcome then the exchange of aggregated information might allow detection of a market price below a certain level. The other undertakings could then automatically assume that someone had deviated from the collusive outcome and could take market-wide retaliatory steps. In other words, in order to keep collusion stable, undertakings in a very tight and stable oligopoly might not always need to know who had deviated, it might be enough to learn that 'someone' had deviated.

Imprecise, inaccurate or misleading information

8.44 The capacity of the information in question to reduce competitive uncertainty and/or to influence the strategic decision-making of the recipient is relevant to assessing how competitively sensitive the information is. Participants in information exchanges sometimes consider that the information exchanged is not competitively sensitive because the content is imprecise, inaccurate or misleading.

8.45 In some circumstances even an imprecise or inaccurate statement or assurance can be sufficient to reduce uncertainty on the market and/or influence the conduct on the market of recipient undertaking.[305] Similarly, as discussed in paragraph 8.33 above, in some circumstances information received directly from a competitor may be regarded as being more reliable than similar information gathered from another source (such as a customer) and thus it may be capable of influencing competitive strategy despite being relatively vague or imprecise.

8.46 Even an exchange of false or inaccurate information can restrict competition.[306] Indeed, an exchange of information which is deliberately

[305] See *Lexon v CMA* [2021] CAT 5, paragraphs 94(2) and 159 to 160.
[306] Judgment of 15 December 2016, *Philips and Philips France* v *Commission,* T-762/14, EU:T:2016:738, paragraph 91. CMA Decision dated 4 March 2020 in *Nortriptyline Tablets, Information Exchange*, Case 50507.2, paragraphs 5.49, 5.67 and 5.89.

misleading may be particularly likely to be competitively sensitive since it may be designed to influence the recipient undertaking's competitive strategy.[307]

Whether the information exchanged concerns the past, the present or the future

8.47 In general, older information (or statements concerning events in the past) are less likely to be competitively sensitive than current information (or statements concerning current events). Statements concerning future events are more likely to be competitively sensitive. It is the capacity of the information in question to reduce uncertainty in a market and/or influence the strategic decision-making of the recipient which is relevant to assessing how competitively sensitive the information is, rather than simply the age of the data or period to which it relates.

8.48 In many industries, information loses its competitively sensitive nature quickly meaning that after a relatively short period it can be regarded as 'historic'. The exchange of historic information is unlikely to influence strategic decision-making as it is unlikely to be indicative of the competitors' intended conduct or to provide a basis to establish a common understanding on the market.[308] In addition, in principle, the older the information, the less useful it tends to be for timely detection of deviations and thus as a credible threat of prompt retaliation.[309] However, this requires a case by case assessment of the relevance of the information.[310]

8.49 Whether information is historic depends on the specific characteristics of the relevant market, the frequency of purchase and sales negotiations in the industry, and the age of the information typically relied on in the industry for the purposes of business decisions. For example, information can safely be considered as historic if it is several times older than the average length of the pricing cycles or the contracts in the industry if the latter are indicative of price re-negotiations. On the other hand, the exchange of current information may have restrictive effects on competition, especially if this exchange serves to

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[307] See *Lexon v CMA* [2021] CAT 5, paragraph 160. See also CMA Decision dated 4 November 2020 in *Roofing Materials*, Case 50477, at paragraphs 3.150, 5.79 and 5.179.

[308] The collection of historic data can also be used to convey a sector association's input to or analysis of a review of public policy.

[309] For example, in certain past cases the European Commission has considered the exchange of individual data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; European Commission Decision in Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, recital 50; European Commission Decision in Case IV/36.069, *Wirtschaftsvereinigung Stahl*, recital 17.

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

artificially increase the transparency between theundertakings rather than towards the consumers.

8.50 For example, if undertakings typically rely on data about consumer preferences (purchases or other choices) over the last year in order to optimise their brands' strategic business decisions, information covering this period will generally be more competitively sensitive than older data. The information over the last year is then not considered 'historic'.

The characteristics of the exchange

Unilateral disclosures

8.51 A situation where only one undertaking discloses competitively sensitive information to its competitor(s), who accept(s) it, can constitute a concerted practice.[311] Such disclosure could occur, for example, through posts on websites, (chat) messages, emails, phone calls, input in a shared algorithmic tool, meetings etc. When one undertaking alone reveals to its competitors competitively sensitive information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all its competitors and increases the risk of limiting competition and of collusive behaviour.[312]

8.52 For example, participation in a meeting[313] where an undertaking discloses its pricing plans to its competitors is likely to be caught by the Chapter I prohibition, even in the absence of an explicit agreement to raise prices.[314] In the same vein, introducing a pricing rule in a shared algorithmic tool (for instance, the lowest price on the relevant onlineplatform(s) or shop(s) +5%, or the price of one competitor -5%), is also likely to be caught by the Chapter I prohibition, even in the absence of an explicit agreement to align future pricing.

8.53 When an undertaking receives competitively sensitive information from a competitor(be it in a meeting, by phone, electronically or as input in an algorithmic tool), it will be presumed to take account of such information and adapt its market conductaccordingly unless it responds with a clear statement that it does not wish to receive such information or reports it to the

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[311] See judgment of 15 March 2000, *Cimenteries CBR* v *Commission*, T-25/95 and others, EU:T:2000:77, paragraph 1849.
[312] See Opinion of Advocate General Kokott of 19 February 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, paragraph 54.
[313] See judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.
[314] See judgment of 12 July 2001, *Tate & Lyle and Others* v *Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 54.

administrative authorities.[315] However, the mere fact that an email is dispatched to personal mailboxes does not in itself indicate that the recipients ought to have been aware of the content of that message. It may, nonetheless, in the light of other objective and consistent indicia, justify the presumption that the recipients were aware of the content, but those recipients must still have the opportunity to rebut that presumption.[316]

8.54 Where an undertaking makes a unilateral announcement that is also genuinely public,for example through a post on a publicly accessible website, a statement in public or in a newspaper, this generally does not constitute a concerted practice within the meaning of the Chapter I prohibition.[317] However, depending on the facts underlying the case at hand the possibility of finding a concerted practice cannot be excluded. As explained in paragraph 8.29, publishing information and data so that it becomes genuinely public can help customers to make informed choices. These efficiencies are however less likely if the information concerns future intentions that may not materialise and do not bind the undertaking in its behaviour towards its customers.[318]

8.55 A unilateral public announcement referring to future intentions relating to pricing, for example, will not bind the undertaking making the announcement in its behaviour towards its customers but can give important signals concerning an undertaking's intended strategy on the market to its competitors. This will in particular be the case if the information is sufficiently specific and it relates to existing, relatively commoditised products. Such announcements therefore tend to bring no efficiencies benefiting the consumers but can facilitate collusion. On the other hand, an announcement concerning the price on launch of an innovative, new product may bring about efficiencies by stimulating consumer demand.

8.56 Unilateral public announcements may also be indicative of an underlying anti-competitive agreement or concerted practice. On a market where there are only few competitors present and high barriers to entry exist, undertakings that continuously publicise information without apparent benefit for consumers

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

[316] In judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 41, the Court mentioned examples of how to rebut this presumption: by proving that the addressee did not receive the message or that they did not look at the section in question or did not look at it until some time had passed since the dispatch.

[317] See judgment of 5 October 2020, *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, not yet published, EU:T:2020:458, paragraphs 263-267.

[318] See, for instance, European Commission Decision of 7 July 2016, Case AT.39850 *Container Shipping*, recitals 40-43.

(for instance information on R&D costs, costs of adaptations to regulatory requirements, etc.) may – in the absence of another plausible explanation – be engaged in an infringement of the Chapter I prohibition. The unilateral public announcements can be used in order to implement or monitor their collusive arrangements. Whether such infringement is indeed found will depend on the entire body of evidence available.

Indirect information exchange and exchanges in mixed vertical/horizontal relations

8.57 Exchanges of competitively sensitive information between competitors can take place via a third party (for instance a third party service provider, including a platform or third party optimisation tool provider), a common agency (for instance a trade organisation), via one of their suppliers or customers,[319] or via a shared algorithm (together referred to as the 'third party'). It is possible for an anti-competitive agreement or concerted practice to be either facilitated or enforced via the third party. Depending on the facts of the case, the competitors and the third party may both be held liable for such restrictions of competition. There is nothing in the wording of the Chapter I prohibition to indicate that the prohibition laid down in this provision is directed only at parties to agreements or concerted practices which are active on the markets affected by those agreements or practices.[320]

8.58 Indirect exchanges of competitively sensitive information require a case by case analysis of the role of each participant to establish whether they are participating in an anti-competitive agreement or concerted practice. This assessment needs to take into account the level of awareness of the suppliers or recipients of the information regarding the exchanges between other recipients or suppliers of information and the third party.

8.59 Several circumstances can be distinguished:

(a) Certain indirect information exchanges are referred to as hub-and-spoke agreements. In such cases, a common supplier or manufacturer acts as a hub in order to relay information to different retailers, but it may also be that a retailer facilitates coordination between multiple suppliers or manufacturers. An online platform can also act as hub if it facilitates, coordinates or enforces anti-competitive practices among the users of its platform services.

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[319] While guidance on the assessment of vertical distribution arrangements is available in the Vertical Agreements Block Exemption Order and in CMA166 Vertical Agreements Block Exemption Order – CMA Guidance, under certain circumstances vertical distribution arrangements may be used for horizontal collusion.
[320] Judgment of 10 November 2017, *ICAP and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 103; judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraphs 27, 34-35.

(b) Online platforms may, for example, enable information exchanges between platform users to secure certain margins or price levels. Platforms may also be used to impose operational restrictions on the system preventing platform users from offering lower prices or other advantages to final customers. Other indirect information exchanges may involve reliance between (potential) competitors on a shared optimisation algorithm that would take business decisions based on competitively sensitive data-feeds from various competitors, or the implementation in the relevant automated tools, of aligned/coordinated features or mechanisms of optimisation. While using publicly available data to feed algorithmic software is legal, the aggregation of sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to horizontal collusion.

(c) A common agency, such as a trade association, may also facilitate exchanges between its members.

8.60 An undertaking that indirectly receives or transmits competitively sensitive information may be held liable for an infringement of the Chapter I prohibition. This may be the case in the event that the undertaking that received or transmitted the information was aware of the anti-competitive objectives pursued by its competitors and the third party and intended to contribute to them by its own conduct.[321] This would apply, if the undertaking expressly or tacitly agreed with the third party provider sharing that information with its competitors or when it intended, through the intermediary of the third party, to disclose competitively sensitive information to its competitors. In addition, there would be an infringement of the Chapter I prohibition if the undertaking receiving or transmitting the information could reasonably have foreseen that the third party would share its competitively sensitive information with its competitors and if it was prepared to accept the risk which that entailed. On the other hand, an infringement of the Chapter I prohibition would not occur when the third party has used an undertaking's competitively sensitive information and, without informing that undertaking, passed this on to its competitors.[322]

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[321] The absence of any legitimate commercial reason for a disclosure may be indicative of the requisite state of mind of the disclosing undertaking, when viewed in light of all the circumstances known to the disclosing party at the time of the communication. In general, there will be fewer legitimate commercial reasons for a retailer to relay to a supplier its intention to *maintain or increase* its prices in future as opposed to relaying its intention to *decrease* its prices in future. One legitimate reason for relaying an intention to increase future prices might be where it is necessary for the supplier to print the new retail prices on the relevant goods in advance of supply (see *Tesco v OFT (Dairy)* [2012] CAT 31, paragraph 72).

[322] Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 30; judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 30.

8.61 Similarly, a third party that transmits competitively sensitive information may also be held liable for such infringement if it intended to contribute by its own conduct to the common objectives pursued by all the participants to the agreement and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or could reasonably have foreseen this and was prepared to take the risk.[323]

Frequency of the exchange of information

8.62 In general, more frequent exchanges of information are more likely to cause competition concerns than infrequent exchanges. Frequent exchanges of information can reduce strategic uncertainty in a market by facilitating a better common understanding of the market. Frequent exchanges can also increase the risk of collusion because they may make it easier to monitor deviation. In unstable markets, more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets. In markets with long-term contracts (which are indicative of infrequent purchase and sales negotiations) a less frequent exchange of information would normally be sufficient to achieve a collusive outcome. By contrast, infrequent exchanges may not be sufficient to achieve a collusive outcome in markets with short-term contracts indicative of frequent re-negotiations.[324] In general, the frequency with which information needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and aggregation of such information.[325] As a result of the growing importance in some markets of real-time data for businesses' ability to viably compete, the highest competitive advantage may be obtained by the automated real-time information exchange.

The measures put in place to limit and/or control how data is used

8.63 Undertakings that want to (or need to) exchange information can put measures in place to restrict the access to information and/or control how information is used.[326] Such measures may ensure that competitively

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[323] Judgment of 10 November 2017, *ICAP and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 100.

[324] For example, infrequent contracts could decrease the possibility of retaliation.

[325] Depending on the structure of the market and the overall context of the exchange, the possibility cannot be excluded that an isolated exchange may constitute a sufficient basis for the undertakings to concert their market conduct; see judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59. See also *Balmoral v CMA* [2017] CAT 23, paragraph 46, upheld on appeal, *Balmoral v CMA* [2019] EWCA Civ 162, paragraph 18. This case concerned an appeal brought by Balmoral Tanks under section 46 of the Competition Act 1998 against a decision by the CMA in circumstances where the (object) infringement in question was a one-off exchange of information at a single meeting on 11 July 2012.

[326] Such obligations may already stem from UK law on data protection where personal data is included in the exchange.

sensitive information is properly ringfenced so that it cannot influence a competitor's behaviour.

8.64 Undertakings can for instance use clean teams to receive and process information. A clean team generally refers to a restricted group of individuals from an undertaking that are not involved in the day-to-day commercial operations and are bound by strict confidentiality obligations with regard to the competitively sensitive information.A clean team can for instance be used in the implementation of another horizontal agreement to ensure that the information provided for the purposes of such cooperation is provided on a need-to-know basis and in an aggregated manner.

8.65 Participants to a data pool can also put appropriate measures in place to limit and control how data is used. They should in principle only have access to their own information, and the final, aggregated, information of other participants. Technical and practical measures can ensure that a participant is unable to obtain competitively sensitive information from other participants. The management of a data pool can for instance be given to an independent third party that is subject to strict confidentiality rules as regards the information received from participants in the data pool. Those who manage a data pool should also ensure that only information that is necessary for the implementation of the legitimate purpose of the data pool is collected.

Access to information and data collected

8.66 The terms on which access is given to exchanged information is relevant to the assessment of possible foreclosure effects. Information or data may constitute a valuable competitive asset if access to it is necessary to compete effectively in the market. An example of such information might be a data pool between lending institutions relating to the credit history of loan applicants. Assuming it does not reduce strategic uncertainty, the exchange of such information may be permissible only if the information is made accessible in a non-discriminatory manner, to all undertakings active in the relevant market.[327]

8.67 The assessment under the Chapter I prohibition will depend on elements such as the nature of the data shared (for example whether it covers a significant part of the relevant market), the conditions of the data sharing agreement and the access requirements, as well as the market position of the relevant parties. Ensuring a form of open membership or access to the data pool would limit the risk of anti-competitive foreclosure. The assessment should

[327] Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 60.

consider that foreclosure effects from a refusal to grant access to adata pool can be significant, in particular where there is a high degree of market and data concentration, and if the data pooled yields an important competitive advantage in serving not only the relevant market, but also neighbouring markets.

Market characteristics

8.68 The likelihood that an information exchange restricts competition depends on the market characteristics. The exchanges may also affect these market characteristics. Relevant market characteristics in this respect include, among others, the level of transparency in a market, the number of undertakings present, the existence of barriers to entry, the homogeneity of the product or service concerned by the exchange, the homogeneity of the undertakings involved[328] and the stability of demand and supply conditions on the market.[329]

8.69 It is easier to reach a common understanding on the terms of coordination and to monitor deviations on a market in which only a few undertakings are present. If a market is highly concentrated, the exchange of certain information may, depending in particular on the type of information exchanged, be liable to make undertakings aware of the market position and competitive strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if a market is fragmented, the dissemination and information exchange between competitors may be neutral, or even positive, for the competitive nature of the market.[330]

8.70 A market that is very transparent can facilitate collusion by enabling undertakings to reach a common understanding on the terms of coordination, and by increasing the internal and external stability of collusion.[331]

8.71 Collusive outcomes are also more likely where the demand and supply conditions on the market are relatively stable.[332] Volatile demand, substantial internal growth by some undertakings in the market, or frequent entry by new

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[328] When undertakings are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination because their incentives are more aligned.

[329] It should be noted that this is not a complete list of relevant market characteristics. There may be other characteristics of the market that are important in the setting of certain information exchanges

[330] See judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 58 and the case law mentioned there.

[331] See also judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 452.

[332] See judgment of 27 October 1994, *Deere* v *Commission*, T-35/92, EU:T:1994:259, paragraph 78.

undertakings, may indicate that the current situation is not sufficiently stable for coordination to be likely,[333] or may require more frequent exchanges to have an effect on competition.

8.72 Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one undertaking to gain a major advantage over its rivals. A collusive outcome is more likely to be sustainable where the reactions of outsiders, such as current and potential competitors not participating in the coordination, as well as customers, are unlikely to be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.

Restrictions of competition by object

8.73 An information exchange will be considered a standalone restriction by object[334] when the information is competitively sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market.[335] In assessing whether an exchange constitutes a restriction of competition by object, particular attention should be paid to the content, its objectives and the legal and economic context in which the information exchange takes place.[336] When determining that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[337]

8.74 From the examples given in paragraph 8.29, it is clear that there need not be a direct connection required between the information exchanged and

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[333] See European Commission Decision in Cases IV/31.370 and 31.446, *UK Agricultural Tractor Registration Exchange*, recital 51 and judgment of 27 October 1994, *Deere* v *Commission*, T-35/92, EU:T:1994:259, paragraph 78.

[334] See discussion of standalone and other types of infringement at paragraph 8.6 above.

[335] Judgment of 8 July 2020, *Infineon Technologies* v *Commission*, T-758/14 RENV, not yet published, EU:T:2020:307, paragraph 100. See also: judgment of 19 March 2015, *Dole Food and Dole Fresh FruitEurope* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 122; and judgment of 4 June 2009, *T- Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41.

[336] See, for example, *Lexon v CMA* [2021] CAT 5, paragraphs 184 and 185. See also judgment of 4 June 2009, *T-Mobile Netherlands* C-8/08, EU:C:2009:343, paragraph 39 also the judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58; judgment of 20 November 2008, *BIDS*, C-209/07, EU:C:2008:643, paragraph 15 and further.

[337] Judgment of 26 September 2018, *Philips and Philips France* v *Commission*, C-98/17 P, EU:C:2018:774, paragraph 35.

consumer prices for the exchange to constitute a by object restriction.[338] The decisive criterion for establishing whether there is aninfringement by object, is the nature of the contacts, not their frequency.[339]

8.75 For example: a group of competitors is concerned that their products may be subject to ever stricter regulatory requirements. In the context of common lobbying efforts, they regularly meet and exchange views. In order to reach a common position concerning future legislative proposals, they exchange certain information relating to the regulated characteristics of their existing products. As long as this information is historic and does not allow the undertakings to become aware of the intended market strategies of their competitors, the exchange does not constitute a restriction of the Chapter I prohibition.

8.76 However, once the undertakings start exchanging information regarding the development of future products there is a risk that such exchanges may influence the competitors' behaviour in the market. This exchange could even lead competitors to reach a common understanding not to market products which exceed the applicable regulatory requirements. Such coordination affects the parties' behaviour in themarket and restricts consumer choices and competition on the product characteristics. It will therefore be considered a restriction of competition by object.

8.77 An information exchange may be considered as a cartel if it is aimed at coordinating the competitive behaviour or at influencing the relevant parameters of competition on the market between two or more competitors. An information exchange constitutes a cartel if it is an agreement or concerted practice between two or more undertakings aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions,including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.

8.78 Exchanges of information that constitute cartels not only infringe the Chapter I prohibition, but, in addition, are very unlikely to fulfil the conditions of the

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[338] See also *Lexon v CMA* [2021] CAT 5, paragraph 245: 'there was no requirement for the information exchanged in this case to include specific price information, whether relating to the products supplied by the parties or otherwise, in order to establish an objective of slowing a decline in market prices.'
[339] Judgment of 7 November 2019, *Campine and Campine Recycling* v *Commission*, T-240/17, EU:T:2019:778, paragraph 308.

Section 9 exemption. An information exchange may also facilitate the implementation of a cartel by enabling undertakings to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.

Restrictive effects on competition

8.79 An information exchange that does not constitute a restriction by object, may still have restrictive *effects* on competition.

8.80 As is indicated in paragraph 3.38, the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. In this assessment, it is necessary to compare the actual or potential effects of the information exchange on the current condition of the market to the situation that would prevail in the absence of that specific information exchange.[340] For an information exchange to have restrictive effects on competition within the meaning of the Chapter I prohibition, it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation.

8.81 For the assessment of the possible restrictive effects, the nature of the information that is exchanged (see paragraphs 8.27 - 8.50), the characteristics of the exchange (see paragraphs 8.51 - 8.67) and the market characteristics (see paragraphs 8.68 - 8.72) are relevant.[341]

8.82 For an information exchange to have restrictive effects on competition, it will generally be necessary that the undertakings involved cover a sufficiently large part of the relevant market. Otherwise, the undertakings that are not participating in the exchange could constrain any anti-competitive behaviour of the undertakings involved.

8.83 What constitutes 'a sufficiently large part of the market' cannot be defined in the abstract and will depend on the specific facts of each case and the type of exchange in question. Where an information exchange takes place in the context of another type of horizontal agreement, any such exchange that does not go beyond what is necessary for its implementation will usually not give rise to restrictive effects on competition when hardcore provisions are not included and the market coverage is below the market share thresholds set out in the relevant chapter of this Guidance, the relevant block exemption

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[340] Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 76.

[341] Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 54.

order[342]or the *De Minimis Notice* pertaining to the type of agreement in question.[343]

8.84 An information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore, it is the combination of both the pre-existing level of transparency and how the exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. Exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than those in less tight oligopolies. Exchanges of information are not likely to cause such restrictive effects on competition in very fragmented markets.

Assessment under the Section 9 exemption

Efficiencies[344]

8.85 Information exchange may lead to efficiency gains, depending on the characteristics of the market. Undertakings can, for example, become more efficient if they use an information exchange to benchmark their performance against the best practices in the industry. Information exchange may also contribute to a resilient market by enabling undertakings to respond to changes in demand and supply more quickly and may allow them to mitigate internal and external risks of supply chain disruptions or vulnerabilities.

8.86 Exchanges of information may benefit consumers and undertakings alike by giving insights on the relative qualities of products, for instance through the publication of best-selling lists or price comparison data. Information exchange that is genuinely public can thus benefit consumers by helping them to make a more informed choice (and reducing their search costs). Similarly, public information exchange about current input prices can lower search costs for undertakings, which would normally benefit consumers through lower final prices.

8.87 Exchange of consumer data between undertakings in markets with asymmetric information about consumers can also give rise to efficiencies.

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[342] Exchanges of information in the context of an R&D agreement, if they do not exceed what is necessary for implementation of the agreement, can benefit from the safe harbour of 25% set out in the R&D BEO. For SABEO, the relevant safe harbour is 20%.

[343] See paragraphs 3.48 - 3.54

[344] The discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

For instance, if consumers are aware that suppliers in a market are keeping track of the past behaviour of customers in terms of accidents or credit default, that may provide an incentive for consumers to take action to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in,thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another undertaking. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.

Indispensability

8.88 Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of the Section 9 exemption. To fulfil the condition of indispensability, the parties will need to prove that the exchanges were reasonably necessary in order to achieve the efficiency gains, taking account of the relevant context. This may be the case if the efficiency gains could not be achieved without an information exchange or if all realistic alternative types of information exchange would have generated no, or significantly fewer, efficiency gains.[345] Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains.

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

Pass-on to consumers

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

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[345] See the discussion of the indispensability criterion at paragraphs 73ff in the European Commission's Guidelines on the application of Article [101](3) of the Treaty, OJ C 101/97, 27.4.2004, which is a statement of the European Commission for the purpose of section 60A CA98.

No elimination of competition

8.91 The criteria of the Section 9 exemption cannot be met if the undertakings involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

Examples

Example 1

Situation: The luxury hotels in a UK City operate in a tight, non-complex and stable oligopoly, with largely homogenous cost structures, which constitute a separate relevant market from other hotels. They directly exchange individual information about current occupancy rates and revenues. In this case, from the information exchanged, the parties can directly deduce their actual current prices. The companies cannot articulate any legitimate purpose for this information exchange arrangement and the information is not published or shared in a manner which might allow consumers to benefit (eg by reducing their search costs).

Analysis: Even if it were established that the exchange was not part of a wider secret cartel concerning future prices, this exchange of information would nevertheless likely still constitute a restriction of competition by object. This is because the data and information which the hotels exchange may create conditions of competition which do not correspond to the normal conditions of competition in the market in question. In particular, the exchange reduces or removes the degree of uncertainty as to the operation of the market in question, including as to each other's prices, affording the participants with the opportunity to determine their conduct on the market in question with the result that competition between undertakings is restricted. A 'basic reality check' does not reveal any legal or factual circumstances that might suggest that the practice was incapable of having a material effect on the market. It is also unlikely that the parties can demonstrate any efficiencies from the arrangement that would be passed on to consumers to an extent that would outweigh the restrictive effects on competition and so it is also unlikely to benefit from the Section 9 exemption.

Example 2

Situation: Three large undertakings with a combined market share of 80% in a stable, non-complex, concentrated market with high barriers to entry, frequently exchange non-public information directly between themselves about a substantial fraction of their individual costs. However, in this case, the parties cannot deduce each other's actual current prices from the information exchanged. The undertakings

claim that they exchange information to benchmark their performance against their competitors and thereby intend to become more efficient.

Analysis: This information exchange does not in principle constitute a restriction of competition by object. Consequently, its effects on the market need to be assessed. In light of the market structure, the fact that the information exchanged relates to a large proportion of the undertakings' variable costs, the individualised form of presentation of the data, and its large coverage of the relevant market, the information exchange is likely to reduce competitive uncertainty in the market and could facilitate a collusive outcome and thereby give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. It is unlikely that the criteria of the Section 9 exemption are fulfilled because there are less restrictive means to achieve the claimed efficiency gains, for example by way of a third party collecting, anonymising and aggregating the data in some form of industry ranking. Finally, in this case, since the parties form a very tight, non- complex and stable oligopoly, even the exchange of aggregated data could facilitate a collusive outcome in the market. However, this would be very unlikely if this exchange of information happened in a non-transparent, fragmented, unstable, and complex market.

Example 3

Situation: There are five producers of fresh bottled carrot juice in the relevant market. Demand for this product is very unstable and varies from location to location at different points in time. The juice has to be sold and consumed within one day from the date of production. The producers agree to establish an independent market research company that on a daily basis collects current information about unsold juice in each point of sale, which it publishes on its website the following week in a form that is aggregated per point of sale. The published statistics allow producers andretailers to forecast demand and to better position the product. Before the informationexchange was put in place, the retailers had reported large quantities of wasted juice and therefore had reduced the quantity of juice purchased from the producers; that is to say, the market was not working efficiently. Consequently, in some periods and areas there were frequent instances of unmet demand. The information exchange system, which allows better forecasting of oversupply and undersupply, has significantly reduced the instances of unmet consumer demand and increased the quantity sold in the market.

Analysis: Even though the market is quite concentrated and the data exchanged is recent and strategic, it is not very likely that this exchange would meaningfully reduce strategic uncertainty because market demand is unstable. Even if the exchange creates some risk of giving rise to restrictive effects on competition, by better aligning supply and demand and, hence, reducing waste it is likely to result in efficiencies.The information is exchanged in a public and aggregated form, which

carries lower anti-competitive risks than if it were non-public and individualised. The information exchange therefore does not go beyond what is necessary to correct the market failure. Therefore, it is likely that this information exchange meets the criteria of the Section 9 exemption.

Example 4

Situation: There are several producers of essential products present on a market that is frequently hit by shortages of supply. In order to improve supply and increase production in the most effective and expedient manner, the industry association that represents some but not all of the producers proposes to gather data and model demand and supply for the essential products concerned. In addition, they plan to gather data to identify production capacity, existing stocks and potential to optimise the supply chain. A consultancy firm has been lined up to assist the association with collecting the data and aggregating it in a model, subject to non-disclosure agreements concluded with every producer. Aggregated data would be fed back to the producers with the aim of rebalancing and adapting their individual capacity utilisation, production and supply.

Analysis: The data gathered is competitively sensitive and, if exchanged between the producers directly, would be capable of removing uncertainty between those producers as regards the timing, extent and details of the modifications to be adopted in their conduct on the market. In addition, producers that are not members of the industry association may be placed at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system.

In order to avoid the risk that strategic uncertainty is reduced, several measures could be taken. If an exchange of competitively sensitive information between the producers is absolutely required beyond the information that would be collected and shared in aggregated form by the industry association and the consultancy (for instance, to jointly identify where to best switch production or increase capacity), such exchanges would need to be strictly limited to what is indispensable for effectively achieving the aims. Any information and exchanges with regard to the project would need to be well documented to ensure the transparency of the interactions. Participants would need to commit to avoid any discussion of prices or any coordination on other issues that are not strictly necessary for achieving the aims. The project should also be limited in time so that the exchanges immediately cease once the risk of shortages stops being a sufficiently urgent threat to justify the cooperation. Only the consultant would receive the competitively sensitive data and be charged with aggregating it. The foreclosure concerns could be alleviated if the project would be open to every

manufacturer that produces the relevant product, regardless of whether they are a member of the relevant industry association.

9. Standardisation agreements

Introduction

9.1 Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services or methods may comply.[346] Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product, or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard, as well as agreements setting out sustainability standards. While sustainability standards have similarities with standardisation agreements addressed in this Part, they also have features that are atypical for, or less pronounced in, those standardisation agreements. [Relevant guidance for such sustainability standards is therefore provided in Part 11: Environmental Sustainability].

9.2 The preparation and production of technical standards as part of the execution of public powers are not covered by this Guidance.[347] Standards related to the provision of professional services, such as rules of admission to a liberal profession, are also not covered by this Guidance.

Relevant markets

9.3 Standardisation agreements may produce their effects on four possible markets.[348] First, standard development may have an impact on the product or service market or markets to which the standard or standards relates. Second, where the standard development involves the development or selection of technology or where the rights to intellectual property are marketed separately from the products to which they relate, the standard can have effects on the relevant technology market.[349] Third, the market for

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[346] Standardisation can take place in different ways ranging from the adoption of consensus-based standards by recognised international, European or national standards bodies, through consensus based technical specifications developed by consortia and fora, to agreements between independent undertakings.

[347] See judgment of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraph 92

[348] Markets will be defined in accordance with OFT 403, Market Definition. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9.12.1997, which is a statement of the European Commission for the purpose of section 60A CA98.

[349] See Chapter 2 on R&D agreements as well as the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, (2004), paragraphs 20-26

standard development may be affected if different standard development bodies or agreements exist. Fourth, where relevant, a distinct market for testing and certification may be affected by standard development.

Chapter I prohibition: assessment

Main competition concerns

9.4 Standardisation agreements usually produce significant positive economic effects,[350] for example by encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting the economy as a whole. Standards may maintain and enhance quality, security, provide information, and ensure interoperability and compatibility (thus increasing value for consumers).

9.5 Participants in standardisation are not necessarily competitors. Standard development can, however, in specific circumstances where competitors are involved, give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely: (i) reduction in price competition; (ii) foreclosure of innovative technologies; and (iii) exclusion of, or discrimination against, certain undertakings by prevention of effective access to the standard. Each of these channels is expanded on below.

9.6 First, if undertakings were to engage in anti-competitive discussions in the context of standard development, this could reduce or eliminate price competition in the markets concerned or limit or control production, thereby facilitating a collusive outcome on the market.[351]

9.7 Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen or developed and the standard has been set, some technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In addition,

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("*Technology Transfer Guidelines*") (a statement of the European Commission for the purpose of section 60A CA98) which address aspects of market definition that are of particular importance in the field of technology rights licensing. For an example of market definition in accordance with such Guidelines, see European Commission Decision in Case AT.39985, *Motorola - Enforcement of GPRS standard essential patents*, recitals 184-220.

[350] See also paragraph 9.43

[351] Depending on the circle of participants in the standard-development process, restrictions can occur either on the supplier or on the purchaser side of the market for the standardised product.

standards requiring that a particular technology is used exclusively for a standard can have the effect of hindering the development and diffusion of other technologies. Preventing the development of other technologies, by obliging the members of the standard development organisation to exclusively use a particular standard, may lead to the same effect. The risk of limitation of innovation is increased if one or more undertakings are unjustifiably excluded from the standard development process.

9.8 In the context of standards involving intellectual property rights ('IPR'),[352] three main groups of undertakings with different interests in standard development are typically involved. Firstly, there are upstream-only undertakings that solely develop and market technologies. This category can also include undertakings that acquire technologies with the intention of licensing them. Their only source of income is the licensing revenue and their incentive is to maximise their royalties. Secondly, there are downstream-only undertakings that solely manufacture products or offer services based on technologies developed by others and that do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce royalties. Finally, there are integrated undertakings that both develop technology protected by IPR and sell products for which they would need a licence. These undertakings have mixed incentives. On the one hand, they could draw licensing revenue from their own IPR. On the other hand, they may have to pay royalties to other undertakings holding IPR essential to the standard relevant for their own products. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other undertakings or use their IPR defensively. In addition, undertakings may also value their IPRs through methods other than royalties. In practice, many undertakings use a mix of these business models.

9.9 Third, standardisation may lead to anti-competitive results by preventing certain undertakings from obtaining effective access to the results of the standard development process (that is to say, the specification and/or the essential IPR for implementing the standard). If an undertaking is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect. A system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard since it allows the participants to identify which technologies are covered by IPR and which are not.[353] Intellectual property laws and

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[352] In the context of this Part, IPR in particular refers to patent(s) (excluding non-published patent applications). However, if any other type of IPR in practice gives the IPR holder control over the use of the standard the same principles should be applied.

[353] If also accompanied by a FRAND commitment. See paragraphs 9.21 - 9.25

competition laws share the same objectives of promoting consumer welfare and innovation as well as an efficient allocation of resources.[354] IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive.

9.10 However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard development, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways, for example by refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive royalties thereby preventing effective access to the standard ("hold-up").[355] The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a fair, reasonable and non-discriminatory ("FRAND") royalty or using dilatory strategies (i.e. deliberately delaying licensing negotiations with the licensor) ("hold-out").

9.11 However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case-by-case basis.[356]

Restrictions of competition by object

9.12 Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers

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[354] See retained Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements and accompanying guidelines (the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03 ('Technology Transfer Guidelines'), paragraph 7.

[355] High royalties can only be qualified as excessive if the conditions for an abuse of a dominant position contrary to the Chapter II prohibition are fulfilled. See for example judgment of 14 February 1978, *United Brands*, Case 27/76, EU:C:1978:22 and the discussion in *Pfizer and Flynn v CMA* [2020] EWCA Civ 339.

[356] See European Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, recitals 221-270.

of the incumbent product collude to exclude new technology from an already existing standard would fall into this category.[357]

9.13 Any agreements to reduce competition by jointly fixing prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object.[358]

Restrictive effects on competition

Agreements normally not restrictive of competition

9.14 Standardisation agreements which do not restrict competition by object must be analysed in their legal and economic context, including by taking account of the nature of the goods or services affected, the real conditions of the functioning and the structure of the market or markets in question, with regard to their actual and likely effect on competition. In the absence of market power, a standardisation agreement is not capable of producing restrictive effects on competition.[359] Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards.

9.15 For those standard development agreements which risk creating market power, paragraphs 9.16 - 9.24 set out the conditions under which such agreements would normally fall outside the scope of the Chapter I prohibition.

9.16 A standardisation agreement that does not fulfil any or all of the principles set out in this Part cannot be presumed to involve a restriction of competition within the meaning of the Chapter I prohibition. However, it will necessitate a self-assessment to establish whether the agreement falls under the Chapter I prohibition and, if so, if the conditions for exemption under Section 9(1) CA98 are fulfilled. In this context, it is recognised that there exist different models for standard development and that competition within and between those models is a positive aspect of a market economy. Therefore, standard development organisations remain entirely free to put in place rules and procedures different to those described in paragraphs 9.16 - 9.24. However, they will

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[357] See for example European Commission Decision in Case IV/35.691, *Pre-insulated pipes*, recital 147, where part of the infringement of Article 101 consisted in 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions'.

[358] This paragraph should not prevent genuine unilateral ex ante disclosures by individual IPR holders of their most restrictive licensing terms for standard essential patents. It also does not prevent standard development organisations disclosing the total maximum stack of royalty for the standard as described in paragraph 9.42. In addition, it does not prevent patent pools created in accordance with the principles set out in Section IV.4 of the Technology Transfer Guidelines or the decision to license IPR essential to a standard on royalty-free terms as set out in this Part.

[359] See also Part 1 Introduction. As regards market shares see also paragraph 9.40.

need to assess themselves whether such rules or procedures involve restrictions of competition within the meaning of the Chapter I prohibition.

9.17 Where participation in standard development is **unrestricted** and the **procedure** for adopting the standard in question is **transparent,** standardisation agreements which contain **no obligation to comply** with the standard and **provide access** to the standard on **FRAND terms** will normally not restrict competition within the meaning of the Chapter I prohibition.[360]

9.18 In particular, to ensure **unrestricted participation** the rules of the standard-development organisation would need to provide that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard development organisations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard.

9.19 With respect to **transparency**, the relevant standard development organisation would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.

9.20 Furthermore, the standard development organisation's rules would need to ensure **effective access** to the standard on **FRAND terms**.[361]

9.21 In the case of a standard involving IPR, **a clear and balanced IPR policy, adapted to the particular industry** and the needs of the standard development organisation in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards set out by that standard development organisation.[362]

9.22 In order to **ensure effective access** to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR on fair, reasonable and non-discriminatory terms ('FRAND commitment').[363] The FRAND commitment could be drafted so as to require

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[360] See also paragraph 9.30 and following in this regard.

[361] For example, effective access should be granted to the specification of the standard.

[362] As specified in paragraphs 9.22 and 9.23. See also the European Commission Communication COM (2017) 712 on Setting out the EU approach to Standard Essential Patents (a statement of the European Commission for the purpose of section 60A CA98).

[363] See judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 53: '*In those circumstances, and having regard to the fact that an undertaking*

the IPR holder to offer a licence to any third party seeking a licence in order to implement the standard.[364] The FRAND commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard development process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller. It should be noted that FRAND can also cover royalty-free licensing.

9.23 Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This is relevant for (i) enabling the industry to make an informed choice of technology to be included in a standard and (ii) assisting in achieving the goal of effective access to the standard.[365] Such a disclosure obligation could be based on reasonable endeavours to identify at the earliest practicable opportunity IPR reading on the potential standard and to update the disclosure as the standard develops.[366]

9.24 With respect to patents, the IPR disclosure should include at least the patent number or patent application number. If this information is not yet publicly available, then it is also sufficient if the participant declares that it is likely to

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to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU'. See also European Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, paragraph 417: '*In view of the standardisation process that led to the adoption of the GPRS standard and Motorola's voluntary commitment to license the Cudak SEP on FRAND terms and conditions, implementers of the GPRS standard have a legitimate expectation that Motorola will grant them a licence over that SEP, provided they are not unwilling to enter into a licence on FRAND terms and conditions'.*

[364] This would be the most permissive approach to the offering of licences and would therefore fall outside the scope of the Chapter I prohibition. Other less permissive approaches which did not require the IPR-holder to license all comers would require self-assessment to determine whether they in practice ensure effective access to the standard. This is discussed further at paragraphs 9.33 and 9.44 below.

[365] Conversely, a 'patent ambush' occurs when an undertaking taking part in the standard-development process intentionally hides the fact that it holds essential patents over the standard being developed, and starts asserting such patents only after the standard has been agreed and other undertakings are therefore "locked in" to using it. When a 'patent ambush' occurs during the standard development process, this undermines confidence in the standard development process, given that an effective standard development process is a precondition to technical development and the development of the market in general to the benefit of consumers. See, for example, European Commission Decision of 9 December 2009 in Case COMP/38.636.

[366] To obtain the sought-after result a good faith disclosure does not need to go as far as to require participants to compare their IPR against the potential standard and issue a statement positively concluding that they have no IPR reading on the potential standard.

have IPR claims over a particular technology without identifying specific IPR claims or applications for IPR (so-called blanket disclosure).[367] Other than where the relevant IPR information is not yet publicly available, blanket disclosure would be less likely to enable the industry to make an informed choice of technology and to ensure effective access to the standard. Participants should also be encouraged to update their disclosures at the time of adoption of a standard, in particular if there are any changes which may have an impact on the essentiality or validity of their IPRs. Since the risks with regard to effective access are not the same in the case of a standard development organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.

9.25 FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalties,[368] or by engaging in other unfair or unreasonable practices having an equivalent effect.[369] At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky. This can ensure continued incentives to contribute the best available technology to the standard. In addition, the UK Supreme Court has found that, where doing so is in accordance with standard practice in the relevant industry and appropriate (such as because it avoids unreasonable delays in negotiating licences or reduces transaction costs), IPR holders may require that a FRAND licence to their standard-essential IPRs be taken on a global or multi-national portfolio basis.[370]

9.26 Compliance with the Chapter I prohibition by the standard development organisation does not require the standard development organisation to verify

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[367] Participants are encouraged to complete their disclosure information when the patent number and/or patent application numbers become publicly available.

[368] See also judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 71, according to which an action for infringement may constitute an abuse of a dominant position within the meaning of Article 102 if it is brought against a willing licensee without complying with the procedural steps set out by the Court in its Judgment.

[369] An example might be the unfair or unreasonable tying or bundling of non-essential IPR (or other non-essential products or services) to the standard-essential IPR. Another example might be the tying or bundling of licences to essential-IPR of more than one standard, where the licensee does not require a licence to the other standards. For further discussion of tying and bundling, see para. 221-225 of the Technology Transfer Guidelines and para. 10.152—10.160 of *CMA166 Vertical Agreements Block Exemption Order – CMA Guidance*.

[370] See *Unwired Planet v Huawei* [2020] UKSC 37 at para. 168-169.

whether licensing terms of participants fulfil the FRAND commitment.[371] Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.

9.27 This Guidance does not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive or discriminatory under the Chapter II prohibition. Nevertheless, in the event of a dispute, the assessment of whether fees charged for access to IPR in the standard development context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR.[372] The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products which is unrelated to the patented technology.[373] In general, there are various methods available for the assessment,[374] and in practice, more than one method is often used to account for shortcomings of a particular method and to cross-check the result.[375] It may be possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the industry has developed the standard (ex-ante) with the value/royalty of the next best available alternative (ex-ante) or with the value/royalty charged after the industry has been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner.[376]

9.28 An independent expert assessment could also be obtained to assess objectively how central and essential the relevant IPR is to the standard at issue. In an appropriate case, it may also be possible to refer to ex ante disclosures of licensing terms, including the individual or aggregate royalties

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[371] Standard development organisations are not involved in the licencing negotiations or resultant agreements.
[372] See judgment of 14 February 1978, *United Brands*, Case 27/76, EU:C:1978:22, paragraph 250; see also judgment of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 142.
[373] European Commission Communication COM (2017) 712 on Setting out the EU approach to Standard Essential Patents, page 7.
[374] In principle, cost-based methods may not be the best adapted because they impose the difficulty of assessing the costs attributable to the development of a particular patent or groups of patents and may distort the incentives to innovate.
[375] The UK Supreme Court in *Unwired Planet v Huawei* [2020] UKSC 37 endorsed the approach of the Patents Court in *Unwired Planet v Huawei* [2017] EWHC 2988 which relied principally on the analysis of comparable licences and used the 'top down' method as a cross-check, see paragraphs 42-46 of the judgment. However, the methods described in this part of the Guidance are not exclusive and other methods reflecting the same spirit of the described methods can be used to determine FRAND rates.
[376] See judgment of 13 July 1989, *Tournier*, C-395/87, EU:C:1989:319, paragraph 38; judgment of 13 July 1989, *Lucazeau and Others* v *SACEM and Others*, Cases 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 33.

for relevant IPR, in the context of a specific standard development process. Similarly, it may be possible to compare the licensing terms in agreements of the IPR holder with other implementers of the same standard. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These methods assume that the comparison can be made in a consistent and reliable manner and are not the result of undue exercise of market power. Another method consists in determining, first, an appropriate overall value for all relevant IPR and, second, the portion attributable to a particular IPR holder.[377]

9.29 The IPR Policy may also provide for an international tribunal (alternatively, it may identify respected national IP courts or tribunals) to determine the terms of a FRAND licence on a worldwide basis in cases of dispute.[378] In the absence of such a provision, nothing in this Guidance prejudices the possibility for parties to resolve their disputes about the level of FRAND royalties by having recourse to competent national courts or alternative methods of dispute resolution.[379] Moreover, nothing in this Guidance should be taken to suggest that a licensee is unwilling to take a licence on FRAND terms on the basis that it challenges the essentiality, validity or infringement of IPR forming part of a standard in parallel with licensing negotiations, reserves the right to do so in future, or if it requires that the licence provides a mechanism to alter the royalty rates taking account of the result of such challenges.[380]

Effects based assessment for standardisation agreements

9.30 The assessment of each standardisation agreement must take into account the likely effects of the standard on the markets concerned. In analysing standardisation agreements, the characteristics of the sector and industry shall be taken into consideration. The following considerations apply to all standardisation agreements that depart from the principles as set out in paragraphs 9.16 - 9.24.

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[377] See *Unwired Planet v Huawei* [2020] UKSC 37 paragraphs. 42-45.

[378] See *Unwired Planet v Huawei* [2020] UKSC 37 paragraphs 90. See also *Optis v Apple* [2022] EWCA Civ 1411, paragraphs 115.

[379] If both parties agree, the parties can request that the amount of the royalty be determined by an independent third party (e.g. an arbitrator). See, for example, judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 68 and European Commission Decision of 29 April 2014 in Case AT. 39939, *Samsung - Enforcement of UMTS standard essential patents*, recital 78.

[380] See *Unwired Planet v Huawei* [2020] UKSC 37 at para. 64. See also See also judgment of 16 July 2015, *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 69.

(a) Voluntary nature of the standard

9.31 Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard development organisation remain free to develop alternative standards or products that do not comply with the agreed standard.[381] For example, if the standard development agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object.[382] In the same vein, standards only covering minor aspects or parts of the end- product may be less likely to lead to competition concerns than more comprehensive standards in particular if the standard does not involve any essential IPR.

(b) Access to the standard

9.32 The assessment whether the agreement restricts competition will also focus on access to the standard. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible for all members or third parties (that is, non-members of the relevant standard development organisation) this may foreclose or segment markets and is thereby likely to restrict competition. Competition is likewise likely to be restricted where the result of a standard is only accessible on discriminatory or excessive terms for members or third parties. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.

9.33 If an IPR Policy does not provide for licensing to third parties at all levels of the supply chain then the assessment of access to the standard will need to consider whether or not de facto access to the standard at each level of the supply chain can be provided (e.g. whether 'have made' rights for upstream component suppliers will be adequate in the relevant industry context). An IPR Policy will not fall within the scope of the Chapter I prohibition if it ensures that de facto access to the standard is provided to third parties at each level of the supply chain.

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[381] See European Commission Decision in Case IV/29/151, *Philips/VCR*, recital 23: '*As these standards were for the manufacture of VCR equipment, the parties were obliged to manufacture and distribute only cassettes and recorders conforming to the VCR system licensed by Philips. They were prohibited from changing to manufacturing and distributing other video cassette systems … This constituted a restriction of competition under Article 85(1)(b)*'.

[382] See European Commission Decision in Case IV/29/151, *Philips/VCR*, recital 23.

9.34 As regards standard development agreements with **different types of IPR disclosure models** from the ones described in paragraphs 9.23 - 9.24, it would have to be assessed on a case-by-case basis whether the disclosure model in question (for example a disclosure model not requiring but only encouraging IPR disclosure) guarantees effective access to the standard. Standard development agreements providing for the disclosure of information regarding characteristics and value-added of each IPR to a standard and, thereby, increasing transparency to parties involved in the development of a standard will not, in principle, restrict competition within the meaning of the Chapter I prohibition.

(c) Participation in the development of the standard

9.35 If participation in the standard development process is open, this will lower the risks of a likely restrictive effect on competition that would have resulted from excluding certain undertakings from the ability to influence the establishment of the standard.[383]

9.36 Open participation can be achieved by allowing all competitors and/or relevant stakeholders in the market affected by the standard to take part in developing and choosing the standard.

9.37 The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard development process.

9.38 However, in certain situations, restricting participation may not have restrictive effects on competition within the meaning of the Chapter I prohibition, for instance: (i) if there is competition between several standards and standard development organisations;[384] (ii) if in the absence of a restriction on the participants it would not have been possible to adopt the standard or such adoption would have been unlikely;[385] or (iii) if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major

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[383] In European Commission Decision in Case IV/31.458, *X/Open Group*, the European Commission considered that even if the standards adopted were made public, the restricted membership policy had the effect of preventing non- members from influencing the results of the work of the group and from getting the know-how and technical understanding relating to the standards which the members were likely to acquire. In addition, non-members could not, in contrast to the members, implement the standard before it was adopted (see paragraph 32). The agreement was therefore in these circumstances seen to constitute a restriction under Article 101(1) TFEU.

[384] Such restriction may materialise via the exclusion of stakeholders from the standardisation agreement or via a more limited participant status.

[385] Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Section 9(1) CA98.

milestones all competitors have an opportunity to be involved in order to continue the development of the standard.

9.39 In certain situations, the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are kept informed and consulted on the work in progress.[386] Recognised procedures for the collective representation of stakeholders (e.g. consumers) may be envisaged. The more that stakeholders can influence the process leading to the selection of the standard and the more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders.

(d) Market shares

9.40 To assess the effects of a standard development agreement, the market shares of the goods, services or technologies based on the standard should be taken into account. It might not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry. In cases where undertakings contributing technology to the standard are vertically integrated, the relevant market shares of the undertakings having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard (since the undertakings participating in developing the standard would in most cases have an interest in implementing the standard).[387] However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in development and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition.

(e) Discrimination

9.41 Any standard development agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For example, if a standard development organisation explicitly excludes upstream only undertakings (that is, undertakings not active on the downstream production market), this could lead to an exclusion of potentially better upstream technologies.

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[386] See European Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*.

[387] See paragraph 9.3.

(f) Ex ante disclosure of royalty rates

9.42 Standard development agreements providing for the ex ante disclosure of the most restrictive licensing terms for standard essential patents by individual IPR holders or of a maximum accumulated royalty rate by all IPR holders will not, in principle, restrict competition within the meaning of the Chapter I prohibition.[388] In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard development organisation's IPR policy choose to provide for IPR holders to individually disclose prior to the adoption of the standard their most restrictive licensing terms, including the maximum royalty rates or maximum accumulated royalty rate to be charged, this will normally not lead to a restriction of competition within the meaning of the Chapter I prohibition.[389] Such ex ante unilateral disclosures of the most restrictive licensing terms or maximum accumulated royalty rate would be one way to enable the parties involved in the development of a standard to take an informed decision based on the disadvantages and advantages of different alternative technologies.

Assessment under the Section 9 exemption

Efficiencies

9.43 Standardisation agreements frequently give rise to significant efficiencies. For example, standards can allow undertakings to market their goods and services both nationally and internationally, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different undertakings and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality. Standards also play an important role in innovation. They can reduce the time it takes to bring a new technology to the

[388] In order to increase the transparency of the potential costs for implementing a standard, standard development organisations could take an active role in disclosing the total maximum stack of royalty for the standard. Similar to the concept of a patent pool, IPR holders can share the total royalty stack.
[389] Any unilateral or joint ex ante disclosure of most restrictive licensing terms should not serve as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies which is a restriction of competition by object.

market and facilitate innovation by allowing undertakings to build on top of agreed solutions. These efficiencies can help contribute to market resilience.

9.44 To achieve efficiencies in the case of standardisation agreements, the information necessary to apply the standard must be effectively available to those wishing to enter the market.[390] If an IPR Policy does not provide for licensing to third parties at all levels of the supply chain, and the clause falls within the scope of the Chapter I prohibition (see paragraph 9.33 above), then consideration should be given to whether the IPR Policy brings about efficiencies in terms of the successful development and/or adoption by users of the standard in question (compared to a counterfactual where the IPR Policy required IPR holders to license third parties at all levels of the supply chain).[391]

9.45 Dissemination of a standard can be enhanced by marks or logos certifying compliance thereby providing certainty to customers. Agreements for testing and certification go beyond the primary objective of defining the standard and would normally constitute a distinct agreement and market.

9.46 While the effects on innovation must be analysed on a case-by-case basis, standards creating compatibility on a horizontal level between different technology platforms are considered to be likely to give rise to efficiencies.

Indispensability

9.47 Restrictions that go beyond what is necessary to achieve the efficiencies that can be generated by a standardisation agreement do not fulfil the criteria of the Section 9 exemption.

9.48 The assessment of each standardisation agreement must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other.[392]

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[390] See European Commission Decision of 15 December 1986 in Case IV/31.458, *X/Open Group*, recital 42: '*The Commission considers that the willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption*'.

[391] For example, it may be necessary to consider whether or not an obligation to license at all levels would have a significant impact on the incentives of IPR holders to develop and contribute IPR to the standard (taking account of the principle of 'patent exhaustion').

[392] In European Commission Decision in Case IV/29/151, *Philips/VCR*, compliance with the VCR standards led to the exclusion of other, perhaps better systems. Such exclusion was particularly serious in view of the pre-eminent market position enjoyed by Philips *'… [R]restrictions were imposed upon the parties which were not indispensable to the attainment of these improvements. The compatibility of VCR video cassettes with the machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment*' (recital 31).

9.49 Participation in standard development should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation.[393] Alternatively, any restrictive effects of restricted participation should be otherwise removed or lessened.[394] In addition, a restriction on the participants could be outweighed by efficiencies under Section 9(1) CA98 if the adoption of the standard would have been heavily delayed by a process open to all competitors.

9.50 As a general rule, standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical interoperability and compatibility or a certain level of quality. In cases where having only one technological solution would benefit consumers or the economy at large, that standard should, be set on a non-discriminatory basis. Technology neutral standards can, in certain circumstances, lead to larger efficiencies. Including substitute IPR as essential parts of a standard while at the same time forcing the users of the standard to pay for more IPR than technically necessary would go beyond what is necessary to achieve any identified efficiencies.[395] In the same vein, including substitute IPR as essential parts of a standard and limiting the use of that technology to that particular standard (that is to say, exclusive use) could limit inter-technology competition and would not be necessary to achieve the efficiencies identified.

9.51 Restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable.

9.52 In a similar vein, standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. The exclusivity can, however, be justified for a certain period of time, for example

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[393] See European Commission Decision of 15 December 1986 in Case IV/31.458, *X/Open Group*, recital 45: *'[T]he aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed.*' See also European Commission Decision in Case 39.416, *Ship Classification*, paragraph 36: '*the Commitments strike an appropriate balance between maintaining demanding criteria for membership of IACS on the one hand, and removing unnecessary barriers to membership of IACS on the other hand. The new criteria will ensure that only technically competent CSs are eligible to become member of IACS, thus preventing that the efficiency and quality of IACS' work is unduly impaired by too lenient requirements for participation in IACS. At the same time, the new criteria will not hinder CSs, who are technically competent and willing to do so from joining IACS*'.

[394] See paragraph 9.39 above on ensuring that stakeholders are kept informed and consulted on the work in progress if participation is restricted.

[395] Technology which is regarded by users or licensees as interchangeable with or substitutable for another technology, by reason of the characteristics and intended use of the technologies.

by the need to recoup significant start-up costs.[396] The standardisation agreement should in that case include adequate safeguards to mitigate possible risks to competition resulting from exclusivity. This concerns, inter alia, the certification fee which needs to be reasonable and proportionate to the cost of the compliance testing.

Pass-on to consumers

9.53 Efficiencies attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by a standardisation agreement. A relevant part of the analysis of likely pass-on to consumers is which procedures are used to guarantee that the interests of the users of standards and end consumers are protected. Where standards facilitate technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers.

No elimination of competition

1.54 Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a de facto industry standard.[397] In the latter case, competition may be eliminated if third parties are foreclosed from effective access to the standard.

Examples

Setting standards competitors cannot satisfy

Example 1

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[396] In this context, see European Commission Decision of 29 November 1995 in Cases IV/34, *Dutch Cranes (SCK and FNK)*, recital 23: '*The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85(1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services*'.

[397] *De facto* standardisation refers to a situation where a (legally non-binding) standard, is, in practice, used by most of the industry.

Situation: A standard development organisation sets and publishes safety standards that are widely used by the relevant industry. Most competitors of the industry take part in the development of the standard.

Prior to the adoption of the standard, a new entrant has developed a product which is technically equivalent in terms of the performance and functional requirements and which is recognised by the technical committee of the standard development organisation. However, the technical specifications of the safety standard are, without any objective justification, drawn up in such a way as to not allow for this or other new products to comply with the standard.

Analysis: This standardisation agreement is likely to give rise to restrictive effects oncompetition within the meaning of the Chapter I prohibition and is unlikely to meet the criteria of the Section 9 exemption. The members of the standards development organisation have, without any objective justification, set the standard in such a way that products of their competitors which are based on other technological solutions cannot satisfy it, even though they have equivalent performance. Hence, this standard, which has not been set on a non-discriminatory basis, will reduce or prevent innovation and product variety. It is unlikely that the way the standard is drafted will lead to greater efficiencies than a neutral one.

Binding and transparent standard covering a large part of the market.

Example 2

Situation: A number of consumer electronics manufacturers with substantial market shares agree to develop a new standard for audiovisual technology.

Analysis: Provided that (a) the manufacturers remain free to produce other new products which do not conform to the new standard, (b) participation in the standard development is unrestricted and transparent, and (c) the standardisation agreement does not otherwise restrict competition, the Chapter I prohibition is not likely to be infringed. If the parties agreed to only manufacture products which conform to the new standard, the agreement would limit technical development, reduce innovation and prevent the parties from selling different products, thereby likely creating restrictive effects on competition within the meaning of the Chapter I prohibition.

Standardisation agreement without IPR disclosure

Example 3

Situation: A private standard development organisation active in standardisation in the ICT (information and communication technology) sector has an IPR policy which

neither requires nor encourages disclosures of IPR which could be essential for the future standard. The standard development organisation took the conscious decision not to include such an obligation. In reaching this decision, the standard development organisation in particular took into consideration that in general all technologies potentially relevant to the future standard are covered by many IPR.

Therefore the standard development organisation considered that an IPR disclosure obligation would not enable the participants to choose a solution with no or little IPR. Taking account of the number of IPRs, the standard development organisation also considered that such an IPR disclosure obligation would lead to significant additional costs in analysing whether the IPR would be potentially essential for the future standard. However, the IPR policy of the standard development organisation requires all participants to make a commitment to license on FRAND terms any IPR that might read on the future standard. The IPR policy allows for opt-outs if there is specific IPR that an IPR holder wishes to put outside the blanket licensing commitment. In this particular industry, there are several competing private standard development organisations. Participation in the standard development organisation is open to anyone active in the industry.

Analysis: In many cases, an IPR disclosure obligation would be pro-competitive by increasing competition between technologies ex ante. In general, such an obligation allows the members of a standard development organisation to factor in the amount of IPR reading on a particular technology when deciding between competing technologies (or even to, if possible, choose a technology which is not covered by IPR). The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. However, in this particular context, all available technologies seem to be covered by IPR, and for that matter, one or more IPR. Therefore, any IPR disclosure would not have the positive effect of enabling the members to factor in theamount of IPR when choosing technology since regardless of what technology is chosen, it can be presumed that there is IPR reading on that technology. The agreement is unlikely to give rise to any negative effects on competition within the meaning of the Chapter I prohibition.

10. Standard Terms

Definitions

10.1 In certain industries, undertakings use standard terms and conditions of sale or purchase set out by a trade association or directly by the competing undertakings ('standard terms').[398] Such standard terms are covered by this Guidance to the extent that they establish standard conditions of sale or purchase of goods or services between competitors and consumers (and not the conditions of sale or purchase between competitors) for substitute products. When such standard terms are widely used within an industry, the conditions of purchase or sale used in the industry may become de facto aligned.[399] Examples of industries in which standard terms play an important role are the banking (for example, bank account terms) and insurance sectors.

10.2 Standard terms set out individually by an undertaking solely for its own use when contracting with its suppliers or customers are not horizontal agreements and are therefore not covered by this Guidance.

Relevant markets

10.3 As regards standard terms, the effects are, in general, felt on the downstream market where the undertakings using the standard terms compete by selling their product to their customers.

Assessment under the Chapter I prohibition

Main competition concerns

10.4 Standard terms can give rise to restrictive effects on competition by limiting product choice and innovation. If a large part of an industry adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer-power), customers might have no option other than to accept the conditions in the

[398] Such standard terms might cover only a very small or a large part of the clauses contained in the final contract.

[399] This refers to a situation where there is no legal obligation to use standard terms, but the standard terms are in practice are used by most of the industry and/or for most aspects of the product/service thus leading to a limitation or even lack of consumer choice.

standard terms. However, the risk of limiting choice and innovation is only likely in cases where the standard terms define the scope of the end-product.

10.5 In addition, depending on their content, standard terms might risk affecting the commercial conditions of the final product. In particular, there is a serious risk that standard terms relating to price would restrict price competition.

10.6 Moreover, if the standard terms become industry practice, access to them might be vital for entry into the market. In such cases, refusing access to the standard terms could risk causing anti-competitive foreclosure. As long as the standard terms remain effectively open for use for anyone that wishes to have access to them, they are unlikely to give rise to anti-competitive foreclosure.

Restrictions of competition by object

10.7 Agreements that use standard terms as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. An example would be where a trade association does not allow a new entrant access to its standards terms, the use of which is vital to ensure entry to the market.

10.8 Standard terms may also restrict competition by object based on the influence that they have on an undertaking's conduct. For example, any standard terms containing provisions which directly influence the prices charged to customers (that is to say, recommended prices, rebates, etc.) would constitute a restriction of competition by object. Standard terms containing provisions influencing parameters of competition other than price may also restrict competition by object, depending on the circumstances.

Restrictive effects on competition

10.9 The establishment and use of standard terms must be assessed in the appropriate economic context and in the light of the situation on the relevant market in order to determine whether the standard terms at issue are likely to give rise to restrictive effects on competition.

10.10 As long as participation in the actual establishment of standard terms is unrestricted for the competitors in the relevant market (either by participation in the trade association or directly), and the established standard terms are non-binding and effectively accessible for anyone, such agreements to have standard terms are not likely to give rise to restrictive effects on competition (subject to the caveats set out in paragraphs 10.12 - 10.18).

10.11 Effectively accessible and non-binding standard terms for the sale of consumer goods or services (on the presumption that they have no effect on

price) thus generally do not have any restrictive effect on competition since they are unlikely to lead to any negative effect on product quality, product variety or innovation. There are, however, two general exceptions where a more in-depth assessment would be required.

10.12 First, standard terms for the sale of consumer goods or services where the standard terms define the scope of the product sold to the customer, and where therefore the risk of limiting product choice is more significant, could give rise to restrictive effects on competition within the meaning of the Chapter I prohibition where their common application is likely to result in a de facto alignment. This could be the case when the widespread use of the standard terms de facto leads to a limitation of innovation and product variety on the market. For instance, this may arise where standard terms in insurance contracts limit the customer's practical choice of key elements of the contract, such as the standard risks covered. Even if the use of the standard terms is not compulsory, they might undermine the incentives of the competitors to compete on product diversification. This could be overcome by opening the possibility to insurers to also include risks other than standard risks in their insurance contracts.

10.13 When assessing whether there is a risk that the standard terms are likely to have restrictive effects by way of a limitation of product choice, factors such as existing competition on the market should be taken into account. For example, if there is a large number of smaller competitors, the risk of a limitation of product choice would seem to be less than if there are only a few bigger competitors.[400]

10.14 The market shares of the undertakings participating in the establishment of the standard terms might also give a certain indication of the likelihood of uptake of the standard terms or of the likelihood that the standard terms will be used by a large part of the market. However, in this respect, it is not only relevant to analyse whether the standard terms established are likely to be used by a large part of the market, but also whether the standard terms only cover part of the product or the whole product (the less extensive the standard terms, the less likely that they will lead, overall, to a limitation of product choice).

10.15 Moreover, in cases where in the absence of the establishment of the standard terms it would not have been possible to offer a certain product, there would

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[400] If previous experience with standard terms on the relevant market shows that the standard terms did not lead to lessened competition on product differentiation, this might also be an indication that the same type of standard terms established for a neighbouring product will not lead to a restrictive effect on competition.

not be likely to be any restrictive effect on competition within the meaning of the Chapter I prohibition. In that scenario, product choice is increased rather than decreased by the establishment of the standard terms.

10.16 Secondly, even if the standard terms do not define the actual scope of the end-product they might be a decisive part of the transaction with the customer for other reasons. An example would be online shopping where customer confidence is essential (for example, in the use of safe payment systems, a proper description of the products, clear and transparent pricing rules, flexibility of the return policy, etc). As it is difficult for customers to make a clear assessment of all those elements, they tend to favour widespread practices and standard terms regarding those elements could therefore become a de facto standard with which undertakings would need to comply to sell in the market, the effects of which are very close to a binding standard and need to be analysed accordingly.

10.17 If the use of standard terms is binding, there is a need to assess their impact on product quality, product variety and innovation (in particular if the standard terms are binding on the entire market).

10.18 Moreover, should the standard terms (binding or non-binding) contain any terms which are likely to have a negative effect on competition relating to prices (for example terms defining the type of rebates to be given), they would be likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition.

Assessment under the Section 9 exemption

Efficiencies

10.19 The use of standard terms can generate efficiencies such as making it easier for customers to compare offers and thus facilitate switching between undertakings. Standard terms might also lead to efficiencies in the form of savings in transaction costs and, in certain sectors (in particular where the contracts are of a complex legal structure), facilitate entry. Standard terms may also increase legal certainty for the contract parties. These efficiencies can contribute to market resilience.

10.20 Where there are more competitors for customers to choose between, the increased ease of comparison due to the use of standard terms will represent a larger efficiency gain

Indispensability

10.21 Restrictions that go beyond what is necessary to achieve the efficiencies that can be generated by standard terms do not fulfil the criteria of the Section 9 exemption. For instance, it is generally not justified to make standard terms binding and obligatory for the industry. It cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiencies generated by them.

Pass-on to consumers

10.22 Both the risk of restrictive effects on competition and the likelihood of efficiencies increase with the undertakings' market shares and the extent to which the standard terms are used. Hence, it is not possible to provide any general 'safe harbour' within which there is no risk of restrictive effects on competition or which would allow the presumption that efficiencies will be passed on to consumers to an extent that outweighs the restrictive effects on competition.

10.23 However, certain efficiencies generated by standard terms, such as increased comparability of offers on a market, the facilitation of switching between providers, and increased legal certainty around the clauses set out in the standard terms, are inherently beneficial for consumers. As regards other possible efficiencies, such as lower transaction costs, it is necessary to make an assessment on a case-by-case basis and in the relevant economic context whether these are likely to be passed on to consumers.

No elimination of competition

10.24 Standard terms used by a majority of the industry might create a *de facto* industry standard. In such a case, competition may be eliminated if third parties are foreclosedfrom effective access to the standard. However, if the standard terms only concern a limited part of the product or service, competition is not likely to be eliminated.

Examples

Non-binding and open standard terms used for contracts with end-users

Example 1

Situation: A trade association for electricity distributors establishes non-binding standard terms for the supply of electricity to end-users. The establishment of the standard terms is made in a transparent and non-discriminatory manner. The standard terms cover issues such as the specification of the point of consumption,

the location of the connection point and the connection voltage, provisions on service reliability as well as the procedure for settling the accounts between the parties to the contract (for example, what happens if the customer does not provide the supplier with the readings of the measurement devices). The standard terms do not cover any issues relating to prices, that is, they contain no recommended prices or other clauses related to price. Any undertaking active within the sector is free to use the standard terms as it sees fit. About 80% of the contracts concluded with end-users in the relevant market are based on these standard terms.

Analysis: These standard terms are not likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. Even if they have become industry practice, they do not seem to have any appreciable negative impact on prices, product quality or variety.

Standard terms used for contracts between undertakings

Example 2

Situation: Construction undertakings come together to establish non-binding and open standard terms and conditions for use by a contractor when submitting a quotation for construction work to a client. A form of quotation is included together with terms and conditions suitable for building or construction. Together, the documents create the construction contract. Clauses cover such matters as contract formation, general obligations of the contractor and the client and non-price related payment conditions (for example, a provision specifying the contractor's right to give notice to suspend the work for non-payment), insurance, duration, handover and defects, limitation of liability, termination, etc. These standard terms would often be used between undertakings, one active upstream and one active downstream.

Analysis: These standard terms are not likely to have restrictive effects on competition within the meaning of the Chapter I prohibition. There would normally not be any significant limitation in the customer's choice of the end-product, namely the construction work. Other restrictive effects on competition do not seem likely. Indeed, several of the clauses above (handover and defects, termination, etc.) would often be regulated by law.

Standard terms facilitating the comparison of different undertakings' products

Example 3

Situation: A national association for the insurance sector distributes non-binding standard policy conditions for house insurance contracts. The conditions give no indication of the level of insurance premiums, the amount of the cover, excesses or

other relevant charges payable by the insured, or the level of customer service provided. They do not impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed and do not require the policyholders to obtain cover from the same insurer for different risks. While the majority of insurance undertakings use standard policy conditions, not all of their contracts contain the same conditions as they are adapted to each client's individual needs and therefore there is no de facto standardisation of insurance products offered to consumers. The standard policy conditions enable consumers and consumer organisations to compare the policies offered by the different insurers. A consumer association is involved in the process of laying down the standard policy conditions. They are also available for use by new entrants, on a non-discriminatory basis.

Analysis: These standard policy conditions relate to the composition of the final insurance product. If the market conditions and other factors would show that there might be a risk of limitation in product variety as a result of insurance undertakings using such standard policy conditions, it is likely that such possible limitation would be outweighed by efficiencies such as facilitation of comparison by consumers of conditions offered by insurance undertakings. Those comparisons in turn facilitate switching between insurance undertakings and thus enhance competition. Furthermore, the switching of providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process could, in certain instances, increase the likelihood of those efficiencies which do not automatically benefit the consumers being passed on.

The standard policy conditions are also likely to reduce transaction costs and facilitate entry for insurers on a different geographic and/or product markets. Moreover, the restrictions do not seem to go beyond what is necessary to achieve the identified efficiencies and competition would not be eliminated. Consequently, the criteria of the Section 9 exemption are likely to be fulfilled.