

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

August 2023

CMA184

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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.
- 1.2 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 agreement and establish whether they benefit from the block exemptions provided by SABEO and R&D BEO, or otherwise comply with competition law.
- 1.3 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.
- 1.4 The 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 void³ and not enforceable.⁴ It may also lead to a financial penalty or to damages being awarded to third parties.

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. These two EU regulations were initially 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 3.10 to 3.14 for guidance on the circumstances when a natural or legal person constitutes an 'undertaking' for the purpose of the 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 *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 (see, in particular, paragraphs 85 to 87).

- 1.5 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.
- 1.6 There are many situations where horizontal agreements that restrict competition can be beneficial to consumers and are exempt from the Chapter I prohibition because they meet the conditions for exemption specified in section 9(1) CA98 (Section 9 exemption).
- 1.7 Where a category of agreements is likely to meet the conditions for Section 9 exemption, such agreements may also 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 agreement. The effect of the HBEOs is to provide an automatic exemption from the Chapter I prohibition to all agreements that meet the HBEOs' conditions.
- 1.8 By automatically exempting horizontal agreements that meet specified conditions, the HBEOs avoid placing on businesses the unnecessary burden of scrutinising a large number of 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.
- 1.9 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 conditions of the Section 9 exemption.
- 1.10 This Guidance sets out the principles for assessing horizontal agreements under the Chapter I prohibition and provides an analytical framework for the most common types of horizontal agreements. This Guidance is relevant to both existing and new horizontal agreements, and it replaces the European Commission's Guidelines on Horizontal Cooperation Agreements.⁵
- 1.11 Horizontal cooperation takes place in a large number of different forms and types and in a variety of market contexts. It is not therefore possible to provide specific guidance for every possible scenario. The principles set out in this

⁵ European Commission (2011) Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ C 11. Although this Guidance uses the term 'horizontal agreement', where the European Commission's 2011 guidelines use the term 'horizontal cooperation agreement', the CMA considers these terms have the same meaning and may be used interchangeably.

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.

1.12 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 it may revise this Guidance in light of future developments and evolving experience.

1.13 The remainder of this Guidance is structured as follows:

- Part 2: legal framework, which gives a brief overview of the Chapter I prohibition and the exemptions from the Chapter I prohibition under the Section 9 exemption and the HBEOs;
- Part 3: overview of the assessment of horizontal agreements, which provides general guidance on the various steps in assessing horizontal agreements under the Chapter I prohibition. It also explains the relationship between this Guidance and other guidance and legislation;
- Part 4: research and development ('R&D') agreements, including guidance on the application of the R&D BEO;
- Part 5: production agreements, including guidance on the application of the SABEO;
- Part 6: purchasing agreements;
- Part 7: commercialisation agreements;
- Part 8: information exchange;
- Part 9: standardisation agreements; and
- Part 10: standard terms.

⁶ See section 60A CA98 and CMA's Guidance on the functions of the CMA after the end of the Transition Period (CMA125) on the application of EU law following the UK's exit from the EU. Note, however, that section 4 of the Retained EU Law (Revocation and Reform) Act 2023 provides that with effect from 1 January 2024 general principles of EU law are no longer part of UK law.

- 1.14 Parts 4 to 10 provide guidance on the assessment under the Chapter I prohibition of common types of horizontal agreement. The guidance in Parts 4 to 10 complements, and should be read alongside, the more general guidance on the assessment of horizontal agreements in Parts 1 to 3.
- 1.15 Businesses may wish to cooperate to achieve environmental sustainability objectives. The application of the Chapter I prohibition to agreements relating to environmental sustainability is the subject of separate guidance which should be read alongside this Guidance where a horizontal agreement relates to environmental sustainability.⁷
- 1.16 This Guidance uses 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.

⁷ See the CMA's Draft guidance on environmental sustainability agreements (CMA177), which was published in draft for consultation on 28 February 2023, and which will ultimately be replaced by the finalised version of that guidance as well as any future guidance relating to environmental sustainability for the purposes of UK competition law.

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) (eg companies, firms, partnerships, sole traders, public entities) engaged in economic activity, 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 (CMA166).

2. Legal Framework

- 2.1 This Part gives a brief overview of the Chapter I prohibition and the exemption regime, on which the HBEOs were based.
- 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. 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).
- 2.4 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.
- 2.5 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.⁸
- 2.6 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 practice it is very unlikely that an agreement which appreciably restricts competition within the UK does not also affect trade within the UK.
- 2.7 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

⁸ Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 38 to 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.⁹ 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.¹⁰ 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.¹¹

- 2.8 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

- 2.9 The CA98 provides that some agreements that restrict competition are exempt from the Chapter I prohibition where they satisfy certain conditions because of the efficiencies they generate.
- 2.10 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.¹² Broadly, first, 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 indispensable to achieving those benefits. Fourth, it must not give the parties to the agreement the possibility of eliminating competition from a substantial part of the relevant products.
- 2.11 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 authorisation from the CMA. They need to satisfy themselves, based on a

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

¹⁰ Judgment of 12 December 1967, *SA Brasserie de Haecht v Consorts Wilkin-Janssen*, C-23/67, EU:C:1967:54, page 415; judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 14.

¹¹ 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.

¹² 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.

self-assessment, that the agreement fulfils the conditions for the Section 9 exemption.

- 2.12 This Guidance sets out further details on the application of the Section 9 exemption to horizontal agreements at paragraphs 3.47 to 3.54 below.

Block exemption

- 2.13 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 Section 9 exemption. 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.
- 2.14 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.¹³ 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.
- 2.15 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, the parties will need to consider the following questions:
- (a) Should the agreement be amended to bring it within the terms of the HBEOs?
 - (b) Does it fulfil the conditions for Section 9 exemption?
- 2.16 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.¹⁴

¹³ And, therefore, the agreement will not be made void by virtue of section 2(4) CA98.

¹⁴ Although competition laws in other jurisdictions may contain their own exemptions from their prohibitions on anti-competitive conduct.

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

3. Overview of the Assessment of Horizontal Agreements

- 3.1 This Guidance applies to horizontal agreements concerning goods, services and technologies.¹⁵ This Part gives an overview of the various steps in assessing horizontal agreements under the Chapter I prohibition and the HBEOs. It cross-refers to the relevant sections of this Guidance where those matters are addressed in more detail.

Assessing agreements that combine various stages of cooperation

- 3.2 In practice, horizontal agreements may combine various stages of cooperation, for example, parties may agree to joint R&D and to then produce and commercialise the results of that joint R&D. Such combined agreements are also covered by this Guidance.
- 3.3 When using this Guidance to assess combined agreements, as a general rule, all the sections relating to the different stages of the cooperation will be relevant. However, a combined agreement may require a different analysis depending on which Part of the Guidance is under consideration. For instance, a joint selling arrangement that involves joint pricing is likely to restrict competition by object (see paragraph 7.14 in the Part on Commercialisation Agreements); however, the parties might combine joint production with joint selling, for example, through jointly setting the sales prices for the jointly produced products. Where they do so, the joint selling will generally not restrict competition by object where it is objectively necessary to implement the production agreement and proportionate to its objectives, provided that that production agreement has neutral or positive effects on competition (see paragraph 5.985.98 in the Part on Production Agreements). Therefore, in those circumstances, when assessing whether a combined agreement includes a restriction of competition by object or by effect, the Part of this Guidance relating to the combined agreement's 'centre of gravity' prevails for that aspect of the assessment.
- 3.4 Two factors are particularly relevant for determining the centre of gravity of such combined agreements: first, the starting point of the cooperation, and second, the degree of integration of the various functions that are combined. Although assessment under the Chapter I prohibition should be conducted on

¹⁵ In this Guidance, references to 'product' or 'products' include goods, services and technologies, unless the context suggests otherwise.

a case-by-case basis and it is not possible to provide a definitive 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 or joint distribution of the results is generally the joint R&D provided that the joint production or joint distribution would only take place in circumstances where the joint R&D was successful. Therefore, where the results of the joint R&D are decisive for the subsequent joint production or joint distribution, the guidance in the Part on R&D agreements (Part 4) prevails in such a case. The centre of gravity of the cooperation would be different if the parties would have engaged in the joint production or joint distribution in any event, that is, irrespective of the joint R&D. In that case, such agreements should be assessed as joint production or joint commercialisation agreements and the guidance in the Parts on Production Agreements (Part 5) or Commercialisation Agreements (Part 7) prevails for that aspect of the agreement. If the agreement provides for full integration of the parties' production activities and only a partial integration of some R&D activities, the centre of gravity of the cooperation would be the joint production;
- the centre of gravity of a horizontal agreement involving both specialisation in production and joint commercialisation of the resulting products is generally the specialisation, as the joint commercialisation would generally only take place as a result of the specialisation;
- the centre of gravity of a horizontal agreement involving joint production and joint commercialisation of the resulting products would generally be the joint production, as the joint commercialisation generally would only take place as a result of the joint production.

3.5 While the examples above give a general indication of the centre of gravity for combined agreements, in practice, a case-by-case assessment should be conducted by reference to the legal and economic context of each agreement.

3.6 The centre of gravity test applies only to the relationship between the different Parts of this Guidance, not to the relationship between 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 stages of cooperation between parties if that stage meets the conditions of the relevant BEO. 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

Analytical framework

- 3.7 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’ that are ‘actual or potential competitors’ and that may affect trade within the UK and that has as its ‘object’ or ‘effect’ an appreciable prevention, restriction or distortion of competition within the UK.¹⁶ See paragraph 3.10 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 because they restrict competition, they may nonetheless benefit from the block exemption provided by the HBEOs, with the effect that such agreements are 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 scope of the Chapter I prohibition because they restrict competition and do not meet the conditions of the R&D BEO or SABEO may still benefit from exemption from the Chapter I prohibition if they fulfil the conditions of the Section 9 exemption. See paragraph 3.47 onwards and the Part(s) of this Guidance that apply to the agreement in question.
- 3.8 An agreement which is prohibited by the Chapter I prohibition will be void and unenforceable.¹⁷
- 3.9 The remainder of this Guidance considers how to apply the concepts set out in the above analytical framework.

¹⁶ 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 Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 50.

¹⁷ If only certain provisions in a horizontal agreement are prohibited under the Chapter I prohibition and they are capable of being severed from the rest of the agreement, then the remainder of the agreement may be enforceable. See further footnote 4 to paragraph 1.4 above.

Undertakings

- 3.10 The Chapter I prohibition applies to ‘undertakings’ and ‘associations of undertakings’. An undertaking is any natural or legal person or other entity (eg companies, firms, partnerships, sole traders, public entities) engaged in economic activity, regardless of its legal status and the way it is financed.¹⁸ An association of undertakings is a body through which undertakings of the same general type represent and defend their interests on the market.¹⁹ This Guidance applies to horizontal agreements and concerted practices between undertakings and decisions by associations of undertakings.
- 3.11 The Chapter I prohibition does not apply to agreements between undertakings which form part of a single economic unit or entity, for instance, an agreement between a company and its wholly-owned subsidiary, as they are considered as forming part of the same undertaking.²⁰ 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 market(s).
- 3.12 In the context of agreements between parent companies and their joint venture, when it is demonstrated that the parent companies exercise decisive influence over the joint venture, the CMA will in general not apply the Chapter I prohibition to an agreement between the parent companies and the joint venture to the extent that the agreement concerns conduct that occurs in a market(s) where the joint venture is active and in periods during which the parent companies exercise decisive influence over the joint venture.

¹⁸ 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.

¹⁹ 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.

²⁰ See, for example, judgment of 24 October 1996, *Viho*, C-73/95 P, EU:C:1996:405 (in particular paragraph 51) in which the EU 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. See also *Roche Products Ltd and Others v Provimi Ltd* [2003] EWHC 961 (Comm), paragraph 27. In addition, in the context of mergers (including the creation of joint ventures), CA98, schedule 1, paragraph 1 also provides, amongst other things, that the Chapter I prohibition does not apply to certain agreements that result in 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 2002. This exclusion extends to any provision that is directly related and necessary to the implementation of the merger provisions. For further information on the application of competition law to joint ventures, see the CMA’s guidance, *Joint Venture Business Advice*, published 12 April 2018.

3.13 Nevertheless, the CMA may apply the Chapter I prohibition to an agreement between:

- parent companies to create a joint venture;²¹
- parent companies to modify the scope of their joint venture;
- parent companies and their joint venture concerning a product or geographic market(s) in which the joint venture is not active; and
- parent companies not involving their joint venture, even if the agreement concerns a product or geographic market(s) in which the joint venture is active.

3.14 The fact that a joint venture and its parent companies are considered to form part of the same undertaking on a particular market or in a certain context does not preclude the parent companies from being considered independent in other contexts.

Agreements, concerted practices and decisions

3.15 For the Chapter I prohibition to apply to horizontal cooperation, there must be a form of coordination between competitors, namely, an ‘agreement’ or ‘concerted practice’ between two or more undertakings, or a ‘decision’ by an association of undertakings.

3.16 For the purposes of the Chapter I prohibition and this Guidance, an ‘agreement’ refers to two or more undertakings having expressed a concurrence of wills to cooperate.²² A ‘concerted practice’ is a form of coordination between undertakings in which they have not reached an agreement but they knowingly substitute practical cooperation between them for the risks of competition.²³ 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.²⁴

²¹ Subject to Schedule 1, paragraph 1 CA98, which provides, amongst other things, that the Chapter I prohibition does not apply to certain agreements that result in a merger or joint venture within the merger provisions of the Enterprise Act 2002. See further footnote 20 above.

²² See, for example, judgment of 13 July 2006, *Commission v Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37.

²³ 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.

²⁴ 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.

- 3.17 The existence of an agreement, 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.
- 3.18 As noted above and for ease of reference, references elsewhere in this Guidance to the term ‘agreement’ also cover concerted practices and decisions of associations of undertakings, unless otherwise stated.

Actual and potential competitors

- 3.19 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.²⁵
- 3.20 Two undertakings are treated as *actual* competitors if they are active on the same relevant (product and geographic) market(s).
- 3.21 An undertaking is considered a *potential* competitor if there are real, concrete possibilities for that undertaking to enter the market in question and compete with established undertakings.²⁶
- 3.22 An undertaking will therefore be considered a potential competitor of another undertaking if, absent the agreement, the former would on realistic grounds²⁷ and not just as a mere theoretical possibility be likely to, within a short period of time,²⁸ undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.
- 3.23 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;²⁹ the mere wish, desire or purely hypothetical possibility to enter a market is not sufficient.³⁰ Conversely, there is no need to demonstrate with certainty that the undertaking will in fact enter the market concerned or that it will be capable of retaining its place there.³¹

²⁵ See for example *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4, paragraph 91, and the case law cited.

²⁶ See judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 36; *GSK v CMA* [2018] CAT 4, paragraph 92; judgment of 14 April 2011, *Visa Europe Ltd and Visa International Service*, T-461/07, EU:T:2011:181, paragraphs 68 and 166.

²⁷ 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.

²⁸ See, for example, judgment of 14 April 2011, *Visa Europe Ltd and Visa International Service*, T-461/07, EU:T:2011:181, paragraph 189.

²⁹ See for example judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 39.

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

³¹ Judgment of 30 January 2020 *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 36 to 39.

3.24 When assessing whether an undertaking is a potential competitor of another undertaking, the following factors may also 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 face insurmountable barriers to entry.³² 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).³³
- If the undertaking has taken sufficient preparatory steps to enable it to enter the market concerned.³⁴
- If the undertaking established in the market perceives an undertaking outside the market to be a potential entrant. In such cases, the latter undertaking may, merely because it exists, exert competitive pressure on the established undertaking.³⁵

3.25 The conclusion of an agreement between undertakings at the same level in the supply chain may also indicate that those undertakings are potential competitors. For example, in the context of a market-sharing or price-fixing agreement, the undertakings may have been unlikely to conclude the

³² 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 to 51.

³³ 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 EU 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 products (judgment of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, paragraphs 308 to 310 and 321 to 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 by the EU Court of Justice in the judgment of 25 March 2021, *Sun Pharmaceuticals and Ranbaxy v Commission*, C-586/16, EU:C:2021:241, paragraph 44).

³⁴ Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 43.

³⁵ Judgment of 14 April 2011, *Visa Europe and Visa International Service v Commission*, T-461/07, EU:T:2011:181, paragraph 169.

agreement if they had not considered themselves to be at least potential competitors.³⁶

- 3.26 References in this Guidance to ‘competitors’ include both actual and potential competitors, unless indicated otherwise.

Territorial application of the Chapter I prohibition

- 3.27 The Chapter I prohibition only applies to agreements implemented, or intended to be implemented, in the UK.³⁷ 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.

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

- 3.28 The Chapter I prohibition will not apply to certain forms of agreement such as those which lack an effect on trade or those which are of minor importance.³⁸ 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 the Chapter I prohibition may not apply because of the provisions of other legislation.

Assessment under the Chapter I prohibition

Benefits and competition concerns arising from horizontal cooperation

- 3.29 Horizontal agreements can lead to substantial benefits in particular where they combine complementary activities, skills or assets. Horizontal cooperation can be a means to share risk, save costs, increase investments,

³⁶ See for example judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 36 to 58, in particular paragraph 55 and judgment of 21 May 2014, *Toshiba v Commission*, T-519/09, EU:T:2014:263, paragraph 231 (upheld on appeal in judgment of 20 January 2016, *Toshiba v Commission*, C-373/14 P, EU:C:2016:26, paragraphs 33 and 34). See also *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4, paragraph 135.

³⁷ 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, *Reforming competition and consumer policy: government response* (2022) and Bill 350 2022-23 (as amended in Public Bill Committee), Digital Markets, Competition and Consumers Bill, section 117.

³⁸ See paragraphs 3.55 to 3.59 for further information on when an agreement is of minor importance.

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.³⁹

- 3.30 Horizontal agreements may, however, limit competition on the relevant market in several ways. They may, for instance, lead to anti-competitive collusion between the parties or to anti-competitive foreclosure.
- 3.31 Horizontal agreements can also create a context in which other forms of harmful coordination are 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 afford parties mechanisms and opportunities for communication (which may, for instance, lead to the disclosure of competitively sensitive information)⁴⁰ or result in greater symmetries and commonalities in cost structure (for example, the proportion of variable costs that the parties have in common) allowing them to coordinate market prices and output more easily. A loss of competition can also have negative consequences for the quality or variety of products, for innovation and for other parameters of competition.
- 3.32 Some horizontal agreements, for example, production and standardisation agreements, may give rise to anti-competitive foreclosure, in that they prevent or restrict the parties' competitors from competing effectively, for example, by denying them access to an important input or by blocking an important route to the market. The exchange of competitively sensitive information may also place competitors that are not party to the agreement at a significant competitive disadvantage as compared to the undertakings that are.
- 3.33 Those concerns may give rise to a restriction of competition by object or by effect within the meaning of the Chapter I prohibition.

Restrictions of competition by object

- 3.34 The concept of a restriction of competition *by object* within the meaning of the Chapter I prohibition refers to agreements which, by their very nature, are

³⁹ As explained at paragraph 3.1, footnote 15, the notion of 'products' includes goods, services and technologies (unless the context suggests otherwise).

⁴⁰ 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'. See Part 8 on Information Exchange.

harmful to the proper functioning of competition.⁴¹ In that regard, certain types of cooperation between undertakings reveal a sufficient degree of harm to competition that, unlike restrictions of competition by *effect*, there may be no need to examine their effects.⁴²

- 3.35 The types of horizontal agreement found to restrict competition *by object* have included, for example, price fixing,⁴³ market sharing,⁴⁴ bid rigging and collusive tendering,⁴⁵ exchanging competitively sensitive information,⁴⁶ agreeing to limit output or sales,⁴⁷ and paying a competitor to delay launching competing products.^{48, 49}
- 3.36 The concept of a restriction of competition *by object* is to be interpreted strictly. It can only be applied to certain agreements between undertakings which reveal, in themselves and with regard to their content, objectives and context, a sufficient degree of harm to competition such that it is not necessary to assess their actual effects.⁵⁰
- 3.37 The following factors are taken into account in assessing whether an agreement belongs to a type of conduct that, by its very nature, reveals a sufficient degree of harm to competition:
- the content or provisions of the agreement;
 - the objectives it seeks to attain; and
 - the economic and legal context of which it forms part.

⁴¹ Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.

⁴² Judgment of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49.

⁴³ See for example *Residential estate agency services*, CMA decision of 17 December 2019 and *Online sales of posters and frames*, CMA decision of 12 August 2016.

⁴⁴ See for example *Nortriptyline Tablets Market Sharing*, CMA decision of 4 March 2020 and *Supply of products to the furniture industry (drawer fronts)*, CMA decision of 27 March 2017.

⁴⁵ See for example the CAT judgments in *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4, *Durkan Holdings Ltd v OFT* [2011] CAT 6, *ISG Pearce Ltd v OFT* [2011] CAT 10, *Quarmby Construction Co Ltd v OFT* [2011] CAT 11, and *North Midland Construction plc v OFT* [2011] CAT 14. See further the section on bidding consortia in Part 7 on Commercialisation Agreements.

⁴⁶ See for example the CAT judgments in *Lexon v CMA* [2021] CAT 5 and *Balmoral Tanks v CMA* [2017] CAT 23 (upheld on appeal [2019] EWCA Civ 162). See further Part 8 on Information Exchange.

⁴⁷ See for example Judgment of 20 November 2008, *Competition Authority v Beef Development Society*, C-209/07, EU:C:2008:643, in which the EU Court of Justice considered a scheme designed to reduce overcapacity in the beef processing sector in Ireland.

⁴⁸ See for example the CAT judgment in *GSK v CMA* [2021] CAT 9.

⁴⁹ In addition, restrictions that are identified as 'hardcore restrictions' in block exemption orders are generally restrictions of competition by object.

⁵⁰ Judgment of 30 January 2020, *Generics (UK) Ltd and Others*, C-307/18, EU:C:2020:52, paragraph 67 and the case law cited therein.

3.38 When assessing that legal and economic context, it is also necessary to take into consideration:⁵¹

- the nature of the products affected; and
- the real conditions of the functioning and structure of the market or markets in question.⁵²

3.39 As part of assessing the context of the agreement when considering whether it restricts competition by object, the CMA will take into account pro-competitive effects of the agreement that the parties raise where those effects are demonstrated and relevant, specifically related to the agreement concerned, and sufficiently significant.⁵³ The CMA will consider pro-competitive effects in those circumstances in order to assess whether the legal and economic context of the agreement means that, despite conforming to a category of agreements usually considered anti-competitive, it is nonetheless, and because of some specific circumstances, incapable of producing any detrimental effect in the market or is even pro-competitive.⁵⁴

3.40 While the parties may raise pro-competitive effects, when considering whether an agreement restricts competition *by object*, it is not necessary to prove that the agreement has actual anti-competitive effects on the market concerned.⁵⁵ For instance, there does not need to be a direct link between the agreement and consumer prices.⁵⁶

3.41 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.⁵⁷

⁵¹ For agreements that have been held that they constitute particularly serious breaches of the competition law, 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 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.

⁵² See 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.

⁵³ Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 103 to 107 and *GSK v CMA* [2021] CAT 9, paragraph 41.

⁵⁴ See, to that effect, Opinion of Advocate General Bobek delivered on 5 September 2019 in *Budapest Bank and Others*, C-228/18, EU:C:2019:678, point 45 and *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 97.

⁵⁵ See, to that effect, judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 36 and 37. See also *Lexon v CMA* [2021] CAT 5, paragraph 183(2).

⁵⁶ See *Lexon v CMA* [2021] CAT 5, paragraph 187(5).

⁵⁷ 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.

An agreement may restrict competition by object even if it does not have the restriction of competition as its sole aim.⁵⁸

Restrictive effects on competition

3.42 A horizontal agreement that does not in itself reveal a sufficient degree of harm to competition may still be prohibited by the Chapter I prohibition where it has 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 (and unlike where the agreement restricts competition by *object*), it is necessary to establish a counterfactual, that is, to assess competition within the actual context in which it would occur if the agreement had not existed.⁵⁹

3.43 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 a third party.⁶⁰ The agreement must reduce the parties' decision-making independence,⁶¹ either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties, for example, by causing a change in its incentives.

3.44 The following factors 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

⁵⁸ See, for example, judgment of 8 November 1983, *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 to 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.

⁵⁹ 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.

⁶⁰ 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 Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 51.

⁶¹ Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 88; judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 52.

the functioning and the structure of the market or markets in question;⁶²

- 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;⁶³ and
- both actual and potential restrictive effects on competition, which must be sufficiently appreciable.⁶⁴

3.45 In some cases, undertakings enter into horizontal agreements as based on objective factors they would not, in the particular legal and economic context, have been able to carry out the project or activity covered by the cooperation independently, for instance, because they do not have the technical capabilities. Such horizontal agreements will generally not give rise to restrictive effects on competition within the meaning of the Chapter I prohibition unless the parties could have carried out the project or activity using a form of cooperation that is less restrictive of competition.⁶⁵

Ancillary restraints

3.46 The Chapter I prohibition will not apply to an agreement that is an ‘ancillary restraint’, that is, where it restricts the commercial autonomy of one or more of its parties but that restriction is objectively necessary to implement, and proportionate to the objectives of, another form of cooperation that has neutral

⁶² Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 116, and the case law cited therein. The actual context of the cooperation may include factors such as: the presence of sufficient possibilities for customers to switch supplier; the likelihood that competitors increase supply if prices increase; whether the market characteristics are conducive to anti-competitive coordination; whether the activities covered by the cooperation account for a high proportion of the parties’ variable costs in the relevant market, etc. It may also be relevant to assess whether the parties combine their activities covered by the cooperation to a significant extent. This could be the case, for instance, where they jointly manufacture or purchase an intermediate product which is an important input for their production of downstream products, or where they jointly manufacture or distribute a large proportion of their total output of a final product.

⁶³ 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 generally 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.

⁶⁴ Judgment of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52.

⁶⁵ See for example the judgment of the CAT in *Agents’ Mutual v Gascoigne Halman* [2017] CAT 15, in the context of an agreement to create a new online property portal which restricted members’ use of other similar portals. The CAT held that in that case restricting members’ use of other portals did not have the effect of restricting competition in circumstances where it would not have been possible to enter the market without such provisions.

or positive effects on competition.^{66 67} To determine whether a restriction is an ancillary restraint, it is necessary to examine whether the main cooperation would be impossible to carry out absent the restriction in question.⁶⁸ The fact that the main cooperation 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’.⁶⁹

Assessment under the Section 9 exemption

3.47 The assessment of restrictions of competition by object or effect is only one step of the analysis under the Chapter I prohibition. Another step is the assessment of whether the agreement meets the conditions set out in the Section 9 exemption, because of the efficiencies it generates.⁷⁰

3.48 Where an agreement restricts competition by object or by effect within the meaning of the Chapter I prohibition, the parties to that agreement can invoke the Section 9 exemption as a defence.

⁶⁶ See for example paragraph 6.19 below in the context of purchasing agreements, which refers to the EU Court of Justice’s judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413. That case concerned a cooperative association set up to purchase agricultural products in bulk, with the aim of achieving lower prices. The EU Court of Justice held that a prohibition on members of the cooperative from holding membership of other purchasing cooperatives did not constitute an infringement of competition law so long as it was necessary to ‘ensure that the cooperative functions properly and maintains its contractual power in relation to producers’. See also the judgment of the Court of Appeal in *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2009] EWCA Civ 750, paragraphs 111 to 123, in the context of an agreement to promote a new entrant into a market previously occupied by only one other undertaking. The Court of Appeal accepted that racecourse owners’ collective selling of media rights to horseracing events in support of that purpose was ‘both objectively necessary for the implementation of the main operation and proportionate to it’ and that ‘[w]ithout the restrictions, the main object would have been, at the very least, difficult, and in reality impossible, to implement’. The Court of Appeal later added that the position may well be different on expiry of the licences at issue, after which the joint selling arrangement would no longer ‘need the sort of protection which was necessary to secure its entry into the market at the outset’.

⁶⁷ 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 of the EU 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 of the EU, so far as applicable immediately before the end of the Transition Period (subject to section 60A(4) to (7) CA98).

⁶⁸ 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 1536 (Civ), paragraph 58 to 74 (issue not considered on appeal to the Supreme Court).

⁶⁹ See for example the judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91.

⁷⁰ The European Commission’s general approach to the EU-equivalent of the Section 9 exemption, ie Article 101(3) of the TFEU (formerly Article 81(3) of the Treaty establishing the European Community), is presented in the European Commission (2004) Guidelines on the application of Article 81(3) of the Treaty, OJ C 101. The CMA will have regard to those guidelines in accordance with section 60A CA98.

3.49 The burden of proof under the Section 9 exemption rests on the undertaking(s) invoking the benefit of that provision.⁷¹ In other words, it is for the undertaking(s) to prove that the agreement in question is likely to give rise to objective⁷² efficiencies within the meaning of the Section 9 exemption. Cogent empirical evidence is needed to carry out the required evaluation of any claimed efficiencies for the purposes of fulfilling the conditions of the Section 9 exemption.⁷³

3.50 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 such 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, ‘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;⁷⁴
- 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.

3.51 The assessment of horizontal agreements under the Section 9 exemption is made within the actual context in which they occur⁷⁵ and based on the facts

⁷¹ Section 9(2) CA98.

⁷² See the judgment of 6 October 2009, *GlaxoSmithKline v Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraphs 92 to 95.

⁷³ See the judgment of the Supreme Court in *Sainsbury’s v Visa and Sainsbury’s Mastercard* [2020] UKSC 24, in particular paragraph 116.

⁷⁴ More detail on the concept of consumers is provided at paragraph 84 of the European Commission [2004] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, to which the CMA will have regard in accordance with section 60A CA98.

⁷⁵ See judgment of 17 September 1985, *Ford*, 25/84 and 26/84, EU:C:1985:340.

existing at any given point in time.⁷⁶ The assessment is sensitive to material changes in the facts. Therefore, the exemption applies provided that the four conditions above are fulfilled and ceases to apply when that is no longer the case.⁷⁷

- 3.52 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.
- 3.53 The exemptions under R&D BEO and SABEO are based on the premise that the combination of complementary skills or assets can be a source of substantial efficiencies in R&D and specialisation agreements. Other types of horizontal agreement may similarly combine skills and assets to produce substantial efficiencies which will be relevant to any individual assessment of the application of the Section 9 exemption. The analysis under the Section 9 exemption of the efficiencies generated by an agreement is therefore to a large extent a question of identifying the complementary skills and resources that each of the parties brings to the cooperation and evaluating whether the resulting efficiencies are such that the conditions of the Section 9 exemption are fulfilled.
- 3.54 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 the development and marketing of new or improved products and technologies that may otherwise not have existed. Other horizontal agreements may allow parties to collaborate to design, produce and commercialise products or to jointly purchase products or services they need for their activities. 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.

⁷⁶ In *Sainsbury's v Visa and Sainsbury's v Mastercard* [2020] UKSC 24, paragraphs 109 to 138, the Supreme Court held that the standard of proof under the Section 9 exemption is the civil standard of balance of probabilities.

⁷⁷ 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.

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

Agreements that do not restrict competition appreciably, lack an effect on trade or are of minor importance

- 3.55 The Chapter I prohibition applies only where an agreement brings about an *appreciable* restriction of competition within the UK and affects trade within the UK.⁷⁸ 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.⁷⁹
- 3.56 In determining whether an agreement is an *appreciable* restriction of 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).⁸⁰ Its application is particularly relevant for assessing horizontal agreements between small and medium-sized enterprises ('SMEs').⁸¹
- 3.57 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.⁸² This general rule does not apply to agreements that restrict

⁷⁸ See for example *North Midland Construction v OFT* [2011] CAT 14, paragraphs 35 to 63.

⁷⁹ See for example *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paragraphs 149 to 150, and *P&S Amusements v Valley House Leisure* [2006] EWHC 1510 (Ch), paragraphs 20 to 26. See also CMA decisions, eg *Online resale price maintenance in the light fittings sector*, CMA decision of 3 May 2017, paragraphs 4.156 to 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 to 6.173.

⁸⁰ 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 (2014), OJ C 291, (the 'De Minimis Notice'), paragraph 1, to which the CMA will have regard in accordance with section 60A CA98.

⁸¹ Also relevant for SMEs is section 39 CA98 which provides limited immunity from financial penalties for 'small agreements' infringing the Chapter I prohibition. The immunity applies only to financial penalties, such that a 'small agreement' may still infringe the Chapter I prohibition. Therefore, it does not prevent the CMA from taking other enforcement action, nor does it prevent third parties from bringing damages actions. The immunity does not apply to infringements of the Chapter I prohibition which are price-fixing agreements. The CMA may also withdraw immunity in certain circumstances. See further the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262) (as amended by The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93)) and the Competition (Amendment etc.) (EU Exit) Regulations 2020).

⁸² 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 (2014), OJ C 291, (the 'De Minimis Notice'), paragraph 8.

competition by *object*, irrespective of the parties' market shares.⁸³ 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.⁸⁴ The CMA will also not apply the 10% threshold to agreements containing any of the restrictions listed as 'hardcore' restrictions in any block exemption orders⁸⁵ or retained EU block exemption regulations, as such restrictions generally constitute restrictions by object.⁸⁶

- 3.58 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%.⁸⁷
- 3.59 There is no presumption that horizontal agreements that restrict competition by effect and where the parties' aggregate market share exceeds 10% automatically fall within the scope of the Chapter I prohibition. Such agreements may still lack an effect on trade within the UK or they may not constitute an *appreciable* restriction of competition.⁸⁸ 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

- 3.60 The Chapter I prohibition does not apply to an agreement or the conduct of undertakings to the extent it is made or done to comply with a legal requirement under UK law⁸⁹ or to the extent UK legislation precludes all scope for competitive activity for the undertakings involved.⁹⁰ Nonetheless, the fact that public authorities encourage a horizontal agreement does not mean that it

⁸³ See *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paragraphs 149 to 150.

⁸⁴ See by analogy the judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 37.

⁸⁵ For the purposes of section 6 CA98.

⁸⁶ 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 (2014), OJ C 291, (the 'De Minimis Notice'), paragraph 13.

⁸⁷ 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 (2014), OJ C 291, (the 'De Minimis Notice'), paragraph 10.

⁸⁸ See judgment of 8 June 1995, *Langnese-Iglo v Commission*, T-7/93, EU:T:1995:98, paragraph 98.

⁸⁹ 'Legal requirement' in this context means a requirement imposed by or under any enactment in force in the United Kingdom, and certain requirements imposed under the EU withdrawal agreement or the EEA EFTA separation agreement and having legal effect in the United Kingdom. See further Schedule 3, paragraph 5 CA98.

⁹⁰ See judgment of 14 October 2010, *Deutsche Telekom*, C-280/08 P, EU:C:2010:603, paragraphs 80 to 81. The courts have interpreted this exception narrowly. See, for example, judgment of 29 October 1980, *Van Landewyck*, 209 to 215 and 218/78, EU:C:1980:248, paragraphs 130 to 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.

is permitted under the Chapter I prohibition.⁹¹ Undertakings also remain subject to the Chapter I prohibition if for example a law or public authority merely encourages or makes it easier for them to engage in anti-competitive conduct.⁹²

Agreements excluded by the CA98

3.61 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 2002,⁹³ and in relation to agricultural products, certain agreements between ‘recognised producer organisations’ or ‘recognised associations of producer organisations’.⁹⁴

Relationship to other guidance and legislation

3.62 Agreements entered into between undertakings operating at different levels of the supply chain, that is, vertical agreements, are addressed in the [VABEO](#) and the [VABEO Guidance](#). However, where vertical agreements are entered into between competitors, they may raise competition concerns that are similar to those raised by horizontal agreements. For that reason, vertical agreements between competitors should first be assessed by reference to this horizontal agreements Guidance, and they cannot benefit from the exemption under the VABEO save where the vertical agreement between competitors is non-reciprocal⁹⁵ and meets one of the conditions listed in Article 3(5)(a) to (d) of the VABEO. If the assessment of a vertical agreement between competitors by reference to this Guidance leads to the conclusion that the agreement does not raise horizontal competition concerns, any vertical restrictions in the agreement should also be assessed using the VABEO Guidance.

3.63 Where this Guidance refers to the relevant market, the CMA’s Guidance on Market Definition provides guidance on the rules, criteria and evidence to

⁹¹ See for example judgment of 13 December 2006, *FNGBV and Others v Commission*, T- 217/03 and T-245/03, EU:T:2006:391, paragraph 92.

⁹² Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 82.

⁹³ 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 2002. This exclusion extends to any provision directly related and necessary to the implementation of the merger provisions (CA98, schedule 1, paragraph 1(2)).

⁹⁴ See schedule 3, paragraph 9 CA98.

⁹⁵ Non-reciprocal means, for instance, that where one manufacturer becomes the distributor of a second manufacturer’s products, the second manufacturer does not then become a distributor of the products of the first.

which the CMA has regard when considering market definition issues.⁹⁶ That guidance and any future guidance relating to the definition of relevant markets for the purposes of UK competition law should therefore be taken into account when assessing horizontal agreements under the Chapter I prohibition.

- 3.64 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).
- 3.65 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.⁹⁷
- 3.66 The CMA's guidance on *Investigation procedures in Competition Act 1998 cases* (CMA8) sets out for businesses and their advisers the approach and procedures the CMA uses in the exercise of its investigation and enforcement powers under the CA98 including the Chapter I prohibition.

⁹⁶ OFT 403, Market Definition. The CMA will also have regard to the European Commission (1997) Notice on the definition of relevant market, OJ C 372, which is a statement of the European Commission for the purpose of section 60A CA98.

⁹⁷ 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 competitive assessment of research and development ('R&D')⁹⁸ agreements.
- 4.2 R&D agreements vary in form and scope. They include agreements under which one or more of the parties finances R&D activities carried out by one or more other parties (paid-for R&D); agreements covering the joint improvement of existing products and technologies;⁹⁹ and agreements concerning the development of products and technologies that would create entirely new demand. The R&D cooperation may take the form of a cooperation agreement or a joint venture, for example, a jointly controlled company.¹⁰⁰ Undertakings may also cooperate in looser forms, such as technical cooperation in working groups.
- 4.3 R&D agreements may be entered into by large undertakings, SMEs,¹⁰¹ start-ups, academic bodies or research institutes or any combination of them.
- 4.4 R&D 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, 'competition in innovation'¹⁰² refers to research and development efforts for new products and/or technologies, that create their own new market¹⁰³ 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.¹⁰⁴ The specific aim or objective of an R&D cluster cannot yet be defined as a product or a technology or it involves a

⁹⁸ In paragraphs 4.8 to 4.123, references to the terms 'R&D' or 'research and development' reflect the use of those terms in the R&D BEO.

⁹⁹ In this Part, references to 'technologies' include technologies and processes.

¹⁰⁰ This Guidance applies to the most common types of horizontal agreements, irrespective of the level of integration they entail, with the exception of agreements that fall outside the scope of the Chapter I prohibition such as agreements to the extent they result in a merger or joint venture falling within the merger provisions of the Enterprise Act 2002. See paragraphs 3.61 and 3.64 of this Guidance.

¹⁰¹ 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).

¹⁰² See Article 8(10) of the R&D BEO regarding the parties to the agreement (the definition of 'an undertaking competing in innovation'); 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)).

¹⁰³ Article 2(2)(b) of the R&D BEO.

¹⁰⁴ Article 2(1) of the R&D BEO (definition of R&D cluster).

substantially broader target than a specific product or technology on a specific market.

4.6 R&D cooperation agreements often have pro-competitive effects, in particular where they bring together undertakings with complementary skills and assets and allow them to develop and market new and improved products and technologies more quickly than would otherwise be the case. However, R&D agreements can also restrict competition in various ways. First, they may reduce or slow down innovation, leading to fewer or worse quality products coming to the market, or leading to new products coming to the market later than they otherwise would. This may occur even where the cooperation concerns the development of products or technologies that would create an entirely new demand or concerns early innovation efforts that are not closely related to a specific product or technology, but are directed towards a particular application or use. Second, R&D agreements may lead to a reduction of competition between the parties outside the scope of the cooperation agreement and/or, in cases where one or more of the parties has market power, to anti- competitive foreclosure of third parties.

4.7 This Part is structured as follows:

- Paragraphs 4.8 to 4.123 provide guidance on the application of the R&D BEO, including the conditions for exempting R&D agreements, the thresholds, and the hardcore and excluded restrictions;
- Paragraphs 4.124 to 4.158 provide guidance on the individual assessment of R&D agreements under the Chapter I prohibition;
- Paragraphs 4.159 to 4.168 provide guidance on the individual assessment of R&D agreements for the purposes of the Section 9 exemption;
- Paragraphs 4.169 to 4.173 provide guidance on the relevant time period for the assessment of R&D agreements;
- This Part concludes with examples of hypothetical R&D agreements, together with guidance on their competitive assessment.

The R&D BEO

4.8 R&D agreements may benefit from the exemption established by the R&D BEO. The exemption provided for in the R&D BEO is based on the assumption that – to the extent that an agreement falls within the scope of the Chapter I prohibition and fulfils the conditions set out in the R&D BEO – it will generally fulfil the four cumulative conditions of the Section 9 exemption. 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 4.113 to 4.118 of this Guidance).

- 4.9 R&D agreements which fulfil the conditions of the R&D BEO are compatible with the Chapter I prohibition and no further assessment is necessary. 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.

Definition of research and development in the R&D BEO

- 4.10 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.¹⁰⁵

Definition of R&D agreements in the R&D BEO

- 4.11 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:¹⁰⁶
- (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.

¹⁰⁵ Article 2(1) of the R&D BEO.

¹⁰⁶ Article 3(2) of the R&D BEO.

4.12 For the purposes of the R&D BEO:

- (a) 'contract product'¹⁰⁷ means (a) a product¹⁰⁸ 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;¹⁰⁹
- (b) 'contract technology'¹¹⁰ 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.

4.13 Other types of R&D cooperation agreements are not covered by the R&D BEO. Such agreements require an individual assessment under the Chapter I prohibition (see paragraphs 4.124 to 4.168).

Distinction between 'joint' research and development and 'paid-for research and development' and the concept of 'specialisation relating to research and development'

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

4.15 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:¹¹¹

- (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 appropriate. This does not include paid-for research and development.¹¹²

¹⁰⁷ Article 2(1) of the R&D BEO.

¹⁰⁸ 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).

¹⁰⁹ 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).

¹¹⁰ Article 2(1) of the R&D BEO.

¹¹¹ Article 2(1) of the R&D BEO (see the definition of 'joint').

¹¹² Article 2(1) of the R&D BEO.

- 4.16 **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’.¹¹³ A ‘financing party’ finances the research and development concerned but does not carry out any of the research and development activities itself.¹¹⁴
- 4.17 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 the market share threshold contained in the R&D BEO. 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 4.55 below.

Joint exploitation of the results and specialisation relating to joint exploitation

- 4.18 The R&D BEO covers R&D agreements that include the joint exploitation of the results. Such agreements are, however, subject to specific conditions and an obligation.
- 4.19 The ‘exploitation of the results’ is a 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, distribution or application.¹¹⁵
- 4.20 Under the R&D BEO, joint exploitation of the results is only covered by the R&D BEO if it pertains to results which are:
- (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.¹¹⁶
- 4.21 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

¹¹³ Article 2(1) of the R&D BEO.

¹¹⁴ Article 2(1) of the R&D BEO.

¹¹⁵ Article 2(1) of the R&D BEO. See also Article 3(4) for the definition as it applies to Article 3(2).

¹¹⁶ Article 7(2) of the R&D BEO.

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).

- 4.22 The joint exploitation of the results of joint or paid-for research and development may be provided for in the **original** R&D agreement or may take place in the context of a **subsequent** agreement covering the joint exploitation of the results of a prior R&D agreement entered into between the same parties.¹¹⁷ 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.¹¹⁸
- 4.23 The R&D BEO provides for **three different ways** in which the results can be jointly exploited:¹¹⁹
- (a) the exploitation work can be carried out **together by the parties to the R&D agreement** through a joint team, organisation or undertaking;
 - (b) the parties to the R&D agreement can jointly entrust **a third party** with the exploitation work;
 - (c) the parties to the R&D agreement can allocate the work between them by way of **specialisation relating to exploitation**, which means that:¹²⁰
 - (i) the parties allocate between them individual tasks such as production or distribution of a contract product, or
 - (ii) the parties 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,and 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.
- 4.24 Where the parties agree to specialise in relation to exploitation, they may agree corresponding restrictions on their access to the results for the purposes of such exploitation.¹²¹ For example, they may agree to restrict the

¹¹⁷ As covered by Article 3(2)(c) and (d) of the R&D BEO.

¹¹⁸ Article 8(7) of the R&D BEO.

¹¹⁹ Article 2(1) of the R&D BEO (see definition of 'joint'). The different forms of joint exploitation by the parties to the R&D agreement or subsequent agreement covering the joint exploitation of the results of a prior R&D agreement can be combined (for example combining production of the contract products by a third party and a joint distribution by the parties to the relevant agreement).

¹²⁰ Article 2(1) of the R&D BEO.

¹²¹ Article 5(3)(c) of the R&D BEO.

rights of certain parties to exploit the results of the research and development in relation to particular geographical areas, customers or fields of use.

Assignment or licensing of intellectual property rights

- 4.25 The exemption provided by R&D BEO also applies to R&D agreements which include provisions on the assignment or licensing of intellectual property rights to one or more of the parties or to an entity established by the parties to carry out the joint research and development, the paid-for research and development or the joint exploitation of the results, 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.¹²²
- 4.26 In these cases, the assignment or licensing of intellectual property rights will be subject to the provisions of the R&D BEO and not to those of the retained Technology Transfer Block Exemption Regulation.¹²³ However, in the context of R&D agreements, the parties may also agree on 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 retained Technology Transfer Block Exemption Regulation, if the conditions set out in that Regulation are met.¹²⁴

Other provisions in R&D agreements

- 4.27 Other provisions included in R&D agreements that constitute ancillary restraints will also benefit from the exemption of the R&D BEO provided that the conditions defined under case law¹²⁵ are met (see paragraph 3.46).

Conditions for exemption under the R&D BEO

- 4.28 The R&D BEO sets out several conditions and an obligation that must be fulfilled in order for an R&D agreement to benefit from the block exemption.

¹²² Article 3(3) of the R&D BEO.

¹²³ 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 ('The Retained Technology Transfer Block Exemption Regulation') 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 to which the CMA will have regard in accordance with section 60A CA98 ('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.

¹²⁴ The Retained Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines, point 74.

¹²⁵ Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

Access to the final results

- 4.29 The first condition for an R&D agreement to benefit from the exemption provided by the R&D BEO is that the R&D agreement must provide for all parties to have access to the final results of the joint or paid-for research and development for two purposes:¹²⁶
- (a) for conducting further research and development; and
 - (b) for exploiting the results.
- 4.30 '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.
- 4.31 This condition relates to the results that are final and any resulting intellectual property rights and know-how.¹²⁷ Access must be granted as soon as reasonably practicable after the final results become available.¹²⁸ This requirement is not necessarily linked to the end of the research and development project. 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.
- 4.32 The right of access to the results **cannot be limited** if such access is required for conducting **further research and development**.¹²⁹
- 4.33 However, the parties may restrict their right to exploit the results of the research in two cases. First, such a restriction may be made for R&D agreements entered into with the following categories of undertaking and those undertakings agree to use the results for the purposes of further research (and 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

¹²⁶ Article 5 of the R&D BEO.

¹²⁷ Article 5(2)(a) of the R&D BEO.

¹²⁸ Article 5(1)(b) of the R&D BEO.

¹²⁹ 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.

research and development.¹³⁰

- 4.34 Second, the parties may agree to limit their right to exploit the results of research and development results 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.¹³¹ This means that the parties may 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). This restriction on access to the results relates to access to the final results for the purposes of exploitation. The R&D agreement must still provide for all the parties to have access to the final results for the purposes of further research and development.
- 4.35 Finally, since the parties to an R&D agreement may make unequal contributions to their research and development cooperation, for example, due to differing capabilities, resources or commercial interests, the R&D agreement may provide for one party to compensate the other(s) for granting 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.¹³²

Access to pre-existing know-how

- 4.36 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 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.¹³³
- 4.37 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 of the joint or paid-for research and development. This condition does not require the parties to include all their pre-existing know-how. However, they will have to identify the know-how that is indispensable for exploiting the results. Access to such know-how may be regarded as indispensable for these purposes if there are no effective alternative ways for the parties to exploit the results without

¹³⁰ 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'.

¹³¹ See Article 2(1) of the R&D BEO for the definition of 'specialisation relating to exploitation'.

¹³² See Article 5 (3)(a) of the R&D BEO.

¹³³ See Article 6 of the R&D BEO.

access to that know-how. The R&D agreement may provide that the parties compensate each other for giving access to their pre-existing know-how, for example in the form of licence fees. Such compensation must, however, not be so high as to effectively prevent such access.¹³⁴

- 4.38 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 research and development set out in Article 5 of the R&D BEO. This means that, depending on the facts of the case, a given R&D agreement may have to include provisions both as regards access to pre-existing know-how and as regards the final results, in order to benefit from the block exemption.

Conditions linked to joint exploitation

- 4.39 The R&D BEO includes two further conditions for R&D agreements that provide for joint exploitation of the results. As set out in Article 7(2) of the R&D BEO, any joint exploitation must be limited to results that are indispensable for the production of the contract product(s) or the application of the contract technology(ies) and which are protected by intellectual property rights or constitute know-how.
- 4.40 Second, if the agreement provides for specialisation relating to exploitation and one or more parties are charged with producing the contract products, those parties must be required to fulfil orders for supplies of the contract products from the other parties.¹³⁵ This requirement does not apply, however, where (i) the R&D agreement provides for joint distribution (by a joint team, organisation or undertaking or by a jointly appointed third party) or (ii) where the parties agree that only the parties charged with producing the contract product may distribute it.

Thresholds, market shares and duration of exemption

- 4.41 In applying the Section 9 exemption, it can be presumed that, below a certain level of market power, the positive effects of R&D agreements will, in general, outweigh any negative effects on competition.
- 4.42 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

¹³⁴ Article 6(2) of the R&D BEO.

¹³⁵ Article 7(3) of the R&D BEO.

number of competing research and development 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).¹³⁶

- 4.43 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.¹³⁷

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

- 4.44 Article 8(2) of the R&D BEO establishes a market share threshold of 25%. This market share threshold applies where two or more of the parties to the R&D agreement are actual or potential competitors; and if the agreement relates to more than one contract product or contract technology they are actual competitors or potential competitors in relation to the same contract product or contract technology.
- 4.45 For the purpose of the R&D BEO, actual and potential competitors are defined as follows:
- (a) 'actual competitor' is defined as an undertaking that is supplying an existing product, technology or process capable of being improved, substituted or replaced by the contract product or the contract technology on the relevant geographic market;¹³⁸ 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 or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.¹³⁹

¹³⁶ Article 8 of the R&D BEO.

¹³⁷ Any vertical effects may need to be assessed in line with the VABEO Guidance.

¹³⁸ Article 8(10) of the R&D BEO.

¹³⁹ Article 8(10) of the R&D BEO.

- 4.46 Potential competition must be assessed on realistic grounds. The decisive question is whether each party independently has the necessary means as regards assets, know-how and other resources and is likely to undertake the necessary steps to supply the products and technologies that are capable of being improved, substituted or replaced by the contract products or contract technologies independently from the other parties. 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 as board minutes as well as publicly available information such as press releases.¹⁴⁰
- 4.47 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 research and development 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 research and development into a product and that would be likely to undertake the necessary additional investments to supply that product capable of being improved, substituted or replaced by the product arising from the research and development cooperation (contract product) on the relevant geographic market (potential competitor).
- 4.48 Some products or technologies will not improve, substitute or replace existing products or technologies, but will instead create a new relevant market satisfying a new demand, for example, a vaccine which protects against a virus for which no vaccine existed previously. R&D agreements that concern the development of this category of products or technologies are covered by Article 8(3) and (5) of the R&D BEO, or, if they are not competing undertakings, are not subject to a market share (Article 8(6) of the R&D BEO).

¹⁴⁰ For the approach generally to assessing potential competition, see paragraphs 3.19 to 3.26 of this Guidance.

Undertakings competing in innovation

- 4.49 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.
- 4.50 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.
- 4.51 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,¹⁴¹ their projected prices and their intended use.
- 4.52 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 research and development effort.
- 4.53 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;
 - (b) 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 research and development of the same product or a product that is likely to be substitutable for such a new product;

¹⁴¹ This can also include the underlying technologies for the production of the new products.

- (c) an R&D agreement between (a) an undertaking engaged in an research and development 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;
- (d) 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

- 4.54 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.¹⁴² 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.

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

- 4.55 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,¹⁴³ the R&D agreement can only benefit from the block exemption if the parties’ combined market share does not exceed 25% on the relevant product and technology markets 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.¹⁴⁴
- (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;¹⁴⁵

¹⁴² See Article 8(9) of the R&D BEO.

¹⁴³ Article 8(1)(b) of the R&D BEO sets out the relevant provision for R&D agreements which relate to more than one contract product or contract technology.

¹⁴⁴ See paragraphs 4.14 to 4.17 on the distinction between joint research and development and paid-for research and development.

¹⁴⁵ Article 8(2)(a) of the R&D BEO.

(b) for R&D agreements involving **paid-for research and development**, the same market share threshold of 25% applies but the combined market share must take into account the market share of the financing party and the market shares of all the undertakings with which the financing party has entered into R&D agreements relation to the same contract product or contract technology.¹⁴⁶

4.56 If the results of the joint or paid-for research and development are **not jointly exploited**, the exemption under the R&D BEO applies for the duration of the research and development.¹⁴⁷

4.57 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 UK, or if more than one contract product or contract technology is put on the market within the UK, after the time the first of them is put on the market.¹⁴⁸ 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;¹⁴⁹ or (ii) for those R&D agreements under which the parties pursue the joint exploitation of the results of a prior agreement,¹⁵⁰ at the time of entering into such prior agreement.¹⁵¹

4.58 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.¹⁵² 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, after the end of the seven-year period, the parties' combined market share rises above 25%, the R&D agreement continues to benefit from

¹⁴⁶ Article 8(2)(b) of the R&D BEO. It is not necessary for all the financing party's R&D agreements in relation to the same contract products or contract technologies to fall within the scope of the R&D BEO.

¹⁴⁷ Article 8(6)(a) of the R&D BEO.

¹⁴⁸ Article 8(6)(b) and (7) of the R&D BEO.

¹⁴⁹ Article 8(6)(b) of the R&D BEO.

¹⁵⁰ Article 8(7) of the R&D BEO.

¹⁵¹ As mentioned above at paragraph 4.22 of this Guidance, the prior joint or paid-for R&D agreement also needs to meet the conditions of the R&D BEO to be exempted under the R&D BEO.

¹⁵² Article 8(8) of the R&D BEO.

exemption under the R&D BEO for two consecutive calendar years following the year in which the threshold was first exceeded.¹⁵³

Calculation of market shares for markets for existing products and technologies

- 4.59 At the time the R&D agreement is entered into, the reference point is the market for existing products or technologies capable of being improved, substituted or replaced by the contract products or contract technologies.¹⁵⁴
- 4.60 If the R&D agreement aims to **improve, substitute** or **replace existing** products or technologies, market shares are calculated solely by reference to those existing products or technologies that will be improved, substituted or replaced. This applies even if the replacement product or technology will be significantly different from the existing product or technology. The R&D BEO provides that the market shares of the parties must be calculated on the basis of market sales value data, and if such data are not available, the parties may use other reliable market information to calculate market shares, including expenditure on research and development.¹⁵⁵
- 4.61 Under Article 9(1)(b) of the R&D BEO, market shares must be calculated on the basis of data or information relating to the preceding calendar year. However, in cases where that preceding calendar year is not representative of the undertaking's position in the relevant market(s), market shares are calculated as an average of the undertaking's market shares of the last three preceding calendar years.¹⁵⁶ This may be relevant, for instance, when there are bidding markets where market shares vary significantly (eg from 0% to 100%) from one year to another, depending on whether a party is successful in the bidding process. This may also be relevant for markets characterised by large, lumpy orders, for example where data for the previous calendar year is not representative, because no large orders were placed in that 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 where there is a supply or demand shock in the calendar year preceding the cooperation agreement.
- 4.62 For technology markets, the market share of a technology licensor is calculated on the basis of the sales by the licensor and all its licensees of

¹⁵³ Article 11(2) of the R&D BEO.

¹⁵⁴ See paragraph 3.63 above and the CMA's Guidance on Market Definition sets out the main criteria and evidence to which the CMA has regard when considering market definition issues when it enforces UK competition law (see also Relevant markets at paragraphs 4.125 to 4.130).

¹⁵⁵ Article 9(1) of the R&D BEO.

¹⁵⁶ Article 9(1)(b) of the R&D BEO.

products incorporating the licensed technology, as a share of all sales of competing products, irrespective of whether the competing products are produced using the technology that is being licensed. This methodology is used due to the general difficulty of obtaining reliable royalty income data and because calculations based on actual royalty income may under-estimate a technology's position on the market.¹⁵⁷

*Threshold for new products and/or technologies and R&D clusters*¹⁵⁸

- 4.63 If two or more of the parties to the R&D agreement are undertakings competing in innovation,¹⁵⁹ 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 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.¹⁶⁰
- 4.64 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.
- 4.65 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**

¹⁵⁷ 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), paragraphs 25 and 86 to 88 (or any future guidelines relating to technology transfer agreements that may be adopted in the UK).

¹⁵⁸ The R&D BEO provides in Article 17(1) that for R&D agreements between undertakings competing in innovation, Article 8(3) and (5) of the R&D BEO only apply to agreements that are entered into after 1 January 2024. Also, Article 8(9) 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”.

¹⁵⁹ Article 8(3) 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.

¹⁶⁰ Article 8(5) of the R&D BEO.

and the agreement meets the conditions for exemption under the R&D BEO, the exemption applies **for the duration of the research and development**.

- 4.66 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 UK or, if more than one contract product or contract technology is put on the market within the UK, after the time the first of them is put on the market.¹⁶¹ This applies if the agreement meets the conditions for exemption under the R&D BEO:¹⁶²(i) at the time of entering into an agreement pursuing joint or paid-for research and development and which also provides for joint exploitation;¹⁶³ 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,¹⁶⁴ at the time of entering into such prior agreement.¹⁶⁵
- 4.67 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.¹⁶⁶ 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.¹⁶⁷

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

- 4.68 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 (or only limited) players who could independently conduct the R&D effort that is the subject matter of the agreement. The relevant

¹⁶¹ Article 8(6)(b) and Article 8(7) of the R&D BEO.

¹⁶² 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(3) to 8(5) of the R&D BEO.

¹⁶³ As defined in Article 3(2) (a) and (b) of the R&D BEO.

¹⁶⁴ As defined in Article 3(2) (c) and (d) of the R&D BEO.

¹⁶⁵ As mentioned above at paragraph 4.22 of this Guidance, the prior joint or paid-for R&D agreement also needs to meet the conditions of the R&D BEO to be exempted under the R&D BEO.

¹⁶⁶ Article 8(8) of the R&D BEO.

¹⁶⁷ Article 11 of the R&D BEO.

threshold is therefore based on the existence, at the time the R&D agreement is entered into, 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, that is of the kind set out in Article 8(5)(b).

'Competing R&D efforts'

4.69 According to the definition of 'competing R&D effort' in Article 8(10) of the R&D BEO¹⁶⁸ the following elements need to be considered when identifying 'competing R&D efforts':

- (a) whether the R&D efforts¹⁶⁹ 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.

4.70 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 at paragraphs 4.49 to 4.52 above.

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

4.72 Third, 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.

¹⁶⁸ '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 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).

¹⁶⁹ 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'.

- 4.73 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 information¹⁷⁰ 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 or 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 UK.¹⁷¹
- 4.74 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.
- 4.75 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 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.¹⁷²

¹⁷⁰ This evidence could include, for example, a plan to engage in relevant R&D; the availability of funding; and low barriers to entry (in relation to barriers to entry the CMA's Merger Assessment Guidelines (CMA129) and the VABEO Guidance both provide further information about the concept of barriers to entry). Sources of evidence could be, for example:

- (a) a press release;
- (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); or
- (c) information in the trade press or at trade exhibitions.

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

¹⁷² While a third party R&D effort that is six to eight years from market entry may not be comparable with one that is one year from market entry, it may nonetheless be relevant for the assessment under Article 8(5)(b) of the R&D BEO of whether there are third parties that are able independently to engage in relevant research and development efforts (see further paragraphs 4.78 and 4.79).

- 4.76 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 (eg patents) or relevant know-how by the third party may also speak in favour of comparability.
- 4.77 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 UK. This means, for instance, that R&D efforts that are likely to be exploited only outside of the UK with no prospect of reaching the UK 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 UK.

Third parties that are able independently to engage in a relevant¹⁷³ research and development effort

- 4.78 There may be some situations¹⁷⁴ 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 8(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, at the time the R&D

¹⁷³ That is of the kind specified in Article 8(5)(b) of the R&D BEO, 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.

¹⁷⁴ 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 be some transparency about emerging industry trends.

agreement is entered into, 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).¹⁷⁵ As noted at paragraph 4.153 to 4.156 below, the concern in relation to R&D agreements that are focused on innovation is to protect dynamic competition. Competition concerns are unlikely to 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.

4.79 Under Article 8(5)(b) of the R&D BEO¹⁷⁶ 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 at paragraphs 4.73 to 4.77 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

¹⁷⁵ 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.

¹⁷⁶ 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.

exploit directly or indirectly possible results of their R&D efforts in the UK.¹⁷⁷

- (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.¹⁷⁸ This should be capable of being evidenced. That evidence could include evidence of, for example, a plan to engage in relevant R&D; the availability of funding; and low barriers to entry.¹⁷⁹ Sources of evidence could be, for example, the following:¹⁸⁰
- (i) a press release;
 - (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);¹⁸¹
 - (iii) information in the trade press or at trade exhibitions; 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.¹⁸²

Agreements between not competing undertakings

4.80 Where the parties to the R&D agreement are **not competing undertakings** within the meaning of Article 8(9) of the R&D BEO, Article 8(6) provides that the parties are not subject to any threshold. If the results are **not jointly**

¹⁷⁷ 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 not prevent the block exemption applying.

¹⁷⁸ See Article 9(3)(b) of the R&D BEO.

¹⁷⁹ The CMA's Merger Assessment Guidelines (CMA129) and the VABEO Guidance both provide further information about the concept of barriers to entry.

¹⁸⁰ 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.

¹⁸¹ In relation to funding (whether set out in a business plan or not), one example might be recently announced strong financial results for the third party. However, in order to constitute relevant evidence, there would have to be additional evidence of a link to the third party's ability to engage in relevant research and development efforts (that is as set out in Article 8(5)(b)). Without this link, the original evidence on its own is likely to be considered as supportive only. Another example might be evidence of a recent round of public funding for new research and development efforts in the UK. However, such evidence is only likely to be relevant evidence if it is accompanied by additional evidence such as that such funding has been announced and will be accessible by the third party.

¹⁸² See Article 8(5)(b) of the R&D BEO.

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.

- 4.81 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 UK.
- 4.82 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 market to which a contract product or contract technology belongs.¹⁸³ 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.¹⁸⁴

Hardcore and excluded restrictions

Hardcore restrictions

- 4.83 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.
- 4.84 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.¹⁸⁵
- 4.85 This part considers:
- (a) General principles relating to the hardcore restrictions
 - (b) Summary of the hardcore restrictions and exceptions.

General principles

- 4.86 Article 10 of the R&D BEO contains a list of hardcore restrictions. Hardcore restrictions are serious restrictions of competition that will in general cause

¹⁸³ Article 8(8) of the R&D BEO.

¹⁸⁴ Article 11(2) of the R&D BEO.

¹⁸⁵ Article 11(1) of the R&D BEO.

harm to the market and to consumers. Where an R&D agreement includes one or more of these restrictions, the entire agreement is excluded from the exemption provided by R&D BEO.¹⁸⁶

- 4.87 The hardcore restrictions listed in Article 10 of the R&D BEO are generally restrictions of competition by object which fall within the Chapter I prohibition.¹⁸⁷ 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.¹⁸⁸ In that regard, certain 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.¹⁸⁹
- 4.88 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.¹⁹⁰ 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.
- 4.89 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.¹⁹¹
 - (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

¹⁸⁶ Article 11(1) of the R&D BEO.

¹⁸⁷ See European Commission Guidance (2014) on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD 198, which is a statement of the European Commission for the purpose of section 60A CA98.

¹⁸⁸ Judgment of 4 June 2009, *T-Mobile Netherlands*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.

¹⁸⁹ Judgment of 11 September 2014, *Groupement des Cartes Bancaires*, C-67/13 P, EU:C:2014:2204, paragraph 49.

¹⁹⁰ 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)'.

¹⁹¹ Hardcore restrictions do not necessarily fall within the scope of the Chapter I prohibition.

conditions of the Section 9 exemption.

- 4.90 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 assessment of whether the conditions of the Section 9 exemption are fulfilled (see further paragraphs 3.47 to 3.54)

Summary of hardcore restrictions

- 4.91 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 research and development efforts,
- (b) limitations of output or sales and the fixing of prices,
- (c) active and passive sales restrictions; and
- (d) other hardcore restrictions.

- 4.92 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 research and development efforts

- 4.93 Article 10(1)(a) of the R&D BEO provides that it is a hardcore restriction to restrict the parties' freedom to carry out research and development independently or in cooperation with third parties, in either of the following:

- (a) a field unconnected with that to which the R&D agreement relates, or
- (b) the field to which the R&D agreement relates or in a connected field after the completion of the joint or paid-for research and development.

Limitations of output or sales and price-fixing

- 4.94 Article 10(1)(b) of the R&D BEO provides that limitations of output or sales are hardcore restrictions. However, this is subject to four exceptions: (i) the setting of production targets where the R&D agreement provides for the joint exploitation of the results and the joint exploitation includes the joint production of the contract products;¹⁹² (ii) the setting of sales targets 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;¹⁹³ (iii) practices constituting specialisation relating to exploitation, such as restrictions imposed upon the parties regarding the exploitation of the results in relation to particular geographical areas, customers or fields of use;¹⁹⁴ or (iv) certain non-compete obligations, namely the restriction of the freedom of the parties to produce, sell, assign or license products or technologies which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results.¹⁹⁵
- 4.95 Article 10(1)(c) of the R&D BEO provides that 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 R&D BEO provides exceptions to this hardcore restriction for the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the R&D agreement provides for the joint exploitation of the results and the joint exploitation 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.¹⁹⁶

Active and passive sales restrictions

- 4.96 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).¹⁹⁷ Article 10(1)(d) and (e) of the R&D

¹⁹² Article 10(2)(a) of the R&D BEO.

¹⁹³ Article 10(2)(b) of the R&D BEO.

¹⁹⁴ Article 10(2)(c) of the R&D BEO. For the definition of specialisation relating to exploitation, see Article 2(1) of the R&D BEO and paragraphs 4.18 to 4.24 of this Guidance.

¹⁹⁵ Article 10(2)(d) of the R&D BEO.

¹⁹⁶ Article 10(3) of the R&D BEO.

¹⁹⁷ The VABEO Guidance, paragraph 8.34.

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.¹⁹⁸

4.97 Active sales are defined in Article 10(5) of the R&D BEO.¹⁹⁹

4.98 Article 10(1)(d) of the R&D BEO provides that passive sales restrictions are hardcore restrictions. This covers any restriction as regards (a) the geographical area in which or (b) the customers to whom the parties may passively sell the contract products or license the contract technologies, however it provides an exception for the requirement to exclusively license the results to another party to the R&D agreement.²⁰⁰ The reason for that latter exception is that the R&D BEO provides for the possibility for the parties to specialise relating to exploitation, which 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.²⁰¹

4.99 Article 10(1)(e) of the R&D BEO provides that certain active sales restrictions are hardcore 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 particular geographical areas or to customers which have not

¹⁹⁸ “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(**198**) or the Utilities Contracts Regulations 2016.

¹⁹⁹ “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.

²⁰⁰ Article 10(4) of the R&D BEO.

²⁰¹ As per the definition of ‘specialisation relating to exploitation’ set out in Article 2(1) of the R&D BEO.

been exclusively allocated by the parties to one of the parties by way of specialisation relating to exploitation.

Other hardcore restrictions

4.100 It is a hardcore restriction to require a party to the R&D agreement to refuse to meet demand for a contract product from customers in a geographical area allocated to another party to the agreement, or from customers otherwise allocated to one or more of the parties to the agreement, if such customers would market the contract products in another geographical area within the UK.²⁰²

4.101 The imposition of a requirement on a party to an R&D agreement to make it difficult for users or resellers to obtain the contract products from other resellers within the UK is also a hardcore restriction.²⁰³

Excluded restrictions

4.102 This part considers the condition of the R&D BEO that an R&D agreement must not contain any excluded restrictions.²⁰⁴ 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

4.103 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.²⁰⁵

4.104 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

²⁰² Article 10(1)(f) of the R&D BEO.

²⁰³ Article 10(1)(g) of the R&D BEO.

²⁰⁴ Article 12 of the R&D BEO.

²⁰⁵ 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).

individual assessment under the Chapter I prohibition on a case-by-case basis.

Summary of excluded restrictions and exceptions

- 4.105 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 UK:
- (a) after completion of the research and development, intellectual property rights which are relevant to the research and development; or
 - (b) after the expiry of the R&D agreement, intellectual property rights which protect the results of the research and development to which the agreement relates.²⁰⁶
- 4.106 The reason for excluding such obligations from the block exemption is that parties have information that is relevant for the identification of intellectual property rights that have been granted in error should not be prevented from challenging the validity of such intellectual property rights. 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 to the research and development to which the R&D agreement relates or that protect the results of that research and development are not excluded restrictions.²⁰⁷
- 4.107 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 an R&D agreement provides for the exploitation of the results of the joint R&D or paid-for R&D by at least one of the parties to the agreement and such exploitation takes place in the UK.²⁰⁸

²⁰⁶ Article 12(2)(a) and (b) of the R&D BEO.

²⁰⁷ Article 12(3) of the R&D BEO.

²⁰⁸ Article 12(5) of the R&D BEO sets out further detail, namely that: For the purposes of Article 12(4), the exploitation takes place in the UK if it involves—

- (a) distribution of the contract product to customers (including third party distributors) in the UK,
- (b) production of the contract product or the application of the contract technology within the UK; 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 UK.

Obligation to provide information to the CMA

- 4.108 Article 14(1) of the R&D BEO requires any person²⁰⁹ 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 to require parties to provide information, for example, if a complaint is made about the agreement.
- 4.109 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.
- 4.110 If the request is not complied with without reasonable excuse, the CMA has the power to cancel the block exemption for any R&D 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.
- 4.111 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.
- 4.112 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 of the CMA's investigation procedures in Competition Act 1998 cases,²¹⁰ to which the CMA will have regard when exercising the power in Article 14(1) of the R&D BEO.

Cancellation of the R&D BEO

- 4.113 Not complying with the conditions imposed by Articles 5, 6, 7, 8(2), 8(5), 8(7), 8(8)²¹¹ or 10 of the R&D BEO will have the effect of cancelling the block

²⁰⁹ Under section 59(1) (interpretation) CA98, 'person', in addition to the meaning given by the Interpretation Act 1978, includes any undertaking.

²¹⁰ CMA8: Guidance on the CMA's investigation procedures in Competition Act 1998 cases.

²¹¹ 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).

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 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), 8(5), 8(7), 8(8) or 10

4.114 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

4.115 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 block exemption order is only available for those agreements that satisfy the conditions for Section 9 exemption.

4.116 The R&D BEO sets out two situations in which the CMA may cancel the block exemption in relation to a particular R&D agreement:

- (a) if the CMA considers that a particular R&D agreement is not one which is exempt from the Chapter I prohibition as a result of Section 9 CA98 (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.

4.117 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.²¹² This notice should state the facts

²¹² 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

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.

4.118 A cancellation decision can only have 'ex nunc' effect, which means that the agreements will benefit from the exemption until the date at which the cancellation becomes effective.

Duration of the R&D BEO

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

4.120 A transitional provision also ensures that the Chapter I prohibition does not apply for two 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).

4.121 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 2024.²¹³ Before this time the provisions relating to not competing undertakings would apply.

4.122 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 on the conclusions of the review.²¹⁴ 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.

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.

²¹³ Article 17(1) of the R&D BEO. An R&D agreement falling within Article 3(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).

²¹⁴ 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.

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

Individual assessment under the Chapter I prohibition

4.124 Where an R&D agreement does not benefit from the exemption provided by the R&D BEO, it is necessary to carry out an individual assessment under the Chapter I prohibition (see also paragraph 4.13). The first step in the assessment is to determine whether the agreement restricts competition within the meaning of the Chapter I prohibition.²¹⁵ If the agreement restricts competition within the meaning of that provision, the second step is to determine whether the agreement fulfils the conditions of the Section 9 exemption.

Relevant markets

4.125 When carrying out an individual assessment under the Chapter I prohibition of R&D agreements that do not benefit from the exemption provided by the R&D BEO,²¹⁶ the considerations set out below may be relevant to an assessment of the relevant markets. The CMA's Guidance on Market Definition sets out the main criteria and evidence to which the CMA has regard when considering market definition issues when it enforces UK competition law (see also paragraph 3.63).²¹⁷

Product markets

4.126 If the R&D cooperation agreement relates to the development of products that will improve or substitute existing products, the market(s) for those existing products or technologies are relevant for the assessment under the Chapter I prohibition.

4.127 Existing product markets may also be relevant for the assessment where the R&D agreement relates to products that will replace existing products (namely

²¹⁵ If that is not the case, the Chapter I prohibition does not apply and no further assessment is required.

²¹⁶ The R&D BEO contains specific definitions that are relevant for the application of the market share threshold in the R&D BEO. See paragraphs 4.55 to 4.62

²¹⁷ OFT 403, Market Definition. The CMA will also have regard to the European Commission (1997) Notice on the definition of relevant market, OJ C 372, which is a statement of the European Commission for the purpose of section 60A CA98. Any future guidance relating to market definition for the purposes of UK competition law, as applicable, will also be taken into account.

where the product resulting from the R&D satisfies the same demand as the existing product, but belongs to a separate relevant market). This may in particular be the case where the replacement of the existing products is imperfect or long-term. So-called pipeline products²¹⁸ may, depending on the facts of the particular case, be considered as products that will improve or substitute existing products or as products that will replace existing products.²¹⁹

- 4.128 Where the R&D concerns an important component of a final product, both the market for the component and the market for the final product may be relevant for the assessment of the Chapter I prohibition. However, the market for the final product will only be relevant if the component to which the R&D relates is technically or economically a key component of the final product and at least one of the parties to the R&D agreement is active on the market for the final products and has market power on that market.

Technology markets

- 4.129 R&D agreements may concern not only products but also technology. Where intellectual property rights are marketed separately from the products to which they relate, technology markets will be relevant for the assessment under the Chapter I prohibition. The relevant technology market consists of the technology (intellectual property) that is sold or licensed and technologies that are regarded as substitutable by licensees.²²⁰
- 4.130 Where a R&D agreement concerns the development of technologies that will improve, substitute or replace existing technologies, the markets for those existing technologies are relevant markets for the assessment of the Chapter I prohibition.

Early innovation efforts

- 4.131 In some cases, undertakings may cooperate on R&D that is not closely related to a specific existing product or technology. For instance, the early innovation efforts may concern products or technologies which create new markets, or they may represent an R&D cluster. The results of such early

²¹⁸ This term is used in certain sectors to refer to products that have not yet been put on the market but for which there is sufficient visibility in relation to the research and development process to establish to which market the products will likely belong, if the research and development process is successful.

²¹⁹ Some research and development agreements concern the development of products that will not improve, substitute or replace existing products, but will satisfy an entirely new demand. Pipeline products may also fall into that category of products.

²²⁰ Technology Transfer Guidelines, paragraphs 19 to 26.

innovation efforts may ultimately serve multiple purposes and, in the longer term, feed into various products or technologies.

- 4.132 Where a R&D agreement concerns early innovation efforts, in order to assess the competitive position of the parties for the purpose of applying the Chapter I prohibition, it may be necessary to take into account factors such as the nature and scope of the innovation efforts, the objectives of the various lines of research, the specialisation of the different teams involved or the results of the past innovation efforts of the undertakings concerned. This may require the use of specific metrics, for example, the level of R&D expenditure, or the number of patents or patent citations.

Main competition concerns

- 4.133 R&D cooperation can give rise to various competition concerns, in particular it can directly limit competition between the parties. It can also lead to anti-competitive foreclosure of third parties or to a collusive outcome on the market.
- 4.134 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 products or technologies. It may also lead to reduced or delayed innovation and thereby to worse quality or fewer products or technologies reaching the market.
- 4.135 R&D agreements can lead to the **anti-competitive foreclosure of third parties** where one or more parties to the agreement has market power in relevant product or technology markets and the agreement contains exclusivity or non-compete provisions.

R&D agreements that generally do not restrict competition

- 4.136 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 research and development agreement.
- 4.137 In the absence of market power, research and development agreements entered into by non-competitors generally do not restrict competition. This may be the case where the parties' assets, technologies or skills are complementary and they would not be capable of carrying out the R&D on their own within a short period of time.
- 4.138 If, on the basis of objective factors, the parties would not, in the particular legal and economic context, be able to carry out the necessary research and development **independently**, the R&D agreement would generally not have

restrictive effects on competition (unless the businesses could have carried out the initiative using a form of cooperation that is less restrictive of 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 R&D effort/resulting products coming to market, so the R&D cooperation does not change the number of such efforts/products.

- 4.139 The outsourcing of previously captive R&D to entities that are not active in the exploitation of R&D results, such as research institutes, academic bodies or other specialised undertakings, is an example of a R&D agreement that may bring together complementary assets, technologies and skills. Such agreements generally provide for a transfer of know-how and/or an exclusive obligation concerning the research and development results.
- 4.140 R&D cooperation relating to basic research generally does not restrict competition. In this context, basic research means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts.

Restrictions of competition by object

- 4.141 R&D agreements may restrict competition by object if their main purpose is not the pursuit of 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 the parties engaging in price fixing, output limitation, market allocation or restrictions of technical development.
- 4.142 For example, the parties may use a R&D agreement 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 improvement of a jointly developed product or technology.

Restrictive effects on competition

- 4.143 In order to assess whether an R&D cooperation agreement has the effect of restricting competition, it is necessary to take into account the relevant parameters of competition in the particular case. Those parameters may include the product's price, but also its level of innovation, its quality in various aspects, as well as its availability, including in terms of lead time, resilience of supply chains, reliability of supply and transport costs.
- 4.144 R&D agreements which do not include the joint exploitation of the results of the R&D by means of licensing, production or marketing generally do not

give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. Such agreements are only likely to give rise to anti-competitive effects, where they give rise to an appreciable restriction of competition in innovation.

Market power

4.145 R&D agreements are typically only capable of giving rise to restrictive effects on competition within the meaning of the Chapter I prohibition where one or more of the parties to the agreement has market power on a relevant existing product of technology market or where the agreement leads to an appreciable reduction in competition in innovation. The CMA's Guidance on Market Power provides guidance on how the CMA will assess whether undertakings possess market power.²²¹ That guidance will not be further explained here and should be taken into account in assessing market power.

4.146 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, the stronger the combined position of the parties on the relevant markets, including their position in relation to innovation, the more likely it is that the R&D agreement will lead to restrictive effects on competition.²²²

R&D relating to existing products or technologies

4.147 If the R&D is directed at the **improvement or substitution** of an existing product or technology, 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 if third party competitors are not capable of constraining the behaviour of the parties, for example, due to their limited number or due to inferior resources or skills. Furthermore, if the R&D concerns a relatively minor input of a final product, any effects on competition in the relevant market(s) for that final product are likely to be limited.

²²¹ OFT 415, Assessment of Market Power.

²²² 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 paragraphs 4.159 to 4.161).

- 4.148 If the R&D is directed at the **replacement** of an existing product or technology, possible anti-competitive effects include, for example, delaying the development of the replacing product or technology. This may occur, in particular, where the parties have market power on the existing product or technology market and they are also the only undertakings engaged in R&D relating to a replacement for that existing product or technology. A similar effect can occur if a major player in an existing market cooperates with a smaller or a potential competitor who is just about to emerge with a product or technology that may jeopardise the incumbent's position.
- 4.149 R&D agreements which provide for joint exploitation of the results (for example joint production or distribution) have greater potential to restrict competition than agreements that provide for each party to exploit the results independently. In the case of joint exploitation, restrictive effects in the form of increased prices or reduced output in existing markets are more likely where one or more of the parties has market power. If, however, the joint exploitation is carried out solely by means of licensing to third parties, restrictive effects such as foreclosure are less likely.

R&D clusters and innovation relating to entirely new products and technologies creating a new market

- 4.150 R&D efforts which concern the R&D 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.
- 4.151 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.
- 4.152 R&D clusters are R&D efforts directed primarily towards a specific aim or objective. The specific aim or objective of a research and development cluster cannot be defined as a product or a technology or involves a substantially broader target than products or technologies on a specific market.
- 4.153 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 R&D) 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 R&D) 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 markets²²³ 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.

- 4.154 Effects on price and output on existing markets are generally unlikely for R&D agreements that are focused on innovation.
- 4.155 In such cases, the assessment will focus on possible restrictions of competition at the innovation stage concerning, for instance, the quality and variety of possible future products or technologies or the speed or level of innovation. The assessment must take into account that the outcome of R&D is by its very nature uncertain and that outcomes will, in general, be less certain for early innovation efforts than for R&D efforts that are close to market launch of products or technologies resulting from the R&D agreement.
- 4.156 Restrictive effects are generally unlikely to arise if a sufficient number of third parties have competing R&D projects. However, negative effects are more likely where the R&D agreement brings together independent R&D efforts that are at a stage that is close to launch of the new product or technology. Restrictive effects may result directly from the coordination of the parties' R&D efforts, irrespective of whether the R&D agreement contains restrictions on the parties' ability to carry out R&D independently or with third parties. For example, the R&D agreement may lead one or more of the parties to abandon its R&D project and pool its capabilities with those of the other parties.

Exchanges of information

- 4.157 The implementation of a R&D agreement may require the exchange of competitively sensitive information. Where the R&D agreement itself does not fall within the Chapter I prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either. This is the case if the information exchange is objectively necessary to implement the R&D agreement and is proportionate to its objectives.

²²³ 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 involve years of investment without any guarantee of future success.

4.158 Where the information exchange goes beyond what is objectively necessary to implement the R&D agreement or is not proportionate to the objectives to that agreement, it should be assessed using the guidance provided in Part 8. If the information exchange falls within the Chapter I prohibition, it may still fulfil the conditions of the Section 9 exemption.

Individual assessment under the Section 9 exemption

4.159 Where a R&D agreement restricts competition within the meaning of the Chapter I prohibition, it will nonetheless comply with the Chapter I prohibition if it fulfils the conditions of the Section 9 exemption.²²⁴

Efficiencies

4.160 R&D agreements – with or without joint exploitation of possible results – often generate efficiencies by: combining complementary skills and assets of the parties, thus resulting in a more rapid development and marketing of improved or new products and technologies than without the cooperation; leading to a wider dissemination of knowledge, which may trigger further innovation; giving rise to cost reductions or reducing dependencies in the case of products or technologies for which there are a limited number of suppliers. Such efficiencies can contribute to a resilient internal market in the UK.

4.161 Only objective efficiencies may be taken into account for the purpose of applying the Section 9 exemption.²²⁵ For example, a R&D agreement may result in one or more of the parties abandoning all or part of its R&D. This may reduce (fixed) costs for the parties concerned but is unlikely to lead to benefits for consumers, unless the parties can show that the reduction in the number of R&D efforts is likely to be outweighed by products reaching the market more quickly or a higher likelihood that the R&D will be successful.

Indispensability

4.162 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a 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 BEO²²⁶ are unlikely to meet the indispensability criterion in an individual assessment.

²²⁴ See also paragraphs 2.9 to 2.12, and paragraphs 3.47 to 3.54

²²⁵ See paragraph 49 of the European Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, paragraph 49, to which the CMA will have regard in accordance with section 60A CA98.

²²⁶ See also paragraphs 4.83 to 4.101 of this Guidance on hardcore restrictions.

- 4.163 However, there may be limited circumstances in which such restrictions may nonetheless fulfil the conditions of the Section 9 exemption.
- 4.164 Restrictions that do not meet the conditions of the R&D BEO may also fulfil the conditions of the Section 9 exemption in certain circumstances. 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 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 R&D.

Pass-on to consumers

- 4.165 Efficiencies achieved by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the R&D agreement. For example, the introduction of new or improved products on the market must outweigh any price increase or other restrictive effects on competition.
- 4.166 In general, it is more likely that a R&D agreement will bring about efficiencies that will allow consumers a fair share of the resulting benefit where the parties combine complementary skills and assets, such as research capabilities developed in different sectors or different fields of research.
- 4.167 The greater 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

- 4.168 The conditions of the Section 9 exemption cannot be met if the R&D agreement affords the parties the possibility of eliminating competition in respect of a substantial part of the products or technologies in question.

Relevant time for the assessment

- 4.169 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.
- 4.170 The exception provided by 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 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* investments. 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. Where the investment results in an invention and the parties obtain exclusive rights under that invention under intellectual property rules, the recoupment period for the investment is generally unlikely to exceed the period of exclusivity granted by those rules.

- 4.171 In some cases, the effects of a restrictive agreement may be irreversible. Once the 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.
- 4.172 For instance, in the case of a R&D agreement concerning an entirely new product that does not improve, substitute or replace an existing product, under the terms of which each party agrees to abandon its own research project and pool its capabilities with those of the other part(ies), it may be technically and economically impossible to revive the abandoned projects. If the agreement does not breach the Chapter I prohibition at the time when it is concluded, for instance because a sufficient number of third parties have competing R&D projects, 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.
- 4.173 However, the Chapter I prohibition may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. For example, if in addition to joint R&D, the agreement provides for joint exploitation, the Chapter I prohibition may apply to those provisions 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

Example of R&D agreements between undertakings competing in innovation

Example 1

Situation: Companies A and B have each made significant investments in R&D to develop a new miniaturised electronic component. It is expected that the new component will neither improve nor replace existing components but will instead

create an entirely new demand, if successful. Companies A and B have each developed prototypes and expect to be able to bring these to market in approximately 18 months. Moreover, Companies A and B expect that only the first component to reach the market will be a blockbuster in terms of revenues and the second company to bring its product on the market will not be able to recuperate the considerable research and development investments made, while if both companies start selling the product on the market simultaneously, Companies A and B expect to be able to make a considerable profit. They thus agree to combine their R&D efforts in a joint venture which will develop the prototype of Company A and will then produce the new component and supply it to both companies, which will commercialise it independently. As a result of the joint venture agreement, Company B will abandon the development of its own prototype. By pooling their R&D efforts the parties expect to be able to bring the new component to market in less than one year.

There are no other companies that are developing a substitutable component, or that are able independently to engage in R&D efforts to develop a substitutable component.

Analysis

Individual assessment under the Chapter I prohibition: The miniaturised electronic component to which the R&D agreement relates would create an entirely new demand. It would not improve, substitute or replace an existing product. The R&D agreement would result in Company B abandoning the development of its prototype component, which it would otherwise have been likely to bring to market in approximately 18 months. At the time when Companies A and B enter into the R&D agreement, they are the only undertakings engaged in R&D in relation to the miniaturised electronic component, and no other undertaking is developing a substitutable component. Moreover, the companies are at a late stage of the R&D process (they expect to bring the component to market in approximately 18 months) and through the agreement both companies could avoid a race to be the first one to reach the market, reducing the risk of not being able to recoup all or part of the investment they have already made. Therefore, the R&D agreement appears likely to restrict innovation competition in the UK within the meaning of the Chapter I prohibition. This conclusion is not altered by the fact that each party will commercialise the new component independently.

Applicability of the R&D BEO: 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. Companies A and B are competitors at the innovation level. 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 research and development 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 conditions of the Section 9 exemption.

Individual assessment under the Section 9 exemption: The joint venture will enable the parties to bring the new component to market more quickly, which is an objective efficiency. However, this time saving is unlikely to outweigh the reduction in innovation competition and product variety resulting from the abandonment of Company B's prototype, given that it is likely that B's product would otherwise have been brought to the market before, or at the very latest, within a short period after A's product and the parties do not face any other competitive constraint at innovation level. Therefore, it appears that the R&D agreement does not fulfil at least one of the four cumulative conditions of the Section 9 exemption, namely the fair share for consumers. Therefore, the R&D agreement is unlikely to be exempted under the Section 9 exemption, and the agreement is likely to be prohibited on the grounds that it infringes the Chapter I prohibition.

Example of R&D agreements involving academic bodies/ research institutes

Example 2

Situation: Company A is a major producer of agricultural pesticides. It is active on an upstream market for pesticide ingredients and on a downstream market for pesticides with its pesticide Y. Ingredient X is a key input for the production of pesticide Y. Company A plans to finance a research project aimed at improving ingredient X, so that customers who use pesticide Y will be able to achieve the same crop yields using smaller quantities of pesticide. For this purpose, Company A enters into an R&D agreement with University B, which has significant R&D capabilities in pesticide ingredients. University B does not produce or sell pesticides or pesticide ingredients.

The R&D agreement provides that Company A will finance, but will not carry out, the R&D activities, which will be conducted by University B. The R&D agreement does not allow University B to exploit the R&D results. The R&D agreement reserves the right to exploit the results of the paid-for R&D exclusively to Company A. University B only has the right to use the results of the R&D for the purposes of further R&D.

Analysis

Applicability of the R&D BEO: Company A and University B are not competing undertakings within the meaning of the R&D BEO. Pursuant to Article 8(6) of the R&D BEO, no market share threshold needs to be met.

Article 5 of the R&D BEO imposes as a general condition for block exemption that all parties to the R&D agreement must have full access to the results of the paid-for R&D for the purposes of conducting further R&D and for exploitation. The R&D agreement does not fulfil this condition. However, the R&D agreement falls within the

special exception provided by Article 5(3) of the R&D BEO, according to which R&D agreements which restrict academic bodies' use of R&D results to further R&D only (that is, the agreement excludes exploitation of the results) can benefit from the block exemption.

Therefore, provided the other conditions of the R&D BEO are fulfilled, the R&D agreement between Company A and University B benefits from the block exemption and no further assessment is required.

Example of R&D cooperation and improved products

Example 3

Situation: Two engineering companies that produce vehicle components agree to set up a joint venture to combine their existing R&D efforts aimed at improving the performance of an existing component. The companies expect that combining their research and development efforts will accelerate the development of the improved product. The joint venture agreement provides that each company will continue to manufacture and sell the (existing and improved) components independently. On the market for the supply of the existing component, the two companies have market shares of 15 % and 20 % respectively. There are three other significant competing component manufacturers. The product life cycle of the component is typically three to five years. In each of the last three years one of the major component manufacturers has introduced a new version or upgrade.

Analysis

Applicability of the R&D BEO: Under the R&D BEO, the 'relevant product market' is the market for the products capable of being improved, substituted or replaced by the contract product. In the present case, this is the market for the vehicle component that the research and development aims at improving. The parties have a combined share of 35% on the relevant product market. As this exceeds the 25% market share threshold in the R&D BEO, the joint venture cannot benefit from the block exemption.

Individual assessment under the Chapter I prohibition: By combining the parties' previously independent research and development efforts, the joint venture leads to a reduction in the number of research and development efforts relating to the improvement of the component. Whether this creates an appreciable restriction of competition in the relevant product market or an appreciable restriction of dynamic competition requires a full assessment of the legal and economic context. For this purpose, relevant factors include the presence of three other significant manufacturers in the relevant product market; the record of those manufacturers in terms of innovation; the relatively short life cycle of the component, and the fact that the parties will continue to produce and sell the existing and improved components

independently. On balance, it appears unlikely that the joint venture will lead to an appreciable restriction of competition.

Individual assessment under the Section 9 exemption: An assessment under the Section 9 exemption is only necessary if the joint venture is considered to restrict competition appreciably within the meaning of the Chapter I prohibition. Accelerating the development of an improved version of the component is an objective efficiency. Although the parties have a significant combined market share on the relevant components market, the presence of other significant competitors with a good record of innovation, the short life cycle of the component and the fact that the parties will continue to manufacture and sell the component independently make it likely that the efficiency will be passed on to consumers and make it unlikely that the joint venture will eliminate competition in the relevant components market or eliminate relevant dynamic competition. The parties' claim that combining their R&D efforts is indispensable to accelerate the development of the improved component appears plausible. The R&D joint venture is therefore likely to fulfil the conditions of the Section 9 exemption.

Example of research partnerships

Example 4

Situation: Companies A, B and C are leading players in renewable energy technologies. They set up a research partnership, which defines an R&D agenda setting a common long-term vision for the development of new renewable energy technologies and the improvement of existing ones. This agenda will be implemented via a number of separate subsequent R&D projects covering individual joint and paid-for R&D.

This will be formalised in a memorandum of understanding (MoU), which will establish a framework for the parties' cooperation, including objectives, terms and conditions, governance rules and monitoring arrangements. The MoU notably provides a compensation mechanism for cases in which one party wishes to exploit the results of R&D carried out by the other parties.

Analysis

Applicability of the R&D BEO: As the MoU does not relate to specific R&D projects (it merely establishes general terms and conditions for the implementation of R&D projects that will be the subject of separate, subsequent agreements), the MoU does not in itself constitute an R&D agreement within the meaning of the R&D BEO. The block exemption is therefore not applicable.

Individual assessment under the Chapter I prohibition: The parties to the MoU are all active in the field of renewable energy technologies but the MoU is a high-level framework agreement which does not relate to the specific R&D projects. It is therefore not possible to determine whether the parties are actual or potential

competitors for the purposes of that agreement. It will only be possible to assess their competitive relationship when they enter into the subsequent implementing R&D agreements. The MoU therefore does not restrict competition within the meaning of the Chapter I prohibition.

5. Production Agreements

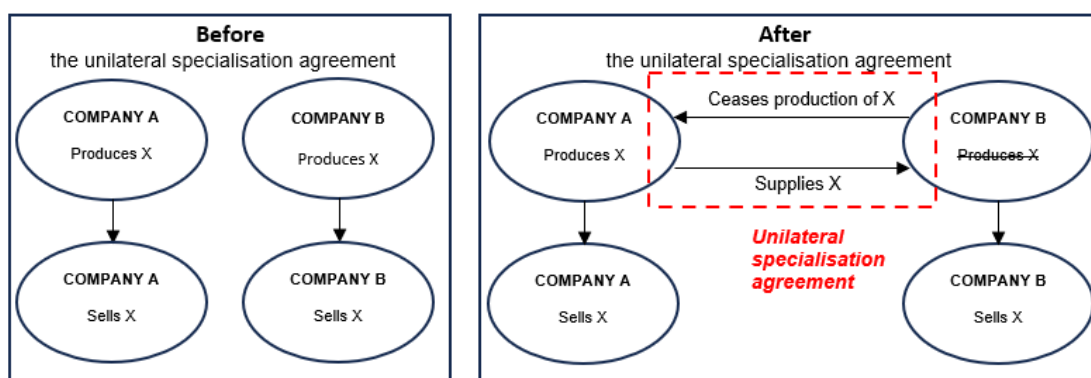
Introduction

- 5.1 The purpose of this Part is to provide guidance on the competitive assessment of horizontal production agreements under the Chapter I prohibition. Such agreements may benefit from the block exemption provided by the SABEO (see paragraph 5.20 onwards). Horizontal production agreements that fall outside the scope of the SABEO, may nonetheless be exempt from the Chapter I prohibition if they fulfil the conditions of the Section 9 exemption (paragraph 5.124 onwards).
- 5.2 This Part also provides guidance on mobile telecommunications infrastructure sharing agreements, a particular type of production agreement (paragraph 5.137 onwards).
- 5.3 Production agreements vary in form and scope:
- (a) they may provide that production is carried out jointly, for example by way of a joint team, or a joint organisation; or
 - (b) they may provide that production is carried out by only one party or by two or more parties, by way of looser forms of cooperation, such as subcontracting agreements.
- 5.4 This Guidance applies to all forms of joint production agreements and horizontal subcontracting agreements.²²⁷
- 5.5 **Joint production agreements** are agreements 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, under which the parties agree to produce certain products jointly. Joint production may take various forms, for example (i) a joint venture, that is to say, a jointly controlled company operating one or more production facilities,²²⁸ or (ii) a joint team or joint organisation composed of an equal or unequal number of representatives of the parties.

²²⁷ 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.

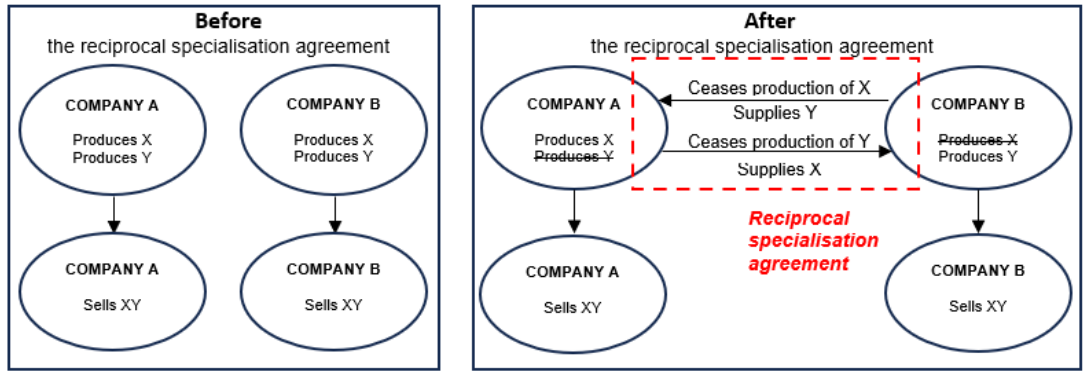
²²⁸ This Guidance does not cover agreements that fall outside the scope of the Chapter I prohibition such as agreements to the extent they result in a merger or joint venture within the merger provisions of the Enterprise Act 2002.

- 5.6 Joint production agreements may benefit from the exemption provided by the SABEO, provided the agreement meets the definition in Article 3(2) of the SABEO and the other conditions for exemption.
- 5.7 In the context of this Part of the Guidance, 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.²²⁹ In this Part of the Guidance, horizontal subcontracting agreements mean subcontracting agreements between undertakings operating on the same product market but not necessarily on the same geographical market, hence irrespective of whether they are competitors. Horizontal subcontracting agreements include unilateral and reciprocal specialisation agreements as well as other horizontal subcontracting agreements.
- 5.8 **Unilateral specialisation agreements** 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 production of a product and purchases it from the other party or parties to the agreement.
- 5.9 Example of a unilateral specialisation agreement:



- 5.10 **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.
- 5.11 Example of a reciprocal specialisation agreement:

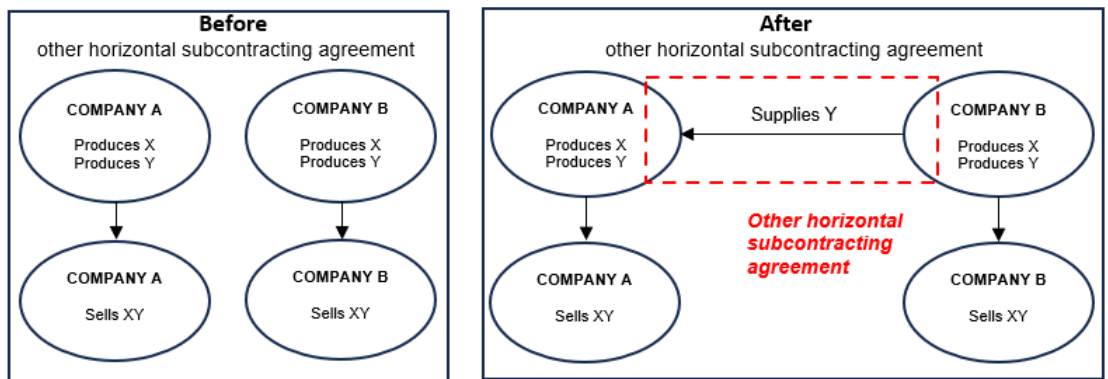
²²⁹ See the definition of products at paragraph 3.1 of this Guidance. In relation to the application of the SABEO, please refer to Article 2 of the SABEO for the definition of ‘product’.



5.12 Both unilateral and reciprocal specialisation agreements may benefit from the exemption provided by the SABEO, provided that the agreements meet the definitions in Article 3(2) of the SABEO and the other conditions for exemption. These forms of agreement are described in more detail at paragraphs 5.25 to 5.27 of this Guidance.

5.13 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.

5.14 Example of a subcontracting agreement aimed at expanding production:



5.15 Undertakings that intend to enter into horizontal production agreements may first wish to consider whether their agreement can benefit from the SABEO. The exemption provided by the SABEO is based on the presumption that to the extent that a production agreement falls within the scope of the Chapter I prohibition and fulfils the conditions set out in the SABEO, it will generally fulfil the conditions of the Section 9 exemption. Where a horizontal production

agreement fulfils the conditions of the SABEO, it is compatible with Chapter I of the CA98 and no further assessment is necessary.²³⁰

- 5.16 Where a production agreement is not covered by the SABEO or does not fulfil the conditions of that block exemption order, it is necessary to carry out an individual assessment under Chapter I in order to determine, first, whether the agreement restricts competition within the meaning of the CA98 and, if so, whether the agreement fulfils all of the four conditions set out in Section 9 of the CA98.
- 5.17 This Part is structured as follows:
- (a) Paragraphs 5.18 to 5.19 provide guidance on the identification of markets that are relevant for the assessment of production agreements;
 - (b) Paragraphs 4.20 to 5.88 provide guidance on the application of the SABEO, including the conditions for exempting specialisation agreements, the market share threshold and the hardcore restrictions;
 - (c) Paragraphs 5.89 to 5.123 provide guidance for the individual assessment of production agreements under the Chapter I prohibition;
 - (d) Paragraphs 5.124 to 5.136 provide guidance for the individual assessment of production agreements under the Section 9 exemption;
 - (e) Paragraphs 5.137 to 5.150 provide specific guidance for the assessment of mobile telecommunications infrastructure sharing agreements under Chapter I of the CA98.

Relevant markets

- 5.18 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.²³¹ 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.

²³⁰ Unless and until the benefit of the block exemption is cancelled in an individual case (see paragraphs 5.78 to 5.84).

²³¹ OFT 403, Market Definition. The CMA will also have regard to the European Commission (1997) Notice on the definition of relevant market, OJ C 372, which is a statement of the European Commission for the purpose of section 60A CA98.

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

Agreements covered by the SABEO

- 5.20 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'.²³²
- 5.21 The benefit of the SABEO exemption 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.
- 5.22 Undertakings that intend to enter into a production agreement may first wish to consider whether their agreement can benefit from the SABEO.

Specialisation agreements

- 5.23 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.
- 5.24 The SABEO uses the term 'specialisation agreement' to refer to these three types of horizontal production agreements. In each case, the agreement may relate to the manufacture of goods and/or the preparation of services.

Unilateral specialisation agreements

- 5.25 '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

²³² As defined in Article 2 of the SABEO.

- (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.

Reciprocal specialisation agreements

5.26 '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.

5.27 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

5.28 '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

5.29 The definition of 'joint production agreement' does not require the parties to be already active on the same product market. The SABEO can apply to joint production agreements entered into by two or more parties which are already active on the same product market or which wish to enter a product market by

way of the agreement concerned. The concept of a joint production agreement does not require that a party or parties ceases or refrains from producing any products.

The term 'joint' is not defined in the context of production. Therefore, provided that the joint production agreement fulfils the other criteria of the SABEO, joint production may take any form.

Other provisions in specialisation agreements

5.30 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)

5.31 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

5.32 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.²³³ 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.

²³³ Please see the definitions of 'unilateral specialisation agreement' and 'reciprocal specialisation agreement' in Articles 3(2)(a) and (3)(2)(b) of the SABEO.

- 5.33 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.
- 5.34 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 specialisation products to third parties who are not competing undertakings (as defined in Article 2(1) of the SABEO).
- 5.35 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.
- 5.36 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 law²³⁴ are met (see paragraph 3.46).

Joint distribution under the SABEO

- 5.37 Specialisation agreements that include provisions for the joint distribution of the specialisation products may also benefit from the exemption under the SABEO.
- 5.38 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.
- 5.39 Joint distribution²³⁵ can be part of a specialisation agreement and can benefit from the exemption of the SABEO if the distribution is:

²³⁴ Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

²³⁵ 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.’

- (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.

Services under the SABEO

- 5.40 Specialisation agreements benefiting from the exemption of the SABEO may also concern the preparation of services.²³⁶
- 5.41 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 or operation of a platform through which a service will be provided could be considered an agreement concerning the preparation of services.
- 5.42 However, the provision of services (as opposed to their preparation) is outside the scope of the SABEO, except in the context of joint distribution in which the parties provide the services prepared under the specialisation agreement.

Subcontracting under the SABEO

- 5.43 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.²³⁷

Competing undertakings: actual or potential competitors

- 5.44 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
 - (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

²³⁶ Please refer to the definitions of 'product', 'production' and 'preparation of services' in Article 2(1) of the SABEO.

²³⁷ 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'.

additional investments or other necessary costs to enter a relevant market.

- 5.45 Potential competition has to be assessed on realistic grounds. The decisive question is whether each party independently has the means necessary to do so (as regards assets, know-how and other resources).
- 5.46 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; where it 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. This could be evidenced by internal information such as board minutes as well as publicly available information such as press releases.
- 5.47 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.²³⁸ 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

- 5.48 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. The market share threshold applies throughout the duration of the specialisation agreement.
- 5.49 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 5.61 of this Guidance.

²³⁸ For the approach generally to assessing potential competition, see paragraphs 3.19 to 3.26 of this Guidance.

Market share threshold

- 5.50 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.
- 5.51 '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
 - (c) 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,²³⁹ a relevant product and geographic market to which the downstream product belongs.
- 5.52 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%.²⁴⁰ 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.
- 5.53 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

- 5.54 Article 6 of the SABEO sets out rules for applying the market share thresholds.
- 5.55 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

²³⁹Article 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'.

²⁴⁰ See Article 5(1) of the SABEO and the definition of 'relevant market' in Article 2 of the SABEO.

based on other reliable market information, such as market sales volumes, should be used to establish the market share of the parties.

- 5.56 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.
- 5.57 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.
- 5.58 For the purpose of the SABEO, the terms 'undertaking' and 'party' include their respective 'connected undertakings', as defined in Article 2(3).
- 5.59 Article 6(2) of the SABEO provides that, in applying the market share threshold, the market share held by the undertakings referred to at paragraph (e) of the definition of 'connected undertakings'²⁴¹ 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.

²⁴¹ That is, the market share of undertakings in which the rights or powers listed at 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).

Duration of the exemption

- 5.60 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.
- 5.61 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 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

- 5.62 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.
- 5.63 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.²⁴²
- 5.64 This part considers:
- (a) General principles relating to the hardcore restrictions
 - (b) Summary of hardcore restrictions
 - (c) Exceptions

General principles

- 5.65 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.²⁴³

²⁴² Article 7(3) of the SABEO.

²⁴³ Article 7(3) of the SABEO.

- 5.66 Hardcore restrictions under Article 7(1) of the SABEO are generally restrictions of competition by object which fall within the Chapter I prohibition.²⁴⁴ 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.²⁴⁵ In that regard, certain 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.²⁴⁶
- 5.67 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.²⁴⁷ 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.
- 5.68 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.²⁴⁸
 - (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.

²⁴⁴ See European Commission (2014) Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD 198, which guidance is a statement of the European Commission for the purpose of section 60A CA98.

²⁴⁵ Judgment of 4 June 2009, *T-Mobile Netherlands*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.

²⁴⁶ Judgment of 11 September 2014, *Groupement des Cartes Bancaires*, C-67/13, EU:C:2014:2204, paragraph 49.

²⁴⁷ 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)'.

²⁴⁸ Hardcore restrictions do not necessarily fall within the scope of the Chapter I prohibition.

5.69 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 assessment of whether the conditions of the Section 9 exemption are fulfilled (see paragraphs 5.124 to 5.136)

Summary of hardcore restrictions

5.70 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.

5.71 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

5.72 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.

5.73 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 (Article 7(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)

5.74 Article 8(1) of the SABEO requires any person²⁴⁹ 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.

5.75 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.

5.76 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.

5.77 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

²⁴⁹ Under section 59(1) (interpretation) CA98, 'person', in addition to the meaning given by the Interpretation Act 1978, includes any undertaking.

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.

Cancellation of the SABEO

- 5.78 Not complying with the conditions imposed by Articles 5²⁵⁰ or 7 of the SABEO will have the effect of cancelling the block exemption in relation to the particular specialisation agreement concerned.
- 5.79 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 paragraphs 5.74 to 5.77 above) (Article 8 of the SABEO).

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

- 5.80 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

- 5.81 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.
- 5.82 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 as a result of Section 9 CA98 (Article 9 of the SABEO); or

²⁵⁰ 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.

(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.

5.83 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.²⁵¹ 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.

5.84 A cancellation decision can only have ‘ex nunc’ effect, which means that the agreements concerned will benefit from the exemption until the date at which the cancellation becomes effective.

Duration of the SABEO

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

5.86 A transitional provision also ensures that the Chapter I prohibition does not apply for two 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).

5.87 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 report²⁵² 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.

²⁵¹ 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.

²⁵² 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.

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

Individual assessment under the Chapter I prohibition

5.89 Where a production agreement does not benefit from the exemption provided by the SABEO, it is necessary to carry out an individual assessment under Chapter I of the CA98.

5.90 The first step in the assessment is to determine 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 scope of the Chapter I prohibition, there is no need to consider whether it benefits from exemption. 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 5.20 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 5.124 onwards).

5.91 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

5.92 Production agreements can raise different competition concerns.

5.93 Production agreements can lead to a **direct limitation of competition between the parties**. Production agreements, and in particular production joint ventures,²⁵³ may lead the parties to directly align (a) output levels, (b)

²⁵³ See paragraphs 3.12 to 3.14 for guidance in the context of agreements between parents and their joint venture.

product 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 produced under the agreement independently.

- 5.94 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.²⁵⁴
- 5.95 The parties' ability to coordinate their behaviour leading to such outcomes will depend on:
- (a) the parties having market power;²⁵⁵ and
 - (b) the existence of market characteristics conducive to such coordination, in particular:
 - (i) when the production agreement increases the parties' commonality of costs (that is, 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.
- 5.96 Production agreements may also lead to **anti-competitive foreclosure of third parties** in downstream markets in situations where the production agreement concerns an intermediate product that accounts for a large proportion of the variable costs of a final product in respect of which the parties compete downstream. In that case, the parties may be able to use the production agreement to increase the price of the intermediate product and thereby raise the costs of their downstream rivals. This may weaken competition downstream and lead to higher final prices.

²⁵⁴ Production agreements may also result in the coordination of the parties' behaviour as buyers. In that case, the guidance provided in Part 6 (Purchasing Agreements) may be relevant, in addition to the guidance provided in this Part 5.

²⁵⁵ See paragraph 5.103.

Restrictions of competition by object

- 5.97 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.
- 5.98 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 objectively necessary for the implementation of the combined production and distribution agreement and proportionate to attain the objectives of that agreement.
- 5.99 Where a production agreement does not fall within the Chapter I prohibition because it has neutral or positive effects on competition and contains a price-setting restriction as referred to at paragraph 5.98 above, this ancillary restraint will also not fall within the Chapter I prohibition.²⁵⁶
- 5.100 Where a production agreement contains an output-related restriction as referred to at paragraph 5.985.98(a) which is not an ancillary restraint falling outside of the Chapter I prohibition,²⁵⁷ it is necessary to assess whether the agreement is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition. Such a restriction will not be assessed separately from the production agreement, but in the light of the overall effects on the market of the entire production agreement.

²⁵⁶ See paragraph 3.46 on ancillary restraints.

²⁵⁷ See paragraph 3.46 on ancillary restraints.

Restrictive effects on competition

Relevant factors

5.101 In order to assess whether a production agreement has the effect of restricting competition within the meaning of the Chapter I prohibition, it is necessary to take various factors into account. These factors include:

- (a) whether the parties to the agreement are actual or potential competitors;
- (b) the situation that would prevail in the absence of the agreement, including any restrictions;
- (c) the characteristics of the relevant market in which the agreement takes place and whether the parties to the agreement have market power;
- (d) the nature and scope of the cooperation envisaged by the agreement; and
- (e) the products concerned by the agreement.

Production agreements unlikely to have restrictive effects

5.102 Certain production agreements are less likely to have restrictive effects. These include:

- (a) Production agreements between undertakings that are not actual or potential competitors. However, such agreements may restrict competition where they include provisions that foreclose competition from third parties;
- (b) Production agreements that enable the parties to launch a product that, on the basis of objective factors, the parties would otherwise not have been able to produce (for example, due to the parties' technical capabilities and access to finance, skilled workers, technologies or other resources) and where the agreement does not lead to a collusive outcome in relation to other products, on which the parties compete;
- (c) Production agreements where the parties to the agreement do not have market power in the market on which a restriction of competition is assessed, including agreements which benefit from the *De Minimis Notice*.²⁵⁸ Typically, it is market power that can enable the parties to the agreement to profitably maintain prices above the competitive level, or

²⁵⁸ See paragraph 3.56.

profitably maintain output, product quality or variety below what would be dictated by competition.

Market power

5.103 The CMA's Guidance on Market Power provides guidance on how the CMA will assess whether undertakings possess market power.²⁵⁹ 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 5.104 to 5.108). This will normally be followed by the concentration ratio and the number of players in the market (see paragraphs 5.109 to 5.110) and by dynamic factors such as potential entry and changing market shares (see paragraph 5.111), as well as other factors relevant to the assessment of market power (see paragraphs 5.112 to 5.114).

Market shares

5.104 As explained at paragraph 5.19, a production agreement may have effects in markets upstream, downstream or neighbouring the market directly concerned by the cooperation (for example, where the agreement concerns intermediary products that are used as inputs for downstream products). Restrictive effects are more likely in upstream, downstream or neighbouring market markets that are interdependent and where the parties have market power.

5.105 Undertakings are unlikely to have market power below a certain level of market share:

5.106 Agreements that benefit from the exemption in the SABEO: Under the SABEO, the market share threshold is set at 20%. Specialisation agreements,²⁶⁰ including specialisation agreements with 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 5.20 onwards).

5.107 Agreements that do not benefit from the exemption in the SABEO: So far as concerns production agreements that do not constitute specialisation agreements within the meaning of the SABEO, if the parties to the agreement

²⁵⁹ OFT 415, Assessment of Market Power.

²⁶⁰ As defined in Article 2 of the SABEO.

have a combined market share not exceeding 20%, it is, in most cases, unlikely that market power exists and it is therefore less likely that such agreements will have restrictive effects.

- 5.108 Market shares above 20%: If the parties' combined market share exceeds 20%, it is necessary to assess any restrictive effects of the production agreement. In general, the higher the combined market shares of the parties, the higher the risk that the production agreement may increase the parties' incentives to increase their prices (and/or decrease quality and range).

Market concentration ratio

- 5.109 Generally, a production agreement is more likely to lead to restrictive effects on competition in a concentrated market (namely, a market with a limited amount of players) 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.
- 5.110 However, the fact that the parties' combined market share is slightly higher than 20% does not necessarily imply a highly concentrated market.

Dynamic factors

- 5.111 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

- 5.112 The number and intensity of links (for example, other cooperation agreements) between the competitors in the market, customers' ability to switch suppliers, and/or whether competitors are unlikely to increase supply if prices increase, may also be relevant to the assessment of the parties' market power.
- 5.113 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.

5.114 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 significant source of competitive constraint.

Direct limitation of competition between the parties

5.115 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 independently.
- (b) If the main product characteristics are determined by the production agreement, this could also eliminate competition between the parties on key parameters (for example quality, the range of products and innovation), irrespective of whether the agreement also involves joint distribution. This concern is particularly relevant in industries where production is the main economic activity, such as manufacturing industries or food processing.
- (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.
- (d) In general, production agreements which also provide for joint distribution (namely the joint selling of the products) carry a higher risk of restrictive effects than production agreements that are limited to production. Joint distribution brings the cooperation closer to the consumer and often involves the joint setting of prices and sales, namely practices that carry the highest risks for competition. 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.

Collusive outcome and anti-competitive foreclosure

5.116 The likelihood of a collusive outcome depends on the parties' market power (see paragraph 5.103 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.

5.117 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

5.118 Where one or more of the parties to a production agreement has market power and the agreement increases the parties' commonality of costs to a substantial level, this may increase the parties' ability to achieve a collusive outcome on prices (including charging higher prices for intermediate products in order to foreclose third party competitors in downstream markets).

5.119 Commonality of costs refers to the proportion of variable costs that the parties to the agreement have in common. The relevant costs are the variable costs of the products in respect of which the parties to the production agreement compete. Therefore, an agreement is less likely to increase commonality of costs where the cooperation concerns products which require costly commercialisation (for example, new or heterogeneous products requiring expensive marketing) or products with high transport costs and the cooperation does not include the joint distribution of those products.

5.120 The increased commonality of costs may also increase the parties' ability to achieve a collusive outcome in downstream markets. This may occur, for example, where the production agreement concerns an intermediate product that accounts for a large proportion of the variable costs of a final product in respect of which the parties compete downstream. In that case, the parties may use the production agreement to increase the price of the intermediate product and thereby raise final prices.²⁶¹

Exchanges of information

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

5.122 The implementation of a production agreement may require the exchange of competitively sensitive information, for example on production costs and processes. Where the production agreement itself does not fall within the Chapter I prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either.²⁶² This is the case if the information exchange is

²⁶¹ Including by increasing the price charged by the parties for the intermediate product to third party competitors in the downstream market who rely on the parties for the supply of the intermediate product.

²⁶² Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

objectively necessary to implement the production agreement and is proportionate to the objectives thereof. For example, the exchange of information on sales volumes and prices may be necessary to implement a production agreement that provides for joint distribution, but will generally not be necessary where the agreement does not include joint distribution.

5.123 Where the information exchange goes beyond what is objectively necessary to implement the production agreement or is not proportionate to the objectives thereof, it should be assessed using the guidance provided in Part 8. If the information exchange falls within the Chapter I prohibition it may still fulfil the conditions of the Section 9 exemption.

Individual assessment under the Section 9 exemption

Introduction

5.124 Where a restrictive agreement does not meet the conditions of the SABEO and has an appreciable impact on competition,²⁶³ 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.

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

Efficiencies

5.126 The production agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress.

5.127 Production agreements may provide efficiencies by, for example:

- (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;

²⁶³ See paragraph 3.42.

- (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) enabling undertakings to produce at lower costs if the agreement enables the parties to increase production where marginal costs decline with output, namely, to achieve economies of scale; and
- (g) providing cost savings by means of economies of scope if the agreement allows the parties to increase the number of different types of products that they produce.

5.128 These efficiency gains may contribute to a resilient market. For example, a production agreement may increase resilience by re-locating production to areas closer to sustainable energy sources.

Indispensability

5.129 The production agreement must not impose restrictions that are not indispensable to the attainment of efficiencies within the meaning of Section 9 of the CA98.

5.130 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a production agreement do not fulfil the conditions 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

5.131 The production agreement must allow consumers a fair share of the resulting benefit.

5.132 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.

- 5.133 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.
- 5.134 Efficiencies that only benefit the parties or cost savings that are caused by output reduction or market allocation are not sufficient to meet the conditions of the Section 9 exemption.
- 5.135 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

- 5.136 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 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 telecommunications infrastructure sharing agreements

5.137 This section provides guidance on mobile telecommunications infrastructure sharing agreements,²⁶⁴ a specific type of production agreement (referred to in this section as ‘Network Sharing Agreements’ or ‘NSAs’).²⁶⁵ These are agreements under which mobile telecommunications network operators share the use of parts of their network infrastructure and such agreements may include sharing operating costs and the cost of subsequent upgrades and maintenance.²⁶⁶

5.138 Connectivity networks are particularly important for the development of the digital economy and society and are of relevance to virtually all businesses and consumers. Mobile network operators often pool their resources in order to offer telecommunication services more cost-effectively.²⁶⁷

5.139 NSAs can involve mobile network operators agreeing 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 Sharing’ or ‘RAN Sharing’), or
- (c) sharing their spectrum, such as frequency bands (‘Spectrum Sharing’).²⁶⁸

5.140 NSAs may involve geographical segmentation, whereby the mobile telecommunications network operators divide their responsibilities for

²⁶⁴ 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.

²⁶⁵ Examples of UK NSAs include Mobile Broadband Network Limited (MBNL) which is a network sharing joint venture between EE and Three and the Beacon network sharing agreements between Vodafone and Virgin Media O2.

²⁶⁶ The guidance in this section covers agreements relating to the joint deployment of infrastructure by mobile telecommunications network operators. This section does not cover agreements relating to the provision of mobile telecommunications wholesale access products.

²⁶⁷ 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).

²⁶⁸ Finally, besides sharing the RAN part of their network the mobile network operators may also share some nodes of their respective core networks such as mobile switching centres and mobile management entities.

installing, maintaining and operating the infrastructure and equipment, which is being shared, in their respective territories.

- 5.141 NSAs can provide potential benefits in terms of cost reductions and improvements in quality and choice. Cost reductions, for example related to rollout and maintenance, may benefit consumers in terms of lower prices, or more investment in infrastructure. 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 competition that would not otherwise exist.²⁶⁹ Mobile telecommunications network operators can benefit from large efficient networks by entering into NSAs without the need for consolidation through mergers (see paragraph 3.61 in respect of the application of the Chapter I prohibition to agreements falling within the merger provisions of the Enterprise Act 2002).
- 5.142 The CMA considers that NSAs, 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.
- 5.143 NSAs can, however, give rise to restrictive effects on competition. They may limit infrastructure competition that would take place absent the agreement.²⁷⁰ Reduced infrastructure competition may in turn limit competition in the supply of mobile telecommunications services, at wholesale as well as at retail level. This is because more limited competition at the infrastructure level may affect parameters of competition such as the number, location and installed capacity of infrastructure sites, the timing of the rollout of new sites as well as the amount of capacity installed at each site, which, in turn, can affect quality of service and prices at wholesale and retail level.
- 5.144 NSAs 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. This may in turn reduce the parties' flexibility in innovation and technology/product differentiation at the wholesale and retail mobile telecommunication levels and thereby limit competition between them.

²⁶⁹ 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 to 79. This judgment relates to national roaming agreements; however, the principles can be applied mutatis mutandis to mobile infrastructure sharing agreements.

²⁷⁰ 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, *O2 (Germany) v Commission*, T-328/03, EU:T:2006:116, paragraph 68.

Therefore, mobile infrastructure sharing agreements – because of their effects on the structure of the market – can harm final consumers by leading to less choice, lower quality of services, as well as delays in innovation. For instance, this may occur due to some technical,²⁷¹ contractual²⁷² or financial terms of the agreement.²⁷³

5.145 Where the parties to the NSA are competitors, exchanges of competitively sensitive information between them may also raise competition concerns if the information exchange exceeds what is objectively necessary to implement and proportionate to the objectives of the agreement.

5.146 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 3.42).

5.147 NSAs always require a Chapter I competitive assessment.²⁷⁴ Depending on the facts of the case, 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);²⁷⁵
- (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 purpose of the spectrum sharing, the duration and the structure put in place by the agreements;

²⁷¹ Mobile infrastructure sharing agreements could lead to situations where a party is holding back the other party. For example, where the mobile network infrastructure operated by one party in a certain area does not support certain technology that the other party using that infrastructure in that area would like to deploy.

²⁷² For example, if two parties agree on a geographic split (whereby (i) party A is the network operator for geographic area A and party B is the network operator for area B; (ii) both parties continue to operate and compete in each other's area; and (iii) the agreement has the effect of increasing the costs of one operator to implement capacity or network expansions.

²⁷³ 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.

²⁷⁴ To the extent that such NSAs do not benefit from the exemption provided by the SABEO.

²⁷⁵ European Commission in case COMP/38.369, *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag*, recital 12; European Commission Decision in case COMP/ 38.370, *O2 UK Limited / T- Mobile UK Limited ('UK Network Sharing Agreement')*, recital 11.

- (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);
- (f) the market structure and characteristics (market shares of the parties, amount of spectrum held by the parties, closeness of competition between the parties, number of operators outside the agreement and extent of competitive pressure exerted by them, barriers to entry, agreements with third parties (such as third party owners of components of network infrastructure or third party service providers, for instance, providers of tower services, etc.));
- (g) the number of NSAs in the relevant market and the number and identity of participating network operators.

5.148 While a case-by-case assessment based on the above factors will always be required, mobile infrastructure sharing agreements that comply, as a minimum, with a number of factors are generally unlikely to have restrictive effects (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, and to differentiate their services based on quality and other parameters;
- (c) Operators maintain the ability to follow independent spectrum strategies;
- (d) Operators do not exchange competitively sensitive information, other than that which is strictly necessary for the mobile infrastructure sharing to operate and where necessary barriers to information exchange have been put in place.

5.149 Finally, the following general guidance is provided for various types of NSA:²⁷⁶

- (a) Passive Sharing²⁷⁷ 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 and (ii) access to passive infrastructure in the relevant market is not restricted (in this respect, relevant factors to be considered are, for example, regulatory obligations or existing commercial arrangements limiting such access);²⁷⁸
- (b) Active Sharing agreements²⁷⁹ may be more likely to give rise to restrictive effects on competition. This is because, compared to passive sharing, active sharing generally 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’)²⁸⁰ are a more far-reaching form of cooperation and may restrict the parties’ ability to differentiate their retail and/or wholesale offers even further and directly limit competition between them.²⁸¹ While the sharing of radio

²⁷⁶ Depending on the evolution of the relevant (RAN) technology over time, the distinction between passive, active and spectrum sharing may become less relevant for future NSAs. However, the principles set out in this paragraph are likely to remain relevant for the assessment of future NSAs, depending also on the role that the hardware components of the (RAN) technology will play in the future in terms of differentiation. For example, in the future, less differentiation may be possible at the level of the hardware components of RAN but more differentiation may be possible at the level of the software.

²⁷⁷ See paragraph 5.139(a) for an explanation of what Passive Sharing involves.

²⁷⁸ 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.

²⁷⁹ See paragraph 5.139(b) for an explanation of what Active RAN Sharing involves.

²⁸⁰ See paragraph 5.139(c) for an explanation of what Spectrum Sharing involves.

²⁸¹ It should be noted that the term ‘Spectrum Sharing’ in this section concerns only the type of infrastructure sharing agreement in which two or more mobile network operators use as a shared resource (‘ie pooling’) their respective spectrum holdings in one or more spectrum bands. The guidance in this Section relating to spectrum sharing does not concern other types of spectrum sharing for instance between non-competitors (including between mobile network operators and non-mobile network operators) which use the same spectrum bands in a dynamic way thereby fostering the efficient use of such a scarce resource and new opportunities for 5G deployment. Furthermore, the term ‘Spectrum Sharing’ in this 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

spectrum may be permitted by Ofcom when it grants rights to use radio spectrum, these agreements must be examined cautiously to determine whether they fall within the scope of the Chapter I prohibition.²⁸²

5.150 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 conditions of the Section 9 exemption (see paragraphs 3.47 to 3.54).

Examples

Example of 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 existing old production plants and build a new larger and more efficient production plant which will produce Product X and be operated 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 production plants 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

Applicability of the SABEO: The SABEO does not apply to this example because the combined market share of the parties exceeds 20% in the relevant market for

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.

²⁸² 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.

product X. Therefore, an individual assessment of the production agreement is required.

Assessment under the Chapter I Prohibition: If the joint venture results in Companies A and B sharing most of their variable costs for product X, it is likely that the production agreement could directly limit competition between them. The joint venture may also lead the parties to limit the output of product X, compared to what they would have brought to the market if each of them had decided their output independently. In light of the limited constraints that competitors will exert in terms of capacity, this limitation of output could lead to higher prices. Therefore, the production joint venture of Companies A and B is likely to restrict competition within the meaning of the Chapter I prohibition on the market for product X.

Assessment under the Section 9 exemption: 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 benefit of consumers. However, the production agreement could meet the conditions of the Section 9 exemption if the parties can demonstrate that the 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.

Example of 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 three 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

Applicability of the SABEO: The SABEO does not apply to this example because the combined market share of the parties exceeds 20% in the relevant market for product Y. Therefore, an individual assessment of the production agreement is required.

Assessment under the Chapter I prohibition: The market is characterised by very few players with similar market shares and variable production costs. The joint venture between Companies A and B would add an additional link between suppliers 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 a restriction of competition within the meaning of the Chapter I prohibition.

Assessment under the Section 9 exemption: In such circumstances the conditions 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.

Example of 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 a key input into the production of downstream product Y and there are no other types of product that are substitutable as inputs. The production costs of product X account for 50% of the variable costs of the final product Y, in respect of which Companies A and B also compete downstream. Companies A and B each have a share of 20% on the market for product Y, there is limited entry on this downstream market and the market shares have been stable over time. In addition to covering their own demand for product X (captive use), both Companies A and B each have a market share of 30% on the market for product X (sales to third parties).

There are high barriers to entry on the market for product X and existing producers are operating near full capacity. On the market for product 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

Application of the SABEO: 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 is required.

Assessment under the Chapter I prohibition: By virtue of the production joint venture, and the parties high combined market share in the upstream market for product X, Companies A and B would be able to largely control the supplies of the essential input X to their competitors in the downstream market for Y. This is likely to 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. The agreement is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition, because of the likelihood anti-competitive foreclosure downstream.

Assessment under the Section 9 exemption: 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.

Example of production agreement as market allocation

Example 4

Situation: Companies A and B each manufacture both products X and Y. Company A has a market share of 30% in the market for product X and a market share of 10% in the market for product Y. Company B has a market share of 10% on the market for product X and 30% on the market for product Y. To achieve economies of scale in production, Companies A and B conclude a production agreement under which Company A will only produce X and Company B will only produce Y. The agreement does not provide for the cross-supply of the products between the parties. As a result, following the agreement Company A will only sell X and Company B will only sell Y. The parties claim that by specialising in this way they will make significant fixed costs savings, due to economies of scale and that by each party focusing on only one product, they will improve their production technologies, which will lead to better quality products.

Analysis

Application of the SABEO: The SABEO does not apply because the combined market share of the parties exceeds 20% in each of the relevant 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 the parties do not agree to supply each other with the products (X and Y) that they respectively cease to produce). Therefore, an individual assessment of the production agreement is required.

Assessment under the Chapter I prohibition: Under the agreement, Companies A and B agree to cease producing (and selling) products in respect of which they compete. The agreement therefore has the object of restricting competition within the meaning of the Chapter I prohibition.

Assessment under the Section 9 exemption: The claimed efficiencies that may be derived from the agreement (in the form of reduction in fixed costs and improving production technology) are linked to the market allocation, so they are unlikely to

outweigh the agreement's restrictive effects, and therefore the agreement would not meet the conditions of the Section 9 exemption. In any event, if Company A or B considers that it would be more efficient to focus on only one product, the company can simply take the unilateral decision to only produce X or Y without agreeing that the other company will focus on producing the other product.

Example of potential Competitors

Example 5

Situation: Company A produces final product X and Company B produces final product Y. Products X and Y belong to separate product markets, in which Companies A and B each have market power, with individual market shares exceeding 20%. Both companies use product Z as an input for their respective production of products X and Y and they both produce Z for captive use only. Product X can be produced by a simple transformation of Z and Company B has made preparations to enter the market for product X and it appears realistic that it will enter that market next year. Companies A and B agree to jointly produce Z, which generates modest economies of scale, and they agree to cease independent production of Z. As part of the agreement, Company B agrees not to enter the market for product X within the next five years.

Analysis

Application of the SABEO: The SABEO does not apply, as the 20% market share threshold is exceeded on the downstream markets for final products X and Y. These markets are relevant for the application of the market share threshold because the product concerned by the production agreement (intermediate product Z) is used by the parties as an input to produce X and Y.

Assessment under the Chapter I prohibition: Companies A and B are not actual competitors with regard to products X, Y or Z. However, in view of its plan to enter the market for product X within one year, Company B is a potential competitor of Company A on that market. Hence the joint production agreement restricts competition on the market for product X within the meaning of the Chapter I prohibition by removing the constraint imposed by Company B's planned entry.

Assessment under the Section 9 exemption: The conditions of the Section 9 exemption are unlikely to be met because the efficiency gains in the form of economies of scale generated by the joint production agreement are modest, so they would be unlikely to outweigh the restrictive effects of the agreement on competition in the market for product X, where Company A has market power.

Example of information Exchange

Example 6

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 component of the total cost of product Z. Company A has a market share of 20% and Company B has a market share 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 supplies its customers located in England with Z manufactured in its production plant in Scotland and transports it to England by truck. Similarly, Company B supplies 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 or by 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

Application of the SABEO: The SABEO does not apply, as the swap agreement does not correspond to any of the types of agreements covered by the SABEO.

Assessment under the Chapter I prohibition: The fact that Companies A and B, which are competitors, swap part of their production would not typically, in itself, give rise to competition concerns. However, the agreement also provides for information

exchange between the parties' on production and transport costs with regard to Z, in respect of which they compete. The information exchange between competitors exceeds what is necessary for the implementation of the swap agreement. Given the relatively concentrated structure of the market, the homogenous nature of product Z and the fact that production and transport costs are a major component of the total product costs and therefore an important parameter of competition, the information exchange could restrict competition by reducing competitive uncertainty in the market, and it may lead to a collusive outcome. In view of the parties' significant market shares, the agreement is therefore likely to restrict competition within the meaning of the Chapter I prohibition.

Assessment under the Section 9 exemption: Even though the agreement will generate 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 conditions of the Section 9 exemption.

6. Purchasing Agreements

Introduction

- 6.1 This Part provides guidance on assessing purchasing agreements, by which the CMA means agreements where undertakings pool their purchasing activities by jointly purchasing or negotiating to purchase from suppliers. References in this Part to joint purchasing cover both joint purchases and joint negotiations of purchase prices or other terms with suppliers.
- 6.2 Joint purchasing arrangements exist in a variety of economic sectors and forms. They may provide for undertakings to make joint purchases, or they may be limited to jointly negotiating the purchase price or other terms with a supplier, while leaving the actual purchase transactions to be concluded by each undertaking individually, based on the jointly negotiated price and other terms. They may also involve additional activities such as joint transport, quality control and warehousing, thereby avoiding duplication of delivery costs. Depending on the sector, the purchaser may consume the jointly purchased products, or it may use them as inputs for its own activities, for example, energy or fertilisers. Alternatively, the purchasers may resell the products that they have purchased jointly such as in the case of fast-moving consumer goods (for example, food, home and personal care products) or consumer electronics. Groups of purchasers consisting of independent retailers, retail chains or retailer groups engaging in joint purchasing are often referred to as ‘retail alliances’.²⁸³
- 6.3 Joint purchasing can be carried out through various forms, such as through a jointly controlled company, through a company in which different undertakings hold non-controlling stakes, through a cooperative, through a contractual arrangement or through looser forms of cooperation, for example, where a representative negotiates or concludes purchases on behalf of several undertakings. This Guidance refers to those various forms collectively as ‘joint purchasing arrangements’.
- 6.4 Joint purchasing arrangements can increase the buying power of its members vis-à-vis suppliers which the members might not attain if they acted independently. The buying power of a joint purchasing arrangement can lead to lower prices, more variety or better-quality products for consumers. It may

²⁸³ Where a joint purchasing arrangement is integrated with additional stages of cooperation, such as joint distribution or the joint selling by the purchasing group of marketing or other services, all the Parts of this Guidance relating to the different stages of that cooperation will be relevant. Where the relevant Parts of the Guidance diverge, it is necessary to determine the cooperation’s ‘centre of gravity’ as that will determine which section of this Guidance prevails. See further paragraphs 3.3 to 3.5.

also allow the members, in particular smaller undertakings, to obtain better purchasing terms and thereby remain competitive on the downstream selling market(s) when faced with strong competitors. Undertakings may also participate in joint purchasing to prevent shortages or address interruptions in the production of certain products, thus avoiding supply chain disruptions. However, joint purchasing may, in certain circumstances, give rise to competition concerns, as set out at paragraph 6.6 onwards.

- 6.5 A joint purchasing arrangement may involve both horizontal and vertical agreements. In such cases, a two-step analysis is needed:
- (a) First, the horizontal agreements between the competing undertakings engaging in joint purchasing should be assessed according to the principles set out in this Guidance.
 - (b) Second, if that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to horizontal competition concerns, any relevant vertical agreements between the joint purchasing arrangement and its individual members and between the joint purchasing arrangement and suppliers will need to be assessed. Such agreements should be assessed using the VABEO Guidance.²⁸⁴ Vertical agreements that do not satisfy the conditions of the VABEO are not presumed to be unlawful but require an individual assessment by reference to the Chapter I prohibition.

Assessment under the Chapter I prohibition

Main competition concerns

- 6.6 Joint purchasing arrangements between actual or potential competitors may be harmful to competition on the upstream purchasing and/or downstream selling market or markets, by causing for example increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other purchasers. Those concerns are further considered below.

Restrictions of competition by object

- 6.7 Joint purchasing arrangements generally do not amount to a restriction of competition *by object* if they genuinely concern joint purchasing, that is, if the joint purchasing arrangement involves a common organisation or

²⁸⁴ See paragraph 3.62 above on when the VABEO will apply to agreements between competitors.

representative²⁸⁵ acting on behalf of its members to collectively negotiate and/or conclude an agreement with a given supplier relating to one or more trading terms governing the supply of products to the cooperating purchasers.

- 6.8 Such arrangements should be distinguished from those that do not genuinely concern joint purchasing, such as buyer cartels, which restrict competition by *object* contrary to the Chapter I prohibition.²⁸⁶
- 6.9 Buyer cartels are agreements between purchasers aimed at coordinating their individual negotiations and purchases with suppliers. They do so by:
- (a) coordinating those purchasers' individual competitive behaviour on the purchasing market or influencing the relevant parameters of competition between them through, for example, fixing or coordinating purchase prices or aspects of purchase prices (including agreements to fix wages²⁸⁷ or not to pay a certain price for a product), allocating purchase quotas, or sharing markets and suppliers, or
 - (b) influencing those purchasers' individual negotiations with suppliers or their individual purchases from suppliers through, for example, coordinating the purchasers' individual negotiation strategies or disclosing competitively sensitive information to other purchasers on such negotiations with suppliers.
- 6.10 Where purchasers deal individually with (rather than jointly negotiating with) suppliers, those purchasers should make their purchasing decisions independently and must not remove strategic uncertainty between themselves regarding their respective future behaviour on the market. Purchasers should not first fix the conditions of the purchase (for example, price, quantity, source of supply, quality or other parameters of competition) between themselves and then proceed individually to negotiate with and purchase from suppliers.
- 6.11 A buyer cartel may also exist where purchasers agree to exchange competitively sensitive information between themselves about their individual purchasing intentions or their individual negotiations with suppliers, outside any genuine joint purchasing arrangement that interacts with suppliers on behalf of its members collectively.²⁸⁸ Such a cartel may exist where the

²⁸⁵ Including the various forms set out at paragraph 6.3.

²⁸⁶ 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.

²⁸⁷ On wage fixing and other forms of collusion between employers, see the CMA's guidance, *Employers advice on how to avoid anti-competitive behaviour*, published 9 February 2023.

²⁸⁸ See further Part 8 on Information Exchange and, in particular, paragraphs 8.54 to 8.58, which also apply to exchanges of competitively sensitive information between purchasers.

purchasers disclose information about, in particular, the purchase prices they will pay (including maximum prices, minimum discounts and other aspects of prices), sources of supply (both in terms of suppliers and territories), volumes, quantities, quality, other terms or other parameters of competition (for example, timing, delivery and innovation).²⁸⁹

- 6.12 A buyer cartel reveals by its nature a sufficient degree of harm to competition such that it is not necessary to assess the actual effects it may have.²⁹⁰ It will therefore restrict competition by *object* contrary to the Chapter I prohibition. As a result, unlike for genuine joint purchasing arrangements, when assessing buyer cartels it is not necessary to define the relevant markets or consider the purchasers' market position on the upstream purchasing or downstream selling markets.
- 6.13 The following factors make it less likely that a purchasing agreement will amount to a buyer cartel:
- (a) The purchasers in the downstream market negotiate *jointly through a member or common organisation* of some kind that represents the purchasers' interests in interactions with the supplier(s) in the upstream market. Such an arrangement contrasts with members agreeing between themselves (or disclosing competitively sensitive information between themselves about) how they will *individually* interact with suppliers.
 - (b) The joint purchasing arrangement makes clear to suppliers beforehand that negotiations are conducted on its members' behalf and that members will be bound by the agreed terms for their individual purchases or the joint purchasing arrangement purchases on its members' behalf. This does not require disclosing the identity of the members of the joint purchasing arrangement, in particular where they are small- or medium-sized undertakings or where they account for a limited share of the joint purchasing arrangement's purchases from a supplier. However, it is not the responsibility of suppliers to take steps to uncover the existence of a joint purchasing arrangement. It should be noted, however, that secrecy is not a necessary requirement for establishing a buyer cartel.²⁹¹

²⁸⁹ 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. For guidance on ensuring that such an exchange is not unlawful, see paragraphs 6.37 to 6.39.

²⁹⁰ Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 37.

²⁹¹ See for example judgment of 20 November 2008, *Beef Industry Development Society*, C-209/07, EU:C:2008:643, in which the EU Court of Justice concluded that the cooperation in that case, which had not operated in secret, had the object of restricting competition.

(c) The members of the joint purchasing arrangement have defined the form, scope and functioning of their cooperation in a written agreement,²⁹² so that its motivation and its compliance with the Chapter I prohibition can be verified after the event and checked against the actual operation of the arrangement. The existence of a written agreement cannot in itself, however, shield the arrangement from competition law enforcement.

- 6.14 In addition to potentially acting as buyer cartels, joint purchasing arrangements may also restrict competition by object if they serve as a tool to engage in a seller cartel, for instance, an agreement between competitors to fix sale prices, limit output or share markets or customers on the downstream selling market(s) or related markets. In that case, the joint purchasing arrangement may be assessed together with the seller cartel.
- 6.15 A joint purchasing arrangement that has the object of harming or excluding an actual or potential competitor from competing with the members of the joint purchasing arrangement in the downstream selling market is a form of horizontal boycott and a restriction of competition by object.
- 6.16 Horizontal purchasing boycotts are distinct from *vertical* purchasing restraints, where purchasers agree not to buy from particular suppliers on the upstream purchasing market. Unlike a horizontal boycott, a purchasing restraint that is genuinely vertical in character will not generally restrict competition *by object*.²⁹³ Such vertical purchasing restraints must therefore be considered in their legal and economic context to assess their actual and likely *effects* on competition.

Restrictive effects on competition

- 6.17 Where a joint purchasing arrangement does not have as its *object* the restriction of competition, it is necessary to assess on a case-by-case basis its actual and likely *effects* on competition. The assessment must cover actual and likely effects on both the relevant purchasing market(s) (ie where the joint purchasing arrangement interacts with suppliers) and the relevant selling market(s) (ie where the members of the joint purchasing arrangement may

²⁹² Such an agreement may take various forms, such as statutes or by-laws.

²⁹³ In contrast, a seemingly vertical purchasing restraint may in fact have the object of a horizontal restriction of competition such as harming or excluding a competitor from the same level of the supply chain. In such cases, that agreement will still restrict competition by object. See, for example, the European Commission's decision of 21 October 1998 in the *Pre-insulated Pipes* case (Case 1999/60/EC), in which it found that the addressees had a 'common plan to eliminate or damage [a competitor] Powerpipe' through practices that included boycotting Powerpipe's suppliers.

compete as sellers), and it must compare any actual or likely effects to the situation that would occur absent that specific arrangement.

- 6.18 In general, joint purchasing arrangements are less likely to give rise to competition concerns when its members do not have market power on the relevant downstream selling market(s).
- 6.19 Certain restrictions imposed by a joint purchasing arrangement on its members, for instance, restrictions on them joining other cooperatives, may fall outside of the Chapter I prohibition where they are limited to what is objectively necessary and proportionate to ensure that the arrangement functions properly and can exercise buying power vis-à-vis suppliers.²⁹⁴ This may apply, for example, to a provision that prohibits the members from participating in competing joint purchasing arrangements to the extent that this would jeopardise the proper functioning of the joint purchasing arrangement and its buying power.²⁹⁵

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.²⁹⁶ That guidance and any future guidance relating to the definition of relevant markets for the purposes of UK competition law should serve as the basis for assessing market definition. The CMA's Guidance on Market Definition will not be further explained in this Part, as the present Guidance only deals with specific issues that arise in the context of horizontal agreements.
- 6.21 Joint purchasing arrangements may affect the market(s) with which it is directly concerned, namely the upstream purchasing market(s) where the members of the joint purchasing agreement jointly negotiate with or purchase from suppliers. They may also affect market(s) downstream where the members of the joint purchasing arrangement act individually as sellers, as well as other related markets.
- 6.22 In relation to the upstream purchasing market(s), once the market is defined, the market share of the members of the joint purchasing arrangement can be

²⁹⁴ See judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413, paragraph 34.

²⁹⁵ See judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413, paragraph 34.

²⁹⁶ OFT 403, Market Definition. The CMA will also have regard to the European Commission (1997) Notice on the definition of relevant market, OJ C 372, which is a statement of the European Commission for the purpose of section 60A CA98.

calculated based on the value or volume of the members' purchases of the relevant product(s) as a share of total sales in the relevant purchasing market.

- 6.23 If the members are also competitors in one or more downstream selling markets, those markets are also relevant for the assessment.

Market power

- 6.24 Market power may, under certain circumstances, lead to competition concerns. There is no absolute threshold above which it can be presumed that the members of a joint purchasing arrangement have market power such 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 members of the joint purchasing arrangement have a combined market share not exceeding 15% on each relevant purchasing market as well as a combined market share not exceeding 15% on each relevant downstream selling market. In any event, if the members' combined market shares do not exceed 15% on the purchasing and selling markets, it is likely that the conditions of the Section 9 exemption are fulfilled, unless the arrangement restricts competition by object.
- 6.25 A combined market share above that threshold in one or both of the upstream purchasing and downstream selling markets does not necessarily 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 exceeding that threshold requires a detailed assessment of its effects on the market, taking into account factors such as market concentration, profit margins, closeness of competition, nature of the products subject to the purchasing arrangement, and possible countervailing power of suppliers.
- 6.26 Moreover, in assessing whether the members of a joint purchasing arrangement jointly have buying power, the number and intensity of links between competitors in the purchasing market are also relevant. For example, some of the same members may also participate in other purchasing arrangements.
- 6.27 If the members of the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that the arrangement may harm competition in the upstream purchasing market, which may ultimately also cause harm to consumers in the downstream selling market(s). For example, the exercise of joint buying power may harm suppliers' investment incentives, discourage innovation or force suppliers without countervailing seller power to reduce the range or quality of products they produce. Moreover, where retailers have buyer power, they may harm consumers downstream by exercising their buyer power and

playing off suppliers against each other by jointly limiting product variety in their shops. Exercise of buyer power may also lead to restrictive effects on competition in the upstream market, such as quality reductions, lessening of innovation efforts, and ultimately sub-optimal supply.

- 6.28 The risk that a joint purchasing arrangement may disincentivise supplier investments or innovations is greater where the purchasers jointly account for a large share of relevant purchases, in particular where such purchasers deal with suppliers that do not have countervailing seller power. Such suppliers may be particularly vulnerable to a reduction in profits, especially if they have made specific investments to supply the members of the joint purchasing arrangement. Restrictive effects on competition are less likely where suppliers have a significant degree of countervailing seller power (which does not necessarily amount to dominance) on the purchasing market(s), for example, because they sell products or services that purchasers need to have in order to compete on the downstream selling market(s) and are difficult to substitute.
- 6.29 The buying power of the members of 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 more likely where there are only a limited number of suppliers and there are barriers to entry on the supply side of the upstream purchasing market.
- 6.30 Where the members of a joint purchasing arrangement are actual or potential competitors downstream, their incentives to compete on price on the downstream selling market(s) may be considerably reduced if they jointly purchase a significant share of the products which they compete to sell downstream. For example, the higher the combined market share of the joint purchasing arrangement members on the downstream selling market, the greater the risk that coordinating upstream purchasing will lead to coordination of downstream selling. This risk is particularly high if the joint purchasing arrangement limits (or disincentivises) its members' ability to purchase additional volumes of the input in the purchasing market independently of the joint purchasing arrangement. An obligation on the members to purchase all or most of their requirements through the joint purchasing arrangement should be assessed taking into account factors such as the scope (including the volume or share of purchases concerned) and duration of the obligation and the combined market share of the joint purchasing arrangement members on the relevant purchasing and selling markets.
- 6.31 Where the members together hold a significant degree of market power on the downstream selling market(s), the lower purchase prices achieved through the joint purchasing arrangement are less likely to be passed on to

consumers. This is especially the case where competitors of the joint purchasing arrangement members have a limited capacity to compete effectively on the downstream selling market due to their weak market position.

- 6.32 Where the members of a joint purchasing arrangement jointly do not have market power or are not active on the same relevant selling market(s) (for example, retailers which are active in different geographic markets and are not potential competitors in those markets), the joint purchasing arrangement is unlikely to have restrictive effects on competition in the downstream selling market(s).

Collusive outcome

- 6.33 Joint purchasing arrangements may lead to a collusive outcome if they facilitate the coordination of the members' behaviour on the downstream selling market(s) where they are actual or potential competitors. This may occur, in particular, if the market structure in the selling market is conducive to collusion (for example, because the market is concentrated and has a significant degree of transparency). A collusive outcome is also more likely if the members of the joint purchasing arrangement have a high combined market share in the downstream selling market(s) and the arrangement extends beyond the mere joint purchasing or joint negotiation of purchasing terms with the supplier. For example, such a collusive outcome could be facilitated where the members of the joint purchasing arrangement agree the volumes that they will purchase through the arrangement with the effect of withholding output from the downstream selling market, or they coordinate the timing of price discounts or promotions in the downstream selling market(s), thereby restricting competition between them on the selling market(s).
- 6.34 Collusion can also be facilitated if the members of the joint purchasing arrangement achieve a high degree of commonality of costs through joint purchasing, provided they 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 members of the joint purchasing arrangement have a significant proportion of their variable costs in the downstream selling market in common. This is, for instance, the case where competing manufacturers and sellers of a final product jointly purchase a high proportion of their inputs together.
- 6.36 A collusive outcome may also arise where retailers that are active on the same relevant retail market(s) jointly purchase a significant share of the products that they offer for resale. Besides increasing the potential for hub-and-spoke type collusion, retailers that are members of a joint purchasing

arrangement may also be more willing to concede price increases by suppliers if they know that these increases will also apply to most of their competitors in the downstream selling market(s) and can therefore be passed on to consumers.

Information exchange

- 6.37 The implementation of a joint purchasing arrangement may require members to disclose information that may be competitively sensitive such as purchase prices (or parts of those purchase prices) and volumes. Disclosing that information to other members may restrict competition, including by facilitating coordination of prices and output in the downstream selling market(s).
- 6.38 However, where the joint purchasing arrangement itself does not fall within the Chapter I prohibition because it has neutral or positive effects on competition, disclosure of information that is ancillary to (that is, objectively necessary to implement and proportionate to the objectives of) the arrangement will also not fall within the Chapter I prohibition. Where the disclosure of information goes beyond what is objectively necessary to implement the arrangement or is not proportionate to its objectives, it may still fall within the Chapter I prohibition. In those circumstances, it should therefore be assessed using the guidance provided in Part 8 on Information Exchange. If the disclosure does restrict competition, it may still fulfil the conditions of the Section 9 exemption.
- 6.39 The risk of a restriction on competition from disclosure of competitively sensitive information can be reduced, for example, by ensuring that such information is not disclosed to other purchaser members and is only disclosed to third parties or separate entities representing the group and which do not compete with the purchasers, and through limiting access to such information by putting in place technical or practical measures to protect its confidentiality. For example, the members of the joint purchasing arrangement may provide for clean teams or confidentiality rules for the staff of the common organisation that represents the joint purchasing agreement in negotiations with suppliers, and provide for those rules to continue to apply to those staff should they work for any individual member of the joint purchasing arrangement. 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.

Negotiation tactics

- 6.40 When jointly negotiating terms with suppliers, a joint purchasing arrangement may exert its buying power by, for example, threatening to abandon negotiations or to stop purchasing unless the supplier offers better terms such as lower purchase prices. The counterparties in such negotiations may similarly threaten to stop negotiating with or supplying products to the purchasers.
- 6.41 Order stops or threats of order stops made collectively by joint purchasing arrangements do not generally restrict competition *by object* where they concern the products that are subject of the negotiations and are temporary, ceasing when negotiations resume or the parties conclude an agreement with the supplier. Such order stops or threats may in some cases, however, give rise to negative *effects*. Any effects on competition arising from such collective threats should be assessed in the light of the overall effects of the joint purchasing arrangement, taking into account the market position of the members of the arrangement making the threats.
- 6.42 For example, members of a retail alliance may stop orders of certain products from a supplier during their negotiations about the terms for the future supply of those products. Such order stops may result in the products selected by the individual members of the alliance becoming temporarily unavailable in their shops until the alliance and the supplier have agreed on the terms of future supply. Such order stops, or threats of order stops, will in general not appreciably affect competition in the downstream selling market(s) where retailers continue to offer substitutes for the products in question and to the extent that customers in the selling market(s) can purchase the products in question or substitutes from competitors of the joint purchasing arrangement members.
- 6.43 Such order stops should be distinguished from a joint purchasing agreement that has the object of harming or excluding an actual or potential competitor from competing with the members of the joint purchasing arrangement. As stated at paragraph 6.15 above, such conduct is likely to qualify as a horizontal boycott and amount to a restriction of competition by object.

Assessment under the Section 9 exemption

Efficiencies

- 6.44 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.

- 6.45 Joint purchasing arrangements can give rise to significant efficiencies. In particular, they can lead to cost savings, such as lower purchase prices, lower production costs or reduced transaction costs. Moreover, joint purchasing arrangements may give rise to qualitative efficiencies, for example, by leading suppliers to innovate and introduce new or improved products on the market or, in particular for smaller suppliers, by expanding distribution of their products to a larger number of purchasers and markets. 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

- 6.46 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a joint purchasing arrangement do not meet the conditions of the Section 9 exemption. For example, cost savings that are not the result of the joint purchasing itself but from additional activities carried out by the joint purchasing arrangement, such as logistics, transportation or storage, can only be considered as efficiencies of the arrangement if the additional activity is necessary for the purchasing arrangement to function and could not be achieved with less restrictive means. 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

- 6.47 Efficiencies that are attained by 'indispensable' restrictions, such as cost reductions 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 any restrictive effects on competition caused by the joint purchasing arrangement. Therefore, cost savings or other efficiencies that only benefit the members of the joint purchasing arrangement do not suffice. Instead, cost savings need to be passed on to the members' customers. For example, in the case of lower purchasing costs, pass-on may occur through lower prices on the selling market or markets.
- 6.48 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

incentive to expand output through price reductions. However, where the members of a joint purchasing arrangement that together hold market power on the relevant downstream selling market(s), they may be less inclined to pass on variable cost reductions to customers. Moreover, reductions in fixed costs (such as lump-sum payments by suppliers) are less likely to be passed on to consumers, as they may often 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.²⁹⁷ Finally, lower sales prices for customers are particularly unlikely if the joint purchasing arrangement limits (or disincentivises) the ability of its members to purchase additional volumes either through, or independently of, the joint purchasing arrangement. In fact, joint purchasing arrangements that limit members' independent purchases of additional volumes from a given supplier may provide an incentive to raise sale prices. This is because jointly limiting the purchase of inputs will generally have the effect of limiting the volume of sales in the selling market or markets.

No elimination of competition

6.49 An agreement cannot fulfil the conditions of the Section 9 exemption if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question in either the relevant purchasing or downstream selling markets.

Examples

Example of a buyer cartel

Example 1

Situation: Many small undertakings collect used mobile phones from retail outlets where they are returned when a new mobile phone is purchased. These collectors sell the 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 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 used mobile phone

²⁹⁷ For example, 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.

collectors, the offers the collectors have made to them, and the price per phone each eventually agrees to pay to the collectors.

Analysis

Assessment under the Chapter I prohibition: The five recycling undertakings are all party to a buyer cartel. They each negotiate and purchase 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 recycling undertakings' relatively small combined market share on the purchasing market, the agreement between them restricts competition by object. Therefore, no market definition or assessment of the agreement's actual or potential effects on the market is needed.

Example of joint negotiation of inputs by manufacturers

Example 2

Situation: Five competing steel manufacturers have a combined market share of 40% on the relevant purchasing market. The five steel manufacturers set up, own and operate a joint venture to negotiate iron ore purchases on their behalf. The joint venture negotiates and obtains from a major iron ore supplier a 20% reduction in the purchase price of iron ore.

Instead of competing with each other to purchase iron ore on the purchasing market, the five steel manufacturers buy iron ore at the purchase price negotiated by the joint venture. There is no evidence that the five steel manufacturers lowered their steel prices in the downstream selling market as a result of the lower purchase prices that they paid for iron ore.

Analysis

Assessment under the Chapter I prohibition: The Chapter I prohibition is capable of applying to the agreement to create the joint venture, assuming that the agreement does not fall within rules on merger control because it results in the enterprises ceasing to be distinct.²⁹⁸ The joint venture is a joint purchasing arrangement which negotiates with suppliers on behalf of the five steel manufacturers. The five steel manufacturers that are party to the joint venture have been able to obtain a lower purchase price for their iron ore. Each of the five steel

²⁹⁸ See paragraph 3.11. 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 2002.

manufacturers purchases its iron ore independently, albeit based on the price negotiated by the joint venture.

The formation and implementation of the joint venture does not have as its *object* the restriction of competition. Whether the joint venture restricts competition by *effect* will depend on, for example, whether it gives rise to significant commonality of costs and whether the joint purchasing arrangement produces a real risk of collusion on the selling market for steel. The fact that none of the five steel manufacturers have lowered their prices in the downstream selling market for steel could indicate such collusion.

Example of a joint negotiation by a retail alliance

Example 3

Situation: A retail alliance, whose members are seven large retail chains each operating in a different geographic market, jointly negotiates with a major brand manufacturer of confectionery with 30% market share an additional rebate for a future supply agreement. The alliance has a market share of no more than 18% on each relevant purchasing market and each of its members has a market share of between 15% and 20% on the relevant retail markets in their respective geographic markets. The members of the retail alliance are not potential entrants to each other's selling markets.

The negotiations cover only the additional rebate from the manufacturer to the retailers. Otherwise, each retail alliance member individually negotiates its other purchase terms directly with the manufacturer.

The retail alliance and the manufacturer both drive a hard bargain to obtain the best possible deal. At a certain point in the negotiations the retail alliance requests that its members temporarily stop ordering the confectionery products under negotiation from the manufacturer in order to increase the pressure on the manufacturer. In implementing this decision, each alliance member decides independently which of the confectionery products under negotiation it will stop ordering during the deadlock in negotiations, taking into account consumer preferences in its selling market. Eventually, after further negotiation, the manufacturer and the alliance agree on the additional rebate that the manufacturer will grant to the individual alliance members' purchases, and the alliance members restart their orders of the confectionery products under negotiation.

Analysis

Assessment under the Chapter I prohibition: The retail alliance is properly assessed as a joint purchasing arrangement even though it only jointly negotiates a

particular rebate as part of the wider purchase transaction between each retail alliance member and the manufacturer.

The joint purchasing arrangement does not restrict competition *by object*. The retail alliance is also unlikely to restrict competition by its *effects*:

The retail alliance members are not actual or potential competitors in the downstream selling markets, as they are not active on the same downstream selling markets, nor are they potential entrants into each other's markets. In addition, the joint purchasing arrangement is unlikely to have restrictive effects on competition downstream to the extent that the retail alliance members face sufficient competitive pressure from competing retailers.

Negative effects on competition upstream resulting from the additional rebate (for instance, reduced innovation and investment by suppliers) seem unlikely given the parties' combined market share of no more than 18% on each relevant purchasing market.

The temporary order stops should be assessed together with the overall effects of the joint purchasing arrangement. The order stops only concern the product categories being negotiated with the manufacturer and in this example does not in itself appear to harm consumers in the downstream market directly or indirectly, insofar as the retailers offer substitute products or customers can purchase the same products from competing retailers, and it may ultimately benefit consumers through lower prices once the retail alliance reaches an agreement with the manufacturer.

Example of joint purchasing by small undertakings with moderate combined market share

Example 4

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 arrangement. They have a combined market share of 23% on both the purchasing and 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 purchasing jointly through the joint purchasing arrangement.

Analysis

Assessment under the Chapter I prohibition: The joint purchasing arrangement does not restrict competition *by object*.

The joint purchasing arrangement is also unlikely to restrict competition by its effects within the meaning of the Chapter I prohibition. The combined market share of the participating retailers on the purchasing and selling markets exceeds the safe harbour threshold of 15%, but the participating retailers are constrained by Undertakings A and B, which each have higher market shares on both the purchasing and selling markets.

The likelihood that the joint purchasing arrangement will disincentivise investments or innovation by the product suppliers is low, given the members' combined market share on the purchasing market. However, this also depends on the degree of countervailing seller power of suppliers on the purchasing market and, for suppliers with no seller power, whether they have made customer-specific investments for the members of the joint purchasing arrangement.

Even though the members of the joint purchasing arrangement 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 each have higher market shares than the members of the joint purchasing arrangement combined. As a result, the members are unlikely to be able to successfully restrict competition through coordinating their behaviour on sales prices that would prevent them from passing on lower purchasing prices or related discounts.

Furthermore, the cooperation brings about some efficiencies via economies of scale that may further decrease sales prices and make the retailers more competitive on the downstream selling market vis-à-vis Undertakings A and B.

Example of commonality of costs and market power on the selling market

Example 5

Situation: Two competing 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 of 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 by others is not likely.

Analysis

Assessment under the Chapter I prohibition: The purchasing agreement does not restrict competition *by object*.

However, it is likely to give the parties the ability to restrict competition *by effect* 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 on the selling market would be even stronger 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 coordinate their behaviour on the selling market.

This agreement also creates a risk that the parties withhold demand and reduce their purchases on the purchasing market, thereby reducing sales volumes and as a result increasing prices on the downstream selling 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.

Assessment under the Section 9 exemption: Even though the agreement is very likely to give rise to 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 6

Situation: Six large retailers, each based in a different UK region, form a joint purchasing arrangement to buy Product A jointly. The arrangement allows the six retailers to purchase other similar branded products outside the cooperation. The members of the 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 a similar size to the joint purchasing arrangement. Each of the members of the joint purchasing arrangement has a market share of between 20% and 30% on the selling markets on which they are active, being regional markets. None of the members are active on the downstream selling market in a region where another member is active. The parties are not potential entrants to each other's downstream selling markets.

Analysis

Assessment under the Chapter I prohibition: The joint purchasing arrangement does not restrict competition *by object*.

The joint purchasing arrangement is also not likely to give rise to restrictive *effects* on competition within the meaning of the Chapter I prohibition. Through the arrangement, the participating retailers will be able to compete with the other existing major buyers on the purchasing market and obtain better prices and other terms than they would if they were to purchase the products independently. The likelihood that the joint purchasing arrangement will disincentivise investments or innovation by the suppliers is low given the participants' relatively low combined market share on the purchasing market. However, this also depends on the degree of countervailing seller power of suppliers on the purchasing market and, for suppliers with no seller power, whether they have made customer-specific investments for the purchasers that are party to the arrangement.

The selling markets are much smaller (in turnover and geographic scope) than the nationwide purchasing market, and in those selling markets some of the members of the arrangement may have some degree of market power. Nonetheless, even though the members of the joint purchasing arrangement have a combined market share of more than 15% on the purchasing markets, the parties are unlikely to be able to successfully coordinate their conduct on the downstream selling markets since they are neither actual nor potential competitors on those markets.

Assessment under the Section 9 exemption: Even if the arrangement were to have restrictive effects on competition, it is likely to fulfil the conditions of the Section 9 exemption. The joint purchasing arrangement leads to purchasing costs that are lower than the members would have been able to obtain if they negotiated prices independently. Given the individual members' position in the downstream selling markets, where they are not present on each other's markets but face significant competition from other retailers who hold at least 70% of the selling market, it seems likely that these lower purchasing costs will be passed on to consumers. Indeed, the members of the arrangement should have an incentive to pass on at least part of the reduction in variable costs to their own customers, by expanding downstream sales through price reductions.

Example of information exchange to, and negotiation by, an independent third party

Example 7

Situation: Three competing manufacturers, A, B and C, participate in a joint purchasing arrangement in which they entrust an independent third party to negotiate on their behalf with suppliers the terms for purchasing product Z. Manufacturers A, B and C use product Z as an input 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 joint purchases (for example, quality specifications, quantities, delivery dates, maximum purchase prices) is only disclosed to the third party who has measures in place to ensure it is not shared with the other manufacturers. The joint purchasing arrangement agrees purchasing prices with each supplier of product Z.

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 each have a market share of 20%.

Analysis

Assessment under the Chapter I prohibition: The joint purchasing arrangement does not restrict competition *by object* and is unlikely to restrict competition *by effect*.

The members of the joint purchasing arrangement together have a combined market share of 30% on both the purchasing and selling markets that exceeds the safe harbour threshold of 15%. This may give them a significant degree of market power on both the purchasing and selling markets. However, the members of the arrangement face competition both upstream and downstream from several competitors. At least two of those competitors have a significant market position (ie a market share each of 20%) that allows them to exert an effective competitive constraint on the members of the arrangement. It therefore seems unlikely that the members of the joint purchasing arrangement hold sufficient market power on the selling markets to be able to exclude these competitors from the purchasing market.

Moreover, the arrangement is limited to the purchase of product Z, which is not a significant cost factor in producing product X. This means that it does not constitute a significant input for the parties' activities on the selling markets and will not lead to a high degree of commonality of costs. A, B and C still buy or produce independently the other inputs for product X, which represent more significant cost factors, and they face effective competition from the six remaining competitors, as well as from each other on the market for product X.

Therefore, the joint purchasing arrangement is unlikely to restrict competition on the purchasing or selling markets within the meaning of the Chapter I prohibition and, in any event, it may meet the four cumulative conditions of the Section 9 exemption.

Moreover, to the extent the manufacturers A, B and C exchange competitively sensitive information, that exchange will similarly not fall within the Chapter I prohibition if it is objectively necessary for and proportionate to the implementation of the joint purchasing arrangement for product Z, covering only those parameters that are required for the members of the arrangement to conclude an agreement with suppliers.

In any event, other than the terms negotiated by the independent third party, A, B and C do not receive each other's competitively sensitive information directly or indirectly as a result of the joint purchasing arrangement, because A, B and C only disclose information on their respective quality specifications, quantities, delivery dates, and maximum purchase prices to the independent third party. Therefore, it is unlikely that the information exchange in this joint purchasing arrangement will 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 vary widely, 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 selling the product, including its price. At the other end, there are more limited agreements that only address one specific commercialisation activity, 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 that the agreements may 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 Distribution agreements (and other agreements, such as franchising agreements) between undertakings operating at different levels of the supply chain are addressed in the VABEO and the VABEO Guidance. 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 distribution agreement between competitors would in principle not restrict competition, a further assessment will be necessary to examine any vertical restrictions in the agreement. 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 concerns a distribution agreement entered into between competing undertakings that is non-reciprocal²⁹⁹ and meets one of the conditions in

²⁹⁹ Non-reciprocal means, for instance, that where one manufacturer becomes the distributor of the products of a second manufacturer, the second manufacturer does not become a distributor of the products of the first. See further the VABEO guidance, paragraph 6.17.

Article 3(5)(a) to (d) of the VABEO.³⁰⁰ 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 the block exemption provided by the VABEO.³⁰¹ Paragraph 3.62 provides additional guidance on the general relationship between this Guidance and the VABEO and VABEO Guidance.

- 7.5 Agreements where parties agree only on joint commercialisation are distinct from agreements where the commercialisation is combined with another type of cooperation upstream, such as joint production or joint purchasing. Commercialisation agreements that are combined with other types of cooperation should be assessed in accordance with paragraphs 3.2 to 3.6 above.

Assessment under the Chapter I prohibition

Main competition concerns

- 7.6 Commercialisation agreements can restrict competition in several ways. First, commercialisation agreements may lead to price-fixing.
- 7.7 Second, commercialisation agreements may facilitate output limitations, because the parties may together decide on the volume of products to be placed on the market, thereby reducing supply in the market.
- 7.8 Third, commercialisation agreements may be a means for the parties to divide 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 Fourth, commercialisation agreements may lead to the parties disclosing competitively sensitive information relating to aspects within or outside the scope of the cooperation or relating to commonality of costs.³⁰²
- 7.10 However, a commercialisation agreement is generally unlikely to give rise to horizontal competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered independently or with fewer parties

³⁰⁰ 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.

³⁰¹ For further guidance on such vertical agreements between competitors and on 'dual distribution', see the VABEO Guidance, paragraph 6.13 onwards.

³⁰² See further Part 8 on Information Exchange

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. When considering such a commercialisation agreement, the parties to the agreement are not each other's potential or actual competitors on that market and, therefore, the agreement will not restrict competition between them on that market.

- 7.11 Therefore, when assessing a reciprocal commercialisation agreement, a key consideration is whether the agreement is objectively necessary for the parties to enter each other's markets. If it is, the agreement does not raise competition concerns. However, if one party to the agreement can enter another's market without the agreement, and the agreement reduces the former party's decision-making independence regarding the possibility of entering the other party's market, it is likely to restrict competition.
- 7.12 The same principle applies to non-reciprocal commercialisation agreements. The risk that competition will be restricted is less pronounced, however, for non-reciprocal agreements, as the parties are less likely to have a mutual incentive to allocate markets or customers.

Restrictions of competition by object

- 7.13 Commercialisation agreements restrict 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, except where those restrictions are ancillary to the main aim of the agreement and where that main aim falls outside the Chapter I prohibition.
- 7.14 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 in relation to substitutable products. Such agreements are therefore likely to restrict competition by object.
- 7.15 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) if the agreement will lead to coordination of the prices charged by the parties to all or part of their customers.
- 7.16 Similarly, output limitations are another serious competition concern that can arise from commercialisation agreements. Each party to the agreement should in principle be free to 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 they will market, the available supply of those products could be reduced, which may increase their price.

- 7.17 Non-exclusive commercialisation agreements are less likely to lead to output limitations, provided that the parties remain free and in fact available to serve individually any additional demand and the parties determine their output outside of the agreement independently of each other.
- 7.18 Commercialisation agreements between parties active in different geographic markets or in relation to different categories of customer may also 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 allocating markets or customers, the agreement is likely to have the object of restricting 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 between the parties to not enter each other's markets or compete for each other's customers.

Restrictive effects on competition

- 7.19 A commercialisation agreement that does not restrict competition *by object* may still have restrictive *effects* on competition. Such effects should be analysed by reference to the factors mentioned at paragraphs 3.42 to 3.45 in addition to the factors set out below.
- 7.20 To assess the effects of a commercialisation agreement, it is necessary to define the relevant product and geographic market(s) and determine the parties' respective positions on those markets. The relevant markets are those to which the products subject to the agreement belong and in which the parties will jointly commercialise those products. However, as a commercialisation agreement in one market may also affect the competitive behaviour of the parties in other closely related markets, any such related markets also need to be defined.³⁰³

³⁰³ For instance, in the case of a commercialisation agreement in a specific geographic market, other geographic markets where the parties to the agreement are also active; or markets for the supply of inputs purchased jointly for the commercialisation of the contractual products.

7.21 Where a commercialisation agreement between competitors does not restrict competition by object, it will generally only have restrictive effects on competition if the parties to it have some degree of market power. Such market power should be assessed by taking into account the possible existence of the parties' customers' countervailing buyer power. Where the parties jointly have market power, it is in general likely that they will have the ability to raise prices or reduce output, product quality, product variety or innovation. In addition, in a commercialisation agreement, the parties pool their activities that have a direct impact on their customers, for instance jointly marketing and selling to customers directly. This direct impact on customers increases the risk that the commercialisation agreement may lead to anti-competitive effects.

Collusive outcome

7.22 A joint commercialisation agreement that does not involve price-fixing, output limitation or market partitioning may nonetheless give rise to restrictive effects on competition if it increases the commonality of the parties' variable costs to a level which is likely to lead to a collusive outcome. This is likely to be the case if, prior to the agreement, the parties already have a high proportion of their variable costs in common. In that scenario, the increment in commonality of costs (that is, the commercialisation costs of the product subject to the agreement) increases the likelihood of a collusive outcome, even where that increment is limited. 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.

7.23 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 commercialisation costs constitute a significant proportion of the variable costs related to the products concerned. Commonality of commercialisation costs increases the risk of a collusive outcome if the commercialisation agreement concerns costly activities, for example, high distribution or marketing costs. As a result, even agreements limited to, for example, joint advertising or joint promotion can give rise to restrictive effects on competition if those activities represent a significant proportion of the parties' variable costs for the product.

Agreements that generally do not raise competition concerns

7.24 As mentioned at paragraph 7.21 above, commercialisation agreements between competitors that do not restrict competition by object will generally only restrict competition by effect if the parties have some degree of market

power. In most cases, the parties to the agreement are unlikely to have market power if their combined market share does not exceed 15% in the market(s) 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.

- 7.25 If the parties' combined market share exceeds 15%, the commercialisation may have restrictive effects, and as a result the likely impact of the commercialisation agreement on the relevant market(s) must be assessed.

Information exchange

- 7.26 The implementation of a joint commercialisation agreement may involve some disclosure of competitively sensitive information, particularly on marketing strategy and pricing. Where the commercialisation agreement itself does not fall within the Chapter I prohibition because it has neutral or positive effects on competition, information disclosure that is ancillary to that agreement will also not fall within the Chapter I prohibition.³⁰⁴ In that context, the disclosure of information will not raise competition concerns where it is objectively necessary to implement the commercialisation agreement and proportionate to its objectives. Where information disclosure is not ancillary to a commercialisation agreement that has neutral or positive effects on competition (for instance, because it goes beyond what is objectively necessary or proportionate), it may restrict competition and it should be assessed by reference to the guidance in Part 8 on Information Exchange.

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 conditions of the Section 9 exemption will depend on the nature of the cooperation 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. Commercialisation agreements can also generate efficiencies benefiting

³⁰⁴ Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

consumers by reducing dependencies or mitigating shortages and disruptions in supply chains, for instance, when they allow a party to enter a market that it could not have entered independently.

- 7.29 In order to fulfil the conditions of the Section 9 exemption, any efficiencies must result from the integration of the parties' economic activities. Savings that result only from the elimination of costs that are an inherent part of competition cannot be taken into account. For example, a reduction in transport costs that results only from customer allocation and without any integration of the parties' logistical systems 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 to the joint commercialisation of significant capital, technology or other assets. Cost savings generated by reducing duplication of resources and facilities may also be relevant. However, if the joint commercialisation consists of 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 generates substantial efficiencies.

Indispensability

- 7.32 Restrictions that go beyond what is necessary to achieve the efficiencies generated by a commercialisation agreement will not fulfil the conditions of the Section 9 exemption. The question of indispensability is especially important for agreements involving price-fixing or market sharing, which will only be considered indispensable under exceptional circumstances.

Pass-on to consumers

- 7.33 Efficiencies achieved 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 greater 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, any

efficiencies generated by the agreement are more likely to be sufficiently passed on to consumers.

No elimination of competition

- 7.34 An agreement will not fulfil the conditions 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. Whether the parties fulfil this condition should be assessed in relation to all relevant markets 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 terms ‘bidding consortium’ and ‘bidding consortia’ to refer to situations 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 take many forms. It may happen, for example, through subcontracting, where the official tenderer agrees that, if a contract is awarded to it, it will subcontract part of the tender activity to one or more other parties. It may also happen through a consortium, where all the consortium partners participate jointly in the tendering process generally through an entity established specifically for the purpose of the tender. From a competition law perspective, subcontracting in anticipation of a tender award and consortia both constitute joint tendering. In this Part, therefore, the CMA refers to both these forms of cooperation as a ‘bidding consortium’ or as ‘bidding consortia’.
- 7.37 Bidding consortium agreements often involve joint commercialisation through joint selling and should generally be assessed according to the principles in the present Part. They may also involve other forms of cooperation such as jointly producing the products required to fulfil the tender contract. See paragraph 7.43 below on assessing bidding consortia that combine multiple stages of cooperation.
- 7.38 When considering an agreement in which the tenderer subcontracts part of the tender to another party, in general, it is only subcontracting that the tenderer and other party agree upon *before* the tender (rather than after the contract has been awarded) that should be analysed by reference to this section of the Guidance on bidding consortia. Subcontracting by the winning tenderer *after* the contract has been awarded should be analysed by

reference to sections of this Guidance relevant to the type of subcontracting agreement at issue.³⁰⁵

Distinction between bidding consortia and bid-rigging/collusive tendering

- 7.39 For this section, bidding consortia are distinguished from bid-rigging and collusive tendering, which refer to illegal agreements between undertakings which aim to distort competition in tendering processes.
- 7.40 Bid-rigging and collusive tendering are some of the most serious restrictions of competition, given that they are restrictions of competition by object.³⁰⁶ They may take various forms, such as participants colluding to agree the content of their respective tenders (especially the price) before submitting their tenders in order to influence the tender award, agreeing to refrain from submitting a tender, agreeing to allocate the market based on geography, customer or the subject of the tender, or setting up rotation schemes for a series of tendering processes.³⁰⁷ The aim of all these practices is to create the impression that the tendering process is genuinely competitive while acting in a way that restricts competition for the particular contract.
- 7.41 Bid-rigging generally does not involve joint participation in the tendering 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 tenderers to coordinate their seemingly independent decisions relating to participation in the tendering process.³⁰⁸ One aspect of

³⁰⁵ For example, for subcontracting agreements in which one party entrusts to another the production of a product, see Part 5 on Production Agreements.

³⁰⁶ 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.

³⁰⁷ See further CMA guidance, *Avoiding collusion in construction: advice for project directors and managers*, published 26 February 2020.

³⁰⁸ 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 EU Court of Justice concluded that the cooperation in that case, which had not been concluded in secret, had the object of restricting competition.

this practice is that the customer is deceived as to the extent of competition.³⁰⁹

- 7.42 However, in some cases the distinction between bid-rigging and legitimate forms of joint tendering is not straightforward, in particular, in the case of subcontracting. For example, where two tenderers enter into reciprocal subcontracts, this may raise competition concerns, given 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 subcontracting between tenderers in the same tendering process raises competition concerns.

Bidding consortia that involve multiple forms of cooperation

- 7.43 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 would only take place as a result of the joint production, the centre of gravity of the agreement lies in the production. Therefore, when considering whether such an agreement restricts competition by object or effect, to the extent that the guidance on joint production and joint commercialisation diverges, the guidance on joint production prevails for that aspect of the assessment.³¹⁰ 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 5.98).
- 7.44 In general, however, bidding consortium agreements that consist mainly or exclusively of 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

- 7.45 The Chapter I prohibition applies to agreements restricting potential competition as well as actual competition. Although bidding consortia need to be considered individually, a bidding consortium agreement will normally not

³⁰⁹ See, for example, judgment of 16 June 2011, *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.

³¹⁰ See further paragraphs 3.3 to 3.5 on assessing agreements that combine different stages of cooperation.

give rise to competition concerns if it allows the parties to tender for contracts that they would not, based on objective factors and in the particular legal and economic context, have been able to undertake individually, and thereby does not reduce the number of bids that realistically could have been made. In that scenario, as the parties to the bidding consortium agreement are not actual or potential competitors for the purposes of 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 supply different services that are complementary for the purposes of participation in the tendering process, or where the parties, although all active in the same market(s), cannot carry out the project individually, for example, due to its size or complexity or the level of financial risk involved. See further the factors listed at paragraph 7.10 above.

- 7.46 The assessment of whether the parties are capable of competing in a tendering process individually, and are therefore competitors for the purpose of the relevant tendering process, depends first 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 mean the parties competitors: it is necessary to assess whether each party could realistically complete the contract on its own taking into account the specific circumstances of the case,³¹¹ such as the party's size and capabilities or the level of financial risk involved, the level of investment required, and the present and future capacity of each party assessed in light of the contractual requirements.
- 7.47 Where tender rules permit tenders for parts of a contract (that is, by lots), two parties that have the ability to tender for one or more lots – but not for the whole contract – should be considered competitors for the parts of the contract for which they both can tender, such that the Chapter I prohibition may apply in principle. Even where a bidding consortium would allow the parties to tender for the whole contract (rather than parts of it) and offer a lower price as a result, this does not change the fact that the parties are competitors for at least part of the tendering process such that the Chapter I prohibition may apply to the consortium in principle. If the agreement does restrict competition within the meaning of the Chapter I prohibition, any possible efficiencies achieved with a joint tender would have to be assessed by reference to the conditions of the Section 9 exemption.

³¹¹ Judgment of 30 January 2020, *Generics (UK) Ltd and Others v Competition and Markets Authority*, C-307/18, EU:C:2020:52, paragraph 39

- 7.48 If the parties to the bidding consortium agreement are capable of competing individually in the tendering process or if the bidding consortium agreement includes more parties than is necessary to tender, a joint tender may restrict competition within the meaning of the Chapter I prohibition. That will still be the case even if only one party to the agreement is capable of bidding individually.
- 7.49 In general, in cases where the parties to a bidding consortium agreement are competitors such that the Chapter I prohibition may apply, it is necessary to individually assess the agreement taking into account factors including the parties' position on the relevant market(s), the number and the market position of the other likely tenderers, the content of the agreement, the products involved and the market conditions.
- 7.50 The bidding consortium agreement may restrict competition by object or by effect, depending on its contents and on the particular circumstances of the case. In general, for bidding consortia that are considered commercialisation agreements, the observations at paragraphs 7.13 to 7.26 above apply. In addition:
- (a) Where two (or more) parties to the agreement are able to tender individually and there is not a significant degree of integration of resources and activities of the parties (for example, it does not include forms of joint production), a joint tender would in principle restrict competition by object. That is because it involves competitors jointly setting prices and is in general not 'ancillary' to (ie it is not objectively necessary to and proportionate to the objectives of) other neutral or procompetitive cooperation between the parties.
 - (b) Where bidding consortium agreements contain more parties than necessary, if there is only one party that could tender individually, in principle the mere fact that there are more parties than necessary may not in itself be sufficient to restrict competition *by object*, as it is possible that the parties may not be actual or potential competitors. However, there may be other reasons why such an agreement may restrict competition by object, for example, if a party that could have tendered individually enters into a bidding consortium agreement with the specific aim of pre-empting a competing joint tender from other parties to the agreement.
 - (c) Absent a restriction by object, whether these types of joint tenders restrict competition *by effect* depends on an assessment of, among other factors, how the competition would most realistically play out absent the bidding consortium agreement in question. A joint tender is less likely to raise competition concerns where it is done at the request of the customer.

- (d) Only the information strictly necessary for formulating the tender and performing the contract should be disclosed between the consortium members. Circulation of the information to relevant staff should be restricted to that which is necessary. For example, the members may minimise the risk of competition concerns by providing for clean teams or confidentiality rules.

Assessment of bidding consortia under the Section 9 exemption

- 7.51 A bidding consortium agreement between competitors that does restrict competition may still fulfil the conditions of the Section 9 exemption.
- 7.52 In such cases, efficiencies claimed in respect of the joint tender should be assessed by reference to the conditions of the Section 9 exemption. These efficiencies 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.
- 7.53 In addition, the other conditions of the Section 9 exemption must be fulfilled, that is, indispensability, pass-on to consumers and no elimination of competition. In tendering processes, these conditions 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 tender – if competition for the contract is not eliminated and other competitors can tender.
- 7.54 The conditions 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 that they would have submitted independently – in terms of price and/or quality – and the benefits to the customer and final consumers outweigh the restrictions of competition. Efficiencies must be passed on to consumers and will not fulfil the conditions 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 (namely, hotels, hospitals and offices), while keeping their independence and freedom to compete for other local, individual customers.

For the purpose of targeting the new segment of demand (ie the institutional customers), they develop a common brand name and a common price, and they offer scheduled deliveries with a maximum delivery time of 24 hours. 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 completely eliminate 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 a new category of customer, which requires 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 undertakings enter into the agreement. The market is very fragmented, with no individual competitor having more than 15% market share.

Analysis

Assessment under the Chapter I prohibition: Although the joint market share of the parties is below 15%, the fact that the agreement involves a common price, ie price-fixing, means in principle that the Chapter I prohibition may still apply.

However, the main purpose of the commercialisation agreement may be seen as neutral or pro-competitive, as the parties could not have provided laundry services to the institutional customers either individually or in cooperation with fewer parties than the four participating in the agreement. Since the price-fixing restriction is indispensable to the promotion of the common brand and the success of the project, that restriction does not appear to raise competition concerns as it is ancillary to the main purpose of the commercialisation agreement.

Example of joint commercialisation involving more parties than are 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

Assessment under the Chapter I prohibition: As with Example 1, although the joint market share of the parties is below 15%, the fact that the agreement involves a

common price, ie price-fixing, means the Chapter I prohibition may still apply in principle.

Unlike Example 1, the agreement could have been carried out by fewer than the four parties. However, as none of the parties could have implemented the project alone, the fact that there are more parties than necessary might not be sufficient to find a restriction *by object*, unless for example the agreement aims at pre-empting a competing initiative involving one of the parties which may have happened otherwise. In carrying out an analysis of any restrictive effects, it will be necessary to take into account an appropriate counterfactual.

Assessment under the Section 9 exemption: Where the agreement restricts competition, it 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 customer 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, 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 while meeting the maximum delivery time.

As such, the efficiencies are likely to outweigh the effects of the restriction on competition between the parties and the agreement is likely to fulfil the conditions of the Section 9 exemption.

Example of joint internet selling

Example 3

Situation: A number of small florists create an online shop for the promotion, sale and delivery of flower arrangements. By paying a monthly fee, the participating florists share the running costs of the platform and jointly invest in brand promotion.

There are a number of existing online shops with comparable market shares that compete with the new cooperation.

Through the online shop, which offers a wide range of different types of flower arrangements, customers order (and pay for) the type of flower arrangement they want to have delivered or to collect in person. Orders to collect in person are allocated to the florist of the customer's choice. Orders for delivery are allocated to the florist closest to the delivery address.

The relevant florist individually bears the costs of making the flower arrangement and providing or delivering it to the customer.

That florist retains 90% of the final sale price, which is set by the online shop and applies uniformly to all participating florists. The remaining 10% of the sale price is used for the common promotion and the operating costs of the online shop.

Apart from paying a monthly fee, there are no further restrictions for participating florists throughout the UK to join the online shop. Moreover, florists with their own website are also able to (and in some cases do) sell flower arrangements online under their own name and therefore can still compete among themselves outside the cooperation.

Customers purchasing through the online shop are guaranteed same day delivery or collection of the flower arrangement and they can also choose a delivery or collection time convenient to them.

Analysis

Assessment under the Chapter I prohibition: Assuming the florists are competitors, Chapter I applies in principle to the agreement. It involves price-fixing, and as a result, it is likely to restrict competition by object.

Assessment under the Section 9 exemption: The agreement therefore needs to be assessed under the Section 9 exemption. The florists taking part in the cooperation are all small shops, and but for their cooperation, they would not be able to compete nationally with other online shops. Therefore, the agreement could give 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 resulting from the agreement.

The florists taking part in the cooperation are still able to sell individually and to compete with each other, both through their physical shops and online. In addition, when buying through the online shop consumers do not want to deal with a multitude of different prices. Therefore, the price-fixing restriction may be considered as indispensable for the promotion of the product and the resulting efficiencies.

Moreover, as a number of other competing online shops exist and the parties to the agreement continue to compete with each other through their physical shops or online, competition will not be eliminated.

Therefore, absent other restrictions, the agreement fulfils the conditions of the Section 9 exemption.

Example of sales joint venture

Example 4

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

Assessment under the Chapter I prohibition: The Chapter I prohibition is capable of applying to the agreement to create the joint venture, assuming that the agreement does not fall within rules on merger control because it results in the two enterprises ceasing to be distinct.³¹² 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%.

³¹² See paragraph 3.11. 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 2002.

Assessment under the Section 9 exemption: 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.

Example of a media distribution platform

Example 5

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 pay to watch films or series produced by each TV broadcaster or by third parties which have licensed the relevant rights to one of them.

The relevant market is assessed as nationwide. TV broadcaster A's group has a market share of around 25% in the free-to-air TV market and TV broadcaster B has a market share of about 15%. There are two other large TV broadcasters with market shares between 10% and 15% and several 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

Assessment under the Chapter I prohibition: Considering their share of 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 independently. Therefore, they are potential competitors in the consumer market for video-on-demand. Since the agreement restricts their incentive to enter the market independently, the Chapter I prohibition applies in principle, assuming that the agreement does not fall within rules on merger control because it results in the two enterprises ceasing to be distinct.³¹³

³¹³ See paragraph 3.11. 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 2002.

Moreover, the agreement eliminates price competition between the two broadcasters and involves the parties coordinating their pricing for video-on-demand. As a result, the agreement in principle restricts competition by object.

Assessment under the Section 9 exemption: As for the application of the Section 9 exemption, the benefits resulting from an increased range of video-on-demand offer and easier navigation through content is unlikely to outweigh the negative effects for competition, which will be material considering the activities and market position of the undertakings involved.

Moreover, the restriction does not appear necessary to achieve the efficiencies identified, 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 conditions of the Section 9 exemption.

Example of a bidding consortium

Example 6

Situation: Undertakings A and B are competing providers of specialised medical products for hospitals. They decide to enter into a bidding consortium agreement to submit joint bids in a series of tender processes, organised by the national health system, for the supply of a set of plasma-derived medicinal products to public hospitals.

The main 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. In fact, both Undertakings A and B have already competed individually in one of the relevant tender processes, which was awarded to another participant as each of their individual tenders was 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 in the tender processes in question.

Analysis

Assessment under the Chapter I prohibition: As Undertaking A and B could each compete individually in the tender processes, the Chapter I prohibition applies in principle, and the joint participation may restrict competition. The agreement therefore needs to be assessed under the Section 9 exemption.

Assessment 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 range of products offered, in particular optional products, which is particularly important for the tendering authority. The bidding consortium agreement appears to be indispensable for the parties involved to submit a competitive offer in the tender procedures, compared with the offers presented by the other participants.

The parties were able to demonstrate that the joint bidding creates a significant degree of synergies capable of leading to efficiencies – in the form of lower prices and increased quality – in turn leading to a more competitive offer.

Competition in the tender process is not eliminated as at least two other relevant competitors can participate independently in the tender 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 conditions 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.³¹⁴
- 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.³¹⁵
- 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,³¹⁶ 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 and enable quicker delivery of perishable products to consumers, or deal 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

³¹⁴ 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.

³¹⁵ Data sharing is also encouraged in the UK's National Data Strategy. See section 6 'Availability: ensuring data is appropriately accessible'.

³¹⁶ 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 to 8.14) 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 8.15 to 8.99 discusses the assessment of whether an information exchange falls within the Chapter I prohibition:
 - (a) Paragraphs 8.19 to 8.32 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 8.33 to 8.58 discuss the nature of information exchanged, noting which types of information are likely to be considered 'competitively sensitive'.
 - (c) Paragraphs 8.59 to 8.77 discuss the characteristics of the exchange, noting which types of exchange are more likely to give rise to competition concerns.
 - (d) Paragraphs 8.78 to 8.82 discuss how market characteristics might impact upon the assessment.
 - (e) Paragraphs 8.83 to 8.99 discuss restrictions by object and effect respectively.
- 8.7 Paragraphs 8.100 to 8.109 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 via a third party (such as a platform operator or optimization tool provider), common agency (for example, a trade association), a market research organisation, or a supplier or customer. While 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 8.66 to 8.69).

8.9 This Part also applies to all types of information, including: (i) raw unorganised digital content that may 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 digital data sharing between actual or potential competitors.³¹⁷ 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.³¹⁸

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 exchanges in the context of vertical agreements involving competitors and, in particular, dual distribution are discussed at paragraphs 6.23 to 6.29 of the VABEO Guidance.

8.14 Information exchange may also be part of a merger process. Any conduct restricting competition that is not directly related to and necessary for the

³¹⁷ 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.

³¹⁸ To ensure an information exchange is ancillary to another horizontal agreement (ie does not raise competition concerns because it is objectively necessary to implement, and proportionate to the objectives of, another form of cooperation that has neutral or positive effects on competition), undertakings may need to adopt measures, for example, to: (i) limit the types of information they share; (ii) limit the recipients with whom the information is shared; (iii) ensure procedures are in place to reduce the risk of any inappropriate disclosures of information, as set out at paragraphs 8.71 to 8.75 below.

implementation of the acquisition of control remains subject to the Chapter I prohibition.

Assessment under the Chapter I prohibition

Introduction

- 8.15 As indicated at paragraph 3.15, 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. 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.³¹⁹ 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.³²⁰ 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.³²¹
- 8.16 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. However, it does preclude any direct or indirect contact between undertakings of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an undertaking has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give

³¹⁹ See, judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 42; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126.

³²⁰ 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.

³²¹ Judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraph 135.

rise to conditions of competition which do not correspond to the normal conditions of the market in question.³²²

- 8.17 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 or public authority merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, rather than requiring it.³²³ In practice, this means that undertakings that are 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 scope of the information exchange to what is required by the applicable regulation and they may have to implement precautionary measures if competitively sensitive information is exchanged.³²⁴
- 8.18 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 the exchange of granular data or data that can be attributed to individual undertakings. Undertakings may also consider entering into non-disclosure agreements with an independent third party service provider ('a trustee') to allow the trustee to collect, collate, check and then aggregate individual information from several sources to create a composite data set that can be shared with the participants without disclosing data which is attributable to the individual disclosing undertakings. The timing of exchanges could also be carefully thought through to ensure that they are not more frequent than necessary.

³²² 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 to 33. See also *Balmoral v CMA* [2017] CAT 23, paragraph 38, upheld on appeal, *Balmoral v CMA* [2019] EWCA Civ 162, paragraph 17.

³²³ See paragraph 3.60 above on conduct required by law.

³²⁴ See paragraphs 8.33 to 8.35 below on the concept of competitively sensitive information.

Main competition concerns arising from the exchange of competitively sensitive information³²⁵

Reducing competitive uncertainty and enabling/strengthening collusive outcomes

- 8.19 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.
- 8.20 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.³²⁶
- 8.21 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. An exchange of competitively sensitive information is likely to facilitate collusion if it allows an undertaking to signal to its competitors, through any means, the conduct that it would find desirable for those competitors to follow, or the conduct that the undertaking itself would adopt in reaction to the same competitors' conduct. Such an 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.³²⁷
- 8.22 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.³²⁸ Information exchange can make the market sufficiently transparent to allow the colluding undertakings to monitor whether other undertakings are deviating from the collusive outcome, and thus to know when and against whom to retaliate. Monitoring mechanisms can involve both

³²⁵ The use of the term 'main competition concerns' means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

³²⁶ See *Lexon v CMA* [2021] CAT 5.

³²⁷ See, for example judgment of 7 November 2019, *Campine and Campine Recycling v Commission*, T- 240/17, EU:T:2019:778, paragraph 305.

³²⁸ In the *Online sales of posters and frames*, CMA decision of 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.

exchanges of present and past data.³²⁹ Such monitoring can either enable undertakings to achieve a collusive outcome on markets where they would otherwise not have been able to collude, or it can increase the stability of a collusive outcome already present on the market.

- 8.23 Information exchange can also be used as a method to increase the *external stability* of an anti-competitive agreement or concerted practice. 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.
- 8.24 Algorithms can potentially be used to implement and/or to increase the stability of an anti-competitive agreement or concerted practice. In this regard, the use of pricing algorithms may result in firms collecting detailed data concerning their competitors, and it is possible that the use of pricing algorithms may increase the predictability of competitors' pricing behaviour.
- (a) Undertakings can deliberately use common behavioural coordination algorithms to agree on parameters of competition. Algorithms then become a device to facilitate collusion. Collusion on parameters of competition is typically restriction of competition by object.
- (b) Similarly, algorithms can also be designed to monitor (pre-existing) anti-competitive agreements or concerted practices between competitors. When used in this way, price monitoring algorithms can increase market transparency, allow the detection of price deviations in real time and make punishment mechanisms more effective.
- 8.25 Undertakings can independently use algorithms to monitor the prices of competitors and to inform their own price setting. This may lead to more intense competition, reduced costs and/or reduced barriers to entry. However, it is possible that the use of such algorithms could result in a concerted practice.³³⁰
- 8.26 For example, where third parties offer tools and algorithms to undertakings in order to help them to set and manage their prices, or even autonomously set prices on behalf of those undertakings, this could create a 'hub-and-spoke'

³²⁹ 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.

³³⁰ 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.

structure and facilitate information exchange which might reduce competitive uncertainty and enable/strengthen collusive outcomes.

8.27 In any event, at a minimum:

- (a) if a pricing practice is illegal when implemented offline, there is a high probability that it will also be illegal when implemented online.
- (b) Undertakings involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by algorithms. Just like an employee or an outside consultant working under a firm's "direction or control", an algorithm remains under the firm's control, and therefore the firm is liable even if its actions were informed by algorithms by increasing market transparency, detecting price deviations in real time, and making punishment mechanisms more efficient.

Anti-competitive foreclosure

8.28 An information exchange can also lead to anti-competitive foreclosure on the same market where the exchange takes place or on a related market.³³¹

8.29 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 compared to the undertakings that participate in the exchange. This type of foreclosure may be possible, for instance, via a data sharing initiative, if the data shared is of strategic importance in order to compete on the market, the exchange covers a significant share of the market and third parties' access is prevented.³³²

8.30 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 input 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 apply non-transparent and discriminatory terms of access to shared information may limit third parties' ability to detect trends for potential new products on related markets.

³³¹ With regard to foreclosure concerns that vertical agreements can give rise to, see paragraphs 10.13 to 10.14 of the VABEO Guidance.

³³² The judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraphs 57 to 58 highlights the importance of analysing the underlying market structure in order to establish whether the risk of foreclosure is likely.

- 8.31 A number of undertakings supplying financial services to consumers may, for instance, establish an association with a shared database containing customer information. All members of the association contribute information to the database and have access to the data, which allows them to better assess the risk of providing financial services to new customers. Exchanging the customer information facilitates the members' risk assessments regarding those customers. This can in turn facilitate market entry and thus benefit consumers. Such a database does not have the object of restricting competition within the meaning of the Chapter I prohibition.
- 8.32 Shared databases as described above may, however, have the effect of restricting competition depending on the economic conditions on the relevant market(s) and on the specific characteristics of the database concerned. These characteristics include the purpose of the database and the conditions of access to and participation in it, as well as the type of information exchanged (for example, whether it is publicly available or not, aggregated or detailed, historic, current or future information, the frequency with which the database is updated and the relevance of the information for setting prices, volumes or conditions of service). A database that covers a significant part of the relevant market and to which access is denied or delayed for other competitors may create an information asymmetry, placing those other competitors at a disadvantage compared to the undertakings that participate in the database. Fair, objective, transparent and non-discriminatory access criteria may alleviate competition concerns.

The nature of the information exchanged

Overview: competitively sensitive information

- 8.33 The Chapter I prohibition applies if an exchange of information is likely to reduce competitive uncertainty in a market and/or is capable of influencing the competitive strategy of other undertakings.³³³ The Chapter I prohibition applies regardless of whether the undertakings involved in the exchange obtain some benefit from their cooperation.
- 8.34 Information that reduces competitive uncertainty in the market and/or 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'. Whether information is competitively

³³³ See *Nortriptyline Tablets, Information Exchange*, CMA decision of 4 March 2020, 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.

sensitive typically depends upon the usefulness of that information to the recipient undertakings in setting their competitive strategy or whether the information otherwise reduces uncertainty regarding the operation of the market in question. Competitively sensitive information often concerns information that in markets with effective competition 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.³³⁴

- 8.35 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

- 8.36 ‘Genuinely public’ information is information that is readily accessible (in terms of costs of access) to all competitors and customers.³³⁵ As the information is 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.³³⁶ 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 8.64 below.
- 8.37 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

³³⁴ 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.

³³⁵ 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.

³³⁶ 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.

equal ease, and hence, in practice, exchanges of genuinely public information are unlikely.

8.38 The exchange of publicly available information between competitors can reduce competitive uncertainty in some circumstances:

- (a) The exchange of publicly available information on an apparently confidential basis can reduce competitive uncertainty, particularly when accompanied by confidential opinions that would not normally be made public. 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.³³⁷ Similarly, some exchanges may allow competitors to become aware of the relevant information more simply, rapidly and directly than they would via the market.³³⁸
- (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 customers from doing so.

8.39 A typical example of genuinely public information is the advertising by fuel stations of their current retail prices on a board. 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 could in principle benefit consumers as it facilitates consumers' comparison of the fuel stations' prices before they fill up their cars, even though the advertising also allows fuel station owners to become aware of the prices charged by their nearby competitors.

8.40 However, if the fuel 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

³³⁷ See *Lexon v CMA* [2021] CAT 5, paragraphs 106 to 107, 162 and 200 to 201.

³³⁸ 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* [2021] CAT 5, paragraph 187(7).

have to travel constantly to collect the prices advertised on the boards of fuel 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.

- 8.41 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 owners of the fuel stations.
- 8.42 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.
- 8.43 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 consumers shop around, which could in turn encourage fuel station owners to compete more intensely to attract customers. Indeed, the CMA has proposed that the government should create, on a statutory basis, an open data fuel finder scheme. This would require retailers to make their prices available on an open, real-time basis, meaning that drivers can easily compare prices in any area of the UK without having to travel in order to physically observe prices at individual fuel stations. In doing so, drivers will be more able to find the cheapest fuel at any given time, which in turn will increase incentives on retailers to compete hard on price and make it easier for consumers to identify where they are not doing so.³³⁹
- 8.44 Even if a certain type of information is publicly available (for example, information published by regulators), an incremental information exchange between competitors of the same or similar type of information may further reduce strategic uncertainty in the market. This may be the case, for example, where the information is exchanged in a less aggregated or more granular form, or the information is exchanged more frequently than it is made publicly available, or when comments are attached to the information that may signal to competitors the desired joint action to undertake. In that case, the exchange may restrict competition within the meaning of the Chapter I prohibition.

³³⁹ See the CMA's Supply of road fuel in the United Kingdom market study, Final Report, dated 3 July 2023.

8.45 For instance, it may be public knowledge in a given sector that the costs of supplies are rising. At public meetings, such as 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 eg by seeking to assess the implications of them for individual firms or discussing their responses to these price rises – as to do so would reduce uncertainty regarding their conduct on the market.²²⁴ A competitor must independently determine the policy which it intends to adopt on the market. This means that each competitor must independently decide its response to the rising costs of supplies.

Aggregated/individualised information and data

- 8.46 In general, the greater the detail of the information exchanged, and the more easily information is attributable to a particular undertaking, the more competitively sensitive that information is likely to be. 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.
- 8.47 The exchange of information which is genuinely aggregated such that the attribution of information to particular undertakings is sufficiently difficult or uncertain or where the data is aggregated across a range of different products, especially if the products have different characteristics or belong to different markets, is less likely to lead to a restriction of competition.
- 8.48 The 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 in 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 share of the relevant market, the exchange of aggregated information is unlikely to give rise to a restriction of competition. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated information and data may restrict competition in markets with specific characteristics.
- 8.49 For example, if undertakings forming a very tight and stable oligopoly had achieved a collusive outcome, then the exchange of aggregated information might allow the detection of a market price below the collusive level. This

might enable the undertakings to deduce that one of them had deviated from the collusive outcome and could lead to them taking 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.

- 8.50 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.³⁴⁰ At the same time, the exchange of processed information may allow undertakings to obtain greater efficiencies than they would achieve by exchanging raw data.

Imprecise, inaccurate or misleading information

- 8.51 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.
- 8.52 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.³⁴¹ Similarly, as discussed at paragraph 8.38(a) 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.
- 8.53 Even an exchange of false or inaccurate information can restrict competition.³⁴² Indeed, an exchange of information which is deliberately misleading may be particularly likely to be competitively sensitive since it may be designed to influence the recipient undertaking’s competitive strategy.³⁴³

³⁴⁰ The exchange of raw data is likely to raise greater risks where the processing of the data is relatively standardised. The risks are lower where the parties are expected to adopt non-standardised, non-public approaches to processing the exchanged data.

³⁴¹ See *Lexon v CMA* [2021] CAT 5, paragraphs 94(2) and 159 to 160.

³⁴² Judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, EU:T:2016:738, paragraph 91. *Nortriptyline Tablets, Information Exchange*, CMA decision of 4 March 2020, paragraphs 5.49, 5.67 and 5.89.

³⁴³ See *Lexon v CMA* [2021] CAT 5, paragraph 160. See also *Roofing Materials*, CMA decision of 4 November 2020, at paragraphs 3.150, 5.79 and 5.179.

Whether the information exchanged concerns the past, the present or the future

- 8.54 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.
- 8.55 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 facilitate a common understanding on the market.³⁴⁴ In addition, in principle, the older the information, the less useful it tends to be for the timely detection of deviations and thus as a means to create a credible threat of prompt retaliation.³⁴⁵ However, this requires a case by case assessment of the relevance of the information.³⁴⁶
- 8.56 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 purpose 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 average lengths of the contracts in the industry where the latter are indicative of the frequency of price re-negotiations. On the other hand, the exchange of current information may have restrictive effects on competition, especially if the exchange serves to artificially increase transparency for competitors rather than for consumers. Current or recent information relating to an undertaking's spare capacity or capacity utilisation may in practice be particularly likely to reduce uncertainty in a market and/or influence the strategic decision-making of the recipient, since it may provide

³⁴⁴ 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.

³⁴⁵ 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.

³⁴⁶ 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.

insight into the disclosing undertaking's likely future conduct. Similarly, in sectors in which undertakings use software or algorithms developed by third parties to assist with their price setting (or other key business terms), disclosing to a competitor the identity of the third party software used may reduce uncertainty in the market and/or influence the strategic decision-making of the recipients.

- 8.57 For example, if undertakings typically rely on data about consumer preferences (purchases or other choices) over the last year to optimise strategic business decisions for their brands, information covering this period will generally be more competitively sensitive than older data. In that case, the information relating to the last year would not be considered 'historic'.
- 8.58 In the context of a stable, non-complex market with high barriers to entry, exchanges of recent past information between close competitors may also result in collusion. For example, exchanging detailed information about recent past sales may reduce uncertainty about the future market behaviour of competitors and allow the parties to adapt their own future market behaviour accordingly.

The characteristics of the exchange

Unilateral disclosures

- 8.59 A situation in which one undertaking discloses competitively sensitive information to a competitor, who accepts it, can constitute a concerted practice where this competitor acts upon the disclosure and provided there is a link of cause and effect between the disclosure and the competitor's subsequent conduct on the market.³⁴⁷ 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.³⁴⁸
- 8.60 Unilateral disclosures could occur, for example, through posts on websites, (chat) messages, emails, phone calls, input in a shared algorithmic tool, or meetings etc.

³⁴⁷ See judgment of 15 March 2000, *Cimenteries CBR v Commission*, T-25/95 and others, EU:T:2000:77, paragraph 1849.

³⁴⁸ See Opinion of Advocate General Kokott of 19 February 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:110, paragraph 54.

- 8.61 For example, participation in a meeting³⁴⁹ where one undertaking discloses its pricing plans to its competitors – without those competitors publicly distancing themselves – is likely to be caught by the Chapter I prohibition, even in the absence of an explicit agreement to raise prices.³⁵⁰ In the same vein, introducing a pricing rule in a shared algorithmic tool (for instance, a rule to match the lowest price on a particular online platform or shop +5%, or the price of a particular 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.
- 8.62 When an undertaking receives competitively sensitive information from a competitor (be it in a meeting, by phone, electronically (including by (chat) messages and email) or as input in an algorithmic tool), the recipient undertaking will be presumed to take account of such information and adapt its market conduct accordingly unless it publicly distances itself (for example, by responding with a clear statement that it does not wish to receive such information³⁵¹) or reports it to the administrative authorities.³⁵² For this presumption to apply, it must be established that the recipient was aware of the content of the communication that it received. Establishing such awareness is a factual question, which will often be straightforward (eg where a person is present in a meeting or where a recipient replies to an email). However, the mere fact that an email is sent to a recipient does not in itself indicate that the recipient was aware of its content nor is there a legal presumption that the recipient ought to have been aware of the content of that message.³⁵³ 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

³⁴⁹ See judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.

³⁵⁰ 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.

³⁵¹ 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. The issue of public distancing is also addressed in *Motorola and Sepura*, Office of Communications decision of 16 December 2022 at paragraphs 700 to 706.

³⁵² See judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 46; 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.

³⁵³ In judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 39 to 40, the Court ruled that the presumption of innocence precludes an inference from the mere dispatch of the email that the recipient ought to have been aware of the content of the message. See also paragraphs 44 to 45.

presumption.³⁵⁴ Similar considerations would apply to the assessment of other modern forms of communication, including posts on websites.

- 8.63 The fact that an undertaking discloses competitively sensitive information through a genuinely public announcement (for example through a post on a publicly accessible website, a statement in public or in a newspaper) does not in itself exclude the possibility that the announcement may constitute a concerted practice within the meaning of the Chapter I prohibition. As explained at paragraph 8.36, publishing information and data so that it becomes genuinely public can help customers to make informed choices. Indeed, public disclosure may in some cases form part of a communication channel between competitors to signal future intentions to behave on the market in a specific way, or to provide a focal point for coordination between competitors and thereby fall within the Chapter I prohibition. Moreover, the fact that the parties to the exchange have previously published the same type of information (for example, through a newspaper or on their public websites) does not imply that a subsequent non-public exchange would not restrict competition within the meaning of the Chapter I prohibition. However, an undertaking publicly announcing an intended future course of action is less likely to generate efficiencies if the announcement does not commit the undertaking in its behaviour vis-à-vis its customers.³⁵⁵
- 8.64 For example, a unilateral public announcement referring to future intentions relating to pricing (as opposed to communicating an actual decision to change prices as of a certain date in the near future), will not bind the undertaking making the announcement in its behaviour towards its customers but may give important signals concerning an undertaking's intended strategy on the market to its competitors. This will be the case in particular if the information is sufficiently specific and it relates to existing, relatively commoditised products. Such announcements therefore tend not to bring any efficiencies that benefit 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.
- 8.65 Unilateral public announcements may be indicative of an underlying anti-competitive agreement or concerted practice. For example, on a market where there are only a few competitors present and where high barriers to

³⁵⁴ 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. This issue is also addressed in *Motorola and Sepura*, Office of Communications decision of 16 December 2022 at paragraphs 720 to 726.

³⁵⁵ See, for instance, European Commission Decision in Case AT.39850 *Container Shipping*, recitals 40-43.

entry exist, undertakings that continuously publicise information that provides no apparent benefit for consumers (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 may be used in order to implement or monitor their collusive arrangements. Whether such infringement is indeed found will depend on the specific facts of the case.

Indirect information exchange

- 8.66 Exchanges of competitively sensitive information between competitors can take place via a third party, such as a service provider (including a platform operator or optimisation tool provider or other person enabling undertakings to use a shared algorithm), a common agency (for instance a trade organisation), or a supplier or customer³⁵⁶ (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 participating competitors and the third party may all be held liable for such restrictions of competition. The Chapter I prohibition is not directed solely at parties to agreements or concerted practices that are active on markets affected by those agreements or practices.³⁵⁷
- 8.67 Where competitively sensitive information is exchanged directly, a case by case analysis of the role of each participant is required 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.
- 8.68 Several scenarios can be distinguished:
- (a) Certain indirect information exchanges are referred to as hub-and-spoke agreements. In such cases, a common supplier or manufacturer may act as a hub in order to relay information to different retailers. Alternatively, a common retailer may facilitate coordination between multiple suppliers or manufacturers. An online platform can also act as a hub if it facilitates, coordinates or enforces information exchanges

³⁵⁶ While guidance on the assessment of vertical distribution arrangements is available in the VABEO and in CMA166 Vertical Agreements Block Exemption Order – CMA Guidance, under certain circumstances vertical distribution arrangements may be used for horizontal collusion.

³⁵⁷ 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 to 35.

between undertakings on the platform.

- (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 technical restrictions which prevent platform users from offering lower prices or other advantages to final customers. Information may also be exchanged indirectly via a shared optimisation algorithm which takes commercial decisions based on competitively sensitive data-feeds from competitors. While using publicly available data to feed algorithmic software is legal, the aggregation of competitively 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.

8.69 Competitors that exchange competitively sensitive information indirectly (via a third party) may be engaging in an infringement of the Chapter I prohibition. Liability for an infringement by those competitors as well as the third party may arise in the following circumstances:

- (a) **Transmitting undertaking:** An undertaking may infringe the Chapter I prohibition when it transmits to a third party competitively sensitive information and expressly or tacitly agrees with that third party that the third party may share that information with the undertaking's competitors, or where that undertaking intended, via the third party, to disclose commercially sensitive information to its competitors.³⁵⁸ An undertaking may also infringe the Chapter I prohibition if it shares competitively sensitive information with a third party and it could reasonably have foreseen that the third party would, in the pursuit of an anticompetitive objective, share its competitively sensitive information with its competitors and if it was prepared to accept the risk which that entailed. On the other hand, there would be no infringement of the Chapter I prohibition if it was not reasonably foreseeable that the third party would, without informing

³⁵⁸ 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).

that undertaking, pass on its competitively sensitive information to its competitors in the pursuit of an anticompetitive objective.³⁵⁹

- (b) **Receiving undertaking:** The competitor undertaking receiving the competitively sensitive information would equally be participating in the infringement, and be liable for it, if it was aware of the anti-competitive objectives pursued by the undertaking sharing the information and by the third party, and intended to contribute to those objectives by its own conduct. Note that, as discussed in more detail at paragraph 8.62 above, the receiving undertaking will be presumed to take account of such information and adapt its market conduct accordingly unless it publicly distances itself or reports the contact to the administrative authorities.
- (c) **Third party:** a third party that transmits competitively sensitive information may also infringe the Chapter I prohibition if it intends to contribute by its own conduct to the common objectives pursued by 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 anti-competitive objectives or could reasonably have foreseen such conduct and was prepared to take the risk.³⁶⁰

Frequency of the exchange of information

8.70 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 is generally 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 that are indicative of frequent re-negotiations.³⁶¹ Whether an exchange of information is sufficiently frequent to facilitate a collusive outcome depends on the circumstances of the market in question. In general, the frequency with which information needs to be exchanged to facilitate a collusive outcome

³⁵⁹ Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraphs 30 and 33; judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 30.

³⁶⁰ Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 100.

³⁶¹ For example, infrequent contracts could decrease the possibility of retaliation.

also depends on the nature, age and degree of aggregation of such information.³⁶² As a result of the growing importance in some markets of real-time data for business decision-making, the highest competitive advantage may be obtained by automated real-time information exchange.

Measures to reduce the risk of competition law infringements

- 8.71 Undertakings that want (or need) to exchange information are encouraged to put measures in place to restrict the access to information and/or control how information is used.³⁶³ Such measures may ensure that competitively sensitive information is properly ringfenced so that it cannot influence a competitor's behaviour.
- 8.72 Undertakings can for instance use clean teams or trustees to receive and process information. A clean team generally refers to a restricted group of individuals within an undertaking who are not involved in the undertaking's commercial operations and are bound by strict confidentiality obligations with regard to the competitively sensitive information. A trustee is an independent third party that provides services to the undertaking. A clean team or trustee can also be used to ensure that the information exchanged pursuant to a horizontal agreement is provided on a need-to-know basis and in an aggregated manner.
- 8.73 Participants in a reciprocal data-sharing arrangement such as 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 be assigned to a trustee 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.

³⁶² 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.

³⁶³ Such obligations may already stem from UK law on data protection where personal data is included in the exchange.

- 8.74 Undertakings can take further measures to reduce the risk that competitively sensitive information is exchanged during interactions with (potential) competitors. Prior to planned contacts, undertakings should carefully review the agenda and purpose of the meeting or call to ensure that potential risks concerning the exchange of competitively sensitive information are identified in advance and that appropriate measures are taken to avoid them. Undertakings may also decide to attend the meeting(s) or call(s) accompanied by a lawyer specialised in competition law. During contacts, participants should stick to the agenda and, if competitively sensitive information is disclosed or exchanged, they should raise objections, ensure that their objections are recorded in the minutes of the meeting or call and publicly distance themselves if the exchange of information occurs despite their objections (see paragraph 8.62). Ensuring that accurate minutes are produced and circulated soon after each contact may allow undertakings to quickly identify whether competitively sensitive information was inadvertently exchanged and immediately raise objections to the minutes.
- 8.75 During contacts, an undertaking can publicly distance itself from any anti-competitive exchange of competitively sensitive information by making its opposition clear to the other participants in the exchange. To establish whether an undertaking has actually distanced itself, what is important is the understanding held by the other participants in the exchange regarding the intentions of the distancing undertaking. For example, an undertaking that wishes to distance itself can state immediately and expressly that it cannot participate in discussions on the subject in question and ask that the subject be changed at once. If the objection and request is ignored, the undertaking should immediately leave the meeting or call in a manner that makes the reason for its departure apparent to all present. Undertakings should ensure that their objections and departure are recorded in any shared minutes of the meeting or, if there are no such minutes, record their departure in their own notes of the contact.³⁶⁴
- 8.76 Undertakings can also take measures to limit the risks of disclosing competitively sensitive information in public (see paragraphs 8.63 and 8.64). Before disclosing competitively sensitive information, undertakings must verify whether the information really serves the legitimate purpose intended and whether the level of detail of the disclosure is required for that purpose. The public disclosure of competitively sensitive information regarding planned conduct on prices and quantities reduces strategic uncertainty in the market and may lead to a collusive outcome. Aggregated and historical information is

³⁶⁴ The case law on public distancing is discussed in *Motorola and Sepura*, Office of Communications decision of 16 December 2022 at paragraph 598(2)(iii).

generally less strategic. Any strategic information announced should also be limited to the undertaking itself and not extend to the sector or industry. In particular, undertakings should avoid public announcements on strategic steps that are dependent on the actions of their (potential) competitors. Depending on the context, undertakings that are faced with public announcements by competitors revealing commercially sensitive information may reduce the risk of competition law infringements by publicly distancing themselves or by reporting the announcements to the administrative authorities.

- 8.77 For example, three undertakings A, B and C are competing on a certain retail market and are faced with rising costs. Undertaking A should not make public statements suggesting that as long as B and C also pass on these rising costs to consumers the sector will continue to be profitable, nor should it announce that it is desirable that B and C should pass on these costs. Similarly, A should not publicly announce that it will not be able to avoid passing on these rising costs to consumers as B and C intend to do the same.

Market characteristics

- 8.78 The likelihood that an information exchange restricts competition depends on the market characteristics. The exchange 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 involved³⁶⁵ and the stability of demand and supply conditions on the market.³⁶⁶
- 8.79 **Transparency:** The more transparent a market is, the less the uncertainty on which there can be competition, thus making further exchanges all the more problematic.³⁶⁷
- 8.80 **Market concentration:** 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, enable undertakings to be aware of the market

³⁶⁵ 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.

³⁶⁶ 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 assessment of certain information exchanges.

³⁶⁷ See also paragraph 8.44 above.

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.³⁶⁸

8.81 **Barriers to entry:** The existence of barriers to entry makes it more difficult for outsiders to undermine the collusive outcome by entering the market and undercutting the colluding incumbents on the market. Barriers to entry thus make it more likely that a collusive outcome on the market is feasible and sustainable.

8.82 **Market stability:** Collusive outcomes are also more likely where the conditions of supply and demand on the market are relatively stable.³⁶⁹ Volatile demand, substantial internal growth by some undertakings in the market, frequent entry by new undertakings, or frequent disruptive innovation by undertakings, may indicate that the market is not sufficiently stable for coordination to be likely,³⁷⁰ or may require more frequent exchanges to have an effect on competition.

Restrictions of competition by object

8.83 An information exchange will be considered a standalone restriction by object 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.³⁷¹ In assessing whether an exchange constitutes a restriction of competition by object, particular attention should be paid to its content, its objectives and the legal and economic context in which the information exchange takes place.³⁷² When assessing that context, it is necessary to take into consideration the nature of the goods

³⁶⁸ See judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 58 and the case law mentioned there.

³⁶⁹ See judgment of 27 October 1994, *Deere v Commission*, T-35/92, EU:T:1994:259, paragraph 78.

³⁷⁰ 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.

³⁷¹ Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 100. See also: judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 122; and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41.

³⁷² 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 43 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.

or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.³⁷³

- 8.84 Exchanges between competitors that in individual cases have been qualified as a by object restriction in previous authority infringement decisions and judgments – in light of the content of the information shared, the objectives pursued and the legal and economic context - include the following:
- (a) The exchange with competitors of an undertaking's current pricing and future pricing intentions;³⁷⁴
 - (b) The exchange with competitors of an undertaking's current and future production capacities;³⁷⁵
 - (c) The exchange with competitors of an undertaking's current³⁷⁶ or future commercial strategy;³⁷⁷
 - (d) The exchange with competitors of an undertaking's arrangements relating to current and future demand;³⁷⁸
 - (e) The exchange with competitors of an undertaking's forecast of future sales;³⁷⁹
 - (f) The exchange with competitors of an undertaking's current financial state on a particular market and its business strategy;³⁸⁰

³⁷³ Judgment of 26 September 2018, *Philips and Philips France v Commission*, C-98/17 P, EU:C:2018:774, paragraph 35.

³⁷⁴ See, for instance judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 96; judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, EU:T:2016:738, paragraphs 134-136. It is not necessary for the information to relate directly to prices. Exchanges concerning information that forms a decisive element of the price to be paid by the end user may also amount to a restriction by object. See, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37.

³⁷⁵ Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, 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.

³⁷⁶ Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 70.

³⁷⁷ Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, 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.

³⁷⁸ Judgment of 9 September 2015, *Samsung SDI and Others v Commission*, T-84/13, EU:T:2015:611, paragraph 51.

³⁷⁹ Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 96.

³⁸⁰ Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 70.

(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;³⁸¹

(h) The exchange with competitors of elements of a potential entrant's launch plans.³⁸²

8.85 The examples above show that no direct connection is required between the information exchanged and consumer prices for the exchange to constitute a by object restriction.³⁸³ The decisive criterion for establishing whether there is an infringement by object, is the nature of the contacts, not their frequency.³⁸⁴

8.86 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.

8.87 However, if the undertakings start exchanging information regarding the development of future products, or reveal how they would react to each other's conduct, there is a risk that such exchanges may influence each other's 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 the market and restricts competition on the product characteristics and consumer choice. It will therefore be considered a restriction of competition by object.

8.88 Depending on the legal and economic context and on the objectives an undertaking seeks to attain, a public disclosure that signals the undertaking's future intentions on parameters of competition, for instance, prices or quantities, may also be considered a restriction by object. Similarly, a public

³⁸¹ See *Lexon v CMA* [2021] CAT 5, paragraph 162.

³⁸² See *Lexon v CMA* [2021] CAT 5, paragraph 115(7).

³⁸³ 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.'

³⁸⁴ Judgment of 7 November 2019, *Campine and Campine Recycling v Commission*, T-240/17, EU:T:2019:778, paragraph 308.

disclosure that does not clearly benefit customers but does signal to competitors how they should act, or the consequences of acting or failing to act in a certain way, or how the undertaking will react to competitors' conduct, will be considered a restriction by object.

- 8.89 Where an information exchange constitutes 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, it may be considered a cartel. This is particularly the case where the exchange involves 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.
- 8.90 Exchanges of information that constitute cartels not only infringe competition by object within the meaning of the Chapter I prohibition, but, in addition, are very unlikely to fulfil the conditions of the 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.
- 8.91 Data sharing arrangements to which different competitors contribute data generally do not amount to a restriction of competition by object if it is established that they have genuine pro-competitive effects meeting the requirements set out at paragraph 8.93.
- 8.92 For instance, a data pool in which (partly) commercially sensitive data is exchanged which addresses information asymmetry in a non-concentrated market and that will result in benefits for consumers is unlikely to be considered as a restriction by object if the participants ensure that any commercially sensitive data that they exchange through the pool is necessary and proportionate to achieve the pro-competitive aim. Participants can, for instance, rely as much as possible on aggregated and historical data; reduce the frequency of the exchange, and implement measures to restrict access to the information exchanged and/or to control how it is used. The participants should ensure that the arrangement is set up in a transparent manner.
- 8.93 Finally, the assessment of whether an exchange of information constitutes a restriction by object should take into consideration any argument put forward by the parties that the exchange is pro-competitive. In that regard, the mere existence of such pro-competitive effects cannot as such preclude the characterisation of the exchange as a restriction by object. Such pro-competitive effects must be demonstrated, relevant, specifically related to the

exchange of information concerned and sufficiently significant to justify a reasonable doubt as to whether the exchange causes a sufficient degree of harm to competition.³⁸⁵ If these conditions are met, a full assessment of the effects of the exchange of information is required to determine whether it constitutes a restriction of competition by effect.

Restrictions of competition by effect

- 8.94 An information exchange that does not constitute a restriction by object, may still have restrictive *effects* on competition.
- 8.95 As is indicated at paragraph 3.44, the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the outcome of the assessment depends 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 market to the situation that would prevail in the absence of that specific information exchange.³⁸⁶ 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 the operation of the market in question, by impacting one (or several) of the parameters of competition in that market, such as price, output, product quality, product variety or innovation.
- 8.96 For the assessment of possible restrictive effects, the nature of the information that is exchanged (see paragraphs 8.33 to 8.58), the characteristics of the exchange (see paragraphs 8.59 to 8.77) and the market characteristics (see paragraphs 8.78 to 8.82) are relevant.³⁸⁷
- 8.97 For an information exchange to have restrictive effects on competition, it will generally be necessary that the undertakings involved cover a sufficiently large share of the relevant market. Otherwise, the undertakings that are not participating in the exchange could constrain any anti-competitive behaviour of the undertakings involved.
- 8.98 What constitutes ‘a sufficiently large share of the market’ cannot be defined in the abstract and will depend on the specific facts of each case, the structure of the market and the type of exchange in question.
- 8.99 An information exchange that contributes little to the transparency of a market is less likely to have restrictive effects on competition than an information

³⁸⁵ Judgment of 30 January 2020, *Generics (UK) and Others v CMA*, C-307/18, EU:C:2020:52, paragraphs 105 to 107.

³⁸⁶ Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 76.

³⁸⁷ Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 54.

exchange that significantly increases transparency. Therefore, the combination of both the pre-existing level of transparency and how the exchange changes that level 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 lead to restrictive effects on competition, while exchanges are unlikely to lead to restrictive effects on competition in very fragmented markets.

Assessment under the Section 9 exemption

Efficiencies³⁸⁸

- 8.100 Information exchange may lead to efficiency gains, depending on the nature of the information exchanged, the characteristics of exchange and the structure of the market.
- 8.101 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 more quickly to changes in demand and supply and may allow them to mitigate internal and external risks of supply chain disruptions or vulnerabilities.
- 8.102 Exchanges of information may benefit consumers and undertakings alike by enabling them to compare the price or quality 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.
- 8.103 An information exchange in the form of data sharing may be essential for the development of new products, services and technologies.
- 8.104 Exchange of consumer data between undertakings in markets with asymmetric information about consumers can also give rise to efficiencies. 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

³⁸⁸ This discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

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.

8.105 Sharing data between e-commerce marketplaces about online sellers engaging in illegal practices such as the sale of counterfeit products may facilitate the identification of counterfeit products by individual marketplaces, thereby protecting consumers from buying such products.

Indispensability

8.106 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.³⁸⁹ Moreover, the exchange should not involve information that goes beyond the variables that are relevant for the attainment of the efficiency gains.

8.107 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

8.108 Efficiency gains achieved 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 undertakings involved in the information exchange, the more likely it is that the efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition.

³⁸⁹ See the discussion of the indispensability criterion at paragraphs 73 and following in the European Commission (2004) Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 27.4.2004, which is a statement of the European Commission for the purpose of section 60A CA98.

No elimination of competition

8.109 The conditions 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 of a reduction of competitive uncertainty via data sharing

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

Assessment under the Chapter I prohibition: 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.

Assessment under the Section 9 exemption: 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 of benchmarking

Example 2

Situation: Three 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 proportion of their individual variable 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 in order to become more efficient.

Analysis

Assessment under the Chapter I prohibition: This information exchange does not in principle constitute a restriction of competition by object: the information exchanged does not reveal in itself a sufficient degree of harm to competition because it does not remove uncertainty about the participants' individual conduct on the market. 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.

Assessment under the Section 9 exemption: It is unlikely that the conditions of the Section 9 exemption are fulfilled because there are less restrictive means to achieve the claimed efficiency gains, for example by using a third party to collect, anonymise and aggregate 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.

Example of data sharing arrangement to address shortages of supply

Example 3

Situation: Several producers of essential medical products are 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, the association plans to gather data to identify production capacity, existing stocks and potential to optimise the supply chain. Data would be fed back to the association's members with the aim of rebalancing and adapting their individual capacity utilisation, production and supply.

Analysis

Assessment under the Chapter I prohibition: 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. For example, a consultancy firm could assist the association with collecting the data and aggregating it in a model, subject to non-disclosure agreements concluded with each producer. Non-competitively sensitive aggregated data could then be shared with the producers. If it were absolutely necessary for the producers to exchange additional competitively sensitive information (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 additional exchanges would need to be strictly limited to what is indispensable for effectively achieving the stated pro-competitive 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 avoiding any discussion of prices or any coordination on other issues that are not strictly necessary for achieving the stated pro-competitive aims. The project should also be limited in time so that the exchanges immediately cease once the risk of supply shortages ceases to be 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 data sharing arrangement were made accessible to every manufacturer that produces the relevant product, regardless of whether they are a member of the relevant industry association.

Example of the use of public announcements

Example 4

Situation: Four suppliers with a combined market share of 70% frequently announce future prices publicly by posting them on their websites and issuing related press statements. There is typically an interval of several months between the date of the price announcement and the date on which the announced prices are available for customers to place orders. The suppliers often revise the announced prices during that interval. Executives of the suppliers regularly make public comments about the price announcements of their competitors, explaining how the competitors should revise their prices. The suppliers claim they do this to inform investors about the future performance of their company.

Analysis

Assessment under the Chapter I prohibition: Information concerning an undertaking's future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. The information announced in public is competitively sensitive and, together with the comments of the executives, the exchange is capable of removing uncertainty between the participants as regards future pricing intentions. This kind of public communication is unlikely to benefit customers, for example by enabling them to make informed purchase decisions, as the announced prices are often changed before the date on which they come into effect. The price announcements therefore do not appear to be a legitimate attempt to inform customers. Moreover, the executives' public comments concerning the prices of rival suppliers may allow the participating suppliers to develop a mutual understanding of a reward-punishment scheme that is characteristic of collusive agreements. Depending on the other elements of economic and legal context, the exchange appears 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. The exchange is therefore likely to be considered as a restriction by object.

Example of unilateral public announcements

Example 5

Situation: The CEO of a major producer of a homogenous product refers publicly in a regular earnings call to the need to respond to recent raw material price increases and address the current excessively low profit margins by means of an industry-wide price increase. She mentions that she would go along with any price increase that competitors would announce in the market. She also expresses her conviction that the industry is "disciplined enough" to know what it takes now to "get the margins right again". After all, she says, the industry successfully implemented price increases ten years ago, when it found itself in a similar situation.

Analysis

Assessment under the Chapter I prohibition: The statements of the CEO in the earnings call can be read as a unilateral invitation to collude. The fact that the announcement takes place in public does not as such exclude that it could constitute a concerted practice within the meaning of the Chapter I prohibition. The statements may provide a potential focal point for coordination between competitors. If, for instance, other competitors make contemporary statements or behave in the market showing that they have taken the invitation to collude into account when determining their own future course of action on the market, and,

depending on the legal and economic context, the conduct may amount to a restriction of competition by object within the meaning of the Chapter I prohibition. Other competitors may limit such risk by publicly distancing themselves from the announcements or by reporting the announcements to the administrative authorities.

Example of data sharing to combat counterfeiting

Example 6

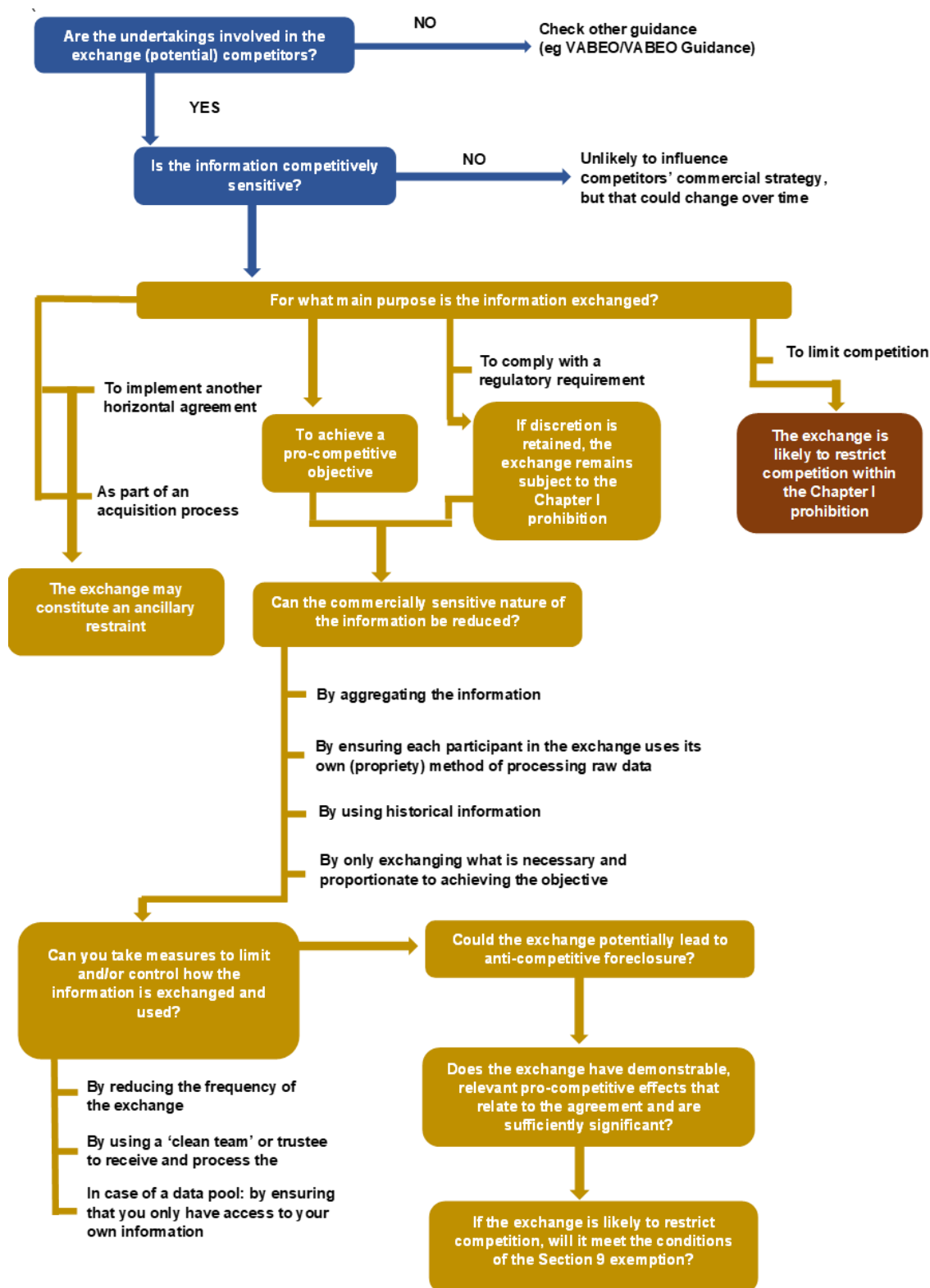
Situation: A brand owner identifies on several social media platforms accounts that have a similar name to the one of her brand. When the brand owner checks the respective accounts, she establishes that counterfeit products are being sold under her brand both on the social media platforms and via a redirection link to a counterfeit website. The legal representatives of the brand owner then contact one of the social media platforms to (i) eliminate the account and block the user from creating new accounts in the future, and (ii) provide the platform with information to identify the counterfeiter with the aim of initiating legal action, such as name, address, IP address, email, etc. The brand owner then asks the social media platforms to share this information with other intermediaries and platforms to avoid platform-shopping for the purpose of promoting or selling illegally produced goods which infringe intellectual property rights.

Analysis

Assessment under the Chapter I prohibition: The exchange of information between social media platforms is intended to prevent the sale of counterfeit products and, given this objective, does not constitute a restriction of competition by object. Moreover, as regards the content of the exchange, the information exchanged is unlikely to constitute competitively sensitive information. Any exchanges of competitively sensitive information would have to be limited to what is objectively necessary for effectively identifying the counterfeiter. To ensure transparency, the exchanges should be documented.

Other market players not directly affected by the counterfeiting activity would not be placed at a competitive disadvantage as a result of the information exchange, since preventing counterfeit sales does not affect them.

Self-assessment steps for undertakings wishing to engage in an exchange of information*



*These assessment steps indicative and not intended to be exhaustive. A case by case analysis pursuant to Part 8 remains necessary to determine whether the exchange of information constitutes a restriction of competition by object or by effect despite the implementation of the measures to reduce the commercially sensitive nature of the information or limit and/or control how the information is used.

The following table provides an overview of liability for exchanges of competitively sensitive information in various scenarios. The table is indicative and not exhaustive.

Scenario	Liability of A	Liability of B	Liability of C
Direct bilateral exchanges between A and B.	Yes.	Yes.	-
Direct unilateral exchange from A to B.	Yes. ³⁹⁰	If B remains active on the market, and B was aware of the content of the communication (eg B read an email sent by A) authorities can rely on the presumption that B takes the information into account unless B publicly distances itself or reports it to the authorities.	-
Public disclosure by A; B receives it.	Yes, if the disclosure constitutes a concerted practice.	Possibly a concerted practice if the authorities can show that B requested the information or accepted it. If B was aware of the content of the communication, authorities can rely on the presumption that B takes the information into account unless B publicly distances itself or reports it to the authorities.	-
Indirect exchange from A via C to B	A liable if it intended for C to share its information with B or if it expressly or tacitly consented for C to disclose the information to B, or if it could reasonably foresee that C would disclose the information to B in pursuit of an anti-competitive objective and was prepared to accept the risk.	B liable if it was aware of the anti-competitive objectives pursued by A (and/or C) and intended to contribute to those objectives by its own conduct. If B was aware of the content of the communication (eg B read an email sent by C), authorities can rely on the presumption that B takes the information into account unless B publicly distances itself or reports it to the authorities.	C liable as facilitator if it was aware of the anti-competitive objectives of A and intended to contribute to those objectives.

³⁹⁰ If B publicly distances itself or reports the exchange to the authorities, A's liability would depend on whether the existence of a concerted practice can be established vis-à-vis one or more other recipients of the exchange.

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.³⁹¹ 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 services 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 certain special features. The application of the Chapter I prohibition to environmental sustainability agreements is the subject of separate guidance which should be read alongside this Guidance where a horizontal agreement relates to environmental sustainability.³⁹²
- 9.2 The preparation and production of technical standards as part of the exercise of public powers are not covered by this Guidance.³⁹³ Standards relating 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 effects on four possible markets.³⁹⁴ First, standard development may have an impact on the product or service market or markets to which the standard relates. Second, where the standard development involves the development or selection of technology or where the intellectual property rights (IPR) are marketed

³⁹¹ 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.

³⁹² See the CMA's *Draft guidance on environmental sustainability agreements* (CMA177), which was published in draft for consultation on 28 February 2023, and which will ultimately be replaced by the finalised version of that guidance as well as any future guidance relating to environmental sustainability for the purposes of UK competition law.

³⁹³ See judgment of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07 P, EU:C:2009:191, paragraph 92

³⁹⁴ Markets will be defined in accordance with OFT 403, Market Definition. The CMA will also have regard to the European Commission (1997) Notice on the definition of relevant market, OJ C 372, which is a statement of the European Commission for the purpose of section 60A CA98.

separately from the products to which they relate, the standard can have effects on the relevant technology market.³⁹⁵ Third, the market for standard development may be affected if different standard development bodies or agreements exist. Fourth, where relevant, a distinct market for testing and certification may be affected by standard development.

Assessment under the Chapter I prohibition

Main competition concerns

- 9.4 Standardisation agreements generally produce significant positive economic effects,³⁹⁶ for example by encouraging the development of new and improved products or markets and improved supply conditions. Standards thus generally 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 In the context of standards involving IPR,³⁹⁷ three main groups of undertakings with different interests in standard development are typically involved. First, there are upstream-only undertakings that solely develop and/or market technologies. This also includes 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. Second, 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

³⁹⁵ See Part 4 on Research and Development 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 (2004), OJ C 89/03, paragraphs 20-26 ("*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.

³⁹⁶ See also paragraph 9.43

³⁹⁷ 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.

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.

- 9.6 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 in three main ways, namely: (i) restriction of price competition; (ii) foreclosure of innovative technologies; and (iii) exclusion of, or discrimination against, certain undertakings by preventing effective access to the standard. Each of these channels is expanded on below.
- 9.7 First, if undertakings were to engage in anti-competitive information exchanges 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.³⁹⁸
- 9.8 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 to be included in the standard and the standard has been set, some technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring the exclusive use of a particular technology 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 ('SDO') 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.
- 9.9 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

³⁹⁸ 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.

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.³⁹⁹ Intellectual property laws and competition laws share the same objectives of promoting consumer welfare and innovation as well as an efficient allocation of resources.⁴⁰⁰ 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 a 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”).⁴⁰¹ By contrast, “hold-out” could occur where the 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 (ie deliberately delaying licensing negotiations with the licensor).⁴⁰²
- 9.11 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

³⁹⁹ If also accompanied by a FRAND commitment. See for example, paragraphs 9.20 to 9.22.

⁴⁰⁰ 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.

⁴⁰¹ 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. However, as noted at paragraph 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.

⁴⁰² Challenging IPRs claimed as essential to a standard does not constitute hold out – see paragraph 9.29. While hold-up and hold-out concerns are both generally of a unilateral nature, hold-up concerns generally follow from the standardisation agreement. Hold-out concerns are inherent to the intangible nature of IPRs. In other words, during the standardisation process, members of the SDO agree on a particular technological solution among (potentially) competing technologies, which may create market power that the holder of a standard-essential IPR can exploit to “hold-up” implementers. By contrast, hold-out by an implementer unwilling to take a licence is not the result of the standardisation but follows from the fact that IPR holders can ultimately only prevent unlicensed use by court action. See also *Optis v Apple* [2022] EWCA Civ 1411 (although at the date of publication of this Guidance, this case is subject to appeal to the UK Supreme Court).

the possession or exercise of market power. The question of market power can only be assessed on a case-by-case basis.⁴⁰³

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 of the incumbent product collude to exclude new technology from an already existing standard would fall into this category.⁴⁰⁴
- 9.13 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.⁴⁰⁵

Restrictive effects on 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.⁴⁰⁶ Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards.

⁴⁰³ See European Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, recitals 221-270.

⁴⁰⁴ See for example European Commission Decision in Case IV/35.691, *Pre-insulated pipes*, recital 147, where part of the infringement of Article 101 of the TFEU consisted in 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions'.

⁴⁰⁵ This paragraph should not prevent genuine unilateral ex ante disclosures by individual IPR holders of their most restrictive licensing terms for standard essential patents or of a maximum accumulated royalty rate by all holders of complementary IPR. It also does not prevent SDOs disclosing the total maximum stack of royalty for all complementary IPR forming part of the standard. Please see paragraph 9.42 below. In addition, it does not prevent patent pools created in accordance with the principles set out in Section IV.4 of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03 ('Technology Transfer Guidelines'), or the decision to license IPR essential to a standard on royalty-free terms as set out in this Part.

⁴⁰⁶ See also Part 1 Introduction. As regards market shares see also paragraph 9.40.

Soft Safe Harbour

- 9.15 For those standard development agreements which may create market power, paragraphs 9.16 to 9.24 below set out the conditions for a Soft Safe Harbour. Agreements that satisfy the conditions for the Soft Safe Harbour would normally fall outside the scope of the Chapter I prohibition and would not normally need self-assessment.
- 9.16 A standardisation agreement that does not satisfy the conditions of the Soft Safe Harbour 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, SDOs remain entirely free to put in place rules and procedures different to the conditions of the Soft Safe Harbour described at paragraphs 9.16 to 9.24. However, they will need to assess themselves whether such rules or procedures involve restrictions of competition within the meaning of the Chapter I prohibition. Paragraphs 9.30 to 9.54 below discuss the considerations applicable to all standardisation agreements that do not meet the conditions of the Soft Safe Harbour.
- 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.⁴⁰⁷
- 9.18 In particular, to ensure **unrestricted participation** the rules of the SDO should 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.⁴⁰⁸ The SDOs should also provide 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 SDO would need to have procedures which allow stakeholders to effectively inform themselves of

⁴⁰⁷ See also paragraph 9.30 and following in this regard.

⁴⁰⁸ Unrestricted participation should cover participation in all steps of the standardisation process, including the preparatory stage within the SDO, such as in the context of SDO specific special interest groups.

upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.

- 9.20 Furthermore, the SDO's rules would need to ensure **effective access** to the standard on **FRAND terms**.⁴⁰⁹
- 9.21 Where an SDO develops standards involving IPR, **a clear and balanced IPR policy, adapted to the particular industry** and the needs of the SDO in question, increases the likelihood both that the implementers of the standard will be granted effective access to the standards set out by that SDO and that the best technologies will be incorporated into the relevant standard as IPR holders can expect to receive compensation on FRAND terms from those who implement their IPR.⁴¹⁰
- 9.22 In order to **ensure effective access** to the standard, for the purposes of the Soft Safe Harbour 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 to any member or any third party their essential IPR on FRAND terms ('FRAND commitment').^{411, 412} 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 (or to which it transfers the right to

⁴⁰⁹ For example, effective access should be granted to the specification of the standard.

⁴¹⁰ As specified at 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).

⁴¹¹ See judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 53: '*In those circumstances, and having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU*'. See also 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*'.

⁴¹² The Soft Safe Harbour requires the most permissive approach to the offering of licences. IPR Policies that meet the conditions of the Soft Safe Harbour are likely to 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 fall outside the Soft Safe Harbour and would therefore require self-assessment to determine whether they in practice ensure effective access to the standard. If they ensure effective access in practice then they are unlikely to have restrictive effects on competition. This is discussed further at paragraphs 9.33 and 9.44 below.

license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller or through a similar clause in any agreement regulating participation in a patent pool. It should be noted that FRAND can also cover royalty-free licensing.

- 9.23 Moreover, the IPR policy should require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This is relevant to (i) enable the industry to make an informed choice of technology to be included in a standard and (ii) assist in achieving the goal of effective access to the standard.⁴¹³ 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.⁴¹⁴
- 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 have IPR claims over a particular technology without identifying specific IPR claims or applications for IPR (so-called blanket disclosure).⁴¹⁵ 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 relating to effective access are not the same in the case of an SDO with a royalty-free standards policy,⁴¹⁶ 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

⁴¹³ 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 in Case COMP/38.636, *Rambus*.

⁴¹⁴ 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.

⁴¹⁵ Participants should be encouraged to complete their earlier blanket disclosure with the patent number and/or patent application numbers when that information becomes publicly available.

⁴¹⁶ The same would apply where the organisation applies a licensing policy based on a one-off nominal fee.

has been locked-in to the standard or by charging discriminatory royalties,⁴¹⁷ or by engaging in other unfair or unreasonable practices having an equivalent effect.⁴¹⁸ At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and, in line with the principles in the following paragraphs, 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: a global or multi-national portfolio licence to an IPR holder's standard essential IPRs may be FRAND where this 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); and the UK courts may grant injunctive relief in respect of valid and infringed standard essential UK IPR where the potential licensee declines to enter into such a portfolio licence which has been found to be FRAND.⁴¹⁹

- 9.26 Compliance with the Chapter I prohibition by the SDO does not require it to verify whether licensing terms of participants fulfil the FRAND commitment.⁴²⁰ Participants must assess for themselves whether their 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.⁴²¹

⁴¹⁷ 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.

⁴¹⁸ 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 paragraphs 221-225 of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03 ('Technology Transfer Guidelines'); *CMA166 Vertical Agreements Block Exemption Order – CMA Guidance*, paragraphs 10.152-10.160.

⁴¹⁹ See *Unwired Planet v Huawei* [2020] UKSC 37 at paragraphs 168 to 169.

⁴²⁰ Standard development organisations are not involved in licensing negotiations or any resultant agreements.

⁴²¹ 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.

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.⁴²² That value primarily needs to focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard.⁴²³ In general, there are various methods available for the assessment,⁴²⁴ and in practice, more than one method is often used to compensate for the shortcomings of a particular method and to cross-check the result.⁴²⁵ It may be possible to compare the licensing fees charged by the undertaking in question for the relevant IPRs 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.⁴²⁶

- 9.28 An independent expert assessment could also be obtained to provide an objective, non-binding assessment of 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 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 that the level of the royalty rates is not the result of undue exercise of market power. Another method consists in determining, first, an

⁴²² European Commission Communication COM (2017) 712 on Setting out the EU approach to Standard Essential Patents, page 7.

⁴²³ European Commission Communication COM (2017) 712 on Setting out the EU approach to Standard Essential Patents, page 7.

⁴²⁴ In principle, cost-based methods may not be the most suitable, not least because they entail 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.

⁴²⁵ 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 to 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. See also, for example, *Interdigital v Lenovo* [2023] EWHC 539 (Pat) and *Optis v Apple* [2023] EWHC 1095 (Ch).

⁴²⁶ 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.

appropriate overall value for all relevant IPR and, second, the portion attributable to a particular IPR holder.⁴²⁷

- 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.⁴²⁸ In the absence of such a provision, nothing in this Guidance affects 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.⁴²⁹ 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.⁴³⁰ Note that prior to commencing proceedings, a holder of a standard essential IPR should alert the alleged infringer of the infringement complained about by identifying the IPR in question and specifying the way in which that IPR has been infringed.⁴³¹ An IPR holder seeking to enforce a standard essential UK IPR that is prepared to license the implementer on whatever terms the UK court determines as FRAND will generally be regarded as being willing to license on FRAND terms.⁴³²

Effects based assessment of standardisation agreements

- 9.30 The assessment of a 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 must be taken into consideration. The following considerations apply to all

⁴²⁷ See *Unwired Planet v Huawei* [2020] UKSC 37 paragraphs 42 to 45.

⁴²⁸ See *Unwired Planet v Huawei* [2020] UKSC 37 paragraph 90. See also *Optis v Apple* [2022] EWCA Civ 1411, paragraph 115 (although at the date of publication of this Guidance, this case is subject to appeal to the Supreme Court).

⁴²⁹ If both parties agree, the parties can request that the amount of the royalty be determined by an independent third party (eg 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 in Case AT. 39939, *Samsung - Enforcement of UMTS standard essential patents*, recital 78.

⁴³⁰ See *Unwired Planet v Huawei* [2020] UKSC 37 at paragraph 64. 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.

⁴³¹ Judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraphs 60 to 61.

⁴³² *Unwired Planet v Huawei* [2020] UKSC 37 at paragraph 158.

standardisation agreements that do not satisfy the conditions of the Soft Safe Harbour as set out at paragraphs 9.16 to 9.24.

(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 an SDO remain free to develop alternative standards or products that do not comply with the agreed standard.⁴³³ For example, if the standardisation 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.⁴³⁴ 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 of 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 SDO) 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 certain members or for third parties. However, where there are several competing standards or where there is effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.
- 9.33 As noted at paragraph 9.22, a provision in an IPR Policy drafted so as to require the IPR holder to offer a licence to any member or third party seeking a licence in order to implement the standard would satisfy one of the conditions of the Soft Safe Harbour, as it would not normally be restrictive of competition since it is likely adequately to ensure access to the standard. If an

⁴³³ 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)'.

⁴³⁴ See European Commission Decision in Case IV/29.151, *Philips/VCR*, recital 23.

IPR Policy does not provide for licensing to members or 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. An IPR Policy provision that ensures de facto access to the standard is provided to members or third parties at each level of the supply chain will not fall within the scope of the Chapter I prohibition.

- 9.34 As regards standard development agreements with **different types of IPR disclosure models** from the ones described at paragraphs 9.23 to 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 Preventing certain undertakings from being able to influence the choice and definition of the standard is (except in the circumstances discussed at paragraph 9.38 below) likely to result in a restrictive effect on competition). By contrast, if participation in the standard development process is open, the risks of a restrictive effect on competition are lower.⁴³⁵
- 9.36 Open participation can be achieved by allowing all competitors and/or relevant stakeholders in the markets affected by the standard to take part in developing and choosing the standard and by avoiding rules or restrictions that disproportionately affect only certain types of stakeholder.
- 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.

⁴³⁵ 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 considered to restrict competition within the meaning of Article 101(1) TFEU.

- 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 SDOs;⁴³⁶ (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;⁴³⁷ or (iii) if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard.
- 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.⁴³⁸ This could be achieved by establishing procedures for the collective representation of stakeholders (eg consumers). 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 may not always be possible⁴³⁹ to assess with any certainty at an early stage whether the standard will in practice be adopted by a large, or only an insignificant share, 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 will in most cases have an interest in implementing the standard).⁴⁴⁰ However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in developing 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.

⁴³⁶ Such restriction may materialise via the exclusion of stakeholders from the standardisation agreement or via a more limited participant status.

⁴³⁷ 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 for the purposes of the Section 9 exemption.

⁴³⁸ See European Commission Decision in Case 39.416, *Ship Classification*.

⁴³⁹ In particular where the introduction of the standard is likely to result in a new relevant market.

⁴⁴⁰ See paragraph 9.5.

(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 an SDO excludes upstream only undertakings (that is, undertakings not active on the downstream production market), either explicitly or through the adoption of rules with disproportionate impact on such undertakings, this could lead to the exclusion of potentially better upstream technologies.

(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 IPR by individual IPR holders or of a maximum accumulated royalty rate by all holders of complementary IPR forming part of the standard will not, in principle, restrict competition within the meaning of the Chapter I prohibition, nor will the disclosure – by the SDO – of the total maximum accumulated royalty rate for the standard sought by participating holders of complementary IPR.⁴⁴¹ In that regard, it is also 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 an SDO'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 their maximum royalty rates, or the maximum accumulated royalty rate to be charged, this will generally not lead to a restriction of competition within the meaning of the Chapter I prohibition.⁴⁴² 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 various alternative technologies.

⁴⁴¹ Similar to the concept of a patent pool comprised of complementary patents, holders of complementary IPR forming part of the standard can share the total royalty stack for their IPR (see, for example, paragraph 253 of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03 ('Technology Transfer Guidelines'). For further discussion of the concept of complementary IPR, see, for example, paragraphs 251-253 of the *Technology Transfer Guidelines*.

⁴⁴² 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.

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 relating to, for instance, the quality, safety and environmental aspects of a product may also facilitate consumer choice and may 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 market and facilitate innovation by allowing undertakings to build on top of agreed solutions. These efficiencies can help contribute to market resilience.
- 9.44 In order for standardisation agreements to achieve efficiencies, the information necessary to apply the standard must be effectively available to those wishing to enter the product/service market to which the standard relates.⁴⁴³ If an IPR Policy falls within the scope of the Chapter I prohibition, 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.
- 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 generally affect a distinct market.
- 9.46 While effects on innovation must be analysed on a case-by-case basis, standards creating compatibility at a horizontal level between different technologies are likely to give rise to efficiencies.

⁴⁴³ See European Commission Decision 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*'.

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 conditions of the Section 9 exemption.
- 9.48 The assessment of a 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.⁴⁴⁴
- 9.49 Participation in standard development should generally be open to all competitors in the market or markets affected by the standard, unless such participation would generate significant inefficiencies, such as long delays in the adoption process.⁴⁴⁵ Where participation in the development of the standard is restricted, any restrictive effects of such limited participation should be removed or lessened in order for such restriction on the participants to be outweighed by efficiencies for the purposes of the Section 9 exemption.⁴⁴⁶
- 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

⁴⁴⁴ 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]estrictions 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).

⁴⁴⁵ See European Commission Decision of 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’.

⁴⁴⁶ See paragraph 9.39 above on ensuring that stakeholders are kept informed and consulted on the work in progress if participation is restricted.

identified efficiencies.⁴⁴⁷ 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 by the need to recoup significant start-up costs.⁴⁴⁸ 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 the standardisation agreement. When assessing the likelihood of pass-on to consumers it is relevant to take into account the procedures that are used to guarantee that the interests of the users of standards and end consumers are protected. In addition, where standards facilitate technical interoperability and compatibility or competition between new and existing products, services and processes, it can be presumed that the standard will benefit consumers.

No elimination of competition

- 9.54 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

⁴⁴⁷ Substitute IPR refers to IPR which is regarded by users of licensees as interchangeable with or substitutable for another IPR, by reason of the characteristics and intended use of the IPR.

⁴⁴⁸ In this context, see European Commission Decision in Cases IV/34.179, 34.202, 216, *Dutch Cranes (SCK and FNK)*, recital 23: ‘*The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85(1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services*’.

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.⁴⁴⁹ In the latter case, competition may be eliminated if members and third parties are foreclosed from effective access to the standard.

Examples

Example of setting standards competitors cannot satisfy

Example 1

Situation: An SDO sets and publishes safety standards that are widely used by the relevant industry. Most competitors in 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 performance and functional requirements and which is recognised by the technical committee of the SDO. 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

In this case participation in the development of the standard is not unrestricted, and the process used to adopt the standard does not seem transparent. This standardisation agreement is likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition and is unlikely to meet the conditions of the Section 9 exemption. The members of the SDO have, without any objective justification, set the standard in such a way that the products of their competitors which are based on different 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.

⁴⁴⁹ *De facto* standardisation refers to a situation where a (legally non-binding) standard, is, in practice, used by most of the industry.

Example of non-binding and transparent standard covering a large part of the market

Example 2

Situation: A number of consumer electronics manufacturers with substantial market shares agree to develop a new standard for audiovisual technology.

Analysis

Assessment under the Chapter I prohibition: Provided that (a) the manufacturers remain free to produce other new products which do not conform to the new standard, (b) participation in the development of the standard is unrestricted and transparent, and (c) the standardisation agreement does not otherwise restrict competition, the Chapter I prohibition is not likely to be infringed. On the other hand, if the parties agreed to only manufacture products which conform to the new standard, the agreement would be likely to restrict competition within the meaning of the Chapter I prohibition by limiting product variety and technical innovation.

Example of standardisation agreement without IPR disclosure

Example 3

Situation: A private SDO 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 SDO took the conscious decision not to include such an obligation. In reaching this decision, the SDO in particular took into consideration that in general all technologies potentially relevant to the future standard are covered by many IPR.

Therefore the SDO considered that an IPR disclosure obligation would not enable the participants to choose a solution with little or no 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 SDO 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 SDOs. Participation in the SDO is open to anyone active in the industry.

Analysis

Assessment under the Chapter I prohibition: In many cases, an IPR disclosure obligation would be pro-competitive, as it would increase competition between technologies ex ante. In general, such an obligation allows the members of an SDO to factor in the amount of IPR reading on a particular technology when deciding between competing technologies (or even – where possible – to 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 the amount of IPR when choosing technology since regardless of what technology is chosen, it can be presumed that there is IPR reading on that technology. The agreement (despite not having an obligation which encourages disclosures of IPR which could be essential for the future standard) 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 some industries, competing undertakings use standard terms and conditions of sale or purchase set out by a trade association or directly by the competing undertakings ('standard terms').⁴⁵⁰ Such standard terms are covered by this Guidance to the extent that they establish standard conditions for the sale or purchase of goods or services by those competing undertakings to third party customers or from third party suppliers (and not conditions of sale or purchase between the competitors) for the 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.⁴⁵¹ Examples of sectors 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 independently 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 In general, standard terms produce effects on the downstream market where the undertakings using the standard terms compete by selling their products 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 a sector adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer power), customers might have no option other than to accept the conditions in the standard terms. However, the potential for a limitation of choice and innovation will

⁴⁵⁰ Such standard terms might cover only a very small or a large part of the clauses contained in the final contract.

⁴⁵¹ This refers to a situation where non-compulsory standard terms are in practice 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.

generally only arise where the standard terms have the effect of defining the scope of the final product.

- 10.5 In addition, depending on their content, standard terms may affect the commercial conditions of the sale 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 may be vital for entry to the market. In such cases, refusing access to the standard terms could risk leading to anti-competitive foreclosure. As long as the standard terms remain effectively open for use by any undertaking 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 standard 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, standard terms containing provisions which directly influence the prices charged to customers (that is to say, recommended prices, rebates, etc.) would generally 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 their 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 establishment of standard terms is unrestricted for the competitors in the relevant market (either by participation in the trade association or directly) and provided that the use of the standard terms is not compulsory and they are effectively accessible for use by any undertaking, agreements relating to standard terms are unlikely to lead to negative effects on product quality, product variety or innovation and therefore are unlikely to give rise to restrictive effects on competition (provided that the standard terms

have no effect on price and subject to the caveats set out at paragraphs 10.12 to 10.18).

- 10.11 There are, however, two general exceptions where a more in-depth assessment is required.
- 10.12 First, standard terms for the sale of consumer goods or services where the standard terms define the characteristics of the product sold to the customer, and therefore where 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 choice of key elements of the contract, such as the types of risk covered. Thus, even if the use of the standard terms is not compulsory, they may undermine the incentives of competing insurers 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 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.⁴⁵²
- 10.14 The market shares of the undertakings participating in the establishment of the standard terms may also give an indication of the likelihood of uptake of the standard terms or of the likelihood that the standard terms will be used by a large share of the market. However, in this respect, it is not only relevant to analyse whether the standard terms are likely to be used by a large share of the market, but also whether the standard terms only cover part of the product or the whole product (the less extensive the scope of 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 is unlikely to be any restrictive effect on competition within the meaning of the

⁴⁵² If previous experience with standard terms on the relevant market shows that the standard terms did not lead to reduced competition on product differentiation, this might also be an indication that the use of the same type of standard terms in a neighbouring product will not lead to a restrictive effect on competition.

Chapter I prohibition. In that scenario, product choice is increased rather than decreased by the establishment of the standard terms.

- 10.16 Second, even if the standard terms do not define the characteristics of the final product, they may exert significant influence on customers' decisions to enter into transactions for other reasons. An example is 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 parameters, they tend to favour practices which are widespread, and in that context, standard terms regarding those parameters could therefore become a de facto standard with which undertakings would need to comply in order to sell in the market, the effects of which are very close to a compulsory standard and need to be analysed accordingly.
- 10.17 If the use of standard terms is compulsory, there is a need to assess their impact on product quality, product variety and innovation (in particular if the use of the standard terms is compulsory on the entire market).
- 10.18 Moreover, should the standard terms (whether their use is compulsory or not) contain terms that are likely to have a negative effect on competition relating to prices (for example terms influencing the types of rebates or other discounts of the price to be given), they are likely to give rise to restrictive effects on competition within the meaning of the Chapter I prohibition.⁴⁵³

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 may 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.

⁴⁵³ In markets where non-price parameters are important parameters of competition, standard terms relating to such parameters may also have the effect of restricting competition.

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 conditions of the Section 9 exemption. For example, it is generally not necessary to make standard terms compulsory for the industry. It cannot, however, be ruled out that making standard terms compulsory 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 participating 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 any 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 are inherently beneficial for consumers. As regards other possible efficiencies, such as lower transaction costs, it is necessary to assess 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 can create a *de facto* industry standard. In such a case, competition may be eliminated if third parties are foreclosed from effective access to the standard. However, if the standard terms only concern minor characteristics of the product or service, competition is not likely to be eliminated.

Examples

Example of non-compulsory and open standard terms used for contracts with end-users

Example 1

Situation: A trade association for electricity distributors establishes non-compulsory standard terms for the supply of electricity to end-users. The standard terms have been established 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 relate 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

Assessment under the Chapter I prohibition: The 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 appear unlikely to have any appreciable negative impact on prices, product quality or variety.

Example of standard terms used for contracts between undertakings

Example 2

Situation: Construction undertakings come together to establish non-compulsory 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 will often be used between undertakings, one active upstream and one active downstream.

Analysis

Assessment under the Chapter I prohibition: The standard terms are not likely to have restrictive effects on competition within the meaning of the Chapter I prohibition. They will generally not lead to any significant limitation in the customer's choice of the final-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.

Example of standard terms facilitating the comparison of different undertakings' products

Example 3

Situation: A national association for the insurance sector distributes non-compulsory 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 the 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 establishing the standard policy conditions. They are also available for use by new entrants to the market, on a non-discriminatory basis.

Analysis

Assessment under the Section 9 exemption: The standard policy conditions relate to the composition of the final insurance product. To the extent that the market conditions and other factors show that there is a risk of limitation in product variety as a result of insurance undertakings using the standard policy conditions, any such limitation is likely to be outweighed by efficiencies such as the facilitation of comparisons by consumers of the conditions offered by insurance undertakings. Those comparisons in turn facilitate switching between insurance undertakings and thus enhance competition. Furthermore, the ability to switch between providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process may increase the likelihood of those efficiencies being passed on.

The standard policy conditions are also likely to reduce transaction costs and facilitate entry by insurers to 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 conditions of the Section 9 exemption are likely to be fulfilled.