# The EU Competition Rules on Horizontal Agreements

A guide to the assessment of horizontal agreements (including the European Commission's guidelines on horizontal cooperation and the block exemption regulations on R&D and specialisation agreements)

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# 1. Introduction

1.1 Businesses are constantly taking measures to remain competitive and get their goods and services to market – producing, selling and marketing their products, purchasing raw materials and inputs, researching and developing new products. Some companies undertake all these functions on their own. Alternatively, in some of these areas they may cooperate with other companies. Horizontal cooperation agreements (i.e. agreements between companies operating at the same level(s) of production or distribution in the market) can be commercially attractive to the companies involved, enabling them to share risk and save costs in getting their products to market. Commercial agreements of these types may also bring benefits to consumers in the form of technically more sophisticated products and greater choice. They can also help open up national markets and lead to the dissemination of know-how across Europe.

1.2 This publication explains how the EU competition rules apply to various forms of horizontal cooperation.[1] In particular, It considers how Article 101 of the Treaty on the Functioning of the European Union (**'TFEU'**) is generally applied to horizontal cooperation between businesses; it does not address special sector-specific rules applicable to horizontal cooperation in some sectors of the economy, notably insurance[2] and maritime transport.[3]

1.3 This publication has seven parts:

- This Part 1 provides general observations on horizontal agreements;
- Part 2 focuses on information exchanges;

[1] For a general overview of the EU competition rules and their application by the European Commission and the National Competition Authorities, see the Slaughter and May publication *An overview of the EU competition rules*. The application of the competition rules on "vertical agreements" is considered in the Slaughter and May publication on *The EU competition rules on vertical agreements* (including a description of the distinction between vertical and horizontal agreements at para. 3). Where vertical agreements (e.g. distribution agreements, purchase and supply agreements) are concluded between competitors, their effects can be similar to horizontal agreements such that they are to be assessed in accordance with the principles explained in this publication (see Horizontal Guidelines at para. 12). Also, see the Slaughter and May publication on *The EU competition rules on intellectual property licensing* which considers agreements where one party, with rights to specific patents or proprietary know-how, authorises another to exploit those intellectual property rights to produce/market goods or provide services.

[2] In the insurance sector, there is a special block exemption (Reg. 267/2010, OJ 2010 L83/1, 30.3.2010) which applies to two categories of cooperation agreements, i.e. agreements on the exchange of statistical information for the calculation of risks, and agreements on the joint coverage of certain types of risk (insurance pools). This replaced an earlier block exemption (Reg. 358/2003, OJ 2003 L53/8, 28.2.2003) which also applied to agreements establishing non-binding standard policy conditions, and agreements establishing common rules on the testing and acceptance of security devices.

[3] In the maritime transport sector, in September 2009 the Commission adopted a new block exemption for liner shipping consortia (Reg. 906/2009, OJ 2009 L256/31, 29.9.2009) which entered into force on 26 April 2010, replacing Reg. 823/2000; it expires on 25 April 2015. This exempts certain consortia agreements between shipping lines providing joint cargo transport services, provided they fulfil certain conditions (including a combined market share of no more than 30%) and meet certain criteria.

- Part 3 looks at agreements relating to research and development (R&D), including an analysis of the European Commission's R&D block exemption;
- Part 4 addresses agreements relating to the production of goods or provision of services, including agreements covered by the Commission's specialisation block exemption;
- Part 5 considers purchasing agreements, notably joint purchasing of raw materials and inputs;
- Part 6 covers commercialisation agreements relating to sales and marketing; and
- Part 7 deals with standardisation agreements.

1.4 Before adopting the current Guidance and block exemptions (in December 2010), the Commission conducted consultations with the Member States' national competition authorities, industry stakeholders and the public. The new regime involves some significant changes, in part reflecting the Commission's Europe 2020 strategy which focuses on innovation and competition to aid the recovery of the European economy. The main changes include the addition of guidance on information exchanges, improvements to the standardisation chapter, an extension of the research and development block exemption to cover paid-for research, and other incremental changes to the other chapters of the Guidance.

## THE COMMISSION'S POLICY TOWARDS HORIZONTAL COOPERATION

1.5 The Commission's Horizontal Guidelines confirm, in broad terms, that each case has to be analysed in its economic context, taking account of (a) the nature of the agreement, (b) the parties' combined market power, and (c) other structural factors. These elements affect whether the horizontal cooperation in question may reduce overall competition to such a significant extent that negative market effects can be expected (on prices, output, innovation or the variety/quality of goods/services). The Commission recognises that for most forms of horizontal cooperation, where the companies involved do not have market power, the effects of cooperation are not anti-competitive.[4] One of the key objectives of a more economics-based approach has been to free the Commission's services from examining cooperation agreements which are of no interest for competition policy, so enabling DG Competition to concentrate on more harmful cases – i.e. cartels and other agreements which harm consumers by fixing prices, sharing markets or reducing output, innovation or the variety/quality of goods/services.

1.6 The Commission's Horizontal Guidelines focus on six broad categories of cooperation between competitors (actual or potential), being types of cooperation which potentially generate efficiency gains. They do not

[4] This is consistent with the Commission's wider-ranging modernisation of EU competition policy, as reflected by the Council Regulation on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU (Regulation 1/2003, OJ 2003 L1/1, 4.1.2003) which came into force on 1 May 2004.

address more complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation.[5] Finally, they do not apply to the extent that sector-specific rules are applicable.[6]

1.7 The Horizontal Guidelines recognise (at paras. 13-14) that some horizontal agreements combine different stages of cooperation (e.g. joint R&D and joint production/ commercialisation of results); they specify that the "centre of gravity" of the cooperation determines which section of the Guidelines applies to the agreement in question. Determining the centre of gravity involves two factors:

(i) identifying the starting point of the cooperation (e.g. where joint production will only take place if the joint R&D is successful, it is generally the R&D agreement which is the starting point); and

(ii) considering the degree of integration of the different functions which are being combined (e.g. if there is full integration of production, but only partial integration of some R&D activities, it would be more appropriate to assess the cooperation in accordance with the principles applicable to production agreements).

## APPLICATION OF THE ARTICLE 101(1) PROHIBITION AND ARTICLE 101(3) CRITERIA

1.8 Depending on the market position of the parties, most commercial agreements (involving horizontal or vertical cooperation or technology licensing) should, if properly drafted and implemented, either fall outside Article 101(1) or meet the criteria for exemption under Article 101(3). Where this is not the case, restrictive provisions in the agreement will be void (by virtue of Article 101(2)), with the consequent risk of litigation between the parties and/or actions being brought by third parties.[7] In extreme cases the Commission may impose fines. Radical changes to the way in which the EU competition rules are implemented were introduced on 1 May 2004 when Regulation 1/2003 came into force. Agreements which comply with special regulations issued by the Commission – commonly referred to as "block exemptions" – are automatically valid and enforceable under EU law (unless they involve an abuse of dominance under Article 102). The block exemptions for R&D agreements and specialisation agreements are described in this publication at Parts 3 and 4 respectively.

1.9 The Commission's 1997 Notice on market definition documents the factors to be taken into account when defining relevant markets for these and other purposes.[8] Many commercial agreements are able to benefit

[5] The EU Merger Regulation may be applicable if such alliances or joint ventures meet relevant thresholds (see separate Slaughter and May publication on *The EU Merger Regulation*). The assessment of individual areas of cooperation within an alliance may be carried out with the help of the corresponding chapters of the Horizontal Guidelines (see Guidelines, para. 13).

[6] Special rules are applicable for agriculture, transport (air, maritime), insurance (see Guidelines, para. 18).

[7] In its judgment in Case C-453/99 *Courage Ltd v Crehan* (20.09.2001), the EU's Court of Justice clarified that a party to an agreement in breach of Article 101 may be liable to the other party (as well as to third parties) for damages arising from that breach. For these purposes, the degree of the claimant's participation in the unlawful aspects of the agreement is relevant, bearing in mind the respective bargaining positions of the parties. The European Commission is currently considering proposals to facilitate private damages actions in the form of collective redress.

[8] Market Definition Notice (OJ 1997 C372/5, 9.12.1997).

from the Commission's 2001 Notice on agreements of minor importance.[9] This *De Minimis* Notice confirms that the Commission will not initiate proceedings under Article 101 against agreements between SMEs (small and medium-sized enterprises with fewer than 250 employees and annual turnover not exceeding €50 million or assets not exceeding €43 million).[10] It also confirms that larger companies should not face investigation where the parties' combined market shares in the relevant markets do not exceed certain thresholds; these are 10% for agreements between actual or potential competitors and 15% for agreements between non-competitors (with the 10% threshold also applying where it is difficult to classify the agreement as being between competitors or non-competitors). An agreement can only benefit from this *De Minimis* Notice if it does not contain any "hardcore" restrictions (e.g. price-fixing and market sharing restrictions: for further details see Part A.4 of Table 1.1 below). The Horizontal Guidelines go further in recognising that certain types of horizontal agreements are unlikely to have a negative effect on competition provided they are between parties which do not enjoy market power. Thus the *de minimis* market share thresholds are effectively raised to:

- 25% for R&D agreements – as addressed by the R&D block exemption regulation (see Part 3 of this publication);
- 20% for production agreements – as addressed by the specialisation block exemption regulation (see Part 4 of this publication);
- 15% for purchasing agreements (see Part 5 of this publication) and commercialisation agreements (see Part 6 of this publication).

1.10 The Horizontal Guidelines also adopt a positive stance towards the application of Article 101 to agreements on standardisation agreements (see Part 7 this publication).

1.11 Table 1.1 below provides a general overview of the key issues relevant to assessing whether a horizontal agreement is caught by Article 101(1) or meets the criteria of Article 101(3).

## THE ROLE OF ARTICLE 102

1.12 If one of the parties is in a dominant position in any relevant product or service market affected by the agreement (whether across Europe as a whole or within a relevant national or regional market which constitutes a substantial part of the EU), it may be vulnerable under Article 102. This risk is greater if the operation of the agreement could have significant foreclosure effects on weaker competitors (making it more difficult for them to remain competitive in the relevant market).

[9] De Minimis Notice (OJ 2001 C368/13, 22.12.2001); Horizontal Guidelines, para. 15.
[10] This definition is based on the definition of SME in the Annex to a Commission Recommendation (OJ 2003 L124/36, 20.5.2003).

TABLE 1.1: ISSUES FOR ARTICLE 101 ANALYSIS OF HORIZONTAL AGREEMENTS

| A. Checklist for Article 101(1) analysis of whether a horizontal agreement appreciably restricts or limits competition (see e.g. Horizontal Guidelines, paras. 20-53) |
|---|
| 1. **Is there an appreciable effect on trade between Member States?** If the agreement is unlikely to be capable of appreciably affecting trade between Member States (the non-appreciable affectation of trade rule or "NAAT rule"), the EU competition rules are not applicable – although national competition rules may be. The Commission has published detailed guidelines on this concept and the NAAT rule in a 2004 Notice (OJ 2004 C101/81, 27.4.2004). The *De Minimis* Notice (at para. 3) acknowledges that agreements between SMEs are rarely capable of appreciably affecting trade between Member States. |
| 2. **Does the agreement fall into one of the six categories addressed by the Horizontal Guidelines?** These are considered in Parts 2 to 7 of this publication. In general terms:<br>– Some categories of agreements tend not to involve restrictions on prices or output (e.g. information exchanges and most agreements on R&D, or standards);<br>– Some other categories of agreements are more likely to lead to a degree of commonality in total costs (e.g. production agreements, purchasing agreements) which may facilitate coordination of market prices and output if (a) the cooperation accounts for a high proportion of total costs in the market, and (b) the parties combine their relevant activities to a significant extent. |
| 3. **What is the competitive relationship between the parties to the agreement?** Some horizontal agreement are, by their very nature, unlikely to infringe Article 101 (1), e.g.:<br>– cooperation between non-competitors;<br>– cooperation between competitors which cannot independently carry out the project/activity covered by the cooperation; or<br>– cooperation between competitors in an area which does not influence the relevant parameters of competition (e.g. agreements on standards or environmental agreements).<br>For these purposes, the Horizontal Guidelines (para. 10) provide that the term "competitors" includes:<br>– *actual competitors*: i.e. if the parties are active on the same relevant market;<br>– *potential competitors*: i.e. if there is evidence that, absent the agreement, one party could and would be likely to undertake the investments or other switching costs needed to enter the relevant market in response to a small and permanent increase in relative prices. The mere theoretical possibility of entry is not sufficient. The entry into the relevant market must also occur within a short period of time. The Guidelines at footnote 5 states that what constitutes a short period of time depends on the facts of the case at hand, its legal and economic context, and whether the company in question is a party to the agreement or a third party. |

4. **Does the agreement include any "hardcore" restrictions?** If so (and assuming there is an effect on trade between Member States), there is a presumption that Article 101(1) is applicable – i.e. that the agreement has as its "object" the restriction of competition – and the criteria of Article 101(3) are unlikely to be met (2004 Guidelines on the application of Article 101(3), para. 23). The *De Minimis* Notice (at para. 11) provides general guidance on the concept, referring to:

   (1) hardcore restrictions in agreements between competitors, i.e. restrictions which (directly or indirectly, in isolation or in combination with other factors) have as their object:

   – *the fixing of prices when selling the products to third parties,*

   – *the limitation of output/sales,*

   – *the allocation of markets/customers;*

   (2) hardcore restrictions in agreements between non-competitors (see Appendix 5 to the Slaughter and May publication on *The EU competition rules on vertical agreements)*, i.e.:

   – *price-fixing or resale price maintenance,*

   – *certain territorial/customer sales restrictions,*

   – *further territorial/customer sales restrictions in selective distribution systems,*

   – *certain sales restrictions affecting spare parts;*

   (3) the fact that, in the context of a vertical agreement between competitors, any of the restrictions at (1) or (2) above will be classified as hardcore.

   For blacklisted/hardcore restrictions in horizontal agreements, see para. 3.11 and Table 3.3 for R&D agreements, and para. 4.9 and Table 4.1 for specialisation agreements.

5. **What are the relevant markets?** Defining the relevant markets is necessary for applying the market share thresholds of the R&D and specialisation block exemptions, as well as for the general application of the competition rules. In particular for cooperation in R&D, this may also require analysis of the impact on "innovation markets" (see Part 3 of this publication).

6. **Other factors.** In appraising whether any effects on competition are appreciable, consider:

   – **parties' market positions** by reference to market share (normally on a sales value basis), first mover advantage, patent portfolio, brands, etc.;

   – **competitors' market positions** by reference to similar criteria;

   – **entry barriers:** economies of scale and scope, government regulations, access to resources, essential facilities, brand loyalty, etc.;

   – **maturity of market:** negative effects are more likely in stable/declining markets;

   – **countervailing buyer/supplier power:** the sophistication of parties active upstream and downstream in the economic supply chain;

   – **nature of the goods/services:** e.g. homogeneity, maturity.

B. **Issues for Article 101(3) analysis of whether a horizontal agreement has sufficient benefits to meet the exemption criteria (all four of which must be satisfied)** (Horizontal Guidelines, paras. 48-53 (generally), 95-104 (information exchange), 141-146 (R&D), 183-186 (production), 217-220 (purchasing), 246-251 (commercialisation), 308-324 (standardisation); Commission 2004 Guidelines on the application of Article 101(3))

1. **Efficiency gains:** The agreement must contribute to improving production or distribution or to promoting technical or economic progress, e.g. combining and integrating different skills or resources, so enabling the parties to offer goods or services at lower prices, better quality or to launch innovation more quickly. Efficiency claims must be substantiated and must produce a net positive effect. Speculative claims or general statements on cost-savings are not sufficient.

   According to the 2004 Guidelines on the application of Article 101(3) (at paras. 51 *et seq.*), substantiating the efficiency claims must enable verification of:

   (a) the *nature* of the claimed efficiencies;

   (b) the *causal link* between the agreement and the efficiencies;

   (c) the *likelihood* and *magnitude* of each claimed efficiency;

   (d) *how* and *when* each claimed efficiency would be achieved.

| | |
|---|---|
| 2. | **Fair share for consumers:** The arrangements must allow consumers a fair share of these benefits. This can normally be assumed if there is sufficient residual competition on the market.<br><br>The 2004 Guidelines on the application of Article 101(3) describe (at para. 93 *et seq.*) the analytical framework for assessing consumer pass-on of efficiency gains, distinguishing between (a) cost efficiencies and (b) other types of efficiencies (e.g. new or improved products). |
| 3. | **Indispensability:** The agreement as such must be reasonably necessary to achieve the efficiencies; furthermore the individual restrictions must be reasonably necessary for the attainment of the efficiencies. This criterion plays a role in ensuring that the least anti-competitive restraints are chosen to obtain certain positive effects. |
| 4. | **No elimination of competition:** The cooperation must not afford the parties the possibility of eliminating competition in respect of a substantial part of the relevant market. This criterion is related to the question of Article 102 market dominance. If an undertaking is dominant, or becomes so as a result of the cooperation, a horizontal agreement with appreciable anti-competitive effects can in principle not meet the exemption criteria. |

# 2. Information Exchange

## GENERAL OBSERVATIONS

2.1 The exchange of information between business can have positive effects in competitive markets, resulting in efficiencies and solving problems of information asymmetries. The exchange of information can take various forms – data shared directly between competitors or indirectly shared through a common agency or a third party. In addition to the positive effects resulting from information exchanges, however, in some circumstances they can reduce competition. The Commission, while recognising that most information exchanges are not aimed at restricting competition, sees the need to provide guidance on the assessment of the restrictive effects and efficiencies of such exchanges. Therefore, the new Guidelines have incorporated a chapter on information exchanges.

## CONCERTED PRACTICES

2.2 Information exchanges are only subject to review under Article 101(1) if they establish or are part of an agreement, a concerted practice or a decision by an association of undertakings.

2.3 A concerted practice refers to a type of coordination between parties where, without necessarily having reached an agreement, there may be loose or informal understanding between the parties, where the object or effect of discussions is to limit competition. Information exchanges can constitute concerted practices if they reduce strategic uncertainty in the market thereby facilitating collusion. An information exchange which constitutes a concerted practice is likely to involve the exchange of strategic information between competitors; it may also arise even if only one party discloses strategic information to the other.

## ASSESSMENT UNDER ARTICLE 101(1)

2.4 Even if it established that there is an agreement or concerted practice (or a decision by an association of undertakings), it is necessary to consider the main competition concerns, namely the possibility of a collusive outcome or anti-competitive foreclosure. Collusive outcomes may occur during an information exchange because the exchange of strategic information can facilitate the coordination of companies' competitive behaviour.

2.5 In assessing the information exchange the parties should analyse whether or not the exchange had the objective of restricting competition by object. The Commission will pay particular attention to the legal and

economic context in which the information exchange takes place. Exchanges of information about future prices or quantities are more likely to lead to a collusive outcome and are highly likely to infringe Article 101(1).

2.6 Whether or not an information exchange will have restrictive effects on competition depends on both the characteristics of the market and the information which is exchanged. The Guidance indicates (at para. 77) that companies are more likely to achieve a collusive outcome in markets that are transparent, concentrated, non-complex, stable and symmetric. This is due to the fact that such market characteristics allow companies to carefully monitor the market and punish any deviations. The Commission also takes into account how the information exchange changes market conditions (e.g. whether it makes a market which was opaque more transparent). The Guidance at paras. 86-94 also provides a detailed list of characteristics of information exchange which are more likely to have anti-competitive effects:

(i) Strategic Information – data that reduces strategic uncertainty in the markets is more likely to be caught by Article 101(1). Examples include information related to prices (e.g. actual prices, discounts, increases, reductions or rebates), customers lists, production costs, quantities, turnover, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes;

(ii) Market coverage – for an information exchange to be restrictive, the parties involved will generally have to cover a large percentage of the market;

(iii) Aggregated/individualised data – the more the data is individualised the greater the risk that it will lead to restrictive effects;

(iv) Age of data – the exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct;

(v) Frequency of the information exchange – the more frequent the exchange between parties, the higher the likelihood of a collusive outcome; and

(vi) Public/non-public information – the exchange of publicly available information will not have an impact on the relevant competitive environment as each party could access the information regardless of the information exchange.

## ASSESSMENT UNDER ARTICLE 101(3)

2.7 Article 101(3) provides that the Article 101(1) prohibition is not applicable in cases where the cooperation contributes to the improvement of the production or distribution of goods or to promoting technical or economic progress, where ultimately the consumer receives a fair share of the benefit. Some information exchanges may lead to efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly. However, there are still limitations on information exchanges which benefit the consumer. No information exchange should go beyond the variables that are relevant for attaining the efficiency. Also, as stated in Article 101(3) the information exchange should not lead to the elimination of competition.

# 3. R&D Agreements

## GENERAL OBSERVATIONS

3.1 Research and development (R&D) can form an important part of a company's business strategy, helping it bring new products or services to market. This is particularly so in research-based or technology-driven markets where businesses need to develop innovative products in order to succeed. Some companies may do all their R&D work themselves. Others may prefer to collaborate with other companies, whether by outsourcing some of their R&D activities, by working together to improve existing technologies, or by cooperating extensively with one another to develop and market new products or processes. All these forms of joint R&D can involve a cross-fertilisation of ideas and experiences, leading to new and improved products being developed quicker, more efficiently and at reduced costs.

3.2 Some parties may limit their cooperation to the "pure R&D" stage. In other cases, however, parties extend their cooperation to the way in which they exploit the results of the R&D, e.g. joint production and sometimes joint sales and marketing of products or processes developed under their joint R&D programme. The various elements which may be involved at these different stages are illustrated at Table 3.1 (at the end of this Part 3). This also explains the circumstances in which those steps are treated as being carried out "jointly". EU competition policy looks favourably at pure R&D agreements, but is more wary of agreements extending to subsequent joint exploitation of the results of the R&D.

3.3 R&D agreements often include restrictions on the parties' independent activities in the field covered by their collaboration. If the agreement extends to manufacturing and marketing, the parties may wish to limit the extent to which each of them will exploit the fruits of their joint R&D, e.g. preventing other parties from exploiting the technology in particular business fields or even geographic areas. EU competition law accepts that some contractual limitations on the parties are necessary to encourage effective joint R&D. Other restrictions, however, can raise competition concerns, especially if any parties already enjoy significant market power compared to non-participating competitors.

3.4 Appraising whether an R&D collaboration is caught by the Article 101(1) prohibition involves considering the following preliminary points:

(i) Is there an agreement between two or more independent undertakings? For example, R&D agreements between members of the same group are not caught by Article 101;

(ii) Is the R&D agreement capable of affecting trade between Member States to an appreciable extent? R&D agreements are more likely to affect inter-State trade if they are concluded between undertakings from different Member States or if the markets to which they relate extend beyond a single Member State; and

(iii) Does the R&D agreement prevent, restrict or distort competition to an appreciable extent in a relevant market within the EEA? This is considered in more detail below.

## RELEVANT MARKET DEFINITION

3.5 The Guidelines (at para. 112) point out that the key to defining relevant markets for R&D agreements is identifying those products, technologies or R&D efforts which will act as a competitive constraint on the parties. Relevant factors include the impact on:

(i) the product market(s) directly concerned by the cooperation, i.e. whether the product(s) which may result from the innovation may compete in:

(a) an existing product market (e.g. R&D aimed at slight improvements or variations). For such cases, a negative effect on prices or output is only likely if the parties together have a strong market position, entry is difficult and there is little other innovation in the market;

(b) an entirely new product market (e.g. R&D aimed at creating an innovative product, such as a vaccine for a previously incurable disease). For such cases, the agreement may have medium- to longer-term effects on markets for existing products which may be replaced over time by the new products. This will require an appraisal of the impact of the cooperation on the existing market, particularly if the parties together also have a strong position on that market. For such cases it is also necessary to assess what effects the cooperation may have on "innovation" (see para. 3.6 below); or

(c) a market context somewhere in between the extremes of (a) and (b) above. For such cases the competition analysis may need to cover the existing market(s) and also the impact of the agreement on innovation.

(ii) any neighbouring product market(s) closely related to the directly concerned product market(s). For example, if the R&D concerns a technically or economically important component of a downstream product, the competition analysis may need to address the impact on the downstream market, particularly if the participants are important competitors in that downstream market;

(iii) technology markets, i.e. where R&D will result in IPRs which will be licensed to third parties. As for product market definition, the resulting IPRs may compete in:

(a) an existing technology market, including other technologies which licensees can use as an alternative to the IPRs developed under the relevant R&D agreement. For these purposes, market shares are to be calculated by reference to the licensing income generated by the parties compared with the total licensing income of all sellers of substitutable technologies; or

(b) an entirely new technology market. For technology markets, particular emphasis must be put on potential competition. If sufficient potential entrants to the relevant technology market can be

identified, this would constrain the ability of the parties to raise prices for their technology. (In order to be considered a "potential competitor" a three year time-frame during which a party would need to be likely to enter a market is considered.)

3.6 R&D cooperation may also affect competition in innovation. This may be relevant where (as considered at para. 3.5(i)(b) and (iii)(b) above) the new products/technologies are expected to create new product or technology markets (and/or lead to the eventual replacement of existing products). It is possible to distinguish different scenarios:

(i) industries with different R&D poles, where different companies/groupings competing against each other in their R&D efforts to develop new products (e.g. as in the pharmaceutical sector). Here the competition analysis needs to consider whether there will be a sufficient number of credible competing poles of research left after the relevant R&D agreement, taking account of:

(a) the nature, scope and size of possible other R&D efforts,

(b) competing poles' access to financial and human resources,

(c) know-how/patents and other specialised assets,

(d) the timing of these alternatives and the capability of the other poles to exploit possible results; and

(ii) industries where competing R&D efforts are not so obvious. Here the competition analysis will generally focus not on the impact of the R&D agreement on innovation, but rather on its likely impact on the relevant product and/or technology market(s).

## ASSESSMENT UNDER ARTICLE 101(1)

3.7 Where parties limit their collaboration purely to R&D – with each of the parties free to exploit the results of the joint R&D as it wishes – the agreement may well fall outside the Article 101(1) prohibition altogether. This is recognised by the Commission's Horizontal Guidelines (para. 132) and in the R&D block exemption (Recital (6)). Thus, the Commission accepts that "pure" R&D agreements which do not restrict the parties' independent R&D activities are unlikely to restrict competition. Likewise, R&D cooperation between non-competitors generally does not restrict competition, nor does cooperation between parties with complementary skills who do not independently have the assets, know-how and other resources needed to carry out the R&D activities.

3.8 The Horizontal Guidelines also recognise (at para. 131) that Article 101(1) does not apply where a company outsources previously captive R&D to a specialist company, research institute or academic body which is not active in the exploitation of the results. These arrangements may be accompanied by the transfer of technology/know-how and/or exclusive supply arrangements regarding possible results.

## THE "SAFE HARBOUR" OF THE R&D BLOCK EXEMPTION

3.9 Recognising that R&D cooperation is generally pro-competitive, the Commission has adopted a block exemption regulation under Article 101(3) in respect of R&D agreements.[11] The current block exemption is in place until 31 December 2022. Where an R&D agreement might be caught by Article 101(1), bringing it within this block exemption gives the parties the added comfort of knowing that its provisions are valid and enforceable as a matter of EU law (see flowchart at Table 3.2). R&D agreements which do not meet all the criteria of the block exemption will not necessarily be condemned under the EU competition rules. They may still fall outside Article 101(1) altogether (as considered above), but even if Article 101(1) is applicable they may still be appraised favourably in accordance with the principles of Articles 101 and 102.

3.10 The block exemption will apply to an R&D agreement containing provisions which relate to:

(i) the assignment or licensing of intellectual property rights to one or more of the parties or to an entity the parties establish to carry out the joint research and development;

(ii) paid-for research and development; or

(iii) joint exploitation; provided that those provisions do not constitute the primary object of such agreement but are directly related to and necessary for their implementation.

3.11 The R&D block exemption sets out various categories of hardcore restrictions (Article 5): see Table 3.3. These are restrictions which are considered to have such an obvious restrictive effect on competition that they can be presumed to be caught by the Article 101(1) prohibition (and are unlikely to meet the Article 101(3) exemption criteria) irrespective of the market shares of the undertakings concerned. They include certain restrictions on independent R&D, as well as certain restrictions on marketing the products resulting from the R&D (e.g. pricing and territorial restrictions). Field of use restrictions do not constitute limitations of output or sales (or territorial or customer restrictions), so are acceptable (Recital 15). Where an R&D agreement does not contain any of the hardcore restrictions, it is eligible for Article 101(3) exemption through the "safe harbour" of the R&D block exemption, provided it meets the block exemption's other conditions (Articles 3 and 4). The block exemption expressly provides that certain categories of restrictions ("no challenge clauses" and licencing restrictions which prevent exploitation of the R&D) are excluded from the scope of the block exemption (Article 6); however, if the agreement provides for the severability of those restrictions, the remainder of the agreement can still benefit from the block exemption.

3.12 The availability of the R&D block exemption depends on whether any of the participating undertakings are actual or potential producers of products capable of being improved or replaced by the contract products. If they are not (and absent any hardcore restrictions), the parties can benefit from the block exemption irrespective of market share. If they are actual or realistic potential competitors, however, they are only able to benefit from the block exemption if, at the time the agreement was entered into, the participating

[11] Reg. 1217/2010 (OJ 2010 L335/36, 18.12.2010).

undertakings' combined market share did not exceed 25% of the relevant market for the products capable of being improved or replaced by the contract products. Provided this threshold is not triggered, the parties may rely on the block exemption for the entire duration of the joint R&D stage. Where the R&D agreement extends to joint exploitation, the parties can continue to rely on the block exemption for an initial seven years from the date the contract products are first put on the market in the EU. After that seven year period, the exemption is only available for as long as the parties' combined market share does not exceed 25% of the relevant market for the contract products within the EEA.

## WITHDRAWAL OF THE R&D BLOCK EXEMPTION

3.13 The Commission may withdraw the benefit of the R&D block exemption in respect of any particular agreement in a number of circumstances if the agreement is having effects which are incompatible with the criteria of Article 101(3) (Recitals 19 and 21). Although in practice the Commission has never done this, it could do so if it found that, despite the agreement falling within the safe harbour, it nevertheless has effects which are incompatible with Article 101(3).

## THE POSITION OUTSIDE THE R&D "SAFE HARBOUR" – CASE-BY-CASE ANALYSIS

3.14 For a checklist of issues to consider when appraising whether an R&D agreement is caught by Article 101(1) see Part A of Table 1.1. Where an R&D agreement is caught by Article 101(1) but does not benefit from the R&D block exemption, it may still be appraised favourably in accordance with the provisions of Articles 101 and 102. This will involve a full analysis of the agreement's effect on competition. The Horizontal Guidelines include some observations on R&D agreements aimed at assisting businesses in undertaking this assessment for themselves. Any analysis should consider how far such an R&D agreement may restrict actual or potential competition between the parties and whether it is likely to put third parties at a significant competitive disadvantage (i.e. whether it would have appreciable anticompetitive "foreclosure effects").

3.15 The Horizontal Guidelines (paras. 141-146) recognise that R&D agreements tend to bring about economic benefits which may outweigh their restrictive effects. This requires a careful analysis of whether particular restrictions are indispensable (which will generally rule out price-fixing, market-sharing or other "hardcore" restrictions under the R&D block exemption) and of whether the agreement risks affording the parties the possibility of eliminating competition in respect of a substantial part of the relevant market (see also Part B of Table 1.1).

3.16 If, however, one of the parties is in a dominant position in any relevant product or service market affected by the agreement (whether across Europe as a whole or within a relevant national market), the agreement is less likely to meet the Article 101(3) criteria and may also be vulnerable under Article 102. This risk is greater if the agreement is between competitors or its operation is having significant foreclosure effects on third parties, making it more difficult for them to remain competitive in the relevant market.

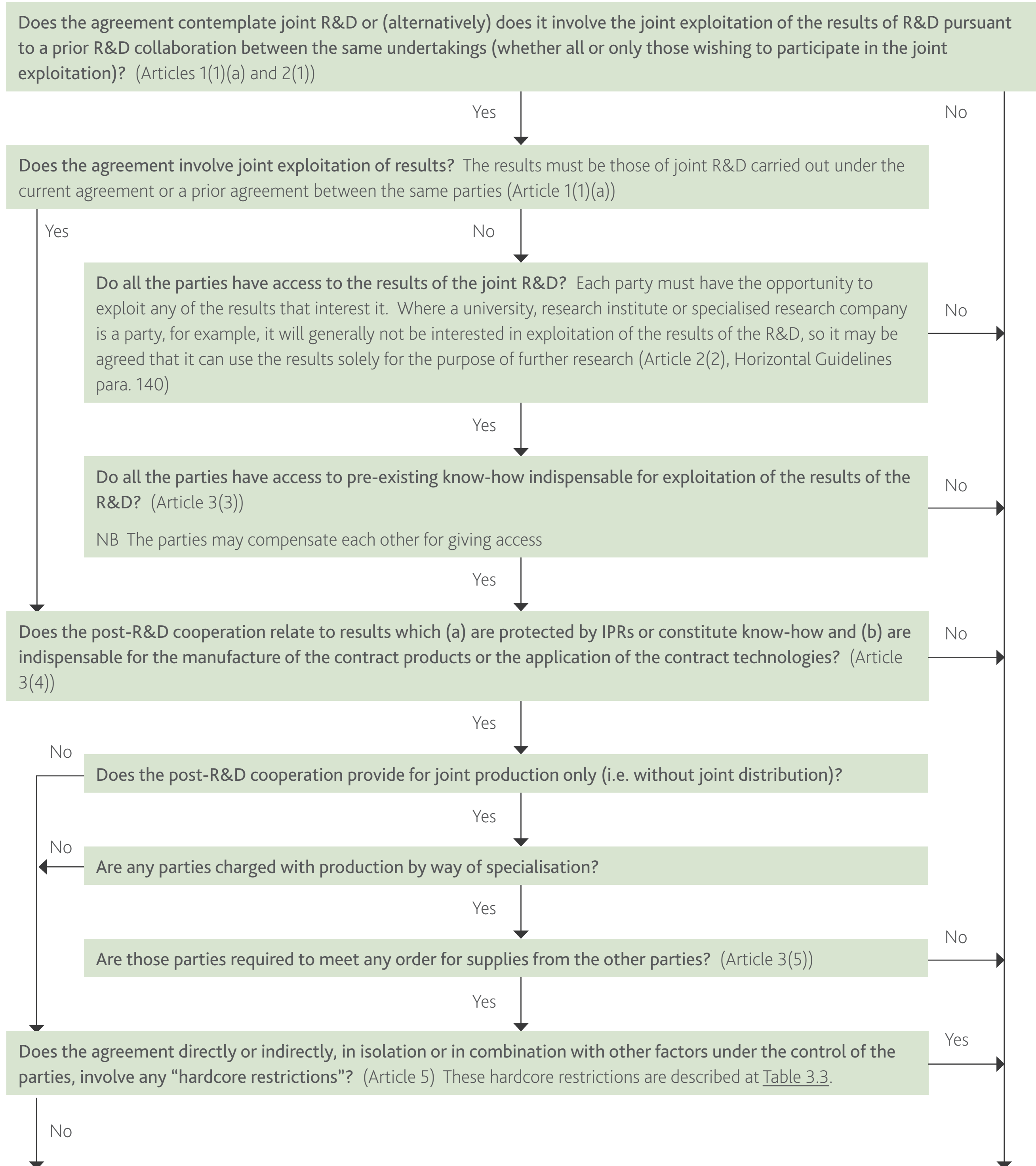
TABLE 3.1: R&D AND EXPLOITATION OF RESULTS (DEFINITIONS)

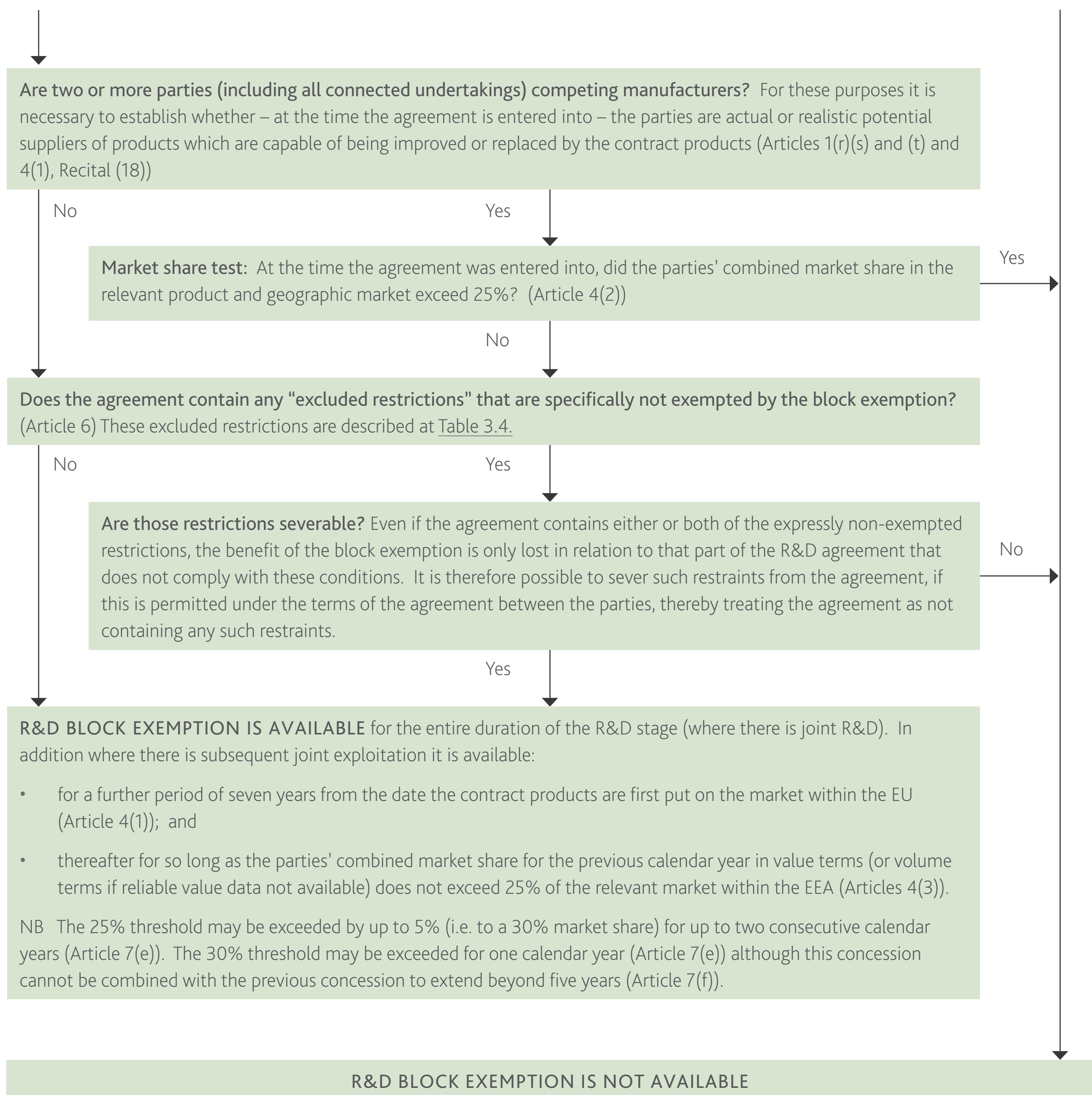
(terms in **bold** are defined in the R&D block exemption, Article 1)

| R&D stage |
| --- |
| **R&D** (of products or processes) includes the following steps:<br>• the acquisition of **know-how** relating to products, technologies or processes (i.e. a package of non-patented practical information, resulting from experience and testing, which is **secret**, **substantial** and **identified**: see also definitions at Appendix 2 to the separate Slaughter and May publication on *The EU competition rules on intellectual property licensing*);<br>• the carrying out of theoretical analysis;<br>• systematic study or experimentation (including experimental or pilot production);<br>• technical testing of products or processes;<br>• establishment of necessary facilities; and<br>• obtaining **IPRs** for the results of the R&D activities. |
| **Joint R&D** is where some or all of the above activities are:<br>• carried out by the parties jointly (e.g. by a joint team, organisation or undertaking);<br>• jointly entrusted to a third party (e.g. under subcontracting arrangements); or<br>• allocated between the parties by way of specialisation. |
| **Paid-for R&D** means R&D that is carried out by one party and financed by a financing party (i.e. a party financing paid-for R&D while not carrying out any of the activities itself). |

| Subsequent exploitation of results of R&D (including production, sales and marketing) |
| --- |
| **Exploitation of the results** includes the following steps:<br>• production or distribution of **contract products** (i.e. products/services which arise out of the R&D or are manufactured/provided using the contract processes);<br>• application of **contract processes** (i.e. technology/processes arising out of the R&D);<br>• technology transfers (assignment or licensing) to third parties of **IPRs** required for such production or application; and<br>• commercialisation (marketing and sales) of contract products. |
| **Joint exploitation of the results** is where some or all of the above activities are:<br>• carried out by the parties jointly (e.g. by a joint team or by a JV undertaking),<br>• jointly entrusted to a third party (e.g. under subcontracting arrangements), or<br>• allocated between the parties (by way of specialisation).<br>Alternatively, the parties may decide not to exploit the results themselves, but instead to cooperate in the licensing/assignment of IPRs/know-how to third party licensees/assignees. If so, the agreements between the parties and such third parties will not be exempted under the R&D block exemption (although they may be able to benefit from the technology transfer block exemption: see separate Slaughter and May publication on *The EU competition rules on intellectual property licensing*). |

## TABLE 3.2: R&D BLOCK EXEMPTION FLOWCHART





Are two or more parties (including all connected undertakings) competing manufacturers? For these purposes it is necessary to establish whether – at the time the agreement is entered into – the parties are actual or realistic potential suppliers of products which are capable of being improved or replaced by the contract products (Articles 1(r)(s) and (t) and 4(1), Recital (18))
No
Yes
Market share test: At the time the agreement was entered into, did the parties' combined market share in the relevant product and geographic market exceed 25%? (Article 4(2))
Yes
No
Does the agreement contain any "excluded restrictions" that are specifically not exempted by the block exemption? (Article 6) These excluded restrictions are described at Table 3.4.
No
Yes
Are those restrictions severable? Even if the agreement contains either or both of the expressly non-exempted restrictions, the benefit of the block exemption is only lost in relation to that part of the R&D agreement that does not comply with these conditions. It is therefore possible to sever such restraints from the agreement, if this is permitted under the terms of the agreement between the parties, thereby treating the agreement as not containing any such restraints.
No
Yes
R&D BLOCK EXEMPTION IS AVAILABLE for the entire duration of the R&D stage (where there is joint R&D). In addition where there is subsequent joint exploitation it is available:
• for a further period of seven years from the date the contract products are first put on the market within the EU (Article 4(1)); and
• thereafter for so long as the parties' combined market share for the previous calendar year in value terms (or volume terms if reliable value data not available) does not exceed 25% of the relevant market within the EEA (Articles 4(3)).
NB The 25% threshold may be exceeded by up to 5% (i.e. to a 30% market share) for up to two consecutive calendar years (Article 7(e)). The 30% threshold may be exceeded for one calendar year (Article 7(e)) although this concession cannot be combined with the previous concession to extend beyond five years (Article 7(f)).
R&D BLOCK EXEMPTION IS NOT AVAILABLE

TABLE 3.3: HARDCORE RESTRICTIONS UNDER THE R&D BLOCK EXEMPTION

| |
|---|
| **Non-compete restrictions on R&D** prohibiting independent R&D, or R&D agreements with third parties (Article 5(a)) if those restrictions:<br>• prevent R&D in a field unconnected with that to which the R&D agreement relates, or<br>• apply following completion of the R&D or the paid-for R&D covered by the agreement (whether in the field to which the agreement related or any other field). |
| **Quantitative restrictions** on the number of contract products a party may manufacture or sell or of operations it may carry out using the contract process (Article 5(b)). This does not prevent the setting of production/sales targets where the agreement extends to joint production/distribution. |
| **Pricing restrictions** on freedom to determine prices (including components of prices or discounts) when selling contract products to third parties (Article 5(c)). This does not prevent the fixing of prices charged to immediate customers where the agreement extends to joint distribution or to joint licensing of the contract technologies. |
| **Restrictions on passive sales** of contract products (or licensing of contract technology) in any territory or to any customer in the EEA (Article 5(d)). This does not prevent a requirement to license the results exclusively to another party. |
| **Restrictions on active sales** of contract products (or licensing of contract technology) in any territories or to any customers in the EEA which have not been exclusively allocated to one of the parties by way of specialisation in context of exploitation (Article 5(e)). |
| **Restrictions on licensing third parties** to manufacture the contract products (or apply the contract processes) in circumstances where the agreement does not envisage joint exploitation or the parties do not themselves exploit the results of the joint R&D (Article 5(d)). |
| **Restrictions or concerted practices impeding parallel trade** involving:<br>• refusals to meet orders from users/dealers in the parties' respective territories who would market the contract products in other parts of the EEA (Article 5(f)); or<br>• making it difficult for users/dealers to obtain contract products from other dealers within the EEA (e.g. exercising IPRs or taking measures to prevent users/dealers from obtaining, or putting on the market within the EEA, products which have been lawfully put on the market within the EEA by another party or with its consent) (Article 5(g)). |

TABLE 3.4: EXCLUDED RESTRICTIONS UNDER THE R&D BLOCK EXEMPTION

| |
|---|
| No challenge obligations (Article 6(a)) prohibiting a party from challenging:<br>• after completion of the R&D, the validity of IPRs which the parties hold in the EEA and which are relevant to the R&D, or<br>• after expiry of the R&D agreement, the validity of IPRs which the parties hold in the EEA and which protect the results of the R&D<br>without prejudice to the possibility to provide for termination of the R&D agreement in the event of one of the parties challenging the validity of such IPRs. |
| Licensing restrictions (Article 6(b)) prohibiting a party from granting licences to third parties to manufacture the contract products or to apply the contract technologies, unless:<br>• the 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, and<br>• such exploitation takes place in the internal market vis-à-vis third parties. |

# 4. Production Agreements

## GENERAL OBSERVATIONS

4.1 The term “production agreement” is used to describe an agreement between two or more parties (who may be competitors) relating to the conditions under which they will cooperate in the production of goods or provision of services. In broad terms, the object of such an agreement is to obtain efficiency gains through rationalisation.

4.2 There are different types of production agreements. The Guidelines apply to all forms of joint production agreements and horizontal subcontracting agreements (Guidelines paras. 150-153). The Commission defines production agreements as follows:

(i) *Joint production agreements*: where two or more parties agree to produce certain products jointly, whether by establishing a joint venture or otherwise;

(ii) *Horizontal subcontracting agreements*: where parties operating in the same product market (irrespective of whether they are actual or potential competitors) agree to any of the following:

(a) *Unilateral specialisation agreements*: agreement between two parties which are active on the same product market whereby one party ceases to produce the good and agrees to purchase the product from the other party (Article 1(1)(b));

(b) *Reciprocal specialisation agreements*: where two or more parties, who are active on the same products market, agree to cease production, fully or partly, of a particular good and source it from the other. For example, where company A ceases to make product X, and purchase product X from company B, and company B ceases to make product Y and purchases product Y from company A (Article 1(1)(c));

(c) *Subcontracting agreements*: where the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good, thereby expanding overall production.

4.3 Subject to certain condition, joint production agreements as well as unilateral and reciprocal specialisation agreements may benefit from the specialisation block exemption (Guidelines para. 153).

## RELEVANT MARKET DEFINITION

4.4 The Horizontal Guidelines (paras. 155-156) provide that the appraisal of a production agreement under the competition rules should be undertaken by reference to its effects on:

(i) the market(s) directly concerned by the cooperation (i.e. in which the products to be produced compete); and

(ii) any upstream markets (for inputs), downstream markets (for final products) or other neighbouring markets closely related to the directly concerned market(s), i.e. "spillover markets".

4.5 A production agreement is more likely to raise competition problems if the parties are actual or realistic potential competitors on at least one of these relevant markets. This risk increases if the cooperation extends to a significant proportion of their input costs. Furthermore, a production agreement could have negative foreclosure effects on third parties if it relates to an important input which could enable the parties to raise the costs of their rivals in a downstream market.

## ASSESSMENT UNDER ARTICLE 101(1)

4.6 The Horizontal Guidelines (para. 157) acknowledge that production agreements can lead to a reduction of competition between parties by way of market coordination resulting in higher prices, reduced output or anti-competitive foreclosure. Production agreements by their nature relate to the joint manufacture of products, so may limit output. Whereas in other cases this would be seen as restricting competition by object, this will not be the case in production agreements, even where they fix prices charged to immediate customers in the context of joint distribution; limit the quantity of products in the context of unilateral or reciprocal specialisation agreements or set the capacity and production volume in the context of a joint production agreement; or set sales targets in the context of joint distribution. The key question is whether or not it is likely to have restrictive effects on competition within the meaning of Article 101(1) (Guidelines para. 161).

4.7 Restrictive effects on competition are most likely to arise where one or both parties have strong market power. A production agreement is unlikely to lead to restrictive effects on competition if the parties to the agreement do not have market power in the market on which a restriction of competition is assessed (para. 168). If the parties market share does not exceed 20%, they may fall within the specialisation block exemption if they fulfil all the necessary criteria.

## THE "SAFE HARBOUR" OF THE SPECIALISATION BLOCK EXEMPTION

4.8 Some production agreements can benefit from the Commission's specialisation block exemption.[12] Where a production agreement might be caught by Article 101(1), bringing it within this block exemption gives the parties the added comfort of knowing that its provisions are valid and enforceable as a matter of EU law (see flowchart at Table 4.1 at the end of this Part 4). It sets out various categories of hardcore restrictions (Article 4). A specialisation agreement which does not contain any of these hardcore restrictions is automatically eligible for Article 101(3) exemption through the "safe harbour" of the specialisation block exemption, provided the combined market share of the parties does not exceed 20% on any relevant market (Article 3). Below this level, it can be presumed that specialisation agreements will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, while allowing consumers a fair share of the resulting benefits.

## WITHDRAWAL OF THE SPECIALISATION BLOCK EXEMPTION

4.9 As under the R&D block exemption, the Commission and the competition authority of a Member State may withdraw the benefit of the specialisation block exemption in respect of any particular agreement in a number of circumstances if the agreement is having effects which are incompatible with the criteria of Article 101(3) (Recital (13 & 14)). Although it has never done this, it could do so if the agreement is not yielding sufficient results in terms of rationalisation (or consumers are not receiving a fair share of the resulting benefits), or if the products concerned are not subject to effective competition in the relevant marketplace.

## THE POSITION OUTSIDE THE SPECIALISATION "SAFE HARBOUR" – CASE-BY-CASE ANALYSIS

4.10 For a checklist of issues to consider when appraising whether a production agreement is caught by Article 101(1), see Part A of Table 1.1. Where a production agreement is caught by Article 101(1) but does not benefit from the specialisation block exemption, it may still be appraised favourably in accordance with the provisions of Articles 101 and 102. This will involve a full analysis of the agreement's effects on competition. Factors such as high market shares, closeness of competition, whether customers have limited possibilities of switching suppliers, whether the market is dynamic and whether one of the parties to the agreement is an important competitive force, will all be relevant for the competitive assessment of the agreement. Any analysis should consider how far the agreement may restrict actual or potential competition between the parties and whether it is likely to put third parties at a significant competitive disadvantage (i.e. whether it would have appreciable anticompetitive foreclosure effects).

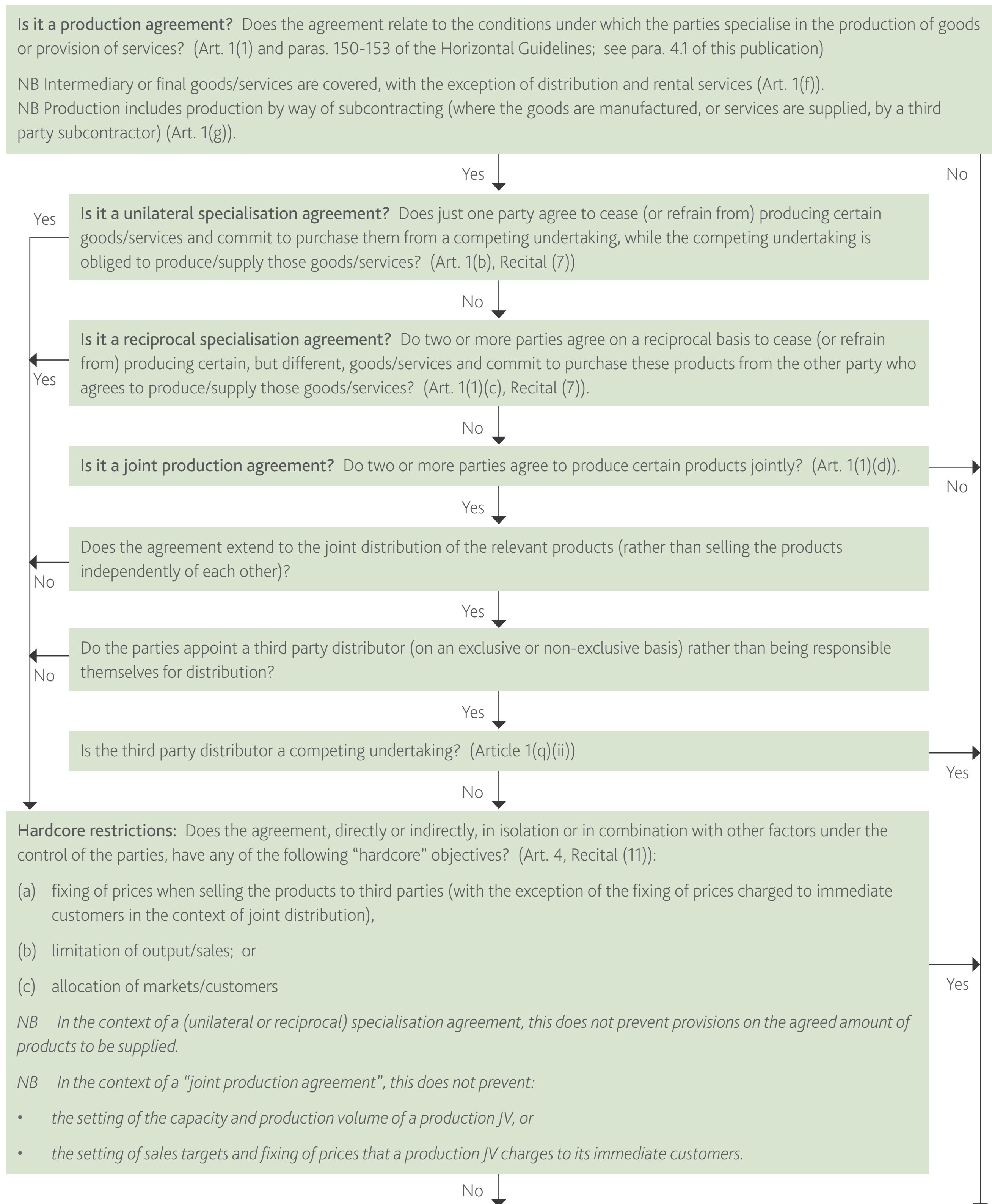
4.11 The Horizontal Guidelines (paras. 183-186) recognise that some production agreements bring about economic benefits which outweigh their restrictive effects. This requires a careful analysis of whether the restrictions are indispensable (which generally rules out price-fixing, market-sharing or other "hardcore"

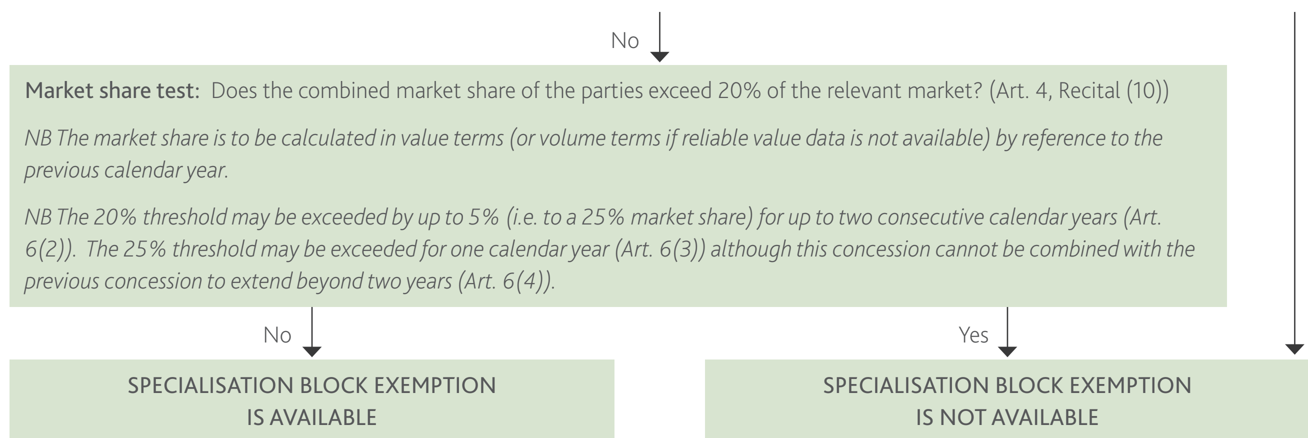
[12] Reg. 1218/2010 (OJ 2010 L335/43, 18.12.2010).

restrictions under the specialisation block exemption), whether the efficiency gains are passed on to consumers, and whether the agreement could enable the parties to eliminate competition in respect of a substantial part of the relevant market (see also Part B of Table 1.1).

4.12 If, however, one of the parties is in a dominant position in any relevant product or service market affected by the agreement, it is less likely to satisfy the Article 101(3) criteria and may also be vulnerable under Article 102.

## TABLE 4.1: SPECIALISATION BLOCK EXEMPTION FLOWCHART




No
**Market share test:** Does the combined market share of the parties exceed 20% of the relevant market? (Art. 4, Recital (10))
*NB The market share is to be calculated in value terms (or volume terms if reliable value data is not available) by reference to the previous calendar year.*
*NB The 20% threshold may be exceeded by up to 5% (i.e. to a 25% market share) for up to two consecutive calendar years (Art. 6(2)). The 25% threshold may be exceeded for one calendar year (Art. 6(3)) although this concession cannot be combined with the previous concession to extend beyond two years (Art. 6(4)).*
No
Yes
SPECIALISATION BLOCK EXEMPTION IS AVAILABLE
SPECIALISATION BLOCK EXEMPTION IS NOT AVAILABLE

# 5. Purchasing Agreements

## GENERAL OBSERVATIONS AND RELEVANT MARKET DEFINITION

5.1 The concept of joint purchasing or joint buying of products encompasses:

(i) purchasing by a company jointly controlled by two or more parent companies;

(ii) purchasing by a company owned by several companies which each hold small non-controlling stakes; or

(iii) joint purchasing by two or more companies under contractual arrangements or even looser forms of cooperation.

5.2 Joint purchasing can enable SMEs (e.g. members of a retailer buying group) to achieve volume discounts comparable to their larger competitors, with possible pro-competitive consequences in the markets in which they compete. Where joint purchasing arrangements involve vertical agreements, a further analysis may be required under the rules of the block exemption for vertical restraints and the guidelines on vertical agreements (Guidelines paras. 195-196).

5.3 There are two relevant markets where purchasing agreements are concerned, and both must be analysed to determine if competition concerns would arise. The first is the "purchasing market", i.e. the market in which the parties purchase the good/service from the supplier. The other is the "selling market", i.e. the downstream market into which the parties sell the goods/services to consumers. In the competition analysis it is necessary to look at the market power of the parties at both these levels.

## ASSESSMENT UNDER ARTICLE 101(1)

5.4 If parties purchase a significant number of goods together, the Guidelines assume that the incentives for price competition on the selling market may be considerably reduced. If these parties have a high degree of market power the lower purchase prices that are gained are unlikely to be passed on to consumers. The Guidelines state that competition concerns will arise where parties have a significant degree of market power on the purchasing market, because the purchasers may force their suppliers to decrease the range and quality of the products that they produce. There is also the concern of foreclosure on the purchasing market, if the parties to the purchasing agreement may limit competing purchasers access to efficient suppliers. This outcome is increased where there are a limited number of suppliers and there are barriers to entry on the supply side of the upstream market (Guidelines paras. 200-201).

5.5 There can also be concerns that joint purchasing arrangements are simply a guise for a cartel. Arrangements which involve the fixing of purchase prices can have as their object the restriction of competition by object. Ultimately, when analysing a purchasing agreement, the Commission will be looking to determine whether the agreement as a whole gives rise to restrictive effects on competition within the meaning of Article 101(1).

## THE "SAFE HARBOUR" FOR PURCHASING AGREEMENTS

5.6 The Guidance offers a safe harbour, where the parties' market power is not large enough to give rise to concerns of anti-competitive behaviour (Guidelines para. 208). The Commission indicates that market power is unlikely to exist where the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market as well as a combined market share not exceeding 15% on the selling market. Where parties are outside this safe harbour, there is no presumption of restrictive effects, but the case will need to be looked at in-depth (see also part B to Table 1.1).

# 6. Commercialisation Agreements

## GENERAL OBSERVATIONS

6.1 The concept of joint commercialisation covers cooperation in the areas of selling, distribution or promotion, ranging from:

(a) extensive joint selling involving all commercial aspects relating to sales (including determination of prices);

(b) more limited cooperation in areas of marketing such as distribution, after-sales service or advertising. Some forms of limited cooperation in the field of distribution may qualify for favourable treatment under the vertical agreements block exemption regulation and the Vertical Guidelines, particularly where the parties are not actual or potential competitors (Horizontal Guidelines, para. 226); and

(c) cooperation in the area of commercialisation which is related to broader cooperation, e.g. involving joint production or joint purchasing (which should be dealt with as in the assessment of those types of cooperation, considered at Parts 4 and 5 of this publication) (Horizontal Guidelines, para. 228).

## ASSESSMENT UNDER ARTICLE 101(1)

6.2 Because of the depth of cooperation that can occur in a commercial agreement, there can be a significant risk of anti-competitive behaviour between parties. The main competition concerns arising from commercial agreements are:

(i) price fixing;

(ii) facilitation of output limitations if the parties agree the volume of products to be put on the market;

(iii) division of the market according to customers or geographic area; and

(iv) Collusive outcomes through the exchange of strategic information.

6.3 These concerns are greater where the parties have market power. Where the commercialisation agreement enables a party to enter a market it could not have entered individually, the Commission will not necessarily see this as a restriction of competition.

## THE "SAFE HARBOUR" FOR COMMERCIALISATION AGREEMENTS

6.4 There is no block exemption for horizontal commercialisation agreements. However, the Guidelines (at para. 240) provides a safe harbour for parties entering into these agreements, where they do not have high a significant degree of market power. The Commission recognises that in most cases, where the parties to the agreement have a market share not exceeding 15%, commercialisation agreements should not raise Article 101 concerns, provided that they do not involve hardcore restrictions such as price-fixing.

6.5 Outside this "safe harbour", a more detailed assessment is required, taking account of factors such as market concentration and market shares. The Horizontal Guidelines recognise that joint commercialisation agreements may bring about economic benefits which outweigh their restrictive effects. This requires a careful analysis of whether particular restrictions are indispensable (in particular for agreements involving price-fixing or market-sharing) and of whether the agreement risks affording the parties the possibility of eliminating competition in respect of a substantial part of the relevant market (see also Part B of Table 1.1).

# 7. Standardisation Agreements and Standard Terms

## GENERAL OBSERVATIONS

7.1 The primary object of a standardisation agreement is the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply. They can cover many different aspects, such as the size of a product, a products interoperability, or the approval of a product or service by a regulatory body.[13]

7.2 There are four possible market areas which may be affected by a standardisation agreement:

(i) the product/service markets to which the standard relates;

(ii) the relevant technology markets (where the standard setting involves the selection of technology and where the rights to intellectual property are marketed separately from the products to which they relate);

(iii) the market for standard setting (if different standard-setting bodies or agreements are already in existence); and

(iv) the market for testing and certification.

7.3 There are two main competition concerns that arise with standardisation agreements. First, there is the concern that the standardisation can result in restrictions in price competition, and secondly, that it could limit or control production, markets, innovation or technical development. The Commission considers that these competition issues could arise through three main channels:

(i) Reduction in price competition if the companies that are party to the standardisation agreement were to engage in anti-competitive discussions;

(ii) Foreclosure of innovation and technologies. Once one technology has been chosen for the standard, there is a risk that competing technologies and standards may face barriers to entry. The risk of

13 Preparation and production of technical standards as part of the execution of public powers are not covered, nor are standards related to the provision of professional services, such as rules of admission to a liberal profession (see Guidelines para.258).

limitation to innovation is increased where one or more companies are unjustifiably excluded from the standard setting process; and

(iii) Exclusion of, or discrimination against, certain companies by prevention of effective access to standards. If a company is denied complete access or is only granted access on a restrictive basis, this can have anti-competitive effects. Equally, where one company holds the intellectual property rights that are essentially for implementing the standard, this could result in anti-competitive effects by the company preventing access to license the IPRs after the standard has been set.

7.4 Where an industry agrees standard terms, anti-competitive effects can arise by:

(i) limiting product choice and innovation where the industry adopts the standard and there is no deviation;

(ii) affecting the commercial conditions of the final product; and

(iii) foreclosing the market where the standard terms have become industry practice, and access to them is vital for entry into the market.

## ASSESSMENT UNDER ARTICLE 101(1)

7.5 Agreements that seek to create a standard or use standard terms as part of a broader restrictive agreement aimed at excluding actual or potential competitors will restrict competition by object. Agreements to disclose licensing terms before the adoption of a standard as a cover to fix prices will likewise be restrictions of competition by object. The same is likely for standard terms which directly influence the prices charged to customers.

7.6 The Guidelines (at para. 277) acknowledge that restrictive effects on competition are unlikely in situations where there is effective competition between a number of voluntary standards. Even where the standardisation agreement risks creating market power, the following will normally fall outside the scope of Article 101(1):

(i) participation in standard-setting is unrestricted such that all competitors in the affected market are able to participate;

(ii) the procedure for adopting the standard in question is transparent;

(iii) the standardisation agreements contain no obligation to comply with the standard;

(iv) the standard provides access on fair, reasonable and non-discriminatory ("FRAND") terms (see below); and

(v) all IPR policies would require good faith disclosure.

If the standardisation agreement does not meet any or all of these principles, there is no presumption of a restriction of competition under Article 101(1). However, a self-assessment will be necessary to determine if it can fall under Article 101(3).

7.7 FRAND commitments are designed so as to ensure that IPRs, which are incorporated in a standard are provided to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. Compliance with Article 101 does not require the holder to verify to the Commission that they are fulfilling the FRAND commitments. The Commission may however expect the parties to conduct a self-assessment. When conducting such a self-assessment, the parties to the agreement must take into account the following:

(i) that the members of standard-setting organisations remain free to develop alternative standards or products that do not comply with the standard;

(ii) whether the agreement restricts competition (either by limiting access or access only being given on discriminatory terms);

(iii) whether participation in the standard setting process is open in the sense that it allows all competitors (and/or stakeholders) to take part in choosing the standard;

(iv) how many standards are in use in the relevant market;

(v) the market shares of the goods or services based on the standard. The relevant market shares of the companies having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard; and

(vi) the level of disclosure of the IPRs. Where there is *ex ante* disclosure of the most restrictive licensing terms, in principle these will not restrict competition within the meaning of Article 101(1).

7.8 Where standard terms are used, they must be assessed so as to ascertain whether they are likely to give rise to restrictive effects on competition. The Guidelines stipulate (at para. 301) that as long as participation in the actual establishment of standard terms is unrestricted for the competitors in the relevant market, and the established standard terms are non-binding and effectively accessible for anyone, such terms are not likely to give rise to restrictive effects on competition. However, there are exceptions to this in the following circumstances:

*(i)* *De facto* alignment: where the standard terms for sale of consumer goods/services define the scope of the product sold to the customer, this can increase the risk of limiting both product variety and product innovation. In such cases, when assessing the impact of the standard terms, parties should take into account:

(a) existing competition on the market;

(b) market shares of the companies participating in the establishment of the standard terms;

(c) the coverage of the standard term (as the less extensive the coverage, the less likely that the standard terms will lead to a limitation of product choice); and

(d) the necessity of the standard term. In cases where in the absence of the standard terms, the ability to offer a certain product would be limited, it is unlikely that there would be any restrictive effect on competition within the meaning of Article 101.

*(ii)* *De facto* standard: where standard terms form a decisive part of the transaction with the customer, it is likely that these terms will begin to form a standard by which all parties must comply. The guidance provides an example of online shopping where customer confidence is essential in the use of safe payment systems, a proper description of the products, clear and transparent pricing rules, and flexibility of the return policy. As it is difficult for customers to make a clear assessment of all those elements, they tend to favour widespread practices and standard terms regarding those elements. In these situations, these elements could therefore become a *de facto* standard with which companies would need to comply in order to sell to the market.

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We have established particularly close ties with the competition practices of several other leading law firms around the world, so that we can provide a coordinated high-quality service to clients covering key European jurisdictions. These include the following five leading firms from other EU Member States, with whom we have co-located our Brussels office (at the above address in the heart of the European Quarter).

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