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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April 2010
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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. 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. It considers in particular 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 which apply to horizontal cooperation in some sectors of the economy, notably insurance and maritime transport.

Part 1 provides some general observations. Part 2 focuses on agreements relating to research and development (R&D), including an analysis of the European Commission’s R&D block exemption. Part 3 addresses agreements relating to the production of goods or provision of services, including agreements covered by the Commission’s specialisation block exemption. Parts 4 to 7 consider other forms of horizontal cooperation at different stages in the business development, production and supply chain – notably purchasing agreements concerning raw materials and inputs (Part 4), commercialisation agreements relating to sales and marketing (Part 5), standardisation agreements (Part 6) and environmental agreements (Part 7).

1.3 The current block exemption regulations applicable to specialisation agreements and R&D agreements are due to expire on 31st December 2010. A public consultation on these block exemptions and the accompanying Horizontal Guidelines closed on 30 January 2009. The Commission is proposing to adopt replacement block exemptions and Guidelines during the course of 2010.

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). To the extent that 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. 11). 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, 30.03.2010) which applies to two categories of cooperation agreements, i.e. agreements concerning 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.

The Commission's policy towards horizontal cooperation

1.4 The application of the EU competition rules to horizontal cooperation, including cooperation between actual or potential competitors, has been clarified to some extent by the Commission’s Horizontal Guidelines. These 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). Thus, 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. 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.

1.5 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 address other types of cooperation between competitors, such as information exchanges and minority shareholdings. Nor do they address more complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation. Finally, they do not apply to the extent that sector-specific rules are applicable.

1.6 The Horizontal Guidelines recognise (at para. 12) 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. In determining the centre of gravity, one must take account of two factors:

(a) 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

(b) 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).

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5 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 1st May 2004.

6 Horizontal Guidelines, para. 25.

7 The current Horizontal Guidelines (at para. 10) indicate that these are to be addressed separately. The Commission is proposing to set out some general principles on the competitive assessment of information exchange in its new Horizontal Guidelines.

8 The EU Merger Regulation may be applicable if such alliances or joint ventures give rise to a concentration with a “Community dimension” (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 chapter of the Horizontal Guidelines (see Guidelines, para. 12).

9 Special rules are applicable for agriculture, transport (air, maritime), insurance.
Application of the Article 101(1) prohibition and Article 101(3) criteria

1.7 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. In extreme cases the Commission may impose fines on the parties. Radical changes to the way in which the EU competition rules are implemented were introduced on 1st 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 which are available in respect of R&D agreements and specialisation agreements are described in this publication at Parts 2 and 3 respectively.

1.8 The Commission has published a Notice on market definition which documents the factors to be taken into account when defining relevant markets for these and other purposes. Many commercial agreements are able to benefit from the Commission’s 2001 Notice on agreements of minor importance. This 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). Likewise, it confirms that larger companies may rely on this Notice 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 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). The Horizontal Guidelines go further in recognising that certain types of horizontal agreements are unlikely to have

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10 In its judgment in Case C-453/99 Courage Ltd v Crehan (20.9.2001), 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 (e.g. whether the claimant was in a markedly weaker position than the other party to negotiate the terms of the agreement or to avoid or reduce the loss by seeking alternative relief). The European Commission is preparing a draft directive which would impose a number of obligations on Member States aimed at facilitating private damages actions.

11 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).


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 more thoroughly by the R&D block exemption regulation (see Part 2 of this publication);
- 20% for production agreements – as addressed more thoroughly by the specialisation block exemption regulation (see Part 3 of this publication);
- 15% for purchasing agreements (see Part 4 of this publication) and commercialisation agreements (see Part 5 of this publication).

1.9 The Horizontal Guidelines also adopt a positive stance towards the application of Article 101 to agreements on standards and environmental agreements (see Parts 6 and 7 of this publication).

1.10 Table 1.1 (at the end of this Part 1) 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**

1.11 It should also be remembered that 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).
## Table 1.1: Issues for Article 101 Analysis of Horizontal Agreements

<table>
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<th>A. Checklist for Article 101(1) analysis of whether a horizontal agreement appreciably restricts or limits competition (see e.g. Horizontal Guidelines, paras. 17-30)</th>
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<tr>
<td>1. <strong>Is there an appreciable effect on trade between Member States?</strong> If the agreement is unlikely to be capable of appreciably affecting trade between Member States (the non-appreciable affection 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 the effect on trade concept and the NAAT rule in a 2004 Notice (OJ 2004 C101/81, 27.4.2004). The <em>De Minimis</em> Notice (at point 3) acknowledges that agreements between SMEs are rarely capable of appreciably affecting trade between Member States.</td>
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| 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:
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<td>Some categories of agreements tend not to include restrictions on prices or output (e.g. most agreements on R&amp;D, standards or environmental issues);</td>
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<td>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 area of cooperation accounts for a high proportion of total costs in the market, and (b) the parties combine their activities in the area of cooperation to a significant extent.</td>
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| 3. **What is the competitive relationship between the parties to the agreement?** Some types of horizontal agreement are, by their very nature, unlikely to fall under Article 101 (1), e.g.:
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<td>cooperation between non-competitors;</td>
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<td>cooperation between competitors which cannot independently carry out the project/activity covered by the cooperation; or</td>
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<td>cooperation between competitors in an area which does not influence the relevant parameters of competition (e.g. as may be the case for agreements on standards or environmental agreements).</td>
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|   | For these purposes, the Horizontal Guidelines (para. 9) provide that the term “competitors” includes:
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<td><em>actual competitors</em>: i.e. if one party (a) is active on the same relevant market as the other or (b) in the absence of the agreement, is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). The same reasoning may lead to the grouping of different geographic markets (Horizontal Guidelines, footnote 8);</td>
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<td><em>realistic potential competitors</em>: i.e. if there is evidence that, absent the agreement, one party could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices. The mere theoretical possibility of entry is not sufficient. NB the Vertical Guidelines (para. 26) consider a period of maximum one year for the purposes of applying the vertical agreements block exemption; however, in individual cases the Commission may take into account longer periods bearing in mind the time actual competitors need to adjust their capacities (Horizontal Guidelines, footnote 9).</td>
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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 point 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 particular categories of horizontal agreements, see para. 2.12 and Table 2.3 for R&D agreements, and para. 3.7 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 to forms of horizontal cooperation where those block exemptions are not available. In particular for cooperation in the R&D field, this may also require analysis of the impact on “innovation markets” (see Part 2 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: Horizontal Guidelines, footnote 20), first mover advantage, patent portfolio, brands, etc.;
- competitors’ market positions by reference to similar criteria. The Horizontal Guidelines (para. 29) refer to the HHI and leading firm concentration ratio as indicators of market power.

NB The HHI (Herfindahl-Hirschman Index) sums up the square of all competitors’ market shares; an HHI below 1,000 is characterised as “unconcentrated”, 1,000-1,800 as “moderately concentrated”, above 1,800 as “highly concentrated”. The Horizontal Guidelines (at footnote 22) refer to the concept of “post-cooperation” HHIs, calculated in the same way as the Horizontal Merger Guidelines calculate post-concentration HHIs where two undertakings merge. It is questionable whether this econometric tool for merger analysis can be used in the same way for analysis of horizontal cooperation between independent undertakings.

NB The leading firm concentration ratio (CR) sums up the individual market shares of the leading competitors, e.g. the three-firm concentration ratio (CR3) is the sum of the market shares of the leading three competitors in the relevant market.
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• entry barriers: economies of scale and scope, government regulations, access to resources, essential facilities, brand loyalty, etc.;
• maturity of market: negative effects are generally more likely in stable/declining markets;
• countervailing buyer/supplier power: the sophistication of parties active upstream and downstream in the economic supply chain will affect the appraisal of the cooperation;
• 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. 31-39 (generally), 68-71 (R&D), 102-105 (production), 132-134 (purchasing), 151-155 (commercialisation), 169-175 (standardisation), 192-197 (environmental); Commission 2004 Guidelines are 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 para. 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 assured if there is sufficient residual competition on the market.

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) the pass-on and balancing of cost efficiencies and
(b) the pass-on and balancing of 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. For example, the Horizontal Guidelines (para. 35) refer to how in some circumstances “exclusivity arrangements” may be acceptable as a way of preventing a participating party from “free-riding” whereas in other circumstances they may not be necessary and may even worsen a restrictive effect.

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. R&D AGREEMENTS

General observations

2.1 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 if a company competes in research-based or technology-driven markets where it needs 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 in carrying out joint R&D with a view to developing and marketing 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.

2.2 Some parties which collaborate with others in their R&D efforts 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 2.1 (at the end of this Part 2). 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.

2.3 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.

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

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

(b) 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

(c) 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

2.5 The Horizontal Guidelines (at para. 43 et seq.) 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. Thus the appraisal of R&D cooperation under the competition rules needs to take account of:

(a) the product market(s) directly concerned by the cooperation (i.e. in which the product(s) which may result from the innovation may compete). This will depend on whether the innovation is expected to compete in:

(i) 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;

(ii) 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. 2.6 below); or

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

(b) 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;

(c) 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:

(i) 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
(ii) 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.

2.6 R&D cooperation may also affect competition in innovation. This may be relevant where (as considered at para. 2.5(a)(ii) and (c)(ii) 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:

(a) 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 reflect on whether there will be a sufficient number of credible competing poles of research left after the relevant R&D agreement, taking account of factors such as:

• the nature, scope and size of possible other R&D efforts,
• competing poles’ access to financial and human resources,
• know-how/patents and other specialised assets,
• the timing of these alternatives and the capability of the other poles to exploit possible results;

(b) industries where competing R&D efforts are not so obvious. Here the competition analysis will generally not focus on the impact of the R&D agreement on innovation. Instead it will be limited more to assessing its likely impact on the relevant product and/or technology market(s).

2.7 Where parties to an R&D agreement already have significant market shares in the relevant product (or technology) market(s), there can be concerns that the joint R&D may reduce the intensity of innovation and so stifle competition. Thus in Henkel/Colgate (a case which pre-dated the first R&D block exemption) the Commission decided that Article 101(1) applied to a pure R&D agreement between competitors who were among Europe’s largest washing powder and detergent manufacturers – even though the agreement did not limit each party’s ability to carry out independent R&D. In reaching this conclusion, the Commission took account of the importance of R&D for competition in the detergents sector and the general market structure. The Commission issued an individual exemption under Article 101(3) only once it was satisfied that both parties would be free to exploit the results of the joint R&D independently from one another and without territorial or other restrictions. This required the parties to delete a contractual prohibition on licensing the results of the R&D to third parties without the consent of the other party.

Henkel/Colgate (OJ 1972 L14/1).
Agreements not caught by the Article 101(1) prohibition

2.8 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 (paras. 55-58) and in the R&D block exemption (Recital (3)). 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.

2.9 The Horizontal Guidelines also recognise (at para. 57) 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

2.10 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. The current R&D block exemption is in place until 31st December 2010. 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 2.2). 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.

2.11 To benefit from the block exemption, an R&D agreement must fall into one of three categories (Article 1(1)):

(a) agreements which contemplate cooperation covering not only joint R&D but also the joint exploitation of the results of that R&D;

(b) “pure” R&D agreements, i.e. agreements for the joint R&D of products or processes excluding joint exploitation of the results; or

(c) agreements involving the joint exploitation of the results of R&D pursuant to a prior related pure R&D collaboration between the same undertakings (whether all or only those wishing to participate in the joint exploitation).

---

2.12 The R&D block exemption sets out various categories of hardcore restrictions (Article 5). See Table 2.3. 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). Conversely, an R&D agreement which does not contain any of these blacklisted restrictions is automatically 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).

2.13 The availability of the R&D block exemption depends upon 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 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

2.14 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) (Article 7 and Recital (19)). Although in practice it has never done this, it could do so if:

(a) the existence of the agreement is substantially restricting the scope for third parties to carry out R&D in the relevant field because of the limited research capacity available elsewhere;

(b) the structure of supply means the agreement is substantially restricting third party access to products developed or manufactured under the agreement;

(c) the parties, without any objectively valid reason, are not exploiting the results of the joint R&D;

(d) the products covered by the agreement are not subject to effective competition in the relevant marketplace; or
(e) the existence of the agreement would eliminate effective competition in R&D on a particular market. This may be relevant if an R&D agreement has the effect of removing competition in innovation in a market where there are very few independent poles of research (see paras. 2.6-2.7 above).

The position outside the R&D “safe harbour” – case-by-case analysis

2.15 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 appraisal involves 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.

2.16 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 (in other words, whether it would have appreciable “foreclosure effects” on third parties). As part of this assessment, the following considerations should be taken into account:

(a) any “network effects”, depending on the existence of other agreements in the relevant market; and

(b) any appreciable “spillover effects”, i.e. whether the agreement may reduce competition between the parents in other areas in which they are both active.

2.17 The Horizontal Guidelines (paras. 68-71) 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). Thus, the Commission did grant individual exemptions (for limited periods and subject to appropriate conditions) for R&D agreements between competitors with strong market positions, even where they had extended to joint exploitation of the R&D results. For example:

(a) In Asahi/Saint-Gobain the parties formally notified a joint venture agreement for R&D, production and technology licensing in a new field of bi-layer safety glass. This was exempted by the Commission, but only when the parties agreed to reduce its 30 year duration to 10 years or, if earlier, five years after first commercial production (reasoning by analogy with the old R&D block exemption which contained a five-year,
rather than seven year, post-commercialisation exemption). This individual exemption was granted notwithstanding that the parties had a combined share of over 30% of the world market for vehicle safety glass.\textsuperscript{17}

(b) In Pasteur Merieux/Merck, the parties formally notified a joint venture agreement for the R&D and distribution of human vaccines. Production was to be undertaken by the parents who would then supply the product at cost price to the joint venture for onward sale. Although the parents had high market shares in a number of relevant product markets, the Commission exempted the arrangement for 12 years (after the parties agreed to grant distribution and manufacturing rights to third parties for Germany and France). The Commission found that in this case distribution was closely linked to development and took account of the fact that Merck did not have a developed distribution infrastructure in Europe (other than in Germany).\textsuperscript{18}

2.18 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.

\textsuperscript{17} Asahi/Saint Gobain (OJ 1994 L354/87).

\textsuperscript{18} Pasteur Merieux/Merck (OJ 1994 L309/1).
TABLE 2.1: R&D AND EXPLOITATION OF RESULTS (DEFINITIONS)
(terms in bold are defined in the R&D block exemption, Article 2)

<table>
<thead>
<tr>
<th>R&amp;D stage</th>
<th>Exploitation of the results (including production, sales and marketing)</th>
</tr>
</thead>
<tbody>
<tr>
<td>R&amp;D (of products or processes) includes the following steps:</td>
<td>Exploitation of the results includes the following steps:</td>
</tr>
<tr>
<td>• the acquisition of know-how relating to products 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);</td>
<td>• production of contract products (i.e. products/services which arise out of the R&amp;D or are manufactured/provided using the contract processes);</td>
</tr>
<tr>
<td>• the carrying out of theoretical analysis;</td>
<td>• application of contract processes (i.e. technology/processes arising out of the R&amp;D);</td>
</tr>
<tr>
<td>• systematic study or experimentation (including experimental or pilot production);</td>
<td>• technology transfers (assignment or licensing) to third parties of IPRs required for such production or application; and</td>
</tr>
<tr>
<td>• technical testing of products or processes;</td>
<td>• commercialisation (marketing and sales) of contract products.</td>
</tr>
<tr>
<td>• establishment of necessary facilities; and</td>
<td></td>
</tr>
<tr>
<td>• obtaining IPRs for the results of the R&amp;D activities.</td>
<td></td>
</tr>
<tr>
<td>Joint R&amp;D is where some or all of the above activities are:</td>
<td>Joint exploitation of the results is where some or all of the above activities are:</td>
</tr>
<tr>
<td>• carried out by the parties jointly (e.g. by a joint team or by a JV undertaking);</td>
<td>• carried out by the parties jointly (e.g. by a joint team or by a JV undertaking),</td>
</tr>
<tr>
<td>• jointly entrusted to a third party (e.g. under subcontracting arrangements); or</td>
<td>• jointly entrusted to a third party (e.g. under subcontracting arrangements), or</td>
</tr>
<tr>
<td>• allocated between the parties by way of specialisation.</td>
<td>• allocated between the parties (by way of specialisation).</td>
</tr>
</tbody>
</table>

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 2.2: R&D BLOCK EXEMPTION FLOWCHART

Does the agreement contemplate joint R&D or (alternatively) does it involve the joint exploitation of the results of R&D pursuant to a prior R&D collaboration between the same undertakings (whether all or only those wishing to participate in the joint exploitation)? (Article 1(1))

Yes

No

Does the agreement involve joint exploitation of results? The results must be those of joint R&D carried out under the current agreement or a prior agreement between the same parties (Article 1(1)(a) and (b))

Yes

No

Do all the parties have access to the results of the joint R&D? Each party must have the opportunity to exploit any of the results that interest it. Where a university, research institute or specialised research company is a party, for example, it will generally not be interested in exploitation of the results of the R&D, so it may be agreed that it can use the results solely for the purpose of further research (Article 3(2) and (3), Recital (14), Horizontal Guidelines para. 67)

Yes

No

Is each party free to exploit the results of the joint R&D (and any pre-existing know-how necessary for such exploitation) independently? (Article 3(3))

NB Where the parties are not competitors at the time of the R&D agreement, they may limit this right to exploitation to one or more technical fields of application

Yes

No

Does the post-R&D cooperation relate to results which (a) are protected by IPRs or constitute know-how, (b) substantially contribute to technical or economic progress and (c) are decisive for the manufacture of the contract products or the application of the contract processes? (Article 3(4))

Yes

No

Does the post-R&D cooperation provide for joint production only (i.e. without joint distribution)?

Yes

No

Are any parties charged with production by way of specialisation?

Yes

No

Are those parties required to meet any order for supplies from the other parties? (Article 3(5))

Yes

No

Does the agreement directly or indirectly, in isolation or in combination with other factors under the control of the parties, involve any “hardcore restrictions”? (Article 5 and Recitals (7) and (17); Horizontal Guidelines para. 70). These hardcore restrictions are described at Table 2.3

Yes

No
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 2(12) and 4(1), Recital (15))

- 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))

- No
- Yes

R&D BLOCK EXEMPTION IS NOT AVAILABLE

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 Recital (16)); 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) and 6(1)).

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 6(2)). The 30% threshold may be exceeded for one calendar year (Article 6(3)) although this concession cannot be combined with the previous concession to extend beyond five years (Article 6(4)).
**TABLE 2.3: THE HARDCORE RESTRICTIONS UNDER THE R&D BLOCK EXEMPTION**

<table>
<thead>
<tr>
<th>Non-compete restrictions on R&amp;D prohibiting independent R&amp;D, or R&amp;D agreements with third parties (Article 5(1)(a)) if those restrictions:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• prevent R&amp;D in a field unconnected with that to which the R&amp;D agreement relates, or</td>
</tr>
<tr>
<td>• apply following completion of the R&amp;D covered by the agreement (whether in the field to which the agreement related or any other field).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>IPR &quot;no challenge&quot; clauses regarding the validity of IPRs which the parties hold in the EU (Article 5(1)(b)) if those restrictions apply:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• for IPRs relevant to the R&amp;D programme, following completion of the R&amp;D programme; or</td>
</tr>
<tr>
<td>• for IPRs protecting the results of the R&amp;D, following termination of the agreement.</td>
</tr>
<tr>
<td>It is, however, acceptable to provide for termination of the agreement in the event that a party challenges such IPRs.</td>
</tr>
</tbody>
</table>

| 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(1)(c)). This does not prevent the setting of production/sales targets where the agreement extends to joint production/distribution (Article 5(2)(a and (b)). |

| Pricing restrictions on freedom to determine prices (including components of prices or discounts) when selling contract products to third parties (Article 5(1)(d)). This does not prevent the fixing of prices charged to immediate customers where the agreement extends to joint distribution (Article 5(2)(b)). |

| Customer restrictions limiting the customers a party may serve after the end of the seven years from the time the contract products are first put on the market within the EU (Article 5(1)(e)). |

| Territorial restrictions on sales or marketing of contract products in territories within the EEA reserved for other parties (other than a permitted restriction on “active sales” for up to seven years from the time the contract products are first put on the market within the EU) (Article 5(1)(f and (g)). |

| 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(1)(h)). |

<table>
<thead>
<tr>
<th>Restrictions or concerted practices impeding parallel trade involving:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• refusals to meet orders from users/dealers in the parties’ respective territories who would market the contract products in other parts of the EU (Article 5(1)(i)); or</td>
</tr>
<tr>
<td>• making it difficult for users/dealers to obtain contract products from other dealers within the EU (and in particular exercising IPRs or taking measures to prevent users/dealers from obtaining, or putting on the market within the EU, products which have been lawfully put on the market within the EU by another party or with its consent) (Article 5(1)(j)).</td>
</tr>
</tbody>
</table>
3. PRODUCTION AGREEMENTS (SPECIALISATION, OUTSOURCING, SUBCONTRACTING)

General observations and definitions

3.1 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.

3.2 It is possible to identify three different categories of production agreements (Horizontal Guidelines, paras. 78-81):

(a) Joint production agreements: where two or more parties agree to produce certain products jointly.

(b) Specialisation agreements: where one or more of the parties agree to cease (or refrain from) producing certain products and agree instead to purchase them from another party. It is possible to distinguish:

(i) “unilateral” specialisation agreements (including “outsourcing” agreements), i.e. where one party agrees to purchase the relevant products from the other, while that other is obliged to produce and supply those products; and

(ii) “reciprocal” specialisation agreements, i.e. where two or more parties agree, on a reciprocal basis, to purchase the (different) relevant products from the other parties who are obliged to supply them.

(c) Subcontracting agreements: where one party (the “contractor”) entrusts the production of goods or supply of services to the other party (the “subcontractor”). Subcontracting agreements (sometimes referred to as “toll manufacturing agreements”) are “vertical agreements” which are generally covered by the vertical agreements block exemption regulation (VABER) and/or the Vertical Guidelines – subject to two exceptions:

(i) subcontracting agreements between competing undertakings (VABER, Article 2(4)). Agreements between actual or realistic potential competitors in the same product market (irrespective of whether they are in the same geographic market) are instead to be appraised in accordance with the Horizontal Guidelines as explained in this Part 3 of this publication. Where a subcontracting agreement between competitors stipulates that the contractor will cease (or refrain from)

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19 Such agreements should not be confused with:

- business sales or asset swaps where parties dispose of parts of their activities to one another. These will usually be analysed as separate “concentrations” under the merger control rules (and not under Article 101), or
- anti-competitive market-sharing cartels where competitors agree to divide markets between themselves. These are generally serious infringements of the competition rules.

20 See Slaughter and May publication on The EU competition rules on vertical agreements.
producing the product to which the agreement relates, it is to be assessed as a "unilateral specialisation agreement";

(ii) **subcontracting agreements between non-competitors but which involve the transfer of know-how to the subcontractor** (VABER, Article 2(3), and para. 33 of the Vertical Guidelines): These are to be appraised in accordance with the Commission’s separate 1978 Notice on subcontracting agreements. Article 101(1) issues may arise where the contractor imposes restrictions in order to protect the economic value of technology or equipment made available to the subcontractor under the agreement. The Notice provides that Article 101(1) does not apply to the following types of restrictions on the subcontractor, provided that the technology or equipment is necessary to enable the work to be carried out (such that the subcontractor is not an independent supplier in the market):

- that it use the technology or equipment only for the purposes of carrying out its functions under the subcontracting agreement;
- that it not make the technology available to third parties; and
- that it supply the products (or perform the services) exclusively to, or on behalf of, the contractor.

However, Article 101(1) issues will arise if the contractor imposes non-compete restrictions where the subcontractor could have obtained access to the necessary technology and equipment elsewhere. The Notice also states that where the agreement includes restrictions on the subcontractor’s right to exploit the results of its own R&D, Article 101(1) may apply if those results are capable of being exploited independently.

### Relevant market definition

3.3 The Horizontal Guidelines (at para. 82) provide that the appraisal of a production agreement under the competition rules should be undertaken by reference to its effects on:

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

(b) 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".

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21 Notice on subcontracting agreements (OJ 1979 C1/2, 3.1.1979).
3.4 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.

**Agreements not caught by the Article 101(1) prohibition**

3.5 The Horizontal Guidelines (at para. 86) acknowledge that production agreements between non-competitors generally do not raise Article 101(1) issues. However, where a strong supplier cooperates with a realistic potential entrant (e.g. a strong supplier of the same product in a neighbouring geographic market), this reduction of “potential competition” could create competition concerns: see Horizontal Guidelines, para. 98.

3.6 Even a production agreement between competitors may fall outside the scope of Article 101(1) if, for example:

(a) it is the only commercially justifiable way for the parties to enter a new market, launch a new product or carry out a specific project (Horizontal Guidelines, para. 87);

(b) it is in an area which accounts for only a small proportion of their total production and marketing costs, e.g. specialisation/joint production of a relatively minor intermediate product (Horizontal Guidelines, para. 88); or

(c) it is a subcontracting agreement limited to individual sales/purchases on the open market, without forming part of a wider commercial relationship between the parties (Horizontal Guidelines, para. 89).

**The “safe harbour” of the specialisation block exemption**

3.7 Some production agreements can benefit from the Commission’s specialisation block exemption.\(^{22}\) 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 3.1 at the end of this Part 3). It sets out various categories of hardcore restrictions (Article 5). 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 it meets the block exemption’s other conditions (Articles 3 and 4).

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3.8 The availability of the specialisation block exemption depends inter alia on whether the parties’ combined market share exceeds 20% of the relevant market. 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

3.9 As under the R&D block exemption, the Commission 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) (Article 7 and Recital (16)). 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

3.10 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 appraisal will involve a full analysis of the agreement’s effects on competition. The Horizontal Guidelines include some observations on production agreements aimed at assisting businesses in undertaking this self-assessment.

3.11 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 (in other words, whether it would have appreciable “foreclosure effects” on third parties). Relevant considerations will include the parties’ market positions on the relevant market(s). As part of this assessment, any “network effects”, i.e. links between a significant number of competitors in a concentrated market, should be taken into account (Horizontal Guidelines, para 97).

3.12 The Horizontal Guidelines (paras. 102-105) 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” restrictions under the specialisation block exemption) and of 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).

3.13 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 3.1: SPECIALISATION BLOCK EXEMPTION FLOWCHART

**Is it a production agreement?** Does the agreement relate to the conditions under which the parties specialise in the production of goods or provision of services? (Art. 1(1) and paras. 78-81 of the Horizontal Guidelines; see para. 3.1 of this publication)

*NB* Intermediary or final goods/services are covered, with the exception of distribution and rental services (Art. 2(4)).

*NB* Production includes production by way of subcontracting (where the goods are manufactured, or services are supplied, by a third party subcontractor) (Art. 2(5)).

---

**Is it a unilateral specialisation agreement?** Does just one party agree to cease (or refrain from) producing certain goods/services and commit to purchase them from a competing undertaking, while the competing undertaking is obliged to produce/supply those goods/services? (Art. 1(1)(a), Recital (12))

*NB* Such an agreement may include “exclusive supply obligations” (i.e. not to supply the relevant product to a competing undertaking) and “exclusive purchase obligations” (i.e. not to purchase the relevant product from any other party) (Arts. 2(8) and (9) and 3(a)).

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**Is it a reciprocal specialisation agreement?** Do two or more parties agree on a reciprocal basis to cease (or refrain from) producing certain, but different, goods/services and commit to produce/supply those goods/services? (Art. 1(1)(b), Recital (12)).

*NB* Such an agreement may include “exclusive supply obligations” (i.e. not to supply the relevant product to a competing undertaking) and “exclusive purchase obligations” (i.e. not to purchase the relevant product from any other party) (Arts. 2(8) and (9) and 3(a)).

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**Is it a joint production agreement?** Do two or more parties agree to produce certain products jointly?

*NB* Such an agreement may include “exclusive supply obligations” (i.e. not to supply the relevant product to a competing undertaking) and “exclusive purchase obligations” (i.e. not to purchase the relevant product from any other party) (Art. 2(8) and (9) and 3(a)).

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Does the agreement extend to the joint distribution of the relevant products (rather than selling the products independently of each other)?

---

Do the parties appoint a third party distributor (on an exclusive or non-exclusive basis) rather than being responsible themselves for distribution?

---

Is the third party distributor a competing undertaking? (Article 3(b))
Market share test: Does the combined market share of the parties exceed 20% of the relevant market? (Arts. 4 and 6, Recital (13))

*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)).

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**Hardcore restrictions:** Does the agreement, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have any of the following “hardcore” objectives? (Art. 5, Recital (14)):

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

(b) limitation of output/sales; or

(c) allocation of markets/customers

*NB* In the context of a (unilateral or reciprocal) specialisation agreement, this does not prevent provisions on the agreed amount of products to be supplied.

*NB* In the context of a “joint production agreement”, this does not prevent:

- the setting of the capacity and production volume of a production JV, or
- the setting of sales targets and fixing of prices that a production JV charges to its immediate customers.

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SPECIALISATION BLOCK EXEMPTION IS AVAILABLE

SPECIALISATION BLOCK EXEMPTION IS NOT AVAILABLE
4. PURCHASING AGREEMENTS

General observations and relevant market definition

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

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

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

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

4.2 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. In addition to this horizontal assessment, however, for joint purchasing agreements it is also necessary to make a further assessment of the vertical agreement(s) concluded with suppliers or individual sellers; this vertical assessment needs to be done in accordance with the rules of the vertical agreements block exemption regulation and the Vertical Guidelines (Horizontal Guidelines, para. 11).23

4.3 The Horizontal Guidelines (at paras. 119-122) provide that the appraisal of a joint purchasing agreement under the competition rules should be undertaken by reference to its effects on possible relevant markets at two levels:

(a) the “purchasing market(s)” with which the cooperation is directly concerned. For these purposes, when assessing whether the purchasers enjoy market power it is necessary to make a supply-side (rather than demand-side) assessment, i.e. whether the upstream suppliers have sufficient alternative outlets for their output, e.g. if the joint purchasing parties were to secure a small but lasting price decrease. Thus relevant market shares can be calculated as the percentage for which the participating purchasers account out of total sales of the purchased product/service in the relevant market.24 A high degree of buying power (over the suppliers on a market) could bring about market inefficiencies such as quality reductions, lessening of innovation efforts, or sub-optimal supply. However, the primary concern in the context of buying power are that lower prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers’ competitors on the selling markets (e.g. because the latter will be subjected to price increases on the selling market);

23 See Slaughter and May publication on The EU competition rules on vertical agreements. The provisions on retailer buying groups are considered in the flowchart at Appendix 3 to that publication.

24 The Horizontal Guidelines (at para. 121) give the example of a group of car manufacturers who jointly buy 15 units of input product X, where total sales of product X to car manufacturers amount to 50 (i.e. the participants account for 30% of sales of product X to car manufacturers). However, if total sales of product X (to car manufacturers and to other purchasers) amount to 100, then the group’s purchasing market share is only 15%.
(b) the downstream "selling market(s)" on which the participants are active as sellers. This additional market assessment is necessary if the parties are in addition competitors on these downstream markets. Negative effects are more likely if the parties will achieve market power by coordinating their activities and if they have a significant proportion of their total costs in common, e.g. if:

- retailers who compete in the same geographic market jointly purchase a significant amount of the products they offer for resale; or
- competing manufacturers/sellers jointly purchase a high proportion of their inputs together.

**Agreements not caught by the Article 101(1) prohibition**

4.4 The Horizontal Guidelines acknowledge that joint purchasing agreements will generally fall outside the scope of the Article 101(1) prohibition if:

(a) the participating purchasers are active in different downstream markets (e.g. retailers who are active in different geographic markets and are not realistic potential competitors); or

(b) the participating purchasers do not enjoy a strong position in the relevant purchasing market which could be used to harm the competitive positions of other players in their respective selling markets.

**Agreements that may be caught by the Article 101(1) prohibition**

4.5 The risk that a joint buying agreement will be caught by Article 101(1) increases:

(a) if, by its nature, it is in fact a tool to engage in a disguised cartel, e.g. otherwise prohibited price-fixing, output limitation, market allocation (Horizontal Guidelines, para. 124); or

(b) if the participating purchasers together have such power on the selling market(s) that the costs savings can be used to foreclose competitors or to raise rivals’ costs, e.g. by (a) limiting their rivals’ access to efficient suppliers or (b) causing their suppliers to seek to recover such price reductions by increasing prices charged to their rivals (Horizontal Guidelines, paras. 126 and 129).
The "safe harbour" for purchasing agreements

4.6 There is no block exemption for horizontal purchasing agreements. However, the Horizontal Guidelines do establish what is effectively a "safe harbour". They recognise (at paras. 130-131) that, in most cases, purchasing agreements should not raise Article 101 concerns if they do not include hardcore restrictions and the participating companies have a combined market share of below 15% on the relevant purchasing and selling market(s).

4.7 Outside this "safe harbour", a more detailed assessment is required, taking account of factors such as market concentration and possible countervailing supplier power. Where market shares are significantly above this 15% threshold, it will be necessary for the parties to demonstrate that efficiencies exist which outweigh the restrictive effects. The Horizontal Guidelines (paras. 132-134) recognise that joint purchasing agreements may bring about economic benefits which outweigh restrictive effects. However, this requires a careful assessment of whether particular restrictions (e.g. any exclusive purchasing commitments) are indispensable and of whether the agreement risks affording the parties the possibility of eliminating competition in respect of a substantial part of the relevant buying and/or selling markets (see also Part B of Table 1.1).
5. COMMERCIALISATION AGREEMENTS

General observations and relevant market definition

5.1 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, 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. 11);

(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: see Parts 3 and 4 of this publication).

5.2 The Horizontal Guidelines (at para. 142) provide that the appraisal of a joint commercialisation agreement under the competition rules should be undertaken by reference to its effects on:

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

(b) any neighbouring market(s) closely related to the directly concerned market(s).

Agreements not caught by the Article 101(1) prohibition

5.3 The Horizontal Guidelines acknowledge that joint commercialisation agreements will generally fall outside the scope of the Article 101(1) prohibition if:

(a) the parties are not competitors with regard to the products/services covered by the agreement. For such agreements, Article 101(1) should only be applicable if the agreement involves vertical restraints such as restrictions on passive sales, resale price maintenance, etc.; or

(b) the cooperation is objectively necessary to allow a party to enter a market it could not have entered individually (e.g. because of the costs involved). This would apply, for example, to consortium bids where the participants are together able to mount a credible tender for projects they could not otherwise have fulfilled individually.
Agreements that may be caught by the Article 101(1) prohibition

5.4 The risk that a joint commercialisation agreement will be caught by Article 101(1) increases in certain circumstances:

(a) **hardcore price-fixing**: if joint selling by competitors amounts to price-fixing by eliminating the price competition which would otherwise have existed between them. This anti-competitive effect may arise even if the participants remain free to sell outside the cooperative agreement, if it can be assumed that the agreement will lead to an overall coordination of the prices charged by the parties;

(b) **information exchange**: if the joint commercialisation (even where it falls short of joint selling) provides a clear opportunity for exchanges of sensitive commercial information on matters such as marketing strategy and pricing, particularly in concentrated markets;

(c) **similar cost structures**: if the joint commercialisation (taking account of its structure) results in a significant part of the parties’ final costs being similar, so limiting potential for price competition at the final sales level; or

(d) **distribution agreements between competitors**: if it is a distribution arrangement between actual or realistic potential competitors in the same product market (even if they are active in different geographic markets). For such agreements:

(i) if it is a reciprocal agreement, the concern is that it will have the effect of allocating markets/customers and eliminate actual or potential competition between the parties. The key horizontal issue should therefore be whether the agreement is objectively necessary for the parties to enter each other’s markets. There will also be vertical issues if the agreement contains hardcore restrictions such as limits on passive sales, resale price maintenance, etc.;

(ii) if it is a non-reciprocal agreement, the risk of market-partitioning is less pronounced. The main issue will be whether it:

• gives rise to the basis for a mutual understanding not to enter each other’s markets, or

• is a means to control access to or competition on the “importing” market.
The "safe harbour" for commercialisation agreements

5.5 There is no block exemption for horizontal commercialisation agreements. However, the Horizontal Guidelines do establish what is effectively a "safe harbour". They recognise (at paras. 150-151) that, in most cases, commercialisation agreements should not raise Article 101 concerns if they do not involve hardcore price-fixing restrictions and the participating companies have a combined market share of below 15% on the relevant market(s).

5.6 Outside this "safe harbour", a more detailed assessment is required, taking account of factors such as market concentration and market shares. The Horizontal Guidelines (paras. 151-155) 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).
6. STANDARDISATION AGREEMENTS

General observations and relevant market definition

6.1 A standardisation agreement is one which has as its primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply.\(^\text{25}\) Agreements to set standards may be concluded between private undertakings or established by public bodies such as standard bodies recognised under EU law.\(^\text{26}\)

6.2 The Horizontal Guidelines (at para. 161) provide that the appraisal of a standardisation agreement under the competition rules should be undertaken by reference to its effects on the following possible relevant markets:

(a) the product market(s) to which the standard(s) relate. Where they relate to an entirely new product, they may raise market definition issues similar to those raised for R&D agreements (see paras. 2.6-2.7 above);

(b) the service market for standard setting (if different standard-setting bodies or agreements exist);

(c) the market for testing and certification (if relevant).

Agreements not caught by the Article 101(1) prohibition

6.3 The Horizontal Guidelines acknowledge that many standardisation agreements fall outside the scope of the Article 101(1) prohibition. This is the case for:

(a) open and objective agreements: a standardisation agreement will not be caught by Article 101(1) if participation is unrestricted and non-discriminatory with open and transparent procedures and provided it does not impose any obligation on participants (directly or as part of a wider agreement) to comply with the standards. Standards adopted by recognised standards bodies will generally meet these requirements. This positive assessment may apply regardless of the market shares of the participating companies. Particular areas to watch out for are standards which risk discriminating against or foreclosing competitors because of their geographic scope of application (Horizontal Guidelines, para. 168); or

\(^{25}\) Horizontal Guidelines, para. 159 (para. 160 provides that standards relating to the provision of professional services – e.g. rules of admission as a lawyer - are not covered by the Guidelines).

(b) minor agreements: a standardisation agreement will not be caught by Article 101(1) if (and for so long as) the standards only have a negligible effect on competition in the relevant market. This may be the case for agreements which (a) pool together SMEs to standardise access forms or conditions to joint tenders or (b) standardise aspects such as minor product characteristics, forms and reports (Horizontal Guidelines, para. 164).

Agreements that may be caught by the Article 101(1) prohibition

6.4 The risk that a standardisation agreement will be caught by Article 101(1) increases insofar as:

(a) it grants the participants joint control over production and/or innovation. Such agreements may affect the participants’ ability to compete on product characteristics and/or affect third parties active upstream (suppliers) or downstream (purchasers) of the standardised products (Horizontal Guidelines, para. 166);

(b) it limits the participants’ freedom to develop alternative standards or products which do not comply with the agreed standard (Horizontal Guidelines, para. 167);

(c) it may have anti-competitive effects on markets other than the product market affected by the standards (Horizontal Guidelines, para. 167), as may be the case if the agreement:

• entrusts certain bodies with the exclusive right to test compliance with the standard, thereby going beyond the primary objective of defining the standard; or

• it imposes restrictions on marking of conformity with the standard (unless imposed by regulatory provisions).

6.5 Where a standardisation agreement is caught by Article 101(1), the Commission will generally adopt a positive approach in appraising whether the criteria of Article 101(3) are satisfied (Horizontal Guidelines, paras. 169-175: see also Part B of Table 1.1).
7. ENVIRONMENTAL AGREEMENTS

General observations and relevant market definition

7.1 The importance of environmental protection has grown in recent years, leading to a wide range of environmental initiatives and to the creation of new economic activities and markets such as the recycling of packaging materials. EU law provides that environmental considerations must be integrated into all other EU policies, including European competition policy. In turn, Member States and companies must respect competition law when putting in place environmental initiatives (e.g. collective systems for the recovery of packaging waste).

7.2 An environmental agreement is one which is directly aimed at the reduction of a pollutant or a type of waste identified as such in relevant regulations. The concept can include:

(a) agreements setting out standards on the environmental performance of products (inputs or outputs) or production processes. These types of environmental agreements are similar to standardisation agreements and will be subject to the same principles of assessment (see Part 6 of this publication);

(b) agreements where competitors provide for the common attainment of an environmental target, e.g. for the recycling of certain materials, emission reductions or improvements in energy efficiency.

7.3 The Horizontal Guidelines (at para. 182) provide that the appraisal of an environmental agreement should be undertaken by reference to its effects on the following possible relevant markets:

(a) where the pollutant is not itself a product, the relevant market will relate to the products into which the pollutant is incorporated (on which the parties will be active as producers/suppliers), and

(b) for collection/recycling agreements, the market for collection services covering the goods in question may also be relevant.

Agreements not caught by the Article 101(1) prohibition

7.4 The Horizontal Guidelines acknowledge that many environmental agreements fall outside the scope of the Article 101(1) prohibition, irrespective of the market shares of the participants. This is the case for:

(a) agreements which do not impose precise obligations on the parties, e.g. agreements which express loose commitments to contributing to the attainment of sector-wide environmental targets. If parties are left with broad discretion as to the means of attaining these environmental objectives, the agreement is less likely to have appreciable competitive effects (Horizontal Guidelines, para. 185);
(b) agreements setting environmental standards that do not appreciably restrict product and production diversity in the relevant market. For example, where some categories of product are banned or being phased out, restrictions applicable to them will not be appreciable insofar as they account for only a minor part of the relevant market (Horizontal Guidelines, para. 186);

(c) agreements which contribute to creating new markets (e.g. recycling agreements) will not generally restrict competition, provided that (and so long as) the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist (Horizontal Guidelines, para. 187).

Agreements that may be caught by the Article 101(1) prohibition

7.5 The risk that an environmental agreement will be caught by Article 101(1) increases:

(a) if, by its nature, it is in fact a tool to engage in a disguised cartel (e.g. otherwise prohibited price-fixing, output limitation, market allocation) or part of a wider restrictive agreement aimed at excluding actual or potential competitors (Horizontal Guidelines, para. 188);

(b) if it is between parties who account for a major share of the industry (at national or EU level) and:

(i) it appreciably restricts the participants’ ability to decide the characteristics of their products (or production processes), thereby granting them influence over each other’s production or sales. Such agreements may also have foreclosure effects on third parties (suppliers or customers). This may be the case, for example, for agreements aimed at phasing out certain products and processes or allocating individual pollution quotas; or

(ii) it appoints an undertaking as the exclusive provider of collection and/or recycling services for the participating parties where other actual or potential providers exist.

7.6 Where a genuine environmental agreement is caught by Article 101(1), the Commission will generally adopt a positive approach in appraising whether the criteria of Article 101(3) are satisfied (Horizontal Guidelines, paras. 192-197: see also Part B of Table 1.1). For example:

(a) In DSD (Duales System Deutschland - Der Grüne Punkt) the Commission found this nationwide German system for the selective collection and recovery of sales packaging waste to be compatible with the competition rules but only after certain changes were made to remove exclusivity provisions and reduce foreclosure effects on competitors;

(b) In CECED the Commission approved under Article 101(3) an agreement under which nearly all European producers and importers of washing machines agreed to stop producing or importing into the EU the least energy-efficient machines. The Commission accepted that this would help improve the environmental performance of the relevant products, reducing energy consumption and thereby reducing pollutant emissions for power generation.

Slaughter and May
April 2010

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28 Case CECEPT Dishwashers (C) 2001 C250/2, 8.9.2001; also CECEPT Water Heaters (C) 2001 C250/4, 8.9.2001.
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