Selection of Legal Texts:

Competition Law

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- Act against Restraints of Competition (GWB)
- Treaty on the Functioning of the European Union (TFEU)
- Regulation (EC) No 1/2003 (Implementing Regulation)
- Regulation (EC) No 139/2004 (EC Merger Regulation)
- Regulation (EC) No 330/2010 (Vertical Agreements Block Exemption Regulation)
- Guidelines on Vertical Restraints (2010/C 130/01)
- Directive on Actions for Damages (2014/104/EU)
- Communication on the Commission’s enforcement priorities
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Part I
Restraints of Competition

First Chapter
Agreements, Decisions and Concerted Practices Restricting Competition

§ 1
Prohibition of Agreements Restricting Competition

Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.

§ 2
Exempted Agreements

(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not

1. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or

2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

shall be exempted from the prohibition of § 1.
(2) For the application of paragraph 1, the Regulations of the Council or the European Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions by associations of undertakings and concerted practices (block exemption regulations) shall apply mutatis mutandis. This shall also apply where the agreements, decisions and practices mentioned therein are not capable of affecting trade between Member States of the European Union.

§ 3
Cartels of Small or Medium-Sized Enterprises

Agreements between competing undertakings and decisions by associations of undertakings whose subject matter is the rationalisation of economic activities through inter-firm cooperation fulfil the conditions of § 2(1) if:

1. competition on the market is not significantly affected thereby, and

2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.

§§ 4 to 17
(abolished)

Second Chapter
Market Dominance, Other Restrictive Practices

§ 18
Market Dominance

(1) An undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it

1. has no competitors,

2. is not exposed to any substantial competition, or

3. has a paramount market position in relation to its competitors.

(2) The relevant geographic market within the meaning of this Act may be broader than the scope of application of this Act.

(3) In assessing the market position of an undertaking in relation to its competitors, account shall be taken in particular of the following:

1. its market share,

2. its financial strength,

3. its access to supply or sales markets,

4. its links with other undertakings,
5. legal or factual barriers to market entry by other undertakings,

6. actual or potential competition from undertakings domiciled within or outside the scope of application of this Act,

7. its ability to shift its supply or demand to other goods or commercial services, and

8. the ability of the opposite market side to resort to other undertakings.

(4) An undertaking is presumed to be dominant if it has a market share of at least 40 per cent.

(5) Two or more undertakings are dominant to the extent that

1. no substantial competition exists between them with respect to certain kinds of goods or commercial services and

2. they comply in their entirety with the requirements of paragraph 1.

(6) A number of undertakings is presumed to be dominant if it

1. consists of three or fewer undertakings reaching a combined market share of 50 per cent, or

2. consists of five or fewer undertakings reaching a combined market share of two thirds.

(7) The presumption of paragraph 6 can be refuted if the undertakings demonstrate that

1. the conditions of competition are such that substantial competition between them can be expected, or

2. that the number of undertakings has no paramount market position in relation to the remaining competitors.

§ 19

Prohibited Conduct of Dominant Undertakings

(1) The abuse of a dominant position by one or several undertakings is prohibited.

(2) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services

1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;

2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;

3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;

4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate consideration, provided that without such joint use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such joint use is impossible or cannot reasonably be expected;
5. uses its market position to invite or cause other undertakings to grant it advantages without any objective justification.

(3) Paragraph 1 in conjunction with paragraph 2 nos 1 and 5 also applies to associations of competing undertakings within the meaning of §§ 2, 3, and 28(1), § 30(2a) and § 31(1) nos 1, 2 and 4. Paragraph 1 in conjunction with paragraph 2 no. 1 shall also apply to undertakings which set resale prices pursuant to § 28(2) or § 30(1) sentence 1 or § 31(1) no. 3.

$\text{§ 20}$

Prohibited Conduct of Undertakings with Relative or Superior Market Power

(1) § 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

(2) § 19(1) in conjunction with paragraph 2 no. 5 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.

(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers food within the meaning of § 2(2) of the German Food and Feed Code [Lebensmittel- und Futtermittelgesetzbuch] below cost price, or

2. offers other goods or commercial services not just occasionally below cost price, or

3. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods and services which is higher than the price it itself offers on such market,

unless there is, in each case, an objective justification. The offer of food below cost price is objectively justified if such an offer is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. The donation of food to charity organisations for use within the scope of their responsibilities shall not constitute an unfair impediment.¹

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking has abused its market power within the meaning of paragraph 3, the undertaking shall be obliged to disprove this appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be clarified by the competitor concerned or by an association within the meaning of § 33(2), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

(5) Business and trade associations or professional organisations as well as quality mark associations [Gütezeichengemeinschaften] may not refuse to admit an undertaking if such refusal would constitute an objectively unjustified unequal treatment and place the undertaking at an unfair competitive disadvantage.

Footnote 1: As from 1 January 2018, pursuant to Article 2 in conjunction with Article 7 sentence 2 of the Act of 26 June 2013 (German Federal Law Gazette I p. 1738), § 20(3) shall be applicable with the following wording:
"(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers goods or commercial services not just occasionally below cost price, or

2. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods and services which is higher than the price it itself offers on such market, unless there is, in each case, an objective justification."

§ 21
Prohibition of Boycott and Other Restrictive Practices

(1) Undertakings and associations of undertakings may not request that another undertaking or other associations of undertakings refuse to supply or purchase, with the intention of unfairly impeding certain undertakings.

(2) Undertakings and associations of undertakings may not threaten or cause disadvantages, or promise or grant advantages, to other undertakings in order to induce them to engage in conduct which, under the following rules and regulations, may not be made the subject matter of a contractual commitment:

1. under this Act,

2. under Articles 101 or 102 of the Treaty on the Functioning of the European Union, or

3. pursuant to a decision issued by the European Commission or the competition authority pursuant to this Act or pursuant to Articles 101 or 102 of the Treaty on the Functioning of the European Union.

(3) Undertakings and associations of undertakings may not compel other undertakings

1. to accede to an agreement or a decision within the meaning of §§ 2, 3 or 28(1), or

2. to merge with other undertakings within the meaning of § 37, or

3. to act uniformly in the market with the intention of restricting competition.

(4) It shall be prohibited to cause economic harm to another person because such person has applied for or suggested that action be taken by the competition authority.

Third Chapter
Application of European Competition Law

§ 22
Relationship between this Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union

(1) The provisions of this Act may also be applied to agreements between undertakings, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, which may affect trade between the Member States of the European Union within the meaning of that provision. Pursuant to Article 3(1) sentence 1 of Council
Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EC 2003 No. L 1, p. 1), Article 101 of the Treaty on the Functioning of the European Union shall also apply in such cases.

(2) Pursuant to Article 3(2) sentence 1 of Regulation (EC) No. 1/2003, the application of the provisions of this Act may not lead to the prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States of the European Union but

1. which do not restrict competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, or

2. which fulfil the conditions of Article 101(3) of the Treaty on the Functioning of the European Union, or

3. which are covered by a regulation regarding the application of Article 101(3) of the Treaty on the Functioning of the European Union.

The provisions of the Second Chapter shall remain unaffected. In other cases, the primacy of Article 101 of the Treaty on the Functioning of the European Union is determined by the relevant provisions under European Union law.

(3) The provisions of this Act may also be applied to practices which constitute an abuse prohibited by Article 102 of the Treaty on the Functioning of the European Union. Pursuant to Article 3(1) sentence 2 of Regulation (EC) No. 1/2003, Article 102 of the Treaty on the Functioning of the European Union shall also apply in that case. The application of stricter provisions of this Act shall remain unaffected.

(4) Without prejudice to European Union law, paragraphs 1 to 3 do not apply to the extent that provisions concerning the control of concentrations are applied. Provisions that predominantly pursue an objective different from that pursued by Articles 101 and 102 of the Treaty on the Functioning of the European Union shall not be affected by the provisions of this Chapter.

§ 23
(abolished)

Fourth Chapter
Competition Rules

§ 24
Definition, Application for Recognition

(1) Business and trade associations and professional organisations may establish competition rules within their area of business.

(2) Competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct in competition which violates the principles of fair competition or effective competition based on performance, and of encouraging conduct in competition which is in line with these principles.

(3) Business and trade associations and professional organisations may apply to the competition authority for recognition of their competition rules.

(4) Applications for recognition of competition rules shall contain:
1. the name, legal form and address of the business and trade association or professional organisation;

2. the name and address of the person representing it;

3. a description of the subject matter and the territorial scope of the competition rules;

4. the wording of the competition rules.

The following must be attached to the application:

1. the by-laws of the business and trade association or professional organisation;

2. proof that the competition rules were established in conformity with the by-laws;

3. a list of unrelated business and trade associations or professional organisations and undertakings operating at the same level in the economic process as well as the suppliers’ and purchasers’ associations and the federal organisations for the relevant levels of the economic sector concerned.

The application may not contain or use incorrect or incomplete information in order to obtain surreptitiously recognition of a competition rule for the applicant or for a third party.

(5) Changes and amendments to recognised competition rules shall be notified to the competition authority.

§ 25
Third Party Comments

The competition authority shall give third-party undertakings operating at the same level in the economic process, business and trade associations and professional organisations of the suppliers and purchasers affected by the competition rules, as well as the federal organisations of the levels of the economic process concerned, the opportunity to comment. This shall also apply to consumer advice centres and other consumer associations supported by public funds if consumer interests are substantially affected. The competition authority may hold a public hearing on the application for recognition where anyone shall be free to raise objections.

§ 26
Recognition

(1) Recognitions are issued by decision of the competition authority. They shall state that the competition authority will not exercise the powers conferred to it under the Sixth Chapter.

(2) As far as a competition rule violates the prohibition in § 1 and is not exempted pursuant to §§ 2 or 3, or violates other provisions of this Act, of the German Act Against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb] or any other legal provision, the competition authority shall reject the application for recognition.

(3) Business and trade associations and professional organisations shall inform the competition authority about the repeal of recognised competition rules which have been established by them.

(4) The competition authority shall withdraw or revoke the recognition if it subsequently finds that the conditions for refusal of recognition pursuant to paragraph 2 are satisfied.
§ 27  
Information on Competition Rules, Publications

(1) Recognised competition rules shall be published in the Federal Gazette [Bundesanzeiger].

(2) The following shall be published in the Federal Gazette:

1. applications made pursuant to § 24(3);

2. the setting of hearing dates pursuant to § 25 sentence 3;

3. the recognition of competition rules as well as any changes and amendments thereto;

4. the refusal of recognition pursuant to § 26(2), the withdrawal or revocation of the recognition of competition rules pursuant to § 26(4).

(3) The publication of applications pursuant to paragraph 2 no. 1 shall include a note to the effect that the competition rules the recognition of which has been requested are open to public inspection at the competition authority.

(4) Where applications pursuant to paragraph 2 no. 1 result in recognition, reference to the publication of the applications shall suffice for the purpose of publishing the recognition.

(5) With respect to recognised competition rules which have not been published pursuant to paragraph 1, the competition authority shall, upon request, provide information on the particulars provided pursuant to § 24(4) sentence 1.

Fifth Chapter  
Special Provisions for Certain Sectors of the Economy

§ 28  
Agriculture

(1) § 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations which concern

1. the production or sale of agricultural products, or

2. the use of joint facilities for the storage, treatment or processing of agricultural products,

provided that they do not maintain resale prices and do not exclude competition. Plant breeding and animal breeding undertakings as well as undertakings operating at the same level of business shall also be deemed to be agricultural producers.

(2) § 1 shall not apply to vertical resale price maintenance agreements concerning the sorting, labelling or packaging of agricultural products.

(3) Agricultural products shall be the products listed in Annex I to the Treaty on the Functioning of the European Union as well as the goods resulting from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.
§ 29
Energy Sector

An undertaking which is a supplier of electricity or pipeline gas (public utility company) on a market in which it, either alone or together with other public utility companies, has a dominant position is prohibited from abusing such position by

1. demanding fees or other business terms which are less favourable than those of other public utility companies or undertakings in comparable markets, unless the public utility company provides evidence that such deviation is objectively justified, with the reversal of the burden of demonstration and proof only applying in proceedings before the competition authorities, or

2. demanding fees which unreasonably exceed the costs.

Costs that would not arise to the same extent if competition existed must not be taken into consideration in determining whether an abuse within the meaning of sentence 1 exists. §§ 19 and 20 shall remain unaffected.

§ 30
Resale Price Maintenance Agreements for Newspapers and Magazines

(1) § 1 shall not apply to vertical resale price maintenance agreements by which an undertaking producing newspapers or magazines requires the purchasers of these products by legal or economic means to demand certain resale prices or to impose the same commitment upon their own customers, down to the resale to the final consumer. Newspapers and magazines shall include products which reproduce or substitute newspapers or magazines and, upon assessment of all circumstances, must be considered as predominantly fulfilling the characteristics of a publishing product, as well as combined products the main feature of which is a newspaper or magazine.

(2) Agreements of the kind defined in paragraph 1 shall be made in writing as far as they concern prices and price components. It shall suffice for the parties to sign documents referring to a price list or to price information. § 126(2) of the German Civil Code [Bürgerliches Gesetzbuch] shall not be applicable.

(2a) § 1 shall not apply to industry agreements concluded between associations of undertakings that maintain resale prices for newspapers or magazines (publishers) pursuant to paragraph 1, on the one hand, and associations of their purchasers, which purchase newspapers and magazines subject to resale price maintenance and with a right of return in order to sell them to retailers, also with a right of return (newspaper and magazine wholesalers), on the other hand, [and] to the undertakings represented by such associations, to the extent that these industry agreements provide for a comprehensive and non-discriminatory distribution of newspaper and magazine lines by newspaper and magazine wholesalers, in particular the prerequisites and compensation therefor and the services covered by such compensation. To this extent, the associations mentioned in sentence 1 and the publishers and newspaper and magazine wholesalers represented by them are entrusted with the operation of services of general economic interest within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union in order to ensure a comprehensive and non-discriminatory distribution of newspapers and magazines in stationary retail. §§ 19 and 20 shall remain unaffected.

(3) The Bundeskartellamt (Federal Cartel Office) may, acting ex officio or upon the request of a bound purchaser, declare the resale price maintenance invalid and prohibit the implementation of a new and equivalent resale price maintenance if

1. the resale price maintenance is applied in an abusive manner, or

2. the resale price maintenance or its combination with other restraints of competition is capable of increasing the price of the goods subject to resale price maintenance, or of preventing their prices from decreasing, or of restricting their production or sales.
If an industry agreement pursuant to paragraph 2a constitutes an abuse of the exemption, the Bundeskartellamt may declare it invalid in whole or in part.

§ 31
Water Management Contracts

(1) The prohibition of agreements restricting competition pursuant to § 1 does not apply to contracts entered into between companies ensuring public water supply (public water suppliers) and

1. other water suppliers or regional and local authorities, to the extent that one of the contracting parties undertakes therein to refrain from operating as a public water supplier within a certain area using fixed pipelines;

2. regional or local authorities, to the extent that a regional or local authority undertakes therein to permit a single supplier the exclusive installation and operation of pipelines on or under public routes for the purpose of an existing or intended direct water supply to end users in the regional or local authority's territory;

3. water suppliers at distribution level, to the extent that a water supplier at distribution level undertakes therein to supply its customers with water using fixed pipelines at prices or terms and conditions that are not less favourable than the prices or terms and conditions granted by the supplying water supplier to its comparable customers;

4. other water suppliers, to the extent that they are entered into for the purpose of providing certain supply services using fixed pipelines to one or several suppliers with the exclusive purpose of ensuring public water supply.

(2) Agreements under paragraph 1, including any changes and amendments, must be made in writing.

(3) Agreements under paragraph 1 or the way in which they are implemented must not constitute an abuse of the market position gained from the exemption from the provisions of this Act.

(4) An abuse shall be deemed to exist in particular if

1. a public water supplier's market conduct is in violation of the principles governing the market conduct of undertakings where effective competition exists; or

2. a public water supplier demands less favourable prices or business terms from its customers than comparable water suppliers, unless the water supplier provides evidence that such deviation is due to differing circumstances not attributable to it; or

3. a public water supplier demands fees that unreasonably exceed the costs; in this context, only costs incurred in the course of efficient business management shall be taken into account.

(5) An abuse does not exist if a public water supplier refuses, in particular for technical or hygienic reasons, to enter into agreements on the feeding-in of water to its pipe network with another undertaking and to permit a connected extraction of water (transmission).

§ 31a
Water Management, Notification Requirement

(1) Agreements under § 31(1) nos 1, 2 and 4, including any changes and amendments, must be fully notified to the competition authority in order to be valid. The notification must contain the following particulars with respect to every undertaking concerned:
1. name or other designation;
2. place of business or registered seat;
3. legal form and address; and
4. name and address of the appointed representative or other authorised agent; in case of legal persons: name and address of the legal representative.

(2) The termination or cancellation of the agreements mentioned in § 31(1) nos 1, 2 and 4 must be notified to the competition authority.

§ 31b
Water Management, Duties and Powers of the Competition Authority, Sanctions

(1) Upon request, the competition authority shall furnish the following information on the agreements exempted pursuant to § 31(1) nos 1, 2 and 4:

1. information pursuant to § 31a and
2. the material content of the agreements and decisions, in particular information on the purpose, the intended measures and the term, termination, rescission and withdrawal.

(2) The competition authority shall issue any orders under this Act that relate to the public supply of water using fixed pipelines in consultation with the relevant industry supervisory authority.

(3) In cases of abuse pursuant to § 31(3), the competition authority may

1. oblige the undertakings concerned to end the abuse;
2. oblige the undertakings concerned to modify the agreements or decisions; or
3. declare the agreements and decisions invalid.

(4) When deciding on a measure pursuant to paragraph 3, the competition authority shall take into account the intent and purpose of the exemption and, in particular, the aim of ensuring that supply is as secure and reasonably priced as possible.

(5) Paragraph 3 shall apply mutatis mutandis if a public water supplier has a dominant position.

(6) § 19 shall remain unaffected.

Sixth Chapter
Powers of the Competition Authorities, Sanctions

§ 32
Termination and Subsequent Declaration of Infringements

(1) The competition authority may require the undertakings or associations of undertakings to bring to an end an infringement of a provision of this Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union.
(2) For this purpose, it may require them to take all necessary conduct-related or structural remedies that are proportionate to the infringement identified and necessary to bring the infringement effectively to an end. Structural remedies may only be imposed if there is no conduct-related remedy which would be equally effective, or if the conduct-related remedy would entail a greater burden for the undertakings concerned than structural remedies.

(2a) In its order to terminate the infringement, the competition authority may order reimbursement of the benefits generated through the infringement of competition laws. The amount of interest that is included in these benefits may be estimated. After expiry of the time limit for reimbursement of the benefits set in the order to terminate the infringement, the benefits generated up to such date shall bear interest in accordance with § 288(1) sentence 2 and § 289 sentence 1 of the German Civil Code.

(3) To the extent that a legitimate interest exists, the competition authority may also declare that an infringement has been committed after the infringement has been terminated.

§ 32a
Interim Measures

(1) In urgent cases, the competition authority may order interim measures ex officio if there is a risk of serious and irreparable damage to competition.

(2) Orders pursuant to paragraph 1 shall be limited in time. The time period may be extended. It should not exceed one year in total.

§ 32b
Commitments

(1) Where, in the course of proceedings under § 30(3), § 31b(3) or § 32, undertakings offer to enter into commitments which are capable of dispelling the concerns communicated to them by the competition authority upon preliminary assessment, the competition authority may by way of a decision declare those commitments to be binding on the undertakings. The decision shall state that, subject to the provisions of paragraph 2, the competition authority will not exercise its powers under § 30(3), § 31b(3), § 32 and § 32a. The decision may be limited in time.

(2) The competition authority may rescind the decision pursuant to paragraph 1 and reopen the proceedings where

1. the factual circumstances have subsequently changed in an aspect that is material for the decision;

2. the undertakings concerned do not meet their commitments; or

3. the decision was based on incomplete, incorrect or misleading information provided by the parties.

§ 32c
No Grounds for Action

The competition authority may decide that there are no grounds for it to take any action if, on the basis of the information available to it, the conditions for a prohibition pursuant to §§ 1, 19 to 21 and 29, Article 101(1) or Article 102 of the Treaty on the Functioning of the European Union are not satisfied. The decision shall state that, subject to new findings, the competition authority will not exercise its powers under §§ 32 and 32a. It does not include an exemption from a prohibition within the meaning of sentence 1.
§ 32d
Withdrawal of Exemption

If agreements, decisions by associations of undertakings or concerted practices falling under a block exemption regulation have effects in a particular case which are incompatible with § 2(1) or with Article 101(3) of the Treaty on the Functioning of the European Union and which arise in a domestic territory bearing all the characteristics of a distinct geographic market, the competition authority may withdraw the legal benefit of the block exemption for that territory.

§ 32e
Investigations into Sectors of the Economy and Types of Agreements

(1) If the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted, the Bundeskartellamt and the supreme Land authorities may conduct an investigation into a specific sector of the economy (sector inquiry) or – across sectors – into a particular type of agreement.

(2) In the course of this investigation, the Bundeskartellamt and the supreme Land authorities may conduct the enquiries necessary for the application of this Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union. They may request information from the undertakings and associations concerned, in particular information on all agreements, decisions and concerted practices.

(3) The Bundeskartellamt and the supreme Land authorities may publish a report on the results of the investigation pursuant to paragraph 1 and may invite third parties to comment.

(4) § 49(1) as well as §§ 57, 59 and 61 shall apply mutatis mutandis.

§ 33
Claims for Injunctions, Liability for Damages

(1) Whoever violates a provision of this Act, Articles 101 or 102 of the Treaty on the Functioning of the European Union or a decision taken by the competition authority shall be obliged to the person affected to rectify the infringement and, where there is a risk of recurrence, to desist from further infringements. A claim for injunction already exists if an infringement is likely. Affected persons are competitors or other market participants impaired by the infringement.

(2) Claims pursuant to paragraph 1 may also be asserted by

1. associations with legal capacity for the promotion of commercial or independent professional interests, provided they have a significant number of member undertakings that are affected persons within the meaning of paragraph 1 sentence 3 above and provided they are able, in particular with regard to their human, material and financial resources, to actually exercise their functions of pursuing commercial or independent professional interests, as laid down in the statutes of the association;

2. entities proving that they have been entered in

   a) the list of qualified entities under § 4 of the German Act on Injunctive Relief [Unterlassungsklagengesetz] or

(3) Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, the fact that the good or service has been resold shall not exclude the occurrence of a damage. The assessment of the size of the damage pursuant to § 287 of the German Code of Civil Procedure [Zivilprozessordnung] may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its pecuniary debts pursuant to sentence 1. §§ 288 and 289 sentence 1 of the German Civil Code shall apply mutatis mutandis.

(4) Where damages are claimed for an infringement of a provision of this Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final and non-appealable decision by the competition authority, the European Commission, or the competition authority – or court acting as such – in another Member State of the European Union. The same applies to such findings in final and non-appealable judgments on appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003, this obligation applies without prejudice to the rights and obligations under Article 267 of the Treaty on the Functioning of the European Union.

(5) The limitation period for a claim for damages pursuant to paragraph 3 shall be suspended if proceedings are initiated

1. by the competition authority for an infringement within the meaning of paragraph 1; or

2. by the European Commission or the competition authority of another Member State of the European Union for infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union.

§ 204(2) of the German Civil Code shall apply mutatis mutandis.

§ 34 Disgorgement of Benefits by the Competition Authority

(1) If an undertaking has intentionally or negligently violated a provision of this Act, Articles 101 or 102 of the Treaty on the Functioning of the European Union or a decision of the competition authority and thereby gained an economic benefit, the competition authority may order the disgorgement of the economic benefit and require the undertaking to pay a corresponding sum.

(2) Paragraph 1 shall not apply if the economic benefit has been disgorged by

1. the payment of damages,

2. the imposition of a fine,

3. virtue of an order of forfeiture or

4. reimbursement.

To the extent that payments pursuant to sentence 1 are made by the undertaking after the disgorgement of benefits, the undertaking shall be reimbursed for the amount of such payments.

(3) If the disgorgement of benefits would result in undue hardship, the order shall be limited to a reasonable sum or not be issued at all. It shall also not be issued if the economic benefit is insignificant.

(4) The amount of the economic benefit may be estimated. The amount of money to be paid shall be specified numerically.
(5) The disgorgement of benefits may be ordered only within a time limit of up to five years from termination of the infringement, and only for a time period not exceeding five years. § 33(5) shall apply *mutatis mutandis*.

§ 34a

Disgorgement of Benefits by Associations

(1) Whoever intentionally commits an infringement within the meaning of § 34(1) and thereby gains an economic benefit at the expense of multiple purchasers or suppliers may be required by those entitled to an injunction under § 33(2) to surrender the economic benefit to the federal budget unless the competition authority orders the disgorgement of the economic benefit by the imposition of a fine, by forfeiture, by reimbursement or pursuant to § 34(1).

(2) Payments made by the undertaking because of the infringement shall be deducted from the claim. § 34(2) sentence 2 shall apply *mutatis mutandis*.

(3) If several creditors claim the disgorgement of benefits, §§ 428 to 430 of the German Civil Code shall apply *mutatis mutandis*.

(4) The creditors shall supply the Bundeskartellamt with information about the assertion of claims pursuant to paragraph 1. They may demand reimbursement from the Bundeskartellamt for the expenses necessary for asserting the claim if they are unable to receive reimbursement from the debtor. The claim for reimbursement is limited to the amount of the economic benefit paid to the federal budget.

(5) § 33(4) and (5) shall apply *mutatis mutandis*.

Seventh Chapter

Control of Concentrations

§ 35

Scope of Application of the Control of Concentrations

(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration

1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and

2. the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of another undertaking concerned was more than EUR 5 million.

(2) Paragraph 1 shall not apply where an undertaking which is not dependent within the meaning of § 36(2) and had a worldwide turnover of less than EUR 10 million in the business year preceding the concentration, merges with another undertaking. Paragraph 1 shall not apply to concentrations of public entities and enterprises that occur in connection with the territorial reform of municipalities, either.

§ 36
Principles for the Appraisal of Concentrations

(1) A concentration which would significantly impede effective competition, in particular a concentration which is expected to create or strengthen a dominant position, shall be prohibited by the Bundeskartellamt. This shall not apply if

1. the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the impediment to competition; or

2. the requirements for a prohibition under sentence 1 are fulfilled on a market on which goods or commercial services have been offered for at least five years and which had a sales volume of less than EUR 15 million in the last calendar year; or

3. the dominant position of a newspaper or magazine publisher acquiring a small- or medium-sized newspaper or magazine publisher is strengthened, where it is proven that the publisher that is acquired had a significant net annual deficit within the meaning of § 275(2) no. 20 of the German Commercial Code [Handelsgesetz] in the last three years and its existence would be jeopardised without the concentration. Furthermore, it must be proven that before the concentration, no other acquirer was found that could have ensured a solution that would have been less harmful to competition.

(2) If an undertaking concerned is a dependent or dominant undertaking within the meaning of § 17 of the German Stock Corporation Act [Aktiengesetz] or a group company within the meaning of § 18 of the Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. Where several undertakings act together in such a way that they can jointly exercise a dominant influence on another undertaking, each of them shall be regarded as dominant.

(3) If a person or association of persons which is not an undertaking holds a majority interest in an undertaking, it shall be regarded as an undertaking.

§ 37
Concentration

(1) A concentration shall be deemed to exist in the following cases:

1. acquisition of all or of a substantial part of the assets of another undertaking;

2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to all factual and legal circumstances, confer the possibility of exercising decisive influence on an undertaking, in particular through:

a) ownership or the right to use all or part of the assets of the undertaking;

b) rights or contracts which confer decisive influence on the composition, voting or decisions of the bodies of the undertaking;

3. acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach

a) 50 percent or

b) 25 percent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall also include the shares held by another person for the account of this undertaking and, if the owner of the
undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall also be deemed to constitute a concentration between the undertakings concerned with respect to those markets on which the other undertaking operates;

4. any other combination of undertakings enabling one or several undertakings to exercise directly or indirectly a material competitive influence on another undertaking.

(2) A concentration shall also be deemed to exist if the undertakings concerned had already merged previously, unless the concentration does not result in a substantial strengthening of the existing affiliation between the undertakings.

(3) If credit institutions, financial institutions or insurance companies acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a concentration as long as they do not exercise the voting rights attached to the shares and provided the resale occurs within one year. This time limit may, upon application, be extended by the Bundeskartellamt if it is substantiated that the resale was not reasonably possible within this period.

§ 38
Calculation of Turnover and Market Shares

(1) § 277(1) of the German Commercial Code shall apply to the calculation of turnover. Turnover from the supply of goods and services between affiliated undertakings (intra-group turnover) as well as excise taxes shall not be taken into account.

(2) For trade in goods, only three quarters of turnover shall be taken into account.

(3) For the publication, production and distribution of newspapers, magazines and parts thereof, eight times the amount of turnover, and for the production, distribution and broadcasting of radio and television programmes and the sale of radio and television advertising time, twenty times the amount of turnover shall be taken into account.

(4) In the case of credit institutions, financial institutions, building and loan associations and external investment management companies within the meaning of § 17 (2) no. 1 of the Investment Act [Kapitalanlagegesetzbuch], turnover shall be replaced by the total amount of the income referred to in § 34(2) sentence 1 no. 1 a) to e) of the Regulation on the Rendering of Accounts of Credit Institutions [Verordnung über die Rechnungslegung der Kreditinstitute], as amended from time to time, minus value added tax and other taxes directly levied on such income. In the case of insurance undertakings, the premium income in the last completed business year shall be relevant. Premium income shall be income from insurance and reinsurance business including the portions ceded for cover.

(5) If a concentration arises as a result of the acquisition of parts of one or more undertakings, only that turnover or market share attributable to the divested parts is to be taken into account on the part of the seller, irrespective of whether or not these parts have a separate legal personality. This shall not apply if the seller maintains control within the meaning of § 37 (1) no. 2 or continues to hold 25 per cent or more of the shares. Two or more acquisition transactions within the meaning of sentence 1 that are effected between the same persons or undertakings within a period of two years shall be treated as a single concentration if, as a result, the turnover thresholds under § 35 are reached for the first time; the date of the concentration shall be the date of the last acquisition transaction.

§ 39
Notification and Information Obligation

(1) Concentrations shall be notified to the Bundeskartellamt pursuant to paragraphs 2 and 3 prior to being implemented. The central De-Mail address set up by the Bundeskartellamt within the meaning of the
(2) The obligation to notify shall be:

1. upon the undertakings participating in the concentration;

2. in the cases of § 37(1) nos 1 and 3, also upon the seller.

(3) The notification shall indicate the form of the concentration. Furthermore, the notification shall contain the following particulars with respect to every undertaking concerned:

1. name or other designation and place of business or registered seat;

2. type of business;

3. turnover in Germany, in the European Union and worldwide; instead of turnover, the total amount of income within the meaning of § 38(4) shall be indicated in the case of credit institutions, financial institutions, building and loan associations and external investment management companies within the meaning of § 17(2) no. 1 of the Investment Act [Kapitalanlagegesetzbuch], and the premium income in the case of insurance companies;

4. the market shares, including the bases for their calculation or estimate, if the combined shares of the undertakings concerned amount to at least 20 per cent within the scope of application of this Act or a substantial part thereof;

5. in the case of an acquisition of shares in another undertaking, the size of the interest acquired and of the total interest held;

6. a person authorised to accept service in Germany if the registered seat of the undertaking is not located within the scope of application of this Act.

In the cases of § 37(1) nos 1 or 3, the particulars pursuant to sentence 2 nos 1 and 6 shall also be given with respect to the seller. If an undertaking concerned is an affiliated undertaking, the particulars required under sentence 2 nos 1 and 2 shall also be given with respect to its affiliated undertakings, and the particulars required under sentence 2 nos 3 and 4 with respect to each undertaking participating in the concentration and with respect to the entirety of all undertakings affiliated to it; intra-group relationships as well as control relationships among and interests held by the affiliated undertakings shall also be indicated. The notification must not contain or use any incorrect or incomplete information in order to cause the competition authority to refrain from issuing a prohibition pursuant to § 36(1) or from issuing an information notice pursuant to § 40(1).

(4) A notification shall not be required if the European Commission has referred a concentration to the Bundeskartellamt and if the particulars required under paragraph 3 have been provided to the Bundeskartellamt in German. The Bundeskartellamt shall inform the undertakings concerned without delay of the time of receipt of the referral and shall at the same time inform them of the extent to which it is in possession of the necessary particulars pursuant to paragraph 3 in the German language.

(5) The Bundeskartellamt may request from each undertaking concerned information on market shares, including the bases for their calculation or estimate, and on the turnover generated by the undertaking in the last business year preceding the concentration in a certain kind of goods or commercial services.

(6) The undertakings participating in the concentration shall inform the Bundeskartellamt without delay of the implementation of the concentration.
§ 40  
Procedure of Control of Concentrations

(1) The Bundeskartellamt may only prohibit a concentration notified to it if it informs the notifying undertakings within a period of one month from receipt of the complete notification that it has initiated an examination of the concentration (second phase proceedings). Second phase proceedings are to be initiated if a further examination of the concentration is necessary.

(2) In the second phase proceedings, the Bundeskartellamt shall decide by way of decision whether the concentration is prohibited or cleared. If the decision is not served upon the notifying undertakings within a period of four months from receipt of the complete notification, the concentration is deemed to be cleared. The parties involved in the proceedings have to be informed without delay of the date when the decision was served. This shall not apply if

1. the notifying undertakings have consented to an extension of the time limit;

2. the Bundeskartellamt has refrained from issuing the notice pursuant to paragraph 1 or from prohibiting the concentration because of incorrect particulars or because of information pursuant to § 39(5) or § 59 not having been provided in time;

3. contrary to § 39(3) sentence 2 no. 6, a person authorised to accept service in Germany is no longer appointed.

The time limit under sentence 2 shall be suspended if the Bundeskartellamt has to again request information pursuant to § 59 from an undertaking involved in the concentration because such undertaking has failed, for reasons for which the undertaking is responsible, to comply with a prior request for information under § 59 in full or in a timely manner. The suspension ends as soon as the undertaking has submitted all the information requested to the Bundeskartellamt. The time limit under sentence 2 shall be extended by one month if, for the first time during the proceedings, a notifying undertaking proposes to the Bundeskartellamt conditions and obligations under paragraph 3.

(3) Clearance may be granted subject to conditions and obligations in order to ensure that the undertakings concerned comply with the commitments they entered into with the Bundeskartellamt to prevent the concentration from being prohibited. These conditions and obligations must not aim at subjecting the conduct of the undertakings concerned to continued control.

(3a) Clearance may be revoked or modified if it is based on incorrect particulars, has been obtained by means of deceit or if the undertakings concerned do not comply with an obligation attached to the clearance. In the case of non-compliance with an obligation, § 41(4) shall apply mutatis mutandis.

(4) Prior to a prohibition, the supreme Land authorities in whose territory the undertakings concerned have their registered seat shall be given the opportunity to submit an opinion. In proceedings conducted in accordance with § 172a of the German Social Code, Book V [Fünftes Buch Sozialgesetzbuch], the competent supervisory authorities must be consulted pursuant to § 90 of the German Social Code, Book IV.

(5) In the cases of § 39(4) sentence 1, the time limits referred to in paragraphs 1 and 2 sentence 2 shall begin to run when the referral decision is received by the Bundeskartellamt and it is in possession of the necessary particulars pursuant to § 39 (3) in the German language.

(6) If clearance by the Bundeskartellamt is repealed in whole or in part by a final and non-appealable court ruling, the time limit referred to in paragraph 2 sentence 2 shall begin to run anew at the time at which the ruling becomes final and non-appealable.
§ 41
Prohibition on Implementing, Divestiture

(1) The undertakings may not implement a concentration not cleared by the Bundeskartellamt, nor participate in implementing such a concentration, before the expiry of the time limits referred to in § 40 (1) sentence 1 and (2) sentence 2. Legal transactions violating this prohibition shall be void. This shall not apply to

1. real estate agreements once they have become legally valid by entry into the cadastral register;

2. agreements on the transformation, integration or formation of an undertaking and enterprise agreements within the meaning of §§ 291 and 292 of the German Stock Corporation Act once they have become legally valid by entry into the appropriate register, and

3. other legal transactions if the non-notified concentration was notified after the concentration was implemented and the divestiture proceedings under paragraph 3 were ended because the conditions for a prohibition were not met, or if the restraint of competition was removed based on a dissolution order under paragraph 3 sentence 2 in conjunction with sentence 3, or if a ministerial authorisation under § 42 was granted.

(1a) Paragraph 1 does not preclude the realisation of acquisition transactions where control, shares or a material influence with respect to competition within the meaning of § 37 (1) or (2) is/are acquired from several sellers either by way of a public takeover bid or by way of a number of legal transactions in securities at a stock exchange, including securities that can be converted into other securities admitted to trading on an exchange or similar market, provided that the concentration is notified to the Bundeskartellamt pursuant to § 39 without undue delay and that the acquirer does not exercise the voting rights attached to the shares or only exercises them to preserve the full value of its investment based on an exemption granted by the Bundeskartellamt under paragraph 2.

(2) The Bundeskartellamt may, upon application, grant exemptions from the prohibition on implementing a concentration if the undertakings concerned put forward important reasons for this, in particular to prevent serious damage to an undertaking concerned or to a third party. The exemption may be granted at any time, even prior to notification, and may be made subject to conditions and obligations. § 40(3a) shall apply mutatis mutandis.

(3) A concentration which has been implemented and which fulfils the conditions for prohibition pursuant to § 36(1) shall be dissolved unless the Federal Minister of Economics and Technology authorises the concentration pursuant to § 42. The Bundeskartellamt shall order the measures necessary to dissolve the concentration. The restraint of competition may also be removed in other ways than by restoring the status quo ante.

(4) To enforce its order, the Bundeskartellamt may in particular

1. (abolished)

2. prohibit or limit the exercise of voting rights attached to shares in an undertaking concerned which are owned by another undertaking concerned or are attributable to it;

3. appoint a trustee who shall effect the dissolution of the concentration.

§ 42
Ministerial Authorisation

(1) The Federal Minister of Economics and Technology will, upon application, authorise a concentration prohibited by the Bundeskartellamt if, in the individual case, the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified
by an overriding public interest. In this context, the competitiveness of the undertakings concerned in markets outside the scope of application of this Act shall also be taken into account. Authorisation may be granted only if the scope of the restraint of competition does not jeopardise the market economy system.

(2) Authorisation may be granted subject to conditions and obligations. § 40(3) sentence 2 and (3a) shall apply mutatis mutandis.

(3) The application shall be submitted in writing to the Federal Ministry of Economics and Technology within a period of one month from service of the prohibition or from service of a dissolution order under § 41(3) sentence 1 in the absence of prior prohibition. If the prohibition is appealed, the period shall run from the date when the prohibition becomes final and non-appealable. If the dissolution order under § 41(3) sentence 1 is appealed, the period shall run from the date when the dissolution order becomes final and non-appealable.

(4) The Federal Minister of Economics and Technology shall decide on the application within four months. Prior to the decision, an opinion of the Monopolies Commission [Monopolkommission] shall be obtained, and the supreme Land authorities in whose territory the undertakings concerned have their registered seat shall be given the opportunity to submit comments.

§ 43 Publications

(1) Notice of the initiation of the second phase proceedings by the Bundeskartellamt pursuant to § 40(1) sentence 1 and the application for a ministerial authorisation shall be published without delay in the Federal Gazette.

(2) The following shall be published in the Federal Gazette:

1. the decision issued by the Bundeskartellamt pursuant to § 40(2);
2. the ministerial authorisation, its revocation, modification or refusal;
3. the withdrawal, revocation or modification of clearance by the Bundeskartellamt;
4. the dissolution of a concentration and any other decisions taken by the Bundeskartellamt pursuant to § 41(3) and (4).

(3) Notices under paragraphs 1 and 2 shall in each case contain the particulars pursuant to § 39 (3) sentences 1 and 2, (1) and (2).

Eighth Chapter Monopolies Commission

§ 44 Tasks

(1) Every two years, the Monopolies Commission shall prepare an expert opinion assessing the situation and the foreseeable development of business concentration in the Federal Republic of Germany, evaluating the application of the provisions concerning the control of concentrations and commenting on other topical issues of competition policy. The expert opinion is to cover the situation in the last two full calendar years and be completed by 30 June of the following year. The Federal Government may instruct
the Monopolies Commission to prepare further expert opinions. In addition, the Monopolies Commission may prepare expert opinions at its discretion.

(2) The Monopolies Commission shall be bound only by the mandate established by this Act, and shall be independent in pursuing its activities. If a minority holds dissenting views when an opinion is drafted, it may express them in the opinion.

(3) The Monopolies Commission shall submit its expert opinions to the Federal Government. The Federal Government shall without delay submit opinions pursuant to paragraph 1 sentence 1 to the legislative bodies and present its views and comments on them within a reasonable period. The expert opinions shall be published by the Monopolies Commission. In the case of opinions pursuant to paragraph 1 sentence 1, this shall be done at the time at which they are submitted by the Federal Government to the legislative body.

§ 45
Members

(1) The Monopolies Commission shall consist of five members who must have special knowledge and experience in the fields of economics, business administration, social policy, technology or commercial law. The Monopolies Commission shall elect a chairman from among its members.

(2) The members of the Monopolies Commission shall be appointed for a term of four years by the Federal President on a proposal by the Federal Government. Re-appointments shall be permissible. The Federal Government shall hear the members of the Commission before nominating new members. The members are entitled to resign from office by giving notice to the Federal President. If a member leaves office prematurely, a new member shall be appointed for the former member's term of office.

(3) The members of the Monopolies Commission may not be members of the government or any legislative body of the Federation or a Land, or of the public service of the Federation, a Land or any other legal person under public law, except as university professors or staff members of a scientific institution. Furthermore, they may neither represent nor be bound by a permanent employment or service relationship to an industry association or an employers' or employees' organisation. Nor must they have held such a position during the year preceding their appointment to the Monopolies Commission.

§ 46
Decisions, Organisation, Rights and Duties of the Members

(1) Decisions of the Monopolies Commission shall require the consent of at least three members.

(2) The Monopolies Commission has rules of procedure and a secretariat. The function of the latter is to scientifically, administratively and technically support the Monopolies Commission.

(2a) As far as this is required for the proper fulfilment of its functions, the Monopolies Commission shall be granted access to the files maintained by the competition authority, including access to operating and business secrets and personal data.

(3) The members of the Monopolies Commission and the staff of the secretariat shall be obliged to keep secret the deliberations and the related documents designated as confidential by the Monopolies Commission. The secrecy obligation shall apply also to information given to the Monopolies Commission and designated as confidential, or obtained pursuant to paragraph 2a.

(4) The members of the Monopolies Commission shall receive a lump sum compensation and they shall be reimbursed for their travel expenses. These shall be determined by the Federal Ministry of Economics and
§ 47
Transmission of Statistical Data

(1) For the purpose of preparing expert opinions on the development of business concentration, the Monopolies Commission is provided by the Federal Statistical Office [Statistisches Bundesamt] with such summarised data from the business statistics kept by it (statistics on the manufacturing industry, crafts, foreign trade, taxes, transport, statistics on wholesale and retail trade, the hotel and restaurant business and service sector) and from the statistical register as concern the percentage shares of the largest undertakings, businesses or divisions of undertakings in the respective sector of economy in the

a) value of goods produced for sale;
b) turnover;
c) number of employees;
d) total wages and salaries paid;
e) investments;
f) value of fixed assets rented or leased;
g) value added or gross proceeds;
h) number of the respective units.

Sentence 1 applies mutatis mutandis to the provision of information about the percentage shares of the largest groups of undertakings. For the purpose of allocating the data to the groups of undertakings, the Monopolies Commission shall provide the Federal Statistical Office with the names and addresses of the undertakings, information as to their affiliation with a group of undertakings and their identification codes. The summarised data may not cover fewer than three groups of undertakings, undertakings, businesses or divisions of undertakings. The combination or time proximity with other information provided or generally accessible may not allow inferences on the summarised data of fewer than three groups of undertakings, undertakings, businesses or divisions of undertakings. This shall apply mutatis mutandis to the calculation of summary measures of concentration, in particular Herfindahl indexes and Gini coefficients. The Land statistical offices shall provide the Federal Statistical Office with the requisite particulars.

(2) Persons who are to receive summarised data pursuant to paragraph 1 shall, prior to the transmission, be specifically committed to confidentiality unless they hold a public office or have special obligations in the public service. § 1(2), (3) and (4) no. 2 of the German Act on the Obligations of Public Servants [Verpflichtungsgesetz] shall apply mutatis mutandis. Persons specifically committed pursuant to sentence 1 shall, for the purpose of the application of the provisions of the German Penal Code [Strafgesetzbuch] concerning the violation of private secrets (§ 203(2), (4), (5); §§ 204, 205) and official secrets (§ 353b(1)), be treated like persons having special obligations in the public service.

(3) The summarised data may be used only for the purposes for which they were provided. They must be deleted as soon as the purpose referred to in paragraph 1 has been achieved.

(4) The Monopolies Commission shall take organisational and technical measures to ensure that only holders of a public office, persons having special obligations in the public service or persons committed to confidentiality pursuant to paragraph 2 sentence 1 will receive summarised data.
(5) The transmissions shall be recorded in accordance with § 16(9) of the German Federal Statistics Act [Bundesstatistikgesetz]. The records shall be kept for at least five years.

(6) When the business statistics mentioned in paragraph 1 are compiled, the undertakings which are questioned shall be informed in writing that pursuant to paragraph 1 the summarised data may be transmitted to the Monopolies Commission.

Ninth Chapter
Market Transparency Units for Electricity and Gas Wholesale Trading and Fuels

I.
Market Transparency Unit for Electricity and Gas Wholesale Trading

§ 47a
Establishment, Competencies, Organisation

(1) In order to ensure that the formation of wholesale prices for electricity and gas complies with competition provisions, a Market Transparency Unit shall be set up at the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway [Bundesnetzagentur]. It shall continuously monitor the marketing of, and trading in, electricity and natural gas at the wholesale level.

(2) The tasks of the Market Transparency Unit will be carried out by the Bundesnetzagentur and the Bundeskartellamt by mutual consent.

(3) Details of the consensual cooperation will be governed by a cooperation agreement between the Bundeskartellamt and the Bundesnetzagentur requiring approval by the Federal Ministry of Economics and Technology. In particular, this agreement shall contain provisions governing:

1. staffing and allocation of tasks and
2. coordination of data collection and of the exchange of data and information.

(4) The Federal Ministry of Economics and Technology is authorised to promulgate requirements regarding the terms and conditions of the cooperation agreement by means of an ordinance.

(5) Decisions by the Market Transparency Unit shall be taken by the person heading the unit. § 51(5) shall apply mutatis mutandis to all members of staff of the Market Transparency Unit.

§ 47b
Tasks

(1) The Market Transparency Unit shall continuously monitor electricity and natural gas wholesale trading, irrespective of whether it is aimed at physical or financial settlement, in order to detect irregularities in pricing that might be due to market dominance, inside information or market manipulation. For this purpose, the Market Transparency Unit shall also monitor the production of natural gas and the generation of electricity, the use of power plants and the marketing of electricity and natural gas by the producers, as well as the marketing of electricity and natural gas as balancing services. The Market Transparency Unit may take into account interdependencies between the wholesale markets for electricity and natural gas on the one hand and the emissions trading system on the other.
(2) As a national market monitoring body pursuant to Article 7(2) subpara. 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326 of 8 December 2011, p. 1), the Market Transparency Unit shall monitor, together with the Bundesnetzagentur, electricity and natural gas wholesale trading. In this context, it shall cooperate with the Agency for the Cooperation of Energy Regulators pursuant to Article 7(2) and Article 10 of Regulation (EU) No 1227/2011.

(3) The Market Transparency Unit shall collect the data and information it needs in order to fulfil its tasks. In this context, it shall take account of the reporting obligations of the persons required to report to the authorities and supervisory entities mentioned in § 47i and of the reporting obligations to be laid down by the European Commission in accordance with Article 8(2) and (6) of Regulation (EU) No 1227/2011. Where possible, existing sources and reporting systems are to be used.

(4) The Bundesnetzagentur can instruct the Market Transparency Unit to collect and analyse data to the extent necessary for the fulfilment of its tasks under Regulation (EU) No 1227/2011.

(5) Prior to issuing determinations under § 47g in conjunction with the ordinance to be issued under § 47f, the Market Transparency Unit shall give the authorities, stakeholders and market participants concerned the opportunity to comment within a specified period. In preparation of these consultations, the Market Transparency Unit shall, where necessary, prepare and amend a detailed list of all data and categories of data that must continuously be reported to it by the persons subject to the reporting obligation as specified in § 47e(1) pursuant to §§ 47e and 47g and based on the ordinance to be issued in accordance with § 47f, including the point in time when the data must be transmitted, the data format and the transmission channels to be complied with, as well as alternative reporting channels. The Market Transparency Unit is not bound by the comments.

(6) The Market Transparency Unit shall continuously analyse the data and information received by it, in particular to determine whether there are any indications of a violation of §§ 1, 19, 20 or 29 of this Act, Article 101 or 102 of the Treaty on the Functioning of the European Union, the German Securities Trading Act, the German Stock Exchange Act or the prohibitions under Articles 3 and 5 of Regulation (EU) No 1227/2011.

(7) If there is any indication that a natural or legal person is violating any of the legal provisions referred to in paragraph 6, the Market Transparency Unit must immediately inform the competent authorities and delegate the issue to them. In case of a suspected violation of §§ 1, 19, 20 or 29 of this Act or of Articles 101 and 102 of the Treaty on the Functioning of the European Union, the Market Transparency Unit will inform the competent decision division of the Bundeskartellamt. If more than one authority is potentially competent to conduct investigations, the Market Transparency Unit will inform each of these authorities of the suspected violation and of the other authorities that have been informed. The Market Transparency Unit shall transfer all information and data required or requested by these authorities to them without undue delay in accordance with § 47i.

(8) Paragraphs 1 to 3 may also apply to production and marketing abroad as well as to trading activities performed abroad, to the extent that these affect the pricing of electricity and natural gas within the scope of application of this Act.

§ 47c
Use of Data

(1) The Market Transparency Unit shall provide the data received pursuant to § 47b(3) also to the following entities:

1. the Bundeskartellamt for the conduct of its monitoring activities pursuant to § 48(3);

2. the Bundesnetzagentur for the conduct of its monitoring activities pursuant to § 35 of the German Energy Industry Act;
3. the competent decision division of the Bundeskartellamt for the purpose of merger control proceedings under §§ 35 to 41 and for sector inquiries under § 32e; and

4. the Bundesnetzagentur for the fulfilment of its further tasks under the German Energy Industry Act [Energiewirtschaftsgesetz], in particular for the purpose of monitoring compliance with transparency obligations in accordance with the annexes of the following regulations:


(2) The Market Transparency Unit shall further provide the data to the Federal Ministry of Economics and Technology and the Bundesnetzagentur for the fulfilment of their tasks under § 54a of the German Energy Industry Act.

(3) The data may be provided to the Federal Statistical Office for the purpose of fulfilling its tasks under the German Energy Statistics Act and the Monopolies Commission for the purpose of fulfilling its tasks under this Act and under § 62 of the German Energy Industry Act.

(4) The Market Transparency Unit may provide the data in anonymised form also to federal ministries for use in scientific studies conducted by them or on their behalf if the data is necessary to achieve these aims. Data that represents operating or business secrets may only be disclosed by the Market Transparency Unit if it is no longer possible to link it to any specific undertaking. The federal ministries may provide the data received from the Market Transparency Unit pursuant to sentence 1 also to third parties for the conduct of scientific studies on their behalf if the third parties have proven their professional skills to the ministries and have assured confidential treatment of the data.

§ 47d
Powers

(1) In order to fulfil its tasks, the Market Transparency Unit has the powers conferred upon it pursuant to § 59 in relation to natural and legal persons. In accordance with § 47f, it may determine in respect of one, some or all of the persons and undertakings mentioned in § 47e(1) the category of data and the timing and form of transmission for the areas set out in § 47g. The Market Transparency Unit has the power, in accordance with § 47f, to change the determination, where required, to the extent that this is necessary for the fulfilment of its tasks. It may, in particular, stipulate that an online platform must be used to enter the required information and reports. In accordance with § 47f, the Market Transparency Unit may also stipulate that information and data be delivered to a third party assigned to collect data; however, the data will be analysed and used by the Market Transparency Unit only. §§ 48 and 49 of the German Administrative Procedure Act [Verwaltungsverfahrensgesetz] remain unaffected. §§ 50c, 54, 56, 57 and 61 to 67 as well as §§ 74 to 76, 83, 91 and 92 shall apply mutatis mutandis. In case of decisions made by the Market Transparency Unit by determination, delivery under § 61 may be replaced by publication in the Federal Gazette. § 55 of the German Code of Criminal Procedure applies mutatis mutandis to disclosure obligations under sentence 1 and reporting obligations under § 47e.

(2) As a national market monitoring body pursuant to Article 7(2) subpara. 2 of Regulation (EU) 1227/2011, the Market Transparency Unit also has the rights set out in Article 7(2) subpara. 1, (3) subpara. 2 sentence 2, Article 4(2) sentence 2, Article 8(5) sentence 1 and Article 16 of Regulation (EU) No 1227/2011. Paragraph 1 applies mutatis mutandis.
(3) The Market Transparency Unit may request information on the outcome of investigations from the authority to which it has delegated a suspected violation under § 47b(7) sentence 1.

§ 47e
Reporting Obligations

(1) The following persons and undertakings are subject to the reporting obligation set out in paragraphs 2 to 5:

1. wholesale customers within the meaning of § 3 no. 21 of the German *Energy Industry Act*,
2. energy supply companies within the meaning of § 3 no. 18 of the German *Energy Industry Act*,
3. operators of energy facilities within the meaning of § 3 no. 15 of the German *Energy Industry Act* except for operators of final consumer distribution facilities or, in case of gas supply, operators of ultimate shut-off devices in consumption systems,
4. customers within the meaning of § 3 no. 24 of the German *Energy Industry Act* except for final consumers within the meaning of § 3 no. 25 of the German *Energy Industry Act*, and
5. trading platforms.

(2) Those subject to the reporting obligation must submit to the Market Transparency Unit the trading, transport, capacity, production/generation and consumption data, further specified in accordance with § 47f in conjunction with § 47g, for the markets on which they operate. This includes information:

1. on transactions in wholesale markets where electricity and natural gas are traded, including orders to trade, with precise details on the wholesale energy products bought and sold, the prices and quantities agreed, the dates and times of execution and the parties to and beneficiaries of the transactions,
2. on the capacity and use of facilities and installations for the production/generation, storage, consumption or transmission of electricity or natural gas or on the capacity and use of facilities for liquefied natural gas (LNG facilities), including any planned and unplanned unavailability or any under-consumption,
3. in the field of electricity generation that enables identification of individual generation units,
4. on costs incurred in connection with the operation of the generation units that are subject to the reporting obligation, in particular on marginal costs, fuel costs, CO2 costs, opportunity costs and start-up costs,
5. on technical information relevant for the operation of the generation units that are subject to the reporting obligation, in particular on minimum idle times, minimum run times and minimum production volumes,
6. on any planned decommissioning of plants or cold reserves,
7. on drawing rights agreements,
8. on planned investment projects, and
9. on import agreements and balancing services in natural gas trading.

(3) The data must be submitted to the Market Transparency Unit in accordance with §§ 47f and 47g by way of remote data transmission and, if requested, on a continuous basis. If the Market Transparency Unit provides standard forms, the data must be transmitted electronically using such forms.
(4) The relevant reporting obligation shall be deemed fulfilled if

1. those subject to the reporting obligation pursuant to paragraph 1 have reported the information to be reported or requested in accordance with Article 8 of Regulation (EU) No 1227/2011 and prompt data access by the Market Transparency Unit is secured, or

2. third parties have communicated the information to be reported or requested in the name of a person subject to reporting obligations pursuant to paragraph 1 also in conjunction with § 47f nos 3 and 4 and the Market Transparency Unit has been informed thereof, or

3. those subject to the reporting obligation pursuant to paragraph 1 also in conjunction with § 47f nos 3 and 4 have communicated the information to be reported or requested to a third party appointed for this purpose pursuant to § 47d(1) sentence 5 in conjunction with § 47f no. 2, or

4. those subject to the reporting obligation pursuant to paragraph 1 no. 3 in conjunction with § 47g(6) have reported the information to be reported or requested in accordance with the provisions of the German Renewable Energy Act [Erneuerbare Energien-Gesetz] or an ordinance based on that Act to the network operator, the Market Transparency Unit has been informed thereof and prompt access to the data by the Market Transparency Unit is secured.

(5) The obligations set forth in paragraphs 1 to 4 shall apply also to undertakings with registered seat in another Member State of the European Union or another state party to the Agreement on the European Economic Area if they are admitted to trading on a German exchange or if their activities have an effect within the scope of application of this Act. If any such undertaking fails to communicate the information requested, the Market Transparency Unit may request the competent authority of the country of domicile to take appropriate measures to improve access to that information.

§ 47f

Power to issue an Ordinance

The Federal Ministry for Economic Affairs and Energy shall be empowered to issue, by way of an ordinance not requiring the consent of the Bundesrat, in agreement with the Federal Ministry of Finance, taking into account the requirements imposed by implementing acts issued under Article 8(2) or (6) of Regulation (EU) No 1227/2011

1. detailed provisions on the type, content and scope of data and information that the Market Transparency Unit may request from those subject to the reporting obligation based on determinations made pursuant to § 47d(1) sentence 2, as well as on the timing and the form of transmission of this data,

2. detailed provisions on the type, content and scope of data and information that are to be delivered pursuant to § 47d(1) sentence 5 to third parties appointed for this purpose, as well as on the timing and the form of transmission and the recipients of this data,

3. provisions stipulating that the following entities shall transmit to the Market Transparency Unit records of the wholesale energy transactions on an ongoing basis:

a) organised markets,

b) systems for matching buy and sell orders or trade reporting systems,

c) trading surveillance offices at exchanges on which electricity and gas are traded, as well as

d) the authorities referred to in § 47i,
4. provisions stipulating that an exchange or a suitable third party may transmit the information pursuant to § 47e(2) in conjunction with § 47g at the cost of those subject to the reporting obligation, and to specify the details thereof, and

5. reasonable *de minimis* thresholds for reporting transactions and data, as well as transitional periods for the start of the reporting obligations.

### § 47g

**Areas for issuing Determinations**

(1) The Market Transparency Unit shall decide, by making determinations for the areas referred to in paragraphs 2 to 12 and subject to § 47d(1) and § 47e as well as subject to the ordinance to be issued based on § 47f, which data and categories of data are to be transmitted and how.

(2) The Market Transparency Unit may determine that operators of electricity generation units and of storage facilities with an installed generation or storage capacity of more than 10 megawatts must transmit information on the following data and categories of data for each unit:

1. for each electricity generation unit, in particular, the name, location, control area, installed generation capacity and type of generation,

2. for each individual generation unit, on an hourly basis
   a) net generation capacity,
   b) generation planned on the previous day,
   c) actual generation,
   d) marginal costs of generation, including information on the cost components, in particular fuel costs, CO2 costs, opportunity costs,
   e) planned and unplanned unavailability due to technical restrictions,
   f) unavailability due to grid restrictions,
   g) balancing services and operating reserves held available and supplied,
   h) unused available capacities,

3. for each individual generation unit
   a) start-up costs (warm starts and cold starts), minimum idle times, minimum run times and minimum production volumes,
   b) planned decommissioning of plants and cold reserves,

4. drawing rights agreements,

5. planned investment projects,

6. for cross-border trading activities: volumes, trading venues used or trade partners, to be listed separately for each country in which trading took place, and

7. information enabling the Market Transparency Unit to observe and assess the supply behaviour in trading.
(3) The Market Transparency Unit may determine that operators of generation units with an installed generation capacity per unit of more than 1 megawatt and up to 10 megawatts must specify, on an annual basis, the aggregate total of the installed generation capacity of all generation units in each control area separately for each type of generation.

(4) The Market Transparency Unit may determine that operators of electricity consumption units must transmit information on the following data and categories of data:

1. the planned and unplanned under-consumption of consumption units with a maximum consumption capacity of more than 25 megawatts per unit, and

2. balancing services that are held available and supplied.

(5) The Market Transparency Unit may determine that transmission systems operators within the meaning of § 3 no. 10 of the German Energy Industry Act must transmit information on the following data and categories of data:

1. the transmission capacity at cross-border interconnectors on an hourly basis,

2. import and export data on an hourly basis,

3. the forecast and actual feed-in of energy from facilities for which tariffs are governed by the German Renewable Energy Sources Act [Erneuerbare-Energien-Gesetz] on an hourly basis,

4. the sales offers made based on the German Equalisation Scheme Ordinance [Ausgleichsmechanismusverordnung] on an hourly basis and

5. the offers and results of auctions for balancing services.

(6) The Market Transparency Unit may determine that operators of facilities generating electricity from renewable energy sources with an installed generation capacity of more than 10 megawatts must transmit information on the following data and categories of data:

1. the volumes produced by type of facility and

2. the selling method within the meaning of § 20(1) of the German Renewable Energy Sources Act chosen, and the volumes attributable to each selling method.

(7) The Market Transparency Unit may determine that trading platforms for trading electricity and natural gas must transmit information on the following data and categories of data:

1. the offers made on the platforms,

2. trading results and

3. all off-exchange non-standardised trading activities where the counterparties individually negotiate bilateral trades (OTC transactions) that are secured by cash or commodities clearing through the trading platform.

(8) The Market Transparency Unit may determine that wholesalers within the meaning of § 3 no. 21 of the German Energy Industry Act that trade in electricity must transmit information on the transactions specified in § 47e(2) no. 1, to the extent that these transactions do not fall under the scope of paragraph 7. As regards the trading of electricity generated from renewable energy sources, the Market Transparency Unit may also determine that wholesalers within the meaning of sentence 1 must transmit information on the form of direct selling within the meaning of § 5 no. 9 of the German Renewable Energy Sources Act and on the quantities of electricity traded thereunder.
(9) The Market Transparency Unit may determine that wholesalers within the meaning of § 3 no. 21 of the German *Energy Industry Act* that trade in natural gas must transmit information on the following data and categories of data:

1. cross-border quantities and prices as well as data on import and export quantities,
2. quantities of gas produced in Germany and the initial sales prices for these quantities,
3. import agreements (cross-border agreements),
4. delivery volumes for each distribution level in the distribution system,
5. transactions concluded with wholesale customers, transmission systems operators and operators of storage and LNG facilities under gas supply contracts and energy derivatives within the meaning of § 3(15a) of the German *Energy Industry Act* that are based on gas, including the term, volume, date and time of execution, the stipulations on term, delivery and settlement, and transaction prices,
6. offers and results of their own natural gas auctions,
7. existing gas procurement and supply contracts and
8. any other gas trading activities concluded as OTC transactions.

(10) The Market Transparency Unit may determine that transmission system operators within the meaning of § 3 no. 5 of the German *Energy Industry Act* must transmit information on the following data and categories of data:

1. existing capacity contracts,
2. contractual agreements with third parties regarding flow commitments and
3. offers and results of invitations to tender for flow commitments.

(11) The Market Transparency Unit may determine that market area managers within the meaning of § 2 no. 11 of the German *Gas Grid Access Ordinance* [Gasnetzzugangsverordnung] must transmit information on the following data and categories of data:

1. existing contracts on balancing services,
2. offers and results of auctions and invitations to tender for balancing services,
3. transactions concluded via trading platforms and
4. any other gas trading activities concluded as OTC transactions.

(12) The Market Transparency Unit may determine that, for balancing services and biogas, information must be transmitted on the procurement of third-party balancing services, on results of invitations to tender and on the feeding-in and marketing of biogas.

**Footnote 2:** Pursuant to Article 4(2) of the Act of 5 December 2012 (Federal Law Gazette I p. 2403), § 47g(2) will cease to be in force on 31 December 2015. [Translators note: Pursuant to Articles 2 to 4 of the Act of 21 April 2015 (Federal Law Gazette I p. 582) the date on which § 47g(2) will cease to be in force has been postponed to 31 December 2018.]
§ 47h
Reporting Duties, Publications

(1) The Market Transparency Unit shall inform the Federal Ministry of Economics and Technology of the transmission of information pursuant to § 47b(7) sentence 1.

(2) The Market Transparency Unit shall prepare a report on its activities every two years. Where wholesale trading in electricity and natural gas is concerned, it shall prepare such report in agreement with the Bundesnetzagentur. Business secrets of which the Market Transparency Unit has obtained knowledge in performing its tasks will be removed from the report. The report will be published on the website of the Market Transparency Unit. The report may be issued at the same time as the report to be issued by the Bundeskartellamt pursuant to § 53(3) and combined with it.

(3) The Market Transparency Unit shall publish the lists prepared pursuant to § 47b (5), including the drafts thereof, on its website.

(4) To increase wholesale transparency, the Market Transparency Unit may publish, in agreement with the Bundesnetzagentur, the generation and consumption data currently published on the transparency platform operated by European Energy Exchange AG and the transmission system operators as soon as that publication is discontinued. The publication requirements imposed on the market participants under the German Energy Industry Act and any ordinances promulgated thereunder as well as under European law in order to increase transparency on the electricity and gas markets remain unaffected.

§ 47i
Cooperation with other Authorities and Supervisory Entities

(1) In carrying out the tasks of the Market Transparency Unit pursuant to § 47b, the Bundeskartellamt and the Bundesnetzagentur shall cooperate with the following authorities:

1. the German Federal Financial Supervisory Authority [Bundesanstalt für Finanzdienstleistungsaufsicht],

2. the exchange supervisory authorities and trading surveillance offices of the exchanges on which electricity and gas as well as energy derivatives within the meaning of § 3 no. 15a of the German Energy Industry Act are traded,

3. the Agency for the Cooperation of Energy Regulators and the European Commission, to the extent that they perform tasks under Regulation (EU) No 1227/2011, and

4. regulatory authorities of other Member States.

Irrespective of the relevant procedure chosen in a given case, these entities may exchange information, including personal data as well as operating and business secrets, to the extent this is necessary for the performance of their respective tasks. They may use this information for their procedures. Prohibitions on the use of evidence shall remain unaffected. Provisions concerning legal assistance in criminal matters as well as agreements on administrative and legal assistance shall remain unaffected.

(2) Subject to the consent of the Federal Ministry of Economics and Technology, the Market Transparency Unit may enter into cooperation agreements with the Federal Financial Supervisory Authority, the exchange supervisory authorities and trading surveillance offices of the exchanges on which electricity and gas as well as energy derivatives within the meaning of § 3 no. 15a of the German Energy Industry Act are traded, and with the Agency for the Cooperation of Energy Regulators.
§ 47j
Confidential Information, Operational Reliability, Data Protection

(1) Information that the Market Transparency Unit has obtained or prepared in the ordinary course of business when fulfilling its duties must be kept confidential. The Market Transparency Unit's members of staff are subject to a duty of confidentiality regarding the confidential information referred to in sentence 1. Other persons who are to receive confidential information shall, prior to transmission thereof, be specifically committed to secrecy unless they hold a public office or are bound by special obligations in the public service. § 1(2), (3) and (4) no. 2 of the German Act on the Obligations of Public Servants [Verpflichtungsgesetz] shall apply mutatis mutandis.

(2) Together with the Bundesnetzagentur, the Market Transparency Unit shall ensure the operational reliability of the data monitoring and the confidentiality, integrity and protection of the incoming information. In this regard, the Market Transparency Unit is bound to the same degree of confidentiality as the entity transmitting the information or the entity that collected the information. The Market Transparency Unit shall take all necessary measures to prevent any abuse of, and any unauthorised access to, the information managed in its systems. The Market Transparency Unit shall identify sources of operational risks and minimise these risks by developing adequate systems, controls and procedures.

(3) Paragraph 1 applies mutatis mutandis to persons that are to receive data pursuant to § 47d(1) sentence 5 or that receive information pursuant to § 47c(4).

(4) The Market Transparency Unit may store, edit and use personal data communicated to it for the purposes of fulfilling its tasks pursuant to § 47b only to the extent necessary for the fulfilment of the tasks within its scope of competence and for purposes of cooperation pursuant to Article 7(2) and Article 16 of Regulation (EU) No 1227/2011.

(5) Access to files by persons whose personal rights are affected by the decisions taken by the Market Transparency Unit pursuant to § 47b(5) and (7), § 47d(1) and (2), § 47e and § 47g as well as § 81(2) no. 2(c) and (d), and nos 5a, 5b and 6 shall be restricted to documents that are exclusively attributable to the legal relationship between the affected person and the Market Transparency Unit.

II.
Market Transparency Unit for Fuels

§ 47k
Fuel Market Monitoring

(1) A Market Transparency Unit for Fuels shall be set up at the Bundeskartellamt. It shall monitor the trade in fuels in order to facilitate the detection and sanctioning by the competition authorities of infringements of §§1, 19 and 20 of this Act and of Articles 101 and 102 of the Treaty on the Functioning of the European Union. It shall perform its duties in accordance with the provisions set out in paragraphs 2 to 9.

(2) Operators of public petrol stations that offer fuels to end consumers at self-set prices are obliged, subject to the ordinance referred to in paragraph 8, to report to the Market Transparency Unit for Fuels any changes in their fuel prices in real time and separately for each type of fuel. If the sales prices are imposed on the operator by another undertaking, the undertaking that has price setting power shall be obliged to communicate the prices.

(3) Fuels for the purposes of this provision shall mean petrol and diesel fuels. Public petrol stations shall include any service stations that are located at places accessible to the general public and that may be accessed without restrictions as to certain groups of persons.

(4) If there is any indication that an undertaking is in violation of the legal provisions referred to in paragraph 1, the Market Transparency Unit for Fuels must immediately inform the competent competition
authority and refer the issue to it. To this end, it shall transfer all information and data required or requested by the competition authority to the competition authority without undue delay. In addition, the Market Transparency Unit for Fuels shall provide the data collected by it pursuant to paragraph 2 to the following authorities and entities:

1. the Bundeskartellamt for merger control proceedings under §§ 35 to 41,
2. the competition authorities for sector inquiries as provided under § 32e,
3. the Federal Ministry of Economics and Technology for statistical purposes, and
4. the Monopolies Commission for the purpose of performing its tasks under this Act.

(5) Subject to the ordinance pursuant to paragraph 8, the Market Transparency Unit for Fuels shall be authorised to pass on the price data collected pursuant to paragraph 2 electronically to providers of consumer information services for consumer information purposes. When publishing or passing on this price data to consumers, the providers of consumer information services must abide by the requirements specified in more detail in the ordinance referred to in paragraph 8 no. 5. If these requirements are not met, the Market Transparency Unit for Fuels is authorised to refrain from passing on the data.

(6) The Market Transparency Unit for Fuels shall ensure the operational reliability of the data monitoring and the confidentiality, integrity and protection of the incoming information.

(7) For the purpose of fulfilling its tasks under paragraph 1 sentence 1, the Market Transparency Unit for Fuels has the powers set out in § 59.

(8) The Federal Ministry of Economics and Technology is empowered to impose certain requirements regarding the reporting duty provided for in paragraph 2 and the passing on of the price data pursuant to paragraph 5 by way of an ordinance not requiring the consent of the Bundesrat, in particular

1. to issue more detailed provisions on the exact timing and the type and form of reporting the price data pursuant to paragraph 2,
2. to determine appropriate *de minimis* thresholds for the reporting duty under paragraph 2 and to provide for more detailed provisions as regards a voluntary submission to the reporting duties under paragraph 2 where the relevant threshold is not reached,
3. to issue more detailed provisions on the requirements applicable to providers of consumer information services as referred to in paragraph 5,
4. to issue more detailed provisions on the content, type, form and scope of the passing-on of price data by the Market Transparency Unit for Fuels to the providers referred to in paragraph 5, as well as
5. to issue more detailed provisions on the content, type, form and scope of the publication or passing-on of price data to consumers by the providers of consumer information services referred to in paragraph 5.

The Federal Ministry of Economics and Technology must transmit the ordinance to the Bundestag. The ordinance may be amended or refused by resolution of the Bundestag. Any amendments or a refusal are to be communicated by the Bundestag to the Federal Ministry of Economics and Technology. If the Bundestag has not dealt with the ordinance within three sitting weeks of receipt thereof, the consent of the Bundestag shall be deemed granted.

(9) Decisions by the Market Transparency Unit for Fuels shall be taken by the person heading the Unit. § 51(5) shall apply *mutatis mutandis* to all members of staff of the Market Transparency Unit for Fuels. For the purpose of fulfilling its tasks under paragraph 1 sentence 1, the Market Transparency Unit for Fuels has the powers set out in § 59.
III. Evaluation

§ 47f
Evaluation of the Market Transparency Units

The Federal Ministry of Economics and Technology shall report to the legislative bodies on the results of the market transparency units' work and the experiences gained therefrom. The reporting for the wholesale trade in electricity and gas shall be carried out five years after the beginning of the notification duties pursuant to § 47e(2) to (5) in conjunction with the ordinance referred to in § 47f. The reporting for the trade in fuels shall be carried out three years after the beginning of the notification duty pursuant to § 47k(2) in conjunction with the ordinance referred to in § 47k(8) and should in particular include information on the development of prices and the situation of the small and medium-sized mineral oil industry.

Part II
Competition Authorities

First Chapter
General Provisions

§ 48
Competencies

(1) The competition authorities are the Bundeskartellamt, the Federal Ministry of Economics and Technology, and the supreme Land authorities competent according to the laws of the respective Land.

(2) Unless a provision of this Act assigns competence for a particular matter to a particular competition authority, the Bundeskartellamt shall exercise the functions and powers assigned to the competition authority by this Act if the effect of the restrictive or discriminatory conduct or of a competition rule extends beyond the territory of a Land. In all other cases, the supreme Land authority competent according to the laws of the Land shall exercise these functions and powers.

(3) The Bundeskartellamt shall monitor the level of transparency, including of wholesale prices, and the level and effectiveness of market opening and the extent of competition at the wholesale and retail levels of the gas and electricity markets and on the gas and electricity exchanges. The Bundeskartellamt shall, without delay, make the data compiled from its monitoring activities available to the Bundesnetzagentur.

§ 49
Bundeskartellamt and Supreme Land Authority

(1) If the Bundeskartellamt institutes proceedings or conducts investigations, it shall simultaneously inform the supreme Land authority in whose district the undertakings concerned have their registered seat. If a supreme Land authority institutes proceedings or conducts investigations, it shall simultaneously inform the Bundeskartellamt.

(2) The supreme Land authority shall refer a matter to the Bundeskartellamt if the Bundeskartellamt is competent pursuant to § 48(2) sentence 1. The Bundeskartellamt shall refer a matter to the supreme Land authority if that authority is competent pursuant to § 48(2) sentence 2.
(3) Upon application by the Bundeskartellamt, the supreme Land authority may refer to the Bundeskartellamt a matter falling under the competence of the supreme Land authority pursuant to § 48(2) sentence 2, provided this is expedient in view of the circumstances of the matter. Upon referral, the Bundeskartellamt shall become the competent competition authority.

(4) Upon application by the supreme Land authority, the Bundeskartellamt may refer to the supreme Land authority a matter falling under the Bundeskartellamt's competence pursuant to § 48(2) sentence 1, provided this is expedient in view of the circumstances of the matter. Upon referral, the supreme Land authority shall become the competent competition authority. Prior to the referral, the Bundeskartellamt shall inform the other supreme Land authorities concerned. The referral shall not take place if a supreme Land authority concerned objects to it within a time limit to be set by the Bundeskartellamt.

§ 50

Enforcement of European Law

(1) To the extent they are competent under §§ 48 and 49, the Bundeskartellamt and the supreme Land authorities shall be the competition authorities responsible for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union within the meaning of Article 35(1) of Council Regulation (EC) No 1/2003.

(2) If the supreme Land authorities apply Articles 101 and 102 of the Treaty on the Functioning of the European Union, all dealings with the European Commission or the competition authorities of other Member States of the European Union shall be made via the Bundeskartellamt. The Bundeskartellamt may provide guidance to the supreme Land authorities regarding the execution of such dealings. The Bundeskartellamt will, also in such cases, attend the Advisory Committee on Restrictive Practices and Dominant Positions as a representative pursuant to Article 14 (2) sentence 1 and Article 14(7) of Regulation (EC) No 1/2003.

(3) The Bundeskartellamt shall be the competent competition authority for the cooperation in proceedings of the European Commission or the competition authorities of other Member States of the European Union for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union. The procedural provisions which are relevant for the application of this Act shall apply.

(4) The Bundeskartellamt may allow officials of the competition authority of a Member State of the European Union, as well as other accompanying persons authorised by that competition authority, to assist in searches and interviews pursuant to Article 22(1) of Regulation (EC) No 1/2003.

(5) In cases other than those falling under paragraphs 1 to 4, the Bundeskartellamt shall exercise the functions assigned to the authorities of the Member States of the European Union in Articles 104 and 105 of the Treaty on the Functioning of the European Union as well as in the Regulations issued under Article 103 of the Treaty on the Functioning of the European Union, also in conjunction with Article 43(2), Article 100(2), Article 105(3) and Article 352(1) of the Treaty on the Functioning of the European Union. Paragraph 3 sentence 2 above shall apply mutatis mutandis.

§ 50a

Cooperation within the Network of European Competition Authorities

(1) Article 12(1) of Regulation (EC) No 1/2003 authorises the competition authority to inform, for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union, the European Commission and the competition authorities of the other Member States of the European Union

1. of any matter of fact or of law, including confidential information and in particular operating and business secrets, and to transmit to them appropriate documents and data, and
2. to request these competition authorities to transmit information pursuant to no. 1 above, and to receive
and use in evidence such information.

§ 50(2) shall apply mutatis mutandis.

(2) The competition authority may use in evidence the information received only for the purpose of applying
Articles 101 or 102 of the Treaty on the Functioning of the European Union and in respect of the subject-
matter of the investigation for which it was collected by the transmitting authority. However, information
exchanged under paragraph 1 may also be used for the purpose of applying this Act if provisions of this Act
are applied in accordance with Article 12(2) sentence 2 of Regulation (EC) No 1/2003.

(3) Information received by the competition authority pursuant to paragraph 1 can only be used in evidence
for the purpose of imposing sanctions on natural persons where the law of the transmitting authority
provides for sanctions of a similar kind in relation to violations of Articles 101 or 102 of the Treaty on the
Functioning of the European Union. Where the conditions set out in sentence 1 are not fulfilled, the
information may be used in evidence if it has been collected in a way which ensures the same level of
protection of the rights of defence of natural persons as provided for under the law applicable to the
competition authority. The prohibition to use evidence pursuant to sentence 1 shall not exclude using the
evidence against legal persons or associations of persons. Compliance with prohibitions to use evidence
which are based on constitutional law shall remain unaffected.

§ 50b
Other Cooperation with Foreign Competition Authorities

(1) The Bundeskartellamt shall have the powers pursuant to § 50a(1) also in other cases in which it
cooperates with the European Commission or with the competition authorities of other states for the
purpose of applying provisions of competition law.

(2) The Bundeskartellamt may only forward information pursuant to § 50a(1) with the proviso that the
receiving competition authority

1. uses the information in evidence only for the purpose of applying provisions of competition law and in
respect of the subject-matter of the investigation for which it was collected by the Bundeskartellamt, and

2. maintains the confidentiality of the information and transmits such information to third parties only if the
Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential
information in court and administrative proceedings.

Confidential information, including operating and business secrets, disclosed in merger control proceedings
may only be transmitted by the Bundeskartellamt with the consent of the undertaking which has provided
that information.

(3) Provisions concerning legal assistance in criminal matters as well as agreements on administrative and
legal assistance shall remain unaffected.

§ 50c
Cooperation of Authorities

(1) Irrespective of the type of proceeding chosen in a given case, the competition authorities, the regulatory
authorities and the competent authorities within the meaning of § 2 of the German EC Consumer Protection
Enforcement Act [EG-Verbraucherschutzdurchsetzungsgesetz] may exchange information, including
personal data and operating and business secrets, to the extent that this is necessary for the performance
of their respective functions, and use such information in their proceedings. Prohibitions on the use of
evidence shall remain unaffected.
(2) In the performance of their functions the competition authorities shall cooperate with the German Federal Financial Supervisory Authority [Bundesanstalt für Finanzdienstleistungsaufsicht], the German Central Bank [Bundesbank], the competent supervisory authorities pursuant to § 90 of the German Social Code, Book IV [Viertes Buch Sozialgesetzbuch] and the German Land media authorities [Landesmedienanstalten]. The competition authorities may, upon request, exchange information with the authorities mentioned in sentence 1 on a mutual basis, to the extent that this is necessary for the performance of their respective functions. This shall not apply to

1. confidential information, in particular operating and business secrets, as well as

2. information obtained pursuant to § 50a or pursuant to Article 12 of Regulation (EC) No 1/2003.

Sentences 2 and 3 no.1 shall not affect the provisions on the cooperation with other authorities of the German Securities Acquisition and Takeover Act [Wertpapiererwerbs- und Übernahmegesetz] and the German Securities Trading Act [Gesetz über den Wertpapierhandel].

(3) The Bundeskartellamt may communicate information relating to the undertakings participating in a concentration it has been provided with pursuant to § 39(3) to other authorities to the extent that this is necessary for the purposes set forth in § 4(1) no. 1 and § 5(2) of the German Foreign Trade Act [Außenwirtschaftsgesetz]. In the case of concentrations with a Community dimension within the meaning of Article 1 paragraph 1 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings as amended, the Bundeskartellamt shall have the power referred to in sentence 1 only with regard to information published by the European Commission in accordance with Article 4(3) of that Regulation.

Second Chapter
Bundeskartellamt

§ 51
Seat, Organisation

(1) The Bundeskartellamt is an independent higher federal authority with its seat in Bonn. It is assigned to the Federal Ministry of Economics and Technology.

(2) Decisions of the Bundeskartellamt shall be made by the decision divisions established as determined by the Federal Ministry of Economics and Technology. Further to this, the President shall determine the allocation and handling of business in the Bundeskartellamt by means of rules of procedure; these rules of procedure require confirmation by the Federal Ministry of Economics and Technology.

(3) The decisions of the decision divisions shall be made by a chairperson and two associate members.

(4) The chairpersons and associate members of the decision divisions must be civil servants appointed for life and must be qualified to serve as judges or senior civil servants.

(5) The members of the Bundeskartellamt may not own or manage any undertakings, nor may they be members of the management board or supervisory board of an undertaking, a cartel, or a business and trade association or professional organisation.
§ 52
Publication of General Instructions

Any general instructions given by the Federal Ministry of Economics and Technology to the Bundeskartellamt with regard to the issuance or non-issuance of decisions pursuant to this Act shall be published in the Federal Gazette.

§ 53
Report on Activities

(1) Every two years, the Bundeskartellamt shall publish a report on its activities and on the situation and development in its field of responsibilities. The report shall include the general instructions given by the Federal Ministry of Economics and Technology pursuant to § 52. The Bundeskartellamt shall also regularly publish its administrative principles.

(2) The Federal Government shall without delay submit the report of the Bundeskartellamt to the Bundestag together with its opinion.

(3) The Bundeskartellamt shall prepare a report on its monitoring activities under § 48(3) in agreement with the Bundesnetzagentur to the extent that aspects of regulation of the distribution networks are concerned, and shall transmit the report to the Bundesnetzagentur.

Part III
Proceedings and Legal Protection against Protracted Judicial Proceedings

First Chapter
Administrative Matters

I.
Proceedings before the Competition Authorities

§ 54
Institution of Proceedings; Parties

(1) The competition authority shall, acting ex officio or upon application, institute proceedings. If so requested, the competition authority may ex officio institute proceedings for the protection of a complainant.

(2) Parties to the proceedings before the competition authority are

1. those who have applied for proceedings to be initiated;

2. cartels, undertakings, business and trade associations or professional organisations against which the proceedings are directed;

3. persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the competition authority to the proceedings; the
interests of consumer advice centres and other consumer associations supported by public funds are substantially affected also in cases in which the decision affects a wide range of consumers and in which therefore the interests of consumers in general are substantially affected.

4. in the cases of § 37(1) nos 1 or 3, also the seller.

(3) The Bundeskartellamt shall also be a party to proceedings before the supreme Land authorities.

§ 55
Preliminary Decision on Jurisdiction

(1) If a party pleads that the competition authority lacks territorial or subject matter jurisdiction, the competition authority may issue a preliminary decision on the issue of jurisdiction. Such decision may be challenged independently by way of appeal; the appeal shall have suspensive effect.

(2) If a party fails to plead that the competition authority lacks territorial or subject matter jurisdiction, an appeal cannot be based upon the contention that the competition authority erroneously assumed it had jurisdiction.

§ 56
Opportunity to Comment, Hearing

(1) The competition authority shall give the parties an opportunity to state their case.

(2) In appropriate cases, the competition authority may give representatives of the business sectors affected by the proceedings an opportunity to comment.

(3) The competition authority may, upon application of a party or acting ex officio, hold a public hearing. The public shall be excluded from the hearing or from a part thereof if it is feared that public order, in particular state security, or important operating or business secrets may be endangered. In the cases of § 42 the Federal Ministry of Economics and Technology shall conduct a public hearing; with the consent of the parties a decision may be taken without a hearing.

(4) §§ 45 and 46 of the German Administrative Procedure Act [Verwaltungsverfahrensgesetz] shall be applied.

§ 57
Investigations, Evidence

(1) The competition authority may conduct any investigations and collect any evidence required.

(2) §§ 372(1), §§ 376, 377, 378, 380 to 387, 390, 395 to 397, 398(1), §§ 401, 402, 404, 404a, 406 to 409, 411 to 414 of the German Code of Civil Procedure shall apply mutatis mutandis to the gathering of evidence by inspection, testimony of witnesses and experts; detention may not be imposed. The Higher Regional Court [Oberlandesgericht] shall have jurisdiction over appeals.

(3) The testimony of witnesses should be recorded, and the record signed by the investigating member of the competition authority and, if a recording clerk attends, also by the clerk. The record should indicate the place and the date of the hearing as well as the names of those who conducted it and of the parties.
(4) The record shall be read to the witness or be presented to be read by the witness him/herself for his/her approval. The approval given shall be recorded and signed by the witness. If the signature is omitted, the reason for this shall be indicated.

(5) The provisions of paragraphs 3 and 4 shall apply mutatis mutandis to the questioning of experts.

(6) The competition authority may request that the Local Court [Amtsgericht] administer the oath to witnesses if it considers such an oath to be necessary to obtain truthful testimony. The court shall decide whether the oath is required.

§ 58
Seizure

(1) The competition authority may seize objects which may be of importance as evidence in the investigation. The person affected by the seizure shall be informed thereof without delay.

(2) If neither the person affected nor any relative of legal age was present at the seizure or if the person affected or, in his/her absence, a relative of legal age explicitly objected to the seizure, the competition authority shall seek judicial confirmation by the Local Court in the district of which the competition authority has its seat within three days of the seizure.

(3) The person affected may at any time request judicial review of the seizure. He/she shall be informed of this right. The court having jurisdiction under paragraph 2 shall rule on the request.

(4) The court decision may be appealed. §§ 306 to 310 and 311a of the German Code of Criminal Procedure shall apply mutatis mutandis.

§ 59
Requests for Information

(1) To the extent necessary to perform the functions assigned to the competition authority by this Act, the competition authority may, until its decisions enter into force:

1. request from undertakings and associations of undertakings the disclosure of information regarding their economic situation, as well as the surrender of documents; this shall also include general market surveys which serve the purpose of evaluating or analysing the conditions of competition or the market situation and are in the possession of the undertaking or the association of undertakings;

2. request from undertakings and associations of undertakings the disclosure of information on the economic situation of undertakings affiliated with them pursuant to § 36(2), as well as the surrender of documents of these undertakings, as far as this information is at their disposal or as far as existing legal relations enable them to obtain the requested information about the affiliated undertakings;

3. inspect and examine business documents of undertakings and associations of undertakings on their premises during normal business hours.

Sentence 1 nos1 and 3 shall apply mutatis mutandis to business and trade associations and professional organisations with respect to their activities, by-laws, decisions, as well as the number and names of the members affected by the decisions. The competition authority may prescribe the form in which the information referred to in sentences 1 and 2 must be disclosed; in particular, it may stipulate that an online platform must be used to enter the required information.

(2) The owners of undertakings and their representatives, and in the case of legal persons, corporations and associations without legal capacity the persons designated as representatives by law or statutes, shall
be obliged to surrender the documents requested, disclose the requested information, render the business
documents available for inspection and examination, and allow the examination of these business
documents as well as access to offices and business premises.

(3) Persons entrusted by the competition authority to carry out an examination may enter the offices of
undertakings and associations of undertakings. The fundamental right under Article 13 of the German Basic
Law [Grundgesetz] is restricted to this extent.

(4) Searches may be conducted only by order of the Local Court judge of the district in which the
competition authority has its seat. Searches are permissible if it is to be assumed that documents are
located in the relevant premises which may be inspected and/or examined, and the surrender of which may
be requested, by the competition authority pursuant to paragraph 1. The fundamental right to the
inviolability of the home (Article 13(1) of the German Basic Law) is restricted to this extent. §§ 306 to 310
and 311a of the German Code of Criminal Procedure shall apply mutatis mutandis to appeals from such
orders. If there is imminent danger, the persons referred to in paragraph 3 may conduct the necessary
search during business hours without judicial order. A record of the search and its essential results shall be
prepared on the spot, showing, if no judicial order was issued, also the facts which led to the assumption
that there would be imminent danger.

(5) § 55 of the German Code of Criminal Procedure shall apply mutatis mutandis to the person obliged to
provide the information.

(6) Requests for information made by the Federal Ministry of Economics and Technology or the supreme
Land authority shall be made by written individual order, those of the Bundeskartellamt by decision. The
legal basis, the subject matter and the purpose of the request shall be stated therein and an appropriate
time limit shall be fixed for providing the information.

(7) Examinations shall be ordered by the Federal Ministry of Economics and Technology or the supreme
Land authority by written individual order, and by the Bundeskartellamt by decision made with the consent
of its President. The order or decision shall state the time, the legal basis, the subject matter and the
purpose of the examination.

§ 60
Preliminary Injunctions

The competition authority may issue preliminary injunctions to regulate matters on a temporary basis until a
final decision is taken on

1. a decision pursuant to § 31b(3), § 40(2), § 41(3) or a revocation or modification of a clearance pursuant
to § 40(3a),

2. an authorisation pursuant to § 42(1), its revocation or modification pursuant to § 42(2) sentence 2,

3. a decision pursuant to § 26(4), § 30(3) or § 34(1).

§ 61
Completion of the Proceedings, Reasons for the Decision, Service

(1) Decisions of the competition authority shall contain a statement of reasons and be served upon the
parties together with advice as to the available legal remedies in accordance with the provisions of the
German Act on Service in Administrative Procedure [Verwaltungszustellungsgesetz], § 5(4) of the German
Act on Service in Administrative Procedure and § 178(1) (2) of the German Code of Civil Procedure shall
apply mutatis mutandis to undertakings and associations of undertakings as well as to contracting entities
within the meaning of § 98. Decisions directed at undertakings with their registered seat outside the scope
of application of this Act shall be served by the competition authority upon the person resident or domiciled in Germany who was named by the undertaking to the Bundeskartellamt as authorised to accept service. If the undertaking has not named any person authorised to accept service, the competition authority shall serve the decisions by way of publication in the Federal Gazette.

(2) If proceedings are not completed by way of a decision served upon the parties pursuant to paragraph 1, the parties shall be informed in writing of the completion of the proceedings.

§ 62
Publication of Decisions

Decisions of the competition authority pursuant to § 30(3), § 31b(3), §§ 32 to 32b and § 32d shall be published in the Federal Gazette. Decisions pursuant to § 32c may be published by the competition authority.

II.
Appeals

§ 63
Admissibility; Jurisdiction

(1) Decisions of the competition authority may be appealed. An appeal may be based also upon new facts and evidence.

(2) The appeal may be filed by the parties to the proceedings before the competition authority (§ 54(2) and (3)).

(3) An appeal may also be made if the competition authority fails to take a decision requested in an application and the applicant claims to be entitled to demand such a decision. If the competition authority without sufficient reason has failed to rule within a reasonable period of time on an application to take a decision, this shall also be deemed a failure to act. Failure to act shall in such a case be regarded as a rejection of the application.

(4) Decisions on an appeal shall be made by the Higher Regional Court for the district in which the competition authority has its seat and, in the cases of §§ 35 to 42, by the Higher Regional Court for the district in which the Bundeskartellamt has its seat, also if the appeal is directed against a decision of the Federal Ministry of Economics and Technology. § 36 of the German Code of Civil Procedure shall apply mutatis mutandis. § 202 sentence 3 of the German Social Courts Act [Sozialgerichtsgesetz] shall apply to all disputes regarding decisions of the Bundeskartellamt relating to voluntary associations of health insurance funds under § 172a of the German Social Code, Book V.

§ 64
Suspensive Effect

(1) The appeal has suspensive effect insofar as the decision being appealed:

1. (abolished)

2. is a decision pursuant to § 26(4), § 30(3), § 31b(3), § 32(2a) sentence 1, or § 34(1), or
3. revokes or modifies an authorisation pursuant to § 42(2) sentence 2.

(2) If an appeal is made against a decision to issue a preliminary injunction pursuant to § 60, the appellate court may order that the appealed decision or a part thereof shall enter into force only upon completion of the appeal proceedings or upon the furnishing of security. Such order may be repealed or amended at any time.

(3) § 60 shall apply mutatis mutandis to proceedings before the appellate court. This shall not apply in the cases of § 65.

§ 65
Order of Immediate Enforcement

(1) In the cases of § 64(1), the competition authority may order the immediate enforcement of the decision if this is required by the public interest or by the prevailing interest of a party.

(2) Orders under paragraph 1 may be issued already before the appeal is filed.

(3) The appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal if

1. the conditions for issuing an order under paragraph 1 were not satisfied or are no longer satisfied, or
2. there are serious doubts as to the legality of the appealed decision, or
3. the enforcement would result for the party concerned in undue hardship not justified by prevailing public interests.

In cases where the appeal has no suspensive effect, the competition authority may suspend enforcement; such suspension should be made if the conditions of sentence 1 no. 3 are satisfied. The appellate court may, upon application, order the suspensive effect in full or in part if the conditions of sentence 1 nos 2 or 3 are satisfied. If a third party has lodged an appeal against a decision pursuant to § 40(2), the application by the third party for an order pursuant to sentence 3 is only admissible if the third party claims that its rights are infringed by the decision.

(4) An application under paragraph 3 sentences 1 or 3 shall also be admissible prior to the appeal being lodged. The applicant shall substantiate the facts upon which the application is based. If the decision has already been enforced at the time of the court ruling, the court may also order the enforcement measures to be lifted. Orders restoring or ordering the suspensive effect may be made contingent upon the furnishing of security or upon other conditions. They may also be limited in time.

(5) Decisions on applications pursuant to paragraph 3 may be amended or repealed at any time.

§ 66
Time Limits and Formal Requirements

(1) The appeal shall be filed in writing within one month with the competition authority whose decision is being appealed. That period shall begin upon service of the decision of the competition authority. If, in the cases of § 36(1), an application is made for the issuance of an authorisation pursuant to § 42, the period for the appeal against the decision of the Bundeskartellamt shall begin upon service of the order issued by the Federal Ministry of Economics and Technology. Receipt of the appeal by the appellate court within the time limit shall be sufficient.
(2) If no decision is taken on an application (§ 63(3) sentence 2), the appeal shall not be subject to any time limit.

(3) The appeal shall include a statement of reasons to be filed within two months from the service of the decision being appealed. In the case of paragraph 1 sentence 3, the time limit shall begin upon service of the decision issued by the Federal Ministry of Economics and Technology. If such decision is appealed, the time limit shall begin to run upon the prohibition becoming unappealable. In the case of paragraph 2, the time limit is one month; it shall begin upon the filing of the appeal. The time limit may, upon application, be extended by the presiding judge of the appellate court.

(4) The statement of reasons for the appeal shall contain

1. a statement as to the extent to which the decision is being appealed and its modification or revocation is being sought,
2. details of the facts and evidence on which the appeal is based.

(5) The appeal and the statement of reasons for the appeal must be signed by a lawyer admitted to practise before a German court; this shall not apply to appeals by the competition authorities.

§ 67
Parties to the Appeal Proceedings

(1) The following are parties to the proceedings before the appellate court:

1. the appellant,
2. the competition authority whose decision is being appealed,
3. persons and associations of persons whose interests are substantially affected by the decision and who, upon their application, have been admitted by the competition authority to the proceedings.

(2) If an appeal is directed against a decision issued by a supreme Land authority, the Bundeskartellamt shall also be a party to the proceedings.

§ 68
Mandatory Representation by Lawyers

In proceedings before the appellate court, the parties must be represented by a lawyer admitted to practise before a German court. The competition authority may be represented by a member of the authority.

§ 69
Hearing

(1) The appellate court shall decide on the appeal on the basis of a hearing; with the consent of the parties, a decision may be taken without a hearing.

(2) If the parties, despite having been summoned in time, do not appear at the hearing or are not duly represented, the case may nevertheless be heard and decided.
§ 70
Principle of Investigation

(1) The appellate court shall, acting *ex officio*, investigate the facts.

(2) The presiding judge shall endeavour to have formal defects eliminated, unclear motions explained, relevant motions made, insufficient factual information completed, and all declarations essential for ascertaining and assessing the facts made.

(3) The appellate court may direct the parties to file statements within a specified time on issues requiring clarification, to specify evidence, and to submit documents as well as other evidence in their possession. In the event of failure to observe the time limit, a decision may be made on the basis of the established facts without consideration of evidence which has not been produced.

(4) If a request pursuant to § 59(6) or an order pursuant to § 59(7) is challenged by way of appeal, the competition authority shall substantiate the factual aspects. § 294(1) of the German *Code of Civil Procedure* shall be applicable. No substantiation shall be required insofar as § 20 presupposes that small or medium-sized enterprises are dependent on undertakings in such a way that sufficient or reasonable alternatives of switching to other undertakings do not exist.

§ 71
Decision on the Appeal

(1) The appellate court shall decide by decree on the basis of its conclusions freely reached from the overall results of the proceedings. The decree may be based only on facts and evidence on which the parties had an opportunity to comment. The appellate court may depart from this requirement insofar as, for important reasons, in particular to protect business or trade secrets, third parties admitted to the proceedings were not allowed to inspect the files, and the content of the files was not part of the pleadings for these reasons. This shall not apply to such third parties admitted to the proceedings who are involved in the disputed legal relationship in such a way that the decision can only be made uniformly also in relation to them.

(2) If the appellate court holds the decision of the competition authority to be inadmissible or unfounded, it shall reverse the decision. If meanwhile the decision has been withdrawn or otherwise become moot, the appellate court shall declare, upon application, that the decision of the competition authority was inadmissible or unfounded, provided the appellant has a legitimate interest in such a declaration.

(3) If a decision pursuant to §§ 32 to 32b or § 32d has become moot because of a subsequent change of the factual situation or for other reasons, the appellate court shall decree, upon application, whether, to what extent and up to what time the decision was well founded.

(4) If the appellate court holds the refusal or failure to issue the decision to be inadmissible or unfounded, it shall decree the obligation of the competition authority to issue the decision applied for.

(5) If the decision shall also be inadmissible or unfounded if the competition authority has improperly exercised its discretionary powers, in particular if it has exceeded the statutory limits of its discretionary powers or if it has exercised its discretion in a manner violating the purpose and intent of this Act. The evaluation of the general economic situation and trends by the competition authority shall not be subject to review by the court.

(6) The decree shall contain a statement of reasons and be served upon the parties together with advice as to the available legal remedies.
§ 71a
Relief in Case of Violation of the Right to be Heard

(1) Upon objection of a party aggrieved by a court decision, the proceedings shall be continued if

1. an appeal or other legal remedy against the decision is not available, and

2. the court has violated the party's right to be heard in a manner which is relevant to the decision of the case.

An objection is not permissible against a decision preceding the final decision.

(2) The objection shall be raised within two weeks from obtaining knowledge of the violation of the right to be heard; the time at which knowledge was obtained shall be credibly demonstrated. After the expiration of one year from the announcement of the appealed decision, the objection may no longer be raised. Decisions which are communicated informally are deemed to be announced by the third day after their posting. The objection shall be made in writing or shall be recorded by the clerk of the court the decision of which is appealed. The objection must indicate the decision being appealed and show that the conditions mentioned in paragraph 1 sentence 1 no. 2 are satisfied.

(3) The other parties shall, to the extent necessary, be given an opportunity to comment.

(4) If the objection is not permissible or has not been raised in accordance with the legal form or time limit, it shall be dismissed as inadmissible. If the objection is unfounded, the court shall reject it. The decision is taken by way of a final and non-appealable decree. The decree should be accompanied by a brief statement of reasons.

(5) If the objection is founded, the court shall grant relief by continuing the proceedings as far as required by the objection. The proceedings shall be relegated to the state at which they were at the end of the court hearing. In the case of written proceedings, the end of the hearing shall be replaced by the point in time up to which documents may be submitted. § 343 of the German Code of Civil Procedure shall apply as regards the judicial pronouncement.

(6) § 149(1) sentence 2 of the German Code of Administrative Procedure shall apply mutatis mutandis.

§ 72
Access to Files

(1) The parties referred to in § 67(1) nos 1 and 2 and § 67(2) may access the court files and may obtain executed copies, excerpts and transcripts at their own expense from the court clerk. § 299(3) of the German Code of Civil Procedure shall apply mutatis mutandis.

(2) Access to preparatory files, supplementary files, expert opinions and other information shall be permissible only with the consent of the entities to which the files belong or which have obtained the respective statement. The competition authority shall refuse to grant access to its records if this is necessary for important reasons, in particular to protect operating or business secrets. If access is refused or impermissible, the decision may be based on such records only to the extent that their content formed part of the pleadings. The appellate court may, after hearing the person affected by such disclosure, order by decree the disclosure of facts or evidence, the confidentiality of which is demanded for important reasons, in particular to protect operating or business secrets, to the extent that such facts or evidence are relevant for the decision, there is no other way to ascertain the facts and, considering all circumstances of the particular case, the significance of the matter in protecting competition outweighs the interests of the person affected in maintaining confidentiality. The decree shall contain a statement of reasons. In proceedings pursuant to sentence 4, the person affected need not be represented by a lawyer.
The appellate court may grant the parties referred to in § 67(1) no. 3 access to files to the same extent, having heard those to whom the files belong.

§ 73

Application of the Provisions of the German Courts Constitution Act and the German Code of Civil Procedure

Unless otherwise provided for herein, the following provisions shall apply mutatis mutandis to proceedings before the appellate court:

1. the provisions in §§ 169 to 201 of the German Courts Constitution Act [Gerichtsverfassungsgesetz] regarding admission of the public to proceedings, maintenance of order in court, the official court language, judicial deliberation and voting as well as legal protection against excessively long judicial proceedings;

2. the provisions of the German Code of Civil Procedure regarding the exclusion or challenge of a judge, representation and assistance in court, service of process ex officio, summons, dates of hearings and time limits, orders for the appearance in person of the parties, joining of several proceedings, taking of testimony of witnesses and experts and any other procedures for gathering evidence, and reinstatement of prior conditions where a time limit has not been complied with.

III.

Appeal on Points of Law

§ 74

Leave to Appeal, Absolute Reasons for Appeal

(1) Appeals on points of law to the Federal Court of Justice [Bundesgerichtshof] from decrees issued by the Higher Regional Courts shall be admissible if the Higher Regional Court grants leave to appeal on points of law. § 202 sentence 3 of the German Social Courts Act shall apply to all decisions of a Higher Social Court [Landessozialgericht] in disputes regarding voluntary associations of health insurance funds under §172a of the German Social Code, Book V.

(2) Leave to appeal on points of law shall be granted if

1. a legal issue of fundamental importance is to be decided, or

2. a decision by the Federal Court of Justice is necessary to develop the law or to ensure uniform court practice.

(3) The decision of the Higher Regional Court shall state whether leave to appeal on points of law is granted or not. If leave to appeal is refused, the reasons shall be given.

(4) No leave to appeal on points of law against a decision of an appellate court shall be required if the appeal is based on, and objects to, one of the following procedural defects:

1. if the court that rendered the decision was not duly constituted,

2. if a judge participating in the decision was excluded by law from the exercise of judicial functions or was successfully challenged on grounds of prejudice,

3. if a party was denied its right to be heard,
4. if a party to the proceedings was not represented in accordance with the provisions of the law, unless such party consented explicitly or implicitly to the conduct of the proceedings,

5. if the decision was made on the basis of a hearing at which the provisions regarding the admission of the public to the proceedings were violated, or

6. if the decision does not contain a statement of reasons.

§ 75
Appeal against Refusal to Grant Leave

(1) The refusal to grant leave to appeal on points of law may be challenged separately by way of an appeal against refusal to grant leave.

(2) The decision on the appeal against a refusal to grant leave shall be made by the Federal Court of Justice by decree which shall contain a statement of reasons. The decree may be issued without a hearing.

(3) The appeal against refusal to grant leave shall be filed in writing with the Higher Regional Court within one month. The time period shall begin upon service of the decision being appealed.

(4) § 64(1) and (2), § 66(3), (4)no.1 and (5), §§ 67, 68, 72 and 73 (2) of this Act as well as §§ 192 to 201 of the German Courts Constitution Act regarding the deliberation and voting of the court and on legal protection against protracted judicial proceedings shall apply mutatis mutandis to the appeal against a refusal to grant leave. The appellate court shall be competent to issue preliminary injunctions.

(5) If leave to appeal on points of law is refused, the decision of the Higher Regional Court shall become final and binding upon service of the decree of the Federal Court of Justice. If leave to appeal on points of law is granted, the time period for filing the appeal shall begin upon service of the decree of the Federal Court of Justice.

§ 76
Right to Appeal, Formal Requirements and Time Limits

(1) The competition authority as well as the parties to the appeal proceedings shall be entitled to file an appeal on points of law.

(2) The appeal on points of law may be based only on the contention that the decision rests upon a violation of the law; §§ 546, 547 of the German Code of Civil Procedure shall apply mutatis mutandis. The appeal on points of law cannot be based upon the contention that the competition authority erroneously and in breach of § 48 assumed it had jurisdiction.

(3) The appeal on points of law shall be filed in writing with the Higher Regional Court within one month. The time period shall begin upon service of the decision being appealed.

(4) The Federal Court of Justice shall be bound by the findings of fact in the decision being appealed unless admissible and well founded reasons for an appeal on points of law have been put forth in respect of these findings.

(5) As for other matters, § 64(1) and (2), § 66(3), (4) no.1 and (5), §§ 67 to 69, 71 to 73 shall apply mutatis mutandis to appeals on points of law. The appellate court shall be competent to issue preliminary injunctions.
IV.
Common Provisions

§ 77
Capacity to Participate in the Proceedings

In addition to natural and legal persons, associations of persons without legal capacity shall have the capacity to participate in proceedings before the competition authority, in appeal proceedings and in appeal proceedings on points of law.

§ 78
Apportionment and Taxation of Costs

In appeal proceedings and in appeal proceedings on points of law, the court may order that the costs necessary for duly pursuing the matter shall be reimbursed, in whole or in part, by one of the parties if equity so requires. If a party caused costs incurred due to an unfounded appeal or by gross fault, the costs shall be imposed upon that party. As for other matters, the provisions of the German Code of Civil Procedure regarding the taxation of costs and the enforcement of court decisions allocating costs shall apply mutatis mutandis.

§ 78a
Electronic Transmission of Documents

In appeal proceedings and in appeal proceedings on points of law, § 130a(1) and (3) as well as § 133(1) sentence 2 of the German Code of Civil Procedure shall apply mutatis mutandis, provided that the parties pursuant to § 67 may use electronic legal communication services. The Federal Government and the Land governments shall determine, by way of an ordinance, the time from which electronic documents may be submitted to the courts and the format suitable for the processing thereof. The Land governments may delegate their powers in this regard, by way of an ordinance, to the Land judicial administrations. The permissibility of the electronic form may be restricted to individual courts or proceedings.

§ 79
Ordinances

The details of the proceedings before the competition authority shall be determined by the Federal Government by ordinance requiring the approval of the Bundesrat.

§ 80
Chargeable Acts

(1) In proceedings before the competition authority, costs (fees and expenses) shall be imposed to cover administrative effort. The following acts shall be subject to fees (chargeable acts):

1. notifications pursuant to § 31a(1) and § 39(1); in concentrations referred to the Bundeskartellamt by the European Commission, the application for referral submitted to the European Commission or the notification filed with the European Commission shall be deemed equal to the notification pursuant to § 39(1);
2. official acts on the basis of §§ 26, 30(3), § 31b(3), §§ 32 to 32d, § 34 – also in conjunction with §§ 50 to 50b –, §§ 36, 39, 40, 41, 42 and 60;

3. any discontinuation of the divestiture proceedings pursuant to § 41(3);

4. the issue of certified copies from the files of the competition authority.

The costs of publications, of public notices and of additional executed copies, duplicates and excerpts, as well as the contributions to be paid due to the analogous application of the German *Judicial Remuneration and Compensation Act* (*Justizvergütungs- und -entschädigungsgesetz*) shall also be charged as expenditures. The fee for the notification of a concentration pursuant to § 39(1) shall be credited against the fees for the clearance or prohibition of a concentration pursuant to § 36(1).

(2) The amount of the fees shall be determined according to the personnel and material expenses of the competition authority, taking into account the economic significance of the subject matter of the chargeable act. However, the fee rates shall not exceed

1. EUR 50,000 in the cases of §§ 36, 39, 40, 41(3) and (4) and § 42;

2. EUR 25,000 in the cases of § 31b(3), §§ 32 and 32b(1) as well as §§ 32c, 32d, 34 and 41(2) sentences 1 and 2;

3. (abolished)

4. EUR 5,000 in the cases of § 26(1) and (2), § 30(3) and § 31a (1);

5. EUR 17.50 for the issue of certified copies (paragraph 1 sentence 2 no. 4);

6.

a) in the cases of § 40(3a), also in conjunction with § 41(2) sentence 3 and § 42(2) sentence 2, the amount charged for the clearance, exemption or authorisation;

b) EUR 250 for decisions relating to agreements or decisions of the kind described in § 28(1);

c) in the cases of § 26(4), the amount for the decision pursuant to § 26(1) no. 4;

d) in the cases of §§ 32a and 60, one fifth of the fee in the main proceedings.

If the personnel and material expenses of the competition authority are unusually high in a particular case, taking into account the economic importance of the chargeable act concerned, the fee may be increased up to twice its amount. For reasons of equity, the fee determined according to sentences 1 to 3 may be reduced to a minimum of one tenth of its amount.

(3) As regards payment for several similar official acts or similar notifications by the same person liable to pay the fee, provision may be made for lump-sum fee rates which allow for the minor extent of administrative effort involved.

(4) Fees shall not be charged

1. for oral and written information and suggestions;

2. if they would not have arisen had the matter been handled correctly;

3. in the cases of § 42 if the preceding decision of the Bundeskartellamt pursuant to § 36(1) or § 41(3) has been reversed.
(5) If an application is withdrawn before a decision is made thereon, one half of the fee shall be paid. The same shall apply if an application is withdrawn within three months from its receipt by the competition authority.

(6) The person liable to pay the costs shall be

1. in the cases of paragraph 1 sentence 2 no. 1, whoever has submitted a notification or an application for referral;

2. in the cases of paragraph 1 sentence 2 no. 2, whoever has, by making an application or a notification, caused the competition authority to act, or the person against whom the competition authority has issued a decision;

3. in the cases of paragraph 1 sentence 2 no. 3, whoever was required to make the notification pursuant to § 39(2);

4. in the cases of paragraph 1 sentence 2 no. 4, whoever caused the copies to be made.

Liable to pay the costs shall also be whoever, by declaration made before the competition authority or communicated to it, assumed the obligation to pay the costs, or is liable by virtue of the law for the cost owed by another person. Several debtors shall be jointly and severally liable.

(7) The claim to payment of fees shall become statute-barred four years after the setting of the fees. The claim to reimbursement of disbursements shall become statute-barred four years after they have arisen.

(8) The Federal Government is authorised to regulate, by way of an ordinance which requires the approval of the Bundesrat, the fee rates and the collection of the fees from persons liable to pay fees under the provisions in paragraphs 1 to 6, as well as the reimbursement of disbursements pursuant to paragraph 1 sentence 3. For this purpose, it may also issue provisions which concern the exemption of legal persons under public law from costs, the statute of limitations, and the collection of costs.

(9) The Federal Government shall regulate, by way of an ordinance requiring the approval of the Bundesrat, the details of reimbursement of the costs incurred in proceedings before the competition authority in accordance with the principles of § 78.

Second Chapter
Administrative Fine Proceedings

§ 81
Provisions Concerning Administrative Fines


1. reaching an agreement, making a decision or engaging in concerted practices contrary to Article 101(1) or

2. abusing a dominant position contrary to Article 102 sentence 1.

(2) An administrative offence is committed by whoever intentionally or negligently

1. violates a provision in §§ 1, 19, 20(1) to (3) sentence 1 or 20(5), § 21(3) or (4), § 29 sentence 1 or § 41(1) sentence 1 concerning the prohibition of an agreement referred to therein, of a decision referred to
therein, of a concerted practice, of an abuse of a dominant position, a market position or of superior market power, of an unfair hindrance or differential treatment, of the refusal to admit an undertaking, of the exercise of coercion, the infliction of an economic disadvantage or the implementation of a concentration,

2. acts contrary to an enforceable order issued pursuant to

a) § 30(3), § 31b(3) nos 1 and 3, § 32(1), § 32a(1), § 32b(1) sentence 1 or § 41(4) no. 2, also in conjunction with § 40(3a) sentence 2, also in conjunction with § 41(2) sentence 3 or § 42(2) sentence 2, or § 60 or

b) § 39(5) or
c) § 47d(1) sentence 2 in conjunction with an ordinance pursuant to § 47f no. 1 or
d) § 47d(1) sentence 5 first half of the sentence in conjunction with an ordinance pursuant to § 47f(2),

3. contrary to § 39(1), fails to file a notification correctly or completely,

4. contrary to § 39(6), fails to file a notice or to file a notice correctly or completely or in time,

5. acts contrary to an enforceable obligation pursuant to § 40(3) sentence 1 or § 42(2) sentence 1,

5a. acts contrary to an ordinance pursuant to § 47f no. 3(a), (b) or (c) or an enforceable order based on such ordinance, to the extent that the ordinance refers to this fine provision for a specific offence,

5b. contrary to § 47k(2) sentence 1, also in conjunction with sentence 2 and in each case in conjunction with an ordinance pursuant to § 47k(8) sentence 1 nos 1 or 2, fails to communicate any of the changes referred to in § 47k(2) sentence 1 or to communicate such change correctly or completely or in time, or

6. contrary to § 59(2), also in conjunction with § 47d(1) sentence 1 or § 47k(7), fails to provide information or to provide information correctly, completely or in time, fails to surrender documents or to surrender documents completely or in time, fails to present business documents for the purpose of inspection and examination or to present them completely or in time, or does not tolerate the examination of such business documents or access to offices and business premises, or

7. contrary to § 81a(1) sentence 1, fails to provide information or to provide information correctly, completely or in time, or fails to surrender documents or to surrender documents correctly, completely or in time.

(3) An administrative offence is committed by whoever

1. contrary to § 21(1), requests a refusal to supply or purchase,

2. contrary to § 21(2), threatens or causes a disadvantage or promises or grants an advantage, or

3. contrary to § 24(4) sentence 3 or § 39(3) sentence 5, gives or uses information.

(4) In the cases of paragraph 1, paragraph 2 no. 1, no. 2 (a) and no. 5 and paragraph 3, the administrative offence may be punished by a fine of up to EUR 1 million. Beyond sentence 1, a higher fine may be imposed on an undertaking or an association of undertakings; the fine must not exceed 10 percent of the total turnover of such undertaking or association of undertakings achieved in the business year preceding the decision of the authority. Calculation of the total turnover must be based on the turnover achieved worldwide by all natural and legal persons operating as a single economic entity. The amount of the total turnover may be estimated. In all other cases, the administrative offence may be punished by a fine of up to EUR 100,000. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
(5) § 17(4) of the German Administrative Offences Act shall be applied to the setting of the fine, with the proviso that the economic benefit which was derived from the administrative offence may be disgorged by the fine pursuant to paragraph 4. If the fine is imposed for reasons of punishment only, this must be taken into account in setting the amount of the fine.

(6) Interest is payable on fines imposed on legal persons and associations of persons by way of an order imposing an administrative fine; fines bear interest as of two weeks after service of the order imposing the fine. § 288(1) sentence 2 and § 289 sentence 1 of the German Civil Code shall apply mutatis mutandis.

(7) The Bundeskartellamt may lay down general administrative principles on the exercise of its discretionary powers in determining the fine, in particular in setting the amount of the fine, and also with regard to its cooperation with foreign competition authorities.

(8) Proceedings for administrative offences as defined in paragraphs 1 to 3 shall become statute-barred in accordance with the provisions of the German Administrative Offences Act also if the offence is committed by dissemination of printed material. Administrative offences as defined in paragraph 1, paragraph 2 no. 1 and paragraph 3 shall become statute-barred after five years.

(9) Where the European Commission or the competition authorities of other Member States of the European Union, acting upon a complaint or ex officio, are engaged in proceedings for an infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union against the same agreement, the same decision or the same practice as the competition authority, the limitation period for administrative offences pursuant to paragraph 1 shall be interrupted by all acts of these competition authorities which correspond to acts under § 33(1) of the German Administrative Offences Act.

(10) The administrative authorities within the meaning of § 36(1) no. 1 of the German Administrative Offences Act shall be

1. the Bundesnetzagentur as the market transparency unit for electricity and gas for administrative offences under paragraph 2 no. 2 lit. c and d, no. 5a and no. 6 in cases of violation of § 47d(1) sentence 1 in conjunction with § 59(2),

2. the Bundeskartellamt as the market transparency unit for fuels for administrative offences under paragraph 2 no. 5b and no. 6 in cases of violation of § 47k(7) in conjunction with § 59(2), and

3. in all other cases referred to in paragraphs 1, 2 and 3 the Bundeskartellamt and the highest-ranking Land authority competent under the applicable laws of the respective Land, each for their own area of competence.

§ 81a
Disclosure Duties

(1) Where the imposition of a fine against a legal person or association of persons is considered under § 81(4) sentences 2 and 3, the legal person or association of persons is required under § 81 (10) to disclose, upon demand, the following information to the administrative authority:

1. total turnover of the undertaking or association of undertakings for the financial year that presumably was or is likely to be relevant for the authority's decision under § 81(4) sentence 2, and for the five preceding financial years,

2. the turnover of the undertaking or association of undertakings generated within a defined or definable period with all customers or products, with specific customers or products, or with customers or products that can be determined by abstract criteria,
and to surrender documents. § 81(4) sentence 3 shall apply to the calculation of turnover and total turnover. In this context, § 136(1) sentence 2 and § 163a(3) and (4) of the German Code of Criminal Procedure shall not apply mutatis mutandis.

(2) Paragraph 1 shall apply mutatis mutandis to a disclosure of information or surrender of documents to the court.

(3) Individuals acting on behalf of the legal person or association of persons may refuse to answer questions if the answers would expose them personally or a relative as specified in § 52(1) of the German Code of Criminal Procedure to the risk of being prosecuted for a criminal or administrative offence; the individual acting on behalf of the legal person or association of persons must be informed hereof. § 56 of the German Code of Criminal Procedure shall apply mutatis mutandis. Sentences 1 and 2 shall apply mutatis mutandis to a surrender of documents.

§ 82
Jurisdiction in Proceedings for the Imposition of an Administrative Fine against a Legal Person or Association of Persons

The competition authority shall be exclusively competent in proceedings for the imposition of an administrative fine against a legal person or association of persons (§ 30 of the German Administrative Offences Act) in cases arising from

1. a criminal offence which also fulfils the elements of § 81 (1), (2) no. 1 and (3), or

2. an intentional or negligent administrative offence pursuant to § 130 of the German Administrative Offences Act, where a punishable breach of duty also fulfils the elements of § 81(1), (2) no. 1 and (3).

This shall not apply if the proceedings pursuant to § 30 of the German Administrative Offences Act are referred to the public prosecutor by the authority.

§ 82a
Competences and Jurisdiction in Judicial Proceedings Concerning Administrative Fines

(1) In judicial proceedings concerning administrative fines, the representative of the competition authority may be allowed to address questions to parties, witnesses and experts.

(2) If the Bundeskartellamt has acted as the administrative authority in the preliminary proceedings, the enforcement of the administrative fine and of the amount of money the forfeit of which has been ordered shall be made by the Bundeskartellamt as the law enforcement authority, pursuant to the provisions on the enforcement of administrative fines, on the basis of a certified copy of the operative part of the judgment to be issued by the clerk of the court and endowed with the certificate of enforceability. The administrative fines and amounts of money the forfeit of which has been ordered shall accrue to the German Federal Treasury [Bundeskasse], which also bears the costs imposed on the State Treasury [Staatskasse].

§ 83
Jurisdiction of the Higher Regional Court in Judicial Proceedings

(1) The Higher Regional Court in whose district the competent competition authority has its seat shall decide in judicial proceedings concerning an administrative offence pursuant to § 81; it shall also decide on an application for judicial review (§ 62 of the German Administrative Offences Act) in the cases of § 52(2) sentence 3 and § 69(1) sentence 2 of the German Administrative Offences Act. § 140(1) no. 1 of the
German Code of Criminal Procedure in conjunction with § 46(1) of the German Administrative Offences Act shall not be applicable.

(2) The decisions of the Higher Regional Court shall be made by three members including the presiding member.

§ 84
Appeal to the Federal Court of Justice on Points of Law

The Federal Court of Justice shall decide on appeals on points of law (§ 79 of the German Administrative Offences Act). If the decision being appealed is set aside without a decision being taken on the merits of the case, the Federal Court of Justice shall refer the case back to the Higher Regional Court whose decision is being reversed.

§ 85
Proceedings for Revision of an Order Imposing an Administrative Fine

Proceedings for revision of an order of the competition authority imposing an administrative fine (§ 85(4) of the German Administrative Offences Act) shall be decided by the court having jurisdiction pursuant to § 83.

§ 86
Court Decisions Concerning Enforcement

The court decisions which become necessary for enforcement (§ 104 of the German Administrative Offences Act) shall be made by the court having jurisdiction pursuant to § 83.

Third Chapter
Enforcement

§ 86a
Enforcement

The competition authority may enforce its orders pursuant to the provisions applying to the enforcement of administrative measures. The amount of the penalty payment shall be at least EUR 1,000 and shall not exceed EUR 10 million.

Fourth Chapter
Civil Actions

§ 87
Exclusive Jurisdiction of the Regional Courts

Regardless of the value of the matter in dispute, the Regional Courts [Landgerichte] shall have exclusive jurisdiction in civil actions concerning the application of this Act, of Articles 101 or 102 of the Treaty on the
Functioning of the European Union or of Articles 53 or 54 of the Agreement on the European Economic Area. Sentence 1 shall apply also if the decision in a civil action depends, in whole or in part, on a decision to be taken pursuant to this Act, or on the applicability of Articles 101 or 102 of the Treaty on the Functioning of the European Union or of Articles 53 or 54 of the Agreement on the European Economic Area.

§ 88
Joining of Actions

An action under § 87(1) may be joined with an action based on another cause if the other cause has a legal or direct economic connection with the claim to be asserted before the court having jurisdiction pursuant to § 87; this shall apply also if another court has exclusive jurisdiction over the other cause of action.

§ 89
Jurisdiction of one Regional Court for Several Court Districts

(1) The Land governments are authorised to refer, by way of an ordinance, civil actions for which the Regional Courts have exclusive jurisdiction pursuant to § 87 to one Regional Court for the districts of several Regional Courts if such centralisation serves the administration of justice in cartel matters, in particular to ensure the uniformity of court practice. The Land governments may delegate their powers in this regard to their judicial administrations.

(2) The jurisdiction of one Regional Court for individual districts or for the entire territory of several Länder may be established by treaties between the Länder.

(3) The parties may be represented before the courts referred to in paragraphs 1 and 2 also by lawyers admitted to practice before the court which, in the absence of paragraphs 1 and 2, would have jurisdiction over the legal action.

§ 89a
Adjustment of the Value in Dispute

(1) If, within a legal action in which a claim pursuant to §§ 33 or 34a is asserted, a party satisfies the court that its economic situation would be seriously jeopardised if it had to bear the costs of litigation calculated on the basis of the full value in dispute, the court may, upon such party's application, order the obligation of this party to pay the court fees to be assessed on the basis of a part of the value in dispute which is adjusted to its economic situation. The court may make its order contingent on the party credibly demonstrating that the costs of litigation to be borne by it are not directly or indirectly assumed by a third party. The order entails that the benefiting party also has to pay its lawyer's fees only according to the adjusted part of the value in dispute. Where costs of litigation are imposed upon or assumed by the benefiting party, it shall reimburse the opposing party for paid court fees and the fees of its lawyer only on the basis of the adjusted value in dispute. Where the extra-judicial costs are imposed upon or assumed by the opposing party, the lawyer of the benefiting party may recover his fees from the opposing party according to the value in dispute applying to the opposing party.

(2) The application pursuant to paragraph 1 may be declared for the record of the registry of the court. It shall be made prior to the trial of the case on its merits. Thereafter the request shall only be admissible if the assumed or specified value in dispute is subsequently raised by the court. The opposing party shall be heard prior to the decision on the application.
§ 90
Information of and Participation by the Competition Authorities

(1) The Bundeskartellamt shall be informed by the court of all legal actions pursuant to § 87(1)[sic]. The court shall, upon demand, transmit to the Bundeskartellamt copies of all briefs, records, orders and decisions. Sentences 1 and 2 shall apply mutatis mutandis in other legal actions which concern the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

(2) The President of the Bundeskartellamt may, if he considers it to be appropriate to protect the public interest, appoint from among the members of the Bundeskartellamt a representative authorised to submit written statements to the court, to point out facts and evidence, attend hearings, present arguments and address questions to parties, witnesses and experts in such hearings. Written statements made by the representative shall be communicated to the parties by the court.

(3) If the significance of the legal action does not extend beyond the territory of a Land, the supreme Land authority shall take the place of the Bundeskartellamt for the purposes of paragraph 1 sentence 2 and paragraph 2.

(4) Paragraphs 1 and 2 shall apply mutatis mutandis to legal actions which have as their subject matter the enforcement of a price set pursuant to § 30 against a purchaser bound thereby or against another undertaking.

§ 90a
Cooperation of the Courts with the European Commission and the Competition Authorities

(1) In all judicial proceedings where Articles 101 or 102 of the Treaty on the Functioning of the European Union are applied the court shall, without undue delay after serving the decision on the parties, forward a duplicate of any decision to the European Commission via the Bundeskartellamt. The Bundeskartellamt may transmit to the European Commission the documents which it has obtained pursuant to § 90(1) sentence 2.

(2) In proceedings pursuant to paragraph 1, the European Commission may, acting on its own initiative, submit written observations to the court. In case of a request pursuant to Art. 15(3) sentence 5 of Council Regulation (EC) No 1/2003, the court shall provide the European Commission with all documents necessary for the assessment of the case. The court shall provide the Bundeskartellamt and the parties with a copy of the written observations of the European Commission made pursuant to Article 15(3) sentence 3 of Council Regulation (EC) No 1/2003. The European Commission may also submit oral observations in the hearing.

(3) In proceedings pursuant to paragraph 1, the court may ask the European Commission to transmit information in its possession or for its observations on questions concerning the application of Articles 101 or 102 of the Treaty on the Functioning of the European Union. The court shall inform the parties about a request made pursuant to sentence 1, and shall provide them as well as the Bundeskartellamt with a copy of the reply of the European Commission.

(4) In the cases of paragraphs 2 and 3, the dealings between the court and the European Commission may also be made via the Bundeskartellamt.
§ 91
Antitrust Division of the Higher Regional Court

The Higher Regional Courts shall set up antitrust divisions. They shall decide on legal matters assigned to them pursuant to § 57(2) sentence 2, § 63(4), §§ 83, 85 and 86, and on appeals from final judgments and other decisions in civil actions pursuant to § 87(1)[sic].

§ 92
Jurisdiction of a Higher Regional Court or of the Supreme Court of a Land for Several Court Districts in Administrative Matters and Proceedings Concerning Administrative Fines

(1) Where several Higher Regional Courts exist in a Land, the legal matters for which the Higher Regional Courts have exclusive jurisdiction pursuant to § 57(2) sentence 2, § 63(4), §§ 83, 85 and 86, may be assigned by the Land governments by way of an ordinance to one or several of the Higher Regional Courts or to the Supreme Court of a Land if such centralisation serves the administration of justice in cartel matters, in particular to ensure the uniformity of court practice. The Land governments may delegate their powers in this regard to their judicial administrations.

(2) The jurisdiction of one Higher Regional Court or of the Supreme Court of a Land for individual districts or for the entire territory of several Länder may be established by treaties between the Länder.

§ 93
Jurisdiction over Appeals

§ 92(1) and 92(2) shall apply mutatis mutandis to decisions on appeals from final judgments and from other decisions in civil actions pursuant to § 87(1)[sic].

§ 94
Cartel Panel of the Federal Court of Justice

(1) The Federal Court of Justice shall set up a cartel panel; it shall decide on the following judicial remedies:

1. in administrative matters, on appeals on points of law from decisions of the Higher Regional Courts (§§ 74, 76) and on appeals from the refusal to grant leave to appeal (§ 75);

2. in proceedings concerning administrative fines, on appeals on points of law from decisions of the Higher Regional Courts (§ 84);

3. in civil actions pursuant to § 87(1)[sic]:

a) on appeals on points of law from final judgments of the Higher Regional Courts including appeals from the refusal to grant leave to appeal,

b) on leap-frog appeals from final judgments of the Regional Courts,

c) on appeals on points of law from decisions of the Higher Regional Courts in the cases of § 574(1) of the German Code of Civil Procedure.

(2) In proceedings concerning administrative fines, the cartel panel shall constitute a criminal panel within the meaning of § 132 of the German Courts Constitution Act, in all other matters it shall constitute a civil panel.
§ 95
Exclusive Jurisdiction

The jurisdiction of the courts which are competent under this Act shall be exclusive.

§ 96
(abolished)

Part IV
Award of Public Contracts

First Chapter
Award Procedures

§ 97
General Principles

(1) Public contracting entities shall procure goods, works and services in accordance with the following provisions through competition and transparent award procedures.

(2) The participants in an award procedure shall be treated equally unless discrimination is expressly required or permitted under this Act.

(3) The interests of small and medium-sized undertakings shall primarily be taken into account in an award procedure. Contracts shall be subdivided into partial lots and awarded separately according to the type or area of specialisation (trade-specific lots). Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons. If an undertaking which is not a public contracting entity is entrusted with the realisation or execution of a public assignment, it shall be obliged by the contracting entity, so far as it subcontracts to third parties, to proceed according to sentences 1 to 3.

(4) Contracts shall be awarded to skilled, efficient, law-abiding and reliable undertakings. Contractors may be expected to meet additional requirements involving social, environmental or innovative aspects if these have a direct relation to the subject matter of the contract and arise from the description of the service to be rendered. Other or further requirements may only be imposed on contractors if federal law or the laws of a Land provide for this.

(4a) Contracting entities can implement or allow the use of pre-qualification systems to verify the suitability of undertakings.

(5) The tender which is the most economically advantageous shall be accepted.

(6) The Federal Government is empowered to define more precisely, by way of an ordinance requiring the approval of the Bundesrat, the procedure to be followed in awarding contracts, in particular with regard to the tender notice, the process and the types of procedure, the selection and examination of undertakings and tenders, the conclusion of the contract as well as other issues relating to the award procedure.

(7) Undertakings shall have a right to the provisions concerning the award procedure being complied with by the contracting entity.
§ 98  
Contracting Entities

Public contracting entities within the meaning of this Part are:

1. regional or local authorities and their special funds,

2. other legal persons under public or private law which were established for the specific purpose of meeting non-commercial needs in the general interest, if they are for the most part financed individually or jointly through a participation or in some other way by entities within the meaning of nos 1 or 3, or if such entities supervise their management or have appointed more than half of the members of one of their management or supervisory boards. The same shall apply if the entity which individually or together with others provides, for the most part, such financing or has appointed the majority of the members of a management or supervisory board, falls under sentence 1,

3. associations whose members fall under nos 1 or 2,

4. natural or legal persons under private law which operate in the fields of drinking water, energy supply or transport if these activities are exercised on the basis of special or exclusive rights granted by a competent authority, or if contracting entities falling under nos 1 to 3 can individually or jointly exercise a controlling influence upon these persons; special or exclusive rights are rights the effect of which is to limit the exercise of these activities to one or more undertakings and which substantially affect the ability of other undertakings to carry out such activity. Activities in the fields of drinking water, energy supply or transport shall be services as listed in the annex,

5. natural or legal persons under private law as well as legal persons under public law, so far as they do not fall under no. 2, in cases where they receive funds for civil engineering projects, for building hospitals, sports, leisure or recreational facilities, school, university or administrative buildings or for related services and design contests from entities falling under nos 1 to 3, and where these funds are used to finance more than 50% of these projects,

6. natural or legal persons under private law who have concluded a works concession contract with entities falling under nos 1 to 3, with respect to contracts awarded to third parties.

§ 99  
Public Contracts

(1) Public contracts are contracts for pecuniary interest concluded between public contracting entities and undertakings for the procurement of services whose subject matter is supplies, works or services, works concessions and design contests for the award of a service contract.

(2) Supply contracts are contracts for the procurement of goods involving in particular a purchase or hire purchase or leasing, or a lease with or without a purchase option. The contracts may also include ancillary services.

(3) Works contracts are contracts either for the execution or both the design and execution of a work project or building for the public contracting entity which is the result of civil engineering or building construction work and is to fulfil a commercial or technical function, or for the execution of a work by a third party which is for the direct economic benefit of the contracting entity, corresponding to the requirements specified by the contracting entity.

(4) Service contracts are contracts for the performance of services which are not covered by paragraph 2 or paragraph 3.
(5) Design contests within the meaning of this Part are only such award procedures which are intended to enable the contracting entity to acquire a plan on the basis of a comparative evaluation by a jury with or without the award of prizes.

(6) A works concession is a contract for the execution of a works contract where consideration for the construction work consists, instead of remuneration, in the limited right to use the installation plus, if appropriate, the payment of a fee.

(7) Contracts relevant under defence or security aspects are contracts for at least one of the services set out under nos 1 to 4 below:

1. the supply of military equipment within the meaning of paragraph 8, including any related parts, components or assembly kits;

2. the supply of equipment awarded under a classified contract within the meaning of paragraph 9, including any related parts, components or assembly kits;

3. construction works, supplies and services directly connected with the equipment referred to in nos 1 and 2 in all phases of the equipment's life cycle;

4. construction works and services specifically for military purposes or construction works and services awarded under a classified contract within the meaning of paragraph 9.

(8) Military equipment is any equipment that is designed specifically for military purposes or adjusted to suit military purposes and destined to be used as a weapon, ammunition or war material.

(9) A classified contract is a contract for security purposes

1. in the performance of which classified information under § 4 of the German Act on the Prerequisites and Procedures for Security Clearance Checks Undertaken by the Federal Government [Sicherheitsüberprüfungsgesetz] or corresponding provisions on the level of the Länder is used, or

2. which requires or contains classified information within the meaning of no. 1.

(10) Public contracts the subject matter of which is both the purchase of goods and the procurement of services shall be deemed service contracts if the value of the services performed exceeds the value of the goods supplied. Public contracts which, in addition to services, involve the execution of construction works which, in relation to the principal subject matter, are ancillary services shall be deemed service contracts.

(11) In the case of contracts for the execution of several activities, the relevant provisions shall be those which apply to the activity which constitutes the principal subject matter.

(12) If, in the case of contracts for the exercise of activities in the fields of drinking water, energy supply or transport or in the area of the contracting entities under the German Federal Mining Act [Bundesberggesetz] and in the case of activities of contracting entities in accordance with § 98 nos 1 to 3, it cannot be determined which activity constitutes the principal subject matter, the contract shall be awarded according to the provisions applying to contracting entities under § 98 nos 1 to 3. If one of the activities the exercise of which forms the subject matter of the contract concerns both an activity in the fields of drinking water, energy supply or transport or in the area of the contracting parties under the Federal Mining Act, as well as an activity which does not fall into the areas of contracting entities under § 98 nos 1 to 3, and it cannot be determined which activity constitutes the principal subject matter, the contract shall be awarded according to those provisions applying to contracting entities operating in the fields of drinking water, energy supply and transport or the Federal Mining Act.

(13) If parts of a contract for works, supplies or services are relevant to defence or security, that contract will as a whole be awarded in accordance with the provisions applicable to contracts relevant to defence or security, provided that procurement by way of a uniform award is justified for objective reasons. If part of a contract for works, supplies or services is relevant to defence or security, but the other part neither falls into
that area nor under the scope of application of the German Ordinance on the Award of Public Contracts [Vergabeverordnung] or of the German Sector Ordinance [Sektorenverordnung], the award of that contract will not be subject to Part IV of this Act if procurement by way of a uniform award is justified for objective reasons.

§ 100
Scope of Application

(1) This Part shall apply to contracts whose contract value reaches or exceeds the thresholds applicable in each case. The threshold is determined for contracts

1. that are awarded by contracting entities within the meaning of § 98 nos 1 to 3, 5 and 6 and do not fall under nos 2 or 3, based on § 2 of the German Ordinance on the Award of Public Contracts,

2. that are awarded by contracting entities within the meaning of § 98 nos 1 to 4 and include activities in the fields of transport or drinking water or energy supply, based on § 1 of the German Sector Ordinance,

3. that are awarded by contracting entities within the meaning of § 98 and are relevant under defence or security aspects within the meaning of § 99(7), based on the rules issued by regulation pursuant to § 127 no. 3 of this Act.

(2) This Part shall not apply to the cases referred to in paragraphs 3 to 6 and 8 and in §§ 100a to 100c.

(3) This Part shall not apply to employment contracts.

(4) This Part shall not apply to the award of contracts the subject matter of which is the following:

1. arbitration and conciliation services, or

2. research and development services, unless the results of such services become the sole property of the contracting entity for its use in the conduct of its own activities and the service is fully remunerated by the contracting entity.

(5) This Part shall not apply to contracts concerning

1. the acquisition of land, existing buildings or other immovable property,

2. the rental of land, existing buildings or other immovable property,

3. rights to land, existing buildings, or other immovable property,

irrespective of how these contracts are financed.

(6) This Part shall not apply to the award of contracts

1. where application of this Part would force the contracting entity to supply information in connection with the award procedure or the execution of the order the disclosure of which it considers contrary to the essential interests of the security of the Federal Republic of Germany within the meaning of Article 346(1)(a) of the Treaty on the Functioning of the European Union,

2. that fall within the scope of application of Article 346(1)(b) of the Treaty on the Functioning of the European Union.

(7) Essential interests of security within the meaning of paragraph 6 justifying non-application of this Part may be affected in the operation or deployment of the armed forces, in the implementation of measures to combat terrorism or in the procurement of information technology or telecommunication systems.
This Part shall not apply to the award of contracts that are not relevant to defence or security within the meaning of § 99(7), and

1. are declared to be secret in accordance with German legal and administrative provisions,

2. the performance of which requires special security measures to be taken under the provisions set forth in no. 1,

3. warrant non-application of procurement law for purposes of the operation or deployment of the armed forces or the implementation of measures to combat terrorism or in connection with the procurement of information technology or telecommunication systems in order to protect essential national security interests,

4. are awarded in pursuance of an international agreement concluded between the Federal Republic of Germany and one or more countries which are not parties to the Agreement on the European Economic Area, and cover a project which is to be implemented and financed jointly by the signatory states and which is subject to different procedural rules,

5. are awarded in pursuance of an international agreement relating to the stationing of troops and are subject to special procedural rules, or

6. are awarded pursuant to the particular procedure of an international organisation.

§ 100a
Special Exceptions for Contracts that are not Sector-Specific and not Relevant to Defence or Security

(1) In the case of § 100(1) sentence 2 no. 1, this Part shall not only not apply to the cases set forth in § 100(3) to (6) and (8), but shall equally not apply to the contracts specified in paragraphs 2 to 4.

(2) This Part shall not apply to the award of contracts the subject matter of which is the following:

1. the purchase, development, production or co-production of programmes that are intended for broadcast via radio or television channels, as well as the broadcast of programmes, or

2. financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions entered into by the contracting entities to raise money or capital, as well as central bank services.

(3) This Part shall not apply to the award of service contracts to a person that is itself a contracting entity within the meaning of § 98 nos 1, 2 or 3 and, by virtue of a law or ordinance, has an exclusive right to perform the contract.

(4) This Part shall not apply to the award of contracts the main purpose of which is to enable the contracting entity to provide or operate public telecommunication networks or to provide one or several telecommunication services to the public.

§ 100b
Special Exceptions for Certain Sectors

(1) In the case of § 100(1) sentence 2 no. 2, this Part shall not only not apply to the cases set forth in § 100(3) to (6) and (8), but shall equally not apply to the contracts specified in paragraphs 2 to 9.

(2) This Part shall not apply to the award of contracts the subject matter of which is the following:
1. financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions entered into by the contracting entities to raise money or capital, as well as central bank services,

2. in the case of activities relating to the supply of drinking water: the procurement of water, or

3. in the case of activities relating to the supply of energy: the procurement of energy or fuels for the production of energy.

(3) This Part shall not apply to the award of contracts to a person that is itself a contracting entity within the meaning of § 98 nos 1, 2 or 3 and, by virtue of a law or ordinance, has an exclusive right to perform the contract.

(4) This Part shall not apply to the award of contracts

1. that are awarded by a contracting entity within the meaning of § 98 no. 4 if they serve purposes other than those relevant to the sectoral activity,

2. that are awarded for carrying out activities in the fields of drinking water or energy supply or transport outside the territory of the European Union, where this does not involve the physical use of a network or facility within the European Union,

3. that are awarded for the purpose of resale or lease to third parties, provided that

a) the contracting entity has no special or exclusive right to sell or lease the subject of such contracts and

b) other undertakings are free to sell or lease these products under the same conditions as the respective contracting entity, or

4. that serve the purpose of carrying out an activity in the fields of drinking water or energy supply or transport, if the European Commission, in accordance with Article 30 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 7 of 7 January 2005, p. 7), has established that this activity in Germany is directly exposed to competition on markets to which access is not restricted, and this has been published in the Federal Gazette by the Federal Ministry of Economics and Technology.

(5) This Part shall not apply to the award of works concessions for the purpose of carrying out an activity in the fields of drinking water or energy supply or transport.

(6) Subject to the provisions of paragraph 7, this Part shall not apply to the award of contracts

1. that are awarded to an undertaking affiliated with the contracting entity or

2. that are awarded by a joint venture formed by several contracting entities active in the fields of drinking water or energy supply or transport exclusively for the purpose of carrying out these activities, to an undertaking affiliated with one of these contracting entities.

(7) Paragraph 6 shall apply only if at least 80% of the average turnover achieved by the affiliated undertaking in the preceding three years within the European Union in the respective supply, works or services sector derives from the provision of such supplies or services to the contracting entities with which it is affiliated. If the undertaking has been in existence for less than three years, paragraph 6 shall apply if it is expected that the undertaking will achieve at least 80% in the first three years of its existence. If the same or similar supplies, works or services are provided by more than one undertaking affiliated with the contracting entity, the percentage figure shall be calculated taking into account the total turnover achieved by these affiliated undertakings from the provision of the supplies or services. § 36(2) and (3) shall apply mutatis mutandis.
Subject to the provisions of paragraph 9, this Part shall not apply to the award of contracts

1. that are awarded by a joint venture formed by several contracting entities active in the fields of drinking water or energy supply or transport exclusively for the purpose of carrying out these activities, to one of these contracting entities, or

2. that are awarded by a contracting entity to a joint venture within the meaning of paragraph 1 of which it forms part.

(9) Paragraph 8 shall apply only if

1. the joint venture has been set up to carry out the activity concerned over a period of at least three years, and

2. the instrument setting up the joint venture stipulates that the contracting entities constituting the joint venture will be part thereof for at least the same period.

§ 100c
Special Exceptions for the Defense and Security Sectors

(1) In the case of § 100(1) sentence 2 no. 3, this Part shall not only not apply to the cases set forth in § 100(3) to (6), but shall equally not apply to the contracts specified in paragraphs 2 to 4.

(2) This Part shall not apply to the award of contracts

1. the subject matter of which is financial services, excluding insurance services,

2. that are awarded for the purpose of intelligence operations,

3. that are awarded as part of a cooperation programme
   a) that is based on research and development and
   b) is conducted together with at least one other EU Member State for the development of a new product and, where applicable, the later phases of the entire or part of the product's life cycle,

4. that are awarded by the Federal government, the government of a Land or a local authority to another government or to a local authority of another state, and cover any of the following subject matters:
   a) the supply of military equipment or equipment awarded under a classified contract within the meaning of § 99(9),
   b) construction works and services directly connected to such equipment,
   c) construction works and services specifically for military purposes, or
   d) construction works and services awarded under a classified contract within the meaning of § 99(9).

(3) This Part shall not apply to the award of contracts that are awarded in a country outside the European Union; this also includes procurements for civilian purposes as part of a deployment of armed forces or of federal police or police forces of the Länder outside the territory of the European Union if the operation requires the relevant contract to be concluded with undertakings that are domiciled in the area of operation. Procurements for civilian purposes means the procurement of non-military products, works or services for logistical purposes.

(4) This Part shall not apply to the award of contracts subject to special procedural rules
1. arising under an international convention or international agreement concluded between one or more Member States on the one hand and one or more non-Member States that are not party to the Agreement on the European Economic Area on the other,

2. arising under an international convention or an international agreement in connection with a stationing of troops affecting undertakings of a Member State or a non-Member State, or

3. applicable to an international organisation if such organisation effects procurements for its own purposes or if a Member State must award contracts based on such rules.

§ 101
Types of Award Procedures

(1) Public supply, works and service contracts shall be awarded through open procedures, restricted procedures, negotiated procedures or in competitive dialogue.

(2) Open procedures are procedures whereby an unlimited number of undertakings is publicly invited to submit a tender.

(3) Restricted procedures are procedures whereby a public invitation to participate is made and a limited number of undertakings from among the candidates is invited to submit a tender.

(4) Competitive dialogue is a procedure for the award of particularly complex contracts by public contracting entities within the meaning of § 98 nos 1 to 3, so far as they are not active in the fields of drinking water or energy supply or transport, and § 98 no. 5. In this procedure an invitation to participate is made and selected undertakings are invited to negotiate all the details of the contract.

(5) Negotiated procedures are procedures whereby the contracting entity consults undertakings of its choice, with or without any prior public invitation to participate, to negotiate the terms of the contract with one or more of them.

(6) An electronic auction serves to determine electronically the most economically advantageous tender. A dynamic electronic procedure is an open time-limited and completely electronic award procedure for the procurement of services which are customary on the market, where the specifications generally available on the market meet the requirements of the contracting entity.

(7) Public contracting entities shall apply the open procedure unless otherwise permitted by this Act. Contracting entities active in the fields of drinking water or energy supply or transport may freely choose between the open procedure, the restricted procedure and the negotiated procedure. Where the contracts to be awarded are relevant to defence or security, public contracting entities may choose between the restricted procedure and the negotiated procedure.

§ 101a
Information and Standstill Obligation

(1) The contracting entity shall inform the unsuccessful tenderers in writing and without undue delay of the name of the successful undertaking, the reasons for the rejection of their tenders and of the earliest date of the conclusion of the contract. This shall also apply to candidates who were not informed of the rejection of their tenders before the notification of the decision on the award was sent to the successful tenderers. A contract may be concluded at the earliest 15 calendar days after the information pursuant to sentences 1 and 2 has been sent. If the information is sent by fax or electronically, the standstill period shall be reduced to ten calendar days. The standstill period shall begin on the day after which the contracting entity despatches the information; the date of receipt by the tenderer and candidate in question shall be irrelevant.
The obligation to inform the tendering parties shall not apply in cases in which negotiation procedures are justified without previous notification on grounds of extreme urgency.

§ 101b
Ineffectiveness

(1) A contract shall be deemed ineffective from the outset if the contracting entity

1. has violated § 101a or

2. has awarded a public contract directly to an undertaking without inviting other undertakings to participate in the award procedure and without this being expressly permissible in accordance with the law

and this violation has been established in review proceedings in accordance with paragraph 2.

(2) Ineffectiveness pursuant to paragraph 1 can only be established if this is claimed in review proceedings within 30 calendar days after knowledge of the infringement and at the latest six months after conclusion of the contract. If the contracting entity has published the award of the contract in the Official Journal of the European Union, the time limit for claiming ineffectiveness shall end 30 calendar days after publication of the notice of the award in the Official Journal of the European Union.

Second Chapter
Review Procedures

I.
Reviewing Authorities

§ 102
Principle

Without prejudice to review by the supervisory authorities, any award of public contracts shall be subject to review by the public procurement tribunals.

§ 103
(abolished)

§ 104
Public Procurement Tribunals

(1) For contracts attributable to the Federation, the federal public procurement tribunals shall review the awarding of public contracts, and the Land public procurement tribunals for contracts attributable to the Länder.

(2) Rights under § 97(7) as well as other claims against public contracting entities for the performance or omission of an act in award procedures may only be asserted before the public procurement tribunals and the appellate court.
(3) The jurisdiction of the civil courts over damage claims and the powers of the competition authorities to prosecute infringements, especially of §§ 19 and 20, shall remain unaffected.

§ 105
Composition, Independence

(1) The public procurement tribunals shall exercise their functions independently and on their own responsibility within the limits of the law.

(2) The public procurement tribunals shall take their decisions through a chairman and two associate members of which one shall serve in an honorary capacity (honorary associate member). The chairman and the regular associate member must be civil servants appointed for life with the qualification to serve in the senior civil service, or comparable expert employees. Either the chairman or the regular associate member must be qualified to serve as a judge; generally this should be the chairman. The associate members should have in-depth knowledge of public procurement, the honorary associate members should additionally have several years of practical experience in the field of public procurement. Where the awarding of contracts relevant under defence or security aspects within the meaning of § 99(7) is reviewed, the public procurement tribunals may, in deviation of sentence 1, also take their decisions through a chairman and two regular associate members.

(3) The tribunal may assign the case to the chairman or to the regular associate member without a hearing by unappealable decision, for him/her to decide alone. Such an assignment shall be possible only if the case involves no major factual or legal difficulties, and the decision will not be of fundamental importance.

(4) The members of the tribunal shall be appointed for a term of office of five years. They take their decisions independently and are bound only by the law.

§ 106
Establishment, Organisation

(1) The Federation shall establish the necessary number of public procurement tribunals at the Bundeskartellamt. The establishment and composition of the public procurement tribunals as well as the allocation of duties shall be determined by the President of the Bundeskartellamt. Honorary associate members and their substitute members shall be appointed by the President upon a proposal by the central organisations of the chambers under public law. Having obtained approval from the Federal Ministry of Economics and Technology, the President of the Bundeskartellamt shall issue rules of procedure and publish these in the Federal Gazette.

(2) The establishment, organisation and composition of the entities (review bodies) of the Länder mentioned in this Chapter shall be determined by the authorities competent under the laws of the Länder or, in the absence of any such determination, by the Land government which may delegate this power. The Länder may establish joint review bodies.

§ 106a
Delimitation of Competence of the Public Procurement Tribunals

(1) The federal public procurement tribunal shall be responsible for reviewing the procedures for the award of public contracts

1. of the Federation;
2. of contracting entities within the meaning of § 98 no. 2 so far as the Federation for the most part manages the participation, or has otherwise predominantly provided means of financing or predominantly supervises its management or has appointed the majority of the members of the management or supervisory board, unless the undertakings which are part of the contracting entity have agreed that another public procurement tribunal shall be competent;

3. of contracting entities within the meaning of § 98 no. 4 so far as the Federation exercises a controlling influence on them; a controlling influence exists if the Federation directly or indirectly owns the majority of the subscribed capital of the contracting entity or holds the majority of the voting rights attached to the shares of the contracting entity or can appoint more than half of the members of the administrative, management or supervisory board of the contracting entity;

4. of contracting entities within the meaning of § 98 no. 5 so far as funding has been granted for the most part by the Federation;

5. of contracting entities within the meaning of § 98 no. 6 so far as the contracting entity falling under § 98 nos 1 to 3 is attributable to the Federation;

6. that are performed for the Federation by way of an official delegation of powers.

(2) If the award procedure is carried out for the Federation by a Land acting on federal commission, the public procurement tribunal of the Land shall be the competent authority. If, in application of paragraph 1 nos 2 to 6, a contracting entity is attributable to a Land, the public procurement tribunal of the respective Land shall be the competent authority.

(3) In all other cases the competence of the public procurement tribunals shall be determined according to the seat of the contracting entity. In the case of procurements which involve more than one Land, the contracting entities shall name only one competent public procurement tribunal in the publication of the contract notice.

II. Proceedings before the Public Procurement Tribunal

§ 107
Initiation of Proceedings, Application

(1) The public procurement tribunal shall initiate review proceedings only upon application.

(2) Every undertaking that has an interest in the contract and claims that its rights under § 97(7) were violated by non-compliance with the provisions governing the awarding of public contracts has the right to file an application. In doing so, it must show that it has been or risks being harmed by the alleged violation of public procurement provisions.

(3) The application is inadmissible if

1. the applicant became aware of the violation of public procurement provisions during the award procedure, but did not complain to the contracting entity without undue delay,

2. violations of public procurement provisions which become apparent from the tender notice are not notified to the contracting entity by the end of the period for the submission of a tender or application specified in the notice,
3. violations of public procurement provisions which only become apparent from the award documents are not notified to the contracting entity by the end of the period for the submission of a tender or application specified in the notice,

4. more than 15 calendar days have expired since receipt of notification from the contracting entity that it is unwilling to redress the complaint.

Sentence 1 shall not apply to an application under § 101b(1) no. 2 to have the award contract declared ineffective. § 101a(1) sentence 2 shall remain unaffected.

§ 108
Form

(1) The application shall be submitted in writing to the public procurement tribunal and substantiated without undue delay. It should state a specific request. An applicant without a domicile or habitual residence, seat or headquarters within the scope of application of this Act shall appoint an authorised receiving agent within the scope of application of this Act.

(2) The substantiation must designate the respondent, contain a description of the alleged violation of rights with a description of the facts, as well as a list of the available evidence, and show that an objection was made to the contracting entity; it should name the other parties, if known.

§ 109
Parties to the Proceedings, Admission to the Proceedings

The parties to the proceedings are the applicant, the contracting entity and the undertakings the interests of which are severely affected by the decision and which are therefore admitted by the public procurement tribunal to the proceedings. The decision to admit a party to the proceedings shall be incontestable.

§ 110
Principle of Investigation

(1) The public procurement tribunal shall investigate the facts ex officio. In doing so, it may limit itself to the facts presented by the parties or those of which it can be reasonably expected to be aware. The public procurement tribunal shall not be obliged to review extensively the lawfulness of the award procedure. In its entire activities, it shall take care to not unduly impede the course of the award procedure.

(2) The public procurement tribunal shall review the application for manifest inadmissibility or unfoundedness. In doing so, it shall also consider a written statement lodged by the contracting entity as a precautionary measure (protective writ). Unless the application is clearly inadmissible or unfounded, the public procurement tribunal shall serve a copy thereof upon the contracting entity and request from the contracting entity the files which document the award procedure (award files). The contracting entity shall immediately make the award files available to the tribunal. §§ 57 to 59 (1) to (5) and § 61 shall apply mutatis mutandis.

§ 110a
Storing of Confidential Documents

(1) The public procurement tribunal ensures the confidentiality of classified information and other confidential information contained in the documents transmitted by the parties.
(2) The members of the public procurement tribunal are subject to a duty of confidentiality; type and content of the deeds, files, electronic documents and information kept confidential must not be recognisable from the reasons given for the decision.

§ 111  
Access to Files

(1) The parties may access the files at the public procurement tribunal and may obtain executed copies, excerpts or transcripts from the clerk's office at their own expense.

(2) The public procurement tribunal shall refuse access to documents where this is necessary for important reasons, in particular for the protection of secrets or to protect business or trade secrets.

(3) Every party shall indicate the secrets named in paragraph 2 when sending its files or representations and shall mark them accordingly in the documents. If this is not done, the public procurement tribunal may assume that the party consents to access being granted.

(4) Refusal to grant access to the files may be challenged only in connection with an immediate appeal on the merits of the case.

§ 112  
Hearing

(1) The public procurement tribunal shall decide on the basis of a hearing, which should be limited to one date. All parties shall have an opportunity to state their case. With the consent of the parties or in the case of the inadmissibility or manifest unfoundedness of the application, a decision may be taken on the basis of the files.

(2) The case may be discussed and decided also if the parties do not appear or are not duly represented at the hearing.

§ 113  
Expedition

(1) The public procurement tribunal shall take its decision and give reasons in writing within a period of five weeks of receipt of the application. In the case of particular factual or legal difficulties, the chairman may in exceptional cases by notice to the parties extend this period by the required time. The extended period shall not exceed two weeks. The chairman shall give reasons in writing for this order.

(2) The parties shall co-operate in clarifying the facts in a manner appropriate to a course of action designed to further and speedily conclude the proceedings. Time limits may be set for the parties, after the expiry of which further submissions may be disregarded.

§ 114  
Decision of the Public Procurement Tribunal

(1) The public procurement tribunal shall decide whether the applicant's rights were violated, and shall take suitable measures to remedy a violation of rights, and to prevent any impairment of the interests affected. It shall not be bound by the applications and may also independently intervene to ensure the lawfulness of the award procedure.
(2) Once an award has been made, it cannot be revoked. If the review procedure becomes obsolete by the granting of the award, cancellation, discontinuance of the award procedure or in any other way, the public procurement tribunal shall determine, upon the application of a party, whether there has been a violation of rights. § 113(1) shall be inapplicable in this case.

(3) The public procurement tribunal shall decide by way of an administrative act. Decisions shall be enforced, also against public authorities, in accordance with the administrative enforcement acts of the Federation and the Länder. §§ 61 and 86a sentence 2 shall apply mutatis mutandis.

§ 115
Suspension of the Award Procedure

(1) If the public procurement tribunal informs the contracting entity in writing about the application for review, the latter must not make the award prior to the decision of the public procurement tribunal and before the expiry of the period for a complaint pursuant to § 117(1).

(2) The public procurement tribunal may allow the contracting entity, upon its application or upon application by the undertaking that has been named by the contracting entity pursuant to § 101a as the undertaking to be awarded the contract, to award the contract after the expiry of two weeks after the announcement of this decision if, taking into account all interests which may be impaired as well as the interest of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award until the end of the review outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant to defence or security within the meaning of § 99(7) are concerned, special defence and security interests must additionally be taken into account. The public procurement tribunal shall also consider the overall prospects of the applicant of winning the award in the award procedure. The prospects of success of the application for review need not be taken into account in every case. The appellate court may, upon application, reinstate the prohibition of the award pursuant to paragraph 1; § 114(2) sentence 1 shall remain unaffected. If the public procurement tribunal does not allow the award, the appellate court may, upon application by the contracting entity, allow the immediate award subject to the conditions in sentences 1 to 4. § 121(2) sentences 1 and 2 and §121(3) shall apply mutatis mutandis to the proceedings before the appellate court. An immediate appeal pursuant to § 116(1) shall not be admissible against decisions taken by the public procurement tribunal under this paragraph.

(3) If during the procurement procedure any rights of the applicant under § 97(7) are jeopardised in another way than by the imminent award, the tribunal may, upon specific application, intervene in the award procedure through further preliminary measures. In doing so, it shall apply the evaluation criterion of paragraph 2 sentence 1. This decision shall not be separately challengeable. The public procurement tribunal may enforce the additional preliminary measures under the administrative enforcement acts of the Federation and the Länder; the measures shall be immediately enforceable. § 86a sentence 2 shall apply mutatis mutandis.

(4) If the contracting entity claims that the requirements of § 100(8) nos 1 to 3 are fulfilled, the prohibition of the award pursuant to paragraph 1 shall lapse five business days after service of a corresponding brief to the applicant; the public procurement tribunal shall serve the brief without undue delay after its receipt. The appellate court may, upon application, reinstate the prohibition of the award. § 121(1) sentence 1, §121(2) sentence 1 and §121(3) and (4) shall apply mutatis mutandis.

§ 115a
Exclusion of Divergent Land Law

Any deviation under Land law from the provisions on the administrative procedure contained in this subdivision of the Act shall not be admissible.
III. Immediate Appeal

§ 116 Admissibility, Jurisdiction

(1) Immediate appeals shall be admissible against decisions of a public procurement tribunal. An immediate appeal may be filed by the parties to the proceedings before the public procurement tribunal.

(2) An immediate appeal shall also be admissible if the public procurement tribunal does not decide upon an application for review within the period set out in § 113(1); in this case the application shall be deemed to have been rejected.

(3) The immediate appeal shall be decided exclusively by the Higher Regional Court having jurisdiction at the seat of the public procurement tribunal. An award division shall be established at the Higher Regional Courts.

(4) Legal matters pursuant to paragraphs 1 and 2 may be assigned to other Higher Regional Courts or the Supreme Court of a Land by an ordinance issued by the Land governments. The Land governments may delegate this authority to their judicial administrations.

§ 117 Time Limit, Formal Requirements

(1) An immediate appeal shall be filed in writing with the appellate court within a non-extendable period of two weeks beginning upon service of the decision or, in the case of § 116(2), upon the expiry of the time period.

(2) Reasons for the immediate appeal shall be given when it is filed. The statement of reasons for the appeal shall contain:

1. a statement as to the extent to which the decision of the public procurement tribunal is challenged and a deviating decision is applied for,

2. details of the facts and evidence on which the appeal is based.

(3) The notice of appeal shall be signed by a lawyer admitted to practise before a German court. This shall not apply to appeals lodged by legal persons under public law.

(4) Upon the filing of the appeal, the other parties to the proceedings before the public procurement tribunal shall be informed by the appellant by way of transmission of a copy of the appeal.

§ 118 Effect

(1) The immediate appeal shall have a suspensive effect upon the decision of the public procurement tribunal. The suspensive effect shall lapse two weeks after the expiry of the time limit for the appeal. If the public procurement tribunal rejects the application to review the award, the appellate court may, upon application by the appellant, extend the suspensive effect up to the time of the decision on the appeal.
(2) The court shall reject the application pursuant to paragraph 1 sentence 3 if, taking into account all interests which may be impaired, the negative consequences of delaying the award up to the time of the decision on the appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of § 99(7) are concerned, special defence and security interests must additionally be taken into account. In its decision, the court shall also consider the prospects of success of the appeal, the overall prospects of the applicant to win the award in the award procedure and the interests of the general public in the quick conclusion of the award procedure.

(3) If the public procurement tribunal grants the application for review by prohibiting the award, the award shall not be made unless the appellate court annuls the decision of the public procurement tribunal pursuant to § 121 or § 123.

§ 119
Parties to the Appeal Proceedings

The parties to the proceedings before the public procurement tribunal are the parties to the proceedings before the appellate court.

§ 120
Procedural Provisions

(1) The parties shall be represented before the appellate court by a lawyer admitted to practise before a German court who acts as their authorised representative. Legal persons under public law may be represented by civil servants or by employees qualified to serve as a judge.

(2) §§ 69, 70(1) to (3), § 71(1) and (6), §§ 71a, 72, 73 with the exception of the reference to § 227(3) of the German Code of Civil Procedure, §§ 78, 111 and 113(2) sentence 1 shall apply mutatis mutandis.

§ 121
Preliminary Decision on the Award

(1) Upon application by the contracting entity or upon application by the undertaking named in accordance with § 101a by the contracting entity as the undertaking to be awarded the contract, the court may allow the continuation of the award procedure and the award if, taking into account all interests which may be impaired, the negative consequences of delaying the award up to the time of the decision on the appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interests of the general public in the contracting entity carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of § 99(7) are concerned, special defence and security interests must additionally be taken into account. In its decision, the court shall also consider the prospects of success of the immediate appeal, the overall prospects of the applicant of winning the award in the award procedure and the interest of the general public in the quick conclusion of the award procedure.

(2) The application shall be made in writing, stating the reasons. The facts to be put forward as reasons for the application as well as the reason for the urgency of the matter shall be substantiated. The appeal proceedings may be suspended until a decision is made on the application.

(3) The decision shall be made and reasons shall be given without undue delay and in no event later than five weeks after receipt of the application; in the event of particular factual or legal difficulties, the chairman may, in exceptional cases, extend the period for the required amount of time by declaration to the parties.
stating the reasons for the extension. The decision may be made without a hearing. The reasons shall explain the lawfulness or unlawfulness of the award procedure. § 120 shall apply.

(4) No appeal is admissible against a decision made pursuant to this provision.

§ 122
End of the Award Procedure after the Decision of the Appellate Court

If an application of the contracting entity pursuant to § 121 is rejected by the appellate court, the award procedure shall be deemed to have ended upon the expiry of ten days after service of the decision unless the contracting entity takes the measures following from the decision in order to restore the lawfulness of the procedure; the procedure must not be continued.

§ 123
Decision on the Appeal

If the court considers the appeal to be well founded, it shall reverse the decision of the public procurement tribunal. In this case, the court shall decide on the matter itself or oblige the public procurement tribunal to decide again on the matter with due consideration of the legal opinion of the court. Upon application, it shall state whether the rights of the undertaking having applied for the review were violated by the contracting entity. § 114(2) shall apply mutatis mutandis.

§ 124
Binding Effect and Duty to Refer the Matter

(1) If damages are claimed because of a violation of the provisions governing the award of public contracts, and proceedings were conducted before the public procurement tribunal, the court of general jurisdiction shall be bound by the final decision of the public procurement tribunal and the decision of the Higher Regional Court, as well as, where applicable, by the decision of the Federal Court of Justice on the appeal in the case of a referral pursuant to paragraph 2.

(2) If a Higher Regional Court wishes to deviate from a decision taken by another Higher Regional Court or the Federal Court of Justice, it shall refer the matter to the Federal Court of Justice. The Federal Court of Justice shall decide in lieu of the Higher Regional Court. The Federal Court of Justice may confine itself to deciding only on the matter of divergence and assigning the decision on the merits of the case to the court of appeal, if this seems appropriate based on the factual and legal context of the appeal proceedings. The duty to refer the matter shall not apply to proceedings pursuant to § 118(1) sentence 3 and § 121.

Third Chapter
Other Provisions

§ 125
Damages in the Event of an Abuse of Law

(1) If an application pursuant to § 107 or the immediate appeal pursuant to § 116 proves to have been unjustified from the outset, the applicant or the appellant shall be obliged to compensate the opponent and the parties for the damage incurred by them due to the abuse of the right to file an application or an appeal.
(2) An abuse shall exist in particular

1. if a suspension or further suspension of the award procedure is achieved through incorrect statements made intentionally or with gross negligence;

2. if the review is applied for with the intention of obstructing the award procedure or harming competitors;

3. if an application is made with the intention of subsequently withdrawing it against payment of money or other benefits.

(3) If the preliminary measures taken by the public procurement tribunal in accordance with a specific application pursuant to § 115(3) prove to have been unjustified from the outset, the applicant shall compensate the contracting entity for the damage arising from the enforcement of the measures that were ordered.

§ 126
Claim for Damages arising from Reliance

If the contracting entity has violated a provision intended to protect undertakings, the undertaking may claim damages for the costs incurred in connection with the preparation of the tender or the participation in a procurement procedure if, without such violation, the undertaking would have had a real chance of being awarded the contract after assessment of the tenders, and provided that such chance was impaired as a consequence of the violation. Further claims for damages shall remain unaffected.

§ 127
Authorisations

The Federal Government may, by an ordinance requiring the approval of the Bundesrat, issue rules

1. to implement the thresholds of the public procurement directives of the European Union as applicable at that time;

2. to define award procedures to be observed by contracting entities engaged in the fields of drinking water, energy supply or transport, including the selection and examination of the undertakings and the tenders, the conclusion of the contract, as well as other provisions relating to the award procedure;

3. regarding the procedure to be observed in awarding public contracts that are relevant in terms of defence and security, regarding the selection and examination of the undertakings and the tenders, the exclusion from the award procedure, the conclusion of the contract, the discontinuation of the award procedure and other provisions relating to the award procedure, including any defence and security-related requirements as regards secrecy, general rules on the protection of confidentiality, the security of supply as well as specific rules on the award of sub-contracts;

4. (abolished)

5. (abolished)

6. to define a procedure whereby contracting entities may obtain a certificate by independent auditors to the effect that their award conduct is in compliance with the provisions of this Act and with the provisions issued on the basis of this Act;

8. concerning the information to be transmitted by the contracting entities to the Federal Ministry of Economics and Technology in order to fulfil obligations arising from directives of the Council of the European Community or the European Union;

9. to define the conditions under which contracting entities active in the fields of drinking water or energy supply or transport, as well as contracting entities under the Federal Mining Act may be exempted from the obligation to apply the provisions of this Part, and to define the procedure to be followed in this respect, including the necessary investigatory powers of the Bundeskartellamt in this context.

§ 127a
Costs for Expert Opinions and Observations under the German Sector Ordinance; Power to Introduce Ordinances

(1) The Bundeskartellamt charges costs (fees and disbursements) to cover the administrative expenses involved in the preparation of expert opinions and observations made based on the provision issued under § 127 no. 9. § 80 (1) sentence 3 and §127(2) sentence 1, sentence 2 no. 1, sentences 3 and 4, (5) sentence 1 and §127(6) sentence 1 no. 2, sentences 2 and 3 shall apply mutatis mutandis. § 63(1) and (4) shall apply mutatis mutandis to the possibility to file an appeal regarding the cost decision.

(2) The Federal Government may define more precisely, by way of an ordinance requiring the approval of the Bundesrat, the costs charged. Measures of clemency may be provided for.

§ 128
Costs of Proceedings before the Public Procurement Tribunal

(1) Costs (fees and expenses) to cover the administrative expense shall be charged for official acts of the public procurement tribunals. The German Administrative Costs Act [Verwaltungskostengesetz] of 23 June 1970 (BGBl. I p. 821) as amended on 14 August 2013 shall apply.

(2) The fee shall amount to at least EUR 2,500; this amount may, for reasons of equity, be reduced to a minimum of one tenth. The fee should not exceed the amount of EUR 50,000, but may be increased up to an amount of EUR 100,000 in individual cases if the expense involved or the economic significance is unusually high.

(3) If a party to the proceedings is unsuccessful, it shall bear the costs. Several debtors shall be jointly and severally liable. Costs caused by the fault of a party may be imposed upon that party. If the application becomes obsolete by withdrawal or otherwise before the decision of the public procurement tribunal half of the fee shall be payable by the applicant. The decision which party has to bear the costs shall be based on reasonable discretion. For reasons of equity, payment of the fee may be waived entirely or partially.

(4) If a party to the review proceedings is unsuccessful, that party shall bear the respondent's expenses necessary for appropriately pursuing the matter or legally defending himself. Any expenses of third parties admitted to the proceedings shall only be reimbursable if the public procurement tribunal imposes them on the unsuccessful party for reasons of equity. If the applicant withdraws his application, he shall bear the respondent's and any third parties' expenses necessary for appropriately pursuing the matter. § 80(1), (2) and (3) sentence 2 of the German Administrative Procedure Act [Verwaltungsverfahrensgesetz] and the corresponding provisions of the administrative procedure acts of the Länder shall apply mutatis mutandis. No separate proceedings for the taxation of costs shall take place.
§ 129  
Corrective Mechanism of the Commission

(1) If, in the course of an award procedure before the conclusion of a contract, the Federal Government receives a notice from the European Commission informing it of a severe violation of EU law in the area of public contracts which has to be remedied, the Federal Ministry of Economics and Technology shall inform the contracting entity accordingly.

(2) Within 14 calendar days from receipt of this notice, the contracting entity shall submit to the Federal Ministry of Economics and Technology a detailed description of the facts of the case and state whether the alleged violation has been remedied or provide reasons why it has not been remedied, and whether the award procedure is subject to review proceedings or has been suspended for other reasons.

(3) If the award procedure is subject to review proceedings or has been suspended, the contracting entity shall inform the Federal Ministry of Economics and Technology without undue delay of the outcome of the review proceedings.

§ 129a  
Information Duties of the Review Bodies

The public procurement tribunals and the higher regional courts shall inform the Federal Ministry of Economics and Technology by 31 January of each year of the number of review proceedings conducted in the previous year and their results.

§ 129b  
Provision for Contracting Entities under the Federal Mining Act

(1) In the award of contracts relating to supplies, works or services exceeding the contract thresholds set by Article 16 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector (OJ EU no. L 134, p.1), as last amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ EU no. L 317, p. 34), contracting entities which are entitled under the German Federal Mining Act [Bundesberggesetz] to explore for or extract oil, gas, coal or other solid fuels, must observe the principles of non-discrimination and competitive procurement in the award of contracts for the exploration for or extraction of oil, gas, coal or other solid fuels. In particular, they must provide adequate information to undertakings which could be interested in such a contract and apply objective criteria in the award of the contract. This shall not apply to the award of contracts for the purchase of energy or fuels for the production of energy.

(2) The contracting entities under paragraph 1 shall inform the European Commission via the Federal Ministry of Economics and Technology of the award of the contracts covered by this provision in accordance with Commission Decision 93/327/EEC of 13 May 1993 defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award (OJ EU no. L 129, p. 25). They may be exempted from the obligation to apply this provision under the procedure stipulated by the regulation issued in accordance with § 127 number 9.

Part V  
Scope of Application of the Act
§ 130
Public Undertakings, Scope of Application

(1) This Act shall apply also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities. §§ 19, 20, and 31b(5) shall not apply to any charges and fees under public law. The provisions of Parts I to III of this Act shall not apply to the German Central Bank and to the German Kreditanstalt für Wiederaufbau (KfW).

(2) This Act shall apply to all restraints of competition having an effect within the scope of application of this Act, even if they were caused outside the scope of application of this Act.

(3) The provisions of the German Energy Industry Act shall not preclude the application of §§ 19, 20 and 29 provided that § 111 of the German Energy Industry Act does not state otherwise.

Part VI
Transitional and Final Provisions

§ 131
Transitional Provisions

(1) § 29 shall no longer be applied after 31 December 2017.

(2) Award proceedings which were initiated before 24 April 2009, including ensuing review proceedings, and review proceedings pending on 24 April 2009 shall be terminated in accordance with the previously applicable rules.

(3) Award proceedings which were initiated before 14 December 2011 shall be terminated in accordance with rules previously applicable to these proceedings; this shall also apply to any ensuing review proceedings, and review proceedings pending on 14 December 2011.

Annex
(to § 98 number 4)

Activities in the fields of drinking water, energy supply or transport are:

1. Supply of Drinking Water:

The provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water and the supply of drinking water to such networks; this shall also apply if this activity is connected with the disposal or treatment of sewage or with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations; in the case of contracting entities under § 98 number 4 the activity shall not be considered an activity in the supply of drinking water where the production of drinking water is necessary for carrying out an activity other than the supply of drinking water or energy or transport services, and where the supply to the public network depends only on the contracting entity's own consumption and has not exceeded 30% of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year;

2. Supply of Electricity and Gas:
The provision and operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the production of gas as well as the supply of electricity or gas to these networks; the activity of contracting entities under § 98 number 4 shall not be considered an activity in the supply of electricity and gas where the production of electricity or gas is necessary for carrying out an activity other than the supply of drinking water or energy or transport services, where the supply of electricity or gas to the public network depends only on the contracting entity's own consumption, where the supply of gas is also aimed only at the economic exploitation of such production, if the supply of electricity has not exceeded 30 per cent of the entity's total production of energy, having regard to the average for the preceding three years, including the current year, and if the supply of gas amounts to not more than 20 per cent of the entity's turnover;

3. Supply of Heat:

The provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of heat and the supply of heat to these networks; this activity shall not be considered an activity in the supply of heat where the production of heat by contracting entities under § 98 number 4 is the unavoidable consequence of carrying out an activity other than the supply of drinking water or energy supply or transport services, where the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover, having regard to the average for the preceding three years, including the current year;

4. Transport:

The provision and operation of airports intended to provide a service to carriers in the air transport sector by airport undertakings which in particular have been granted a licence under § 38(2) number 1 of the Air Traffic Licensing Ordinance [Luftverkehrszulassungsordnung] as published on 10 July 2008 (Federal Law Gazette I p. 1229) or require such a licence;

the provision and operation of ports or other terminal facilities intended to provide a service to carriers by sea or inland waterway;

the provision of transport services, the provision or operation of infrastructure facilities intended to provide a service to the public in the field of transport by railway, tramway or other rail transport, by cable and automated systems, in the public transport of passengers within the meaning of the Passenger Transport Act [Personenbeförderungsgesetz] also by bus and trolleybus.
Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

**Article 102**

*(ex Article 82 TEC)*

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

**Article 103**

*(ex Article 83 TEC)*

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.
Article 104
(ex Article 84 TEC)

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Article 105
(ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106
(ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

SECTION 2

AIDS GRANTED BY STATES
Article 107
(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.
On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

**Article 109**

*(ex Article 89 TEC)*

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.
Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

(4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.
In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

Regulations such as 19/65/EEC(6), (EEC) No 2821/71(7), (EEC) No 3976/87(8), (EEC) No 1534/91(9), or (EEC) No 479/92(10) empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called "block" exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.
(11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.

(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition
authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty.
The competition authorities of the Member States should cooperate actively in the exercise of these powers.

(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.

(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

(30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.

(31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74(11), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.

(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets
be protected. The confidentiality of information exchanged in the network should likewise
be safeguarded.

(33) Since all decisions taken by the Commission under this Regulation are subject to
review by the Court of Justice in accordance with the Treaty, the Court of Justice should,
in accordance with Article 229 thereof be given unlimited jurisdiction in respect of
decisions by which the Commission imposes fines or periodic penalty payments.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been
applied by Regulation No 17, have given a central role to the Community bodies. This
central role should be retained, whilst associating the Member States more closely with
the application of the Community competition rules. In accordance with the principles of
subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does
not go beyond what is necessary in order to achieve its objective, which is to allow the
Community competition rules to be applied effectively.

(35) In order to attain a proper enforcement of Community competition law, Member
States should designate and empower authorities to apply Articles 81 and 82 of the Treaty
as public enforcers. They should be able to designate administrative as well as judicial
authorities to carry out the various functions conferred upon competition authorities in this
Regulation. This Regulation recognises the wide variation which exists in the public
enforcement systems of Member States. The effects of Article 11(6) of this Regulation
should apply to all competition authorities. As an exception to this general rule, where a
prosecuting authority brings a case before a separate judicial authority, Article 11(6)
should apply to the prosecuting authority subject to the conditions in Article 35(4) of this
Regulation. Where these conditions are not fulfilled, the general rule should apply. In any
case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(36) As the case-law has made it clear that the competition rules apply to transport, that
sector should be made subject to the procedural provisions of this Regulation. Council
Regulation No 141 of 26 November 1962 exempting transport from the application of
Regulation No 17(12) should therefore be repealed and Regulations (EEC) No
1017/68(13), (EEC) No 4056/86(14) and (EEC) No 3975/87(15) should be amended in
order to delete the specific procedural provisions they contain.

(37) This Regulation respects the fundamental rights and observes the principles
recognised in particular by the Charter of Fundamental Rights of the European Union.
Accordingly, this Regulation should be interpreted and applied with respect to those rights
and principles.

(38) Legal certainty for undertakings operating under the Community competition rules
contributes to the promotion of innovation and investment. Where cases give rise to
genuine uncertainty because they present novel or unresolved questions for the
application of these rules, individual undertakings may wish to seek informal guidance
from the Commission. This Regulation is without prejudice to the ability of the Commission
to issue such informal guidance,

HAS ADOPTED THIS REGULATION:

CHAPTER I
PRINCIPLES

Article 1
Application of Articles 81 and 82 of the Treaty

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty
which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no
prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.

3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2
Burden of proof
In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3
Relationship between Articles 81 and 82 of the Treaty and national competition laws
1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

CHAPTER II
POWERS

Article 4
Powers of the Commission
For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.
Article 5
Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6
Powers of the national courts

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III
COMMISSION DECISIONS

Article 7
Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8
Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.
Article 9
Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:
   (a) where there has been a material change in any of the facts on which the decision was based;
   (b) where the undertakings concerned act contrary to their commitments; or
   (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10
Finding of inapplicability

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV
COOPERATION

Article 11
Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the
proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12

Exchange of information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13

Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.
Article 14

Advisory Committee

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission’s preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.
Article 15
Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16
Uniform application of Community competition law

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V
POWERS OF INVESTIGATION

Article 17
Investigations into sectors of the economy and into types of agreements

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned
to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis.

**Article 18**

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

**Article 19**

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of
Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject
matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

**Article 21**

**Inspection of other premises**

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply mutatis mutandis.

**Article 22**

**Investigations by competition authorities of Member States**

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.
2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI
PENALTIES

Article 23
Fines
1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;

(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);

(d) in response to a question asked in accordance with Article 20(2)(e),

- they give an incorrect or misleading answer,
- they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
- they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);

(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24
Periodic penalty payments
1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;

(b) to comply with a decision ordering interim measures taken pursuant to Article 8;

(c) to comply with a commitment made binding by a decision pursuant to Article 9;

(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);

(e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII
LIMITATION PERIODS

Article 25
Limitation periods for the imposition of penalties
1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:
(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted:

(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;

(b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.
CHAPTER VIII
HEARINGS AND PROFESSIONAL SECRECY

Article 27
Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28
Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX
EXEMPTION REGULATIONS
Article 29
Withdrawal in individual cases
1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X
GENERAL PROVISIONS

Article 30
Publication of decisions
1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31
Review by the Court of Justice
The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32
Exclusions
This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;

(c) air transport between Community airports and third countries.
Article 33
Implementing provisions

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, inter alia:

(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

(b) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the hearings provided for in Article 27.

2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI
TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34
Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35
Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority
when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 36
Amendment of Regulation (EEC) No 1017/68
Regulation (EEC) No 1017/68 is amended as follows:
1. Article 2 is repealed;
2. in Article 3(1), the words "The prohibition laid down in Article 2" are replaced by the words "The prohibition in Article 81(1) of the Treaty";
3. Article 4 is amended as follows:
(a) In paragraph 1, the words "The agreements, decisions and concerted practices referred to in Article 2" are replaced by the words "Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty";
(b) Paragraph 2 is replaced by the following:
"2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease."
4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;
5. in Article 30, paragraphs 2, 3 and 4 are deleted.

Article 37
Amendment of Regulation (EEC) No 2988/74
In Regulation (EEC) No 2988/74, the following Article is inserted:
"Article 7a
Exclusion
This Regulation shall not apply to measures taken under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(16)."

Article 38
Amendment of Regulation (EEC) No 4056/86
Regulation (EEC) No 4056/86 is amended as follows:
1. Article 7 is amended as follows:
(a) Paragraph 1 is replaced by the following:
"1. Breach of an obligation
Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(17) adopt a decision that either prohibits them from
carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed."

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words "under the conditions laid down in Section II" are replaced by the words "under the conditions laid down in Regulation (EC) No 1/2003";

(ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:

"At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, inter alia, to obtaining access to the market for non-conference lines."

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words "pursuant to Article 10" are replaced by the words "pursuant to Regulation (EC) No 1/2003".

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words "Advisory Committee referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

(b) In paragraph 2, the words "Advisory Committee as referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words "the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)" are deleted.

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**Article 39**

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

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**Article 40**

Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

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**Article 41**

Amendment of Regulation (EEC) No 3976/87

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:
"Article 6

The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(18) before publishing a draft Regulation and before adopting a Regulation."

2. Article 7 is repealed.

**Article 42**

**Amendment of Regulation (EEC) No 479/92**

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

"Article 5

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty(19)."

2. Article 6 is repealed.

**Article 43**

**Repeal of Regulations No 17 and No 141**

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

2. Regulation No 141 is repealed.

3. References to the repealed Regulations shall be construed as references to this Regulation.

**Article 44**

**Report on the application of the present Regulation**

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

**Article 45**

**Entry into force**

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 16 December 2002.

For the Council
The President
M. Fischer Boel


(3) OJ C 155, 29.5.2001, p. 73.

(4) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.


(14) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.


THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings(4) has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action...
necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained; this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission's reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a
situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to the Commission. Such requests for pre-notification referrals to the Commission would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement to such a referral, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.

(17) The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

(18) The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

(19) Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

(21) This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in
application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

(22) The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

(23) It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

(26) A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or
strengthening of a dominant position, is to be declared incompatible with the common market.

(27) In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

(28) In order to clarify and explain the Commission’s appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

(29) In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

(30) Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

(31) The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfil a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.

(32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.

(33) The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior
to the implementation of a concentration which has been declared incompatible with the common market.

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

(35) A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

(36) The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union(5). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

(37) The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

(38) In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.

(39) In the course of an inspection, officials authorised by the Commission should have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

(40) Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as
provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

(41) When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against themselves or against others the existence of such infringements.

(42) For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of the rights of defence of the undertakings concerned, in particular the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network and with the competent authorities of third countries should likewise be safeguarded.

(43) Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.

(44) The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.

(45) This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.

(46) The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1
Scope
1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:
- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3
Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of
companies provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 4

Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.
If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply mutatis mutandis.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

**Article 5**

**Calculation of turnover**

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

(a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC(7), after deduction of value added tax and other taxes directly related to those items, where appropriate:
(i) interest income and similar income;
(ii) income from securities:
   - income from shares and other variable yield securities,
   - income from participating interests,
   - income from shares in affiliated undertakings;
(iii) commissions receivable;
(iv) net profit on financial operations;
(v) other operating income.

The turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or in the Member State in question, as the case may be;

(b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and para fiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and 1(3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;
(b) those undertakings in which the undertaking concerned, directly or indirectly:
   (i) owns more than half the capital or business assets, or
   (ii) has the power to exercise more than half the voting rights, or
   (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
   (iv) has the right to manage the undertakings’ affairs;
(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.
Article 6
Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7
Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:
(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and
(b) the acquirer does not exercise the voting rights attached to the securities in question or
does so only to maintain the full value of its investments based on a derogation granted by
the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in
paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the
request, the Commission shall take into account inter alia the effects of the suspension on
one or more undertakings concerned by the concentration or on a third party and the
threat to competition posed by the concentration. Such a derogation may be made subject
to conditions and obligations in order to ensure conditions of effective competition. A
derogation may be applied for and granted at any time, be it before notification or after the
transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be
dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a
presumption pursuant to Article 10(6).

This Article shall, however, have no effect on the validity of transactions in securities
including those convertible into other securities admitted to trading on a market such as a
stock exchange, unless the buyer and seller knew or ought to have known that the
transaction was carried out in contravention of paragraph 1.

Article 8
Powers of decision of the Commission

1. Where the Commission finds that a notified concentration fulfils the criterion laid down
in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article
81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with
the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions
directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings
concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the
cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall
issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure
that the undertakings concerned comply with the commitments they have entered into vis-
à-vis the Commission with a view to rendering the concentration compatible with the
common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions
directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article
2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article
81(3) of the Treaty, it shall issue a decision declaring that the concentration is
incompatible with the common market.

4. Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible
with the common market, or
(b) has been implemented in contravention of a condition attached to a decision taken
under paragraph 2, which has found that, in the absence of the condition, the
concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to
in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:
- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

(c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

(a) it finds that a concentration has been implemented

(i) in contravention of a condition attached to a decision under Article 6(1)(b), or

(ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or

(b) a decision has been revoked pursuant to paragraph 6.

8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 9
Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or
(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

   (a) it shall itself deal with the case in accordance with this Regulation; or

   (b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

   (a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

   (b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.
9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.

Article 10
Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2) or where the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).
6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11
Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which the information is to be provided, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided. It shall also indicate the penalties provided for in Article 14 and indicate or impose the penalties provided for in Article 15. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Persons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

6. At the request of the Commission, the governments and competent authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

7. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.
Article 12

Inspections by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

2. If so requested by the Commission or by the competent authority of the Member State within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Article 13

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

   (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

   (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

   (c) to take or obtain in any form copies of or extracts from such books or records;

   (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

   (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection, including the sealing of business premises,
books or records, ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission's decision shall be subject to review only by the Court of Justice.

Article 14
Fines

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

(a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);

(b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);

(c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;

(d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);

(e) in response to a question asked in accordance with Article 13(2)(e),
   - they give an incorrect or misleading answer,
   - they fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
   - they fail or refuse to provide a complete answer on facts relating to the subject matter and purpose of an inspection ordered by a decision adopted pursuant to Article 13(4);

(f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
(b) implement a concentration in breach of Article 7;
(c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
(d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.
4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

Article 15
Periodic penalty payments
1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:
   (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
   (b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);
   (c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;
   (d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).
2. Where the persons referred to in Article 3(1)(b), undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Article 16
Review by the Court of Justice
The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17
Professional secrecy
1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.
2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.
3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).

4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most
important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20
Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the Official Journal of the European Union.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21
Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003(8), (EEC) No 1017/68(9), (EEC) No 4056/86(10) and (EEC) No 3975/87(11) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the
measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

Article 22
Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay. Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23
Implementing provisions

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:
(a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;

(b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;

(c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);

(d) implementing provisions concerning hearings pursuant to Article 18.

2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.

(a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.

(b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.

(c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

Relations with third countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.

2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25

Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.
Article 26
Entry into force and transitional provisions

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

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


For the Council
The President
C. McCreevy


ANNEX
Correlation table
>TABLE>
COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (1), and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (2) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.

(2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (3) defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should include the corresponding concerted practices.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

(6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

(7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.
It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30%, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

Above the market share threshold of 30%, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.

This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

In order to ensure access to or to prevent collusion on the relevant market, certain conditions should be attached to the block exemption. To this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a defined duration. For the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.

The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (4), where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may for example arise in the case of selective distribution or non-compete obligations.

In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50% of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements.

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
(a) 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(b) 'vertical restraint' means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;

(c) 'competing undertaking' means an actual or potential competitor; 'actual competitor' means an undertaking that is active on the same relevant market; 'potential competitor' means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;

(d) 'non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;

(e) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

(f) 'intellectual property rights' includes industrial property rights, know how, copyright and neighbouring rights;

(g) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(h) 'buyer' includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;

(i) 'customer of the buyer' means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.

2. For the purposes of this Regulation, the terms ‘undertaking’, ‘supplier’ and ‘buyer’ shall include their respective connected undertakings.

'Connected undertakings' means:

(a) undertakings in which a party to the agreement, directly or indirectly:
   (i) has the power to exercise more than half the voting rights, or
   (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
   (iii) has the right to manage the undertaking's affairs;

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

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

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

(e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
   (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or
(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

**Article 2**

**Exemption**

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.

3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

(a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or

(b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.

**Article 3**

**Market share threshold**

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

2. For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

**Article 4**

**Restrictions that remove the benefit of the block exemption — hardcore restrictions**

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

(ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,

(iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and

(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

(e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

**Article 5**

**Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;

(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

(a) the obligation relates to goods or services which compete with the contract goods or services;

(b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;

(c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;

(d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.
Article 6

Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

Article 7

Application of the market share threshold

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

(a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;

(b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;

(d) if a market share is initially not more than 30% but subsequently rises above that level without exceeding 35%, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30% market share threshold was first exceeded;

(e) if a market share is initially not more than 30% but subsequently rises above 35%, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35% was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years;

(g) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

Article 8

Application of the turnover threshold

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10%.

Article 9

Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999.
Article 10

Period of validity

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2022.

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

Done at Brussels, 20 April 2010.

For the Commission
The President
José Manuel BARROSO

(1) OJ 36, 6.3.1965, p. 533.
(2) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.
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I. INTRODUCTION

1. Purpose of the Guidelines

(1) These Guidelines set out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union (1) (hereinafter ‘Article 101’) (2), Article 1(1)(a) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (3) (hereinafter referred to as the ‘Block Exemption Regulation’) (see paragraphs (24) to (46)) defines the term ‘vertical agreement’. These Guidelines are without prejudice to the possible parallel application of Article 102 of the Treaty on the Functioning of the European Union (hereinafter ‘Article 102’) to vertical agreements. These Guidelines are structured in the following way:

—Section II (paragraphs (8) to (22)) describes vertical agreements which generally fall outside Article 101(1);
—Section III (paragraphs (23) to (73)) clarifies the conditions for the application of the Block Exemption Regulation;
—Section IV (paragraphs (74) to (85)) describes the principles concerning the withdrawal of the block exemption and the disapplication of the Block Exemption Regulation;
—Section V (paragraphs (86) to (95)) provides guidance on how to define the relevant market and calculate market shares;
—Section VI (paragraphs (96) to (229)) describes the general framework of analysis and the enforcement policy of the Commission in individual cases concerning vertical agreements.
(2) Throughout these Guidelines, the analysis applies to both goods and services, although certain vertical restraints are mainly used in the distribution of goods. Similarly, vertical agreements can be concluded for intermediate and final goods and services. Unless otherwise stated, the analysis and arguments in these Guidelines apply to all types of goods and services and to all levels of trade. Thus, the term ‘products’ includes both goods and services. The terms ‘supplier’ and ‘buyer’ are used for all levels of trade. The Block Exemption Regulation and these Guidelines do not apply to agreements with final consumers where the latter are not undertakings, since Article 101 only applies to agreements between undertakings.

(3) By issuing these Guidelines, the Commission aims to help companies conduct their own assessment of vertical agreements under EU competition rules. The standards set forth in these Guidelines cannot be applied mechanically, but must be applied with due consideration for the specific circumstances of each case. Each case must be evaluated in the light of its own facts.

(4) These Guidelines are without prejudice to the case-law of the General Court and the Court of Justice of the European Union concerning the application of Article 101 to vertical agreements. The Commission will continue to monitor the operation of the Block Exemption Regulation and Guidelines based on market information from stakeholders and national competition authorities and may revise this notice in the light of future developments and of evolving insight.

2. Applicability of Article 101 to vertical agreements

(5) Article 101 applies to vertical agreements that may affect trade between Member States and that prevent, restrict or distort competition ('vertical restraints'). Article 101 provides a legal framework for the assessment of vertical restraints, which takes into consideration the distinction between anti-competitive and pro-competitive effects. Article 101(1) prohibits those agreements which appreciably restrict or distort competition, while Article 101(3) exempts those agreements which confer sufficient benefits to outweigh the anti-competitive effects.

(6) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.

(7) The objective of Article 101 is to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market to the detriment of consumers. Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. Market integration enhances competition in the European Union. Companies should not be allowed to re-establish private barriers between Member States where State barriers have been successfully abolished.

II. VERTICAL AGREEMENTS WHICH GENERALLY FALL OUTSIDE THE SCOPE OF ARTICLE 101(1)

1. Agreements of minor importance and SMEs

(8) Agreements that are not capable of appreciably affecting trade between Member States or of appreciably restricting competition by object or effect do not fall within the scope of Article 101(1). The Block Exemption Regulation applies only to agreements falling within the scope of application of Article 101(1). These Guidelines are without prejudice to the application of Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) or any future de minimis notice.

(9) Subject to the conditions set out in the de minimis notice concerning hardcore restrictions and cumulative effect issues, vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15% are generally considered to fall outside the scope of Article 101(1). There is no presumption that vertical agreements concluded by undertakings having more than 15% market share automatically infringe Article 101(1). Agreements between undertakings whose market share exceeds the 15% threshold may still not have an appreciable effect on trade between Member States or may not constitute an appreciable restriction of competition. Such agreements need to be assessed in their legal and economic context. The criteria for the assessment of individual agreements are set out in paragraphs (96) to (229).

(10) As regards hardcore restrictions referred to in the de minimis notice, Article 101(1) may apply below the 15% threshold, provided that there is an appreciable effect on trade between Member States and on competition. The applicable case-law of the Court of Justice and the General Court is relevant in this case.
respect\(^{(9)}\). Reference is also made to the possible need to assess positive and negative effects of hardcore restrictions as described in particular in paragraph (47) of these Guidelines.

(11) In addition, the Commission considers that, subject to cumulative effect and hardcore restrictions, vertical agreements between small and medium-sized undertakings as defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises \(^{(10)}\) are rarely capable of appreciably affecting trade between Member States or of appreciably restricting competition within the meaning of Article 101(1), and therefore generally fall outside the scope of Article 101(1). In cases where such agreements nonetheless meet the conditions for the application of Article 101(1), the Commission will normally refrain from opening proceedings for lack of sufficient interest for the European Union unless those undertakings collectively or individually hold a dominant position in a substantial part of the internal market.

2. Agency agreements

2.1 Definition of agency agreements

(12) An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the:

— purchase of goods or services by the principal, or
— sale of goods or services supplied by the principal.

(13) The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. \(^{(11)}\) In this respect it is not material for the assessment whether the agent acts for one or several principals. Neither is material for this assessment the qualification given to their agreement by the parties or national legislation.

(14) There are three types of financial or commercial risk that are material to the definition of an agency agreement for the application of Article 101(1). First, there are the contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks. Secondly, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss. Thirdly, there are the risks related to other activities undertaken on the same product market, to the extent that the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk.

(15) For the purposes of applying Article 101(1), the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent’s income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment.

(16) For the purpose of applying Article 101(1), an agreement will thus generally be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not himself supply the contract services and where the agent:

(a) does not contribute to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal;

(b) does not maintain at its own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks);
The risk analysis involving a hashing function of the non-bijective nature of the exclusive agency provisions will in general not lead to anti-competitive effects. They can also be individually justified by efficiencies under Article 101(3) as for instance described in paragraphs (144) to (148).

2.2 The application of Article 101(1) to agency agreements

In the case of agency agreements as defined in section 2.1, the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1). The following obligations on the agent's part will be considered to form an inherent part of an agency agreement, as each of them relates to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services, which is essential if the principal is to take the risks and therefore to be in a position to determine the commercial strategy:

(a) limitations on the territory in which the agent may sell these goods or services;

(b) limitations on the customers to whom the agent may sell these goods or services;

(c) the prices and conditions at which the agent must sell or purchase these goods or services.

In addition to governing the conditions of sale or purchase of the contract goods or services by the agent on behalf of the principal, agency agreements often contain provisions which concern the relationship between the agent and the principal. In particular, they may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) and/or a provision preventing the agent from acting as an agent or distributor for the principal. Since the agent is a separate undertaking from the principal, the provisions which concern the relationship between the agent and the principal may infringe Article 101(1). Exclusive agency provisions will in general not lead to anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern the competition between the agent and the principal, may infringe Article 101(1) if they lead to or contribute to a (cumulative) foreclosure effect on the relevant market where the contract goods or services are sold or purchased (see in particular Section VI.2.1). Such provisions may benefit from the Block Exemption Regulation, in particular when the conditions provided in Article 5 of that Regulation are fulfilled. They can also be individually justified by efficiencies under Article 101(3) as for instance described in paragraphs (144) to (148).

An agency agreement may also fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. That could, for instance, be the case...
when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.

(21) Where the agent bears one or more of the relevant risks as described in paragraph (16), the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1). In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to Article 101(1) as any other vertical agreement.

3. Subcontracting agreements

(22) Subcontracting concerns a contractor providing technology or equipment to a subcontractor that undertakes to produce certain products on the basis thereof (exclusively) for the contractor. Subcontracting is covered by Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (hereinafter ‘subcontracting notice’). According to that notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside the scope of Article 101(1) provided that the technology or equipment is necessary to enable the subcontractor to produce the products. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development or not to produce for third parties in general may fall within the scope of Article 101(1).

III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

1. Safe harbour created by the Block Exemption Regulation

(23) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services which determine the applicability of the block exemption. In order for the block exemption to apply, the supplier's and the buyer's market share must each be 30% or less. Section V of these Guidelines provides guidance on how to define the relevant market and calculate the market shares. Above the market share threshold of 30%, there is no presumption that vertical agreements fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3) but there is also no presumption that vertical agreements falling within the scope of Article 101(1) will usually satisfy the conditions of Article 101(3).

2. Scope of the Block Exemption Regulation

2.1 Definition of vertical agreements

(24) Article 1(1)(a) of the Block Exemption Regulation defines a ‘vertical agreement’ as ‘an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services’.

(25) The definition of ‘vertical agreement’ referred to in paragraph (24) has four main elements:

(a) The Block Exemption Regulation applies to agreements and concerted practices. The Block Exemption Regulation does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of Article 102 which prohibits abuses of a dominant position. For there to be an agreement within the meaning of Article 101 it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties’ intention. In case there is no explicit agreement expressing the concurrence of wills, the Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party. For vertical agreements, there are two ways in which acquiescence with a particular
unilateral policy can be established. First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof (14). Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice (15). For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy. This can however not be concluded if the distributors continue to engage in parallel trade or try to find new ways to engage in parallel trade. Similarly, for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy. The two ways of establishing acquiescence described in this paragraph can be used jointly;

(b) The agreement or concerted practice is between two or more undertakings. Vertical agreements with final consumers not operating as an undertaking are not covered by the Block Exemption Regulation. More generally, agreements with final consumers do not fall under Article 101(1), as that article applies only to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings. This is without prejudice to the possible application of Article 102;

(c) The agreement or concerted practice is between undertakings each operating, for the purposes of the agreement, at a different level of the production or distribution chain. This means for instance that one undertaking produces a raw material which the other undertaking uses as an input, or that the first is a manufacturer, the second a wholesaler and the third a retailer. This does not preclude an undertaking from being active at more than one level of the production or distribution chain;

(d) The agreements or concerted practices relate to the conditions under which the parties to the agreement, the supplier and the buyer, ‘may purchase, sell or resell certain goods or services’. This reflects the purpose of the Block Exemption Regulation to cover purchase and distribution agreements. These are agreements which concern the conditions for the purchase, sale or resale of the goods or services supplied by the supplier and/or which concern the conditions for the sale by the buyer of the goods or services which incorporate these goods or services. Both the goods or services supplied by the supplier and the resulting goods or services are considered to be contract goods or services under the Block Exemption Regulation. Vertical agreements relating to all final and intermediate goods and services are covered. The only exception is the automobile sector, as long as this sector remains covered by a specific block exemption such as that granted by Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (16) or its successor. The goods or services provided by the supplier may be resold by the buyer or may be used as an input by the buyer to produce its own goods or services.

(26) The Block Exemption Regulation also applies to goods sold and purchased for renting to third parties. However, rent and lease agreements as such are not covered, as no good or service is sold by the supplier to the buyer. More generally, the Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as an obligation preventing parties from carrying out independent research and development which the parties may have included in an otherwise vertical agreement. In addition, Article 2(2) to (5) of the Block Exemption Regulation directly or indirectly excludes certain vertical agreements from the application of that Regulation.

2.2 Vertical agreements between competitors

(27) Article 2(4) of the Block Exemption Regulation explicitly excludes ‘vertical agreements entered into between competing undertakings’ from its application. Vertical agreements between competitors are dealt with, as regards possible collusion effects, in the Commission Guidelines on the applicability of
Article 81 of the EC Treaty to horizontal cooperation agreements. However, the vertical aspects of such agreements need to be assessed under these Guidelines. Article 1(1)(c) of the Block Exemption Regulation defines a competing undertaking as 'an actual or potential competitor'. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices it is likely that this first company, within a short period of time normally not longer than one year, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active. That assessment must be based on realistic grounds; the mere theoretical possibility of entering a market is not sufficient. A distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods.

(28) Article 2(4) of the Block Exemption Regulation contains two exceptions to the general exclusion of vertical agreements between competitors. These exceptions concern non-reciprocal agreements. Non-reciprocal agreements between competitors are covered by the Block Exemption Regulation where (a) the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a competing undertaking at the manufacturing level, or (b) the supplier is a provider of services operating at several levels of trade, while the buyer operates at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. The first exception covers situations of dual distribution, that is, the manufacturer of particular goods also acts as a distributor of the goods in competition with independent distributors of its goods. In case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level. The second exception covers similar situations of dual distribution, but in this case for services, when the supplier is also a provider of products at the retail level where the buyer operates.

2.3 Associations of retailers

(29) Article 2(2) of the Block Exemption Regulation includes in its application vertical agreements entered into by an association of undertakings which fulfils certain conditions and thereby excludes from the Block Exemption Regulation vertical agreements entered into by all other associations. Vertical agreements entered into between an association and its members, or between an association and its suppliers, are covered by the Block Exemption Regulation only if all the members are retailers of goods (not services) and if each individual member of the association has a turnover not exceeding EUR 50 million. Retailers are distributors reselling goods to final consumers. Where only a limited number of the members of the association have a turnover exceeding the EUR 50 million threshold and where these members together represent less than 15 % of the collective turnover of all the members combined, the assessment under Article 101 will normally not be affected.

(30) An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements must be assessed according to the principles set out in the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements. If that assessment leads to the conclusion that a cooperation between undertakings in the area of purchasing or selling is acceptable, a further assessment will be necessary to examine the vertical agreements concluded by the association with its suppliers or its individual members. The latter assessment will follow the rules of the Block Exemption Regulation and these Guidelines. For instance, horizontal agreements concluded between the members of the association or decisions adopted by the association, such as the decision to require the members to purchase from the association or the decision to allocate exclusive territories to the members must first be assessed as a horizontal agreement. Once that assessment leads to the conclusion that the horizontal agreement is not anticompetitive, an assessment of the vertical agreements between the association and individual members or between the association and suppliers is necessary.

2.4 Vertical agreements containing provisions on intellectual property rights (IPRs)

(31) Article 2(3) of the Block Exemption Regulation includes vertical agreements containing certain provisions relating to the assignment of IPRs to or use of IPRs by the buyer in its application and thereby excludes all other vertical agreements containing IPR provisions from the Block Exemption Regulation. The Block Exemption Regulation applies to vertical agreements containing IPR provisions where five conditions are fulfilled:
(a) The IPR provisions must be part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

(b) The IPRs must be assigned to, or licensed for use by, the buyer;

(c) The IPR provisions must not constitute the primary object of the agreement;

(d) The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;

(e) The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints which are not exempted under the Block Exemption Regulation.

(32) Such conditions ensure that the Block Exemption Regulation applies to vertical agreements where the use, sale or resale of goods or services can be performed more effectively because IPRs are assigned to or licensed for use by the buyer. In other words, restrictions concerning the assignment or use of IPRs can be covered when the main object of the agreement is the purchase or distribution of goods or services.

(33) The first condition makes clear that the context in which the IPRs are provided is an agreement to purchase or distribute goods or an agreement to purchase or provide services and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement. The Block Exemption Regulation does not cover, for instance:

(a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe;

(b) agreements under which one party provides another party with a mould or master copy and licenses the other party to produce and distribute copies;

(c) the pure licence of a trade mark or sign for the purposes of merchandising;

(d) sponsorship contracts concerning the right to advertise oneself as being an official sponsor of an event;

(e) copyright licensing such as broadcasting contracts concerning the right to record and/or broadcast an event.

(34) The second condition makes clear that the Block Exemption Regulation does not apply when the IPRs are provided by the buyer to the supplier, no matter whether the IPRs concern the manner of manufacture or of distribution. An agreement relating to the transfer of IPRs to the supplier and containing possible restrictions on the sales made by the supplier is not covered by the Block Exemption Regulation. That means, in particular, that subcontracting involving the transfer of know-how to a subcontractor does not fall within the scope of application of the Block Exemption Regulation (see also paragraph (22)). However, vertical agreements under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied fall within the scope of application of the Block Exemption Regulation.

(35) The third condition makes clear that in order to be covered by the Block Exemption Regulation, the primary object of the agreement must not be the assignment or licensing of IPRs. The primary object must be the purchase, sale or resale of goods or services and the IPR provisions must serve the implementation of the vertical agreement.

(36) The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or its customers. The goods or services for use or resale are usually supplied by the licensor but may also be purchased by the licensee from a third supplier. The IPR provisions will normally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells goods for resale to the franchisee and licenses the franchisee to use its trade mark and know-how to market the goods or where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

(37) The fifth condition highlights the fact that the IPR provisions should not have the same object as any of the hardcore restrictions listed in Article 4 of the Block Exemption Regulation or any of the restrictions excluded from the coverage of the Block Exemption Regulation by Article 5 of that Regulation (see paragraphs (47) to (69) of these Guidelines).
(38) Intellectual property rights relevant to the implementation of vertical agreements within the meaning of Article 2(3) of the Block Exemption Regulation generally concern three main areas: trade marks, copyright and know-how.

**Trade mark**

(39) A trade mark licence to a distributor may be related to the distribution of the licensor's products in a particular territory. If it is an exclusive licence, the agreement amounts to exclusive distribution.

**Copyright**

(40) Resellers of goods covered by copyright (books, software, etc.) may be obliged by the copyright holder only to resell under the condition that the buyer, whether another reseller or the end user, shall not infringe the copyright. Such obligations on the reseller, to the extent that they fall under Article 101(1) at all, are covered by the Block Exemption Regulation.

(41) Agreements, under which hard copies of software are supplied for resale and where the reseller does not acquire a licence to any rights over the software but only has the right to resell the hard copies, are to be regarded as agreements for the supply of goods for resale for the purpose of the Block Exemption Regulation. Under that form of distribution, licensing the software only occurs between the copyright owner and the user of the software. It may take the form of a 'shrink wrap' licence, that is, a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.

(42) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright, and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. Such use-restrictions, to the extent that they fall within Article 101(1) at all, are covered by the Block Exemption Regulation.

**Know-how**

(43) Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example of where know-how for marketing purposes is communicated to the buyer. Franchise agreements contain licences of intellectual property rights relating to trade marks or signs and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPR, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance, such as procurement services, training, advice on real estate, financial planning etc. The licence and the assistance are integral components of the business method being franchised.

(44) Licensing contained in franchise agreements is covered by the Block Exemption Regulation where all five conditions listed in paragraph (31) are fulfilled. Those conditions are usually fulfilled as under most franchise agreements, including master franchise agreements, the franchisor provides goods and/or services, in particular commercial or technical assistance services, to the franchisee. The IPRs help the franchisee to resell the products supplied by the franchisor or by a supplier designated by the franchisor or to use those products and sell the resulting goods or services. Where the franchise agreement only or primarily concerns licensing of IPRs, it is not covered by the Block Exemption Regulation, but the Commission will, as a general rule, apply the principles set out in the Block Exemption Regulation and these Guidelines to such an agreement.

(45) The following IPR-related obligations are generally considered necessary to protect the franchisor's intellectual property rights and are, where these obligations fall under Article 101(1), also covered by the Block Exemption Regulation:

(a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;

(b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking;

(c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;
(d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting
the franchise and to grant the franchisor, and other franchisees, a non-exclusive licence for the know-
how resulting from that experience;

(e) an obligation on the franchisee to inform the franchisor of infringements of licensed intellectual property
rights, to take legal action against infringers or to assist the franchisor in any legal actions against
infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than
the exploitation of the franchise;

(g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement
without the franchisor's consent.

2.5 Relationship to other block exemption regulations

(46) Article 2(5) states that the Block Exemption Regulation does 'not apply to vertical agreements the subject
matter of which falls within the scope of any other block exemption regulation, unless otherwise provided
for in such a regulation'. The Block Exemption Regulation does not therefore apply to vertical agreements
covered by Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3)
of the Treaty to categories of technology transfer agreements (22), Regulation 1400/2002 on the
application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in
the motor vehicle sector (23) or Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the
application of Article 81(3) of the Treaty to categories of specialisation agreements (24) and Commission
Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to
categories of research and development agreements (25) exempting vertical agreements concluded in
connection with horizontal agreements, or any future regulations of that kind, unless otherwise provided
for in such a regulation.

3. Hardcore restrictions under the Block Exemption Regulation

(47) Article 4 of the Block Exemption Regulation contains a list of hardcore restrictions which lead to the
exclusion of the whole vertical agreement from the scope of application of the Block Exemption
Regulation (26). Where such a hardcore restriction is included in an agreement, that agreement is
presumed to fall within Article 101(1). It is also presumed that the agreement is unlikely to fulfil the
conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings
may demonstrate pro-competitive effects under Article 101(3) in an individual case (27). Where the
undertakings substantiate that likely efficiencies result from including the hardcore restriction in the
agreement and demonstrate that in general all the conditions of Article 101(3) are fulfilled, the
Commission will be required to effectively assess the likely negative impact on competition before making
an ultimate assessment of whether the conditions of Article 101(3) are fulfilled (28).

(48) The hardcore restriction set out in Article 4(a) of the Block Exemption Regulation concerns resale price
maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object
the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by
the buyer. In the case of contractual provisions or concerted practices that directly establish the resale
price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples
of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the
distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of
promotional costs by the supplier subject to the observance of a given price level, linking the prescribed
resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or
suspension of deliveries or contract terminations in relation to observance of a given price level. Direct
or indirect means of achieving price fixing can be made more effective when combined with measures to
identify price-cutting distributors, such as the implementation of a price monitoring system, or the
obligation on retailers to report other members of the distribution network that deviate from the standard
price level. Similarly, direct or indirect price fixing can be made more effective when combined with
measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing
a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-
customer clause. The same indirect means and the same 'supportive' measures can be used to make
maximum or recommended prices work as RPM. However, the use of a particular supportive measure
or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not
considered in itself as leading to RPM.
In the case of agency agreements, the principal normally establishes the sales price, as the agent does not become the owner of the goods. However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) (see paragraphs (12) to (21)) an obligation preventing or restricting the agent from sharing its commission, fixed or variable, with the customer would be a hardcore restriction under Article 4(a) of the Block Exemption Regulation. In order to avoid including such a hardcore restriction in the agreement, the agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal. 

The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation concerns agreements or concerted practices that have as their direct or indirect object the restriction of sales by a buyer party to the agreement or its customers, in as far as those restrictions relate to the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services. This hardcore restriction relates to market partitioning by territory or by customer group. That may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported or profit pass-over obligations. It may further result from the supplier not providing a Union-wide guarantee service under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory. Such practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective destination of the supplied goods, such as the use of differentiated labels or serial numbers. However, obligations on the reseller relating to the display of the supplier's brand name are not classified as hardcore. As Article 4(b) only concerns restrictions of sales by the buyer or its customers, this implies that restrictions of the supplier's sales are also not a hardcore restriction, subject to what is stated in paragraph (59) regarding sales of spare parts in the context of Article 4(e) of the Block Exemption Regulation. Article 4(b) applies without prejudice to a restriction on the buyer's place of establishment. Thus, the benefit of the Block Exemption Regulation is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory.

There are four exceptions to the hardcore restriction in Article 4(b) of the Block Exemption Regulation. The first exception in Article 4(b)(i) allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, irrespective of sales by the supplier. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by for instance appointing an exclusive distributor for a particular customer group in a certain territory. Such protection of exclusively allocated territories or customer groups must, however, permit passive sales to such territories or customer groups. For the application of Article 4(b) of the Block Exemption Regulation, the Commission interprets ‘active’ and ‘passive’ sales as follows:

—‘Active’ sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory.

—‘Passive’ sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors’ (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.
The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group; however, such effects result from the technology allowing easy access from everywhere. If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. Offering different language options on the website does not, of itself, change the passive character of such selling. The Commission thus regards the following as examples of hardcore restrictions of passive selling given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers:

(a) an agreement that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall automatically re-rout its customers to the manufacturer's or other (exclusive) distributors' websites. This does not exclude an agreement that the distributor's website shall also offer a number of links to websites of other distributors and/or the supplier;

(b) an agreement that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;

(c) an agreement that the distributor shall limit its proportion of overall sales made over the internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (see paragraphs (54) and (56)). This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location;

(d) an agreement that the distributor shall pay a higher price for products intended to be resold online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts.

A restriction on the use of the internet by distributors that are party to the agreement is compatible with the Block Exemption Regulation to the extent that promotion on the internet or use of the internet would lead to active selling into, for instance, other distributors' exclusive territories or customer groups. The Commission considers online advertisement specifically addressed to certain customers as a form of active selling to those customers. For instance, territory-based banners on third party websites are a form of active sales into the territory where these banners are shown. In general, efforts to be found specifically in a certain territory or by a certain customer group is active selling into that territory or to that customer group. For instance, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory.

However, under the Block Exemption the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distributors. Similarly, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.

There are three further exceptions to the hardcore restriction set out in Article 4(b) of the Block Exemption Regulation. All three exceptions allow for the restriction of both active and passive sales. Under the first exception, it is permissible to restrict a wholesaler from selling to end users, which allows a supplier to
keep the wholesale and retail level of trade separate. However, that exception does not exclude the possibility that the wholesaler can sell to certain end users, such as bigger end users, while not allowing sales to (all) other end users. The second exception allows a supplier to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (referred to as ‘the territory reserved by the supplier to operate that system’ in Article 4(b)(iii)). The third exception allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier. The term ‘component’ includes any intermediate goods and the term ‘incorporation’ refers to the use of any input to produce goods.

(56) The hardcore restriction set out in Article 4(c) of the Block Exemption Regulation excludes the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment. Accordingly, dealers in a selective distribution system, as defined in Article 1(1)(e) of the Block Exemption Regulation, cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users except to protect an exclusive distribution system operated elsewhere (see paragraph (51)). Within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes. For example, in order to prevent sales to unauthorised dealers, a supplier can restrict its selected dealers from selling more than a given quantity of contract products to an individual end user. Such a requirement may have to be stricter for online sales if it is easier for an unauthorised dealer to obtain those products by using the internet. Similarly, it may have to be stricter for offline sales if it is easier to obtain them from a brick and mortar shop. In order to ensure timely delivery of contract products, a supplier may impose that the products be delivered instantly in the case of offline sales. Whereas an identical requirement cannot be imposed for online sales, the supplier may specify certain practicable delivery times for such sales. Specific requirements may have to be formulated for an online after-sales help desk, so as to cover the costs of customers returning the product and for applying secure payment systems.

(57) Within the territory where the supplier operates selective distribution, this system may not be combined with exclusive distribution as that would lead to a hardcore restriction of active or passive selling by the dealers under Article 4(c) of the Block Exemption Regulation, with the exception that restrictions can be imposed on the dealer’s ability to determine the location of its business premises. Selected dealers may be prevented from operating their business from different premises or from opening a new outlet in a different location. In that context, the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location. If the dealer’s outlet is mobile, an area may be defined outside which the mobile outlet cannot be operated. In addition, the supplier may commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied.

(58) The hardcore restriction set out in Article 4(d) of the Block Exemption Regulation concerns the restriction of cross-supplies between appointed distributors within a selective distribution system. Accordingly, an agreement or concerted practice may not have as its direct or indirect object to prevent or restrict the active or passive selling of the contract products between the selected distributors. Selected distributors must remain free to purchase the contract products from other appointed distributors within the network, operating either at the same or at a different level of trade. Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on appointed wholesalers as regards their sales of the product to appointed retailers.

(59) The hardcore restriction set out in Article 4(e) of the Block Exemption Regulation concerns agreements that prevent or restrict end-users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. An agreement between a manufacturer of spare parts and a buyer that incorporates those parts into its own products (original equipment manufacturer (OEM)), may not, either directly or indirectly, prevent or restrict sales by the manufacturer.
of those spare parts to end users, independent repairers or service providers. Indirect restrictions may arise particularly when the supplier of the spare parts is restricted in supplying technical information and special equipment which are necessary for the use of spare parts by users, independent repairers or service providers. However, the agreement may place restrictions on the supply of the spare parts to the repairers or service providers entrusted by the original equipment manufacturer with the repair or servicing of its own goods. In other words, the original equipment manufacturer may require its own repair and service network to buy spare parts from it.

4. Individual cases of hardcore sales restrictions that may fall outside the scope of Article 101(1) or may fulfil the conditions of Article 101(3)

(60)Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature (31) and therefore fall outside Article 101(1). For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected. In addition, undertakings may plead an efficiency defence under Article 101(3) in an individual case. This section provides some examples for (re)sales restrictions, whereas for RPM this is dealt with in section VI.2.10.

(61)A distributor which will be the first to sell a new brand or the first to sell an existing brand on a new market, thereby ensuring a genuine entry on the relevant market, may have to commit substantial investments where there was previously no demand for that type of product in general or for that type of product from that producer. Such expenses may often be sunk and in such circumstances the distributor may not enter into the distribution agreement without protection for a certain period of time against (active and) passive sales into its territory or to its customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group by other distributors.

(62)In the case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1) for the period necessary for the testing or introduction of the product.

(63)In the case of a selective distribution system, cross supplies between appointed distributors must normally remain free (see paragraph (58)). However, if appointed wholesalers located in different territories are obliged to invest in promotional activities in ‘their’ territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers’ territories to overcome possible free riding may, in an individual case, fulfil the conditions of Article 101(3).

(64)In general, an agreement that a distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline (‘dual pricing’) is a hardcore restriction (see paragraph (52)). However, in some specific circumstances, such an agreement may fulfil the conditions of Article 101(3). Such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer. In that context, the Commission will also consider to what extent the restriction is likely to limit internet sales and hinder the distributor to reach more and different customers.

5. Excluded restrictions under the Block Exemption Regulation

(65)Article 5 of the Block Exemption Regulation excludes certain obligations from the coverage of the Block Exemption Regulation even though the market share threshold is not exceeded. However, the Block
Exemption Regulation continues to apply to the remaining part of the vertical agreement if that part is severable from the non-exempted obligations.

(66) The first exclusion is provided for in Article 5(1)(a) of the Block Exemption Regulation and concerns non-compete obligations. Non-compete obligations are arrangements that result in the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80% of the buyer’s total purchases of the contract goods and services and their substitutes during the preceding calendar year (as defined by Article 1(1)(d) of the Block Exemption Regulation), thereby preventing the buyer from purchasing competing goods or services or limiting such purchases to less than 20% of total purchases. Where, in the first year after entering in the agreement, for the year preceding the conclusion of the contract no relevant purchasing data for the buyer are available, the buyer's best estimate of its annual total requirements may be used. Such non-compete obligations are not covered by the Block Exemption Regulation where the duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulation (see the second subparagraph of Article 5(1)). In general, non-compete obligations are exempted under that Regulation where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period. If, for instance, the agreement provides for a five-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan should not hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. Similarly, when the supplier provides the buyer with equipment which is not relationship-specific, the buyer should have the possibility to take over the equipment at its market asset value once the non-compete obligation expires.

(67) The five-year duration limit does not apply when the goods or services are resold by the buyer ‘from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer’. In such cases the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer (Article 5(2) of the Block Exemption Regulation). The reason for this exception is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without its permission. By analogy, the same principles apply where the buyer operates from a mobile outlet owned by the supplier or leased by the supplier from third parties not connected with the buyer. Artificial ownership constructions, such as a transfer by the distributor of its proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the five-year limit cannot benefit from this exception.

(68) The second exclusion from the block exemption is provided for in Article 5(1)(b) of the Block Exemption Regulation and concerns post term non-compete obligations on the buyer. Such obligations are normally not covered by the Block Exemption Regulation, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period, and is limited to a maximum period of one year (see Article 5(3) of the Block Exemption Regulation). According to the definition in Article 1(1)(g) of the Block Exemption Regulation the know-how needs to be ‘substantial’, meaning that the know-how includes information which is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

(69) The third exclusion from the block exemption is provided for in Article 5(1)(c) of the Block Exemption Regulation and concerns the sale of competing goods in a selective distribution system. The Block Exemption Regulation covers the combination of selective distribution with a non-compete obligation, obliging the dealers not to resell competing brands in general. However, if the supplier prevents its appointed dealers, either directly or indirectly, from buying products for resale from specific competing suppliers, such an obligation cannot enjoy the benefit of the Block Exemption Regulation. The objective of the exclusion of such an obligation is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one specific competitor or certain specific competitors from using these outlets to distribute their products (foreclosure of a competing supplier which would be a form of collective boycott) \(^\text{[32]}\).

6. Severability

(70) The Block Exemption Regulation exempts vertical agreements on condition that no hardcore restriction, as set out in Article 4 of that Regulation, is contained in or practised with the vertical agreement. If there are one or more hardcore restrictions, the benefit of the Block Exemption Regulation is lost for the entire vertical agreement. There is no severability for hardcore restrictions.
The rule of severability does apply, however, to the excluded restrictions set out in Article 5 of the Block Exemption Regulation. Therefore, the benefit of the block exemption is only lost in relation to that part of the vertical agreement which does not comply with the conditions set out in Article 5.

7. Portfolio of products distributed through the same distribution system

Where a supplier uses the same distribution agreement to distribute several goods/services some of these may, in view of the market share threshold, be covered by the Block Exemption Regulation while others may not. In that case, the Block Exemption Regulation applies to those goods and services for which the conditions of application are fulfilled.

In respect of the goods or services which are not covered by the Block Exemption Regulation, the ordinary rules of competition apply, which means:

(a) there is no block exemption but also no presumption of illegality;

(b) if there is an infringement of Article 101(1) which is not exemptible, consideration may be given to whether there are appropriate remedies to solve the competition problem within the existing distribution system;

(c) if there are no such appropriate remedies, the supplier concerned will have to make other distribution arrangements.

Such a situation can also arise where Article 102 applies in respect of some products but not in respect of others.

IV. WITHDRAWAL OF THE BLOCK EXEMPTION AND DISAPPLICATION OF THE BLOCK EXEMPTION REGULATION

1. Withdrawal procedure

The presumption of legality conferred by the Block Exemption Regulation may be withdrawn where a vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, comes within the scope of Article 101(1) and does not fulfil all the conditions of Article 101(3).

The conditions of Article 101(3) may in particular not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers. Parallel networks of vertical agreements are to be regarded as similar if they contain restraints producing similar effects on the market. Such a situation may arise for example when, on a given market, certain suppliers practise purely qualitative selective distribution while other suppliers practise quantitative selective distribution. Such a situation may also arise when, on a given market, the cumulative use of qualitative criteria forecloses more efficient distributors. In such circumstances, the assessment must take account of the anti-competitive effects attributable to each individual network of agreements. Where appropriate, withdrawal may concern only a particular qualitative criterion or only the quantitative limitations imposed on the number of authorised distributors.

Responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings which make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall under the prohibition provided for in Article 101(1) and are therefore not subject to the withdrawal mechanism. The assessment of such a contribution will be made in accordance with the criteria set out in paragraphs (128) to (229).

Where the withdrawal procedure is applied, the Commission bears the burden of proof that the agreement falls within the scope of Article 101(1) and that the agreement does not fulfil one or several of the conditions of Article 101(3). A withdrawal decision can only have ex nunc effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the withdrawal becomes effective.

As referred to in recital 14 of the Block Exemption Regulation, the competition authority of a Member State may withdraw the benefit of the Block Exemption Regulation in respect of vertical agreements whose anti-competitive effects are felt in the territory of the Member State concerned or a part thereof, which has all the characteristics of a distinct geographic market. The Commission has the exclusive
power to withdraw the benefit of the Block Exemption Regulation in respect of vertical agreements restricting competition on a relevant geographic market which is wider than the territory of a single Member State. When the territory of a single Member State, or a part thereof, constitutes the relevant geographic market, the Commission and the Member State concerned have concurrent competence for withdrawal.

2. Disapplication of the Block Exemption Regulation

(79) Article 6 of the Block Exemption Regulation enables the Commission to exclude from the scope of the Block Exemption Regulation, by means of regulation, parallel networks of similar vertical restraints where these cover more than 50% of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation disapplying the Block Exemption Regulation.

(80) Whereas the withdrawal of the benefit of the Block Exemption Regulation implies the adoption of a decision establishing an infringement of Article 101 by an individual company, the effect of a regulation under Article 6 is merely to remove, in respect of the restraints and the markets concerned, the benefit of the application of the Block Exemption Regulation and to restore the full application of Article 101(1) and (3). Following the adoption of a regulation declaring the Block Exemption Regulation inapplicable in respect of vertical restraints on a particular market, the criteria developed by the relevant case-law of the Court of Justice and the General Court and by notices and previous decisions adopted by the Commission will guide the application of Article 101 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.

(81) For the purpose of calculating the 50% market coverage ratio, account must be taken of each individual network of vertical agreements containing restraints, or combinations of restraints, producing similar effects on the market. Article 6 of the Block Exemption Regulation does not entail an obligation on the part of the Commission to act where the 50% market-coverage ratio is exceeded. In general, disapplication is appropriate when it is likely that access to the relevant market or competition therein is appreciably restricted. This may occur in particular when parallel networks of selective distribution covering more than 50% of a market are liable to foreclose the market by using selection criteria which are not required by the nature of the relevant goods or which discriminate against certain forms of distribution capable of selling such goods.

(82) In assessing the need to apply Article 6 of the Block Exemption Regulation, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Union.

(83) Any regulation referred to in Article 6 of the Block Exemption Regulation must clearly set out its scope. Therefore, the Commission must first define the relevant product and geographic market(s) and, secondly, must identify the type of vertical restraint in respect of which the Block Exemption Regulation will no longer apply. As regards the latter aspect, the Commission may modulate the scope of its regulation according to the competition concern which it intends to address. For instance, while all parallel networks of single-branding type arrangements shall be taken into account in view of establishing the 50% market coverage ratio, the Commission may nevertheless restrict the scope of the disapplication regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, in consideration of the lesser degree of foreclosure attributable to such restraints. Similarly, when on a particular market selective distribution is practised in combination with additional restraints such as non-compete or quantity-forcing on the buyer, the disapplication regulation may concern only such additional restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect.

(84) Pursuant to Regulation No 19/65/EEC of 2 March 1965 of the Council on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, the Commission will have to set a transitional period of not less than six months before a regulation disapplying the Block Exemption Regulation becomes applicable. This should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the Block Exemption Regulation.
A regulation disapplying the Block Exemption Regulation will not affect the exempted status of the agreements concerned for the period preceding its date of application.

V. MARKET DEFINITION AND MARKET SHARE CALCULATION

1. Commission Notice on definition of the relevant market

The Commission Notice on definition of the relevant market for the purposes of Community competition law provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues. That Notice will not be further explained in these Guidelines and should serve as the basis for market definition issues. These Guidelines will only deal with specific issues that arise in the context of vertical restraints and that are not dealt with in that notice.

2. The relevant market for calculating the 30% market share threshold under the Block Exemption Regulation

Under Article 3 of the Block Exemption Regulation, the market share of both the supplier and the buyer are decisive to determine if the block exemption applies. In order for the block exemption to apply, the market share of the supplier on the market where it sells the contract products to the buyer, and the market share of the buyer on the market where it purchases the contract products, must each be 30% or less. For agreements between small and medium-sized undertakings it is in general not necessary to calculate market shares (see paragraph (11)).

In order to calculate an undertaking's market share, it is necessary to determine the relevant market where that undertaking sells and purchases, respectively, the contract products. Accordingly, the relevant product market and the relevant geographic market must be defined. The relevant product market comprises any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

The product market definition primarily depends on substitutability from the buyers’ perspective. When the supplied product is used as an input to produce other products and is generally not recognisable in the final product, the product market is normally defined by the direct buyers’ preferences. The customers of the buyers will normally not have a strong preference concerning the inputs used by the buyers. Usually, the vertical restraints agreed between the supplier and buyer of the input only relate to the sale and purchase of the intermediate product and not to the sale of the resulting product. In the case of distribution of final goods, substitutes for the direct buyers will normally be influenced or determined by the preferences of the final consumers. A distributor, as reseller, cannot ignore the preferences of final consumers when it purchases final goods. In addition, at the distribution level the vertical restraints usually concern not only the sale of products between supplier and buyer, but also their resale. As different distribution formats usually compete, markets are in general not defined by the form of distribution that is applied. Where suppliers generally sell a portfolio of products, the entire portfolio may determine the product market when the portfolios and not the individual products are regarded as substitutes by the buyers. As distributors are professional buyers, the geographic wholesale market is usually wider than the retail market, where the product is resold to final consumers. Often, this will lead to the definition of national or wider wholesale markets. But retail markets may also be wider than the final consumers’ search area where homogeneous market conditions and overlapping local or regional catchment areas exist.

Where a vertical agreement involves three parties, each operating at a different level of trade, each party's market share must be 30% or less in order for the block exemption to apply. As specified in Article 3(2) of the Block Exemption Regulation, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the block exemption applies only if its market share does not exceed the 30% threshold both as a buyer and a supplier. If, for instance, in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer, a non-compete obligation is agreed, then the market shares of the manufacturer and the wholesaler (or association of retailers) on their respective downstream markets must not exceed 30% and the market share of the
wholesaler (or association of retailers) and the retailer must not exceed 30 % on their respective purchase markets in order to benefit from the block exemption.

(91) Where a supplier produces both original equipment and the repair or replacement parts for that equipment, the supplier will often be the only or the major supplier on the after-market for the repair and replacement parts. This may also arise where the supplier (OEM supplier) subcontracts the manufacturing of the repair or replacement parts. The relevant market for application of the Block Exemption Regulation may be the original equipment market including the spare parts or a separate original equipment market and after-market depending on the circumstances of the case, such as the effects of the restrictions involved, the lifetime of the equipment and importance of the repair or replacement costs. In practice, the issue is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the product. If so, it indicates there is one market for the original equipment and spare parts combined.

(92) Where the vertical agreement, in addition to the supply of the contract goods, also contains IPR provisions — such as a provision concerning the use of the supplier's trademark — which help the buyer to market the contract goods, the supplier's market share on the market where it sells the contract goods is relevant for the application of the Block Exemption Regulation. Where a franchisor does not supply goods to be resold but provides a bundle of services and goods combined with IPR provisions which together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method. For that purpose, the franchisor needs to calculate its market share on the market where the business method is exploited, which is the market where the franchisees exploit the business method to provide goods or services to end users. The franchisor must base its market share on the value of the goods or services supplied by its franchisees on this market. On such a market, the competitors may be providers of other franchised business methods but also suppliers of substitutable goods or services not applying franchising. For instance, without prejudice to the definition of such market, if there was a market for fast-food services, a franchisor operating on such a market would need to calculate its market share on the basis of the relevant sales figures of its franchisees on this market.

3. Calculation of market shares under the Block Exemption Regulation

(93) The calculation of market shares needs to be based in principle on value figures. Where value figures are not available substantiated estimates can be made. Such estimates may be based on other reliable market information such as volume figures (see Article 7(a) of the Block Exemption Regulation).

(94) In-house production, that is, production of an intermediate product for own use, may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of a company. However, for the purpose of market definition and the calculation of market share for intermediate goods and services, in-house production will not be taken into account.

(95) However, in the case of dual distribution of final goods, that is, where a producer of final goods also acts as a distributor on the market, the market definition and market share calculation need to include sales of their own goods made by the producers through their vertically integrated distributors and agents (see Article 7(c) of the Block Exemption Regulation). ‘Integrated distributors’ are connected undertakings within the meaning of Article 1(2) of the Block Exemption Regulation.

VI. ENFORCEMENT POLICY IN INDIVIDUAL CASES

1. The framework of analysis

(96) Outside the scope of the block exemption, it is relevant to examine whether in the individual case the agreement falls within the scope of Article 101(1) and if so whether the conditions of Article 101(3) are satisfied. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions of competition, there is no presumption that vertical agreements falling outside the block exemption because the market share threshold is exceeded fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). Individual assessment of the likely effects of the agreement is required. Companies are encouraged to do their own assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) or which fulfil the conditions of Article 101(3) are valid and enforceable. Pursuant to Article 1(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, no notification needs to be made to benefit from an individual exemption under Article 101(3). In the case of
an individual examination by the Commission, the latter will bear the burden of proof that the agreement in question infringes Article 101(1). The undertakings claiming the benefit of Article 101(3) bear the burden of proving that the conditions of that paragraph are fulfilled. When likely anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a certain distribution system is indispensable to bring likely benefits to consumers without eliminating competition, before the Commission decides whether the agreement satisfies the conditions of Article 101(3).

(97) The assessment of whether a vertical agreement has the effect of restricting competition will be made by comparing the actual or likely future situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the agreement. In the assessment of individual cases, the Commission will take, as appropriate, both actual and likely effects into account. For vertical agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable. Appreciable anticompetitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.

(98) Vertical restraints are generally less harmful than horizontal restraints. The main reason for the greater focus on horizontal restraints is that such restraints may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships, the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships, the product of the one is the input for the other, in other words, the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.

(99) Such self-restraining character should not, however, be over-estimated. When a company has no market power, it can only try to increase its profits by optimising its manufacturing and distribution processes, with or without the help of vertical restraints. More generally, because of the complementary role of the parties to a vertical agreement in getting a product on the market, vertical restraints may provide substantial scope for efficiencies. However, when an undertaking does have market power it can also try to increase its profits at the expense of its direct competitors by raising their costs and at the expense of its buyers and ultimately consumers by trying to appropriate some of their surplus. This can happen when the upstream and downstream company share the extra profits or when one of the two uses vertical restraints to appropriate all the extra profits.

1.1 Negative effects of vertical restraints

(100) The negative effects on the market that may result from vertical restraints which EU competition law aims at preventing are the following:

(a) anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;
(b) softening of competition between the supplier and its competitors and/or facilitation of collusion amongst these suppliers, often referred to as reduction of inter-brand competition;
(c) softening of competition between the buyer and its competitors and/or facilitation of collusion amongst these competitors, often referred to as reduction of intra-brand competition if it concerns distributors’ competition on the basis of the brand or product of the same supplier;
(d) the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose.

(101) Foreclosure, softening of competition and collusion at the manufacturers’ level may harm consumers in particular by increasing the wholesale prices of the products, limiting the choice of products, lowering their quality or reducing the level of product innovation. Foreclosure, softening of competition and
collusion at the distributors' level may harm consumers in particular by increasing the retail prices of the products, limiting the choice of price-service combinations and distribution formats, lowering the availability and quality of retail services and reducing the level of innovation of distribution.

(102) On a market where individual distributors distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers.

(103) Exclusive arrangements are generally more anti-competitive than non-exclusive arrangements. Exclusive arrangements, whether by means of express contractual language or their practical effects, result in one party sourcing all or practically all of its demand from another party. For instance, under a non-compete obligation the buyer purchases only one brand. Quantity forcing, on the other hand, leaves the buyer some scope to purchase competing goods. The degree of foreclosure may therefore be less with quantity forcing.

(104) Vertical restraints agreed for non-branded goods and services are in general less harmful than restraints affecting the distribution of branded goods and services. Branding tends to increase product differentiation and reduce substitutability of the product, leading to a reduced elasticity of demand and an increased possibility to raise price. The distinction between branded and non-branded goods or services will often coincide with the distinction between intermediate goods and services and final goods and services.

(105) In general, a combination of vertical restraints aggravates their individual negative effects. However, certain combinations of vertical restraints are less anti-competitive than their use in isolation. For instance, in an exclusive distribution system, the distributor may be tempted to increase the price of the products as intra-brand competition has been reduced. The use of quantity forcing or the setting of a maximum resale price may limit such price increases. Possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects.

1.2. Positive effects of vertical restraints

(106) It is important to recognise that vertical restraints may have positive effects by, in particular, promoting non-price competition and improved quality of services. When a company has no market power, it can only try to increase its profits by optimising its manufacturing or distribution processes. In a number of situations vertical restraints may be helpful in this respect since the usual arm's length dealings between supplier and buyer, determining only price and quantity of a certain transaction, can lead to a sub-optimal level of investments and sales.

(107) While trying to give a fair overview of the various justifications for vertical restraints, these Guidelines do not claim to be complete or exhaustive. The following reasons may justify the application of certain vertical restraints:

(a) To solve a ‘free-rider’ problem. One distributor may free-ride on the promotion efforts of another distributor. That type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. Free-riding can also occur between suppliers, for instance where one invests in promotion at the buyer's premises, in general at the retail level, that may also attract customers for its competitors. Non-compete type restraints can help to overcome free-riding (41).

For there to be a problem, there needs to be a real free-rider issue. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. The product will usually need to be relatively new or technically complex or the reputation of the product must be a major determinant of its demand, as the customer may otherwise very well know what it wants, based on past purchases. And the product must be of a reasonably high value as it is otherwise not attractive for a customer to go to one shop for information and to another to buy. Lastly, it must not be practical for the supplier to impose on all buyers, by contract, effective promotion or service requirements.

Free-riding between suppliers is also restricted to specific situations, namely to cases where the promotion takes place at the buyer's premises and is generic, not brand specific.
(b) To ‘open up or enter new markets’. Where a manufacturer wants to enter a new geographic market, for instance by exporting to another country for the first time, this may involve special ‘first time investments’ by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection to the distributor so that it can recoup these investments by temporarily charging a higher price. Distributors based in other markets should then be restrained for a limited period from selling on the new market (see also paragraph (61) in Section III.4). This is a special case of the free-rider problem described under point (a).

(c) The ‘certification free-rider issue’. In some sectors, certain retailers have a reputation for stocking only ‘quality’ products. In such a case, selling through those retailers may be vital for the introduction of a new product. If the manufacturer cannot initially limit its sales to the premium stores, it runs the risk of being de-listed and the product introduction may fail. There may, therefore, be a reason for allowing for a limited duration a restriction such as exclusive distribution or selective distribution. It must be enough to guarantee introduction of the new product but not so long as to hinder large-scale dissemination. Such benefits are more likely with ‘experience’ goods or complex goods that represent a relatively large purchase for the final consumer.

(d) The so-called ‘hold-up problem’. Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular requirement of one of its customers. The investor may not commit the necessary investments before particular supply arrangements are fixed.

However, as in the other free-riding examples, there are a number of conditions that have to be met before the risk of under-investment is real or significant. Firstly, the investment must be relationship-specific. An investment made by the supplier is considered to be relationship-specific when, after termination of the contract, it cannot be used by the supplier to supply other customers and can only be sold at a significant loss. An investment made by the buyer is considered to be relationship-specific when, after termination of the contract, it cannot be used by the buyer to purchase and/or use products supplied by other suppliers and can only be sold at a significant loss. An investment is thus relationship-specific because it can only, for instance, be used to produce a brand-specific component or to store a particular brand and thus cannot be used profitably to produce or resell alternatives. Secondly, it must be a long-term investment that is not recouped in the short run. And thirdly, the investment must be asymmetric, that is, one party to the contract invests more than the other party. Where these conditions are met, there is usually a good reason to have a vertical restraint for the duration it takes to depreciate the investment. The appropriate vertical restraint will be of the non-compete type or quantity-forcing type when the investment is made by the supplier and of the exclusive distribution, exclusive customer allocation or exclusive supply type when the investment is made by the buyer.

(e) The ‘specific hold-up problem that may arise in the case of transfer of substantial know-how’. The know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by its competitors. In as far as the know-how was not readily available to the buyer, it is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete type of restriction, which would normally fall outside Article 101(1).

(f) The ‘vertical externality issue’. A retailer may not gain all the benefits of its action taken to improve sales; some may go to the manufacturer. For every extra unit a retailer sells by lowering its resale price or by increasing its sales effort, the manufacturer benefits if its wholesale price exceeds its marginal production costs. Thus, there may be a positive externality bestowed on the manufacturer by such retailer’s actions and from the manufacturer’s perspective the retailer may be pricing too high and/or making too little sales efforts. The negative externality of too high pricing by the retailer is sometimes called the “double marginalisation problem” and it can be avoided by imposing a maximum resale price on the retailer. To increase the retailer’s sales efforts selective distribution, exclusive distribution or similar restrictions may be helpful (42).

(g) ‘Economies of scale in distribution’. In order to have scale economies exploited and thereby see a lower retail price for its product, the manufacturer may want to concentrate the resale of its products on a limited number of distributors. To do so, it could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing such a requirement or exclusive sourcing.
(h) ‘Capital market imperfections’. The usual providers of capital (banks, equity markets) may provide capital sub-optimally when they have imperfect information on the quality of the borrower or there is an inadequate basis to secure the loan. The buyer or supplier may have better information and be able, through an exclusive relationship, to obtain extra security for its investment. Where the supplier provides the loan to the buyer, this may lead to non-compete or quantity forcing on the buyer. Where the buyer provides the loan to the supplier, this may be the reason for having exclusive supply or quantity forcing on the supplier.

(i) ‘Uniformity and quality standardisation’. A vertical restraint may help to create a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors, thereby increasing the attractiveness of the product to the final consumer and increasing its sales. This can for instance be found in selective distribution and franchising.

(108) The nine situations listed in paragraph (107) make clear that under certain conditions, vertical agreements are likely to help realise efficiencies and the development of new markets and that this may offset possible negative effects. The case is in general strongest for vertical restraints of a limited duration which help the introduction of new complex products or protect relationship-specific investments. A vertical restraint is sometimes necessary for as long as the supplier sells its product to the buyer (see in particular the situations described in paragraph (107)(a), (e), (f), (g) and (i)).

(109) A large measure of substitutability exists between the different vertical restraints. As a result, the same inefficiency problem can be solved by different vertical restraints. For instance, economies of scale in distribution may possibly be achieved by using exclusive distribution, selective distribution, quantity forcing or exclusive sourcing. However, the negative effects on competition may differ between the various vertical restraints, which plays a role when indispensability is discussed under Article 101(3).

1.3. Methodology of analysis

(110) The assessment of a vertical restraint generally involves the following four steps (13):

(a) First, the undertakings involved need to establish the market shares of the supplier and the buyer on the market where they respectively sell and purchase the contract products.

(b) If the relevant market share of the supplier and the buyer each do not exceed the 30 % threshold, the vertical agreement is covered by the Block Exemption Regulation, subject to the hardcore restrictions and excluded restrictions set out in that Regulation.

(c) If the relevant market share is above the 30 % threshold for supplier and/or buyer, it is necessary to assess whether the vertical agreement falls within Article 101(1).

(d) If the vertical agreement falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for exemption under Article 101(3).

1.3.1. Relevant factors for the assessment under Article 101(1)

(111) In assessing cases above the market share threshold of 30 %, the Commission will undertake a full competition analysis. The following factors are particularly relevant to establish whether a vertical agreement brings about an appreciable restriction of competition under Article 101(1):

(a) nature of the agreement;

(b) market position of the parties;

(c) market position of competitors;

(d) market position of buyers of the contract products;

(e) entry barriers;

(f) maturity of the market;

(g) level of trade;

(h) nature of the product;

(i) other factors.

(112) The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case
of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.

(113) Vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it contains, the duration of those restraints and the percentage of total sales on the market affected by those restraints. It may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement is implemented by the parties and the incentives that they face.

(114) The market position of the parties provides an indication of the degree of market power, if any, possessed by the supplier, the buyer or both. The higher their market share, the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. Such competitive advantages may, for instance, result from being a first mover on the market (having the best site, etc.), from holding essential patents or having superior technology, from being the brand leader or having a superior portfolio.

(115) Such indicators, namely market share and possible competitive advantages, are used to assess the market position of competitors. The stronger the competitors are and the greater their number, the less risk there is that the parties will be able to individually exercise market power and foreclose the market or soften competition. It is also relevant to consider whether there are effective and timely counterstrategies that competitors would be likely to deploy. However, if the number of competitors becomes rather small and their market position (size, costs, R&D potential, etc.) is rather similar, such a market structure may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.

(116) The market position of the parties’ customers provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchase market. That share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the customer on its resale market, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image amongst final consumers. In some circumstances, buyer power may prevent the parties from exercising market power and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong customers have the capacity and incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where strong customers merely extract favourable terms for themselves or simply pass on any price increase to their customers, their position does not prevent the parties from exercising market power.

(117) Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising over a period of time. Vertical restraints and vertical integration may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at only the supplier or buyer level or at both levels. The question whether certain of those factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs that have to be incurred to enter or be active on a market but that are lost when the market is exited. Advertising costs to build consumer loyalty are normally sunk costs, unless an exiting firm could either sell its brand name or use it somewhere else without a loss. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. If, for instance, distributors are tied to a manufacturer via a non-compete obligation, the foreclosing effect will be more significant if setting up its own distributors will impose sunk costs on the potential entrant. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.

(118) A mature market is a market that has existed for some time, where the technology used is well known and widespread and not changing very much, where there are no major brand innovations and in which
demand is relatively stable or declining. In such a market, negative effects are more likely than in more dynamic markets.

(119) The level of trade is linked to the distinction between intermediate and final goods and services. Intermediate goods and services are sold to undertakings for use as an input to produce other goods or services and are generally not recognisable in the final goods or services. The buyers of intermediate products are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods are, directly or indirectly, sold to final consumers that often rely more on brand and image. As distributors have to respond to the demand of final consumers, competition may suffer more when distributors are foreclosed from selling one or a number of brands than when buyers of intermediate products are prevented from buying competing products from certain sources of supply.

(120) The nature of the product plays a role in particular for final products in assessing both the likely negative and the likely positive effects. When assessing the likely negative effects, it is important whether the products on the market are more homogeneous or heterogeneous, whether the product is expensive, taking up a large part of the consumer's budget, or is inexpensive and whether the product is a one-off purchase or repeatedly purchased. In general, when the product is more heterogeneous, less expensive and resembles more a one-off purchase, vertical restraints are more likely to have negative effects.

(121) In the assessment of particular restraints other factors may have to be taken into account. Among these factors can be the cumulative effect, that is, the coverage of the market by similar agreements of others, whether the agreement is ‘imposed’ (mainly one party is subject to the restrictions or obligations) or ‘agreed’ (both parties accept restrictions or obligations), the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the ‘right’ price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

1.3.2. Relevant factors for the assessment under Article 101(3)

(122) Restrictive vertical agreements may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. Such an assessment takes place within the framework of Article 101(3), which contains an exception from the prohibition rule of Article 101(1). For that exception to be applicable, the vertical agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned. 

(123) The assessment of restrictive agreements under Article 101(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 101(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case. When applying Article 101(3) in accordance with these principles it is necessary to take into account the investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

(124) The first condition of Article 101(3) requires an assessment of what are the objective benefits in terms of efficiencies produced by the agreement. In this respect, vertical agreements often have the potential to help realise efficiencies, as explained in section 1.2, by improving the way in which the parties conduct their complementary activities.

(125) In the application of the indispensability test contained in Article 101(3), the Commission will in particular examine whether individual restrictions make it possible to perform the production, purchase and/or (re)sale of the contract products more efficiently than would have been the case in the absence of the restriction concerned. In making such an assessment, the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 101(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable.

(126) The condition that consumers must receive a fair share of the benefits implies that consumers of the products purchased and/or (re)sold under the vertical agreement must at least be compensated for the negative effects of the agreement. In other words, the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement.
The last condition of Article 101(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 101(3), the relationship between Article 101(3) and Article 102 must be taken into account. According to settled case law, the application of Article 101(3) cannot prevent the application of Article 102. Moreover, since Articles 101 and 102 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position. The vertical agreement may not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. A restrictive agreement which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

2. Analysis of specific vertical restraints

The most common vertical restraints and combinations of vertical restraints are analysed in the remainder of these Guidelines following the framework of analysis developed in paragraphs (96) to (127). Other restraints and combinations exist for which no direct guidance is provided in these Guidelines. They will, however, be treated according to the same principles and with the same emphasis on the effect on the market.

2.1. Single branding

Under the heading of 'single branding' fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That component can be found amongst others in non-compete and quantity-forcing on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called 'English clause', requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

Single branding is exempted by the Block Exemption Regulation where the supplier's and buyer's market share each do not exceed 30% and are subject to a limitation in time of five years for the non-compete obligation. The remainder of this section provides guidance for the assessment of individual cases above the market share threshold or beyond the time limit of five years.

The capacity for single branding obligations of one specific supplier to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors that either are not yet present on the market at the time the obligations are concluded, or that are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the supplier in question is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the supplier in
question. The market position of the supplier is thus of main importance to assess possible anti-competitive effects of single branding obligations.

(133) If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations of one specific supplier are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations. The higher its tied market share, that is, the part of its market share sold under a single branding obligation, the more significant foreclosure is likely to be. Similarly, the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects or net negative effects. Single branding obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while single branding obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies.

(134) When assessing the supplier's market power, the market position of its competitors is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not very likely where they have similar market positions and can offer similarly attractive products. In such a case, foreclosure may, however, occur for potential entrants when a number of major suppliers enter into single branding contracts with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where single branding agreements may facilitate collusion between competing suppliers. If, individually, those suppliers are covered by the Block Exemption Regulation, a withdrawal of the block exemption may be necessary to deal with such a negative cumulative effect. A tied market share of less than 5 % is not considered in general to contribute significantly to a cumulative foreclosure effect.

(135) In cases where the market share of the largest supplier is below 30 % and the market share of the five largest suppliers is below 50 %, there is unlikely to be a single or a cumulative anti-competitive effect situation. Where a potential entrant cannot penetrate the market profitably, it is likely to be due to factors other than single branding obligations, such as consumer preferences.

(136) Entry barriers are important to establish whether there is anticompetitive foreclosure. Wherever it is relatively easy for competing suppliers to create new buyers or find alternative buyers for their product, foreclosure is unlikely to be a real problem. However, there are often entry barriers, both at the manufacturing and at the distribution level.

(137) Countervailing power is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing goods or services. More generally, in order to convince customers to accept single branding, the supplier may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into a single branding obligation with the supplier. But it would be wrong to conclude automatically from this that all single branding obligations, taken together, are overall beneficial for customers on that market and for the final consumers. It is in particular unlikely that consumers as a whole will benefit if there are many customers and the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings.

(138) Lastly, ‘the level of trade’ is relevant. Anticompetitive foreclosure is less likely in case of an intermediate product. When the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial part of demand that is free. Below the level of dominance an anticompetitive foreclosure effect may however arise in a cumulative effect situation. A cumulative anticompetitive effect is unlikely to arise as long as less than 50 % of the market is tied.

(139) Where the agreement concerns the supply of a final product at the wholesale level, the question whether a competition problem is likely to arise depends on large part on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of anticompetitive foreclosure if competing manufacturers can easily establish their own wholesaling operation. Whether entry barriers are low depends in part on the type of wholesaling, that is, whether or not wholesalers can operate efficiently with only the product concerned by the agreement (for example ice cream) or whether it is more efficient to trade in a whole range of products (for example frozen foodstuffs). In the latter case, it is not efficient for a manufacturer selling only one product to set up its own wholesaling operation. In that case, anti-
competitive effects may arise. In addition, cumulative effect problems may arise if several suppliers tie most of the available wholesalers.

(140) For final products, foreclosure is in general more likely to occur at the retail level, given the significant entry barriers for most manufacturers to start retail outlets just for their own products. In addition, it is at the retail level that single branding agreements may lead to reduced in-store inter-brand competition. It is for these reasons that for final products at the retail level, significant anti-competitive effects may start to arise, taking into account all other relevant factors, if a non-dominant supplier ties 30% or more of the relevant market. For a dominant company, even a modest tied market share may already lead to significant anti-competitive effects.

(141) At the retail level, a cumulative foreclosure effect may also arise. Where all suppliers have market shares below 30%, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is less than 40% and withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors like the number of competitors, entry barriers etc. are taken into account. Where not all companies have market shares below the threshold of the Block Exemption Regulation but none is dominant, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is below 30%.

(142) Where the buyer operates from premises and land owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies for a possible foreclosure effect will be limited. In that case, intervention by the Commission below the level of dominance is unlikely.

(143) In certain sectors, the selling of more than one brand from a single site may be difficult, in which case a foreclosure problem can better be remedied by limiting the effective duration of contracts.

(144) Where appreciable anti-competitive effects are established, the question of a possible exemption under Article 101(3) arises. For non-compete obligations, the efficiencies described in points (a) (free riding between suppliers), (d), (e) (hold-up problems) and (h) (capital market imperfections) of paragraph (107), may be particularly relevant.

(145) In the case of an efficiency as described in paragraph (107)(a), (107)(d) and (107)(h), quantity forcing on the buyer could possibly be a less restrictive alternative. A non-compete obligation may be the only viable way to achieve an efficiency as described in paragraph (107)(e), (hold-up problem related to the transfer of know-how).

(146) In the case of a relationship-specific investment made by the supplier (see paragraph (107)(d)), a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.

(147) Where the supplier provides the buyer with a loan or provides the buyer with equipment which is not relationship-specific, this in itself is normally not sufficient to justify the exemption of an anticompetitive foreclosure effect on the market. In case of capital market imperfection, it may be more efficient for the supplier of a product than for a bank to provide a loan (see paragraph (107)(h)). However, in such a case the loan should be provided in the least restrictive way and the buyer should thus in general not be prevented from terminating the obligation and repaying the outstanding part of the loan at any point in time and without payment of any penalty.

(148) The transfer of substantial know-how (paragraph (107)(e)) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising.

Example of non-compete obligation

The market leader in a national market for an impulse consumer product, with a market share of 40%, sells most of its products (90%) through tied retailers (tied market share 36%). The agreements obliged the retailers to purchase only from the market leader for at least four years. The market leader is
especially strongly represented in the more densely populated areas like the capital. Its competitors, 10 in number, of which some are only locally available, all have much smaller market shares, the biggest having 12%. Those 10 competitors together supply another 10% of the market via tied outlets. There is strong brand and product differentiation in the market. The market leader has the strongest brands. It is the only one with regular national advertising campaigns. It provides its tied retailers with special stocking cabinets for its product.

The result on the market is that in total 46% (36% + 10%) of the market is foreclosed to potential entrants and to incumbents not having tied outlets. Potential entrants find entry even more difficult in the densely populated areas where foreclosure is even higher, although it is there that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and the high search costs relative to the price of the product, the absence of in-store inter-brand competition leads to an extra welfare loss for consumers. The possible efficiencies of the outlet exclusivity, which the market leader claims result from reduced transport costs and a possible hold-up problem concerning the stocking cabinets, are limited and do not outweigh the negative effects on competition. The efficiencies are limited, as the transport costs are linked to quantity and not exclusivity and the stocking cabinets do not contain special know-how and are not brand specific. Accordingly, it is unlikely that the conditions of Article 101(3) are fulfilled.

Example of quantity forcing

A producer X with a 40% market share sells 80% of its products through contracts which specify that the reseller is required to purchase at least 75% of its requirements for that type of product from X. In return X is offering financing and equipment at favourable rates. The contracts have a duration of five years in which repayment of the loan is foreseen in equal instalments. However, after the first two years buyers have the possibility to terminate the contract with a six-month notice period if they repay the outstanding loan and take over the equipment at its market asset value. At the end of the five-year period the equipment becomes the property of the buyer. Most of the competing producers are small, twelve in total with the biggest having a market share of 20%, and engage in similar contracts with different durations. The producers with market shares below 10% often have contracts with longer durations and with less generous termination clauses. The contracts of producer X leave 25% of requirements free to be supplied by competitors. In the last three years, two new producers have entered the market and gained a combined market share of around 8%, partly by taking over the loans of a number of resellers in return for contracts with these resellers.

Producer X's tied market share is 24% (0.75 × 0.80 × 40%). The other producers' tied market share is around 25%. Therefore, in total around 49% of the market is foreclosed to potential entrants and to incumbents not having tied outlets for at least the first two years of the supply contracts. The market shows that the resellers often have difficulty in obtaining loans from banks and are too small in general to obtain capital through other means like the issuing of shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows him to plan its sales better and to save transport costs. In the light of the efficiencies on the one hand and the 25% non-tied part in the contracts of producer X, the real possibility for early termination of the contract, the recent entry of new producers and the fact that around half the resellers are not tied on the other hand, the quantity forcing of 75% applied by producer X is likely to fulfil the conditions of Article 101(3).

2.2 Exclusive distribution

In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor for resale in a particular territory. At the same time, the distributor is usually limited in its active selling into other (exclusively allocated) territories. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may facilitate price discrimination in particular. When most or all of the suppliers apply exclusive distribution, it may soften competition and facilitate collusion, both at the suppliers' and distributors' level. Lastly, exclusive distribution may lead to foreclosure of other distributors and therewith reduce competition at that level.

Exclusive distribution is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share each do not exceed 30%, even if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. A combination of exclusive distribution and selective distribution is only exempted by the Block Exemption Regulation if active selling in other territories is not restricted. The remainder of this section provides guidance for the assessment of exclusive distribution in individual cases above the 30% market share threshold.
(153) The market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more serious is the loss of intra-brand competition. Above the 30% market share threshold, there may be a risk of a significant reduction of intra-brand competition. In order to fulfil the conditions of Article 101(3), the loss of intra-brand competition may need to be balanced with real efficiencies.

(154) The position of the competitors can have a dual significance. Strong competitors will generally mean that the reduction in intra-brand competition is outweighed by sufficient inter-brand competition. However, if the number of competitors becomes rather small and their market position is rather similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems. Multiple exclusive dealerships, that is, when different suppliers appoint the same exclusive distributor in a given territory, may further increase the risk of collusion and/or softening of competition. If a dealer is granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition may be substantially restricted for those brands. The higher the cumulative market share of the brands distributed by the exclusive multiple brand dealers, the higher the risk of collusion and/or softening of competition and the more inter-brand competition will be reduced. If a retailer is the exclusive distributor for a number of brands this may have as result that if one producer cuts the wholesale price for its brand, the exclusive retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, compared to the situation without multiple exclusive dealerships, producers have a reduced interest in entering into price competition with one another. Such cumulative effect situations may be a reason to withdraw the benefit of the Block Exemption Regulation where the market shares of the suppliers and buyers are below the threshold of the Block Exemption Regulation.

(155) Entry barriers that may hinder suppliers from creating new distributors or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding.

(156) Foreclosure of other distributors is not an issue where the supplier which operates the exclusive distribution system appoints a high number of exclusive distributors on the same market and those exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however become an issue where there is buying power and market power downstream, in particular in the case of very large territories where the exclusive distributor becomes the exclusive buyer for a whole market. An example would be a supermarket chain which becomes the only distributor of a leading brand on a national food retail market. The foreclosure of other distributors may be aggravated in the case of multiple exclusive dealerships.

(157) Buying power may also increase the risk of collusion on the buyers' side when the exclusive distribution arrangements are imposed by important buyers, possibly located in different territories, on one or several suppliers.

(158) Maturity of the market is important, as loss of intra-brand competition and price discrimination may be a serious problem in a mature market but may be less relevant on a market with growing demand, changing technologies and changing market positions.

(159) The level of trade is important as the possible negative effects may differ between the wholesale and retail level. Exclusive distribution is mainly applied in the distribution of final goods and services. A loss of intra-brand competition is especially likely at the retail level if coupled with large territories, since final consumers may be confronted with little possibility of choosing between a high price/high service and a low price/low service distributor for an important brand.

(160) A manufacturer that chooses a wholesaler to be its exclusive distributor will normally do so for a larger territory, such as a whole Member State. As long as the wholesaler can sell the products without limitation to downstream retailers there are not likely to be appreciable anti-competitive effects. A possible loss of intra-brand competition at the wholesale level may be easily outweighed by efficiencies obtained in logistics, promotion etc., especially when the manufacturer is based in a different country. The possible risks for inter-brand competition of multiple exclusive dealerships are however higher at the wholesale than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, not only is there a risk that competition between these brands is reduced, but also that there is foreclosure at the wholesale level of trade.
As stated in paragraph (155), foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding. But even when exclusive distribution is combined with single branding anticompetitive foreclosure of other suppliers is unlikely, except possibly when the single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect. In such a case it may be necessary to apply the principles on single branding set out in section 2.1. However, when the combination does not lead to significant foreclosure, the combination of exclusive distribution and single branding may be pro-competitive by increasing the incentive for the exclusive distributor to focus its efforts on the particular brand. Therefore, in the absence of such a foreclosure effect, the combination of exclusive distribution with non-compete may very well fulfil the conditions of Article 101(3) for the whole duration of the agreement, particularly at the wholesale level.

The combination of exclusive distribution with exclusive sourcing increases the possible competition risks of reduced intra-brand competition and market partitioning which may facilitate price discrimination in particular. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors and usually also restricts the distributors in their freedom of active selling. Exclusive sourcing, requiring the exclusive distributors to buy their supplies for the particular brand directly from the manufacturer, eliminates in addition possible arbitrage by the exclusive distributors, which are prevented from buying from other distributors in the system. As a result, the supplier's possibilities to limit intra-brand competition by applying dissimilar conditions of sale to the detriment of consumers are enhanced, unless the combination allows the creation of efficiencies leading to lower prices to all final consumers.

The nature of the product is not particularly relevant to the assessment of possible anti-competitive effects of exclusive distribution. It is, however, relevant to an assessment of possible efficiencies, that is, after an appreciable anti-competitive effect is established.

Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. In general, the case for efficiencies is strongest for new products, complex products, and products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution.

Example of exclusive distribution at the wholesale level

On the market for a consumer durable, A is the market leader. A sells its product through exclusive wholesalers. Territories for the wholesalers correspond to the entire Member State for small Member States, and to a region for larger Member States. Those exclusive distributors deal with sales to all the retailers in their territories. They do not sell to final consumers. The wholesalers are in charge of promoting their products, including sponsoring of local events, but also explaining and promoting the new products to the retailers in their territories. Technology and product innovation are evolving fairly quickly on this market, and pre-sale service to retailers and to final consumers plays an important role. The wholesalers are not required to purchase all their requirements of the brand of supplier A from the producer himself, and arbitrage by wholesalers or retailers is practicable because the transport costs are relatively low compared to the value of the product. The wholesalers are not under a non-compete obligation. Retailers also sell a number of brands of competing suppliers, and there are no exclusive or selective distribution agreements at the retail level. On the EU market of sales to wholesalers A has around 50% market share. Its market share on the various national retail markets varies between 40% and 60%. A has between 6 and 10 competitors on every national market. B, C and D are its biggest competitors and are also present on each national market, with market shares varying between 20% and 5%. The remaining producers are national producers, with smaller market shares. B, C and D have similar distribution networks, whereas the local producers tend to sell their products directly to retailers.

On the wholesale market described in this example, the risk of reduced intra-brand competition and price discrimination is low. Arbitrage is not hindered, and the absence of intra-brand competition is not very relevant at the wholesale level. At the retail level, neither intra- nor inter-brand competition are hindered. Moreover, inter-brand competition is largely unaffected by the exclusive arrangements at the wholesale level. Therefore it is likely, even if anti-competitive effects exist, that also the conditions of Article 101(3) are fulfilled.

Example of multiple exclusive dealerships in an oligopolistic market
On a national market for a final product, there are four market leaders, which each have a market share of around 20%. Those four market leaders sell their product through exclusive distributors at the retail level. Retailers are given an exclusive territory which corresponds to the town in which they are located or a district of the town for large towns. In most territories, the four market leaders happen to appoint the same exclusive retailer (‘multiple dealership’), often centrally located and rather specialised in the product. The remaining 20% of the national market is composed of small local producers, the largest of these producers having a market share of 5% on the national market. Those local producers sell their products in general through other retailers, in particular because the exclusive distributors of the four largest suppliers show in general little interest in selling less well-known and cheaper brands. There is strong brand and product differentiation on the market. The four market leaders have large national advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the national level. The market is rather mature, with stable demand and no major product and technological innovation. The product is relatively simple.

In such an oligopolistic market, there is a risk of collusion between the four market leaders. That risk is increased through multiple dealings. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly with the low brand image goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited, as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, the conditions of Article 101(3) may not be fulfilled and withdrawal of the block exemption may be necessary for the agreements concluded with distributors whose market share is below 30% of the procurement market.

Example of exclusive distribution combined with exclusive sourcing

Manufacturer A is the European market leader for a bulky consumer durable, with a market share of between 40% and 60% in most national retail markets. In Member States where it has a high market share, it has less competitors with much smaller market shares. The competitors are present on only one or two national markets. A’s long time policy is to sell its product through its national subsidiaries to exclusive distributors at the retail level, which are not allowed to sell actively into each other’s territories. Those distributors are thereby incentivised to promote the product and provide pre-sales services. Recently the retailers are in addition obliged to purchase manufacturer A’s products exclusively from the national subsidiary of manufacturer A in their own country. The retailers selling the brand of manufacturer A are the main resellers of that type of product in their territory. They handle competing brands, but with varying degrees of success and enthusiasm. Since the introduction of exclusive sourcing, A applies price differences of 10% to 15% between markets with higher prices in the markets where it has less competition. The markets are relatively stable on the demand and the supply side, and there are no significant technological changes.

In the high price markets, the loss of intra-brand competition results not only from the territorial exclusivity at the retail level but is aggravated by the exclusive sourcing obligation imposed on the retailers. The exclusive sourcing obligation helps to keep markets and territories separate by making arbitrage between the exclusive retailers, the main resellers of that type of product, impossible. The exclusive retailers also cannot sell actively into each other’s territory and in practice tend to avoid delivering outside their own territory. As a result, price discrimination is possible, without it leading to a significant increase in total sales. Arbitrage by consumers or independent traders is limited due to the bulkiness of the product.

While the possible efficiency arguments for appointing exclusive distributors may be convincing, in particular because of the incentivising of retailers, the possible efficiency arguments for the combination of exclusive distribution and exclusive sourcing, and in particular the possible efficiency arguments for exclusive sourcing, linked mainly to economies of scale in transport, are unlikely to outweigh the negative effect of price discrimination and reduced intra-brand competition. Consequently, it is unlikely that the conditions of Article 101(3) are fulfilled.
2.3. **Exclusive customer allocation**

In an exclusive customer allocation agreement, the supplier agrees to sell its products to only one distributor for resale to a particular group of customers. At the same time, the distributor is usually limited in its active selling to other (exclusively allocated) groups of customers. The Block Exemption Regulation does not limit the way an exclusive customer group can be defined; it could for instance be a particular type of customers defined by their occupation but also a list of specific customers selected on the basis of one or more objective criteria. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. Where most or all of the suppliers apply exclusive customer allocation, competition may be softened and collusion, both at the suppliers' and the distributors' level, may be facilitated. Lastly, exclusive customer allocation may lead to foreclosure of other distributors and therewith reduce competition at that level.

Exclusive customer allocation is exempted by the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed the 30% market share threshold, even if combined with other non-hardcore vertical restraints such as non-compete, quantity-forcing or exclusive sourcing. A combination of exclusive customer allocation and selective distribution is normally a hardcore restriction, as active selling to end-users by the appointed distributors is usually not left free. Above the 30% market share threshold, the guidance provided in paragraphs (151) to (167) applies also to the assessment of exclusive customer allocation, subject to the specific remarks in the remainder of this section.

The allocation of customers normally makes arbitrage by the customers more difficult. In addition, as each appointed distributor has its own class of customers, non-appointed distributors not falling within such a class may find it difficult to obtain the product. Consequently, possible arbitrage by non-appointed distributors will be reduced.

Exclusive customer allocation is mainly applied to intermediate products and at the wholesale level when it concerns final products, where customer groups with different specific requirements concerning the product can be distinguished.

Exclusive customer allocation may lead to efficiencies, especially when the distributors are required to make investments in for instance specific equipment, skills or know-how to adapt to the requirements of their group of customers. The depreciation period of these investments indicates the justified duration of an exclusive customer allocation system. In general the case is strongest for new or complex products and for products requiring adaptation to the needs of the individual customer. Identifiable differentiated needs are more likely for intermediate products, that is, products sold to different types of professional buyers. Allocation of final consumers is unlikely to lead to efficiencies.

**Example of exclusive customer allocation**

A company has developed a sophisticated sprinkler installation. The company has currently a market share of 40% on the market for sprinkler installations. When it started selling the sophisticated sprinkler it had a market share of 20% with an older product. The installation of the new type of sprinkler depends on the type of building that it is installed in and on the use of the building (office, chemical plant, hospital etc.). The company has appointed a number of distributors to sell and install the sprinkler installation. Each distributor needed to train its employees for the general and specific requirements of installing the sprinkler installation for a particular class of customers. To ensure that distributors would specialise, the company assigned to each distributor an exclusive class of customers and prohibited active sales to each others' exclusive customer classes. After five years, all the exclusive distributors will be allowed to sell actively to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. Competitors, with market shares between 25% and 5%, are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their sales efforts first on a certain class of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions of Article 101(3) are likely to be fulfilled.

2.4. **Selective distribution**

Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorised distributors on the one hand and the possibilities of resale on the other. The difference with
exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products.

(175) The possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and softening of competition and facilitation of collusion between suppliers or buyers. To assess the possible anti-competitive effects of selective distribution under Article 101(1), a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold etc. The application of such criteria does not put a direct limit on the number of dealers. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary. Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.

(176) Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long as the market share of both supplier and buyer each do not exceed 30%, even if combined with other non-hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. The Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn. In addition, the remainder of this section provides guidance for the assessment of selective distribution in individual cases which are not covered by the Block Exemption Regulation or in the case of cumulative effects resulting from parallel networks of selective distribution.

(177) The market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more problematic is the loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same market. Where selective distribution is applied by only one supplier on the market, quantitative selective distribution does not normally create net negative effects provided that the contract goods, having regard to their nature, require the use of a selective distribution system and on condition that the selection criteria applied are necessary to ensure efficient distribution of the goods in question. The reality, however, seems to be that selective distribution is often applied by a number of the suppliers on a given market.

(178) The position of competitors can have a dual significance and plays in particular a role in case of a cumulative effect. Strong competitors will mean in general that the reduction in intra-brand competition is easily outweighed by sufficient inter-brand competition. However, when a majority of the main suppliers apply selective distribution, there will be a significant loss of intra-brand competition and possible foreclosure of certain types of distributors as well as an increased risk of collusion between those major suppliers. The risk of foreclosure of more efficient distributors has always been greater with selective distribution than with exclusive distribution, given the restriction on sales to non-authorised dealers in selective distribution. That restriction is designed to give selective distribution systems a closed character, making it impossible for non-authorised dealers to obtain supplies. Accordingly, selective distribution is particularly well suited to avoid pressure by price discounters (whether offline or
online-only distributors) on the margins of the manufacturer, as well as on the margins of the authorised dealers. Foreclosure of such distribution formats, whether resulting from the cumulative application of selective distribution or from the application by a single supplier with a market share exceeding 30%, reduces the possibilities for consumers to take advantage of the specific benefits offered by these formats such as lower prices, more transparency and wider access.

(179) Where the Block Exemption Regulation applies to individual networks of selective distribution, withdrawal of the block exemption or disapplication of the Block Exemption Regulation may be considered in case of cumulative effects. However, a cumulative effect problem is unlikely to arise when the share of the market covered by selective distribution is below 50%. Also, no problem is likely to arise where the market coverage ratio exceeds 50%, but the aggregate market share of the five largest suppliers (CR5) is below 50%. Where both the CR5 and the share of the market covered by selective distribution exceed 50%, the assessment may vary depending on whether or not all five largest suppliers apply selective distribution. The stronger the position of the competitors which do not apply selective distribution, the less likely other distributors will be foreclosed. If all five largest suppliers apply selective distribution, competition concerns may arise with respect to those agreements in particular that apply quantitative selection criteria by directly limiting the number of authorised dealers or that apply qualitative criteria, such as a requirement to have one or more brick and mortar shops or to provide specific services, which forecloses certain distribution formats. The conditions of Article 101(3) are in general unlikely to be fulfilled if the selective distribution systems at issue prevent access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, thereby limiting distribution to the advantage of certain existing channels and to the detriment of final consumers. More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with the requirement imposed on the dealers to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if such an amount does not represent a significant proportion of the dealer's total turnover achieved with the type of products in question and it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution. As regards individual contributions, a supplier with a market share of less than 5% is in general not considered to contribute significantly to a cumulative effect.

(180) Entry barriers are mainly of interest in the case of foreclosure of the market to non-authorised dealers. In general, entry barriers will be considerable as selective distribution is usually applied by manufacturers of branded products. It will in general take time and considerable investment for excluded retailers to launch their own brands or obtain competitive supplies elsewhere.

(181) Buying power may increase the risk of collusion between dealers and thus appreciably change the analysis of possible anti-competitive effects of selective distribution. Foreclosure of the market to more efficient retailers may especially result where a strong dealer organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.

(182) Article 5(1)(c) of the Block Exemption Regulation provides that the supplier may not impose an obligation causing the authorised dealers, either directly or indirectly, not to sell the brands of particular competing suppliers. Such a condition aims specifically at avoiding horizontal collusion to exclude particular brands through the creation of a selective club of brands by the leading suppliers. That kind of obligation is unlikely to be exemptible when the CR5 is equal to or above 50%, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers on the market.

(183) Foreclosure of other suppliers is normally not a problem as long as other suppliers can use the same distributors, that is, as long as the selective distribution system is not combined with single branding. In the case of a dense network of authorised distributors or in the case of a cumulative effect, the combination of selective distribution and a non-compete obligation may pose a risk of foreclosure to other suppliers. In that case, the principles set out in section 2.1. on single branding apply. Where selective distribution is not combined with a non-compete obligation, foreclosure of the market to competing suppliers may still be a problem where the leading suppliers apply not only purely qualitative selection criteria, but impose on their dealers certain additional obligations such as the obligation to reserve a minimum shelf-space for their products or to ensure that the sales of their products by the dealer achieve a minimum percentage of the dealer's total turnover. Such a problem is unlikely to arise if the share of the market covered by selective distribution is below 50% or, where this coverage ratio is exceeded, if the market share of the five largest suppliers is below 50%.
Maturity of the market is important, as loss of intra-brand competition and possible foreclosure of suppliers or dealers may be a serious problem on a mature market but is less relevant on a market with growing demand, changing technologies and changing market positions.

Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport and that may occur irrespective of the nature of the product (paragraph (107)(g)). However, such an efficiency is usually only marginal in selective distribution systems. To help solve a free-rider problem between the distributors (paragraph (107)(a)) or to help create a brand image (paragraph (107)(i)), the nature of the product is very relevant. In general, the case is strongest for new products, complex products, products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). The combination of selective distribution with a location clause, protecting an appointed dealer against other appointed dealers opening up a shop in its vicinity, may in particular fulfil the conditions of Article 101(3) if the combination is indispensable to protect substantial and relationship-specific investments made by the authorised dealer (paragraph (107)(d)).

To ensure that the least anti-competitive restraint is chosen, it is relevant to see whether the same efficiencies can be obtained at a comparable cost by for instance service requirements alone.

Example of quantitative selective distribution

On a market for consumer durables, the market leader (brand A) with a market share of 35%, sells its product to final consumers through a selective distribution network. There are several criteria for admission to the network: the shop must employ trained staff and provide pre-sales services, there must be a specialised area in the shop devoted to the sales of the product and similar hi-tech products, and the shop is required to sell a wide range of models of the supplier and to display them in an attractive manner. Moreover, the number of admissible retailers in the network is directly limited through the establishment of a maximum number of retailers per number of inhabitants in each province or urban area. Manufacturer A has 6 competitors in that market. Its largest competitors, B, C and D, have market shares of respectively 25, 15 and 10%, whilst the other producers have smaller market shares. A is the only manufacturer to use selective distribution. The selective distributors of brand A always handle a few competing brands. However, competing brands are also widely sold in shops which are not members of A's selective distribution network. Channels of distribution are various: for instance, brands B and C are sold in most of A's selected shops, but also in other shops providing a high quality service and in hypermarkets. Brand D is mainly sold in high service shops. Technology is evolving quite rapidly in this market, and the main suppliers maintain a strong quality image for their products through advertising.

On that market, the coverage ratio of selective distribution is 35%. Inter-brand competition is not directly affected by the selective distribution system of A. Intra-brand competition for brand A may be reduced, but consumers have access to low service/low price retailers for brands B and C, which have a comparable quality image to brand A. Moreover, access to high service retailers for other brands is not foreclosed, since there is no limitation on the capacity of selected distributors to sell competing brands, and the quantitative limitation on the number of retailers for brand A leaves other high service retailers free to distribute competing brands. In this case, in view of the service requirements and the efficiencies these are likely to provide and the limited effect on intra-brand competition the conditions of Article 101(3) are likely to be fulfilled.

Example of selective distribution with cumulative effects

On a market for a particular sports article, there are seven manufacturers, whose respective market shares are: 25%, 20%, 15%, 15%, 10%, 8% and 7%. The five largest manufacturers distribute their products through quantitative selective distribution, whilst the two smallest use different types of distribution systems, which results in a coverage ratio of selective distribution of 85%. The criteria for access to the selective distribution networks are remarkably uniform amongst manufacturers: the distributors are required to have one or more brick and mortar shops, those shops are required to have trained personnel and to provide pre-sale services, there must be a specialised area in the shop devoted to the sales of the article and a minimum size for this area is specified. The shop is required to sell a wide range of the brand in question and to display the article in an attractive manner, the shop must be located in a commercial street, and that type of article must represent at least 30% of the total turnover of the shop. In general, the same dealer is appointed selective distributor for all five brands. The two brands which do not use selective distribution usually sell through less specialised retailers with lower service levels. The market is stable, both on the supply and on the demand side, and there is strong brand image and product differentiation. The five market leaders have strong brand images, acquired
through advertising and sponsoring, whereas the two smaller manufacturers have a strategy of cheaper products, with no strong brand image.

On that market, access by general price discounters and online-only distributors to the five leading brands is denied. Indeed, the requirement that this type of article represents at least 30% of the activity of the dealers and the criteria on presentation and pre-sales services rule out most price discounters from the network of authorised dealers. The requirement to have one or more brick and mortar shops excludes online-only distributors from the network. As a consequence, consumers have no choice but to buy the five leading brands in high service/high price shops. This leads to reduced inter-brand competition between the five leading brands. The fact that the two smallest brands can be bought in low service/low price shops does not compensate for this, because the brand image of the five market leaders is much better. Inter-brand competition is also limited through multiple dealership. Even though there exists some degree of intra-brand competition and the number of retailers is not directly limited, the criteria for admission are strict enough to lead to a small number of retailers for the five leading brands in each territory.

The efficiencies associated with these quantitative selective distribution systems are low: the product is not very complex and does not justify a particularly high service. Unless the manufacturers can prove that there are clear efficiencies linked to their network of selective distribution, it is probable that the block exemption will have to be withdrawn because of its cumulative effects resulting in less choice and higher prices for consumers.

2.5. Franchising

Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof.

The coverage by the Block Exemption Regulation of the licensing of IPRs contained in franchise agreements is dealt with in paragraphs (24) to (46). As for the vertical restraints on the purchase, sale and resale of goods and services within a franchising arrangement, such as selective distribution, non-compete obligations or exclusive distribution, the Block Exemption Regulation applies up to the 30% market share threshold. The guidance provided in respect of those types of restraints applies also to franchising, subject to the following two specific remarks:

(a) The more important the transfer of know-how, the more likely it is that the restraints create efficiencies and/or are indispensable to protect the know-how and that the vertical restraints fulfill the conditions of Article 101(3);

(b) A non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Article 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 101(1), as long as it does not exceed the duration of the franchise agreement itself.

Example of franchising

A manufacturer has developed a new format for selling sweets in so-called fun shops where the sweets can be coloured specially on demand from the consumer. The manufacturer of the sweets has also developed the machines to colour the sweets. The manufacturer also produces the colouring liquids. The quality and freshness of the liquid is of vital importance to producing good sweets. The manufacturer made a success of its sweets through a number of own retail outlets all operating under the same trade name and with the uniform fun image (style of lay-out of the shops, common advertising etc.). In order to expand sales the manufacturer started a franchising system. The franchisees are obliged to buy the sweets, liquid and colouring machine from the manufacturer, to have the same image and operate under the trade name, pay a franchise fee, contribute to common advertising and ensure the confidentiality of the operating manual prepared by the franchisor. In addition, the franchisees are
only allowed to sell from the agreed premises, to sell to end users or other franchisees and are not allowed to sell other sweets. The franchisor is obliged not to appoint another franchisee nor operate a retail outlet himself in a given contract territory. The franchisor is also under the obligation to update and further develop its products, the business outlook and the operating manual and make these improvements available to all retail franchisees. The franchise agreements are concluded for a duration of 10 years.

Sweet retailers buy their sweets on a national market from either national producers that cater for national tastes or from wholesalers which import sweets from foreign producers in addition to selling products from national producers. On that market the franchisor's products compete with other brands of sweets. The franchisor has a market share of 30 % on the market for sweets sold to retailers. Competition comes from a number of national and international brands, sometimes produced by large diversified food companies. There are many potential points of sale of sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops. The franchisor's market share of the market for machines for colouring food is below 10 %.

Most of the obligations contained in the franchise agreements can be deemed necessary to protect the intellectual property rights or maintain the common identity and reputation of the franchised network and fall outside Article 101(1). The restrictions on selling (contract territory and selective distribution) provide an incentive to the franchisees to invest in the colouring machine and the franchise concept and, if not necessary to, at least help maintain the common identity, thereby offsetting the loss of intra-brand competition. The non-compete clause excluding other brands of sweets from the shops for the full duration of the agreements does allow the franchisor to keep the outlets uniform and prevent competitors from benefiting from its trade name. It does not lead to any serious foreclosure in view of the great number of potential outlets available to other sweet producers. The franchise agreements of this franchisor are likely to fulfil the conditions for exemption under Article 101(3) in as far as the obligations contained therein fall under Article 101(1).

2.6 Exclusive supply

(192) Under the heading of exclusive supply fall those restrictions that have as their main element that the supplier is obliged or induced to sell the contract products only or mainly to one buyer, in general or for a particular use. Such restrictions may take the form of an exclusive supply obligation, restricting the supplier to sell to only one buyer for the purposes of resale or a particular use, but may for instance also take the form of quantity forcing on the supplier, where incentives are agreed between the supplier and buyer which make the former concentrate its sales mainly with one buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

(193) Exclusive supply is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share does not exceed 30 %, even if combined with other non-hardcore vertical restraints such as non-compete. The remainder of this section provides guidance for the assessment of exclusive supply in individual cases above the market share threshold.

(194) The main competition risk of exclusive supply is anticompetitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular when the exclusive distributor becomes the exclusive buyer for a whole market (see section 2.2, in particular paragraph (156)). The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the factor which determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise when the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30 %. Where the market share of the buyer on the upstream market does not exceed 30 %, significant foreclosure effects may still result, especially when the market share of the buyer on its downstream market exceeds 30 % and the exclusive supply relates to a particular use of the contract products. Where a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects.

(195) It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent to and the duration for which it applies an exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply, the more significant the foreclosure is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements
last long than five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

(196) The market position of the competing buyers on the upstream market is important as it is likely that competing buyers will be foreclosed for anti-competitive reasons, that is, to increase their costs, if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where those competitors have similar buying power and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies when a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative effect may lead to withdrawal of the benefit of the Block Exemption Regulation.

(197) Entry barriers at the supplier level are relevant to establishing whether there is real foreclosure. In as far as it is efficient for competing buyers to provide the goods or services themselves via upstream vertical integration, foreclosure is unlikely to be a real problem. However, there are often significant entry barriers.

(198) Countervailing power of suppliers is relevant, as important suppliers will not easily allow themselves to be cut off from alternative buyers. Foreclosure is therefore mainly a risk in the case of weak suppliers and strong buyers. In the case of strong suppliers, the exclusive supply may be found in combination with non-compete obligations. The combination with non-compete obligations brings in the rules developed for single branding. Where there are relationship-specific investments involved on both sides (hold-up problem) the combination of exclusive supply and non-compete obligations that is, reciprocal exclusivity in industrial supply agreements may often be justified, in particular below the level of dominance.

(199) Lastly, the level of trade and the nature of the product are relevant for foreclosure. Anticompetitive foreclosure is less likely in the case of an intermediate product or where the product is homogeneous. Firstly, a foreclosed manufacturer that uses a certain input usually has more flexibility to respond to the demand of its customers than the wholesaler or retailer has in responding to the demand of the final consumer for whom brands may play an important role. Secondly, the loss of a possible source of supply matters less for the foreclosed buyers in the case of homogeneous products than in the case of a heterogeneous product with different grades and qualities. For final branded products or differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream market.

(200) Efficiencies can be expected in the case of a hold-up problem (paragraph (107)(d) and (107)(e)), and such efficiencies are more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph (107)(g)) do not seem likely to justify exclusive supply.

(201) In the case of a hold-up problem and even more so in the case of economies of scale in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative.

(202) Example of exclusive supply

On a market for a certain type of components (intermediate product market) supplier A agrees with buyer B to develop, with its own know-how and considerable investment in new machines and with the help of specifications supplied by buyer B, a different version of the component. B will have to make considerable investments to incorporate the new component. It is agreed that A will supply the new product only to buyer B for a period of five years from the date of first entry on the market. B is obliged to buy the new product only from A for the same period of five years. Both A and B can continue to sell and buy respectively other versions of the component elsewhere. The market share of buyer B on the upstream component market and on the downstream final goods market is 40%. The market share of the component supplier is 35%. There are two other component suppliers with around 20-25% market share and a number of small suppliers.

Given the considerable investments, the agreement is likely to fulfil the conditions of Article 101(3) in view of the efficiencies and the limited foreclosure effect. Other buyers are foreclosed from a particular version of a product of a supplier with 35% market share and there are other component suppliers that could develop similar new products. The foreclosure of part of buyer B's demand to other suppliers is limited to maximum 40% of the market.
2.7. Upfront access payments

(203) Upfront access payments are fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices such as slotting allowances, the so-called pay-to-stay fees, payments to have access to a distributor’s promotion campaigns, etc. Upfront access payments are exempted under the Block Exemption Regulation when both the supplier’s and buyer’s market share does not exceed 30%. The remainder of this section provides guidance for the assessment of upfront access payments in individual cases above the market share threshold.

(204) Upfront access payments may sometimes result in anticompetitive foreclosure of other distributors if such payments induce the supplier to channel its products through only one or a limited number of distributors. A high fee may make that a supplier wants to channel a substantial volume of its sales through this distributor in order to cover the costs of the fee. In such a case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation. The assessment of that negative effect is made by analogy to the assessment of exclusive supply obligations (in particular paragraphs (194) to (199)).

(205) Exceptionally, upfront access payments may also result in anticompetitive foreclosure of other suppliers, where the widespread use of upfront access payments increases barriers to entry for small entrants. The assessment of that possible negative effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)).

(206) In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments. Such reduction of competition between distributors through the cumulative use of upfront access payments normally requires the distribution market to be highly concentrated.

(207) However, the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products. Distributors often have less information than suppliers on the potential for success of new products to be introduced on the market and, as a result, the amount of products to be stocked may be sub-optimal. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive a signal of which products are most likely to be successful since a supplier would normally agree to pay an upfront access fee if it estimates a low probability of failure of the product introduction.

(208) Furthermore, due to the asymmetry in information mentioned in paragraph (207), suppliers may have incentives to free-ride on distributors’ promotional efforts in order to introduce sub-optimal products. If a product is not successful, the distributors will pay part of the costs of the product failure. The use of upfront access fees may prevent such free riding by shifting the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product introductions.

2.8. Category Management Agreements

(209) Category management agreements are agreements by which, within a distribution agreement, the distributor entrusts the supplier (the ‘category captain’) with the marketing of a category of products including in general not only the supplier’s products, but also the products of its competitors. The category captain may thus have an influence on, for instance, the product placement and product promotion in the shop and product selection for the shop. Category management agreements are exempted under the Block Exemption Regulation when both the supplier’s and buyer’s market share does not exceed 30%. The remainder of this section provides guidance for the assessment of category management agreements in individual cases above the market share threshold.

(210) While in most cases category management agreements will not be problematic, they may sometimes distort competition between suppliers, and finally result in anticompetitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells
competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products. The assessment of such upstream foreclosure effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)) by addressing issues like the market coverage of these agreements, the market position of competing suppliers and the possible cumulative use of such agreements.

(211) In addition, category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors on a market and provides these distributors with a common point of reference for their marketing decisions.

(212) Category management may also facilitate collusion between suppliers through increased opportunities to exchange via retailers sensitive market information, such as for instance information related to future pricing, promotional plans or advertising campaigns (58).

(213) However, the use of category management agreements may also lead to efficiencies. Category management agreements may allow distributors to have access to the supplier’s marketing expertise for a certain group of products and to achieve economies of scale as they ensure that the optimal quantity of products is presented timely and directly on the shelves. As category management is based on customers’ habits, category management agreements may lead to higher customer satisfaction as they help to better meet demand expectations. In general, the higher the inter-brand competition and the lower consumers’ switching costs, the greater the economic benefits achieved through category management.

2.9 **Tying**

(214) Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying may constitute an abuse within the meaning of Article 102 (59). Tying may also constitute a vertical restraint falling under Article 101 where it results in a single branding type of obligation (see paragraphs (129) to (150)) for the tied product. Only the latter situation is dealt with in these Guidelines.

(215) Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product (60). Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product (61), or evidence indicating that undertakings with little market power, particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.

(216) Tying may lead to anticompetitive foreclosure effects on the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. On the question of what can be considered appreciable foreclosure under Article 101(1), the analysis for single branding can be applied. Tying means that there is at least a form of quantity-forcing on the buyer in respect of the tied product. Where in addition a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers that will buy the tied product alone to sustain competitors of the supplier on the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry onto the tying market alone more difficult.

(217) Tying may also directly lead to prices that are above the competitive level, especially in three situations. Firstly, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the supplier may seek to avoid this substitution and as a result be able to raise its prices. Secondly, when
the tying allows price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopiers (metering). Thirdly, when in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying.

(218) Tying is exempted under the Block Exemption Regulation when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30%. It may be combined with other vertical restraints, which are not hardcore restrictions under that Regulation, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section provides guidance for the assessment of tying in individual cases above the market share threshold.

(219) The market position of the supplier on the market of the tying product is obviously of central importance to assess possible anti-competitive effects. In general, this type of agreement is imposed by the supplier. The importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse a tying obligation.

(220) The market position of the supplier's competitors on the market of the tying product is important in assessing the supplier's market power. As long as its competitors are sufficiently numerous and strong, no anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are applying similar tying. In addition, entry barriers on the market of the tying product are relevant to establish the market position of the supplier. When tying is combined with a non-compete obligation in respect of the tying product, this considerably strengthens the position of the supplier.

(221) Buying power is relevant, as important buyers will not easily be forced to accept tying without obtaining at least part of the possible efficiencies. Tying not based on efficiency is therefore mainly a risk where buyers do not have significant buying power.

(222) Where appreciable anti-competitive effects are established, the question whether the conditions of Article 101(3) are fulfilled arises. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. Where the tied product is not produced by the supplier, an efficiency may also arise from the supplier buying large quantities of the tied product. For tying to fulfil the conditions of Article 101(3), it must, however, be shown that at least part of these cost reductions are passed on to the consumer, which is normally not the case when the retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph (107)(i)). However, it needs to be demonstrated that the positive effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase these from the supplier or someone designated by the latter. The requirements concerning minimum quality standards would not normally fall within the scope of Article 101(1). Where the supplier of the tying product imposes on the buyer the suppliers from which the buyer must purchase the tied product, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of Article 101(1), especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.

2.10 Resale price restrictions

(223) As explained in section III.3, resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as a hardcore restriction. Where an agreement includes RPM, that agreement is presumed to restrict competition and thus to fall within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled. It then falls to the Commission to effectively assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled.

(224) RPM may restrict competition in a number of ways. Firstly, RPM may facilitate collusion between suppliers by enhancing price transparency on the market, thereby making it easier to detect whether a
supplier deviates from the collusive equilibrium by cutting its price. RPM also undermines the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales. Such a negative effect is particularly plausible where the market is prone to collusive outcomes, for instance if the manufacturers form a tight oligopoly, and a significant part of the market is covered by RPM agreements. Second, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, that is, at the distribution level. Strong or well organised distributors may be able to force or convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. The resulting loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers. Third, RPM may more generally soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them. Fourth, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase. Fifth, RPM may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin. Sixth, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all. Lastly, RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters.

(225)However, RPM may not only restrict competition but may also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3). Most notably, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors on this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. Similarly, fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers. In some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.

(226)The practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is covered by the Block Exemption Regulation when the market share of each of the parties to the agreement does not exceed the 30 % threshold, provided it does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties. The remainder of this section provides guidance for the assessment of maximum or recommended prices above the market share threshold and for cases of withdrawal of the block exemption.

(227)The possible competition risk of maximum and recommended prices is that they will work as a focal point for the resellers and might be followed by most or all of them and/or that maximum or recommended prices may soften competition or facilitate collusion between suppliers.

(228)An important factor for assessing possible anti-competitive effects of maximum or recommended resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a maximum resale price or a recommended resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find
it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market.

(229) Where appreciable anti-competitive effects are established for maximum or recommended resale prices, the question of a possible exemption under Article 101(3) arises. For maximum resale prices, the efficiency described in paragraph (107)(f) (avoiding double marginalisation), may be particularly relevant. A maximum resale price may also help to ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor.

(1) With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, 102, respectively, of the Treaty on the Functioning of the European Union (‘TFEU’). The two sets of provisions are, in substance, identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout these Guidelines.


(5) See Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97 for the Commission’s general methodology and interpretation of the conditions for applying Article 101(1) and in particular Article 101(3).


(7) For agreements between competing undertakings the de minimis market share threshold is 10 % for their collective market share on each affected relevant market.


(12) OJ C 1, 3.1.1979, p. 2.

(13) See paragraph 3 of the subcontracting notice.


(19) See paragraph (27).

(20) See the subcontracting notice (referred to in paragraph (22)).
Paragraphs 43-45 apply by analogy to other types of distribution agreements which involve the transfer of substantial know-how from supplier to buyer.

See paragraph (25).


This list of hardcore restrictions applies to vertical agreements concerning trade within the Union. In so far as vertical agreements concern exports outside the Union or imports/re-imports from outside the Union see judgment of the Court of Justice in Case C-306/96 Javico v Yves Saint Laurent [1998] ECR I-1983. In that judgment the ECJ held in paragraph 20 that 'an agreement in which the reseller gives to the producer an undertaking that it will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States'.

See in particular paragraphs 106 to 109 describing in general possible efficiencies related to vertical restraints and Section VI.2.10 on resale price restrictions. See for general guidance on this the Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

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See in this respect for example Commission Decision 1999/242/EC (Case No IV/36.237 – TPS), OJ L 90, 24.1.1999, p. 6. Similarly, the prohibition of Article 101(1) also only applies as long as the agreement has a restrictive object or restrictive effects.


See Judgment of the Court of Justice in Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge [2000] ECR I-1365, paragraph 130. Similarly, the application of Article 101(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 101(1), see to that effect Judgment of the Court of Justice in Case C-309/99 Wouters [2002] ECR I-1577, paragraph 120.


See also paragraphs (86) to (95), in particular paragraph (92).

Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.

Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

Direct information exchange between competitors is not covered by the Block Exemption Regulation, see Article 2(4) of that Regulation and paragraphs 27-28 of these Guidelines.


This assumes that it is not practical for the supplier to impose on all buyers by contract effective promotion requirements, see also paragraph 107 point (a).

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (1),

Acting in accordance with the ordinary legislative procedure (2),

Whereas:

(1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted.

(2) The public enforcement of Articles 101 and 102 TFEU is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003. Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Community became Articles 101 and 102 TFEU, and they remain identical in substance. Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation (EC) No 1/2003. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 TFEU as public enforcers and to carry out the various functions conferred upon competition authorities by that Regulation.

(3) Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. The right to compensation in Union law applies equally to infringements of Articles 101 and 102 TFEU by public undertakings and by undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU.

(4) The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law.

(5) Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.

(6) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a
In accordance with Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate.

It is necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market. It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases.

Article 3(1) of Regulation (EC) No 1/2003 provides that '[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].' In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same cases in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market. This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.

In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such
conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.

(12) This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (*loss of profit* or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

(13) The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.

(14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

(15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply.

(16) National courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.

(17) Where a court in one Member State requests a competent court in another Member State to take evidence or requests that evidence be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 apply.

(18) While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the
persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.

(19) This Directive affects neither the possibility under the laws of the Member States to appeal disclosure orders, nor the conditions for bringing such appeals.

(20) Regulation (EC) No 1049/2001 of the European Parliament and of the Council (4) governs public access to European Parliament, Council and Commission documents, and is designed to confer on the public as wide a right of access as possible to documents of those institutions. That right is nonetheless subject to certain limits based on reasons of public or private interest. It follows that the system of exceptions laid down in Article 4 of that Regulation is based on a balancing of the opposing interests in a given situation, namely, the interests which would be favoured by the disclosure of the documents in question and those which would be jeopardised by such disclosure. This Directive should be without prejudice to such rules and practices under Regulation (EC) No 1049/2001.

(21) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority. This Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities.

(22) In order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's intended action for damages since it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to those proceedings.

(23) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

(24) This Directive does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of competition law when ordering the disclosure of any type of evidence with the exception of leniency statements and settlement submissions.

(25) An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national competition law and sent to the parties to those proceedings (such as a ‘Statement of Objections’) or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of decisions on interim measures.

(26) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure
undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. That exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents. Those limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law. In order to ensure that that exemption does not unduly interfere with injured parties' rights to compensation, it should be limited to those voluntary and self-incriminating leniency statements and settlement submissions.

(27) The rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive. Any content falling outside those definitions should be disclosable under the relevant conditions.

(28) National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority ('pre-existing information').

(29) The disclosure of evidence should be ordered from a competition authority only when that evidence cannot reasonably be obtained from another party or from a third party.

(30) Pursuant to Article 15(3) of Regulation (EC) No 1/2003, competition authorities, acting upon their own initiative, can submit written observations to national courts on issues relating to the application of Article 101 or 102 TFEU. In order to preserve the contribution made by public enforcement to the application of those Articles, competition authorities should likewise be able, acting upon their own initiative, to submit their observations to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in the authorities' files, in light of the impact that such disclosure would have on the effectiveness of the public enforcement of competition law. Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in that competition authority's investigation into the alleged infringement, without prejudice to national law providing for ex parte proceedings.

(31) Any natural or legal person that obtains evidence through access to the file of a competition authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, other legal persons belonging to the same undertaking should also be able to use that evidence.

(32) However, the use of evidence obtained through access to the file of a competition authority should not unduly detract from the effective enforcement of competition law by a competition authority. In order to ensure that the limitations on disclosure laid down in this Directive are not undermined, the use of evidence of the types referred to in recitals 24 and 25 which is obtained solely through access to the file of a competition authority should be limited under the same circumstances. The limitation should take the form of inadmissibility in actions for damages or the form of any other protection under applicable national rules capable of ensuring the full effect of the limits on the disclosure of those types of evidence. Moreover, evidence obtained from a competition authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors. That limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.

(33) The fact that a claim for damages is initiated, or that an investigation by a competition authority is started, entails a risk that persons concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. In so far as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective penalty, and can help avoid delays. Penalties should also be available for non-compliance with obligations to protect confidential
Ensuring the effective and consistent application of Articles 101 and 102 TFEU by the Commission and the national competition authorities necessitates a common approach across the Union on the effect of national competition authorities’ final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the decision envisaged or, in the absence thereof, of any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation (EC) No 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of that Regulation. The Commission should ensure the consistent application of Union competition law by providing, bilaterally and within the framework of the European Competition Network, guidance to the national competition authorities. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.

Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least prima facie evidence of the fact that an infringement of competition law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties. The effects of decisions by national competition authorities and review courts finding an infringement of the competition rules are without prejudice to the rights and obligations of national courts under Article 267 TFEU.

National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by a competition authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer. Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.

Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, thus potentially making the immunity recipient the preferential target of litigation. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution
it must make vis-à-vis co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

(39) Harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated. It is therefore in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, in so far as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. This burden of proof should not affect the possibility for the infringer to use evidence other than that in its possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties.

(40) In situations where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.

(41) Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered harm caused by an infringement of Union or national competition law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show prima facie that such passing-on has occurred. This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such prima facie proof. As regards the quantification of passing-on, national courts should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them.

(42) The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.

(43) Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers’ cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.

(44) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from related proceedings and hence to avoid the harm caused by the infringement of Union or national competition law not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts should have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should also be available in cross-border cases. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidentiary value of judgments rendered in that context. It is possible for
actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. This Directive is without prejudice to the rights and obligations of national courts under that Regulation.

(45) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation.

(46) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused by the competition law infringement. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability, the Commission should provide general guidance at Union level.

(47) To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

(48) Achieving a ‘once-and-for-all’ settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

(49) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringers from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both sides with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.

(50) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages for the same claim has been brought before a national court, that court should be able to suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the advantages of an expeditious procedure.

(51) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A
settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer’s share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer’s share of the harm that the infringement inflicted upon the settling injured party. The latter possibility to claim damages from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.

(52) Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

(53) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.

(54) Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers, cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(55) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents (7), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(56) It is appropriate to provide rules for the temporal application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1
Subject matter and scope

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.
Article 2
Definitions

For the purposes of this Directive, the following definitions apply:

(1) 'infringement of competition law' means an infringement of Article 101 or 102 TFEU, or of national competition law;

(2) 'infringer' means an undertaking or association of undertakings which has committed an infringement of competition law;

(3) 'national competition law' means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;

(4) 'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;

(5) 'claim for damages' means a claim for compensation for harm caused by an infringement of competition law;

(6) 'injured party' means a person that has suffered harm caused by an infringement of competition law;

(7) 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003, as being responsible for the application of Articles 101 and 102 TFEU;

(8) 'competition authority' means the Commission or a national competition authority or both, as the context may require;

(9) 'national court' means a court or tribunal of a Member State within the meaning of Article 267 TFEU;

(10) 'review court' means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law;

(11) 'infringement decision' means a decision of a competition authority or review court that finds an infringement of competition law;

(12) 'final infringement decision' means an infringement decision that cannot be, or that can no longer be, appealed by ordinary means;

(13) 'evidence' means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;

(14) 'cartel' means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

(15) 'leniency programme' means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;

(16) 'leniency statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;
(17)'pre-existing information' means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;

(18)'settlement submission' means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;

(19)'immunity recipient' means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme;

(20)'overcharge' means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law;

(21)'consensual dispute resolution' means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;

(22)'consensual settlement' means an agreement reached through consensual dispute resolution.

(23)'direct purchaser' means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law;

(24)'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

Article 3

Right to full compensation

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Article 4

Principles of effectiveness and equivalence

In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

CHAPTER II

DISCLOSURE OF EVIDENCE

Article 5

Disclosure of evidence

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions
set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.

7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.

8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

Article 6

Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.

3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:
(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
(c) settlement submissions that have been withdrawn.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:
(a) leniency statements; and
(b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

Article 7

Limits on the use of evidence obtained solely through access to the file of a competition authority

1. Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

2. Member States shall ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority and which does not fall under paragraph 1 or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

Article 8

Penalties

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:
(a) their failure or refusal to comply with the disclosure order of any national court;
(b) their destruction of relevant evidence;
(c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
(d) their breach of the limits on the use of evidence provided for in this Chapter.

2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties available to national courts shall include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.

CHAPTER III
EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

Article 9
Effect of national decisions
1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

Article 10
Limitation periods
1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
   (a) of the behaviour and the fact that it constitutes an infringement of competition law;
   (b) of the fact that the infringement of competition law caused harm to it; and
   (c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

Article 11
Joint and several liability
1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

2. By way of derogation from paragraph 1, Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 3, where the infringer is a small or medium-sized enterprise (SME)
as defined in Commission Recommendation 2003/361/EC (9), the infringer is liable only to its own direct and indirect purchasers where:

(a) its market share in the relevant market was below 5 % at any time during the infringement of competition law; and

(b) the application of the normal rules of joint and several liability would irrevocably jeopardise its economic viability and cause its assets to lose all their value.

3. The derogation laid down in paragraph 2 shall not apply where:

(a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or

(b) the SME has previously been found to have infringed competition law.

4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:

(a) to its direct or indirect purchasers or providers; and

(b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.

5. Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

6. Member States shall ensure that, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

CHAPTER IV
THE PASSING-ON OF OVERCHARGES

Article 12
Passing-on of overcharges and the right to full compensation

1. To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.

2. In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.

3. This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

4. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer.

5. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.
Article 13
Passing-on defence
Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Article 14
Indirect purchasers
1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.
2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:
   (a) the defendant has committed an infringement of competition law;
   (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
   (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.
This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Article 15
Actions for damages by claimants from different levels in the supply chain
1. To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 is satisfied, national courts seized of an action for damages are able, by means available under Union or national law, to take due account of any of the following:
   (a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;
   (b) judgments resulting from actions for damages as referred to in point (a);
   (c) relevant information in the public domain resulting from the public enforcement of competition law.
2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

Article 16
Guidelines for national courts
The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

CHAPTER V
QUANTIFICATION OF HARM
Article 17
Quantification of harm
1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

CHAPTER VI
CONSENSUAL DISPUTE RESOLUTION

Article 18
Suspensive and other effects of consensual dispute resolution
1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.

2. Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.

3. A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

Article 19
Effect of consensual settlements on subsequent actions for damages
1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party.

2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.

3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer. The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.

4. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.
CHAPTER VII
FINAL PROVISIONS

Article 20

Review


2. The report referred to in paragraph 1 shall, inter alia, include information on all of the following:

(a) the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law;

(b) the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred;

(c) the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.

3. If appropriate, the report referred to in paragraph 1 shall be accompanied by a legislative proposal.

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Temporal application

1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.

2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.

Article 23

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 24

Addressees

This Directive is addressed to the Member States.
Done at Strasbourg, 26 November 2014.

For the European Parliament
The President
M. SCHULZ
For the Council
The President
S. GOZI

I. INTRODUCTION

1. Article 82 of the Treaty establishing the European Community (‘Article 82’) prohibits abuses of a dominant position. In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Article 82 is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers. This is particularly important in the context of the wider objective of achieving an integrated internal market.

II. PURPOSE OF THIS DOCUMENT

2. This document sets out the enforcement priorities that will guide the Commission’s action in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission’s specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article 82.

3. This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities. In addition, the general framework set out in this document applies without prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on grounds of lack of Community interest.

4. Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by an undertaking holding a single dominant position.

5. In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.

6. The emphasis of the Commission’s enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.

7. Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage
limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common.

8. In applying the general enforcement principles set out in this Communication, the Commission will take into account the specific facts and circumstances of each case. For example, in cases involving regulated markets, the Commission will take into account the specific regulatory environment in conducting its assessment (1). The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case.

III. GENERAL APPROACH TO EXCLUSIONARY CONDUCT

A. Market power

9. The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82. According to the case-law, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case (2).

10. Dominance has been defined under Community law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (3). This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking’s decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains (4). In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative (5).

11. The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant (6). In this Communication, the expression ‘increase prices’ includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers (7).

12. The assessment of dominance will take into account the competitive structure of the market, and in particular the following factors:

—a constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),

—a constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),

—a constraints imposed by the bargaining strength of the undertaking’s customers (countervailing buyer power).

(a) Market position of the dominant undertaking and its competitors

13. Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market (8). However, the Commission will interpret market shares in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated. The trend or development of market shares over time may also be taken into account in volatile or bidding markets.

14. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission’s experience suggests that dominance is not likely if the undertaking’s market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission.
Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article 82 \(^{(9)}\). However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behaviour of the undertaking.

(b) Expansion or entry

Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation. The potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant. An undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient. For the Commission to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risks and costs of failure. For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power. For expansion or entry to be considered sufficient, it cannot be simply small-scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market.

Barriers to expansion or entry can take various forms. They may be legal barriers, such as tariffs or quotas, or they may take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies \(^{(10)}\) or an established distribution and sales network \(^{(11)}\). They may also include costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier. The dominant undertaking's own conduct may also create barriers to entry, for example where it has made significant investments which entrants or competitors would have to match \(^{(12)}\), or where it has concluded long-term contracts with its customers that have appreciable foreclosing effects. Persistently high market shares may be indicative of the existence of barriers to entry and expansion.

(c) Countervailing buyer power

Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength \(^{(13)}\). Such countervailing buying power may result from the customers’ size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.

B. Foreclosure leading to consumer harm (‘anti-competitive foreclosure’)

The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term ‘anti-competitive foreclosure’ is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices \(^{(14)}\) to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti-competitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels \(^{(15)}\).

The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment:
—the position of the dominant undertaking: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure,

—the conditions on the relevant market: this includes the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to ‘tip’ a market characterised by network effects in its favour or to further entrench its position on such a market. Likewise, if entry barriers in the upstream and/or downstream market are significant, this means that it may be costly for competitors to overcome possible foreclosure through vertical integration,

—the position of the dominant undertaking’s competitors: this includes the importance of competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. In its assessment, the Commission may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy,

—the position of the customers or input suppliers: this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure (16). In the case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behaviour of other customers. In the case of input suppliers, those with whom the dominant undertaking has concluded exclusive supply arrangements may be the ones most likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or may produce a grade of the product — or produce at a location — particularly suitable for a new entrant. Any strategies at the disposal of the customers or input suppliers which could help to counter the conduct of the dominant undertaking will also be considered,

—the extent of the allegedly abusive conduct: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect,

—possible evidence of actual foreclosure: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed,

—direct evidence of any exclusionary strategy: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking’s conduct.

21. When pursuing a case the Commission will develop the analysis of the general factors mentioned in paragraph 20, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct, and any other factors which it may consider to be appropriate. This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.

22. There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its
customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product.

C. Price-based exclusionary conduct

23. The considerations in paragraphs 23 to 27 apply to price-based exclusionary conduct. Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking. (17)

24. However, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.

25. In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing. This will require that sufficiently reliable data be available. Where available, the Commission will use information on the costs of the dominant undertaking itself. If reliable information on those costs is not available, the Commission may decide to use the cost data of competitors or other comparable reliable data.

26. The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market. (19)

27. If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.

D. Objective necessity and efficiencies

28. In the enforcement of Article 82, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified. (20) A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

29. The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product. (21)

30. The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with
a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled (22):

— the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution,

— the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies,

— the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets,

— the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission’s view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

31. It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm.

IV. SPECIFIC FORMS OF ABUSE

A. Exclusive dealing

32. A dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing (23). This section sets out the circumstances which are most likely to prompt an intervention by the Commission in respect of exclusive dealing arrangements entered into by dominant undertakings.

(a) Exclusive purchasing

33. An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertaking. Certain other obligations, such as stocking requirements, which appear to fall short of requiring exclusive purchasing, may in practice lead to the same effect (24).

34. In order to convince customers to accept exclusive purchasing, the dominant undertaking may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into an exclusive purchasing obligation with the dominant undertaking. But it would be wrong to conclude automatically from this that all exclusive purchasing obligations, taken together, are beneficial for customers overall, including those currently not purchasing from the dominant undertaking, and the final consumers. The Commission will focus its attention on those cases where it is likely that consumers as a whole will not benefit. This will, in particular, be the case if there are many customers and the exclusive purchasing obligations of the dominant undertaking, taken together, have the effect of preventing the entry or expansion of competing undertakings.

35. In addition to the factors mentioned in paragraph 20, the following factors will generally be of particular relevance in determining whether the Commission will intervene in respect of exclusive purchasing arrangements.

36. The capacity for exclusive purchasing obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner.
at least for part of the demand on the market, for instance because its brand is a ‘must stock item’ preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier. If competitors can compete on equal terms for each individual customer’s entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation. In general, the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure.

(b) Conditional rebates

37. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking.

38. In addition to the factors already mentioned in paragraph 20, the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti-competitive foreclosure and, consequently, will be part of the Commission's enforcement priorities.

39. As with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the ‘non contestable’ portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the ‘contestable’ portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes).

40. In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates. The potential foreclosing effect of retroactive rebates is in principle stronger on the last purchased unit of the product before the threshold is exceeded. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system on (actual or potential) competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.

41. When applying the methodology explained in paragraphs 23 to 27, the Commission intends to investigate, to the extent that the data are available and reliable, whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers. In this context the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand (‘the relevant range’) away from the dominant undertaking. The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time. The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis.

42. The relevant range over which to calculate the effective price in a particular case depends on the specific facts of each case and on whether the rebate is incremental or retroactive. For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer’s purchase requirements can realistically be switched to a competitor (the ‘contestable share’ or ‘contestable portion’). If it is likely that customers would be willing and able to switch large amounts of demand to a (potential) competitor relatively quickly, the relevant range is likely to be relatively large. If, on the other hand, it is
likely that customers would only be willing or able to switch small amounts incrementally, then the relevant range will be relatively small. For existing competitors their capacity to expand sales to customers and the fluctuations in those sales over time may also provide an indication of the relevant range. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant (29).

43. The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect. However, as long as the effective price remains consistently above the LRAIC of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way.

44. Where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors. Where the effective price is between AAC and LRAIC, the Commission will investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected. In this context, the Commission will investigate whether and to what extent competitors have realistic and effective counterstrategies at their disposal, for instance their capacity to also use a ‘non contestable’ portion of their buyers' demand as leverage to decrease the price for the relevant range. Where competitors do not have such counterstrategies at their disposal, the Commission will consider that the rebate scheme is capable of foreclosing equally efficient competitors.

45. As indicated in paragraph 27, this analysis will be integrated in the general assessment, taking into account other relevant quantitative or qualitative evidence. It is normally important to consider whether the rebate system is applied with an individualised or a standardised threshold. An individualised threshold — one based on a percentage of the total requirements of the customer or an individualised volume target — allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect (30). By contrast, a standardised volume threshold — where the threshold is the same for all or a group of customers — may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold approximates the requirements of an appreciable proportion of customers, the Commission is likely to consider that such a standardised system of rebates may produce anti-competitive foreclosure effects.

(c) Efficiencies

46. Provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to customers (31). Transaction-related cost advantages are often more likely to be achieved with standardised volume targets than with individualised volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes (32). Under the same conditions, the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those arrangements are necessary for the dominant undertaking to make certain relationship-specific investments in order to be able to supply those customers.

B. Tying and bundling

47. A dominant undertaking may try to foreclose its competitors by tying or bundling. This section sets out the circumstances which are most likely to prompt an intervention by the Commission when assessing tying and bundling by dominant undertakings.

48. ’Tying’ usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis (33). ’Bundling’ usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

49. Tying and bundling are common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by
foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.

50. The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market (34) and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti-competitive foreclosure (35).

(a) Distinct products

51. Whether the products will be considered by the Commission to be distinct depends on customer demand. Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product (36). Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product (37) or of each of the products bundled by the dominant undertaking, or evidence indicating that undertakings with little market power, particularly in competitive markets, tend not to tie or not to bundle such products.

(b) Anti-competitive foreclosure in the tied and/or tying market

52. Tying or bundling may lead to anti-competitive effects in the tied market, the tying market, or both at the same time. However, even when the aim of the tying or bundling is to protect the dominant undertaking's position in the tying market, this is done indirectly through foreclosing the tied market. In addition to the factors already mentioned in paragraph 20, the Commission considers that the following factors are generally of particular importance for identifying cases of likely or actual anti-competitive foreclosure.

53. The risk of anti-competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one, for example through technical tying which is costly to reverse. Technical tying also reduces the opportunities for resale of individual components.

54. In the case of bundling, the undertaking may have a dominant position for more than one of the products in the bundle. The greater the number of such products in the bundle, the stronger the likely anti-competitive foreclosure. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

55. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied market, the tying can lead to those customers facing higher prices.

56. If the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the dominant undertaking may seek to avoid this substitution and as a result be able to raise its prices.

57. If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.

58. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

(c) Multi-product rebates

59. A multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

60. In theory, it would be ideal if the effect of the rebate could be assessed by examining whether the incremental revenue covers the incremental costs for each product in the dominant undertaking's bundle. However, in practice assessing the incremental revenue is complex. Therefore, in its enforcement practice the Commission will in most situations use the incremental price as a good proxy. If the incremental price
that customers pay for each of the dominant undertaking’s products in the bundle remains above the LRAIC of the dominant undertaking from including that product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC, because in such a case even an equally efficient competitor may be prevented from expanding or entering.

61. If the evidence suggests that competitors of the dominant undertaking are selling identical bundles, or could do so in a timely way without being deterred by possible additional costs, the Commission will generally regard this as a bundle competing against a bundle, in which case the relevant question is not whether the incremental revenue covers the incremental costs for each product in the bundle, but rather whether the price of the bundle as a whole is predatory.

(d) Efficiencies

62. Provided that the conditions set out in Section III D are fulfilled, the Commission will look into claims by dominant undertakings that their tying and bundling practices may lead to savings in production or distribution that would benefit customers. The Commission may also consider whether such practices reduce transaction costs for customers, who would otherwise be forced to buy the components separately, and enable substantial savings on packaging and distribution costs for suppliers. It may also examine whether combining two independent products into a new, single product might enhance the ability to bring such a product to the market to the benefit of consumers. The Commission may also consider whether tying and bundling practices allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product.

C. Predation

63. In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as ‘sacrifice’), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.

(a) Sacrifice

64. Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided. Pricing below AAC will thus in most cases be viewed by the Commission as a clear indication of sacrifice.

65. However, the concept of sacrifice does not only include pricing below AAC. In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided. The Commission will not compare the actual conduct with hypothetical or theoretical alternatives that might have been more profitable. Only economically rational and practicable alternatives will be considered which, taking into account the market conditions and business realities facing the dominant undertaking, can realistically be expected to be more profitable.

66. In some cases it will be possible to rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy, such as a detailed plan to sacrifice in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action.
(b) Anti-competitive foreclosure

67. If sufficient reliable data are available, the Commission will apply the equally efficient competitor analysis, described in paragraphs 25 to 27, to determine whether the conduct is capable of harming consumers. Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market.

68. In addition to the factors already mentioned in paragraph 20, the Commission will generally investigate whether and how the suspected conduct reduces the likelihood that competitors will compete. For instance, if the dominant undertaking is better informed about cost or other market conditions, or can distort market signals about profitability, it may engage in predatory conduct so as to influence the expectations of potential entrants and thereby deter entry. If the conduct and its likely effects are felt on multiple markets and/or in successive periods of possible entry, the dominant undertaking may be shown to be seeking a reputation for predatory conduct. If the targeted competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant undertaking could adversely affect the competitor’s performance so that its access to further financing may be seriously undermined.

69. The Commission does not consider that it is necessary to show that competitors have exited the market in order to show that there has been anti-competitive foreclosure. The possibility cannot be excluded that the dominant undertaking may prefer to prevent the competitor from competing vigorously and have it follow the dominant undertaking’s pricing, rather than eliminate it from the market altogether. Such disciplining avoids the risk inherent in eliminating competitors, in particular the risk that the assets of the competitor are sold at a low price and stay in the market, creating a new low cost entrant.

70. Generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.

71. This does not mean that the Commission will only intervene if the dominant undertaking would be likely to be able to increase its prices above the level persisting in the market before the conduct. It is sufficient, for instance, that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred. Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers (46). In this context, the Commission will also consider possibilities of re-entry.

72. It may be easier for the dominant undertaking to engage in predatory conduct if it selectively targets specific customers with low prices, as this will limit the losses incurred by the dominant undertaking.

73. It is less likely that the dominant undertaking engages in predatory conduct if the conduct concerns a low price applied generally for a long period of time.

(c) Efficiencies

74. In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market.

D. Refusal to supply and margin squeeze

75. When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking (47). The existence of such an obligation — even for a fair remuneration — may undermine undertakings’ incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.
76. Typically competition problems arise when the dominant undertaking competes on the ‘downstream’ market with the buyer whom it refuses to supply. The term ‘downstream market’ is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service. This section deals only with this type of refusal.

77. Other types of possibly unlawful refusal to supply, in which the supply is made conditional upon the purchaser accepting limitations on its conduct, are not dealt with in this section. For instance, halting supplies in order to punish customers for dealing with competitors or refusing to supply customers that do not agree to tying arrangements, will be examined by the Commission in line with the principles set out in the sections on exclusive dealing and tying and bundling. Similarly, refusals to supply aimed at preventing the purchaser from engaging in parallel trade \(^{(48)}\) or from lowering its resale price are also not dealt with in this section.

78. The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers \(^{(49)}\), refusal to license intellectual property rights \(^{(50)}\), including when the licence is necessary to provide interface information \(^{(51)}\), or refusal to grant access to an essential facility or a network \(^{(52)}\).

79. The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified \(^{(53)}\). Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; ‘constructive refusal’ is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.

80. Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market \(^{(54)}\), does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called ‘margin squeeze’). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking \(^{(55)}\).

81. The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

— the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,

— the refusal is likely to lead to the elimination of effective competition on the downstream market, and

— the refusal is likely to lead to consumer harm.

82. In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present.

(a) Objective necessity of the input

83. In examining whether a refusal to supply deserves its priority attention, the Commission will consider whether the supply of the refused input is objectively necessary for operators to be able to compete effectively on the market. This does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market \(^{(56)}\). Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal \(^{(57)}\). In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future \(^{(58)}\). The notion of duplication means the creation of
an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market. 

84. The criteria set out in paragraph 81 apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (de novo refusals to supply). However, the termination of an existing supply arrangement is more likely to be found to be abusive than a de novo refusal to supply. For example, if the dominant undertaking had previously been supplying the requesting undertaking, and the latter had made relationship-specific investments in order to use the subsequently refused input, the Commission may be more likely to regard the input in question as indispensable. Similarly, the fact that the owner of the essential input in the past has found it in its interest to supply is an indication that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment. It would therefore be up to the dominant company to demonstrate why circumstances have actually changed in such a way that the continuation of its existing supply relationship would put in danger its adequate compensation.

(b) Elimination of effective competition

85. If the requirements set out in paragraphs 83 and 84 are fulfilled, the Commission considers that a dominant undertaking’s refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market. The likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market. The less capacity-constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking’s output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.

(c) Consumer harm

86. In examining the likely impact of a refusal to supply on consumer welfare, the Commission will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. If they do, the Commission will normally pursue the case.

87. The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled. This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development.

88. The Commission also considers that a refusal to supply may lead to consumer harm where the price in the upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do.

(d) Efficiencies

89. The Commission will consider claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The Commission will also consider claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow-on innovation by competitors.

90. However, when considering such claims, the Commission will ensure that the conditions set out in Section III D are fulfilled. In particular, it falls on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation. If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds.
Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided. Long-run average incremental cost is the average of all the (variable and fixed)
costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.

In order to apply these cost benchmarks it may also be necessary to look at revenues and costs of the dominant company and its competitors in a wider context. It may not be sufficient to only assess whether the price or revenue covers the costs for the product in question, but it may be necessary to look at incremental revenues in case the dominant company's conduct in question negatively affects its revenues in other markets or of other products. Similarly, in the case of two sided markets it may be necessary to look at revenues and costs of both sides at the same time.


The notion of exclusive dealing also includes exclusive supply obligations or incentives with the same effect, whereby the dominant undertaking tries to foreclose its competitors by hindering them from purchasing from suppliers. The Commission considers that such input foreclosure is in principle liable to result in anti-competitive foreclosure if the exclusive supply obligation or incentive ties most of the efficient input suppliers and customers competing with the dominant undertaking are unable to find alternative efficient sources of input supply.

Case T-65/98 Van den Bergh Foods v Commission [2003] ECR II-4653. In this case the obligation to use coolers exclusively for the products of the dominant undertaking was considered to lead to outlet exclusivity.


In this regard, the assessment of conditional rebates differs from that of predation, which always entails a sacrifice.


Case 322/81 Nederlandsche Banden Industrie Michelin v Commission (Michelin I) [1983] ECR 3461, paragraphs 70 to 73.

The relevant range will be estimated on the basis of data which may have varying degrees of precision. The Commission will take this into account in drawing any conclusions regarding the dominant undertaking's ability to foreclose equally efficient competitors. It may also be useful to calculate how big a share of customers' requirements on average the entrant should capture as a minimum so that the effective price is at least as high as the LRAIC of the dominant company. In a number of cases the size of this share, when compared with the actual market shares of competitors and their shares of the customers' requirements, may make it clear whether the rebate scheme is capable to have an anti-competitive foreclosure effect.


For instance, for rebates see Case C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraph 86.

See, to that effect, Case T-203/01 Michelin v Commission (Michelin II) [2003] ECR II-4071, paragraphs 56 to 60, 74 and 75.

Technical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors). Contractual tying occurs when the
customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by competitors).

The undertaking should be dominant in the tying market, though not necessarily in the tied market. In bundling cases, the undertaking needs to be dominant in one of the bundled markets. In the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied after-market.


In principle, the LRAIC cost benchmark is relevant here as long as competitors are not able to also sell bundles (see paragraphs 23 to 27 and paragraph 61).

The Commission may also pursue predatory practices by dominant undertakings on secondary markets on which they are not yet dominant. In particular, the Commission will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly. While the dominant undertaking does not need to engage in predatory conduct to protect its dominant position in the market protected by legal monopoly, it may use the profits gained in the monopoly market to cross-subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market.

In most cases the average variable cost (AVC) and AAC will be the same, as often only variable costs can be avoided. However, in circumstances where AVC and AAC differ, the latter better reflects possible sacrifice: for example, if the dominant undertaking had to expand capacity in order to be able to predate, then the sunk costs of that extra capacity should be taken into account in looking at the dominant undertaking's losses. Those costs would be reflected in the AAC, but not the AVC.

In Case 62/86 AKZO Chemie v Commission [1991] ECR I-3359, paragraph 71, the Court held, in relation to pricing below average variable cost (AVC), that: 'A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss …'.

If the estimate of cost is based on the direct cost of production (as registered in the undertaking's accounts), it may not adequately capture whether or not there has been a sacrifice.

However, undertakings should not be penalised for incurring ex post losses where the ex ante decision to engage in the conduct was taken in good faith, that is to say, if they can provide conclusive evidence that they could reasonably expect that the activity would be profitable.


In Case 62/86 AKZO Chemie v Commission [1991] ECR I-3359, the Court accepted that there was clear evidence of AKZO threatening ECS in two meetings with below cost pricing if it did not withdraw from the organic peroxides market. In addition there was a detailed plan, with figures, describing the measures that AKZO would put into effect if ECS would not withdraw from the market (see paragraphs 76 to 82, 115, and 131 to 140).

This was confirmed in Case T-83/91 Tetra Pak International v Commission (Tetra Pak II) [1994] ECR II-755, upheld on appeal in Case C-333/94 P Tetra Pak International v Commission [1996] ECR I-5951, where the Court of First Instance stated that proof of actual recoupment was not required (paragraph 150 in fine).

More in general, as predation may turn out to be more difficult than expected at the start of the conduct, the total costs to the dominant undertaking of predating could outweigh its later profits and thus make actual recoupment impossible while it may still be rational to decide to continue with the predatory strategy that it started some time ago. See also COMP/38.233 Wanadoo Interactive, Commission Decision of 16 July 2003, paragraphs 332 to 367.


See Judgment of 16 September 2008 in Joined Cases C-468/06 to C-478/06 Sot. Lélos kai Sia and Others v GlaxoSmithKline, not yet reported.


Case C-418/01 IMS Health v NDC Health [2004] ECR I-5039, paragraph 44.

Including a situation in which an integrated undertaking that sells a ‘system’ of complementary products refuses to sell one of the complementary products on an unbundled basis to a competitor that produces the other complementary product.

In some cases, however, the LRAIC of a non-integrated competitor downstream might be used as the benchmark, for example when it is not possible to clearly allocate the dominant undertaking’s costs to downstream and upstream operations.


In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called ‘single source’ information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.


