# LEGISLATIVE FRAMEWORK FOR AMENDING SECTION 45 OF THE *COMPETITION ACT*

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## I. EXECUTIVE SUMMARY

This report examines various legislative frameworks which could provide a basis for amending section 45 of the *Competition Act*. The main objective of such amendments would be to create a system which efficiently and effectively proscribes hard-core cartel behaviour, while encouraging strategic alliances and collaborations among competitors that produce pro-competitive benefits. Ancillary to this objective is the desire to harmonize Canada's laws with that of its major trading partners and, to the extent possible, provide a similar policy framework for competitor collaborations and mergers.

To determine the appropriate legislative model to meet the above objectives, we have examined the approach taken in a number of jurisdictions; specifically: the European Community, Germany, Italy, the United States, Australia, New Zealand and South Africa. The results of this review reveal a number of unique features and contrasting approaches. For example, section 1 of the U.S. *Sherman Act* is a broad provision with judge-made categories of *per se* prohibitions and no competitive effects test for hard-core cartel activity. For other types of arrangements examined under section 1 of the *Sherman Act*, the courts have applied a rule of reason analysis to determine if the prohibition is violated. In comparison, Article 81 of the European Community Treaty (the "EC Treaty") does not include any *per se* prohibitions, but relies on a broad prohibition and a system of individual or block exemptions that, in principle, could result in exemption for arrangements that would fall within the *per se* prohibitions implied under the *Sherman Act*. The Australian *Trade Practices Act* contains very specific *per se* prohibitions against price-fixing arrangements, while others rely upon broader and more general prohibitions, similar to Article 81 of the EC Treaty.

Section 45 of the *Competition Act* is unique in a number of respects in comparison to its foreign counterparts. For example, unlike the rule of reason analysis applied under section 1 of the *Sherman Act* and Article 81(3) of the EC Treaty, section 45 includes only a "partial" rule of reason. Further, unlike the *Sherman Act*, as interpreted and applied by the U.S. judiciary, there are no *per se* prohibitions under section 45. Various commentators have criticized section 45 on the basis that it is both underinclusive, because it can allow manifestly anti-competitive arrangements to escape condemnation, and overinclusive, because it subjects all horizontal arrangements to criminal prohibitions, even where these may potentially increase welfare. Also, the record of enforcement of section 45 in contested proceedings demonstrates that the failure to establish either that the arrangement unduly lessened competition or that the parties' intended that the agreement should have this effect, has become a significant obstacle to the effective enforcement of this provision against hard-core cartel behaviour.

In addressing this deficiency, reference may be made to the experience under section 1 of the *Sherman Act*, which demonstrates that a *per se* prohibition may provide an effective means of deterring and remedying hard-core, cartel behaviour. In particular, *per se* prohibitions are less costly to enforce and promise increased certainty and predictability. However, the U.S. experience also demonstrates that the significant disadvantage of a *per se* restriction is the inflexibility of such a provision, which may result in the prohibition of beneficial competitor collaborations.

To ensure that potentially pro-competitive arrangements are not inhibited, it is necessary to provide an exception for the limited class of agreements that, strictly speaking, violate these prohibitions, but

which are nevertheless desirable due to their pro-competitive benefits. One option is to adopt a rule of reason analysis. Under such an analysis, a court would have the flexibility required to differentiate pro-competitive, welfare enhancing collaborations from those which are not. However, the rule of reason may only be implemented gradually through successive cases and would not provide a practical solution to the Competition Bureau's enforcement concerns. Further, a rule of reason approach arguably leads to greater uncertainty and reduces the effectiveness of enforcement due to the need in each case to undertake a complex market assessment and analysis in order to determine whether the anti-competitive effects of the arrangement in question are outweighed by its pro-competitive benefits.

A notification, authorization or exemption mechanism avoids several of the shortcomings associated with the American approach to rule of reason analysis. Article 81(3) of the EC Treaty utilizes this approach, as do the Australian and New Zealand statutes. Like the American model, a full rule of reason analysis is applied. Enforcement authorities are given a broad discretion to immunize arrangements based on the particular circumstances of each case. In terms of process, it is the relevant enforcement agency, and not the courts (or an administrative tribunal), that has exclusive authority (at least at first instance) to authorize or exempt an agreement that would otherwise contravene a statutory prohibition. As a result, antitrust authorities are able to control the development of competition policy as it relates to competitors collaborations without the cost and delay associated with full administrative proceedings and without having to rely on the unpredictable direction of caselaw.

To be effective, such a notification and exemption regime should not, as a rule, exclude hard-core cartel behaviour and should not involve a cumbersome or lengthy procedure. In this regard, we have proposed two models: (i) a system whereby the Commissioner would be able to either grant an exemption or institute civil or criminal proceedings in respect of an existing or proposed arrangement for which an exemption has been sought (the "discretionary track model"); and (ii) an identical model, with two exceptions: first, only those arrangements that are notified prior to time they are entered into or given effect would be eligible for exemption; and second the Commissioner would not be authorized to institute proceedings under the criminal prohibition in respect of a notified arrangement (the "civil track model"). We believe that the latter approach is somewhat problematic because naked, hard-core cartel behaviour that is more effectively and more appropriately addressed through the application of a *per se* criminal prohibition, would be subject to a full-blown competitive effects analysis under the civil provision. Also, the effectiveness in terms of cost and time would be lost because a competitive effects analysis would be required even for an arrangement that otherwise clearly falls afoul of a *per se* prohibition. For all these reasons, we believe that the civil track model may reduce the efficiency and effectiveness with which the Commissioner would be able to "prosecute" naked, hard-core cartel behaviour In addition, there is a risk under the civil track model that parties would utilize the exemption procedure to insulate hard-core, cartel behaviour from criminal prosecution. However, these weaknesses are significantly reduced by limiting notification to proposed arrangements that have not yet been implemented.

Under either model proposed in this report, agreements that do not violate the *per se* prohibitions would be examined under a civil provision. The establishment of a civil regime has a number of advantages, including harmonization of the treatment of mergers and strategic alliances. Further, the examination of potential anti-competitive effects and corresponding benefits, are matters in respect of which the specialized experience of the Tribunal and the lower standard of proof applied in Tribunal proceedings may be more appropriate.

We believe that a "dual track" approach strikes an appropriate balance between the competing objectives of, on the one hand, effective deterrence and punishment of hard-core cartel behaviour and, on the other hand, the need for a forum in which pro-competitive, welfare enhancing collaborations can be effectively differentiated from those which are not.

## II. BACKGROUND

As part of the Competition Bureau's on-going legislative development initiative, we have been asked to consider potential amendments to section 45 of the *Competition Act*. Section 45 has been described as the "cornerstone" or "central provision" of Canada's competition laws. The harm to which section 45 is directed, such as price-fixing and other anti-competitive horizontal arrangements, has been characterized as the "antithesis of open competition" that "tear[s] at the economic fabric of our society". However, despite its central importance to the Canadian competition law regime, the conspiracy provision has remained largely unchanged since its introduction under the original 1889 *Act for the Prevention or Suppression of Trade*.

Notwithstanding its longevity, several commentators have made a case for amending section 45. As outlined below, recent studies and a number of high-profile prosecutions conducted in the United States, Canada, the European Community and elsewhere demonstrate that hard-core cartels are more prevalent and more harmful than previously believed. For example, in last two years alone, Canadian courts have levied over $126 million in fines under section 45 in relation to hard-core cartel behaviour.

At the same time, however, there is a growing consensus on the need to encourage the pro-competitive benefits that may arise from certain strategic alliances or competitor collaborations. The Federal Trade Commission-Department of Justice *Antitrust Guidelines for Collaborations Among Competitors* and European Commission *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation* both recognize the substantial benefits that arise from such collaborations and the need to ensure that they are encouraged.

These commentators have also argued that section 45 permits neither effective prosecution of plainly anti-competitive arrangements nor effective differentiation between arrangements that raise social welfare by creating efficiencies that outweigh anti-competitive harm and those that do not. In this light, those advocating the amendment of section 45 suggest that the main objective of any changes must be to make section 45 more effective against arrangements which have the most significant potential to distort competition, such as hard-core cartels, while, at the same time, ensuring that pro-competitive strategic alliances are not discouraged.

In furtherance of this objective, significant amendments were proposed to section 45 of the *Competition Act* through Bill C-472.[1] Bill C-472 would have created a *per se* prohibition against certain types of arrangements, including price fixing, market allocation, restrictions on production and boycotts, which, at present, constitute offences under section 45 only where they are proved to "unduly prevent or lessen competition". Also, this Bill proposed the introduction of a companion

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1 *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, 2nd Session, 36th Parliament, 48-49 Elizabeth II, 1999-2000.

civil provision that would have allowed the Commissioner to seek remedial orders from the Tribunal in relation to all other arrangements, where these were shown to substantially lessen competition. Finally, Bill C-472 proposed the establishment of a clearance process for strategic alliances that would have allowed parties to obtain immunity from civil action.

In evaluating proposals, such as Bill C-472, it is useful to have regard to the approaches adopted in other jurisdictions. In this report, we provide a comparative review of the approach to competitor collaborations taken in a number of jurisdictions and propose legislation that incorporates elements of these models. Specifically, this report examines each of the following areas:

(i) the need to encourage strategic alliances while deterring hard-core cartel behaviour;

(ii) the need to harmonize the conspiracy provision with that of Canada's major trading partners;

(iii) the approach to competitor collaborations in the European Community, Germany, Italy, the United States, Australia, New Zealand and South Africa and the respective merits and weaknesses of these regimes;

(iv) the elements of the current section 45 and its weaknesses; and

(v) proposed legislative models.

## III. STRATEGIC ALLIANCES AND HARD-CORE CARTELS

As noted above, one of the main objectives of the proposed amendments to section 45 is to provide a flexible mechanism that will effectively deter hard-core cartel behaviour while ensuring that parties are not discouraged from engaging in potentially beneficial strategic alliances. The benefits flowing from such strategic alliances between competitors have been expressly recognized by a number of competition authorities. For example, the Federal Trade Commission-Department of Justice *Antitrust Guidelines for Collaborations Among Competitors* state:

> In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.
>
> Such collaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations. Nevertheless, a perception that antitrust laws are

> sceptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.[2]

The Joint Guidelines further recognize that consumers may benefit from competitor collaborations in a variety of ways; such as, where cooperation enables participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent cooperation. Further, such collaborations may allow participants to make more efficient use of their existing resources or derive other potential benefits not achievable without some form of collaboration. The Joint Guidelines state:

> Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. For example, one participant may have special technical expertise that uses or complements another participant's manufacturing process, allowing the latter participant to lower its production cost or improve the quality of its product. In other instances, a collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant. For example, two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products.[3]

A copy of the Joint Guidelines is attached at Schedule "I". The European Commission has also recognized that horizontal cooperation may be beneficial in certain circumstances:

> [H]orizontal cooperation can lead to substantial economic benefits. Companies need to respond to increasing competitive pressure and a changing market place driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means to share risk, save costs, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place.[4]

Nevertheless, despite the benefits that may result from strategic alliances, it is also clear that co-operation among competitors that constitutes "hard-core cartel" behaviour may result in significant distortions of competition. A recent Organisation for Economic Co-operation and Development ("OECD") report on hard core cartels defines these as "anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets" and notes that such

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2 Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April, 2000) at page 1, Schedule I [hereinafter "Joint Guidelines"]

3 Joint Guidelines, *supra* note 2 at 6.

4 *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation* (2001/C3/02) at C 3/2. [hereinafter "Guidelines"]

agreements "are much more prevalent and harmful to the global economy than previously believed".[5] To address this concern, the OECD has urged each member country to:

> ...ensure that it competition laws effectively halt and deter hard core cartels. Members are urged to ensure that their sanctions and investigatory powers are adequate and that their exclusions and authorizations of what would otherwise be hard core cartels are both necessary and not broader than necessary to achieve their overriding policy objectives.[6]

Apart from hard core cartel behaviour, otherwise pro-competitive collaborations among competitors may facilitate tacit collusion through practices such as the exchange and disclosure of competitively sensitive information.

Given the significance of the potential benefits and detriments arising from collaboration among competitors, it is commonly recognized that any system directed at regulating such arrangements must be able to effectively deter and prohibit cartel behaviour, while remaining flexible enough so as not to dissuade competitors from entering into potentially beneficial strategic alliances. Further, statutory provisions must be clear and easy to enforce, facilitating consistent and inexpensive enforcement as well as providing a reasonable degree of predictability to those whose conduct may be subject to scrutiny.[7] In our view, any reforms of the conspiracy provision must be consistent with these objectives. Bill C-472 and the proposed amendment described in the Terms of Reference address this objective through a dual-track approach whereby only the most harmful types of agreements would be subject to criminal sanctions, while other agreements would be assessed on the basis of a civil standard. The merits of this approach are discussed in further detail below.

## IV. THE NEED FOR HARMONIZATION

One objective expressed during the public consultations concerning Bill C-472 as well as in the Terms of Reference, is the need to harmonize the conspiracy provision with those of the U.S., Europe and Canada's other major trading partners. The approach to collaborations among competitors applied in many of these jurisdictions is discussed below. A number of advantages arise from convergence in the field of competition law. For example, it has been noted that: "a lack of convergence constitutes a trade barrier", "convergence reduces compliance costs for companies conducting international business" and "convergence ends the need for states to apply their competition laws extraterritorially, and the corresponding need of target states to enact blocking or

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5 Organisation for Economic Co-operation and Development, *Hard Core Cartels* (2000) at 6 and 11. [hereinafter *Cartels*]

6 *Ibid* at 14.

7 *See* Thomas W. Ross, "Proposals for a New Canadian Competition Law on Conspiracy" (1991) 36 Antitrust Bulletin 851 at 869-70.

claw-back statutes".[8] These advantages have prompted a number of attempts at harmonization of international competition laws, including: the *United Nations Conference on Trade and Development Restrictive Business Practices Code*, the *Organization for Economic Cooperation and Development 1994 Interim Report on Convergence of Competition Policies* and the *Draft International Antitrust Code*. These measures have to date been largely unsuccessful.[9]

As will be demonstrated from the discussion below, the difficulty in promoting "harmonization with Canada's major trading partners" is the divergence in the models applied by many of Canada's trading partners. For example, section 1 of the U.S. *Sherman Act*, as interpreted and applied by the U.S. judiciary, establishes *per se* prohibitions, without a competitive effects test, for hard-core cartel activity. For other types of arrangements examined under that section, a rule of reason analysis has been applied to determine if the prohibition against unreasonable restraints of trade is violated. In contrast, Article 81 of the European Community Treaty does not incorporate a *per se* approach relying instead upon a broad prohibition and a system of individual or block exemptions that, in principle, could provide an exemption for arrangements that would fall within the *per se* prohibitions implied under the *Sherman Act*. As a result, the objective of harmonization, particularly with Canada's largest trading partners, necessarily raises the question as to which model Canada should harmonize its competition laws? Further, as discussed in greater detail below, full harmonization with Canada's trading partners may not be desirable given that many of these foreign jurisdictions consider social or other non-economic considerations as relevant to the determination of whether collaborations are permissible.

## V. ARTICLE 81 OF THE EUROPEAN COMMUNITY TREATY

### (a) Introduction

Article 81 (formerly Article 85) of the Treaty on the European Union (the "EC Treaty") prohibits as incompatible with the common market a broad range of anti-competitive agreements, decisions and practices. Article 81(1) applies to "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Members States and which have as their object or effect the prevention, restriction or distortion of competition...". Agreements caught under Article 81(1) are automatically void by virtue of Article 81(2), unless exempted under Article 81(3). In addition, violations of Article 81 may result in the imposition of significant fines of up to 10% of the previous year's turnover of the firms involved. The full text of Article 81 is attached at Schedule "II".

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8 Daniel Steiner, "The International Convergence of Competition Laws" (1997), 24 Man. L.J. 577 at 581.

9 *Ibid* at 578.

### (b) Application of Article 81

In determining whether an agreement, decision or practice violates Article 81(1), there are two requirements that must be satisfied:

- the prohibited agreement, decision or practice must be shown to be liable to affect trade between members states; and
- the agreements, decisions or practices must have as their object or effect the prevention, restriction or distortion of competition within the common market.

As noted above, an agreement may be prohibited under Article 81 if it has either the object or effect of preventing, restricting or distorting competition within the common market. As such, where parties enter into an arrangement with the object of restricting or distorting competition, such conduct is prohibited under Article 81(1) irrespective of its effect on competition. Conversely, agreements or arrangements which have the effect of distorting competition are prohibited regardless of the parties' intentions. This approach was confirmed by the European Court of Justice in *Société Technique Miniere v. Machinenbau Ulm GmbH*[10] where the Court held that the words "object or effect" must be read disjunctively such that it was necessary to first consider what the purpose of an agreement was and if it was clear that the object of the agreement was to harm competition, there was no need to consider the effect of the agreement. The approach used to determine the "object" and "effect" of an arrangement for the purpose of Article 81(1) is described below.

### (c) Object of the Agreement

The European Court of Justice has confirmed that the term "object" does not mean the subjective intent of the parties. Rather, the object of the agreement is the purpose of the agreement as may be determined from the words of the agreement itself, considered in the context in which the agreement would be applied.[11] An interesting consequence of this interpretation is the potential application of a *quasi per se* approach to Article 81(1) for certain agreements which are obviously restrictive of competition, such as naked price-fixing arrangements. As the Commission states in its recently published *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation*:[12]

> In some cases the nature of a cooperation indicates from the outset the applicability of Article 81(1). This is the case for agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or

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10 [1966] ECR 235, [1966] CMLR 357 (ECJ). [hereinafter *Machinenbau Ulm*]

11 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission*, [1984] ECR 1679. [1985] 1 CMLR 688 at paras. 25-26.

12 *Guidelines*, *supra* note 4.

> customers. These agreements are presumed to have negative market effects. **It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1).**
> ...
>
> **Another category of agreements can be assessed from the outset as normally falling under Article 81(1). This concerns cooperation agreements that have the object to restrict competition by means of price fixing, output limitation or sharing of markets or customers.** These restrictions are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. Price fixing and output limitation directly lead to customers paying higher prices or not receiving the desired quantities. The sharing of markets or customers reduces the choice available to customers and therefore also leads to higher prices or reduced output. **It can therefore be presumed that these restrictions have negative market effects. They are therefore almost always prohibited.** [13] [emphasis added]

For these types of agreements, the Commission may simply assume that their object is to reduce competition and that, therefore, there is no need to have regard to the actual effect on competition of the agreement. In its *10th Annual Report*, the Commission expressed the view that price-fixing agreements fall into "the category of manifest infringements under Article [81(1)] which it is always impossible to exempt under Article [81(3)] because of the total lack of benefit to the consumer".[14] However, despite this broad statement by the Commission, it would be incorrect to suggest that Article 81 includes a full *per se* prohibition, even against such price fixing arrangements. Unlike the *per se* prohibitions implied under section 1 of the *Sherman Act*, an agreement that is caught under Article 81(1) (even a naked price-fixing arrangement) may qualify for an exemption under Article 81(3) based on its pro-competitive benefits. In fact, the Commission has been prepared to accept restrictions on pricing where these were considered essential in the circumstances and did not lead to an elimination of competition.[15] The Court of First Instance described the approach to Article 81 in the case of *European Night Services v. EC Commission*:

> Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind that in assessing an agreement under Article 81(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, . . . **unless it is an agreement containing obvious restrictions of competition such as price-fixing,**

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13 *Ibid* at paras. 18 and 25.

14 Available online at http://europa.eu.int/comm/competition/publications/publications/#ports.

15 For example, through Regulation 4056/86, the Commission implemented a block exemption for certain liner conference agreements. See also *Eurocheque: Helsinki Agreement*, OJ [1992] 95/50.

**market-sharing or the control of outlets ... In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 81(1).**[16]

### (d) Effect of the Agreement

Where the object of the arrangement cannot be said to restrict competition, an examination of the effect of the arrangement becomes crucial. This requires a full analysis of the market in which the arrangement will be implemented. In particular, as the Court of First Instance held in the above passage from *European Night Services*, account must be taken of "the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned". Further, the Court in that case emphasized that the prescribed examination of the conditions of competition had to be based not only on existing competition between undertakings currently in the relevant market, but also on potential competition. This was necessary "in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real and concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established".[17]

### (e) Guidelines on the Applicability of Article 81 to Horizontal Cooperation

As noted above, the Commission has issued guidelines on horizontal co-operation which describe the Commission's analytical framework for the examination of many forms of horizontal arrangements.[18] In the Guidelines, the Commission recognizes that horizontal cooperation may lead to competition problems where, for example, parties agree to fix prices or output, to share markets or if cooperation enables the parties to maintain, gain or increase market power. However, the Commission also recognizes that most horizontal co-operation agreements do not have as their object a restriction of competition and therefore, regard must be had to the effect of the agreement within its economic context.[19]

The Commission emphasizes in the Guidelines that arrangements between parties which do not have a significant share of the relevant market are unlikely to have a restrictive effect.[20] In addition to examining market power, the Guidelines state that the Commission will examine the level of

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16 [1998] ECR II - 3141, [1998] 5 CMLR 138, at para. 136 (ECJ).[hereinafter "*European Night Services*"] [emphasis added]

17 *Ibid* at para. 137.

18 *Guidelines*, *supra* note 5.

19 *Ibid* at para. 19.

20 *Ibid* at para. 20.

concentration within the relevant market, barriers and the likelihood of market entry, the countervailing power of buyer/suppliers and the nature of the products.[21]

The Guidelines also contain specific provisions describing the treatment of agreements that may not be prohibited under Article 81, including: agreements on research and development,[22] joint production agreements,[23] specialization agreements (*i.e.*, where parties agree unilaterally or reciprocally to cease production of a product and to purchase it from another party),[24] subcontracting agreements (*i.e.*, where one party entrusts to another party the production of a product),[25] joint purchasing agreements,[26] agreements on standards,[27] environmental agreements[28] and others. A copy of the Guidelines is attached at Schedule "III".

### (f) Article 81 and the Rule of Reason

Despite these attempts to limit the application of Article 81, the Commission has often been criticized for adopting an extremely broad interpretation of Article 81(1).[29] Some critics suggest that much of the analysis of the pro-competitive benefits of an arrangement carried out under Article 81(3) should be conducted under Article 81(1) in deciding whether the agreement is in fact restrictive of competition.[30] However, as discussed below, the exemption process under Article 81(3) results in significant delay and expense to the parties. Consequently, a broad interpretation of Article 81(1) may have the result of discouraging parties from engaging in potentially beneficial arrangements.

The disadvantages of a liberal interpretation of Article 81(1) has prompted some critics to suggest that the Commission adopt a "rule of reason" approach to Article 81(1).[31] As discussed more fully

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21 *Ibid* at para. 30.

22 *Ibid* at section 2.

23 *Ibid* at section 3.

24 *Ibid* at para. 79.

25 *Ibid* at para. 80.

26 *Ibid* at section 4.

27 *Ibid* at section 6.

28 *Ibid* at section 7.

29 *See, e.g.*, Peter Freeman and Richard Whish (ed.), *Butterworths Competition Law* (2000) at para. 188 [hereinafter *Butterworths*]; A. Jones, *EC Competition Law* (2001) at paras. 1-065 ; Alexander Schaub, "EC Competition System - Proposals for Reform", (1999) 22 Fordham Int'l L.J. 853 at 880.

30 *See* Jones *supra* note 29 at para. 1-068.

31 Schaub, *supra* note 29.

in the section below describing the *Sherman Act*, a rule of reason approach requires a balancing of the pro-competitive aspects of an agreement against its anti-competitive effect. The result of adopting the foregoing recommendation would be that fewer agreements would be caught under Article 81(1).

There is some limited support within the European Community caselaw for the adoption of a "rule of reason" analysis under Article 81(1). For example, in *Maschinenbau Ulm* the European Court of Justice held that a term conferring exclusivity on a distributor might not infringe Article 81(1) where it was a vital element in the distributor's decision to market a particular supplier's goods. Further, Advocate-General Roemer stated as follows in *Etablissements Consten and Grundig v. EEC Commission*:

> Next, I have already indicated in another case that American law (the "White Motor Case") requires for situations of the type before us a comprehensive examination of their economic repercussions. Clearly I do not mean to say that we should imitate in all respects the principles of American procedure in the field of cartels. This would not in fact be justified by reason of the essential differences between the systems (prohibition *per se* in American law; possibility of exemption under Article 85(3) of the EEC Treaty). But such a reference is useful nevertheless in so far as it shows that in respect of Article 85(1) also it is not possible to dispense with observing the market *in concreto*. It seems to me wrong to have regard to such observation only for the application of paragraph (3) of Article 85, because that paragraph requires an examination from other points of view which are special and different. But in particular (as is shown by *Société Technique Minière v Maschinenbau Ulm GmbH*) **it would be artificial to apply Article 85(1), on the basis of purely theoretical considerations, to situations which upon closer inspection would reveal no appreciable adverse effects on competition, in order then to grant exemption on the basis of Article 85(3).**[32]

### (g) Ancillary Restraints

Rather than adopting a rule of reason approach, others suggest that the Commission should apply the doctrine of "ancillary restraints" more liberally. Pursuant to this doctrine, restrictions on competition are held to fall outside Article 81(1) where they are objectively necessary for the performance of a specific type of pro-competitive agreement or are essential to induce a party to a contract to take on the commercial risk inherent in the agreement.[33]

A common example of an ancillary restraint is a restrictive covenant found in an agreement regarding the sale of a business. Both the European Court of Justice and the Commission have

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32 [1966] ECR 299 at 358 (ECJ). [emphasis added]

33 Schaub, *supra* note 28.

accepted that Article 81(1) does not apply to non-competition clauses and other restrictions on the commercial freedom of undertakings when these restrictions are imposed in the context of the sale of a business. For example, in *Reuter/BASF* the Commission held as follows:

> It is recognized that it may be necessary in certain cases to provide safeguards to ensure the effective performance of an agreement. These may take the form of a contractual non-competition clause in cases where not only the material assets of a undertaking but also its commercial goodwill, including relations with customers, are to be transferred to the purchaser. In such cases it is essential to prevent a seller from re-acquiring his old customers either directly or indirectly through cooperation with the purchaser's competitors in the period following the transfer. Compliance by the seller with such a non-competition clause means no more than that he must respect his obligation under the agreement to transfer full value of the undertaking. Application of Article 85(1) to such a non-competition clause in an agreement can be excluded in such cases, since it would make more difficult or even impossible transactions which are generally recognized as legitimate.[34]

Other forms of ancillary restraints accepted by the Commission include provisions protecting a franchisor's rights,[35] restrictions on licensees of patented products[36] and provisions relating to products requiring an exclusive and selective distribution arrangement.[37]

In 1990, the Commission issued a Notice regarding the ancillary restraints doctrine in the context of the review of mergers. The Notice defined the eligible restraints as follows:

> The "restrictions" meant are those agreed on between the parties to the concentration which limit their own freedom of action in the market. They do not include restrictions to the detriment of third parties. If such restrictions are the inevitable consequence of the concentration itself, they must be assessed together with it under the provisions of Article 2 of the Regulation. If, on the contrary, such restrictive effects on third parties are separable from the concentration they may, if appropriate, be the subject of an assessment of compatibility with Articles 85 and 86 of the EEC Treaty.[38]

Further, sections 5 and 6 of the Notice describe the notion that these restraints must be "necessary":

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34 O.J. L54/40, [1976] 2 C.M.L.R. at D56-57.

35 *Pronuptia*, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

36 *Buroughs/Geha*, O.J. L13/53, [1972] 2 C.M.L.R. D127.

37 Commission Decision No. 85/616/EEC, [1988] 4 C.M.L.R. 461.

38 *Notice on Restrictions Ancillary to Concentrations*, OJ [1990] C203/5 at s. 3.

> The restrictions must likewise be "necessary to the implementation of the concentration", which means that in their absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success. This must be judged as an objective basis.
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> The question of whether a restriction meets those conditions cannot be answered in general terms. In particular as concerns the necessity of the restriction, it is proper not only to take account of its nature, but equally to ensure, in applying the rule of proportionality, that its duration and subject matter, and geographic field of application, do not exceed what the implementation of the concentration reasonably requires. If alternatives are available for the attainment of the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.[39]

### (h) The *De Minimus* Rule

To further reduce the breadth of Article 81(1), the Commission has adopted a *de minimus* rule that exempts agreements which do not have a significant impact on competition.[40] The *Notice on Agreements of Minor Importance Which do not Fall Within the Meaning of Article 85(1) of the Treaty*[41] provides guidance in respect of the application of the *de minimus* doctrine. Pursuant to this doctrine, agreements which affect competition may nevertheless be considered to fall outside of Article 81 because they do not have an appreciable impact either on competition or on inter-state trade. In the Commission's opinion, agreements whose effects on trade between Member States or on competition are negligible do not fall under the prohibition on restrictive agreements. Only those agreements which have an appreciable impact on market conditions are prohibited.

The Notice also provides guidance on the nature of agreements that may fall outside of Article 81(1) based upon the aggregate market share of the parties. Specifically, the Notice indicates that the Commission will not apply Article 81 in respect of arrangements between undertakings engaged in the production or distribution of goods or in the provision of services where the aggregate market share held by all of the participating undertakings does not exceed, in any of the relevant markets:

(a) a 5% market share threshold, where the agreement is between undertakings operating at the same level of production (*i.e.*, horizontal agreements); or

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39 *Ibid* at ss. 5-6.

40 The *de minimus* doctrine was formulated by the European Court of Justice in *Volk v. Vervaecke*, [1969] ECR 295, [1969] CMLR 273.

41 OJ [1997] C 372/13.

(b) a 10% market share threshold, where the agreement is made between undertakings operating at different economic levels (*i.e.*, vertical agreements).[42]

However, both horizontal and vertical agreements which have the effect of fixing prices, limiting production or sales, or sharing markets or sources of supply or, in the case of vertical agreements, conferring territorial protection on the participating undertakings or third party undertakings may not benefit from this exclusion regardless of the market share of the participants.[43]

The Commission Notice provides an additional exception for agreements between small and medium sized businesses, defined as undertakings with gross revenues less than 40 million ECU that employ less than 250 people. This exception applies irrespective of the market share of the parties, except that the Commission has reserved the right to seek a remedy where the agreements involve a large number of smaller undertakings such that the cumulative effect may be unduly restrictive.[44]

### (i) The Exemption Under Article 81(3)

Despite the Commission Notices described above, and the application of the ancillary restraints doctrine, a large number of agreements continue to fall within the scope of the prohibition in Article 81(1). As a consequence, the focus of the inquiry under Article 81 is typically on whether the agreement may be exempted pursuant to Article 81(3). Article 81(3) allows the Commission to declare Article 81(1) inapplicable in various situations. In general, Article 81(3) provides an exemption where the impugned agreement:

(a) contributes to:

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

(iii) while allowing consumers a fair share of the resulting benefit; but

(b) does not:

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

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42 *Ibid* at para. 9.

43 *Ibid* at para. 11.

44 *Ibid* at para. 19.

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Overall, Article 81(3) is an extremely flexible provision that permits the Commission to exercise its discretion in determining whether an agreement is permissible.

In terms of procedure, an exemption may be obtained in two ways: the parties may submit a "notification" requesting an individual exemption for a particular agreement; or, the parties may draft the agreement in a manner that will be exempted pursuant to one of the "block exemptions" issued by the Commission. These options are discussed below.

The procedure governing individual exemptions under Article 81(3) is found in Regulation 17/62.[45] Pursuant to this Regulation, parties may apply for an exemption under Article 81(3) by submitting a notification to the Commission. While the Commission, national courts and national authorities can all apply Article 81(1), Regulation 17 stipulates that the power to grant exemptions under Article 81(3) is exclusively the Commission's. As such, Regulation 17 establishes the Commission as the centralized authorization body for the exemption of practices or agreements that infringe Article 81(1).

One of the principal advantages to the parties of submitting a notification is that it has the effect of "stopping the clock" for the purpose of the imposition of a fine for any infringement. Pursuant to Article 15(5) of Regulation 17, the Commission may not impose a fine for the period between the date of notification and the final decision by the Commission. To avoid abuse of this provisional immunity, the Commission retains the discretion to impose a fine retrospectively where it is clear that the agreement infringes Article 81(1). As such, a notification in respect of a price-fixing agreement or other restrictive arrangements is unlikely to trigger immunity from fines.

Unfortunately, the notification scheme is prone to abuse by parties wishing to delay or hinder litigation before the national courts under Article 81. As noted above, national courts have the jurisdiction to apply Article 81(1), but may not grant exemptions under Article 81(3). In litigation before national courts where it is alleged that an agreement violates Article 81(1), the court may decline to hear the matter pending the determination of whether the agreement is exempt under Article 81(3). As a result, defendants in proceedings before the national courts may submit notifications solely with a view to delay proceedings before the national courts. [46]

The vast majority of notifications seeking an individual exemption are resolved informally through the use of "comfort letters".[47] Similar to "no action" letters issued by the Canadian Competition

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45 Council Regulation (EEC) No 17/62, OJ Sp Ed [1962] No 204/62.

46 *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (1999) at 4. [hereinafter *White Paper on Modernisation*]

47 *Ibid* at para. 34.

Bureau, these letters indicate that the file has been closed, but without a formal decision having been made. In 1999, of the 582 cases closed, only 68 were closed by formal decisions, as compared with 514 cases closed by various informal means.[48]

An alternative to the individual exemptions described above is to draft the agreement in a manner that will take advantage of the block exemptions issued by the Commission. Agreements which fall within the scope of the block exemptions do not need to be notified, and are valid without authorization from the Commission. In general, block exemptions are structured in the following manner:

(a) clarification of the categories of agreements or practices to which the exemption relates;

(b) restrictions which will often be acceptable (often referred to as the "white list"); and

(c) restrictions which will take the agreement outside of the scope of the exemption (often referred to as the "black list").[49]

Such exemptions may be withdrawn by the Commission and are limited in duration. A further alternative is available under certain block exemptions which provide an "opposition procedure". Pursuant to this procedure, agreements that fall outside of the relevant block exemption may be notified individually. If the Commission fails to oppose the agreement within a specified period (usually between 4 to 6 months), the agreement is deemed to be exempted.[50]

### (j) Critique of European Community Treaty System

As noted above, the main criticism of the EC Treaty system is that due to the Commission's broad interpretation of Article 81(1), agreements with little or no risk of being economically anti-competitive are caught by Article 81(1). Further, Article 81(2) deems all forms of agreements which fall within the broad scope of Article 81(1) void and unenforceable, unless the agreement is subject to an exemption.[51] As a result, parties are required to submit a notification to secure an individual exemption or are required to "fit" the arrangement within the scope of a block exemption. More generally, the result is that companies are required to notify a large number of agreements that do

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48 European Commission, *XXIXth Report on Competition Policy* (1999) available online at: http://europa.eu.int/comm/competition/annual_reports/1999/en.pdf at 20. [hereinafter *Report*]

49 *Butterworths*, *supra* note 29 at I/165.

50 *Ibid* at I/179.

51 Mario Siragusa, "The Millenium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules" (1998) 21 Fordham Int'l L. J. 650 at 660.

not raise serious competition issues. Such notifications are also encouraged by the availability of provisional immunity from fines.

The significant number of notifications imposes a large administrative burden on the Commission. For example, in 1999 alone, the Commission received 162 notifications.[52] This administrative burden is exacerbated by the fact that pursuant to Regulation 17/62, only the Commission has the power to grant exemptions under Article 81(3). Recognizing these deficiencies, the Commission published a White Paper[53] in 1999 discussing modernization of the rules implementing Articles 81 and 82 and EC Treaty. Comments submitted during the public consultation surrounding the White Paper indicated almost universal dissatisfaction with the current regime. A copy of the White Paper is attached at Schedule "IV".

Among the proposals considered by the legislators was the suggestion to incorporate a rule of reason into Article 81(1), in order to increase the number of arrangements that would be permitted, without the necessity of resorting to an exemption under Article 81(3).[54] Supporters of this approach note that Article 81(1) is drafted in a manner similar to the broad language found in section 1 of the *Sherman Act* and that, therefore, a rule of reason may be implied without the necessity of redrafting the existing legislation.[55]

However, some commentators have argued against incorporating a U.S. rule of reason into EC law on the basis that it is problematic and difficult to define.[56] As the Commission noted in its White Paper, the importation of a rule of reason analysis into Article 81(1) would effectively nullify Article 81(3) of the Treaty.[57] In addition, the Commission expressed the concern that the substance of such an approach would have to be developed through caselaw, in a manner similar to the gradual definition and development of the rule of reason in U.S. jurisprudence. It stated:

> It would moreover be dangerous if modernisation of the competition rules were to be based on developments in decision-making practice, subject to such developments being upheld by the Community Courts. Any such approach would mean that modernisation was contingent upon the cases submitted to the Commission and could take many years. Lastly, this option would run the risk of diverting Article 85(3) [now Art. 81(3)] from its purpose, which is to provide a legal framework for the

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52 *Report*, *supra* note 48 at 20.

53 *White Paper on Modernisation*, *supra* note 46.

54 Jones, *supra* note 29 at paras. 1-068 to 1-070; Schaub, *supra* note 29 at 880

55 Siragusa, *supra* note 51 at 664-65.

56 Jones, *supra* note 29 at para. 1-071; *Butterworths*, *supra* note 29 at I/99-I/103;

57 *White Paper on Modernisation*, *supra* note 46 at para. 57.

> economic assessment of restrictive practices, not to allow application of competition rules to be set aside because of political considerations.[58]

These concerns have been echoed by others. For example, in "EC Competition System - Proposals for Reform", Alexander Schaub, the then Director-General of DGIV states:

> Another drawback is that a switch to a rule of reason approach, which the Commission could only implement gradually, i.e., step by step, would probably be too slow to provide effective remedies for the weaknesses of the present system. Moreover, in such a process, the Commission would have limited steering powers, as the evolution of this approach would depend on confirmation by the Court of Justice, which is difficult to predict.

Further, Professor Alison Jones states:

> A rule of reason approach to Article 81(1) arguably leads to greater uncertainty for parties to agreements who must, in every case, have to undertake complex market assessments and analyses in order to determine whether or not their agreement could be said to have as its object or effect the prevention, restriction or distortion of competition. Further, Article 81(1) is directly effective and can therefore be applied by national courts or, in some Member States, national competition authorities. It is not necessarily the case that national courts or competition authorities are suitable for the sophisticated analysis of agreements under Article 81(1) that some critics call for, and there must at least be a danger that the analysis might vary from one Member State to another.[59]

Due to the unwillingness to implement a rule of reason analysis in Article 81(1), EC legislators have been faced with two fundamentally different options for reform: the adoption of a modified authorization system (e.g., an altered system of notification); or, a directly applicable exception (i.e., an exemption that is applicable without prior notification or administrative authorization).

In examining whether the notification and authorization regime should be abolished, commentators identified at least five disadvantages to the notification regime as it is currently applied under Article 81(3):

(i) due to the high number of notifications received by the Commission and the significant time required to review such notifications, the Commission is unable to focus its limited resources on dealing with the most significant restrictions on competition;

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58 *Ibid.*

59 Jones, *supra* note 29 at para. 1-071.

(ii) experience has indicated that notifications do not reveal serious threats to competition such as cartels, which are almost never notified, and in fact, dealing with notifications diverts resources away from investigating such conduct;

(iii) due to the administrative burden resulting from such notifications, the Commission is unable to respond in a timely manner to the parties;

(iv) the costs of preparing the notifications required are significant and may discourage parties from engaging in potentially beneficial alliances or arrangements, particularly where the parties are small or medium sized enterprises; and

(v) parties may improperly rely upon the notification system to prevent or delay litigation under Article 81 before the national courts.[60]

The Commission itself has expressly recognized the above deficiencies of the notification regime. In a recent proposal to amend Regulation 17, the Commission stated:

> The Commission's monopoly on the application of Article 81(3) is a significant obstacle to the effective application of the rules by national competition authorities and courts. ... Furthermore, the notification regime no longer constitutes an effective tool for the protection of competition. It only rarely reveals cases that pose a real threat to competition. In fact, the notification system prevents the Commission's resources from being used for the detection and punishment of serious infringements.[61]

In fact, in the 40 years since the enactment of Regulation 17, there have been only 9 decisions in which a notified agreement was prohibited without a complaint being lodged against it. The Commission has also recognized the burdens of the notification system on industry, particularly small- and medium-sized enterprises:

> The second deficiency of the current system is that it imposes an excessive burden on industry by increasing compliance costs and preventing companies from enforcing their agreements without notifying them to the Commission even if they fulfil the conditions of Article 81(3). This is particularly detrimental to [small and medium sized enterprises] for whom the cost of notification and in the absence of notification,

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60 *White Paper on Modernisation, supra* note 46 at para. 44; *see also White Paper on the Reform of Regulation 17 - Summary of the Observations* (DG Document 29.02.2000) [hereinafter "*White Paper on Reform*"]; Siragus, *supra* note 51 at. 657-64.

61 *Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No 3975/87*, 2000/0243 (CNS) (27.9.2000) at 2.

the difficulty of enforcing their agreements can constitute a competitive disadvantage compared with larger firms.[62]

On the other hand, the notification regime offers a number of advantages, including:

(i) it has enabled the Commission to build a coherent body of precedent decisions through the issuance of formal determinations granting or denying exemptions;

(ii) the centralized authorization system has permitted the Commission to ensure that competition rules have been applied consistently across the EC;

(iii) a determination by the Commission as to whether an exemption is available provides legal certainty for the parties; and

(iv) the notification and authorization regime is extremely flexible and, in principle, permits the Commission to exempt agreements that are *prima facie* violations of Article 81(1).

Notwithstanding these advantages, the Commission has expressly supported the abolishment of the notification and authorization regime currently applied in Article 81(3). If the proposed Council Regulation implementing Articles 81 and 82 of the Treaty is accepted, a new enforcement regime will be implemented under which the Commission will no longer have the exclusive authority to apply Article 81(3). Rather, both the prohibition set out in Article 81(1) and the exception contained in Article 81(3) would be directly applied by not only the Commission, but also by national courts and national competition authorities. The proposed system is anticipated to increase the effective enforcement of the Community competition rules by allowing national competition authorities and courts to apply Articles 81 and 82 in their entirety.[63] Furthermore, by abolishing the notification system, the Commission will be able to focus on complaints and on proceedings that are instituted on its own initiative. This is to be coupled with increased powers of investigation for Commission officials.[64]

A concern expressed during the consultation process for the White Paper was whether the abolition of the notification regime would destroy the legal certainty that exists under the current notification and authorization regime. Under the proposed Council Regulation, all agreements that satisfy the conditions of Article 81(3) would be considered valid and enforceable, without the necessity of any authorization from the Commission or a court. However, even though the applicable criteria would be established through prior decisions or administrative guidelines, it is possible that parties would experience difficulty in determining whether particular arrangements fall within Article 81. As noted

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62 *Ibid.*

63 *See ibid* at 6.

64 *See ibid* at 7.

in paragraph 77 of the White Paper: "undertakings would have to make their own assessment of the compatibility of their restrictive practices with Community law, in the light of the legislation in force and the case-law".

The lack of certainty resulting from the abolishment of the notification and authorization regime was described by Professor Whish as follows:

> The White Paper proposals are radical. The willingness of the Commission to volunteer the abandonment of its monopoly over the granting of exemptions under Regulation 17/62 is in some respects the most radical proposition. However, for companies and their advisers the ending of the notification and authorisation system may be the most important feature of what is proposed. Under the existing system, the problem has been that, for most agreements, an individual exemption required pre-notification to the Commission, and **yet the Commission did not have the staff or resources to deal with the large number of agreements it received.** The system is flawed, but at least it offers the possibility of notification to those that wish to notify. Under the proposals in the White Paper, the Commission will scrap the system of notification altogether. It will not be possible to notify at all: the safe-haven, or fairly safe haven, of sending in a Form A/B to the Commission and relying on immunity from being fined will no longer be available.
>
> Assuming that the idea of abandoning notification prevails, this will present significant challenges to companies and their advisers. The position will be a lot closer to that in the US, where companies have to be more self-reliant.[65]

To attempt to address these concerns, the Commission has also expressed its commitment to introduce block exemptions and guidelines that will assist in the enforcement of the rules. In addition, the Commission has noted that with a larger number of decision-makers applying Article 81(3), case-law and practice on the interpretation of this Article will develop more rapidly.

### (k) Other European Community Jurisdictions

The above provisions are similar to the legislation found throughout the EC and applied by various national authorities. In Germany, the *Act Against Restraints of Competition*[66] contains a broad prohibition in section 1 that is similar to Article 81(1). Section 1 provides:

> Agreements between competing 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.

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65 Richard Whish, *EC Competition Law* (2001) at paras. 2-095 to 2-090. [emphasis added]

66 GWB-Übersetzung. Endfassung 09.03.1999 BkasrtA.

Unlike the EC Treaty however, the German legislation identifies a number of potential exemptions to the general prohibition set out above, including: agreements whose subject matter is merely the uniform application of standards or types, and agreements whose subject matter is the uniform application of general terms of business, delivery and payment.

For example, Section 3 provides an exemption for "specialisation cartels":

> Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation may be exempted from the prohibition under Section 1 provided the restraint of competition does not lead to the creation or strengthening of a dominant position.

Section 4 contains an exemption for agreements between small or medium sized businesses for the rationalization of economic activities provided that competition in the market is not substantially impaired and the agreement serves to improve the competitiveness of the small or medium sized enterprises.

In addition to further exemptions for "rationalisation cartels" and "structural crisis cartels", section 7 provides the following general exemption:

> Agreements and decisions which contribute to improving the development, production, distribution, procurement, taking back or disposal of goods or services, while allowing consumers a fair share of the resulting benefit, may be exempted from the prohibition under Section 1 provided the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it, and the restraint of competition does not result in the creation or strengthening of a dominant position.
>
> Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation or in some other way, the joint purchasing of goods or the joint procurement of commercial services, or the uniform application of terms and conditions, may be exempted from the prohibition under Section 1...

Similar to the EC regime, to secure an exemption, the parties to the agreement are required to submit a notification to the cartel authority. Also, like the opposition procedure found in the EC regime, certain types of agreements shall be "exempt from the prohibition under section 1 and shall take effect unless the cartel authority objects within a period of three months from receipt of the notification". For other types of agreements, such as structural crisis cartels, the exemption may only be granted through a decision of the cartel authority.

As a further example of European Community legislation, reference may be made to the Italian anti-trust regime. Article 2 of *Law No. 287 of October 10, 1990*[67] prohibits agreements restricting freedom of competition in a manner similar to Article 81(1) of the EC Treaty:

> 1. The following shall be regarded as agreements: accords and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities.
>
> 2. Agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it, including those that:
>
> (a) directly or indirectly fix purchase or selling prices or other contractual conditions;
>
> (b) limit or restrict production, market outlets or market access, investment, technical development or technological progress;
>
> (c) share markets or sources of supply;
>
> (d) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable 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.
>
> 3. Prohibited agreements are null and void.

Similarly, the exemptions contained in Article 4 correspond to the exemptions found in Article 81(3):

> 1. The Authority may authorize, for a limited period, agreements or categories of agreements prohibited under section 2 which have the effect of improving the conditions of supply in the market, leading to substantial benefits for consumers. Such improvements shall be identified taking also into account the need to guarantee the undertakings the necessary level of international competitiveness and shall be related, in particular, with increases of production, improvements in the quality of production or distribution, or with technical and technological progress. The

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67 Available online at http://www.agcm.it/AGCM_ENG/NORMATIV/E_NORMNA.NSF/09b5eea8ca4739cec12564d1004837ee/d9221ec1a3ef3879802564a30066bc40?OpenDocument.

> exemption may not permit restrictions that are not strictly necessary for the purposes of this subsection, and may not permit competition to be eliminated in a substantial part of the market.
>
> 2. The Authority may subsequently, after giving notice, revoke the exemption referred to in subsection (1) in cases where the party concerned abuses it, or when any of the conditions on which the exemption was based no longer obtain.
>
> 3. Requests for exemption shall be submitted to the Authority, which shall avail itself of the powers of investigation referred to in section 14 and decide within a period from 120 days of the date on which the application is filed.

It is interesting to note that despite the similarity in the wording between the Italian and EC regimes, the Italian Antitrust Authority has implied a form of the "rule of reason" analysis into Article 2 of its legislation. For example, in *Autorita Garante della Concorrenza e del Mercato, Relazione Annuale Sull'attivita Svolta*[68] the Court held that in general, consistent with the European Community approach, after an agreement is found to have a restrictive object, an assessment of the restrictive nature of its effect is not necessary for purposes of establishing a violation of Article 2(2), since the two prerequisites laid down in this provision are alternative. However, the Court went further to describe the following additional considerations:

> As a qualification to the above, however, . . . it cannot be ruled out that, even if an agreement is found to have a restrictive object, the analysis of its effects, as a possible indicator of the agreement's restrictive nature with respect to the structure of the relevant market, may become appropriate. The agreement's effects may become relevant for the purpose of establishing possible external factors, which must be taken into account in the whole assessment, with particular respect to the agreement's appreciability. Under the settled case law of the Court of Justice, the effects of an agreement must be assessed in its legal and economic context. Therefore, the way in which market relationships would have developed in the absence of the agreement in question must be taken into account; furthermore, the agreement must be assessed jointly with any other similar agreements existing in the same market. Where scrutiny of an agreement's effects appears necessary, an economic analysis of the markets, which must take into account such elements as the existence of intellectual property rights, the existing degree of competition and the competitor's reaction to the agreement's effects, will thus be indispensable.[69]

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68 *See Annual Report* (1994) at 129.

69 *Ibid* at 129.

### (l) Conclusion in respect of European Community Systems

There are a number of advantages to the approach adopted under the EC Treaty and in the legislation of other EC jurisdictions as described above. Applying a broad interpretation to Article 81(1), and its counterparts found in national legislation, ensures that these provisions are applicable to all forms of anti-competitive horizontal arrangements, including price-fixing and other hard-core cartel behaviour. To ensure that the broad prohibition found in Article 81(1) does not dissuade parties from engaging in potentially pro-competitive arrangements, Article 81(3) provides a broad discretion to the Commission to grant exemptions.

The benefit of the broad and liberal interpretation of Article 81 is also its greatest weakness. Given its breadth, Article 81(1) is applicable to agreements with little or no risk of being economically anti-competitive. Also, Article 81(2) renders agreements which fall within the broad scope of Article 81(1) void and unenforceable, unless an individual exemption is obtained or the agreement falls with the block exemptions. This, in turn, results in a heavy reliance by industry and the Commission upon the notification and exemption regime found in Article 81(3). Therefore, from a practical perspective, the Commission works reactively, dealing only with notifications from industry participants as opposed to focusing its efforts and resources on proactively addressing significant distortions of competition, such as hard-core cartels, which are almost never the subject of notification. Further, the legal certainty created by the exemption process is eroded due to excessive delay in the processing of notifications. Finally, the high cost of such notifications is potentially prohibitive, particularly for small- and medium-sized enterprises. The overall result is that parties may be dissuaded from engaging in potentially beneficial strategic alliances which do not fall within the strict terms of the block exemptions. As noted by Presley Warner and Michael Trebilcock:

> The mere availability of an authorization mechanism may not be sufficient to encourage parties to proceed with potentially competitive arrangements, since parties to arrangements which may trigger the prohibition will be reluctant to proceed with their arrangements if they must submit to cumbersome procedures to protect themselves from sanctions.... the mechanism must be simple to invoke and must provide legal certainty to the parties.[70]

The proposed abolition of the notification and authorization regime, as outlined in the draft Council Regulation discussed above, will certainly reduce the administrative burden on the Commission and the costs to industry participants. However, these benefits will come at the expense of legal certainty. Similar to the U.S. model, parties will be forced to resort to their own assessment of their agreement's compliance, or lack thereof, with provisions of Article 81.

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70 Presley L. Warner and Michael J. Trebilcock, "Rethinking Price-Fixing Law" (1993) 38 McGill L.J. 679 at 710. [hereinafter "Warner et al."]

It is noteworthy that unlike some of the other regimes canvassed herein, the European Community approach utilizes a "single track" notification system. This places heavy emphasis on notification and creates potential for abuse. As discussed below, limiting the requirement for notifications to those agreements falling within category of *per se* prohibition would significantly lower the number of notifications. Similarly, making all agreements - not just *per se* illegal agreements - unenforceable absent a notification, requires parties to submit notifications for agreements for which there is little risk of opposition by competition authorities.

## VI. UNITED STATES

Section 1 of the *Sherman Act*[71] sets out a prohibition against contracts, combinations, and conspiracies (collectively "agreement") "in restraint of trade or commerce among the several States or with foreign nations". Violations of section 1 may be prosecuted civilly or as criminal offences. Criminal enforcement of section 1 – the preserve of the Department of Justice ("DOJ") – is limited to traditional *per se* offences of the law. Criminal violation of section 1 is a felony punishable by maximum fines of $10 million in the case of corporate defendants and $350,000 in the case of all other defendants.[72] Individual offenders may also be imprisoned for up to 3 years.

Civilly, there are three possible plaintiff-side actors – the DOJ, Federal Trade Commission ("FTC") (collectively the "Agencies"), and private plaintiffs. The DOJ may obtain injunctive relief restraining or enjoining an agreement or it may file suit to amend it.[73] It may also recover treble damages if the U.S. government is the purchaser of the affected goods or services.[74] Private plaintiffs may also obtain injunctive relief[75] or bring suit for treble damages.[76] In private actions, a prior conviction flowing from a related criminal prosecution may serve as *pr* *facie* evidence of

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71 15 U.S.C. § 1.

72 *See* Gary R. Spratling, "The Trend Toward Higher Corporate Fines: It's a Whole New Ball Game" in *National Institute on White Collar Crime Presented by the ABA's Criminal Justice Section* (March, 1997) for a discussion of the manner in which fines are calculated under the *Sentencing Guidelines*. Notably, the "double the gain/double the loss standard" in 18 U.S.C. § 3571(d) has been successfully employed to fine defendants in excess of the $10 million *Sherman Act* cap. This standard provides for an "alternative maximum fine for an antitrust violation [equal to] twice the gross gain derived from the crime [*i.e.*, total gain derived by all persons from the offense] or twice the gross loss [*i.e.*, the total loss suffered by all persons other than the defendant as a result of the offense] caused by, *the cartel, not the defendant*". Spratling, *supra* at 5. [emphasis in the original]

73 *See* 15 U.S.C. §§ 4, 25.

74 *See* § 4A *Clayton Act*, 15 U.S.C. § 15a.

75 *See Clayton Act*, 15 U.S.C. § 26. Plaintiffs must establish "threatened loss or damage". *See, e.g., Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 260-64 (1972).

76 *See* § 5(a) *Clayton Act*, 15 U.S.C. § 15. Plaintiffs must establish both standing to sue and actual injury as a result of the alleged antitrust violation. *See also* 54 Am. Jur. 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* (1996) at § 50.

the alleged civil wrongdoing.[77] Finally, the FTC may institute civil proceedings under section 5 (*i.e.*, "unfair methods of competition") of the *Federal Trade Commission Act*[78] in respect of an agreement that violates section 1.[79]

As a general matter, the type of agreement at issue will be determinative of the DOJ's decision to proceed civilly or criminally.

> [C]urrent [Antitrust] Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations. Civil process and, if necessary, civil prosecution is used with respect to other suspected antitrust violations, including those that require analysis under the rule of reason as well as some offenses that historically have been labelled "per se" by the courts.[80]

There are, however, circumstances in which criminal investigation and/or prosecution may not be pursued, despite the fact that an agreement may appear to be *per se* illegal.

> These ... may include cases in which: (1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; [and] (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.[81]

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77 *See* § 4(a) *Clayton Act*, 15 U.S.C. § 15.

78 15 U.S.C.S §§ 41 et seq.

79 *See* Warner et al., *supra* note 70 at 699 for a fuller discussion of the details of antitrust enforcement by the FTC.

80 U.S. Department of Justice, Antitrust Division, *Antitrust Division Manual* available at http://www.usdoj.gov/atr/foia/divisionmanual/ch3.htm. It should be noted that the phrase "some offenses that historically have been labeled 'per se' by the courts" refers to certain categories of agreements (*e.g.*, agreement to price fix or boycott) that have traditionally been treated as *per se* illegal but which, under current Supreme Court jurisprudence, may now be subject to review according to a rule of reason standard where they are shown to be ancillary to a productive transaction.

81 *Ibid.*

### (a) Modern American Approach to Horizontal Agreements

Read literally, section 1's broad, unqualified language "would condemn all contracts affecting interstate commerce".[82] For this reason, the provision has been construed by the United States Supreme Court as proscribing agreements only where they are "unreasonably restrictive of competitive conditions".[83] As applied by the U.S. judiciary, a section 1 violation, in respect of a competitor collaboration, thus has three elements:

- there must be a contract, combination or conspiracy ("agreement") between two or more competitors;
- the agreement must affect interstate or foreign commerce; and
- the agreement must have as its object or effect the unreasonable restraint of trade.[84]

Specific intent must also be proved where Section 1 is enforced criminally. On the civil side, although an anti-competitive intent cannot by itself found an antitrust violation, pro-competitive intent will not necessarily negate a violation. However, "extrinsic evidence of intent may aid in evaluating market power, the likelihood of anticompetitive harm, and claimed procompetitive justifications [under a rule of reason review] where an agreement's effects are otherwise ambiguous".[85]

Under U.S. law, there are three categories of horizontal agreement – *per se* illegal agreements, rule of reason agreements and *per se* legal agreements. In general, the label of "*per se* illegality" applies to an agreement coming within one of the judicially-determined categories of agreement that is conclusively presumed to be anti-competitive and is thus summarily condemned as unlawful (*e.g.*, price fixing[86] and output fixing agreements as well as agreements to divide territories or customers[87]

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82 Thomas C. Arthur, "Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act" (1986) 74 Calif. L. Rev. 266 at 268.

83 *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

84 *See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

85 Joint Guidelines, *supra* note 2 at 12.

86 *See, e.g., United States v. Trenton Potteries*, 273 U.S. 392 (1927) [hereinafter *Trenton Potteries*]; *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) [hereinafter *Socony-Vacuum*]; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). [hereinafter *Kiefer-Stewart*]

87 *See,e.g., U.S. v. Topco Assocs. Inc.*, 405 U.S. 596 (1972) [hereinafter *Topco Assocs. Inc.*]; *U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967) [hereinafter *Sealy, Inc.*]; *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951). [hereinafter *Timken*]

or to boycott customers and suppliers[88]). Rule of reason agreements are those agreements that are thought to be potentially pro-competitive, and are thus subject to review according to the rule of reason standard which requires that, in order to avoid condemnation, an impugned agreement be shown to have a net pro-competitive effect within the relevant market.

### (b) The Rule of Reason Standard

The rule of reason is the presumptive standard according to which the "reasonableness", and hence the legality, of competitor collaborations is determined.[89] As noted above, the factual inquiry mandated by the rule of reason is whether, on balance, the impugned agreement promotes or suppresses competition.[90] In practical terms, this involves as many as four different inquiries.

#### (i) Anti-Competitive Harm

Courts first ask whether the agreement harms competition. Here, the plaintiff must establish the likelihood that some anti-competitive harm will result from the impugned agreement. Output reduction, likely or actual, is used as a measure of anti-competitive harm.[91] Market power, which acts as a surrogate for an agreement's output-reducing effects, may also be used due to "the inherent difficulty of measuring the effects of [an agreement] on output".[92] The Joint Guidelines identify four factors relevant to the question of anti-competitive harm. These are:

- the nature of the agreement (*i.e.*, whether it limits independent decision-making or combines control or financial interests);

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88 *See Klor's, Inc. v. Broadway-Hale Sores, Inc.*, 359 U.S. 207 (1959) [hereinafter *Klor's*]; *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941) [hereinafter *Fashion Originators'*]; *Eastern States Lumber Dealers' Assoc. v. U.S.*, 234 U.S. 600 (1914). [hereinafter *Eastern States Lumber Dealers' Assoc.*]

89 *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) [hereinafter *GTE Sylvania*]; *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *National Collegiate Athletic Asso. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) [hereinafter *NCAA*]; *see also Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (CA3 NJ 1977).

90 *See National Society of Prof'l Eng'rs v. United States*, 435 U.S.679, 691 (1978). [hereinafter *Prof'l Eng'rs*]

91 *See Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 20 (1979). [hereinafter *Broadcast Music*]

92 Warner et al., *supra* note 70 at 694. Notably, according to Warner et al. (at 694) "[t]here is no consensus among either courts or academics on the degree of market power that parties must possess for courts to conclude that their [agreements] reduce output".

- relatedly, the ability and incentive of participants to compete independently;[93]
- the likelihood, timing and sufficiency of entry;[94] and
- more generally, the market circumstances.[95]

(ii) Efficiency Justification

At the second stage, the burden of proof shifts to the defendant who is required to proffer an efficiency justification for the impugned agreement. For example, an agreement may permit competitors with differing capabilities and resources to act jointly or collectively "to offer goods or services that are cheaper, more valuable to consumers, or brought to the market faster than would be possible absent the collaboration".[96] The Joint Guidelines refer to the foregoing as "cognizable efficiencies", defined as verifiable – as opposed to vague or speculative – efficiencies "not arising from anti-competitive reductions in output or service, and that cannot be achieved through, practical, significantly less restrictive means".[97] Where the implausibility of an alleged efficiency justification is obvious, the agreement will be summarily condemned.[98]

There is some uncertainty as to the proper scope and limits of the justification inquiry. The question is whether economic efficiency alone, as opposed to a balance of efficiency and non-economic considerations, is the proper focus of the rule of reason justification analysis. In the *Professional Engineers* case,[99] the Supreme Court appeared to strictly limit the justification analysis to

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93 The Joint Guidelines review six factors relevant to the ability and incentive of participants and the collaborations to compete – exclusivity, control over assets, financial interests in the collaboration or in other participants, control of the collaboration's competitively significant decision-making, likelihood of anti-competitive information sharing, and the duration of the collaboration – at 18-21.

94 Entry is discussed at 21-23 of the Joint Guidelines.

95 Joint Guidelines, *supra* note 2 at 11; *see also* Joint Guidelines, *supra* note 2 at 13-15 for a discussion of the manner in which independent decision-making may be limited by various kinds of collaborations (*e.g.*, production collaborations, R&D collaborations, buying collaborations, and marketing collaborations) and the resulting anti-competitive harm.

96 Joint Guidelines, *supra* note 2 at 6.

97 Joint Guidelines, *supra* note 2 at 23. Note that "cognizable efficiencies are assessed net of costs produced by the competitor collaboration or incurred in achieving those efficiencies".

98 *NCAA*, *supra* note 89 at 111 (quoting Areeda).

99 *See Prof'l Eng's*, *supra* note 90 at 693-95.

consideration of a challenged agreement's effect on competition. Thus, it has been suggested that non-economic considerations are not cognizable for the purpose of the justification analysis.[100] However, it has been argued that the Court has failed, either in *Professional Engineers* and/or in subsequent cases, to "squarely indicate whether [and, if so, precisely in what manner] social concerns are relevant to the validity of" horizontal restraints.[101]

(iii) Reasonable Necessity

Assuming that the defendant has successfully demonstrated that a plausible efficiency justification exists for the impugned agreement, courts move to the third stage of rule of reason inquiry where the defendant is required to establish the justification's "reasonable necessity". Notably, the manner in which the necessity of a restraint, or the lack thereof, is to be established has not been determined authoritatively.[102]

The Joint Guidelines establish that "reasonable necessity" does not require a showing that the restraint is "essential". Instead, where an equivalent or comparable efficiency-enhancing integration could practically be realized through "significantly less restrictive means", an impugned restraint will not be considered to be "reasonably necessary".[103] The Joint Guidelines also indicate that "reasonable necessity" will also turn on the market context (*e.g.*, new entrant versus established competitor), the duration of the agreement, and the extent to which the collaboration is structured so as to deter free riding or opportunistic conduct that could ultimately diminish promised efficiencies.[104]

(iv) Net Effect

As described in the Joint Guidelines, the final stage of the rule of reason analysis involves a comparison of the "likelihood and relative magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market".[105] The actual or likely short-term effects of the agreement are the principal focus here .

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100 *See* Warner et al., *supra* note 70 at 694.

101 *See* Arthur, *supra* note 82 at 365-66: *see generally* Barry Wertheimer, "Rethinking the Rule of Reason: From Professional Engineers to NCAA" (1984) Duke L.J. 1297.

102 *See* James T. Halverson, "The Direction of Antitrust in the Decade Ahead: Some Predictions: The Future of Horizontal Restraints Analysis" (1988) 57 Antitrust L.J. 33 at 46; Arthur, *supra* note 82 at 360.

103 *See* Joint Guidelines, *supra* note 2 at 9.

104 *See* Joint Guidelines, *supra* note 2 at 24.

105 Joint Guidelines, *supra* note 2 at 25.

While "delayed benefits" may also be taken into account, the Joint Guidelines indicate that these are given less weight "because they are less proximate and more difficult to predict".[106]

### (c) *Per Se* Illegality

As noted at the outset, in principle, American law designates certain agreements as unreasonable *per se* and hence illegal under section 1. Historically, where judicial experience has demonstrated that a specific type of agreement is "so 'plainly anticompetitive' and so often 'lacking ... any redeeming virtue'"[107] (*e.g.*, it is solely a means of restricting output and increasing prices) the Court's jurisprudence establishes that an agreement falling into that category will be conclusively presumed to be illegal, without the necessity of an inquiry into its:

- net competitive effect,
- claimed business purpose, or
- possible non-economic justifications (*viz.* its reasonableness).[108]

As a general rule, U.S. law summarily proscribes price fixing[109] and output fixing agreements as well as agreements to divide territories or customers[110] or to boycott customers and suppliers[111] on this basis. Consequently, the mere fact of agreeing to fix prices, for example, is a sufficient basis for liability.[112] The business purpose or effects of an agreement of this kind have no place in the summary *per se* analysis

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106 Joint Guidelines, *supra* note 2 at 25.

107 Halverson, *supra* note 102 at 35 (quoting *Prof'l Eng'rs, supra* note 90 at 692; *GTE Sylvania, supra* note 89 at 50; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) [hereinafter *Northern Pac. Ry.*]).

108 *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982). [The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if pro-competitive justifications are offered for some] [hereinafter *Maricopa*]

109 *See, e.g., Trenton Potteries, supra* note 86.; *Socony-Vacuum, supra* note 86; *Kiefer-Stewart, supra* note 86.

110 *See, e.g., Topco Assocs. Inc., supra* note 87; *Sealy, Inc., supra* note 87; *Timken, supra* note 87.

111 *See Klor's, supra* note 88; *Fashion Originators', supra* note 88; *Eastern States Lumber Dealers' Assoc., supra* note 88.

112 *See* T. Webb, "Fixing the Price Fixing Confusion: A Rule of Reason Approach" (1993) Yale L.J. 706 at 708.

The *per se* analysis has three rationales – economic reliability, ease of judicial administration, and predictability.[113] *Per se* illegality reflects the judgment that the economic theory underpinning price fixing, for example, is "sufficiently well developed to obviate the need for consideration of [ a price-fixing agreement's] positive effects in particular instances".[114] Relatedly, the *per se* rules also reflect the judgment that the likelihood of anti-competitive harm is so great (and the likelihood of pro-competitive benefits so minute) in relation to certain categories of agreement that the costly and time-consuming rule of reason inquiry may justifiably be foregone.[115] Finally, assuming that the proscribed conduct is capable of clear definition, the *per se* rules also rest on the judgment that they increase the consistency and predictability of anti-trust enforcement and judicial decision-making.[116]

In the 1980s and 1990s, however, significant criticism of the economics underpinning most of the categories of *per se* illegal agreements cast doubt on the economic reliability rationale and has inevitably, given the inter-relatedness of the three rationales discussed above, led to a diminution in the *per se* rules' ease of administration and predictability.[117] "Only the rules against cartel activities have escaped without serious challenge".[118] The result has been abandonment, both by the Supreme Court and U.S. Circuit Courts, of strict *per se* treatment of certain categories of agreement historically thought to produce consequences necessarily violative of the statute. These include tying agreements,[119] agreements to price fix,[120] to allocate customers or markets,[121] and to boycott.[122]

The Courts' recent approach to the *per se* rule against price-fixing is illustrative of the foregoing trend. "Under the Sherman Act, a combination formed for the purpose and with the effect of raising,

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113 *Ibid* at 708.

114 *Ibid* at 709.

115 *Ibid* at 709; *see also Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15-16 n. 25 (1984). [hereinafter *Hyde*]

116 *See* Webb, *supra* note 112 at 710.

117 *See* Arthur, *supra* note 82 at 316-17 and n. 288.

118 Arthur, *supra* note 82 at 316.

119 *See Hyde*, *supra* note 115.

120 *Board of Regents v. NCAA*, 104 S. Ct. 2948, 2960-62 (1984); *Broadcast Music*, *supra* note 91 at 8-10, 16-24.

121 The trend is now to evaluate market-division agreements using a rule of reason standard. "There is now strong authority for the proposition that defendant's must have market power for their market-sharing arrangements to be condemned". Warner et al., *supra* note 70 at 696 n. 92 (citing *NCAA*, 468 U.S.; *Polk Brothers INc. v. Forest City Enterprises Inc.*, 776 F.2d 185 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *General Leaseways, Inc. v. National Truck Leasing Assoc.*, 74 F.2d 588 (7th Cir. 1984)).

122 *See* Johnston; *Northwest Wholesale Stationers Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985); *Maricopa*, *supra* note 108.

depressing, fixing or pegging, or stabilizing the price of a commodity . . . is illegal per se".[123] The *per se* rule against price fixing, as historically articulated and applied by the Supreme Court, catches maximum as well as minimum price agreements, agreements involving contractual terms which affect price (*e.g.*, credit terms), agreements on final price, agreements to force other to raise their prices and even agreements that only indirectly interfere with free market pricing decisions.[124] However, the historic rule which condemns any combination that literally raises, depresses, fixes, pegs, or stabilizes no longer holds in all cases. In *Broadcast Music*, the Supreme Court abandoned the literal *per se* rule, distinguishing "price fixing agreements" and "*per se* price fixing" in recognition of the fact that "agreements which literally 'fix' prices may under some circumstances be lawful, in particular, where ancillary to legitimate joint activity".[125]

The current approach to price fixing relies on the distinction between "naked" restraints – agreements between competitors not reasonably necessary to a *bona fide* collaboration or productive transaction – and "ancillary" restraints – agreements that aid some valid business transaction and thus create "integrative efficiencies".[126] Naked restraints are *per se* illegal and subject to summary condemnation, while ancillary restraints are subject to evaluation pursuant to the rule of reason standard, where market definition and power issues are considered.

The Joint Guidelines indicate that "[i]f ... participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies [will] analyze the agreement under the rule of reason, **even if** it is of a type that might otherwise be considered per se illegal".[127] The Joint Guidelines define "efficiency enhancing integration" as follows:

> In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entirely created by the collaboration or by one or more participants or third parties acting on behalf of other participants) one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that

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123 *Socony-Vacuum*, *supra* note 86 at 223.

124 *See* M. Elaine Johnston, "Horizontal Restraints" in *The 47th Annual Spring Meeting: Antitrust Fundamentals* (1999) at 7-8.

125 *Ibid* at 8.

126 Warner et al., *supra* note 70 at 697; *see also* Halverson, *supra* note 102 at 46 [ancillary restraints are those that are "subordinate and collateral to a separate, legitimate transaction ... [serving] to make the main transaction more effective..." ((quoting *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), cert. denied, 107 S. Ct. 329 (1986)).

127 Joint Guidelines, *supra* note 2 at 8. [emphasis added]

participants could not achieve separately ... The integration must be of a type that **plausibly** would generate procompetitive benefits cognizable under the efficiencies analysis.[128]

### (d) Conclusion in Respect of the US Regime

#### (i) Macro Advantages

The U.S. model, to a considerable extent, permits differentiation between competitor collaborations that reduce social welfare and those that raise social welfare by creating efficiencies that exceed and compensate for any resultant anti-competitive harm.[129] The American regime, at least in principle, builds in the aforementioned distinction on two levels:

- the rule of reason/*per se* illegality dichotomy; and
- the rule of reason review itself, which, of course, permits a comprehensive assessment of the alleged pro-competitive benefits of an impugned agreement prior to deciding its legality.

Further, it is arguable that the Supreme Court's recent relaxation of the *per se* rules has enhanced, rather than diminished, the ability of regulatory and judicial decision-makers to differentiate between collaborations in the manner described above.

#### (ii) Macro Disadvantages

As a result of section 1's broad, standardless language the current state of American conspiracy law has been one hundred years of jurisprudence in the making. Even now, however, some suggest that the absence of a singular operational standard "to guide the decision of hard cases" has "permit[ted] courts to reappraise and reshape the basic policies of antitrust law" with the result that "[a]ntitrust litigation [in the U.S.] remains notoriously costly and unpredictable, despite repeated efforts to simplify both the doctrine and the litigation process".[130]

Recent developments in American law (described above) have created uncertainty in relation to the circumstances in which a *per se* rule or rule of reason analysis will be applied by the courts. For example, in relation to "agreements that concern price in some way", Webb argues that there is uncertainty in predicting which analysis will be adopted by the courts in a given case.[131] In this

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128 Joint Guidelines, *supra* note 2 at 8. [emphasis added]

129 *See* Ross, *supra* note 7.

130 Arthur, *supra* note 82 at 268 and 270; *see also* Webb, *supra* note 112 at 706.

131 *See* Webb, *supra* note 112 at 720.

regard, he points to the inconsistent results in the *Broadcast Music* and *Maricopa* cases despite broadly similar facts. In both cases, the defendants were engaged in marketing a new product – "blanket licenses" in *Broadcast Music* and low-cost, full coverage health insurance in *Maricopa* – and in both cases "the new product was a 'blanket' response to the high transaction costs of per-use purchases".[132] However, the Court applied the *per se* rule in *Maricopa* and the rule of reason in *Broadcast Music*. Webb contends that there is no principled basis for distinguishing these cases.[133]

(iii) Micro Advantages and Disadvantages

The respective advantages and disadvantages of each of the constituent elements of the relevant American regime will be considered next.

(1) *Per Se* Illegality

In principle, the strict variant of the *per se* rule offers at least two inter-related advantages:

- it is relatively less costly; and
- it promises increased certainty and predictability.[134]

Because the sole question under a *per se* analysis is whether the unlawful conduct has taken place, logically *per se* rules should be less costly, as a matter of time and expense, to enforce and apply than the rule of reason's in-depth comparative inquiry into the net competitive effect of the same conduct.[135] Similarly, the *per se* rules' categorical approach, which purports to make the types of the agreements that are proscribed more certain, promises greater consistency and predictability, to the benefit of business planners.

However, the efficiency and clarity of the *per se* rule may be more apparent than real. In practice, application of a *per se* rule involves a threshold inquiry, namely whether the impugned agreement may be properly characterized as falling within the *per se* rule in question. Characterizing an agreement "can be very difficult, and may involve a fair amount of sophisticated economic inquiry".[136] Consequently, as the Supreme Court has recognized, "there is often no bright line

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132 Webb, *supra* note 112 at 721-22.

133 *See* Webb, *supra* note 112 at 722.

134 *See* Webb, *supra* note 112 at 708.

135 *See Northern Pac. Ry., supra* note 109 at 5 [A *per se* rule avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries].

136 H. Hovenkamp, *Economics and Federal Antitrust Law* (1985), at 128-29.

separating *per se* from Rule of Reason analysis".[137] The cost advantages, both to the administration of justice and litigants, of the *per se* rule are, of course, lost if a full-blown or even a partial rule of reason analysis is required prior to condemning an agreement as *per se* illegal.

Relatedly, this characterization problem has negative consequences for the vaunted certainty and predictability of the *per se* rule. For example, "an uncertain definition of price fixing cannot provide businessmen with a reliable standard by which to guide their conduct".[138] The chilling effect flowing from the uncertain application of the *per se* rule arguably inhibits efficient competitor collaborations, ultimately diminishing social welfare.

More fundamentally, as noted above, the *per se* rules are premised on the related assumptions that:

- the economic theory underpinning the conclusion that a category of agreements is invariably injurious to competition is sound and, consequently,
- that the burdensome rule of reason inquiry may justifiably be avoided in relation to certain categories of agreements.

The *per se* rule against price fixing illustrates the problematic nature of the foregoing assumptions.

Webb argues that "as a legal category [the *per se* rule] has no coherent economic rationale" (apart from the harms from anti-competitive cartels).[139] Pointing to the well-known exceptions for joint ventures and partnerships, he argues that it is not every "agreement concerning price" that is "economically invidious but rather agreements by producers with market power to restrict output and raise price to above competitive levels".[140] The result of American law's historically mechanical interdiction against any combination that raises, depresses, fixes, pegs, or stabilizes prices (*i.e.*, without regard to market power and economic effects) has ultimately been, he suggests, to undermine competition and consumer welfare.[141]

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137 *NCAA*, *supra* note 89 at 104 n. 26.

138 Webb, *supra* note 112 at 711.

139 Webb, *supra* note 112 at 715.

140 Webb, *supra* note 112 at 715.

141 *See* Webb, *supra* note 112 at 714. Webb holds out *Boise Cascade v. FTC*, 693 F.2d 573 (9th Cir. 1980) as an example of the overbreadth of the traditional *per se* rule against price fixing. In that case, three Southern plywood manufacturers were found guilty of *per se* violations of section 1 for conspiring to maintain a uniform system of "delivered" pricing (*i.e.*, a method of price quotation). In keeping with the *per se* rule, no adverse effect on total prices was found or even considered. The defendants had standardized delivery charges, as between Southern and Western producers, by quoting a mill price adjusted to reflect the higher delivery charges from West Coast producers. Webb doubts whether, in the absence of evidence that total price was affected, an agreement of this kind actually results in anti-competitive harm. On the contrary, he suggests that the price quoting system had a clear pro-competitive justification, namely "[it] reduce[d] information costs to consumers comparing Southern

Similarly, Ross suggests that "even a practice as notorious [and as inimical to competition] as price fixing can be part of a socially efficient arrangement".[142] By way of illustration, he points to a hypothetical agreement among a number of small retail pharmacists in a large city to jointly advertise and honour the prices listed. He notes that "[w]hile this is no doubt (in part) an agreement to fix price, the arrangement can have no negative effect on competition (since the retailers together represent a tiny fraction of sales in the city) and will in fact be beneficial to the extent that it improves information in the market and lowers the cost of advertising" through the realization of scale economies.[143]

A final arguable disadvantage of *per se* illegality is its effect on the flow of information to judicial decision-makers. "It is difficult enough for judges to inform themselves about business practices without shutting off the information flow before it begins, by prematurely adopting a rule of blanket illegality".[144]

### (2) Rule of Reason

As noted above, the fundamental advantage offered by the rule of reason standard is flexibility, permitting courts to differentiate between pro-competitive, welfare enhancing collaborations from those which are not. Flexibility comes at a price, however. The rule of reason is an imprecise standard requiring a case-by-case weighing of all the relevant circumstances before a determination regarding the reasonableness of an impugned agreement can be made. The complicated and prolonged economic investigation necessitated by the rule of reason standard often entails significant time and expense.

The other difficulty associated with the rule of reason arises from the task of comparing the relevant pro-competitive and anti-competitive effects. Where the two effects are disproportionate the net effect is plain. However, close cases are more problematic. According to Arthur, Supreme Court jurisprudence provides "neither a methodology for case-by-case weighing of restrictive and efficiency effects, nor a set of rules with which to avoid such a case-[by]-case inquiry".[145]

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and Western plywood by enabling them to compare the respective mill prices directly and to determine the total delivered price simply by adding the same standard freight charge to each mill quotation. The result was increased competition among all plywood producers and reduced search costs for plywood consumers". Webb, *supra* note 112 at 718-19.

142 Ross, *supra* note 7 at 866.

143 Ross, *supra* note 7 at 862.

144 *Vogel v. American Society of Appraisers*, 744 F.2d 598, 604 (7th Cir. 1984) (quoted in Halverson, *supra* note 102 at 43).

145 Arthur, *supra* note 82 at 362.

Finally, it has also been suggested that under the current rule of reason approach "defendants will find it hard to prevail".[146] This of course raises the spectre of over-deterrence, with its attendant harm to consumer and, ultimately, social welfare.

## VII. AUSTRALIA

Australia's first antitrust statute "closely followed the terms of the *Sherman Act* 1890" and did not provide an authorization mechanism.[147] However, the current Part IV of the Australian *Trade Practices Act* includes a number of different elements from the U.S. and European Community regimes discussed above, along with other aspects which are unique to Australia. Specifically, the *Act* incorporates detailed *per se* prohibitions against agreements to fix prices or engage in other forms of hard-core cartel behaviour. The *Act* also contains a broad proscription that relies on a partial rule of reason analysis, similar to section 45 of the Canadian *Competition Act*, to prohibit agreements or arrangements which have the purpose or effect of substantially lessening competition. Similar to Article 81(3) of the EC Treaty, the *Act* permits the Australian Competition and Consumer Commission (the "ACCC") to grant "authorizations" to "make" or "give effect to" agreements, even for those agreements which fall within the *per se* prohibitions. A copy of the relevant provisions is attached at Schedule "V".

Section 45 proscribes agreements, arrangements and understandings which have as their purpose, effect or likely effect the substantial lessening of competition.[148] Section 45 also prohibits corporations from giving effect to such agreements. The *per se* prohibitions are found in section 45A of the *Act*. Section 45A states as follows:

> Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

As noted above, section 45A prohibits agreements between actual or likely competitors, that have the purpose, effect, or likely effect of fixing prices in relation to the supply of products. Pursuant

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146 Arthur, *supra* note 82 at 364.

147 John Duns, "Competition Law and Public Benefits" (1994) 16 Adel L.R. 245 at 248.

148 *See* s. 45(2)(a)(ii).

to section 45(1), agreements to fix prices are deemed to have the purpose or effect of substantially lessening competition and therefore, are contrary to section 45. Despite the express wording of the statute however, the Australian courts have diluted the "*per se*" nature of the proscription by interpreting s. 45A as requiring proof of an "intention or likelihood to affect price competition".[149]

In a report published by an Independent Committee of Inquiry following a review of Australian competition policy conducted in 1993, it was recommended that exemptions should generally not be permitted for horizontal price-fixing on the basis that it will "undermine the message that price competition is central to effective competition...".[150] Contrary to this recommendation however, the legislation recognizes that certain types of price-fixing or other agreements which fall within the *per se* prohibitions may result in pro-competitive benefits and therefore should be exempted. For example, section 45A contains a number of exceptions for agreements relating to combined purchasing, joint supply and joint advertising among competitors in certain circumstances. Specifically, section 45A(4) states that the prohibition does not apply to agreements "in relation to the price for goods or services to be collectively acquired" or "for the joint advertising of the price for the re-supply of goods or services so acquired". Although such agreements are not subject to the *per se* prohibition, they remain subject to the general prohibition found in section 45 where it is established that the agreement has the purpose or effect of substantially lessening competition.

Section 45 and the related prohibitions are enforced by the national courts within Australia. Similar to the EC regime, violations of section 45 are only punishable by fines, referred to as "pecuniary penalties". However, as with the EC regime, the fines that may be imposed by the Australian Courts are significant. Section 76 authorizes the courts to impose fines against a corporation of up to $10 million (approximately C$8 million) for conduct contrary to section 45. Secondary boycotts, which are also prohibited under section 45, may result in fines of up to $750,000. In addition, individuals may fined up to $500,000 in respect of any of conduct contrary to section 45. Pursuant to s. 82, private plaintiffs are permitted to bring suit to recover damages for loss or injury suffered as a result of acts or omissions in breach of Part IV. Notably, half the litigation under the Act is commenced by non-governmental plaintiffs.[151]

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149 Lynden Griggs, "Compliance with Section 45 of the Trade Practices Act: A Plan" (1997) 15 Australian Bar Rev. 149 at 156 (citing *Radio 2UE Sydney Pty Ltd Stereo FM Pty Ltd* (1983) 68 FLR 70 at 72).

150 Maureen Brunt, "The Australian Antitrust Law After 20 Years – A Stocktake" in David K. Round, ed., *The Australian Trade Practices Act 1974* (1994) 483 at 509 (quoting The Hilmer *Report* (National Competition Policy Review (1993)) at 39).

151 Allan Fels, "The Trade Practices Act 1974 – Twenty Years On" (1994)16:2 Competition and Consumer L J. 1 at 4.

Despite the availability of significant fines, it is noteworthy that the Commission spent $12 million on litigation in 1999-2000 in order to secure only roughly $14 million in penalties against companies that were found to have contravened the Act.[152]

### (a) Authorizations

Under s. 88 of the Act, the ACCC has the power to grant "authorizations" to "make" or "give effect to" agreements that would or might be contrary to Part IV of the Act, including agreements that substantially lessen competition and even price fixing agreements falling within the *per se* prohibitions. Authorization has the effect of insulating successful applicants from legal action by the ACCC or any other party. At the ACCC's discretion, authorizations may be granted subject to conditions, undertakings[153] and time-limitations.[154] Authorizations are generally only available where the agreement has not yet been concluded. Specifically, unless the parties make the agreement subject to a condition that the provisions will not come into effect until an authorization is granted and an application is made to the ACCC, an agreement that "has been made" or an "understanding has been arrived at" before the ACCC makes a determination in respect of the application, is not eligible for an authorization.[155]

The issue of delay that has plagued the European Community regime appears to have been avoided under the Australian legislation through the imposition of a fixed deadline within which the ACCC must grant or deny an authorization. Subject to certain minor exceptions, the ACCC has four months in which to grant or refuse an authorization, failing which, at the expiry of this period, it is deemed to have granted the authorization.[156] Statistics specific to the authorization of competitor collaborations under the Act are unavailable. Nevertheless, global statistics relating to both mergers and anti-competitive conduct found in the ACCC's 1999-2000 *Annual Report* are available. In 1999 - 2000, 160 authorization applications were subject to consideration by the ACCC. Of these, 78 authorization applications were carried forward from the previous year, while 82 were new applications. Over a 12 month period ending June 30, 2000, seven applications were withdrawn and 72, or roughly 45% of the total applications subject to ACCC consideration, were decided.[157] In assessing these figures, however, it should be noted that the *Report* does not reveal the proportion

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152 Australian Competition & Consumer Commission, *Annual Report 1999-2000* at 2.

153 *See* s. 87B.

154 *See* ss. 90(3) and 91(1).

155 *See* s. 88(12).

156 *See* s. 90(10A).

157 *Ibid* at 45.

of decided applications that fell into the "carried forward" category. Nor does it indicate the average processing time for an application.

Two different tests govern the ACCC's decision to grant an authorization, the first resembles the comparative inquiry mandated by the American rule of reason standard. In the case of agreements and covenants that may substantially lessen competition, the ACCC is not permitted to grant an authorization unless it is satisfied that the proposed agreement would or is likely to result in a net benefit to the public (*i.e.*, benefit in excess of detriment due to any resultant lessening of competition).[158] A causal relationship between the claimed public benefit and the agreement must be shown to exist.[159] The applicant is not required, however, to establish that the benefit would not otherwise be available, but for the impugned agreement.[160] On a practical note, Adhar suggests that the burden on applicants is a heavy one.[161]In fact, between 1974 and 1983 only 1.65% of authorization applications were granted.[162]

Eligible "benefits to the public" have been defined broadly by the ACCC and the Australian Competition Tribunal. Unlike the inquiry under the *Sherman Act*, the ACCC and Tribunal are not limited to economic considerations, but may also examine a number of non-economic factors, such as the following:

- fostering business efficiency, especially when this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;

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158 *See* ss. 90(6) and (7).

159 Rex J. Adhar, "Authorisation and Public Benefit Under the Commerce Act 1986: Some Emerging Principles" (1988) 16 Australian B.L.R. 128 at 142.

160 *Ibid* at 143.

161 *Ibid* at 147.

162 *See* Warren Pengilley, "Comparative Approaches to the Enforcement of Antitrust Laws Against Price-Fixing Arrangements (with Special Emphasis on the Lessons Learned from the Antitrust Law and Enforcement in Australia)" (1983) 28 Antitrust Bulletin 882 at 884 and 917.

- promotion of competition in industry;
- promotion of equitable dealings in the market;
- growth in exports;
- development of import replacements;
- economic development, *e.g.*, of natural resources through encouraging exploration, research and capital investment;
- assistance to efficient small business, *e.g.*, guidance on costing and pricing or marketing initiatives which promote competitiveness;
- industrial harmony;
- improvement in the quality and safety of goods and services and expansion of consumer choice; and
- supply of better information to consumers and business to permit informed choices in their dealings.[163]

On the breadth of the "relevant considerations" under the authorization procedure, Duns confirms that "[n]o attempt has been made to limit consideration of benefits to what might be considered directly economic benefits and certainly not to efficiency criteria".[164] However, in practice, according to Duns, economic analysis dominates the authorization process under the Act, although there are a number of examples where the ACCC or the Tribunal have given weight to non-efficiency factors. [165]

Further, where the analysis of the foregoing non-economic factors reveals a detriment, rather than a benefit, these factors may be considered in determining the magnitude of the anti-competitive harm produced by an impugned agreement. It should be noted that the task of evaluating whether the public benefits flowing from proposed anti-competitive agreements does not rest with the courts, which under the Australian regime are charged with applying the foregoing legislative prohibitions, but with the ACCC. The courts consider only the purpose and effect – actual, likely or deemed –

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163 Jones, *supra* note 29.

164 Duns, *supra* note 147 at 256 (quoting *Queensland Co-operative* at 17,242: a public benefit may constitute "anything of value to the community generally, any contribution to the aims pursued by the society").

165 *See* Duns, *supra* note 147 at 260 and 262.

of the relevant agreement on competition; their task does not extend to assessing any other effects, efficiency-enhancing or otherwise, of the impugned agreement. The notification and authorization process before the ACCC constitutes the institutional mechanism for ensuring that net pro-competitive competitor collaborations are not deterred.[166]

Authorizations are subject to variation, revocation and/or the substitution of a replacement authorization by the ACCC where, for example, the person to whom the authorization was granted has failed to comply with a condition thereof or there has been a material change in circumstances.[167] Determinations by the ACCC to grant, vary, revoke or substitute authorizations are also subject to review by the Australian Competition Tribunal (the "Tribunal") under s. 101 at the instance of any "dissatisfied person" having a "sufficient interest" in the determination in question.

## VIII. NEW ZEALAND

The *Commerce Act* (1986) (the "Act"), reflects New Zealand's adoption, albeit modified, of the Australian competition law regime, in furtherance of the governments' pledge, as part of the 1983 Closer Economic Relations Treaty, to harmonize their respective competition legislation.[168] As such, the general approach and basic elements of the *Commerce Act* are very similar to those reviewed above in respect of Australia's *Trade Practices Act*.

### (a) Substantive Provisions

Like the Australian *Trade Practices Act*, the *Commerce Act* combines a general prohibition, specific *per se* proscriptions and an authorization or exemption scheme. The general prohibition is found in section 27 which declares contracts, arrangements or understandings the purpose, effect or likely effect of which is to substantially lessen competition in a market, or which attempt to so lessen competition, illegal and unenforceable.[169] A copy of the relevant provisions is attached at Schedule "VI".

Sections 30 and 34 make "price fixing" agreements *per se* illegal. Under s. 30, agreements among competitors to "fix" the prices for goods or services are deemed to substantially lessen competition. "Price fixing" is defined broadly by s. 30 to include the fixing, controlling or maintaining the price of goods or services or any discount, allowance, rebate, or credit in relation to goods or services. According to the Commission, s. 30 is likely to catch agreements to:

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166 *See* Karen Yeung, "Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective" (1999) 22 Melbourne U. L.R. 444 at 466.

167 *See* ss. 91B(3) and 91C(3).

168 Adhar, *supra* note 159 at 129.

169 *See* http://www.comcom.govt.nz/acts/comact/3restrictive.cfm.

- create a price range;
- create a price or discount formula or system;
- set credit and rebate levels;
- set prices or discount levels; or
- control the elements that contribute to prices.[170]

As with the Australian statute, the *per se* prohibition found in s. 30 is subject to three exemptions: joint ventures (s. 31), recommended price (s. 32) and joint buying and advertising arrangements (s. 33). However, in all three of these cases, the parties' agreement remains subject to the general prohibition found in section 27 against agreements which have as their purpose or effect the substantial lessening of competition.[171]

Under the Act, the Commerce Commission (the "Commission") may also obtain an injunction restraining conduct as described above[172] or negotiate administrative settlements resulting in signed undertakings.[173] Further, the Commission, as well as private plaintiffs are entitled to bring suit in the High Court of New Zealand against those allegedly in breach of the statute. Acts or omissions contrary to the above prohibitions are punishable by fines of up to $5 million (approximately Cdn. $3.2 million) for a corporation and $500,000 in the case of individuals.[174] However, as of August 1998, the highest penalty imposed under Act totalled only $300,000 or 6 per cent of the $5 million statutory maximum fine which may be imposed on corporations that have contravened the Act.[175] The Commission has expressed concern, from both a deterrence and an enforcement standpoint, about the courts' reluctance to impose significant penalties, relative to the costs incurred by firms in defending an action brought by the Commission.[176] It notes that the small size of court-awarded

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170 *Ibid.*

171 *See* www.comcom.govt.nz/acts/comact/3restrictive.cfm.

172 *See* s. 81.

173 *Ibid.*

174 *Ibid*; *see* s. 80. It should be noted that recently proposed amendments to the Act would increase the maximum corporate fine to $10 million, introduce an alternative maximum penalty equal to three times the value of the illegal gain and clarify the availability of exemplary damages in private actions. *See* OECD Annual Report on Competition Law and Policy - New Zealand (1999-2000) available at http://www.oecd.org/daf/clp/annrep.htm.

175 *Ibid* at 275.

176 *Ibid.*

penalties has hindered it in penalty negotiations with defendants. The Commission also suggests that, to this time, courts have not set penalties at deterrent levels. As regards the appropriate starting point, the Commission maintains that:

> To be effective deterrents should eliminate any profit incentive to engage in illegal activity ... includ[ing] taking into account the expected future net gains from the contravention, and the probability of detection and prosecution.
>
> At times it is totally appropriate for penalties to be far higher than the actual gain made by the firms involved.
>
> ... [E]xpected gains are likely to be higher than the profits made up to the time when the contravention was detected; and in cases which are difficult to detect, such as hard core conspiracies, the optimal deterrent penalty would be some multiple of the expected illegal gain.
>
> ... for the civil standard under the Act, a suitable proxy would be a range of five per cent to 40 per cent of turnover for a minimum one year.[177]

Pointing to the "overwhelmingly positive" experience in the U.S. from a compliance perspective, the Commission also advocates the inclusion of criminal sanctions under the Act.[178]

### (b) Authorisations and Exemptions

As with the Australian statute, the New Zealand regime provides for "authorisations" for agreements which contravene the above provisions, even including those agreements which fall within the *per se* prohibition against price-fixing.[179] As a general rule, such authorisations are available only where the impugned agreement has not yet been concluded.[180] However, agreements may be authorised, despite having been already concluded, so long as they contain an exclusionary provision delaying their force and effect until an authorisation is secured. It should also be noted that the Commission's jurisprudence establishes that the "mere making of an application [for an authorisation] is not

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177 *Ibid* at 275-76.

178 *Ibid* at 276; *see also* Stephen Corones, "Penalties for Price-Fixing: A Built-In Feature of How we do Business in Australia?" (1996) 24 Australian Business L. Rev. 160 (advocating use of criminal sanctions to punish serious contraventions of Part IV of the *Trade Practices Act*).

179 *See* s. 61(6) ["or is deemed to result therefrom"]; *see also* Adhar, *supra* note 159 at 131 (citing *Re New Zealand Vegetable Growers Federation*, Unreported, 9 July 1987, no. 206).

180 *See* s. 59.

necessarily an admission that the [agreement in question] is one to which section 27 or other appropriate section applie[s]".[181]

The Commission is not entitled to grant an authorisation unless it is satisfied that an agreement will in all the circumstances result, or is likely to result, in a "net public benefit".[182] Like the American model, the Commission must undertake a form of rule of reason review where the benefit enuring to the public from the impugned agreement is weighed against its anti-competitive effects. Significantly, the Act does not identify or define those considerations which are properly examined in assessing the benefit to the public. Consequently, in *Weddel*,[183] the Commission gave the phrase "public benefit" a broad and liberal interpretation: "The Act is worded broadly and there appears to be no limitation as to the nature of the public benefit which may be claimed ... A benefit is something of value to the public". Further, Adhar notes that it "has been stressed that notwithstanding the importance given economic efficiency through the promotion of competition, the types of public benefit are not confined to economic benefits".[184] To date, accepted "benefits to the public" have included:

- productive efficiencies;
- economies of scale;
- cost savings;
- lower unit wage costs;
- enhanced job security;
- increased utilization of New Zealand resources; and
- improved road safety.[185]

A former Chairman of the Commission suggested that eligible public benefits may also include regional development, enhancement of work skills and employment opportunities, the interests of employees and "any other effect aiding the well-being of the people of New Zealand" (*e.g.*, freedom

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181 *Weddel Crown* Unreported, 22 July 1987, no. 205 at 10 (quoted in Miriam R. Dean, "Collective Pricing - A Practical Guide to Section 30 of the Commerce Act 1986" (1990) 20 Victoria University of Wellington L.R. 1 at 19). [hereinafter *Weddel*]

182 *See* ss. 61(6).

183 *Supra*, note 181 at para. 25(ii)-(iii).

184 Adhar, *supra* note 159 at 139.

185 Adhar, *supra* note 159 at 139.

of the press).[186] As with the Australian regime, the task of evaluating the public benefits from proposed anti-competitive agreements does not rest with the High Court of New Zealand, which is charged with applying the foregoing legislative prohibitions, but with the Commission. The Court considers only the purpose and effect – actual, likely or deemed – of the relevant agreement on competition; its task does not extend to assessing any other effects, efficiency-enhancing or otherwise, of the impugned agreement. The notification and authorisation process constitutes the institutional mechanism for ensuring that net pro-competitive competitor collaborations are not deterred.

Pursuant to s. 61, the burden throughout the authorisation process is on the applicant to establish a "causal nexus" between the agreement and the alleged public benefit.[187] While the applicant is not required to establish that the benefit would not otherwise be available, but for the impugned agreement, the Commission will take into account evidence that the benefit in question could be achieved through less harmful means in assessing the weight to be given to the benefit claimed.[188] Further, any detriment flowing from a claimed benefit will be netted from the benefit before the ultimate weighing takes place.[189] From an evidentiary standpoint, the Commission has stated the following guidelines as to proof:

- the need for specific reasoned, as opposed to conclusory or general, claims;
- the need for evidence to show that the claimed beneficial effects are likely to eventuate;
- demonstration that the benefits will actually flow form the proposal or conduct;
- demonstration that the New Zealand public will benefit;
- the desirability of demonstrating that sections of the public which will benefit;
- the need, where possible, to provide some quantification of the benefit, whilst recognising the difficulty of quantifying the benefit in monetary terms;

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186 *Ibid.*

187 *Ibid* at 142.

188 Adhar, *supra* note 159 at 143.

189 *Ibid* at 146.

- the irrelevancy of motives or objectives, except to assist in ascertaining where the benefit is likely to flow.[190]

On a practical note, at least in the early stages of the Act's operation, authorisations were granted sparingly, with the Commission refusing applications in the first five of six cases. Adhar suggests that, like in Australia, the burden on applicants is a heavy one.[191] In fact, the Commission received no restrictive trade practices authorisation applications in 1999-2000. Further, the Commission's annual report for that year reveals that since 1996, only seven applications have been received – four in 1996-97 and three in 1998-99.[192]

## IX. SOUTH AFRICA

### (a) Substantive Provisions

Similar to the Australian and New Zealand statutes, South Africa's recently enacted *Competition Act* (the "Act") includes a combination of specific *per se* prohibitions, a general prohibition for agreements that substantially lessen competition and a system for granting authorizations and exemptions. Horizontal agreements to price fix, allocate markets or customers and rig bids are *per se* illegal.[193] For all other agreements, the Act requires a rule of reason analysis to determine whether the agreement in question substantially prevents or lessens competition in a market and whether the pro-competitive benefits flowing from the agreement (*i.e.*, technology, efficiency or other pro-competitive gains) outweigh the resulting anti-competitive harm.[194]

For violations of the *per se* prohibitions, the Competition Tribunal may impose administrative fines. Such fines "may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year".[195] For violations of the general prohibition, the Tribunal may order that the agreement is void or restrain the parties from engaging in any practice that is contrary to the Act. The Commissioner of Competition (the "Commissioner") may

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190 *Amcor Ltd./N.Z. Forest Products Ltd.* (unreported, 21 August 1987, no. 208 at para. 53) (quoted in Adhar, *supra* note 168 at 144); *see also Goodman Fiedler Ltd/Wattie Industries Ltd.* (1987), 6 N.Z.A.R. 446 at 449 (quoted in Adhar, *supra* note 159 at 144).

191 Adhar, *supra* note 159 at 147.

192 *Report of the Commerce Commission for the Year Ended 30 June 2000* at 34.

193 *See* s. 4(1)(b).

194 *See* s. 4(1)(a); Competition Commission South Africa, *General Brochure - 2000* available at http://www.compcom.co.za/publications/LatestPublications.asp.

195 *See* s. 61(2).

also negotiate and obtain consent orders.[196] Notably, a consent order may, if the complainant agrees, include an award of damages to the latter.

### (b) Exemptions

Like Australia and New Zealand's respective regimes, the Act provides a form of authorization, termed "exemption".[197] However, unlike the former two regimes, where authorization performs a task similar to the American rule of reason standard (albeit with reference to a broader set of considerations), the South African exemption is concerned almost purely with the public policy (*e.g.*, social and economic democratization), as opposed to the economic, implications of an impugned agreement. This is not surprising, given that the Act's objectives include diversification of ownership in favour of members of historically disadvantaged communities, promotion of the social and economic welfare of South Africans, and the creation of new employment opportunities.[198] An exemption may be granted, with or without conditions,[199] where an agreement that is otherwise in breach of the Act is necessary to attain one or more of the following objectives:

- maintenance or promotion of exports;
- promotion of the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons;
- changing the productive capacity to stop decline in an industry; and
- maintaining economic stability in an industry designated by the Minister of Trade and Industry.[200]

Notably, the Act is silent as to whether, assuming that an agreement is in fact shown to be required to achieve one of the foregoing objectives, the Commission may nevertheless decline to grant an exemption because, for example, the nature and magnitude of the agreement's contribution to the realization of the one of the foregoing objectives is outstripped by its anti-competitive harm. As with the other two models, an exemption is subject to being revoked where it is determined that it was granted on the basis of false or incorrect information, a condition imposed by the Commission has not been fulfilled or the reason for granting the exemption has ceased to exist.[201] Like the New

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196 *See* s. 63.

197 *See* s. 10 (Part C - Exemptions from Application of Chapter)

198 *See* s. 2.

199 *See* s. 10(2)(b).

200 *See* s. 10(3)(a) and (b); *Ibid.*

201 *See* s. 10(5).

Zealand statute, the Act does not set any time limit for determination of an application for an exemption.

## X. ADVANTAGES AND DISADVANTAGES OF THE AUSTRALIAN, NEW ZEALAND AND SOUTH AFRICAN REGIMES

Similar to the American regime, these regimes are all subject to the same generic pros and cons of *per se* rules and the rule of reason standard.

In relation to *per se* illegality, Warner et al. assert that in applying their respective deeming provisions,

> Australian and New Zealand courts have apparently experienced the same difficulties as American courts have had in applying the *per se* illegal rule. In at least some cases, Australian courts have been unable to apply the deeming provision to price-fixing arrangements in such a way as to avoid inquiring into the surrounding circumstances of those arrangements.[202]

However, the authors leave unanswered the more important question of whether the detailed and precise (relative to section 1 of the *Sherman Act*) statutory language of the relevant Australian provisions has, to any appreciable degree, reduced the relative frequency with which Australian courts have been confronted with the "characterization" problem that plagues their American counterparts. South Africa's *Competition Act* which came into force on September 1, 1999 has not yet been the subject of relevant academic commentary or critique. There is, however, no reason to believe, based on statutory language or otherwise, that the challenges and difficulties experienced in the United States, New Zealand, and Australia will be avoided in South Africa. In fact, assuming that the magnitude of the characterization problem is a direct function of drafting precision, it is arguable that the South African statute, which identifies the restrictive horizontal practices it proscribes on a *per se* basis in general terms, will present significant problems from a characterization perspective.

As regards the rule of reason, it appears that non-economic considerations are relevant and admissible in all three regimes, be it as part of a review resembling the American rule of reason analysis (*see* Australia and perhaps New Zealand) or as a condition precedent for the issuance of a "public policy" exemption (*see* South Africa). The South African public policy exemption, in particular, is uncharted territory as far as the validity and importance of non-economic considerations is concerned. It is arguable that the South African exemption, which applies to all manner of restrictive horizontal practices, reflects a legislative judgment that South Africans are or should be willing to tolerate supra-competitive prices for goods and services as the cost of advancing economic and social democratization and enfranchisement. It remains to be seen how broadly the South

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202 Warner et al., *supra* note 70 at 713. Note, however, that the authors do not cite any cases in support of this assertion.

African Commission will construe its exemption power. More generally, in respect of all three mechanisms, it is arguable[203] that the absence of a principled basis for courts to accept or reject non-economic considerations will lead to inconsistency and unpredictability in the law. Also, multiple objectives and, in particular, the combination of economic and non-economic objectives in a single policy tool is a recipe for policy failure. As the New Zealand Commission has observed: "It is not easy to make a judgment between two public policies".[204] This is particularly so where the public policies being compared and weighed against one another are different in kind.

Finally, in relation to authorizations/exemptions, the failure of the New Zealand and South African statutes to limit the time available to their respective Commissions for determination of an application may result in businesses being placed in a legal limbo as they await approval. This is of course creates uncertainty, thereby undermining effective business planning.

## XI. FOREIGN APPROACHES TO HORIZONTAL RESTRAINTS SUMMARIZED

Although each of the jurisdictions examined in this report have adopted prohibitions against horizontal restraints, there are important differences in relation to the source and nature of the relevant proscription. Section 1 of the *Sherman Act* states a broad, standardless prohibition against restrictive horizontal trade practices. Due to the absence of specific statutory proscriptions within section 1, the scope and limits of the prohibition are defined through judge-made rules. In contrast, New Zealand and Australia's respective regimes employ both a general prohibition along with precise statutory *per se* prohibitions against price-fixing, as well as other forms of restrictive conduct. Similarly, Article 81 of the EC Treaty combines a general prohibition against agreements that have the purpose or effect of distorting competition, together with a non-exhaustive list of prohibited arrangements. Finally, the South African statute provides an exhaustive list of *per se* illegal arrangements as well as a general statutory prohibition against all other arrangements that have the effect of substantially preventing or lessening competition.

The various regimes also display important differences in relation to the standard used to determine whether an arrangement is prohibited. The American and South African regimes apply a *per se* rule to certain categories of arrangements and a rule of reason analysis to all other arrangements. As noted above, the EC Treaty prohibits arrangements that have the object or effect of distorting or restricting competition, but allows for the application of a full rule of reason analysis where parties have submitted a request for an exemption. Australia and New Zealand combine *per se* prohibitions with a general prohibition, subject to authorization, against arrangements that substantially lessen competition.

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203 Please note that there is a dearth or complete absence of commentary and criticism in relation to the Australian, New Zealand and South African models.

204 *Amcor*, *supra* note 190 at para. 75 (quoted in Adhar, *supra* note 159 at 146). In that case, the Commission was asked to weigh the benefit of "utilization of resources and the flow-on effects" against the detriment to competition.

Only the United States lacks some form of notification, exemption or authorization system. The EC, South African, Australian and New Zealand models all have similar notification and authorization regimes which permit regulators to grant immunity to certain forms of pro-competitive arrangements, even for price-fixing or similar agreements. Subject to certain limited exceptions, these regimes also provide that applications for authorizations will be granted with prospective effect. The consequences of notification, authorization or exemption are significant in the four regimes with such a mechanism. As noted above, under the EC Treaty as well as the Australian, New Zealand and South African statutes, notification, authorization or exemption is the condition precedent for immunity from liability.

The basis upon which exemptions will be granted also varies among the various jurisdictions. Except in rare cases, the decision to grant or refuse an application for an exemption under the EC regime is based solely on economic considerations. In both Australia and New Zealand, economic and non-economic considerations are accepted as relevant to the determination of an application for authorization. In South Africa however, exemptions are granted or refused exclusively with reference to non-economic considerations. In determining whether an authorization may be granted under the EC, Australian, South African and New Zealand legislation, a rule of reason analysis is applied to determine the benefits and detriments of an impugned arrangement.

In terms of a dual-track approach, only the American regime provides the option of either criminal or civil review of impugned arrangements. As a general rule, the nature of the arrangement will govern whether the arrangement is subject to criminal or civil review. The other regimes examined in this report rely exclusively on a single-track civil review mechanism. However, under each of these single-track civil regimes, significant fines may be imposed which, although they do not carry the same social stigma as a criminal conviction, result in significant deterrence.

From a remedial perspective, the American and South African models have unique elements. The American regime alone authorizes the recovery of treble damages and provides for the incarceration of individuals convicted of criminal violation of the proscription against horizontal restraints. Similarly, only the South African statute contemplates the making of an order akin to specific performance (*i.e.*, directing a party found to have engaged in a prohibited practice to supply or distribute goods or services to another). Notably, all five regimes permit private enforcement of the prohibitions against competitor collaborations.

Our review also reveals the significant structural differences in the competition regimes of these jurisdictions. The United States has a dual criminal/civil regime which relies on adjudicative models of decision making, as opposed to the administrative decision makers which predominate in Europe, at least in respect of the granting of exemptions. Notably, it is these structural differences that are often the source of criticism in each jurisdiction. The American system is criticized for being expensive and uncertain, whereas the European system is criticized for being bureaucratic and slow. Canada has chosen a compromises between these two extremes.

## XII. LESSONS FROM THE COMPARATIVE REVIEW

### (a) Defining the Prohibition

The American experience under section 1 of the *Sherman Act* suggests that *per se* prohibitions provide an effective means of deterring and remedying hard-core cartel behaviour. In particular, it indicates that *per se* prohibitions are less costly to enforce and promise increased certainty and predictability. As noted above, the *per se* inquiry into whether the unlawful conduct has taken place at all – the sole question under a *per se* analysis – requires less time and expense, than the in-depth inquiry into competitive effects required under a rule of reason. Further, the *per se* rule's categorical approach promises greater consistency and predictability in judicial decision-making and thus increased certainty for industry. In addition to the increased expense and time, as noted in respect of proposed amendments of the EC Treaty, utilizing a rule of reason analysis also runs the risk that competition rules may be set aside because of political considerations.

However, the U.S. experience also demonstrates the disadvantage of *per se* restrictions; namely, the inflexibility of such restrictions may result in the condemnation of beneficial competitor collaborations. As noted by Warner et al., "[even] a *per se* criminal prohibition for naked price-fixing cannot be formulated with complete precision, and will unavoidably target potentially pro-competitive arrangements".[205] Further, the application of a *per se* rule involves a threshold inquiry, namely whether the impugned agreement may be properly characterized as falling within the *per se* prohibition in question. The cost advantages, both to the administration of justice and litigants, of the *per se* rule are, of course, lost if a full-blown or even a partial rule of reason analysis is required prior to condemning an agreement as *per se* illegal. Further, the characterization problem has negative consequences for the desired certainty and predictability of the *per se* rule. In sum, the efficiency and clarity of the American *per se* approach may be, to an unspecifiable degree, more apparent than real.

Our comparative review suggests that the inefficiency and uncertainty resulting from the above-mentioned characterization problem may be reduced by a statutory provision that specifically and precisely identifies (and, to the extent possible, describes) the types of arrangements that are proscribed on a *per se* basis, such as section 45A of the Australian *Trade Practices Act* and section 30 of New Zealand's *Commerce Act*. Our review also indicates that the overbreadth that results from the inflexibility of *per se* prohibitions can be limited by providing some means of exempting the limited class of agreements that, strictly speaking, violate these prohibitions, but which, due to their potentially pro-competitive benefits, should not be condemned summarily, if at all.

One option, based on the American model, is simply to review impugned arrangements thought to be potentially pro-competitive using a rule of reason analysis. Under a rule of reason analysis, the Tribunal (or the courts) would have the flexibility required to differentiate pro-competitive, welfare enhancing collaborations from those which are not. However, as noted by the European

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205 Warner et al. *supra* note 70 at 716.

Commission and other commentators, in rejecting a rule of reason approach to Article 81(1) of the EC Treaty, the rule of reason can only be implemented gradually through successive cases and, consequently, would not provide a quick answer to the Competition Bureau's enforcement concerns. Further, a rule of reason approach arguably leads to greater uncertainty because, in each case, a complex market assessment and analysis would have to be undertaken in order to determine whether the pro-competitive benefits of the impugned arrangement outweigh its anti-competitive effects. Of course, an analysis of this kind would also increase the time, cost and complexity of enforcement. Relatedly, because the evolution of the rule of reason analysis would be determined by the courts, its development would be difficult to predict and potentially inconsistent with the Commissioner's policy objectives.

A notification, authorization or exemption mechanism offers a second option and, as will be explained, one that avoids several of the shortcomings associated with the American approach to rule of reason analysis. As noted above, Article 81(3) of the EC Treaty provides a mechanism of this kind, as do the Australian and New Zealand statutes. Like the American model, a full rule of reason analysis is applied in considering whether an exemption should be granted. However, in contrast to the American model, these mechanisms truly except arrangements from statutory prohibitions, *per se* or otherwise. Under Article 81(3) of the EC Treaty, s. 88 of the *Trade Practices Act* and ss. 58 and 61 of the *Commerce Act*, enforcement authorities are given a broad discretion to immunize arrangements based on the particular circumstances of each case. In further contrast to the American model, it is the relevant enforcement agency, and not the courts, that has exclusive authority (at least at first instance) to authorize or exempt an agreement that would otherwise contravene a statutory prohibition. This administrative model for exemptions avoids the problems identified with the US system, including the costs and uncertainty of purely adjudicative model. Notably, industry participants in the EC have expressed support for the existing notification and exemption regime based on the legal certainty it provides.

However, based on the experience in the EC, we note that, to maximize its effectiveness, a notification or authorization regime must not involve a cumbersome or lengthy procedure. In the EC, a backlog of notifications has produced significant delays which may have discouraged parties from pursuing potentially pro-competitive alliances. This appears to be the result of an over-inclusive notification regime which, as a result of Article 81(2), voids all forms of agreements that fall within the broad scope of Article 81(1) and for which no notification has been submitted. As outlined below, a more manageable notification system would likely result if only those agreements which contain price-fixing or other similar provisions required notification to retain provisional validity.

### (b) Dual Track Regime

The U.S. experience demonstrates the advantages of maintaining both a civil and criminal review process for competitor collaborations. Deterrence is the least expensive method of enforcement and criminal penalties provide a powerful deterrent. Also, criminal sanctions are unquestionably appropriate for hard-core cartel behaviour that is, by definition, harmful to consumers. As noted

above, the effectiveness of criminal penalties from a compliance perspective has prompted the New Zealand Commerce Commission to advocate the inclusion of criminal sanctions within the New Zealand statute. Further, as stated by the Assistant Attorney General, in describing the core mission of the Department of Justice - Criminal Antitrust Enforcement division:

> Price fixing and other criminal violations of the Sherman Act are the antithesis of open competition. They are criminal precisely because they raise prices, they lower quality and they reduce choice. In a narrow sense, as I have said, they take money from Americans. In a broader sense – and equally important – criminal antitrust violations tear at the economic fabric of our society. Antitrust crimes are antisocial, just as fraud and robbery are antisocial. A society that tolerated such crimes could no longer maintain its economic freedom, any more than a society that tolerated murder could long maintain its physical freedom.[206]

On the other hand, as noted above, the DOJ also recognizes that where a legitimate disagreement exists as to whether the pro-competitive benefits of an arrangement outweigh its anti-competitive effects, criminal prosecution is inappropriate. In those cases, it has acknowledged that civil review may be preferable to criminal review, even for arrangements that have customarily been labeled *per se* illegal.[207] In the same vein, noting that reasonable disagreements often exists about the net competitive effect of competitor collaborations, Ross has remarked that "it seems difficult to support the threat of criminal prosecution with the possibility of imprisonment and accompanying social stigma" in respect of any and all horizontal restraints.[208] It must also be remembered that the criminal law process, with its stringent burden of proof, may entail high cost and delay to the disadvantage of enforcers and those whose conduct is subject to prosecution.

### (c) Social and Other Non-Economic Considerations

To a greater or lesser extent, the European, Australian, New Zealand and South African models admit social and other "non-economic" considerations (*i.e.*, considerations unrelated to economic efficiency) as relevant to the determination of whether an exemption or authorization should be granted. For example, the ACCC has expressly stated that in determining whether an arrangement is to be authorized, it will have regard to non-economic benefits, such as "employment growth in particular regions" or "industrial harmony". As discussed below, the inclusion of such non-economic factors arguably leads to inconsistency and unpredictability in the law, due to the absence of any principled basis for accepting and rejecting factors of this nature. Furthermore, while recognizing that, in its present form, s. 45 of the *Competition Act* expressly admits a narrowly cast

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206 Anne K. Bingman and Gary R. Spratling, "Criminal Antitrust Enforcement" (February, 1995) available online at http://www. usdoj.gov/atr/public/speeches/95-02-23.htm..

207 *See Antitrust Division Manual, supra* note 80.

208 Ross, *supra* note 7 at 867.

exception for arrangements relating only to the export of products fr[illegible] this country,[209] we believe that the unrestricted introduction of non-economic factors into the s. 45 analysis would mark a major policy shift that risks politicizing competition policy in this country. We also note the absence, among Canadian competition policy commentators, of any support for an expanded rule of reason analysis which would include non-economic considerations. It may be however that increased globalization may place some pressure on competition policy to balance the global competiveness of Canadian businesses, against short term anticompetitive effects in domestic Canadian markets.

### (d) The Core Elements for an Amended Section 45

The foregoing review supports the following attributes and core elements for an amended section 45:

- the section should prohibit hard-core cartel behaviour through a *per se* criminal provision;
- the section should precisely enumerate the types of arrangements that are subject to the *per se* prohibition;
- arrangements that do not fall within the *per se* prohibitions would be subject to a full rule of reason analysis pursuant to a civil provision; and
- parties would be able to seek an exemption from the *per se* criminal provisions on the basis that the pro-competitive benefits of the potentially criminal arrangement outweigh its anti-competitive effects.

## XIII. CRITIQUE OF SECTION 45: THE CASE FOR REFORM

There are certain notable differences between section 45 of the *Competition Act* and the other regimes described above. For example, unlike the rule of reason analysis applied under section 1 of the *Sherman Act* and Article 81(3) of the EC Treaty, section 45 includes only a "partial" rule of reason. As the Supreme Court of Canada confirmed in *R. v. Nova Scotia Pharmaceutical Society et al.*:

> Section 32(1)(c) [now section 45] lies somewhere on the continuum between a *per se* rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a *per se* rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-

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209 *See* ss. 45(5) and (6); *see also* s. 49(2)(a).

> blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would.[210]

Further, unlike the *Sherman Act*, as interpreted and applied by the U.S. judiciary, there are no *per se* prohibitions implied under section 45. Under Canadian law, it is insufficient for the Crown to establish that the proscribed agreement was entered into or given effect. Rather, as part of the *actus reus* of the offence, the Crown must establish that if the agreement were carried out it would likely lessen competition unduly in a relevant market. This may be contrasted with sections 47 and 49 of the *Competition Act* which create *per se* offences for bid-rigging and agreements between federal financial institutions respectively. In addition, section 45 contains two separate *mens rea* requirements:

(i) a subjective *mens rea* requirement - the accused must have had a subjective intent to enter into the impugned agreement and had knowledge of its terms; and

(ii) an objective *mens rea* requirement - the accused must have known, or ought to have known, that the effect of the agreement would be to lessen competition unduly.[211]

In relation to the objective *mens rea* element, in *R. v. Nova Scotia Pharmaceutical Society et al.* Gonthier J. stated that:

> In order to satisfy the objective element of the offense, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. ... [I]t would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition.[212]

Academic commentators have criticized section 45 on the basis that it is vague and economically unsound. For example, in "Rethinking Price Fixing Law", Warner et al. describe the disadvantages of the current regime as follows:

> The current prohibition is underinclusive because it can allow manifestly anti-competitive arrangements to escape condemnation. ...the current prohibition, which requires the Crown to prove on a criminal burden of proof that an arrangement has lessened competition "unduly" can allow price-fixers to escape conviction...

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210 [1992] 2 S.C.R. 606 at 650.

211 Davies, Ward & Beck, *Competition Law of Canada* (2000) at 8-7.

212 *Supra* note 210 at 660.

> At the same time, the current prohibition is overinclusive because it subjects all horizontal arrangements to criminal prohibitions and casts a shadow over many arrangements that may potentially increase welfare. Apart from the obvious price-fixing case, the welfare effects of many horizontal arrangements are ambiguous, and arrangements with ambiguous welfare effects should not be deterred and do not require criminal sanctions.[213]

The record of enforcement of section 45 also supports the need for reform. In "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act",[214] Robert Jackson and Harry Chandler examine the historical record of enforcement of s. 45. As noted above, of the 51 cases brought under section 45 since 1980, 29 of these cases resulted in guilty pleas. However, the most striking statistic from the report is that of the 22 contested cases under section 45, the Crown has succeeded in only three. Of the 17 cases involving acquittals or discharges, Jackson and Chandler report that 6 were due to a failure to establish the existence of an agreement and the remaining 11 were due to a failure to establish either that the arrangement unduly lessened competition or that the parties' intended that the agreement should have this effect. This is of particular concern considering that all of these prosecutions involved hard-core cartel behaviour, such as agreements to fix prices or share markets. As Jackson and Chandler note:

> A review of all the cases listed in Appendix I reveals that every single case involved blatant hard-core anticompetitive behaviour - primarily price-fixing, market-sharing or bid-rigging. None involved what are sometimes called strategic alliances, for example, competing firms entering into partnerships to facilitate the transfer of knowledge, skills and technologies; to enter new markets at a lower cost and with less risk; to enhance innovation and growth; to bring products to the market more quickly; to overcome legal or trade barriers; to realize economies of scale and scope; or to be more competitive against larger rivals with wider product lines.[215]

They conclude that "the results suggest that the 'undueness' element poses the greatest obstacle to achieving convictions under section 45".[216]

## XIV. PROPOSALS FOR REFORM

### (a) Statutory Objectives

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213 Warner et al., *supra* note 70 at 690-91.

214 Available online at: http://strategis.ic.gc.ca.

215 *Ibid* at 5-6 of 23.

216 *Ibid* at 7 of 23.

In examining proposals for reform, we believe that any model proffered should be evaluated based on the extent to which it achieves the following objectives:

- consistent and cost-effective enforcement;
- certainty and predictability for both enforcement authorities and those whose conduct may be subject to scrutiny;
- flexibility, sufficient to permit differentiation between pro-competitive and anti-competitive competitor collaborations;
- adequate punishment of economically harmful collaborations without deterring efforts to develop new, pro-competitive cooperative arrangements; and
- harmonization of the treatment of competitor collaborations and mergers.[217]

### (b) Previously Proposed Models

Two prior legislative models for section 45 have been advanced. In "Rethinking Price Fixing Law", Presley Warner and Michael Trebilcock propose a dual-track model (the "Trebilcock-Warner Model") with four basic components: (a) a redefined criminal, *per se* prohibition that targets only naked (and covert) price-fixing arrangements; (b) an *ex ante* notification system which offers "immediate and permanent immunity from criminal liability"[218] to parties that notify the Competition Bureau "prior to the time at which the arrangement takes effect, or within 30 days of the execution of the arrangement";[219] (c) a civil review process for notified arrangements which the Commissioner believes to be anti-competitive; and (d) collateral amendments to the Act, the purpose of which would be to adopt the procedural protections and devices available in relation to merger review in respect of the review of horizontal arrangements.

Under the Trebilcock-Warner model, immunity from criminal prosecution would not depend on the Commissioner's acceptance of a notified arrangement, rather immunity would flow from notification itself. The authors reason that by making criminal immunity automatic upon notification, the delays and administrative burden that have been experienced in the EC Treaty system will be avoided [220] While notification forecloses criminal prosecution, under the Trebilcock-Warner Model the Commissioner would retain the right to pursue a civil remedy as against any notified arrangement it considered to be anti-competitive. Warner et al. propose that the merger review process be

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217 Ross, *supra* note 7 at 869-70.

218 Warner et al., *supra* note 70 at 718.

219 Warner et al., *supra* note 70 at 717.

220 Warner et al., *supra* note 70 at 719.

adopted for civil review of notified arrangements. For example, under the Trebilcock-Warner Model, notified arrangements would constitute reviewable practices, within the meaning of Part VIII of the Act, and the Tribunal would apply the standard of "substantial lessening or prevention of competition" found in s. 92 of the Act when reviewing an impugned, notified arrangement.[221] Relatedly, the efficiency defence in s. 96 of the Act would be available to parties defending a notified arrangement.[222] Finally, Warner et al. proposed that s. 36 of the Act be amended to declare all arrangements in violation of the criminal prohibition unenforceable and to proscribe private actions in respect of notified arrangements.

The model proposed under Bill C-472 is very similar to the Trebilcock-Warner Model. This Bill would have amended section 45 to include a criminal prohibition against collusive arrangements between one or more competitors that

> ... if implemented would or would likely have had the effect of
>
> > (a) fixing, establishing, controlling or maintaining the minimum price of a product;
> >
> > (b) allocating any markets, territories, customers or sales for the product as between the person and the competitor;
> >
> > (c) boycotting a competitor or competitor's suppliers or customers; or
> >
> > (d) preventing, eliminating, lessening or otherwise limiting the production or supply of a product.

All other arrangements would have been subject to review under a companion civil provision,[223] pursuant to which the Commissioner would have been entitled to seek remedial orders from the Tribunal in relation to those arrangements which were shown to substantially prevent or lessen competition.[224] Bill C-472 would also have created express exceptions to the prohibition for ancillary restraints and arrangements among participants who collectively did not hold more than 25% of the relevant market.[225]

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221 Warner et al., *supra* note 70 at 720.

222 Warner et al., *supra* note 70 at 721.

223 *See* s. 79.1.

224 *See* s. 79.1.

225 *See* ss. 45(7)(d) and (e).

Like the Trebilcock-Warner Model, Bill C-472 provided for notification. However, the Bill C-472 notification regime differed from Warner et al.'s model in two ways. First, while it too provided for the notification of potentially criminal arrangements, the effect of which would have been automatic immunization from criminal prosecution, Bill C-472 did not require notification prior to entering into an arrangement. [226] Instead, parties would have been entitled to notify and insulate themselves from criminal prosecution at any time. Second, the Bill provided for the issuance of clearance certificates, available only prior to entering into an arrangement and valid for three years, that would have had the effect of immunizing the notified arrangement from both civil review and criminal prosecution.[227] In contrast, under the Trebilcock-Warner Model, notified arrangements, while immunized from criminal review, would have remained subject to civil scrutiny by the Tribunal, at the Commissioner's discretion.

### (c) Concerns Raised by Previous Proposals

#### (i) "Between Competitors"

The criminal prohibition proposed by Bill C-472 offers a useful precedent. In fact, the criminal prohibition recommended below shares many of its features. We note, however, that, similar to the prohibition formulated by Warner et al., Bill C-472 proscribed only arrangements between competitors.[228] In our view, this limitation is problematic for a number of reasons: First, the question of whether the parties to an arrangement are actual, or even potential, competitors imports a complex market definition exercise into what is meant to be a summary review process. In addition, the criminal prohibition under Bill C-472 would have been inapplicable to arrangements between potential competitors or parties in a vertical relationship. At the same time, we recognize that the economic presumption which supports the application of *per se* prohibitions to hard-core, cartel behaviour among competitors, namely, certainty concerning its anti-competitive effects, may not hold for arrangements between parties who are not competitors, with the result that there is a greater need to consider the net competitive effects of such arrangements in particular instances.

Limiting the prohibition to agreements between competitors is also inconsistent with each of the jurisdictions which are reviewed above. Specifically, Article 81(1) applies broadly to "agreements between undertakings [and] decisions by associations of undertakings". Similarly, the Joint Guidelines defines the term "competitor" as "encompassing both actual and potential competitors". Generally, Section 45 of the Australian *Trade Practices Act* applies to both actual and likely competitors. The New Zealand statute applies to "persons" generally, and specifically, to actual, likely or potential competitions in respect of price-fixing agreements. The *per se* prohibitions in the

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226 *See* s. 45(7)(c).

227 *See* s. 79.2(2).

228 *See* s. 45(1); Warner et al., *supra* note 70 at 717.

South African statute apply to "parties in a legal relationship" and to "firms or associations of firms".

(ii) Market Share Exception

The 25% market share exception found in section 45(7)(e) of Bill C-472 is unusual and merits comment. Section 45(7)(e) permits parties who are or have been engaged in hard-core cartel behaviour to avoid its application solely on the basis of their market presence, or lack thereof, irrespective of the effect of the conduct and of the level of concentration within the relevant market. To illustrate the pitfalls in focusing exclusively upon market share, reference may be made to an example reviewed in Ross's paper. Ross states:

> An example offered by Bork involves a cooperative advertising arrangement among a small number of retail pharmacists in a large city. To realize economies of scale in advertising, they agree to prepare a common advertisement and honour the prices listed. While this is no doubt (in part) an agreement to fix price, the arrangement can have no negative effect on competition (since the retailers together represent a tiny fraction of scales in the city) and will in fact be beneficial to the extent that it improves information in the market and lowers the cost of advertising.

In considering the application of the exemption that was proposed in Bill C-472 to the above example, if we assume that the pharmacists referred to in the above example collectively represent 25% of the market and the market is not heavily concentrated, with a significant number of similarly sized or larger competitors, then the proposed advertising arrangement will not have a significant impact upon competition and should not be subject to the *per se* prohibitions proposed in Bill C-472. However, if we assume that the proposed arrangement involves two pharmacies which collectively hold 25% of the market, with the remaining market share being held by a chain controlled by a single entity, the proposed arrangement would likely result in a substantial lessening of competition and further increase the risk of interdependent behaviour among these market participants.

Further, by way of comparison, the *de minimus* doctrine under EC law is inapplicable in the context of hard-core cartel behaviour. According to the *Commission Notice on Agreements of Minor Importance* (97/C 372/04),[229] horizontal or vertical agreements which have the effect of fixing prices, limiting production or sales, sharing markets or sources of supply or, in the case of vertical agreements, conferring territorial protection on the participants or third parties cannot benefit from this exclusion regardless of the participants' aggregate market share. The *de minimus* doctrine also has no application where the market is heavily concentrated, even if the participants' respective market shares are small. Similarly, in *FTC v. Superior Court Trial Lawyers Association*,[230] the United States Supreme Court confirmed that the absence of market power is no defence to *per se* illegality.

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229 *Supra* note 41.

230 493 U.S. 411 (1990).

In fact, none of the regimes discussed above contains any exception based exclusively upon market share. From a practical perspective, we also note that the application of this exception will likely require a full determination of the relevant market, thereby reducing the efficacy of the section 45 prohibitions.

For these reasons, we do not support a statutory market share exception. As an alternative, we recommend that a market share exception, if any, should be published as a guideline. The guideline-approach offers superior and important flexibility from a policy-making perspective.

(iii) Dual Track Model

The amendments proposed in Bill C-472 also would have gone a long way towards creating an effective, dual track model, while preserving criminal sanctions for hard-core cartel behaviour. However, we believe that two elements of the model require further review: (a) notification and the immunization of hard-core cartel behaviour; and, (b) the availability of rule of reason review for arrangements about to be entered into or given effect. These elements are considered below.

(1) Criminal Immunity

As noted above, the amendments proposed in Bill C-472 would have permitted parties to immunize covert, hard-core cartel behaviour from criminal prosecution by notifying. Specifically, section 45(7)(c) provides that an arrangement shall not be considered "collusion", within the meaning of s. 45(1), if "notice of it is given to the Commissioner pursuant to subsection 79.2(1)". The unilateral, and non-discretionary entitlement to criminal immunity found in section 45(7)(c) would have created the risk that parties would enter into arrangements that they knew violated section 45 and then notify the arrangement solely for the purpose of avoiding criminal penalties and depriving private plaintiffs of a remedy under section 36 of the Act. Likewise, the Trebilcock-Warner Model also raises the spectre of strategic behaviour. In this case, however, the risk is that parties to an agreement that has not yet been entered into or given effect will notify and then proceed after the 30 day waiting period knowing that: (a) the Commissioner may have difficulty securing an interim injunction to prevent them from proceeding with the arrangement; and, (b) that although it is likely that the arrangement will ultimately be condemned in the end, they have successfully insulated themselves from criminal sanctions as well as civil damages.

Further, although, section 79.2 of Bill C-472 provides that clearance certificates are available only for agreements "about to be entered into", section 45(7)(c) does not impose a similar limit on the right to notify. As we have already indicated, this suggests that under the system proposed by Bill C-472, parties would have been entitled to notify and immunize themselves from criminal prosecution even where they had already implemented the agreement. Parties should not have an unqualified, unilateral entitlement to avoid criminal liability. However, the idea of granting immunity or leniency, based on post-agreement notification may have some benefits. Like pre-agreement notifications, post-agreement notifications would ease the Commissioner's detection and evidence gathering tasks. Also, post-agreement notification would permit parties that had

unwittingly entered into a potentially criminal arrangement as well as parties to an arrangement which, as a result of a material change in market circumstances, had become potentially criminal, to notify. To encourage parties to notify agreements which have already been implemented, the Bureau may wish to extend some form of immunity, similar to that granted under the existing Immunity Program, to the party which submits a post-agreement notification under an amended section 45.[231]

(2) Unavailability of a Rule of Reason Analysis

Bill C-472 contemplates a full-blown rule of reason analysis only in relation to arrangements that have already taken effect or been entered into. The Bill does not empower the Commissioner to seek a full rule of reason review by the Tribunal prior to the parties having entered into an arrangement. This raises two points. First, under Bill C-472, where the Commissioner refuses to grant a clearance certificate, the parties are forced either to abandon their arrangement or to proceed without knowing whether the arrangement will subsequently be unravelled, in whole or in part, pursuant to an order by the Tribunal under ss. 79.1(1)(c) or (d). Second, Bill C-472 is, in this respect, inconsistent with the merger review process under s. 92 of the Act. Under that section, the Commissioner is empowered to seek a remedy from the Tribunal in respect of "proposed mergers". In our view, the objectives of certainty, predictability, and harmonization dictate, at a minimum, that the Commissioner should be similarly empowered to seek a review of competitor collaborations prior to their implementation.

(iv) Civil Remedies

The Trebilcock-Warner Model is not explicit concerning the powers that the Tribunal would enjoy under their proposed civil review procedure. It appears, however, that they would vest the Tribunal with powers similar, if not identical, to those available to it under the merger review process.[232] Under the amendments proposed by Bill C-472, the Tribunal would have had the power (a) to prohibit a person from carrying into effect or continuing an arrangement[233] and, additionally, (b) to "order the person to take such actions as the Tribunal considers reasonable and necessary to overcome any of the effects of the agreement or arrangement or to restore competition in the market including, without limitation, directing modifications to the agreement or arrangement".[234]

Arrangements that are not *per se* illegal may still warrant deterrence and censure if, pursuant to a rule of reason analysis, they are found to cause significant anti-competitive harm which is not compensated for by pro-competitive benefits. In this light, there is a strong argument that the

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231 See at http://strategis.ic.gc.ca/SSG/ct01990e.html.

232 *See* Warner et al. *supra* note 70 at 720-21; *see* s. 92 of the Act.

233 *See* s. 79.1(1)(c).

234 Section 79.1(2)(d).

Tribunal should have the power to impose administrative monetary penalties in appropriate circumstances. As part of the amendments introduced in 1999, the Tribunal was given remedial powers of this kind under Part VII.1 of the Act.[235]

It should be noted, however, that the power to impose monetary penalties may attract a criminal due process argument to the effect that the Tribunal must, if it is to impose what amounts to fines, review any matters coming before it to a higher standard than the civil burden of proof. This would, of course, detract from a key advantage of civil review, namely, avoidance (or minimization) of the high cost and delay associated with a more stringent burden of proof (*e.g.*, beyond a reasonable doubt).

### (d) New Proposal for Amendment

We believe that a "dual track" regime represents the most advantageous approach to balancing the need, on the one hand, for effective deterrence and punishment of hard-core cartel behaviour and, on the other hand, for a forum in which pro-competitive, welfare enhancing collaborations can be effectively differentiated from those which are not.

#### (i) Criminal Prohibition

The statutory language used in a criminal prohibition should be similar or identical to the language employed in s. 45(1) of Bill C-472. Based on our comparative review (*see* Australia and New Zealand), we believe that drafting precision and specificity will minimize the characterization problem that, as was noted above, has proved highly problematic under the American regime. We also endorse the adoption of *per se* prohibitions against hard-core cartel behaviour, such as price fixing and market allocation, based on the view that, relative to a rule of reason standard, these will result in more efficient and effective enforcement as well as increased certainty and predictability for those whose conduct may be subject to scrutiny.

#### (ii) Civil Provision

Under the model we propose, all other arrangements would be subject to review pursuant to a civil provision.

As noted above, the establishment of a civil regime has a number of advantages, including harmonization between the treatment of mergers and strategic alliances. The potential anti-competitive effects flowing from a merger are generally more significant than those resulting from collaborations or strategic alliances between competitors. While most mergers completely end competition between the merging parties, collaborations normally preserve some form of

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235 *See* s. 74.10(1)(c).

competition between the parties.[236] On this basis, it is difficult to justify subjecting mergers to non-criminal review before an administrative tribunal, while potentially less anti-competitive arrangements are reviewed exclusively under a criminal prohibition. Further, as Ross notes, "decisions firms make about how to structure their activities should be driven by considerations of economic efficiency, not by their desire to find the path of least antitrust resistance".[237]

The availability of a civil review process will also the permit the Commissioner, in appropriate cases, to prove his case to the lower "balance of probabilities" standard and to gather evidence through the discovery mechanisms available in proceedings before the Tribunal. Further, a number of commentators believe that the Competition Tribunal is better equipped, relative to the courts, to engage in the detailed economic analysis required by rule of reason analysis. Also, matters such as potential anti-competitive effects and corresponding benefits, are predictive and speculative matters for which the specialized Tribunal and the lower standard of proof in Tribunal proceedings may be more appropriate.

Nevertheless, despite the advantages of a civil regime, given the importance of the conspiracy provision and the significant distortions and losses to consumers which may arise from hard-core cartel behaviour, it is also desirable to retain a criminal prohibition. The most efficient means of enforcing the prohibitions against hard-core cartel behaviour is through deterrence. It is unlikely that the prohibitions available through reviewable matters would result in a sufficient level of deterrence.

The level of deterrence may be increased, to some degree, by amending section 36 of the *Act* to permit private parties to recover damages suffered as a result of arrangements that are the subject of a remedy under the civil provision. We question whether the Commissioner's decision to pursue a remedy under a civil provision, as opposed to a criminal route, is a sufficient basis to deny recovery to a private party that has suffered losses as a result of anti-competitive conduct. Further, the risk of such civil liability would encourage parties to delay implementation of the arrangement pending the disposition of any Tribunal proceedings relating to that arrangement.

It should be open to "respondents" under the civil review process to rely on the efficiency exception found in section 96 of the *Competition Act*. This defence would provide the mechanism through which the Tribunal would have occasion to consider the net pro-competitive effects of an impugned competitor collaboration. We propose to allow parties to defend a proceeding on the basis that the efficiency gains resulting from their collaboration outweigh its harm to competition. In this way, the Tribunal may apply a full rule of reason analysis to collaborations among competitors.

As noted above, permitting the consideration of social objectives, apart from narrow economic efficiencies, under the civil review process would mark a significant, and unadvised, alteration of Canada's current competition regime. In our view, the Commissioner should resist weighing non-

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236 *See* Joint Guidelines, *supra* note 2.

237 Ross, *supra* note 7 at 870.

economic factors. The absence of a principled basis for courts to accept or reject non-economic considerations will lead to inconsistency and unpredictability in the law. Also, multiple objectives and, in particular, the combination of economic and non-objectives in a single policy tool is a recipe for policy failure. As the New Zealand Commission has observed: "It is not easy to make a judgment between two public policies".[238] This is particularly so where the public policies being compared and weighed against one another are different in kind.

(iii) Notification

We recommend the adoption of a notification system, the principal purposes of which, from a functional standpoint, would be to:

(a) reduce the inflexibility and overbreadth of the *per se* prohibitions; and

(b) diminish the burden on the Commissioner's enforcement resources by reducing its detection and evidence gathering costs.

Such a notification system has a number of advantages, certain of which have been demonstrated through the experience under Article 81(3) of the EC Treaty; specifically: the EC Treaty notification system has permitted the Commission to build a coherent body of precedent decisions; parties benefit from submitting a notification as it has the effect of "stopping the clock" for the purposes of the imposition of a fine for any infringement; a determination by the Commission provides legal certainty for the parties; and, the notification regime has proved to be extremely flexible in permitting pro-competitive collaborations.

As with the EC Treaty system, the Canadian Commissioner may encourage notification by not imposing a fine for the period between the date of notification and any decision concerning the arrangement. However, a system which requires notification of all forms of agreements which could potentially violate the criminal or civil provision may be unmanageable. As indicated in the EC Commission's *White Paper on Modernisation* which are discussed above, the EC Treaty notification system also results in significant delays which may have discouraged parties from pursuing potentially pro-competitive alliances. Also, critics of the EC regime note that the broad interpretation of Article 81(1) requires notifications to be submitted for arrangements which do not raise any significant competition concerns. The universal dissatisfaction with the EC notification regime supports a consideration of a different model of notification.

Including a notification and exemption regime will result in further harmonization with the merger provisions. Similar to the issuance of advance ruling certificates under section 102 of the Canadian *Competition Act*, under the proposed notification system, the Commissioner would be empowered

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238 *Amcor*, *supra* note 190 at para. 75 (quoted in Adhar, *supra* note 139 at 146). In that case, the Commission was asked to weigh the benefit of "utilization of resources and the flow-on effects" against the detriment to competition.

to grant exemptions or "clearance certificates" for specific arrangements. The intent is that the issuance of a clearance certificate will insulate the collaboration from both criminal and civil review. Although we note that the *Competition Act* does not expressly provide that the issuance of an advance ruling certificate insulates a proposed merger from review under either section 45 or 79, it is recognized that it would not be appropriate or consistent with the established practice under the *Act* to commence proceedings under either of these sections in respect of an arrangement that has been approved by the Commissioner through the issuance of an advance ruling certificate. Similarly, where the Commissioner has approved a collaboration through the proposed notification process, it would not be appropriate to commence proceedings under section 45 in respect of that collaboration. Legislative amendments dealing with the effect of advance ruling certificates and the proposed clearance certificates may be required to ensure that this intent is achieved.

In our view, the notification system adopted should strike a balance between a model based purely on the exercise of administrative discretion and one in which civil review is automatic upon notification. This will preserve administrative discretion regarding the applicable review process while resulting in greater symmetry with merger review. We propose two alternative models – the Discretionary Track Model and the Civil Track Model.

(1) Discretionary Track Model ( the "DTM")

The DTM applies both to arrangements that have and have not been entered into or given effect. Under this model, parties whose actual or proposed arrangement would appear to be contrary to a *per se* prohibition found in the amended section would be entitled to submit an application to the Commissioner requesting an exemption. The Commissioner would have the discretion to respond in one of three ways:

(a) grant an exemption to the parties by issuing a Clearance Certificate;

(b) refer the matter to the Competition Tribunal pursuant to the civil provision. The civil provision would provide for both a consent or approval procedure, as well as for review of agreements that have already been entered into; or

(c) advise the parties that a Clearance Certificate will not be granted and that the Commissioner will refer the matter to the Attorney General for criminal prosecution. In the case of an arrangement that has already been entered into or given effect, the Immunity Program may apply in the manner described above.

As is plain from the foregoing, the DTM empowers the Commissioner, in a manner similar to merger review, with a discretion to elect, on a case-by-case basis, between pursuing a civil or criminal remedy. In addition to being consistent with the elections found throughout the Act (*see also* the Act's dual track, misleading advertising regime), this aspect of the DTM offers the important advantage of negating the potential for strategic behaviour which flows from a notification system that provides parties with a unilateral, non-discretionary entitlement to criminal immunity.

Empowering the Commissioner to elect between criminal and civil provisions is also consistent with the American approach. As noted above, the Department of Justice has concluded that criminal sanctions are unquestionably appropriate for hard-core cartel behaviour that is, by definition, harmful to consumers. On the other hand, the DOJ also recognizes that where a legitimate disagreement exists as to whether the pro-competitive benefits of an arrangement outweigh its anti-competitive effects criminal prosecution is inappropriate. Section 1 of the *Sherman Act* gives the DOJ the discretion to determine whether the civil or criminal route is appropriate, taking into account the particular facts of each case.

Also, providing the Commissioner with the discretion to determine which types of collaborations will be subject to criminal prosecution, as opposed to an administrative review, assists the Commissioner in steering the development of competition policy in respect of competitor collaborations. The considerations informing the Commissioner's decision whether to pursue a civil remedy or refer the matter for criminal prosecution may be set out in guidelines similar to those applicable to the misleading advertising regime.[239] For example, one factor which may considered in determining the appropriate route may be whether the arrangement has as its object the restriction of competition, or whether that is merely the effect of the arrangement. The Commissioner may be more inclined to recommend criminal prosecution in respect of an intentional contravention of the provision.

(2) Civil Track Model (the "CTM")

In contrast to the DTM, this model applies only to arrangements that have not been entered into or given effect. Parties whose proposed arrangement would appear to be contrary to a *per se* prohibition found in the amended section would be entitled to notify the Commissioner and request an exemption prior to implementing the arrangement. However, unlike the DTM, the Commissioner's discretion would be limited to responding in one of two ways:

(a) grant a Clearance Certificate to the parties; or

(b) advise the parties that a Clearance Certificate will not be granted and that if the agreement is carried out, the Commissioner will seek a remedy on application to the Competition Tribunal pursuant to the civil provision.

Upon receipt of notification, criminal prosecution would cease to be an option under this model. Instead, under the CTM, all arrangements that are notified would be reviewed on the basis of a full rule of reason analysis pursuant to the civil provision. This approach is somewhat problematic because naked, hard-core cartel behaviour that is more effectively and more appropriately addressed and deterred through the application of a *per se* criminal prohibition, would be subject to a full-blown competitive effects analysis under the civil provision. Also, the time- and cost-effectiveness

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239 *See* "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*" available at http://strategis.ic.gc.ca/SSG/ct01881e.html.

of a *per se* approach is lost because a competitive effects analysis would be required even for an arrangement that is clearly contrary to a *per se* prohibition and that has no chance of avoiding condemnation by the Tribunal. For all these reasons, the CTM may reduce the efficiency and effectiveness with which the Commissioner is able to "prosecute" naked, hard-core cartel behaviour. On the other hand, the use of administrative remedies, rather than criminal sanctions, to "punish" an arrangement that is plainly contrary to a *per se* prohibition could arguably be justified on the basis that prior to the time that the arrangement is entered into or takes effect there has been no actual harm that would warrant criminal sanction.

It should be noted that the CTM would require the institution of measures aimed at minimizing abuse of the notification system. As explained above, the availability of unilateral criminal immunity increases the risk of strategic behaviour. To protect against the possibility of abuse, we recommend that a provision be included which would render immunity contingent on non-implementation of the collaboration, pending the initiation of proceedings by the Commissioner before the Competition Tribunal or the expiry of a fixed statutory time limit, similar to the waiting period applicable under the merger review process.

Warner et al. have criticized models based on administrative discretion in the following terms:

> We cannot emphasize too strong'y that the notification regime we propose is *not* a registration or authorization procedure. To empower the Director to review notifications and to decide whether to accept, reject or propose modifications to the underlying agreement as a precondition of the parties' immunity from criminal prosecution would impose heavy burdens on both the parties and the Bureau. Conferring such powers on the Director risks creating the same paper nightmare that has bedevilled both the European Commission, with negative clearance and exemption applications under article 85 of the *Treaty of Rome*, and the Office of Fair Trading in the United Kingdom under the *Restrictive Trade Practices Act*. Under both regimes, parties are subjected to enormous delays and great uncertainty pending the administrative review of often trivial or benign arrangements by official agencies.

To avoid the issue of large number of notifications referred to by the learned authors above, the Commission may issue administrative guidelines, providing guidance on the interpretation of the criminal prohibitions. Further, in contrast to the single track model under Article 81 of the EC Treaty which invites notification of any arrangement that may substantially lessen competition, under the CTM, notifications would be required only in respect of the small subset of arrangements otherwise prohibited by the *per se* criminal prohibitions. In addition, we believe that the above view is also often motivated by the belief by some commentators that the Commissioner's role should be limited to the role of a prosecutor or litigant with as little administrative discretion as possible. We believe that the competition policy model in Canada expressed, as embodied in the *Act*, cle provides the Commissioner with a policy-making role, through the exercise of administrati discretion, similar to the European Community model. Canadian regulatory policy has, in general, favoured the efficiencies that administrative discretion provides, relative to the more litigious models

of regulation in the United States. In essence this approach provides for administrative discretion in granting exemptions (similar to Europe) and determining the type of proceeding that may be commenced (as in the US).

Further, the number of notifications could also be reduced by carefully limiting the scope of the criminal prohibitions, through exemptions for agreements that rarely or never require a remedy. For example, an "ancillary restraints" exemption could be adopted. In fact, the Terms of Reference and Bill C-472 both proposed an exception for "ancillary restraints". As noted above, the ancillary restraints doctrine has been applied under both Article 81(1) of the EC Treaty and section 1 of the *Sherman Act*. An ancillary restraints exemption would permit the courts to exempt arrangements that are objectively necessary for the performance of a specific type of pro-competitive agreement or are essential to induce a party to the contract to take on the commercial risk inherent in the arrangement. For example, section 45(7)(d) states, in pertinent part:

> (7) An agreement or arrangement shall not be considered to be collusion if
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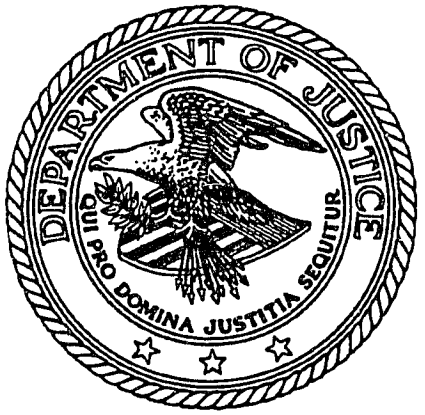
> . . .
>
> (d) it is ancillary to, and reasonably necessary for, another agreement or arrangement among the same participants and the other agreement or arrangement would not itself constitute collusion, when considered on a separate basis.

The advantage of the DTM and CTM is that they provide the Commissioner with a broad and flexible discretion to exempt arrangements based on the particular circumstances of each case. The Commissioner would be entitled to consider a wide range of circumstances in exercising its discretion, including any undertakings given by the parties. The concern raised in the Public Policy Review forum, namely, that static characterization of competitor arrangements will prove to be insufficiently flexible, relative to the fast-evolving technology world, could be addressed by policy guidelines that outline the factors governing the Commissioner's discretionary decision-making. Further, through such guidelines, the Commissioner would be able to manage and oversee the development of competition policy in relation to permissible competitor collaborations, without having to rely on the unpredictable direction of case law. At the same time, the ability to refer certain arrangements to the Tribunal for review would allow competition policy to develop outside of a purely administrative model. Finally, in circumstances where the net pro-competitive benefits are clear cut, Clearance Certificates would provide the legal certainty required by business planners.

# Antitrust Guidelines for Collaborations Among Competitors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*ANTITRUST GUIDELINES FOR*
*COLLABORATIONS AMONG COMPETITORS*

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# *ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS*

## PREAMBLE

In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.

Such collaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations. Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.[1]

To provide guidance to business people, the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") previously issued guidelines addressing several special circumstances in which antitrust issues related to competitor collaborations may arise.[2] But none of these Guidelines represents a general statement of the Agencies' analytical approach to competitor collaborations. The increasing varieties and use of competitor collaborations have yielded requests for improved clarity regarding their treatment under the antitrust laws.

The new *Antitrust Guidelines for Collaborations among Competitors* ("*Competitor Collaboration Guidelines*") are intended to explain how the Agencies analyze certain antitrust issues raised by collaborations among competitors. Competitor collaborations and the market circumstances in which they operate vary widely. No set of guidelines can provide specific

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[1] Congress has protected certain collaborations from full antitrust liability by passing the National Cooperative Research Act of 1984 ("NCRA") and the National Cooperative Research and Production Act of 1993 ("NCRPA") (codified together at 15 U.S.C. § § 4301-06).

[2] The *Statements of Antitrust Enforcement Policy in Health Care* ("*Health Care Statements*") outline the Agencies' approach to certain health care collaborations, among other things. The *Antitrust Guidelines for the Licensing of Intellectual Property* ("*Intellectual Property Guidelines*") outline the Agencies' enforcement policy with respect to intellectual property licensing agreements among competitors, among other things. The *1992* DOJ/FTC *Horizontal Merger Guidelines*, as amended in 1997 (*"Horizontal Merger Guidelines"*), outline the Agencies' approach to horizontal mergers and acquisitions, and certain competitor collaborations.

answers to every antitrust question that might arise from a competitor collaboration. These Guidelines describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors. They should enable businesses to evaluate proposed transactions with greater understanding of possible antitrust implications, thus encouraging procompetitive collaborations, deterring collaborations likely to harm competition and consumers, and facilitating the Agencies' investigations of collaborations.

## SECTION 1: PURPOSE, DEFINITIONS, AND OVERVIEW

### 1.1 Purpose and Definitions

These Guidelines state the antitrust enforcement policy of the Agencies with respect to competitor collaborations. By stating their general policy, the Agencies hope to assist businesses in assessing whether the Agencies will challenge a competitor collaboration or any of the agreements of which it is comprised.[3] However, these Guidelines cannot remove judgment and discretion in antitrust law enforcement. The Agencies evaluate each case in light of its own facts and apply the analytical framework set forth in these Guidelines reasonably and flexibly.[4]

A "competitor collaboration" comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom.[5] "Competitors" encompasses both actual and potential competitors.[6] Competitor collaborations involve one or more business activities, such as research and development ("R&D"), production, marketing, distribution, sales or purchasing. Information sharing and various trade association activities also may take place through competitor

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[3] These Guidelines neither describe how the Agencies litigate cases nor assign burdens of proof or production.

[4] The analytical framework set forth in these Guidelines is consistent with the analytical frameworks in the *Health Care Statements* and the *Intellectual Property Guidelines*, which remain in effect to address issues in their special contexts.

[5] These Guidelines take into account neither the possible effects of competitor collaborations in foreclosing or limiting competition by rivals not participating in a collaboration nor the possible anticompetitive effects of standard setting in the context of competitor collaborations. Nevertheless, these effects may be of concern to the Agencies and may prompt enforcement actions.

[6] Firms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present. A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter.

collaborations.

These Guidelines use the terms "anticompetitive harm," "procompetitive benefit," and "overall competitive effect" in analyzing the competitive effects of agreements among competitors. All of these terms include actual and likely competitive effects. The Guidelines use the term "anticompetitive harm" to refer to an agreement's adverse competitive consequences, without taking account of offsetting procompetitive benefits. Conversely, the term "procompetitive benefit" refers to an agreement's favorable competitive consequences, without taking account of its anticompetitive harm. The terms "overall competitive effect" or "competitive effect" are used in discussing the combination of an agreement's anticompetitive harm and procompetitive benefit.

### 1.2 Overview of Analytical Framework

Two types of analysis are used by the Supreme Court to determine the lawfulness of an agreement among competitors: per se and rule of reason.[7] Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as per se unlawful.[8] All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.[9]

This overview briefly sets forth questions and factors that the Agencies assess in analyzing an agreement among competitors. The rest of the Guidelines should be consulted for the detailed definitions and discussion that underlie this analysis.

***Agreements Challenged as Per Se Illegal.*** Agreements of a type that always or almost always tends to raise price or to reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

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[7] *See* National Soc'y of Prof'l. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[8] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-36 (1990).

[9] *See* California Dental Ass'n v. FTC, 119 S. Ct. 1604, 1617-18 (1999); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459-61 (1986); National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104-13 (1984).

*Agreements Analyzed under the Rule of Reason.* Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.

The Agencies' analysis begins with an examination of the nature of the relevant agreement. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm. In some cases, the nature of the agreement and the absence of market power together may demonstrate the absence of anticompetitive harm. In such cases, the Agencies do not challenge the agreement. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.

If the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis, the Agencies analyze the agreement in greater depth. The Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power or facilitate its exercise. The Agencies examine the extent to which the participants and the collaboration have the ability and incentive to compete independently. The Agencies also evaluate other market circumstances, e.g. entry, that may foster or prevent anticompetitive harms.

If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.

## 1.3 Competitor Collaborations Distinguished from Mergers

The competitive effects from competitor collaborations may differ from those of mergers due to a number of factors. Most mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants. This remaining competition may reduce competitive concerns, but also may raise questions about whether participants have agreed to anticompetitive restraints on the remaining competition.

Mergers are designed to be permanent, while competitor collaborations are more typically of limited duration. Thus, participants in a collaboration typically remain potential competitors, even if they are not actual competitors for certain purposes (*e.g.*, R&D) during the collaboration. The potential for future competition between participants in a collaboration requires antitrust scrutiny different from that required for mergers.

Nonetheless, in some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period[10] by its own specific and express terms.[11] Effects of the collaboration on competition in other markets are analyzed as appropriate under these Guidelines or other applicable precedent. *See* Example 1.[12]

## SECTION 2: GENERAL PRINCIPLES FOR EVALUATING AGREEMENTS AMONG COMPETITORS

### 2.1 Potential Procompetitive Benefits

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[10] In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger. The length of this term may vary, however, depending on industry-specific circumstances, such as technology life cycles.

[11] This definition, however, does not determine obligations arising under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[12] Examples illustrating this and other points set forth in these Guidelines are included in the Appendix.

The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures, trade or professional associations, licensing arrangements, or strategic alliances.

Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. For example, one participant may have special technical expertise that usefully complements another participant's manufacturing process, allowing the latter participant to lower its production cost or improve the quality of its product. In other instances, a collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant. For example, two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products. Consumers may benefit from these collaborations as the participants are able to lower prices, improve quality, or bring new products to market faster.

### 2.2 Potential Anticompetitive Harms

Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants' ability or incentive to compete independently.

Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.

### 2.3 Analysis of the Overall Collaboration and the Agreements of Which It Consists

A competitor collaboration comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom. In general, the Agencies assess the competitive effects of the overall

collaboration and any individual agreement or set of agreements within the collaboration that may harm competition. For purposes of these Guidelines, the phrase "relevant agreement" refers to whichever of these three – the overall collaboration, an individual agreement, or a set of agreements – the evaluating Agency is assessing. Two or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement. *See* Example 2.

### 2.4 Competitive Effects Are Assessed as of the Time of Possible Harm to Competition

The competitive effects of a relevant agreement may change over time, depending on changes in circumstances such as internal reorganization, adoption of new agreements as part of the collaboration, addition or departure of participants, new market conditions, or changes in market share. The Agencies assess the competitive effects of a relevant agreement as of the time of possible harm to competition, whether at formation of the collaboration or at a later time, as appropriate. *See* Example 3. However, an assessment after a collaboration has been formed is sensitive to the reasonable expectations of participants whose significant sunk cost investments in reliance on the relevant agreement were made before it became anticompetitive.

## SECTION 3: ANALYTICAL FRAMEWORK FOR EVALUATING AGREEMENTS AMONG COMPETITORS

### 3.1 Introduction

Section 3 sets forth the analytical framework that the Agencies use to evaluate the competitive effects of a competitor collaboration and the agreements of which it consists. Certain types of agreements are so likely to be harmful to competition and to have no significant benefits that they do not warrant the time and expense required for particularized inquiry into their effects.[13] Once identified, such agreements are challenged as per se illegal.[14]

Agreements not challenged as per se illegal are analyzed under the rule of reason. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. Under the rule of reason, the central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Given the great variety of competitor collaborations, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. Rule of reason analysis focuses on only those factors, and undertakes only the degree of factual inquiry, necessary to assess accurately the overall competitive effect of the

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[13] *See* Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

[14] *See Superior Court Trial Lawyers Assn* , 493 U.S. at 432-36.

relevant agreement.[15]

### 3.2 Agreements Challenged as Per Se Illegal

Agreements of a type that always or almost always tends to raise price or reduce output are per se illegal.[16] The Agencies challenge such agreements, once identified, as per se illegal. Typically these are agreements not to compete on price or output. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.[17] The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal.[18] *See* Example 4. In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entity created by the collaboration or by one or more participants or by a third party acting on behalf of other participants) one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits cognizable under the efficiencies analysis set forth in Section 3.36 below. Such procompetitive benefits may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies. *See* Examples 5 through 7.

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[15] *See California Dental Ass'n*, 119 S. Ct. at 1617-18; *Indiana Fed'n of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 104-13.

[16] *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979).

[17] *See, e.g.*, Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (market allocation); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing).

[18] *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 339 n.7, 351-57 (1982) (finding no integration).

An agreement may be "reasonably necessary" without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary.[19] In making this assessment, except in unusual circumstances, the Agencies consider whether practical, significantly less restrictive means were reasonably available when the agreement was entered into, but do not search for a theoretically less restrictive alternative that was not practical given the business realities.

Before accepting a claim that an agreement is reasonably necessary to achieve procompetitive benefits from an integration of economic activity, the Agencies undertake a limited factual inquiry to evaluate the claim.[20] Such an inquiry may reveal that efficiencies from an agreement that are possible in theory are not plausible in the context of the particular collaboration. Some claims – such as those premised on the notion that competition itself is unreasonable – are insufficient as a matter of law,[21] and others may be implausible on their face. In any case, labeling an arrangement a "joint venture" will not protect what is merely a device to raise price or restrict output; [22] the nature of the conduct, not its designation, is determinative.

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[19] *See id.* at 352-53 (observing that even if a maximum fee schedule for physicians' services were desirable, it was not necessary that the schedule be established by physicians rather than by insurers); *Broadcast Music*, 441 U.S. at 20-21 (setting of price "necessary" for the blanket license).

[20] *See Maricopa*, 457 U.S. at 352-53, 356-57 (scrutinizing the defendant medical foundations for indicia of integration and evaluating the record evidence regarding less restrictive alternatives).

[21] *See Indiana Fedn of Dentists* , 476 U.S. at 463-64; *NCAA*, 468 U.S. at 116-17; *Profl. Engrs* , 435 U.S. at 693-96. Other claims, such as an absence of market power, are no defense to per se illegality. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 434-36; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 & n.59 (1940).

[22] *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

### 3.3 Agreements Analyzed under the Rule of Reason

Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.[23]

Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.[24] The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.

Under the rule of reason, the Agencies' analysis begins with an examination of the nature of the relevant agreement, since the nature of the agreement determines the types of anticompetitive harms that may be of concern. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm.[25] If the nature of the agreement and the absence of market power[26] together demonstrate the absence of anticompetitive harm, the Agencies do not challenge the agreement. *See* Example 8. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement,[27] or anticompetitive harm has resulted from an agreement

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[23] In addition, concerns may arise where an agreement increases the ability or incentive of buyers to exercise monopsony power. *See infra* Section 3.31(a).

[24] *See California Dental Ass'n*, 119 S. Ct. at 1612-13, 1617 ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."); *NCAA*, 468 U.S. 109 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye") (quoting Phillip E. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)).

[25] *See* Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

[26] That market power is absent may be determined without defining a relevant market. For example, if no market power is likely under any plausible market definition, it does not matter which one is correct. Alternatively, easy entry may indicate an absence of market power.

[27] *See California Dental Ass'n*, 119 S. Ct. at 1612-13, 1617 (an "obvious anticompetitive effect" would warrant quick condemnation); *Indiana Fed'n of Dentists*, 476 U.S. at 459; *NCAA*, 468 U.S. at 104, 106-10.

already in operation,[28] then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.[29]

If the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis, the Agencies analyze the agreement in greater depth. The Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power[30] or facilitate its exercise and thus poses risks to competition.[31] The Agencies examine factors relevant to the extent to which the participants and the collaboration have the ability and incentive to compete independently, such as whether an agreement is exclusive or non-exclusive and its duration.[32] The Agencies also evaluate whether entry would be timely, likely, and sufficient to deter or counteract any anticompetitive harms. In addition, the Agencies assess any other market circumstances that may foster or impede anticompetitive harms.

If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably

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[28] *See Indiana Fedn of Dentists* , 476 U.S. at 460-61 ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 424 (1986)); *NCAA*, 468 U.S. at 104-08, 110 n.42.

[29] *See Indiana Fedn of Dentists* , 476 U.S. at 459-60 (condemning without "detailed market analysis" an agreement to limit competition by withholding x-rays from patients' insurers after finding no competitive justification).

[30] Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. Sellers also may exercise market power with respect to significant competitive dimensions other than price, such as quality, service, or innovation. Market power to a buyer is the ability profitably to depress the price paid for a product below the competitive level for a significant period of time and thereby depress output.

[31] *See* Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464 (1992).

[32] *Compare NCAA*, 468 U.S. at 113-15, 119-20 (noting that colleges were not permitted to televise their own games without restraint), *with Broadcast Music*, 441 U.S. at 23-24 (finding no legal or practical impediment to individual licenses).

necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.[33]

### 3.31 Nature of the Relevant Agreement: Business Purpose, Operation in the Marketplace and Possible Competitive Concerns

The nature of the agreement is relevant to whether it may cause anticompetitive harm. For example, by limiting independent decision making or combining control over or financial interests in production, key assets, or decisions on price, output, or other competitively sensitive variables, an agreement may create or increase market power or facilitate its exercise by the collaboration, its participants, or both. An agreement to limit independent decision making or to combine control or financial interests may reduce the ability or incentive to compete independently. An agreement also may increase the likelihood of an exercise of market power by facilitating explicit or tacit collusion,[34] either through facilitating practices such as an exchange of competitively sensitive information or through increased market concentration.

In examining the nature of the relevant agreement, the Agencies take into account inferences about business purposes for the agreement that can be drawn from objective facts. The Agencies also consider evidence of the subjective intent of the participants to the extent that it sheds light on competitive effects.[35] The Agencies do not undertake a full analysis of procompetitive benefits pursuant to Section 3.36 below, however, unless an anticompetitive harm appears likely. The Agencies also examine whether an agreement already in operation has caused anticompetitive harm.[36] Anticompetitive harm may be observed, for example, if a competitor collaboration successfully mandates new, anticompetitive conduct or successfully eliminates procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market. If anticompetitive harm is found, examination of market power ordinarily is not required. In some cases, however, a determination of anticompetitive harm may be informed by consideration of market power.

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[33] *See NCAA*, 468 U.S. at 113-15 (rejecting efficiency claims when production was limited, not enhanced); *Profl. Engrs* , 435 U.S. at 696 (dictum) (distinguishing restraints that promote competition from those that eliminate competition); *Chicago Bd. of Trade*, 246 U.S. at 238 (same).

[34] As used in these Guidelines, "collusion" is not limited to conduct that involves an agreement under the antitrust laws.

[35] Anticompetitive intent alone does not establish an antitrust violation, and procompetitive intent does not preclude a violation. *See, e.g., Chicago Bd. of Trade*, 246 U.S. at 238. But extrinsic evidence of intent may aid in evaluating market power, the likelihood of anticompetitive harm, and claimed procompetitive justifications where an agreement's effects are otherwise ambiguous.

[36] *See id.*

The following sections illustrate competitive concerns that may arise from the nature of particular types of competitor collaborations. This list is not exhaustive. In addition, where these sections address agreements of a type that otherwise might be considered per se illegal, such as agreements on price, the discussion assumes that the agreements already have been determined to be subject to rule of reason analysis because they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. *See supra* Section 3.2.

### 3.31(a) Relevant Agreements that Limit Independent Decision Making or Combine Control or Financial Interests

The following is intended to illustrate but not exhaust the types of agreements that might harm competition by eliminating independent decision making or combining control or financial interests.

*Production Collaborations.* Competitor collaborations may involve agreements jointly to produce a product sold to others or used by the participants as an input. Such agreements are often procompetitive.[37] Participants may combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce. However, production collaborations may involve agreements on the level of output or the use of key assets, or on the price at which the product will be marketed by the collaboration, or on other competitively significant variables, such as quality, service, or promotional strategies, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, the control over some or all production or key assets or decisions about key competitive variables that otherwise would be controlled independently.[38] Such agreements could reduce individual participants' control over assets necessary to compete and thereby reduce their ability to compete independently, combine financial interests in ways that undermine incentives to compete

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[37] The *NCRPA* accords rule of reason treatment to certain production collaborations. However, the statute permits per se challenges, in appropriate circumstances, to a variety of activities, including agreements to jointly market the goods or services produced or to limit the participants' independent sale of goods or services produced outside the collaboration. *NCRPA*, 15 U.S.C. §§ 4301-02.

[38] For example, where output resulting from a collaboration is transferred to participants for independent marketing, anticompetitive harm could result if that output is restricted or if the transfer takes place at a supracompetitive price. Such conduct could raise participants' marginal costs through inflated per-unit charges on the transfer of the collaboration's output. Anticompetitive harm could occur even if there is vigorous competition among collaboration participants in the output market, since all the participants would have paid the same inflated transfer price.

independently, or both.

*Marketing Collaborations.* Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

*Buying Collaborations.* Competitor collaborations may involve agreements jointly to purchase necessary inputs. Many such agreements do not raise antitrust concerns and indeed may be procompetitive. Purchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies. However, such agreements can create or increase market power (which, in the case of buyers, is called "monopsony power") or facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement. Buying collaborations also may facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases.

*Research & Development Collaborations.* Competitor collaborations may involve agreements to engage in joint research and development ("R&D"). Most such agreements are procompetitive, and they typically are analyzed under the rule of reason.[39] Through the combination of complementary assets, technology, or know-how, an R&D collaboration may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes. Joint R&D agreements, however, can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts. Although R&D collaborations also may facilitate tacit collusion on R&D efforts, achieving, monitoring, and punishing departures from collusion is sometimes difficult in the R&D context.

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[39] Aspects of the antitrust analysis of competitor collaborations involving R&D are governed by provisions of the *NCRPA*, 15 U.S.C. §§ 4301-02.

An exercise of market power may injure consumers by reducing innovation below the level that otherwise would prevail, leading to fewer or no products for consumers to choose from, lower quality products, or products that reach consumers more slowly than they otherwise would. An exercise of market power also may injure consumers by reducing the number of independent competitors in the market for the goods, services, or production processes derived from the R&D collaboration, leading to higher prices or reduced output, quality, or service. A central question is whether the agreement increases the ability or incentive anticompetitively to reduce R&D efforts pursued independently or through the collaboration, for example, by slowing the pace at which R&D efforts are pursued. Other considerations being equal, R&D agreements are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their supracompetitive earnings. In addition, anticompetitive harm generally is more likely when R&D competition is confined to firms with specialized characteristics or assets, such as intellectual property, or when a regulatory approval process limits the ability of late-comers to catch up with competitors already engaged in the R&D.

### 3.31(b) Relevant Agreements that May Facilitate Collusion

Each of the types of competitor collaborations outlined above can facilitate collusion. Competitor collaborations may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anticompetitively, as well as a greater ability to detect and punish deviations that would undermine the collusion. Certain marketing, production, and buying collaborations, for example, may provide opportunities for their participants to collude on price, output, customers, territories, or other competitively sensitive variables. R&D collaborations, however, may be less likely to facilitate collusion regarding R&D activities since R&D often is conducted in secret, and it thus may be difficult to monitor an agreement to coordinate R&D. In addition, collaborations can increase concentration in a relevant market and thus increase the likelihood of collusion among all firms, including the collaboration and its participants.

Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. The Agencies recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration. Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.

Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.

### 3.32 Relevant Markets Affected by the Collaboration

The Agencies typically identify and assess competitive effects in all of the relevant product and geographic markets in which competition may be affected by a competitor collaboration, although in some cases it may be possible to assess competitive effects directly without defining a particular relevant market(s). Markets affected by a competitor collaboration include all markets in which the economic integration of the participants' operations occurs or in which the collaboration operates or will operate,[40] and may also include additional markets in which any participant is an actual or potential competitor.[41]

#### 3.32(a) Goods Markets

In general, for goods[42] markets affected by a competitor collaboration, the Agencies approach relevant market definition as described in Section 1 of the *Horizontal Merger Guidelines*. To determine the relevant market, the Agencies generally consider the likely reaction of buyers to a price increase and typically ask, among other things, how buyers would respond to increases over prevailing price levels. However, when circumstances strongly suggest that the prevailing price exceeds what likely would have prevailed absent the relevant agreement, the Agencies use a price more reflective of the price that likely would have prevailed. Once a market has been defined, market shares are assigned both to firms currently in the relevant market and to firms that are able to make "uncommitted" supply responses. *See* Sections 1.31 and 1.32 of the *Horizontal Merger Guidelines*.

#### 3.32(b) Technology Markets

When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may define technology markets in assessing the competitive effects of a competitor collaboration that includes an agreement to license intellectual property. Technology markets consist of the intellectual property that is licensed and its close substitutes;

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[40] For example, where a production joint venture buys inputs from an upstream market to incorporate in products to be sold in a downstream market, both upstream and downstream markets may be "markets affected by a competitor collaboration."

[41] Participation in the collaboration may change the participants' behavior in this third category of markets, for example, by altering incentives and available information, or by providing an opportunity to form additional agreements among participants.

[42] The term "goods" also includes services.

that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed. The Agencies approach the definition of a relevant technology market and the measurement of market share as described in Section 3.2.2 of the *Intellectual Property Guidelines.*

### 3.32(c) Research and Development: Innovation Markets

In many cases, an agreement's competitive effects on innovation are analyzed as a separate competitive effect in a relevant goods market. However, if a competitor collaboration may have competitive effects on innovation that cannot be adequately addressed through the analysis of goods or technology markets, the Agencies may define and analyze an innovation market as described in Section 3.2.3 of the *Intellectual Property Guidelines.* An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

### 3.33 Market Shares and Market Concentration

Market share and market concentration affect the likelihood that the relevant agreement will create or increase market power or facilitate its exercise. The creation, increase, or facilitation of market power will likely increase the ability and incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Other things being equal, market share affects the extent to which participants or the collaboration must restrict their own output in order to achieve anticompetitive effects in a relevant market. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. In assessing whether an agreement may cause anticompetitive harm, the Agencies typically calculate the market shares of the participants and of the collaboration.[43] The Agencies assign a range of market shares to the collaboration. The high end of that range is the sum of the market shares of the collaboration and its participants. The low end is the share of the collaboration in isolation. In general, the Agencies approach the calculation of market share as set forth in Section 1.4 of the *Horizontal Merger Guidelines.*

Other things being equal, market concentration affects the difficulties and costs of achieving and

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[43] When the competitive concern is that a limitation on independent decision making or a combination of control or financial interests may yield an anticompetitive reduction of research and development, the Agencies typically frame their inquiries more generally, looking to the strength, scope, and number of competing R&D efforts and their close substitutes. *See supra* Sections 3.31(a) and 3.32(c).

enforcing collusion in a relevant market. Accordingly, in assessing whether an agreement may increase the likelihood of collusion, the Agencies calculate market concentration. In general, the Agencies approach the calculation of market concentration as set forth in Section 1.5 of the *Horizontal Merger Guidelines*, ascribing to the competitor collaboration the same range of market shares described above.

Market share and market concentration provide only a starting point for evaluating the competitive effect of the relevant agreement. The Agencies also examine other factors outlined in the *Horizontal Merger Guidelines* as set forth below:

The Agencies consider whether factors such as those discussed in Section 1.52 of the *Horizontal Merger Guidelines* indicate that market share and concentration data overstate or understate the likely competitive significance of participants and their collaboration.

In assessing whether anticompetitive harm may arise from an agreement that combines control over or financial interests in assets or otherwise limits independent decision making, the Agencies consider whether factors such as those discussed in Section 2.2 of the *Horizontal Merger Guidelines* suggest that anticompetitive harm is more or less likely.

In assessing whether anticompetitive harms may arise from an agreement that may increase the likelihood of collusion, the Agencies consider whether factors such as those discussed in Section 2.1 of the *Horizontal Merger Guidelines* suggest that anticompetitive harm is more or less likely.

In evaluating the significance of market share and market concentration data and interpreting the range of market shares ascribed to the collaboration, the Agencies also examine factors beyond those set forth in the *Horizontal Merger Guidelines*. The following section describes which factors are relevant and the issues that the Agencies examine in evaluating those factors.

### 3.34 Factors Relevant to the Ability and Incentive of the Participants and the Collaboration to Compete

Competitor collaborations sometimes do not end competition among the participants and the collaboration. Participants may continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. Collaborations may be managed by decision makers independent of the individual participants. Control over key competitive variables may remain outside the collaboration, such as where participants independently market and set prices for the collaboration's output.

Sometimes, however, competition among the participants and the collaboration may be restrained through explicit contractual terms or through financial or other provisions that reduce or eliminate the incentive to compete. The Agencies look to the competitive benefits and harms of the relevant agreement, not merely the formal terms of agreements among the participants.

Where the nature of the agreement and market share and market concentration data reveal a likelihood of anticompetitive harm, the Agencies more closely examine the extent to which the participants and the collaboration have the ability and incentive to compete independent of each other. The Agencies are likely to focus on six factors: (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (b) the extent to which participants retain independent control of assets necessary to compete; (c) the nature and extent of participants' financial interests in the collaboration or in each other; (d) the control of the collaboration's competitively significant decision making; (e) the likelihood of anticompetitive information sharing; and (f) the duration of the collaboration.

Each of these factors is discussed in further detail below. Consideration of these factors may reduce or increase competitive concern. The analysis necessarily is flexible: the relevance and significance of each factor depends upon the facts and circumstances of each case, and any additional factors pertinent under the circumstances are considered. For example, when an agreement is examined subsequent to formation of the collaboration, the Agencies also examine factual evidence concerning participants' actual conduct.

### 3.34(a) Exclusivity

The Agencies consider whether, to what extent, and in what manner the relevant agreement permits participants to continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. The Agencies inquire whether a collaboration is non-exclusive in fact as well as in name and consider any costs or other impediments to competing with the collaboration. In assessing exclusivity when an agreement already is in operation, the Agencies examine whether, to what extent, and in what manner participants actually have continued to compete against each other and the collaboration. In general, competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.

### 3.34(b) Control over Assets

The Agencies ask whether the relevant agreement requires participants to contribute to the collaboration significant assets that previously have enabled or likely would enable participants to be effective independent competitors in markets affected by the collaboration. If such resources must be contributed to the collaboration and are specialized in that they cannot readily be replaced, the participants may have lost all or some of their ability to compete against each other and their collaboration, even if they retain the contractual right to do so.[44] In general, the greater

[44] For example, if participants in a production collaboration must contribute most of their productive capacity to the collaboration, the collaboration may impair the ability of its participants to remain effective independent competitors regardless of the terms of the agreement.

the contribution of specialized assets to the collaboration that is required, the less the participants may be relied upon to provide independent competition.

### 3.34(c) Financial Interests in the Collaboration or in Other Participants

The Agencies assess each participant's financial interest in the collaboration and its potential impact on the participant's incentive to compete independently with the collaboration. The potential impact may vary depending on the size and nature of the financial interest (e.g., whether the financial interest is debt or equity). In general, the greater the financial interest in the collaboration, the less likely is the participant to compete with the collaboration.[45] The Agencies also assess direct equity investments between or among the participants. Such investments may reduce the incentives of the participants to compete with each other. In either case, the analysis is sensitive to the level of financial interest in the collaboration or in another participant relative to the level of the participant's investment in its independent business operations in the markets affected by the collaboration.

### 3.34(d) Control of the Collaboration's Competitively Significant Decision Making

The Agencies consider the manner in which a collaboration is organized and governed in assessing the extent to which participants and their collaboration have the ability and incentive to compete independently. Thus, the Agencies consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker. For example, the Agencies ask whether participants are allowed to appoint members of a board of directors for the collaboration, if incorporated, or otherwise to exercise significant control over the operations of the collaboration. In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions.[46]

To the extent that the collaboration's decision making is subject to the participants' control, the Agencies consider whether that control could be exercised jointly. Joint control over the collaboration's price and output levels could create or increase market power and raise competitive concerns. Depending on the nature of the collaboration, competitive concern also may arise due to joint control over other competitively significant decisions, such as the level and

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[45] Similarly, a collaboration's financial interest in a participant may diminish the collaboration's incentive to compete with that participant.

[46] Control may diverge from financial interests. For example, a small equity investment may be coupled with a right to veto large capital expenditures and, thereby, to effectively limit output. The Agencies examine a collaboration's actual governance structure in assessing issues of control.

scope of R&D efforts and investment. In contrast, to the extent that participants independently set the price and quantity [47] of their share of a collaboration's output and independently control other competitively significant decisions, an agreement's likely anticompetitive harm is reduced. [48]

### 3.34(e) Likelihood of Anticompetitive Information Sharing

The Agencies evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party. Similarly, a buying collaboration might use an independent third party to handle negotiations in which its participants' input requirements or other competitively sensitive information could be revealed. In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.

### 3.34(f) Duration of the Collaboration

The Agencies consider the duration of the collaboration in assessing whether participants retain the ability and incentive to compete against each other and their collaboration. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.

### 3.35 Entry

Easy entry may deter or prevent profitably maintaining price above, or output, quality, service or innovation below, what likely would prevail in the absence of the relevant agreement. Where the nature of the agreement and market share and concentration data suggest a likelihood of anticompetitive harm that is not sufficiently mitigated by any continuing competition identified

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[47] Even if prices to consumers are set independently, anticompetitive harms may still occur if participants jointly set the collaboration's level of output. For example, participants may effectively coordinate price increases by reducing the collaboration's level of output and collecting their profits through high transfer prices, *i.e.*, through the amounts that participants contribute to the collaboration in exchange for each unit of the collaboration's output. Where a transfer price is determined by reference to an objective measure not under the control of the participants, (*e.g.*, average price in a different unconcentrated geographic market), competitive concern may be less likely.

[48] Anticompetitive harm also is less likely if individual participants may independently increase the overall output of the collaboration.

through the analysis in Section 3.34, the Agencies inquire whether entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the anticompetitive harm of concern. If so, the relevant agreement ordinarily requires no further analysis.

As a general matter, the Agencies assess timeliness, likelihood, and sufficiency of committed entry under principles set forth in Section 3 of the *Horizontal Merger Guidelines*.[49] However, unlike mergers, competitor collaborations often restrict only certain business activities, while preserving competition among participants in other respects, and they may be designed to terminate after a limited duration. Consequently, the extent to which an agreement creates and enables identification of opportunities that would induce entry and the conditions under which ease of entry may deter or counteract anticompetitive harms may be more complex and less direct than for mergers and will vary somewhat according to the nature of the relevant agreement. For example, the likelihood of entry may be affected by what potential entrants believe about the probable duration of an anticompetitive agreement. Other things being equal, the shorter the anticipated duration of an anticompetitive agreement, the smaller the profit opportunities for potential entrants, and the lower the likelihood that it will induce committed entry. Examples of other differences are set forth below.

For certain collaborations, sufficiency of entry may be affected by the possibility that entrants will participate in the anticompetitive agreement. To the extent that such participation raises the amount of entry needed to deter or counteract anticompetitive harms, and assets required for entry are not adequately available for entrants to respond fully to their sales opportunities, or otherwise renders entry inadequate in magnitude, character or scope, sufficient entry may be more difficult to achieve.[50]

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[49] Committed entry is defined as new competition that requires expenditure of significant sunk costs of entry and exit. *See* Section 3.0 of the *Horizontal Merger Guidelines*.

[50] Under the same principles applied to production and marketing collaborations, the exercise of monopsony power by a buying collaboration may be deterred or counteracted by the entry of new purchasers. To the extent that collaborators reduce their purchases, they may create an opportunity for new buyers to make purchases without forcing the price of the input above pre-relevant agreement levels. Committed purchasing entry, defined as new purchasing competition that requires expenditure of significant sunk costs of entry and exit — such as a new steel factory built in response to a reduction in the price of iron ore — is analyzed under principles analogous to those articulated in Section 3 of the *Horizontal Merger Guidelines*. Under that analysis, the Agencies assess whether a monopsonistic price reduction is likely to attract committed purchasing entry, profitable at pre-relevant agreement prices, that would not have occurred before the relevant agreement at those same prices. (Uncommitted new buyers are identified as participants in the relevant market if their demand responses to a price decrease are likely to occur within one year and without the expenditure of significant sunk costs of entry and exit. *See id.* at Sections 1.32 and 1.41.)

In the context of research and development collaborations, widespread availability of R&D capabilities and the large gains that may accrue to successful innovators often suggest a high likelihood that entry will deter or counteract anticompetitive reductions of R&D efforts. Nonetheless, such conditions do not always pertain, and the Agencies ask whether entry may deter or counteract anticompetitive R&D reductions, taking into account the likelihood, timeliness, and sufficiency of entry.

To be timely, entry must be sufficiently prompt to deter or counteract such harms. The Agencies evaluate the likelihood of entry based on the extent to which potential entrants have (1) core competencies (and the ability to acquire any necessary specialized assets) that give them the ability to enter into competing R&D and (2) incentives to enter into competing R&D. The sufficiency of entry depends on whether the character and scope of the entrants' R&D efforts are close enough to the reduced R&D efforts to be likely to achieve similar innovations in the same time frame or otherwise to render a collaborative reduction of R&D unprofitable.

### 3.36 Identifying Procompetitive Benefits of the Collaboration

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, as explained above, competitor collaborations have the potential to generate significant efficiencies that benefit consumers in a variety of ways. For example, a competitor collaboration may enable firms to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would otherwise be possible. Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. *See supra* Section 2.1. Indeed, the primary benefit of competitor collaborations to the economy is their potential to generate such efficiencies.

Efficiencies generated through a competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, through collaboration, competitors may be able to produce an input more efficiently than any one participant could individually; such collaboration-generated efficiencies may enhance competition by permitting two or more ineffective (*e.g.*, high cost) participants to become more effective, lower cost competitors. Even when efficiencies generated through a competitor collaboration enhance the collaboration's or the participants' ability to compete, however, a competitor collaboration may have other effects that may lessen competition and ultimately may make the relevant agreement anticompetitive.

If the Agencies conclude that the relevant agreement has caused, or is likely to cause, anticompetitive harm, they consider whether the agreement is reasonably necessary to achieve "cognizable efficiencies." "Cognizable efficiencies" are efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means. *See infra* Sections 3.36(a) and 3.36(b). Cognizable efficiencies are assessed net of costs produced by the competitor collaboration or incurred in achieving those efficiencies.

### 3.36(a) Cognizable Efficiencies Must Be Verifiable and Potentially Procompetitive

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the collaboration's participants. The participants must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each would enhance the collaboration's or its participants' ability and incentive to compete; and why the relevant agreement is reasonably necessary to achieve the claimed efficiencies (*see* Section 3.36 (b)). Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

Moreover, cognizable efficiencies must be potentially procompetitive. Some asserted efficiencies, such as those premised on the notion that competition itself is unreasonable, are insufficient as a matter of law. Similarly, cost savings that arise from anticompetitive output or service reductions are not treated as cognizable efficiencies. *See* Example 9.

### 3.36(b) Reasonable Necessity and Less Restrictive Alternatives

The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be 'reasonably necessary" without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.

The reasonable necessity of an agreement may depend upon the market context and upon the duration of the agreement. An agreement that may be justified by the needs of a new entrant, for example, may not be reasonably necessary to achieve cognizable efficiencies in different market circumstances. The reasonable necessity of an agreement also may depend on whether it deters individual participants from undertaking free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies. Collaborations sometimes include agreements to discourage any one participant from appropriating an undue share of the fruits of the collaboration or to align participants' incentives to encourage cooperation in achieving the efficiency goals of the collaboration. The Agencies assess whether such agreements are reasonably necessary to deter opportunistic conduct that otherwise would likely prevent the achievement of cognizable efficiencies. *See* Example 10.

### 3.37 Overall Competitive Effect

If the relevant agreement is reasonably necessary to achieve cognizable efficiencies, the Agencies

assess the likelihood and magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market, for example, by preventing price increases.[51]

The Agencies' comparison of cognizable efficiencies and anticompetitive harms is necessarily an approximate judgment. In assessing the overall competitive effect of an agreement, the Agencies consider the magnitude and likelihood of both the anticompetitive harms and cognizable efficiencies from the relevant agreement. The likelihood and magnitude of anticompetitive harms in a particular case may be insignificant compared to the expected cognizable efficiencies, or vice versa. As the expected anticompetitive harm of the agreement increases, the Agencies require evidence establishing a greater level of expected cognizable efficiencies in order to avoid the conclusion that the agreement will have an anticompetitive effect overall. When the anticompetitive harm of the agreement is likely to be particularly large, extraordinary cognizable efficiencies would be necessary to prevent the agreement from having an anticompetitive effect overall.

## SECTION 4: ANTITRUST SAFETY ZONES

### 4.1 Overview

Because competitor collaborations are often procompetitive, the Agencies believe that "safety zones" are useful in order to encourage such activity. The safety zones set out below are designed to provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the Agencies presume the arrangements to be lawful without inquiring into particular circumstances. They are not intended to discourage competitor collaborations that fall outside the safety zones.

The Agencies emphasize that competitor collaborations are not anticompetitive merely because they fall outside the safety zones. Indeed, many competitor collaborations falling outside the safety zones are procompetitive or competitively neutral. The Agencies analyze arrangements outside the safety zones based on the principles outlined in Section 3 above.

The following sections articulate two safety zones. Section 4.2 sets out a general safety zone

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[51] In most cases, the Agencies' enforcement decisions depend on their analysis of the overall effect of the relevant agreement over the short term. The Agencies also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from the efficiencies (due to delay in the achievement of, or the realization of consumer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.

applicable to any competitor collaboration.[52] Section 4.3 establishes a safety zone applicable to research and development collaborations whose competitive effects are analyzed within an innovation market. These safety zones are intended to supplement safety zone provisions in the Agencies' other guidelines and statements of enforcement policy.[53]

### 4.2 Safety Zone for Competitor Collaborations in General

Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.[54] The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,[55] or to competitor collaborations to which a merger analysis is applied.[56]

### 4.3 Safety Zone for Research and Development Competition Analyzed in Terms of Innovation Markets

Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required

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[52] *See* Sections 1.1 and 1.3 above.

[53] The Agencies have articulated antitrust safety zones in *Health Care Statements* 7 & 8 and the *Intellectual Property Guidelines*, as well as in the *Horizontal Merger Guidelines*. The antitrust safety zones in these other guidelines relate to particular facts in a specific industry or to particular types of transactions.

[54] For purposes of the safety zone, the Agencies consider the combined market shares of the participants and the collaboration. For example, with a collaboration among two competitors where each participant individually holds a 6 percent market share in the relevant market and the collaboration separately holds a 3 percent market share in the relevant market, the combined market share in the relevant market for purposes of the safety zone would be 15 percent. This collaboration, therefore, would fall within the safety zone. However, if the collaboration involved three competitors, each with a 6 percent market share in the relevant market, the combined market share in the relevant market for purposes of the safety zone would be 21 percent, and the collaboration would fall outside the safety zone. Including market shares of the participants takes into account possible spillover effects on competition within the relevant market among the participants and their collaboration.

[55] *See supra* notes 27-29 and accompanying text in Section 3.3.

[56] *See* Section 1.3 above.

specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. In determining whether independently controlled R&D efforts are close substitutes, the Agencies consider, among other things, the nature, scope, and magnitude of the R&D efforts; their access to financial support; their access to intellectual property, skilled personnel, or other specialized assets; their timing; and their ability, either acting alone or through others, to successfully commercialize innovations. The antitrust safety zone does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,[57] or to competitor collaborations to which a merger analysis is applied.[58]

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[57] *See supra* notes 27-29 and accompanying text in Section 3.3.

[58] *See* Section 1.3 above.

## Appendix

### Section 1.3

#### Example 1 (Competitor Collaboration/Merger)

##### Facts

Two oil companies agree to integrate all of their refining and refined product marketing operations. Under terms of the agreement, the collaboration will expire after twelve years; prior to that expiration date, it may be terminated by either participant on six months' prior notice. The two oil companies maintain separate crude oil production operations.

##### Analysis

The formation of the collaboration involves an efficiency-enhancing integration of operations in the refining and refined product markets, and the integration eliminates all competition between the participants in those markets. The evaluating Agency likely would conclude that expiration after twelve years does not constitute termination "within a sufficiently limited period." The participants' entitlement to terminate the collaboration at any time after giving prior notice is not termination by the collaboration's "own specific and express terms." Based on the facts presented, the evaluating Agency likely would analyze the collaboration under the *Horizontal Merger Guidelines*, rather than as a competitor collaboration under these Guidelines. Any agreements restricting competition on crude oil production would be analyzed under these Guidelines.

### Section 2.3

#### Example 2 (Analysis of Individual Agreements/Set of Agreements)

##### Facts

Two firms enter a joint venture to develop and produce a new software product to be sold independently by the participants. The product will be useful in two areas, biotechnology research and pharmaceuticals research, but doing business with each of the two classes of purchasers would require a different distribution network and a separate marketing campaign. Successful penetration of one market is likely to stimulate sales in the other by enhancing the reputation of the software and by facilitating the ability of biotechnology and pharmaceutical researchers to use the fruits of each other's efforts. Although the software is to be marketed independently by the participants rather than by the joint venture, the participants agree that one will sell only to biotechnology researchers and the other will sell only to pharmaceutical researchers. The

participants also agree to fix the maximum price that either firm may charge. The parties assert that the combination of these two requirements is necessary for the successful marketing of the new product. They argue that the market allocation provides each participant with adequate incentives to commercialize the product in its sector without fear that the other participant will free-ride on its efforts and that the maximum price prevents either participant from unduly exploiting its sector of the market to the detriment of sales efforts in the other sector.

**Analysis**

The evaluating Agency would assess overall competitive effects associated with the collaboration in its entirety and with individual agreements, such as the agreement to allocate markets, the agreement to fix maximum prices, and any of the sundry other agreements associated with joint development and production and independent marketing of the software. From the facts presented, it appears that the agreements to allocate markets and to fix maximum prices may be so intertwined that their benefits and harms "cannot meaningfully be isolated." The two agreements arguably operate together to ensure a particular blend of incentives to achieve the potential procompetitive benefits of successful commercialization of the new product. Moreover, the effects of the agreement to fix maximum prices may mitigate the price effects of the agreement to allocate markets. Based on the facts presented, the evaluating Agency likely would conclude that the agreements to allocate markets and to fix maximum prices should be analyzed as a whole.

**Section 2.4**

**Example 3 (Time of Possible Harm to Competition)**

**Facts**

A group of 25 small-to-mid-size banks formed a joint venture to establish an automatic teller machine network. To ensure sufficient business to justify launching the venture, the joint venture agreement specified that participants would not participate in any other ATM networks. Numerous other ATM networks were forming in roughly the same time period.

Over time, the joint venture expanded by adding more and more banks, and the number of its competitors fell. Now, ten years after formation, the joint venture has 900 member banks and controls 60% of the ATM outlets in a relevant geographic market. Following complaints from consumers that ATM fees have rapidly escalated, the evaluating Agency assesses the rule barring participation in other ATM networks, which now binds 900 banks.

**Analysis**

The circumstances in which the venture operates have changed over time, and the evaluating Agency would determine whether the exclusivity rule now harms competition. In assessing the exclusivity rule's competitive effect, the evaluating Agency would take account of the

collaboration's substantial current market share and any procompetitive benefits of exclusivity under present circumstances, along with other factors discussed in Section 3. The Agencies would consider whether significant sunk investments were made in reliance on the exclusivity rule.

**Section 3.2**

**Example 4 (Agreement Not to Compete on Price)**

**Facts**

Net-Business and Net-Company are two start-up companies. They independently developed, and have begun selling in competition with one another, software for the networks that link users within a particular business to each other and, in some cases, to entities outside the business. Both Net-Business and Net-Company were formed by computer specialists with no prior business expertise, and they are having trouble implementing marketing strategies, distributing their inventory, and managing their sales forces. The two companies decide to form a partnership joint venture, NET-FIRM, whose sole function will be to market and distribute the network software products of Net-Business and Net-Company. NET-FIRM will be the exclusive marketer of network software produced by Net-Business and Net-Company. Net-Business and Net-Company will each have 50% control of NET-FIRM, but each will derive profits from NET-FIRM in proportion to the revenues from sales of that partner's products. The documents setting up NET-FIRM specify that Net-Business and Net-Company will agree on the prices for the products that NET-FIRM will sell.

**Analysis**

Net-Business and Net-Company will agree on the prices at which NET-FIRM will sell their individually-produced software. The agreement is one "not to compete on price," and it is of a type that always or almost always tends to raise price or reduce output. The agreement to jointly set price may be challenged as per se illegal, unless it is reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

**Example 5 (Specialization without Integration)**

**Facts**

Firm A and Firm B are two of only three producers of automobile carburetors. Minor engine variations from year to year, even within given models of a particular automobile manufacturer, require re-design of each year's carburetor and re-tooling for carburetor production. Firms A and B meet and agree that henceforth Firm A will design and produce carburetors only for automobile models of even-numbered years and Firm B will design and produce carburetors only for automobile models of odd-numbered years. Some design and re-tooling costs would be saved,

but automobile manufacturers would face only two suppliers each year, rather than three.

**Analysis**

The agreement allocates sales by automobile model year and constitutes an agreement 'not to compete on . . . output." The participants do not combine production; rather, the collaboration consists solely of an agreement *not* to produce certain carburetors. The mere coordination of decisions on output is not integration, and cost-savings without integration, such as the costs saved by refraining from design and production for any given model year, are not a basis for avoiding per se condemnation. The agreement is of a type so likely to harm competition and to have no significant benefits that particularized inquiry into its competitive effect is deemed by the antitrust laws not to be worth the time and expense that would be required. Consequently, the evaluating Agency likely would conclude that the agreement is per se illegal.

**Example 6 (Efficiency-Enhancing Integration Present)**

**Facts**

Compu-Max and Compu-Pro are two major producers of a variety of computer software. Each has a large, world-wide sales department. Each firm has developed and sold its own word-processing software. However, despite all efforts to develop a strong market presence in word processing, each firm has achieved only slightly more than a 10% market share, and neither is a major competitor to the two firms that dominate the word-processing software market.

Compu-Max and Compu-Pro determine that in light of their complementary areas of design expertise they could develop a markedly better word-processing program together than either can produce on its own. Compu-Max and Compu-Pro form a joint venture, WORD-FIRM, to jointly develop and market a new word-processing program, with expenses and profits to be split equally. Compu-Max and Compu-Pro both contribute to WORD-FIRM software developers experienced with word processing.

**Analysis**

Compu-Max and Compu-Pro have combined their word-processing design efforts, reflecting complementary areas of design expertise, in a common endeavor to develop new word-processing software that they could not have developed separately. Each participant has contributed significant assets – the time and know-how of its word-processing software developers – to the joint effort. Consequently, the evaluating Agency likely would conclude that the joint word-processing software development project is an efficiency-enhancing integration of economic activity that promotes procompetitive benefits.

**Example 7 (Efficiency-Enhancing Integration Absent)**

**Facts**

Each of the three major producers of flashlight batteries has a patent on a process for manufacturing a revolutionary new flashlight battery -- the Century Battery -- that would last 100 years without requiring recharging or replacement. There is little chance that another firm could produce such a battery without infringing one of the patents. Based on consumer surveys, each firm believes that aggregate profits will be less if all three sold the Century Battery than if all three sold only conventional batteries, but that any one firm could maximize profits by being the first to introduce a Century Battery. All three are capable of introducing the Century Battery within two years, although it is uncertain who would be first to market.

One component in all conventional batteries is a copper widget. An essential element in each producers' Century Battery would be a zinc, rather than a copper widget. Instead of introducing the Century Battery, the three producers agree that their batteries will use only copper widgets. Adherence to the agreement precludes any of the producers from introducing a Century Battery.

**Analysis**

The agreement to use only copper widgets is merely an agreement not to produce any zinc-based batteries, in particular, the Century Battery. It is "an agreement not to compete on . . . output" and is "of a type that always or almost always tends to raise price or reduce output." The participants do not collaborate to perform any business functions, and there are no procompetitive benefits from an efficiency-enhancing integration of economic activity. The evaluating Agency likely would challenge the agreement to use only copper widgets as per se illegal.

**Section 3.3**

**Example 8 (Rule-of-Reason: Agreement Quickly Exculpated)**

**Facts**

Under the facts of Example 4, Net-Business and Net-Company jointly market their independently-produced network software products through NET-FIRM. Those facts are changed in one respect: rather than jointly setting the prices of their products, Net-Business and Net-Company will each independently specify the prices at which its products are to be sold by NET-FIRM. The participants explicitly agree that each company will decide on the prices for its own software independently of the other company. The collaboration also includes a requirement that NET-FIRM compile and transmit to each participant quarterly reports summarizing any comments received from customers in the course of NET-FIRM's marketing efforts regarding the desirable/undesirable features of and desirable improvements to (1) that participant's product and (2) network software in general. Sufficient provisions are included to prevent the company-specific information reported to one participant from being disclosed to the other, and those provisions are followed. The information pertaining to network software in general is to be

reported simultaneously to both participants.

**Analysis**

Under these revised facts, there is no agreement "not to compete on price or output." Absent any agreement of a type that always or almost always tends to raise price or reduce output, and absent any subsequent conduct suggesting that the firms did not follow their explicit agreement to set prices independently, no aspect of the partnership arrangement might be subjected to per se analysis. Analysis would continue under the rule of reason.

The information disclosure arrangements provide for the sharing of a very limited category of information: customer-response data pertaining to network software in general. Collection and sharing of information of this nature is unlikely to increase the ability or incentive of Net-Business or Net-Company to raise price or reduce output, quality, service, or innovation. There is no evidence that the disclosure arrangements have caused anticompetitive harm and no evidence that the prohibitions against disclosure of firm-specific information have been violated. Under any plausible relevant market definition, Net-Business and Net-Company have small market shares, and there is no other evidence to suggest that they have market power. In light of these facts, the evaluating Agency would refrain from further investigation.

**Section 3.36(a)**

**Example 9 (Cost Savings from Anticompetitive Output or Service Reductions)**

**Facts**

Two widget manufacturers enter a marketing collaboration. Each will continue to manufacture and set the price for its own widget, but the widgets will be promoted by a joint sales force. The two manufacturers conclude that through this collaboration they can increase their profits using only half of their aggregate pre-collaboration sales forces by (1) taking advantage of economies of scale -- presenting both widgets during the same customer call -- and (2) refraining from time-consuming demonstrations highlighting the relative advantages of one manufacturer's widgets over the other manufacturer's widgets. Prior to their collaboration, both manufacturers had engaged in the demonstrations.

**Analysis**

The savings attributable to economies of scale would be cognizable efficiencies. In contrast, eliminating demonstrations that highlight the relative advantages of one manufacturer's widgets over the other manufacturer's widgets deprives customers of information useful to their decision making. Cost savings from this source arise from an anticompetitive output or service reduction and would not be cognizable efficiencies.

**Section 3.36(b)**

**Example 10 (Efficiencies from Restrictions on Competitive Independence)**

**Facts**

Under the facts of Example 6, Compu-Max and Compu-Pro decide to collaborate on developing and marketing word-processing software. The firms agree that neither one will engage in R&D for designing word-processing software outside of their WORD-FIRM joint venture. Compu-Max papers drafted during the negotiations cite the concern that absent a restriction on outside word-processing R&D, Compu-Pro might withhold its best ideas, use the joint venture to learn Compu-Max's approaches to design problems, and then use that information to design an improved word-processing software product on its own. Compu-Pro's files contain similar documents regarding Compu-Max.

Compu-Max and Compu-Pro further agree that neither will sell its previously designed word-processing program once their jointly developed product is ready to be introduced. Papers in both firms' files, dating from the time of the negotiations, state that this latter restraint was designed to foster greater trust between the participants and thereby enable the collaboration to function more smoothly. As further support, the parties point to a recent failed collaboration involving other firms who sought to collaborate on developing and selling a new spread-sheet program while independently marketing their older spread-sheet software.

**Analysis**

The restraints on outside R&D efforts and on outside sales both restrict the competitive independence of the participants and could cause competitive harm. The evaluating Agency would inquire whether each restraint is reasonably necessary to achieve cognizable efficiencies. In the given context, that inquiry would entail an assessment of whether, by aligning the participants' incentives, the restraints in fact are reasonably necessary to deter opportunistic conduct that otherwise would likely prevent achieving cognizable efficiency goals of the collaboration.

With respect to the limitation on independent R&D efforts, possible alternatives might include agreements specifying the level and quality of each participant's R&D contributions to WORD-FIRM or requiring the sharing of all relevant R&D. The evaluating Agency would assess whether any alternatives would permit each participant to adequately monitor the scope and quality of the other's R&D contributions and whether they would effectively prevent the misappropriation of the other participant's know-how. In some circumstances, there may be no "practical, significantly less restrictive" alternative.

Although the agreement prohibiting outside sales might be challenged as per se illegal if not reasonably necessary for achieving the procompetitive benefits of the integration discussed in Example 6, the evaluating Agency likely would analyze the agreement under the rule of reason if

it could not adequately assess the claim of reasonable necessity through limited factual inquiry. As a general matter, participants' contributions of marketing assets to the collaboration could more readily be monitored than their contributions of know-how, and neither participant may be capable of misappropriating the other's marketing contributions as readily as it could misappropriate know-how. Consequently, the specification and monitoring of each participant's marketing contributions could be a "practical, significantly less restrictive" alternative to prohibiting outside sales of pre-existing products. The evaluating Agency, however, would examine the experiences of the failed spread-sheet collaboration and any other facts presented by the parties to better assess whether such specification and monitoring would likely enable the achievement of cognizable efficiencies.

## Schedule II - Article 81 of the EC Treaty

Article 81

1. The following shall be prohibited as incompatible with the common 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 common 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 questions.

COMMISSION NOTICE

# Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements

(2001/C 3/02)

(Text with EEA relevance)

## 1. INTRODUCTION

### 1.1. Purpose

1. These guidelines set out the principles for the assessment of horizontal cooperation agreements under Article 81 of the Treaty. A cooperation is of a 'horizontal nature' if an agreement or concerted practice is entered into between companies operating at the same level(s) in the market. In most instances, horizontal cooperation amounts to cooperation between competitors. It covers for example areas such as research and development (R & D), production, purchasing or commercialisation.

2. Horizontal cooperation may lead to competition problems. This is for example the case if the parties to a cooperation agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products.

3. On the other hand, horizontal cooperation can lead to substantial economic benefits. Companies need to respond to increasing competitive pressure and a changing market place driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means to share risk, save costs, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place.

4. The Commission, while recognising the economic benefits that can be generated by cooperation, has to ensure that effective competition is maintained. Article 81 provides the legal framework for a balanced assessment taking into account both anti-competitive effects as well as economic benefits.

5. In the past, two Commission notices and two block exemption regulations provided guidance for the assessment of horizontal cooperation under Article 81. Commission Regulation (EEC) No 417/85 [1], as last amended by Regulation (EC) No 2236/97 [2] and Commission Regulation (EEC) No 418/85 [3], as last amended by Regulation (EC) No 2236/97, provided for the exemption of certain forms of specialisation agreement and research and development agreement (R & D) respectively. Those two Regulations have now been replaced by 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 [4] ('the Specialisation block exemption Regulation') 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 [5] ('the R & D block exemption Regulation'). The two notices provided guidance in respect of certain types of cooperation agreement falling outside Article 81 [6] and the assessement of cooperative joint ventures [7].

6. Changing markets have generated an increasing variety and use of horizontal cooperation. More complete and updated guidance is needed to improve clarity and transparency regarding the applicability of Article 81 in this area. Within the assessment greater emphasis has to be put on economic criteria to better reflect recent developments in enforcement practice and the case law of the Court of Justice and Court of First Instance of the European Communities.

7. The purpose of these guidelines is to provide an analytical framework for the most common types of horizontal cooperation. This framework is primarily based on criteria that help to analyse the economic context of a cooperation agreement. Economic criteria such as the market power of the parties and other factors relating to the market structure, form a key element of the assessment of the market impact likely to be caused by a cooperation and therefore for the assessment under Article 81. Given the enormous variety in types and combinations of horizontal cooperation and market circumstances in which they operate, it is impossible to provide specific answers for every possible scenario. The present analytical framework based on economic criteria will nevertheless assist businesses in assessing the compatibility of an individual cooperation agreement with Article 81.

8. The guidelines not only replace the Notices referred to in paragraph 5, but also cover a wider range of the most common types of horizontal agreements. They complement the R & D block exemption Regulation and the Specialisation block exemption Regulation.

## 1.2. Scope of the guidelines

9. These guidelines cover agreements or concerted practices (hereinafter referred to as 'agreements') entered into between two or more companies operating at the same level(s) in the market, e.g. at the same level of production or distribution. Within this context the focus is an cooperation between competitors. The term 'competitors' as used in these guidelines includes both actual ([8]) and potential ([9]).

10. The present guidelines do not, however, address all possible horizontal agreements. They are only concerned with those types of cooperation which potentially generate efficiency gains, namely agreements on R & D, production, purchasing, commercialisation, standardisation, and environmental agreements. Other types of horizontal agreements between competitors, for example on the exchange of information or on minority shareholdings, are to be addressed separately.

11. Agreements that are entered into between companies operating at a different level of the production or distribution chain, that is to say vertical agreements, are in principle excluded from these guidelines and dealt with in Commission Regulation (EC) No 2790/1999 ([10]) (the 'Block Exemption Regulation on Vertical Restraints') and the Guidelines on vertical restraints ([11]). However, to the extent that vertical agreements, e.g. distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, these agreements have to be assessed according to the principles described in the present guidelines. This does not exclude the additional application of the Guidelines on Vertical Restraints to these agreements to assess the vertical restraints included in such agreements ([12]).

12. Agreements may combine different stages of cooperation, for example R & D and the production of its results. Unless they fall under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ([13]), as last amended by Regulation (EC) No 1310/97 ([14]) ('the Merger Regulation'), these agreements are covered by the guidelines. The centre of gravity of the cooperation determines which section of the present guidelines applies to the agreement in question. In the determination of the centre of gravity, account is taken in particular of two factors: firstly, the starting point of the cooperation, and, secondly, the degree of integration of the different functions which are being combined. A cooperation involving both joint R & D and joint production of the results would thus normally be covered in the section on 'Agreements on Research and Development', as the joint production will only take place if the joint R & D is successful. This implies that the results of the joint R & D are decisive for production. The R & D agreement can thus be regarded as the starting point of the cooperation. This assessment would change if the agreement foresaw a full integration in the area of production and only a partial integration of some R & D activities. In this case, the possible anti-competitive effects and economic benefits of the cooperation would largely relate to the joint production, and the agreement would therefore be examined according to the principles set out in the section on 'Production Agreements'. More complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation in varying ways are not covered by the guidelines. The assessment of each individual area of cooperation within an alliance may be carried out with the help of the corresponding chapter in the guidelines. However, complex arrangements must also be analysed in their totality. Due to the variety of areas an alliance may combine, it is impossible to give general guidance for such an overall assessment. Alliances or other forms of cooperation that primarily declare intentions are impossible to assess under the competition rules as long as they lack a precise scope.

13. The criteria set out in these guidelines apply to cooperation concerning both goods and services, collectively referred to as 'products'. However, the guidelines do not apply to the extent that sector-specific rules apply, as is the case for agriculture, transport or insurance ([15]). Operations that come under the Merger Regulation are also not the subject of the present guidelines.

14. Article 81 only applies to those horizontal cooperation agreements which may affect trade between Member States. These guidelines are not concerned with the analysis of the capability of a given agreement to affect trade. The following principles on the applicability of Article 81 are therefore based on the assumption that trade between Member States is affected. In practice, however, this issue needs to be examined on a case-by-case basis.

15. Article 81 does not apply to agreements which are of minor importance because they are not capable of appreciably restricting competition by object or effect. These guidelines are without prejudice to the application of the present or any future 'de minimis' notice ([16]).

16. The assessment under Article 81 as described in these guidelines is without prejudice to the possible parallel application of Article 82 of the Treaty to horizontal cooperation agreements. Furthermore, these guidelines are without prejudice to the interpretation that may be given by the Court of First Instance and the Court of Justice of the European Communities in relation to the application of Article 81 to horizontal cooperation agreements.

### 1.3. Basic principles for the assessment under Article 81

#### 1.3.1. *Article 81(1)*

17. Article 81(1) applies to horizontal cooperation agreements which have as their object or effect the prevention, restriction or distortion of competition (hereinafter referred to as 'restrictions of competition').

18. In some cases the nature of a cooperation indicates from the outset the applicability of Article 81(1). This is the case for agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers. These agreements are presumed to have negative market effects. It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1).

19. Many horizontal cooperation agreements, however, do not have as their object a restriction of competition. Therefore, an analysis of the effects of the agreement is necessary. For this analysis it is not sufficient that the agreement limits competition between the parties. It must also be likely to affect competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected.

20. Whether the agreement is able to cause such negative market effects depends on the economic context taking into account both the nature of the agreement and the parties' combined market power which determines — together with other structural factors -- the capability of the cooperation to affect overall competition to such a significant extent.

Nature of the agreement

21. The nature of an agreement relates to factors such as the area and objective of the cooperation, the competitive relationship between the parties and the extent to which they combine their activities. These factors indicate the likelihood of the parties coordinating their behaviour in the market.

22. Certain types of agreement, for instance most R & D agreements or cooperation to set standards or improve environmental conditions, are less likely to include restrictions with respect to prices and output. If these types of agreements have negative effects at all these are likely to be on innovation or the variety of products. They may also give rise to foreclosure problems.

23. Other types of cooperation such as agreements on production or purchasing typically cause a certain degree of commonality in (total) costs. If this degree is significant, the parties may more easily coordinate market prices and output. A significant degree of commonality in costs can only be achieved under certain conditions: First, the area of cooperation, e.g. production and purchasing, has to account for a high proportion of the total costs in a given market. Secondly, the parties need to combine their activities in the area of cooperation to a significant extent. This is, for instance, the case, where they jointly manufacture or purchase an important intermediate product or a high proportion of their total output of a final product.

Agreements that do not fall under Article 81(1)

24. Some categories of agreements do not fall under Article 81(1) because of their very nature. This is normally true for cooperation that does not imply a coordination of the parties' competitive behaviour in the market such as

— cooperation between non-competitors,

— cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation,

— cooperation concerning an activity which does not influence the relevant parameters of competition.

These categories of cooperation could only come under Article 81(1) if they involve firms with significant market power ([17]) and are likely to cause foreclosure problems vi-à-vis third parties.

Agreements that almost always fall under Article 81(1)

25. Another category of agreements can be assessed from the outset as normally falling under Article 81(1). This concerns cooperation agreements that have the object to restrict competition by means of price fixing, output limitation or sharing of markets or customers. These restrictions are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. Price fixing and output limitation directly lead to customers paying higher prices or not receiving the desired quantities. The sharing of markets or customers reduces the choice available to customers and therefore also leads to higher prices or reduced output. It can therefore be presumed that these restrictions have negative market effects. They are therefore almost always prohibited ([18]).

Agreements that may fall under Article 81(1)

26. Agreements that do not belong to the above-mentioned categories need further analysis in order to decide whether they fall under Article 81(1). The analysis has to include market-related criteria such as the market position of the parties and other structural factors.

Market power and market structure

27. The starting point for the analysis is the position of the parties in the markets affected by the cooperation. This determines whether or not they are likely to maintain, gain or increase market power through the cooperation, i.e. have the ability to cause negative market effects as to prices, output, innovation or the variety or quality of goods and services. To carry out this analysis the relevant market(s) have to be defined by using the methodology of the Commission's market definition notice [19]. Where specific types of markets are concerned such as purchasing or technology markets, these guidelines will provide additional guidance.

28. If the parties together have a low combined market share [20], a restrictive effect of the cooperation is unlikely and no further analysis normally is required. If one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a restrictive effect on competition in the market [21]. Given the variety of cooperation types and the different effects they may cause in different market situations, it is impossible to give a general market share threshold above which sufficient market power for causing restrictive effects can be assumed.

29. In addition to the market position of the parties and the addition of market shares, the market concentration, i.e. the position and number of competitors, may have to be taken into account as an additional factor to assess the impact of the cooperation on market competition. As an indicator the Herfindahl-Hirshman Index ('HHI'), which sums up the squares of the individual market shares of all competitors [22], can be used: With an HHI below 1 000 the market concentration can be characterised as low, between 1 000 and 1 800 as moderate and above 1 800 as high. Another possible indicator would be the leading firm concentration ratio, which sums up the individual market shares of the leading competitors [23].

30. Depending on the market position of the parties and the concentration in the market, other factors such as the stability of market shares over time, entry barriers and the likelihood of market entry, the countervailing power of buyers/suppliers or the nature of the products (e.g. homogeneity, maturity) have to be considered as well. Where an impact on competition in innovation is likely and can not be assessed adequately on the basis of existing markets, specific factors to analyse these impacts may have to be taken into account (see Chapter 2, R & D agreements).

1.3.2. *Article 81(3)*

31. Agreements that come under Article 81(1) may be exempted provided the conditions of Article 81(3) are fulfilled. This is the case if the agreement

— contributes to improving the production or distribution of products or to promoting technical or economic progress

— allows consumers a fair share of the resulting benefit

and does not

— impose restrictions which are not indispensable to the attainment of the above listed objectives

— afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Economic benefits

32. The first condition requires that the agreement contributes to improving the production or distribution of products or to promoting technical or economic progress. As these benefits relate to static or dynamic efficiencies, they can be referred to as 'economic benefits'. Economic benefits may outweigh restrictive effects on competition. For instance, a cooperation may enable firms to offer goods or services at lower prices, better quality or to launch innovation more quickly. Most efficiencies stem from the combination and integration of different skills or resources. The parties must demonstrate that the efficiencies are likely to be caused by the cooperation and cannot be achieved by less restrictive means (see also below). Efficiency claims must be substantiated. Speculations or general statements on cost savings are not sufficient.

33. The Commission does not take into account cost savings that arise from output reduction, market sharing, or from the mere exercise of market power.

Fair share for the consumers

34. Economic benefits have to favour not only the parties to the agreement, but also the consumers. Generally, the transmission of the benefits to the consumers will depend on the intensity of competition within the relevant market. Competitive pressures will normally ensure that cost-savings are passed on by way of lower prices or that companies have an incentive to bring new products to the market as quickly as possible. Therefore, if sufficient competition which effectively constrains the parties to the agreement is maintained on the market, the competitive process will normally ensure that the consumers receive a fair share of the economic benefits.

Indispensability

35. The restriction of competition must be necessary to achieve the economic benefits. If there are less restrictive means to achieve similar benefits, the claimed efficiencies cannot be used to justify the restrictions of competition. Whether or not individual restrictions are necessary depends on market circumstances and on the duration of the agreement. For instance, exclusivity agreements may prevent a participating party from free riding and may therefore be acceptable. Under certain circumstances they may, however, not be necessary and worsen a restrictive effect.

No elimination of competition

36. The last criterion of elimination of competition for a substantial part of the products in question is related to the question of dominance. Where an undertaking is dominant or becoming dominant as a consequence of a horizontal agreement, an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted.

Block Exemption Regulations for R & D and Specialisation

37. Under certain conditions the criteria of Article 81(3) can be assumed to be fulfilled for specified categories of agreements. This is in particular the case for R & D and production agreements where the combination of complementary skills or assets can be the source of substantial efficiencies. These guidelines should be seen as a complement to the R & D and Specialisation block exemption Regulations. Those block exemption Regulations exempt most common forms of agreements in the fields of production/specialisation up to a market share threshold of 20 % and in the field of R & D up to a market share threshold of 25 % provided that the agreements fulfil the conditions for application of the block exemption and do not contain 'hard core' restrictions ('black clauses') that render the block exemption inapplicable. The block exemption Regulations do not provide severability for hardcore restrictions. If there are one or more hardcore restrictions, the benefit of the block exemption Regulation is lost for the entire agreement.

### 1.4. Structure of the following chapters on types of cooperation

38. The guidelines are divided into chapters relating to certain types of agreements. Each chapter is structured according to the analytical framework described above under point 1.3. Where necessary, specific guidance on the definition of relevant markets is given (e.g. in the field of R & D or with respect to purchasing markets).

## 2. AGREEMENTS ON RESEARCH AND DEVELOPMENT

### 2.1. Definition

39. R & D agreements may vary in form and scope. They range from outsourcing certain R & D activities to the joint improvement of existing technologies or to a cooperation concerning the research, development and marketing of completely new products. They may take the form of a cooperation agreement or of a jointly controlled company. This chapter applies to all forms of R & D agreements including related agreements concerning the production or commercialisation of the R & D results provided that the cooperation's centre of gravity lies in R & D, with the exception of mergers and joint ventures falling under the Merger Regulation.

40. Cooperation in R & D may reduce duplicative, unnecessary costs, lead to significant cross fertilisation of ideas and experience and thus result in products and technologies being developed more rapidly than would otherwise be the case. As a general rule, R & D cooperation tends to increase overall R & D activities.

41. Small and medium-sized enterprises (SMEs) form a dynamic and heterogeneous community which is confronted by many challenges, including the growing demands of larger companies for which they often work as sub-contractors. In R & D intensive sectors, fast growing SMEs, more often called 'start-up companies', also aim at becoming a leader in fast-developing market segments. To meet those challenges and to remain competitive, SMEs need constantly to innovate. Through R & D cooperation there is a likelihood that overall R & D by SMEs will increase and that they will be able to compete more vigorously with stronger market players.

42. Under certain circumstances, however, R & D agreements may cause competition problems such as restrictive effects on prices, output, innovation, or variety or quality of products.

## 2.2. Relevant markets

43. The key to defining the relevant market when assessing the effects of an R & D agreement is to identify those products, technologies or R & D efforts, that will act as a competitive constraint on the parties. At one end of the spectrum of possible situations, the innovation may result in a product (or technology) which competes in an existing product (or technology) market. This is the case with R & D directed towards slight improvements or variations, such as new models of certain products. Here, possible effects concern the market for existing products. At the other end, innovation may result in an entirely new product which creates its own new market (e.g. of the spectrum of a new vaccine for a previously incurable disease). In such a case, existing markets are only relevant if they are somehow related to the innovation in question. Consequently, and if possible, the effects of the cooperation on innovation have to be assessed. However, most of the cases probably concern situations in between these two extremes, i.e. situations in which innovation efforts may create products (or technology) which, over time, replace existing ones (e.g. CDs which have replaced records). A careful analysis of those situations may have to cover both existing markets and the impact of the agreement on innovation.

### Existing markets

(a) *Product markets*

44. When the cooperation concerns R & D for the improvement of existing products, these existing products including its close substitutes form the relevant market concerned by the cooperation ([24]).

45. If the R & D efforts aim at a significant change of an existing product or even at a new product replacing existing ones, substitution with the existing products may be imperfect or long-term. Consequently, the old and the potentially emerging new products are not likely to belong to the same relevant market. The market for existing products may nevertheless be concerned, if the pooling of R & D efforts is likely to result in the coordination of the parties' behaviour as suppliers of existing products. An exploitation of power in the existing market, however, is only possible if the parties together have a strong position with respect to both the existing product market and R & D efforts.

46. If the R & D concerns an important component of a final product, not only the market for this component may be relevant for the assessment, but the existing market for the final product as well. For instance, if car manufacturers cooperate in R & D related to a new type of engine, the car market may be affected by this R & D cooperation. The market for final products, however, is only relevant for the assessment, if the component at which the R & D is aimed, is technically or economically a key element of these final products and if the parties to the R & D agreement are important competitors with respect to the final products.

(b) *Technology markets*

47. R & D cooperation may not only concern products but also technology. When rights to intellectual property are marketed separately from the products concerned to which they relate, the relevant technology market has to be defined as well. Technology markets consist of the intellectual property that is licensed and its close substitutes, i.e. other technologies which customers could use as a substitute.

48. The methodology for defining technology markets follows the same principles as product market definition ([25]). Starting from the technology which is marketed by the parties, one needs to identify those other technologies to which customers could switch in response to a small but permanent increase in relative prices. Once these technologies are identified, one can calculate market shares by dividing the licensing income generated by the parties with the total licensing income of all sellers of substitutable technologies.

49. The parties' position in the market for existing technology is a relevant assessment criterion where the R & D cooperation concerns the significant improvement of existing technology or a new technology that is likely to replace the existing technology. The parties' market share can however only be taken as a starting point for this analysis. In technology markets, particular emphasis must be put on potential competition. If companies, who do not currently license their technology, are potential entrants on the technology market they could constrain the ability of the parties to raise the price for their technology (see Example 3 below).

### Competition in innovation (R & D efforts)

50. R & D cooperation may not — or not only — affect competition in existing markets, but competition in innovation. This is the case where cooperation concerns the development of new products/technology which either may — if emerging — one day replace existing ones or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand. The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analysing actual or potential competition in existing product/technology markets. In this respect, two scenarios can be distinguished, depending on the nature of the innovative process in a given industry.

51. In the first scenario, which is for instance present in the pharmaceutical industry, the process of innovation is structured in such a way that it is possible at an early stage to identify R & D poles. R & D poles are R & D efforts directed towards a certain new product or technology, and the substitutes for that R & D, i.e. R & D aimed at developing substitutable products or technology for those developed by the cooperation and having comparable access to resources as well as a similar timing. In this case, it can be analysed if after the agreement there will be a sufficient number of R & D poles left. The starting point of the analysis is the R & D of the parties. Then credible competing R & D poles have to be identified. In order to assess the credibility of competing poles, the following aspects have to be taken into account: the nature, scope and size of possible other R & D efforts, their access to financial and human resources, know-how/patents, or other specialised assets as well as their timing and their capability to exploit possible results. An R & D pole is not a credible competitor if it can not be regarded as a close substitute for the parties' R & D effort from the viewpoint of, for instance, access to resources or timing.

52. In the second scenario, the innovative efforts in an industry are not clearly structured so as to allow the identification of R & D poles. In this situation, the Commission would, absent exceptional circumstances, not try to assess the impact of a given R & D cooperation on innovation, but would limit its assessment to product and/or technology markets which are related to the R & D cooperation in question.

Calculation of market shares

53. The calculation of market shares, both for the purposes of the R & D block exemption Regulation and of these guidelines, has to reflect the distinction between existing markets and competition in innovation. At the beginning of a cooperation the reference point is the market for products capable of being improved or replaced by the products under development. If the R & D agreement only aims at improving or refining existing products, this market includes the products directly concerned by the R & D. Market shares can thus be calculated on the basis of the sales value of the existing products. If the R & D aims at replacing an existing product, the new product will, if succesful, become a substitute to the existing products. To assess the competitive position of the parties, it is again possible to calculate market shares on the basis of the sales value of the existing products. Consequently, the R & D block exemption Regulation bases its exemption of these situations on the market share in 'the relevant market for the products capable of being improved or replaced by the contract products'. For an automatic exemption, this market share may not exceed 25 % [26].

54. If the R & D aims at developing a product which will create a complete new demand, market shares based on sales cannot be calculated. Only an analysis of the effects of the agreement on competition in innovation is possible. Consequently, the R & D block exemption Regulation exempts these agreements irrespective of market share for a period of seven years after the product is first put on the market [27]. However, the benefit of the block exemption may be withdrawn if the agreement would eliminate effective competition in innovation [28]. After the seven year period, market shares based on sales value can be calculated, and the market share threshold of 25 % applies [29].

## 2.3. Assessment under Article 81(1)

### 2.3.1. *Nature of the agreement*

#### 2.3.1.1. Agreements that do not fall under Article 81(1)

55. Most R & D agreements do not fall under Article 81(1). First, this can be said for agreements relating to cooperation in R & D at a rather theoretical stage, far removed from the exploitation of possible results.

56. Moreover, R & D cooperation between non-competitors does generally not restrict competition [30]. The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If the parties are not able to carry out the necessary R & D independently, there is no competition to be restricted. This can apply, for example, to firms bringing together complementary skills, technologies and other resources. The issue of potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the cooperation enables them to carry out the R & D activities. The decisive question is whether each party independently has the necessary means as to assets, know-how and other resources.

57. R & D cooperation by means of outsourcing of previously captive R & D is often carried out by specialised companies, research institutes or academic bodies which are not active in the exploitation of the results. Typically such agreements are combined with a transfer of know-how and/or an exclusive supply clause concerning possible results. Due to the complementary nature of the cooperating parties in these scenarios, Article 81(1) does not apply.

58. R & D cooperation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely falls under Article 81(1). Those 'pure' R & D agreements can only cause a competition problem, if effective competition with respect to innovation is significantly reduced.

2.3.1.2. Agreements that almost always fall under Article 81(1)

59. If the true object of an agreement is not R & D but the creation of a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, it falls under Article 81(1). However, an R & D agreement which includes the joint exploitation of possible future results is not necessarily restrictive of competition.

2.3.1.3. Agreements that may fall under Article 81(1)

60. R & D agreements that cannot be assessed from the outset as clearly non-restrictive may fall under Article 81(1) ([11]) and have to be analysed in their economic context. This applies to R & D cooperation which is set up at a stage rather close to the market launch and which is agreed between companies that are competitors on either existing product/technology markets or on innovation markets.

2.3.2. *Market power and market structures*

61. R & D cooperation can cause negative market effects in three respects: First, it may restrict innovation, secondly it may cause the coordination of the parties' behaviour in existing markets and thirdly, foreclosure problems may occur at the level of the exploitation of possible results. These types of negative market effects, however, are only likely to emerge when the parties to the cooperation have significant power on the existing markets and/or competition with respect to innovation is significantly reduced. Without market power there is no incentive to coordinate behaviour on existing markets or to reduce or slow down innovation. A foreclosure problem may only arise in the context of cooperation involving at least one player with significant market power for a key technology and the exclusive exploitation of results.

62. There is no absolute market share threshold which indicates that an R & D agreement creates some degree of market power and thus falls under Article 81(1). However, R & D agreements are exempted provided that they are concluded between parties with a combined market share not exceeding 25 % and that the other conditions for the application of the R & D Block Exemption Regulation are fulfilled. Therefore, for most R & D agreements, restrictive effects only have to be analysed if the parties' combined market share exceeds 25 %.

63. Agreements falling outside the R & D Block Exemption Regulation due to a stronger market position of the parties do not necessarily restrict competition. However, the stronger the combined position of the parties on existing markets and/or the more competition in innovation is restricted, the more likely is the application of Article 81(1) and the assessment requires a more detailed analysis.

64. If the R & D is directed at the improvement or refinement of existing products/technology possible effects concern the relevant market(s) for these existing products/technology. Effects on prices, output and/or innovation in existing markets are, however, only likely if the parties together have a strong position, entry is difficult and few other innovation activities are identifiable. Furthermore, if the R & D only concerns a relatively minor input of a final product, effects as to competition in these final products are, if invariably, very limited. In general, a distinction has to be made between pure R & D agreements and more comprehensive cooperation involving different stages of the exploitation of results (i.e. licensing, production, marketing). As said above, pure R & D agreements rarely come under Article 81(1). This is in particular true for R & D directed towards a limited improvement of existing products/technology. If, in such a scenario, the R & D cooperation includes joint exploitation only by means of licensing, restrictive effects such as foreclosure problems are unlikely. If, however, joint production and/or marketing of the slightly improved products/technology are included, the cooperation has to be examined more closely. First, negative effects as to prices and output in existing markets are more likely if strong competitors are involved in such a situation. Secondly, the cooperation may come closer to a production agreement because the R & D activities may de facto not form the centre of gravity of such a collaboration.

65. If the R & D is directed at an entirely new product (or technology) which creates its own new market, price and output effects on existing markets are rather unlikely. The analysis has to focus on possible restrictions of innovation concerning, for instance, the quality and variety of possible future products/technology or the speed of innovation. Those restrictive effects can arise where two or more of the few firms engaged in the development of such a new product, start to cooperate at a stage where

they are each independently rather near to the launch of the product. In such a case, innovation may be restricted even by a pure R & D agreement. In general, however, R & D cooperation concerning entirely new products is pro-competitive. This principle does not change significantly if the joint exploitation of the results, even joint marketing, is involved. Indeed, the issue of joint exploitation in these situations is only relevant where foreclosure from key technologies plays a role. Those problems would, however, not arise where the parties grant licences to third parties.

66. Most R & D agreements will lie somewhere in between the two situations described above. They may therefore have effects on innovation as well as repercussions on existing markets. Consequently, both the existing market and the effect on innovation may be of relevance for the assessment with respect to the parties' combined positions, concentration ratios, number of players/innovators and entry conditions. In some cases there can be restrictive price/output effects on existing markets and a negative impact on innovation by means of slowing down the speed of development. For instance, if significant competitors on an existing technology market cooperate to develop a new technology which may one day replace existing products, this cooperation is likely to have restrictive effects if the parties have significant market power on the existing market (which would give an incentive to exploit it), and if they also have a strong position with respect to R & D. A similar effect can occur, if the major player in an existing market cooperates with a much smaller or even potential competitor who is just about to emerge with a new product/technology which may endanger the incumbent's position.

67. Agreements may also fall outside the block exemption irrespective of the market power of the parties. This applies for instance to agreements which restrict access of a party to the results of the work because they do not, as a general rule, promote technical and economic progress by increasing the dissemination of technical knowledge between the parties [32]. The Block exemption provides for a specific exception to this general rule in the case of academic bodies, research Regulation institutes or specialised companies which provide R & D as a service and which are not active in the industrial exploitation of the results of research and development [33]. Nevertheless, it should be noted that agreements containing exclusive access rights may, where they fall under Article 81(1), meet the criteria for exemption under Article 81(3), particularly where exclusive access rights are economically indispensable in view of the market, risks and scale of the investment required to exploit the results of the research and development.

## 2.4. Assessment under Article 81(3)

### 2.4.1. *Economic benefits*

68. Most R & D agreements — with or without joint exploitation of possible results — bring about economic benefits by means of cost savings and cross fertilisation of ideas and experience, thus resulting in improved or new products and technologies being developed more rapidly than would otherwise be the case. Under these conditions it appears reasonable to provide for the exemption of such agreements which result in a restriction of competition up to a market share threshold below which it can, for the application of Article 81(3), in general, be presumed that the positive effects of research and development agreements will outweigh any negative effects on competition. Therefore, the R & D Block Exemption Regulation exempts those R & D agreements which fulfill certain conditions (see Article 3) and which do not include hard core restrictions (see Article 5), provided that the combined market share of the parties in the affected existing market(s) does not exceed 25 %.

69. If considerable market power is created or increased by the cooperation, the parties have to demonstrate significant benefits in carrying out R & D, a quicker launch of new products/technology or other efficiencies.

### 2.4.2. *Indispensability*

70. An R & D agreement can not be exempted if it imposes restrictions that are not indispensable to the attainment of the above-mentioned benefits. The individual clauses listed in Article 5 of the R & D block exemption Regulation will in most cases render an exemption impossible following an individual assessment too, and can therefore be regarded as a good indication of restrictions that are not indispensable to the cooperation.

### 2.4.3. *No elimination of competition*

71. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products (or technologies) in question. Where as a consequence of a R & D agreement an undertaking is dominant or becoming dominant either on an existing markets or with respect to innovation, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted. For innovation this is the case, for example, if the agreement combines the only two existing poles of research.

## Time of the assessment and duration of the exemption

72. R & D agreements extending to the joint production and marketing of new products/technology require particular attention as to the time of the assessment.

73. At the beginning of an R & D cooperation, its success and factors such as the parties' future market position as well as the development of future product or technology markets are often not known. Consequently, the assessment at the point in time when the cooperation is formed is limited to the (then) existing product or technology markets and/or innovation markets as described in this chapter. If, on the basis of this analysis, competition is not likely to be eliminated, the R & D agreement can benefit from an exemption. This will normally cover the duration of the R & D phase plus, in as far as the joint production and marketing of the possible results is concerned, an additional phase for a possible launch and market introduction. The reason for this additional exemption phase is that the first companies to reach the market with a new product/technology will often enjoy very high initial market shares and successful R & D is also often rewarded by intellectual property protection. A strong market position due to this 'first mover advantage' cannot normally be interpreted as elimination of competition. Therefore, the block exemption covers R & D agreements for an additional period of seven years (i.e. beyond the R & D phase) irrespective of whether or not the parties obtain with their new products/technology a high share within this period. This also applies to the individual assessment of cases falling outside the block exemption provided that the criteria of Article 81(3) as to the other aspects of the agreement are fulfilled. This does not exclude the possibility that a period of more than 7 years also meets the criteria of Article 81(3) if it can be shown to be the minimum period of time necessary to guarantee an adequate return on the investment involved.

74. If a new assessment of an R & D cooperation is made after that period — for instance, following a complaint — the analysis has to be based on the (then) existing market situation. The block exemption still continues to apply if the parties' share on the (then) relevant market does not exceed 25 %. Similarly, Article 81(3) continues to apply to R & D agreements falling outside the block exemption provided that the criteria for an exemption are fulfilled.

## 2.5. Examples

75. Example 1

**Situation:** There are two major companies on the European market for the manufacture of existing electronic components: A (30 %) and B (30 %). They have each made significant investment in the R & D necessary to develop miniaturised electronic components and have developed early prototypes. They now agree to pool these R & D efforts by setting up a JV to complete the R & D and produce the components, which will be sold back to the parents, who will commercialise them separately. The remainder of the market consists of small firms without sufficient resources to undertake the necessary investments.

**Analysis:** Miniaturised electronic components, while likely to compete with the existing components in some areas, are essentially a new technology and an analysis must be made of the poles of research destined towards this future market. If the JV goes ahead then only one route to the necessary manufacturing technology will exist, whereas it would appear likely that A and B could reach the market individually with separate products. While the agreement could have advantages in bringing a new technology forward quicker, it also reduces variety and creates a commonality of costs between the parties. Furthermore, the possibility for the parties to exploit their strong position on the existing market must be taken into account. Since they would face no competition at the R & D level, their incentives to pursue the new technology at a high pace could be severely reduced. Although some of these concerns could be remedied by requiring the parties to license key know-how for manufacturing miniature components to third parties on reasonable terms, it may not be possible to remedy all concerns and fulfil the conditions for an exemption.

76. Example 2

**Situation:** A small research company A which does not have its own marketing organisation has discovered and patented a pharmaceutical substance based on new technology that will revolutionise the treatment of a certain disease. Company A enters into an R & D agreement with a large pharmaceutical producer B of products that have so far been used for treating the disease. Company B lacks any similar R & D programme. For the existing products company B has a market share of around 75 % in all Member States, but patents are expiring over the next five-year period. There exist two other poles of research at approximately the same stage of development using the same basic new technology. Company B will provide considerable funding and know-how for product development, as well as future access to the market. Company B is granted a license for the exclusive production and distribution of the resulting product for the duration of the patent. It is expected that the parties could jointly bring the product to market in five to seven years.

**Analysis:** The product is likely to belong to a new relevant market. The parties bring complementary resources and skills to the cooperation, and the probability of the product coming to market increases substantially. Although Company B is likely to have considerable market power on the existing market, this power will be decreasing shortly and the existence of other poles of research are likely to eliminate any incentive to reduce R & D efforts. The exploitation rights during the remaining patent period are likely to be necessary for Company B to make the considerable investments needed and Company A has no own marketing resources. The agreement is therefore unlikely to restrict competition.

77. Example 3

**Situation:** Two engineering companies that produce vehicle components, agree to set up a JV to combine their R & D efforts to improve the production and performance of an existing component. They also pool their existing technology licensing businesses in this area, but will continue to manufacture separately. The two companies have market shares in Europe of 15 % and 20 % on the OEM product market. There are two other major competitors together with several in-house research programmes by large vehicle manufacturers. On the world-wide market for the licensing of technology for these products they have shares of 20 % and 25 %, measured in terms of revenue generated, and there are two other major technologies. The product life cycle for the component is typically two to three years. In each of the last five years one of the major firms has introduced a new version or upgrade.

**Analysis:** Since neither company's R & D effort is aimed at a completely new product, the markets to consider are for the existing components and for the licensing of relevant technology. Although their existing R & D programmes broadly overlap, the reduced duplication through the cooperation could allow them to spend more on R & D than individually. Several other technologies exist and the parties' combined market share on the OEM market does not bring them into a dominant position. Although their market share on the technology market, at 45 %, is very high, there are competing technologies. In addition, the vehicle manufacturers, who do not currently licence their technology, are also potential entrants on this market thus constraining the ability of the parties to raise price. As described, the JV is likely to benefit from an exemption.

## 3. PRODUCTION AGREEMENTS (INCLUDING SPECIALISATION AGREEMENTS)

### 3.1. Definition

78. Production agreements may vary in form and scope. They may take the form of joint production through a joint venture [14], i.e. a jointly controlled company that runs one or several production facilities, or can be carried out by means of specialisation or subcontracting agreements whereby one party agrees to carry out the production of a certain product.

79. Generally, one can distinguish three categories of production agreements: Joint production agreements, whereby the parties agree to produce certain products jointly, (unilateral or reciprocal) specialisation agreements, whereby the parties agree unilaterally or reciprocally to cease production of a product and to purchase it from the other party, and subcontracting agreements whereby one party (the 'contractor') entrusts to another party (the 'subcontractor') the production of a product.

80. Subcontracting agreements are vertical agreements. They are therefore, to the extent that they contain restrictions of competition, covered by the Block Exemption Regulation and the Guidelines on Vertical Restraints. There are however two exceptions to this rule: Subcontracting agreements between competitors [35], and subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor [36].

81. Subcontracting agreements between competitors are covered by these guidelines [37]. Guidance for the assessment of subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor is given in a separate Notice [38].

### 3.2. Relevant markets

82. In order to assess the competitive relationship between the cooperating parties, the relevant product and geographic market(s) directly concerned by the cooperation (i.e. the market(s) to which products subject to the agreement belong) must first be defined. Secondly, a production agreement in one market may also affect the competitive behaviour of the parties in a market which is downstream or upstream or a neighbouring market closely related to the market directly concerned by the cooperation [39] (so-called 'spill-over markets'). However, spill-over effects only occur if the cooperation in one market necessarily results in the coordination of competitive behaviour in another market, i.e. if the markets are linked by interdependencies, and if the parties are in a strong position on the spill-over market.

### 3.3. Assessment under Article 81 (1)

#### 3.3.1. *Nature of the agreement*

83. The main source of competition problems that may arise from production agreements is the coordination of the parties' competitive behaviour as suppliers. This type of competition problem arises where the cooperating parties are actual or potential competitors on at least one of these relevant market(s), i.e. on the markets directly concerned by the cooperation and/or on possible spill-over markets.

84. The fact that the parties are competitors does not automatically cause the coordination of their behaviour. In addition, the parties normally need to cooperate with regard to a significant part of their activities in order to achieve a substantial degree of commonality of costs. The higher the degree of commonality of costs, the greater the potential for a limitation of price competition, especially in the case of homogenous products.

85. In addition to coordination concerns, production agreements may also create foreclosure problems and other negative effects towards third parties. They are not caused by a competitive relationship between the parties, but by a strong market position of at least one of the parties (e.g. on an upstream market for a key component, which enables the parties to raise the costs of their rivals in a downstream market) in the context of a more vertical or complementary relationship between the cooperating parties. Therefore, the possibility of foreclosure mainly needs to be examined in the case of joint production of an important component and of subcontracting agreements (see below).

##### 3.3.1.1. Agreements that do not fall under Article 81(1)

86. Unless foreclosure problems arise, production agreements between non-competitors are not normally caught by Article 81(1). This is also true for agreements whereby inputs or components which have so far been manufactured for own consumption (captive production) are purchased from a third party by way of subcontracting or unilateral specialisation, unless there are indications that the company which so far has only produced for own consumption could have entered the merchant market for sales to third parties without incurring significant additional costs or risks in response to small, permanent changes in relative market prices.

87. Even production agreements between competitors do not necessarily come under Article 81(1). First, cooperation between firms which compete on markets closely related to the market directly concerned by the cooperation, cannot be defined as restricting competition, if the cooperation is the only commercially justifiable possible way to enter a new market, to launch a new product or service or to carry out a specific project.

88. Secondly, an effect on the parties' competitive behaviour as market suppliers is highly unlikely if the parties have a small proportion of their total costs in common. For instance, a low degree of commonality in total costs can be assumed where two or more companies agree on specialisation/joint production of an intermediate product which only accounts for a small proportion of the production costs of the final product and, consequently, the total costs. The same applies to a subcontracting agreement between competitors where the input which one competitor purchases from another only accounts for a small proportion of the production costs of the final product. A low degree of commonality of total costs can also be assumed where the parties jointly manufacture a final product, but only a small proportion as compared to their total output of the final product. Even if a significant proportion is jointly manufactured, the degree of commonality of total costs may nevertheless be low or moderate, if the cooperation concerns heterogeneous products which require costly marketing.

89. Thirdly, subcontracting agreements between competitors do not fall under Article 81(1) if they are limited to individual sales and purchases on the merchant market without any further obligations and without forming part of a wider commercial relationship between the parties ([40]).

##### 3.3.1.2. Agreements that almost always fall under Article 81(1)

90. Agreements which fix the prices for market supplies of the parties, limit output or share markets or customer groups have the object of restricting competition and almost always fall under Article 81(1). This does, however, not apply to cases

— where the parties agree on the output directly concerned by the production agreement (e.g. the capacity and production volume of a joint venture or the agreed amount of outsourced products), or

— where a production joint venture that also carries out the distribution of the manufactured products sets the sales prices for these products, provided that the price fixing by the joint venture is the effect of integrating the various functions ([41]).

In both scenarios the agreement on output or prices will not be assessed separately, but in light of the overall effects of the joint venture on the market in order to determine the applicability of Article 81(1).

3.3.1.3. Agreements that may fall under Article 81(1)

91. Production agreements that cannot be characterised as clearly restrictive or non-restrictive on the basis of the above factors may fall under Article 81(1) [42] and have to be analysed in their economic context. This applies to cooperation agreements between competitors which create a significant degree of commonality of costs, but do not involve hard core restrictions as described above.

3.3.2. *Market power and market structures*

92. The starting point for the analysis is the position of the parties in the market(s) concerned. This is due to the fact that without market power the parties to a production agreement do not have an incentive to coordinate their competitive behaviour as suppliers. Secondly, there is no effect on competition in the market without market power of the parties, even if the parties would coordinate their behaviour.

93. There is no absolute market share threshold which indicates that a production agreement creates some degree of market power and thus falls under Article 81(1). However, agreements concerning unilateral or reciprocal specialisation as well as joint production are block exempted provided that they are concluded between parties with a combined market share not exceeding 20 % in the relevant market(s) and that the other conditions for the application of the Specialisation block exemption Regulation are fulfilled. Therefore, for agreements covered by the block exemption, restrictive effects only have to be analysed if the parties combined market share exceeds 20 %.

94. Agreements which are not covered by the block exemption Regulation require a more detailed analysis. The starting point is the market position of the parties. This will normally be followed by the concentration ratio and the number of players as well as by other factors as described in Chapter 1.

95. Usually the analysis will only involve the relevant market(s) with which the cooperation is directly concerned. Under certain circumstances, e.g. if the parties have a very strong combined position on up- or downstream markets or on markets otherwise closely related to the markets with which the cooperation is directly concerned, these spill-over markets may however have to be analysed as well. This applies in particular to cooperation in upstream markets by firms which also enjoy a strong combined market position further downstream. Similarly, problems of foreclosure may need to be examined if the parties individually have a strong position as either supplier or buyers of an input.

Market position of the parties, concentration ratio, number of players and other structural factors

96. If the parties' combined market share is larger than 20 %, the likely impact of the production agreement on the market must be assessed. In this respect market concentration as well as market shares will be a significant factor. The higher the combined market share of the parties, the higher the concentration in the market concerned. However, a moderately higher market share than allowed for in the block exemption does not necessarily imply a high concentration ratio. For instance, a combined market share of the parties of slightly more than 20 % may occur in a market with a moderate concentration (HHI below 1800). In such a scenario a restrictive effect is unlikely. In a more concentrated market, however, a market share of more than 20 % may, alongside other elements, lead to a restriction of competition (see also example 1 below). The picture may nevertheless change, if the market is very dynamic with new participants entering the market and market positions changing frequently.

97. For joint production, network effects, i.e. links between a significant number of competitors, can also play an important role. In a concentrated market the creation of an additional link may tip the balance and make collusion in this market likely, even if the parties have a significant, but still moderate, combined market share (see example 2 below).

98. Under specific circumstances a cooperation between potential competitors may also raise competition concerns. This is, however, limited to cases where a strong player in one market cooperates with a realistic potential entrant, for instance, with a strong supplier of the same product or service in a neighbouring geographic market. The reduction of potential competition creates particular problems if actual competition is already weak and threat of entry is a major source of competition.

Cooperation in upstream markets

99. Joint production of an important component or other input to the parties' final product can cause negative market effects under certain circumstances:

— Foreclosure problems (see example 3 below) provided that the parties have a strong position on the relevant input market (non-captive use) and that switching between captive and non-captive use would not occur in the presence of a small but permanent relative price increase for the product in question.

— Spill-over effects (see example 4 below) provided that the input is an important component of costs and that the parties have a strong position in the downstream market for the final product.

Subcontracting agreements between competitors

100. Similar problems can arise if a competitor subcontracts an important component or other input to its final product from a competitor. This can also lead to:

— Foreclosure problems provided that the parties have a strong position as either suppliers or buyers on the relevant input market (non-captive use). Subcontracting could then either lead to other competitors not being able to obtain this input at a competitive price or to other suppliers not being able to supply the input competitively if they will be losing a large part of their demand.

— Spill-over effects provided that the input is an important component of costs and that the parties have a strong position in the downstream market for the final product.

Specialisation agreements

101. Reciprocal specialisation agreements with market shares beyond the threshold of the block exemption will almost always fall under Article 81(1) and have to be examined carefully because of the risk of market partitioning (see example 5 below).

### 3.4. Assessment under Article 81(3)

#### 3.4.1. *Economic benefits*

102. Most common types of production agreements can be assumed to cause some economic benefits in the form of economies of scale or scope or better production technologies unless they are an instrument for price fixing, output restriction or market and customer allocation. Under these conditions it appears reasonable to provide for the exemption of such agreements which result in a restriction of competition up to a market share threshold below which it can, for the application of Article 81(3), in general, be presumed that the positive effects of production agreements will outweigh any negative effects on competition. Therefore, agreements concerning unilateral or reciprocal specialisation as well as joint production are block exempted (Specialisation block exemption Regulation) provided that they do not contain hard core restrictions (see Article 5) and that they are concluded between parties with a combined market share not exceeding 20 % in the relevant market(s).

103. For those agreements not covered by the block exemption the parties have to demonstrate improvements of production or other efficiencies. Efficiencies that only benefit the parties or cost savings that are caused by output reduction or market allocation cannot be taken into account.

#### 3.4.2. *Indispensability*

104. Restrictions that go beyond what is necessary to achieve the economic benefits described above will not be accepted. For instance, parties should not be restricted in their competitive behaviour on output outside the cooperation.

#### 3.4.3. *No elimination of competition*

105. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. Where as a consequence of a production agreement an undertaking is dominant or becoming dominant, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted. This has to be analysed on the relevant market to which the products subject to the cooperation belong and on possible spill-over markets.

### 3.5. Examples

Joint production

106. The following two examples concern hypothetical cases causing competition problems on the relevant market to which the jointly manufactured products belong.

107. Example 1

**Situation**: Two suppliers, A and B, of the basic chemical product X decide to build a new production plant controlled by a joint venture. This plant will produce roughly 50 % of their total output. X is a homogeneous product and is not substitutable with other products, i.e. forms a relevant market on its own. The market is rather stagnant. The parties will not significantly increase total output, but close down two old factories and shift capacity to the new plant. A and B each have a market share of 20 %. There are three other significant suppliers each with 10-15 % market share and several smaller players.

**Analysis**: It is likely that this joint venture would have an effect on the competitive behaviour of the parties because coordination would give them considerable market power, if not even a dominant position. Severe restrictive effects in the market are probable. High efficiency gains which may outweigh these effects are unlikely in such a scenario where a significant increase in output cannot be expected.

108. Example 2

**Situation**: Two suppliers, A and B, form a production joint venture on the same relevant market as in example 1. The joint venture also produces 50 % of the parties' total output. A and B each have 15 % market share. There are 3 other players: C with a market share of 30 %, D with 25 % and E with 15 %. B already has a joint production plant with E.

**Analysis**: Here the market is characterised by very few players and rather symmetric structures. The joint venture creates an additional link between the players. Coordination between A and B would de facto further increase concentration and also link E to A and B. This cooperation is likely to cause a severe restrictive effect, and — as in example 1 — high efficiency gains cannot be expected.

109. Example 3 also concerns the relevant market to which the jointly manufactured products belong, but demonstrates the importance of criteria other than market share (here: switching between captive and non-captive production).

110. Example 3

**Situation**: A and B set up a production joint venture for an intermediate product X through restructuring current plants. The joint venture sells X exclusively to A and B. It produces 40 % of A's total output of X and 50 % of B's total output. A and B are captive users of X and are also suppliers of the non-captive market. A's share of total industry output of X is 10 %, B's share amounts to 20 % and the share of the joint venture to 14 %. On the non-captive market, however, A and B have respectively 25 % and 35 % market share.

**Analysis**: Despite the parties' strong position on the non-captive market the cooperation may not eliminate effective competition in the market for X, if switching costs between captive and non-captive use are small. However, only very rapid switching would counteract the high market share of 60 %. Otherwise this production venture raises serious competition concerns which cannot be outweighed even by significant economic benefits.

111. Example 4 concerns cooperation regarding an important intermediate product with spill-over effects on a downstream market.

112. Example 4

**Situation**: A and B set up a production joint venture for an intermediate product X. They will close their own factories, which have been manufacturing X, and will cover their needs of X exclusively from the joint venture. The intermediate product accounts for 50 % of the total costs of the final product Y. A and B each have a share of 20 % in the market for Y. There are two other significant suppliers of Y each with 15 % market share and several smaller competitors.

**Analysis**: Here the commonality of costs is high; furthermore, the parties would gain market power through coordination of their behaviour on the market Y. The case raises competition problems and the assessment is almost identical to example 1 although here the cooperation is taking place in an upstream market.

**Reciprocal specialisation**

113. Example 5

**Situation**: A and B each manufacture and supply the homogeneous products X and Y, which belong to different markets. A's market share of X is 28 % and of Y it is 10 %. B's share of X is 10 % and of Y it is 30 %. Because of scale economies they conclude a reciprocal specialisation agreement according to which A will in future only produce X and B will produce only Y. Both agree on cross-supplies so that they will both remain in the markets as suppliers. Due to the homogeneous nature of the products, distribution costs are minor. There are two other manufacturing suppliers of X and Y with market shares of roughly 15 % each, the remaining suppliers have 5-10 % shares.

**Analysis**: The degree of commonality of costs is extremely high, only the relatively minor distribution costs remain separate. Consequently, there is very little room for competition left. The parties would gain market power through coordination of their behaviour on the markets for X and Y. Furthermore, it is likely that the market

supplies of Y from A and X from B will diminish over time. The case raises competition problems which the economies of scale are unlikely to outweigh.

The scenario may change if X and Y were heterogeneous products with a very high proportion of marketing and distribution costs (e.g. 65-70 % of total costs). Furthermore, if the offer of a complete range of the differentiated products was a condition for competing successfully, the withdrawal of one or more parties as suppliers of X and/or Y would be unlikely. In such a scenario the criteria for exemption may be fulfilled (provided that the economies are significant), despite the high market shares

Subcontracting between competitors

114. Example 6

**Situation**: A and B are competitors in the market for the final product X. A has a market share of 15 %, B of 20 %. Both also produce the intermediate product Y, which is an input into the production of X, but is also used to produce other products. It accounts for 10 % of the cost of X. A only produces Y for internal consumption, while B is also selling Y to third party customers. Its market share for Y is 10 %. A and B agree on a subcontracting agreement, whereby A will purchase 60 % of its requirements of Y from B. It will continue to produce 40 % of its requirements internally to not lose the know-how related to the production of Y.

**Analysis**: As A has only produced Y for internal consumption, it first needs to be analysed if A is a realistic potential entrant into the merchant market for sales of Y to third parties. If this is not the case, then the agreement does not restrict competition with respect to Y. Spill-over effects into the market for X are also unlikely in view of the low degree of commonality of costs created by the agreement.

If A were to be regarded a realistic potential entrant into the merchant market for sales of Y to third parties, the market position of B in the market for Y would need to be taken into account. As B's market share is rather low, the result of the analysis would not change.

## 4. PURCHASING AGREEMENTS

### 4.1. Definition

115. This chapter focuses on agreements concerning the joint buying of products. Joint buying can be carried out by a jointly controlled company, by a company in which many firms hold a small stake, by a contractual arrangement or even looser form of cooperation.

116. Purchasing agreements are often concluded by small and medium-sized enterprises to achieve volumes and discounts similar to their bigger competitors. These agreements between small and medium-sized enterprises are therefore normally pro-competitive. Even if a moderate degree of market power is created, this may be outweighed by economies of scale provided the parties actually bundle volume.

117. Joint purchasing may involve both horizontal and vertical agreements. In these cases a two-step analysis is necessary. First, the horizontal agreements have to be assessed according to the principles described in the present guidelines. If this assessment leads to the conclusion that a cooperation between competitors in the area of purchasing is acceptable, a further assessment will be necessary to examine the vertical agreements concluded with suppliers or individual sellers. The latter assessment will follow the rules of the Block Exemption Regulation and the Guidelines on Vertical Restraints ([43]).

118. An example would be an association formed by a group of retailers for the joint purchasing of products. Horizontal agreements concluded between the members of the association or decisions adopted by the association have to be assessed first as a horizontal agreement according to the present guidelines. Only if this assessment is positive does it become relevant to assess the resulting vertical agreements between the association and an individual members or between the association and suppliers. These agreements are covered — up to a certain limit — by the block exemption for vertical restraints ([44]). Those agreements falling outside the vertical block exemption will not be presumed to be illegal but may need individual examination.

### 4.2. Relevant markets

119. There are two markets which may be affected by joint buying: First, the market(s) with which the cooperation is directly concerned, i.e. the relevant purchasing market(s). Secondly, the selling market(s), i.e. the market(s) downstream where the participants of the joint purchasing arrangement are active as sellers.

120. The definition of relevant purchasing markets follows the principles described in the Commission Notice on the definition of the relevant market and is based on the concept of substitutability to identify competitive constraints. The only difference to the definition of 'selling markets' is that substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words: the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. These could be analysed for instance by examining the suppliers' reaction to a small but lasting price *decrease*. If the market is defined, the market share can be calculated as the percentage for which the purchases by the parties concerned account out of the total sales of the purchased product or service in the relevant market.

121. Example 1

A group of car manufacturers agree to buy product X jointly. Their combined purchases of X account for 15 units. All the sales of X to car manufacturers account for 50 units. However, X is also sold to manufacturers of products other than cars. All sales of X account for 100 units. Thus, the (purchasing) market share of the group is 15 %.

122. If the parties are in addition competitors on one or more selling markets, these markets are also relevant for the assessment. Restrictions of competition on these markets are more likely if the parties will achieve market power by coordinating their behaviour and if the parties have a significant proportion of their total costs in common. This is, for instance, the case if retailers which are active in the same relevant retail market(s) jointly purchase a significant amount of the products they offer for resale. It may also be the case if competing manufacturers and sellers of a final product jointly purchase a high proportion of their input together. The selling markets have to be defined by applying the methodology described in the Commission Notice on the definition of the relevant market.

### 4.3. Assessment under Article 81(1)

#### 4.3.1. *Nature of the agreement*

##### 4.3.1.1. Agreements that do not fall under Article 81(1)

123. By their very nature joint buying agreements will be concluded between companies that are at least competitors on the purchasing markets. If, however, competing purchasers cooperate who are not active on the same relevant market further downstream (e.g. retailers which are active in different geographic markets and cannot be regarded as realistic potential competitors), Article 81(1) will rarely apply unless the parties have a very strong position in the buying markets, which could be used to harm the competitive position of other players in their respective selling markets.

##### 4.3.1.2. Agreements that almost always fall under Article 81(1)

124. Purchasing agreements only come under Article 81(1) by their nature if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation.

##### 4.3.1.3. Agreements that may fall under Article 81(1)

125. Most purchasing agreements have to be analysed in their legal and economic context. The analysis has to cover both the purchasing and the selling markets.

#### 4.3.2. *Market power and market structures*

126. The starting point for the analysis is the examination of the parties' buying power. Buying power can be assumed if a purchasing agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that prices can be driven down below the competitive level or access to the market can be foreclose ' to competing buyers. A high degree of buying power over the suppliers of a market may bring about inefficiencies such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply. However, the primary concerns in the context of buying power are that lower prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers' competitors on the selling markets because either suppliers will try to recover price reductions for one group of customers by increasing prices for other customers or competitors have less access to efficient suppliers. Consequently, purchasing markets and selling markets are characterised by interdependencies as set out below.

<u>Interdependencies between purchasing and selling market(s)</u>

127. The cooperation of competing purchasers can appreciably restrict competition by means of creating buying power. Whilst the creation of buying power can lead to lower prices for consumers, buying power is not always pro-competitive and may even, under certain circumstances, cause severe negative effects on competition.

128. First, lower purchasing costs resulting from the exercise of buying power cannot be seen as pro-competitive, if the purchasers together have power on the selling markets. In this case, the cost savings are probably not passed on to consumers. The more combined power the parties have on their selling markets, the higher is the incentive for the parties to coordinate their behaviour as sellers. This may be facilitated if the parties achieve a high degree of commonality of costs through joint purchasing. For instance, if a group of large retailers buys a high proportion of their products together, they will have a high proportion of their total cost in common. The negative effects of joint buying can therefore be rather similar to joint production.

129. Secondly, power on the selling markets may be created or increased through buying power which is used to foreclose competitors or to raise rivals' costs. Significant buying power by one group of customers may lead to foreclosure of competing buyers by limiting their access to efficient suppliers. It can also cause cost increases for its competitors because suppliers will try to recover price reductions for one group of customers by increasing prices for other customers (e.g. rebate discrimination by suppliers of retailers). This is only possible if the suppliers of the purchasing markets also have a certain degree of market power. In both cases, competition in the selling markets can be further restricted by buying power.

130. There is no absolute threshold which indicates that a buying cooperation creates some degree of market power and thus falls under Article 81(1). However, in most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15 % on the purchasing market(s) as well as a combined market share of below 15 % on the selling market(s). In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

13'. A market share above this threshold does not automatically indicate that a negative market effect is caused by the cooperation but requires a more detailed assessment of the impact of a joint buying agreement on the market, involving factors such as the market concentration and possible countervailing power of strong suppliers. Joint buying that involves parties with a combined market share significantly above 15 % in a concentrated market is likely to come under Article 81(1), and efficiencies that may outweigh the restrictive effect have to be shown by the parties.

### 4.4. Assessment under Article 81(3)

#### 4.4.1. *Economic benefits*

132. Purchasing agreements can bring about economic benefits such as economies of scale in ordering or transportation which may outweigh restrictive effects. If the parties together have significant buying or selling power, the issue of efficiencies has to be examined carefully. Cost savings that are caused by the mere exercise of power and which do not benefit consumers cannot be taken into account.

#### 4.4.2. *Indispensability*

133. Purchasing agreements cannot be exempted if they impose restrictions that are not indispensable to the attainment of the above mentioned benefits. An obligation to buy exclusively through the cooperation can in certain cases be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

#### 4.4.3. *No elimination of competition*

134. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This assessment has to cover buying and selling markets. The combined market shares of the parties can be regarded as a starting point. It then needs to be evaluated whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as countervailing power of suppliers on the purchasing markets or potential for market entry in the selling markets. Where as a consequence of a purchasing agreement an undertaking is dominant or becoming dominant on either the buying or selling market, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted.

### 4.5. Examples

135. Example 2

**Situation:** Two manufacturers, A and B, decide to jointly buy component X. They are competitors on their selling market. Together their purchases represent 35 % of the total sales of X in the EEA, which is assumed to be the relevant geographic market. There are 6 other manufacturers (competitors of A and B on their selling market) accounting for the remaining 65 % of the purchasing market: one having 25 %, the others accounting for significantly less. The supply side is rather concentrated with 6 suppliers of component X, two with 30 % market share each, and the rest with between 10 and 15 % (HHI of 2300-2500). On their selling market, A and B achieve a combined market share of 35 %.

**Analysis:** Due to the parties' market power in their selling market, the benefits of possible cost savings may not be passed on to final consumers. Furthermore, the joint buying is likely to increase the costs of the parties' smaller competitors because the two powerful suppliers probably recover price reductions for the group by increasing smaller customers' prices. Increasing concentration in the downstream market may be the result. In addition, the cooperation may lead to further concentration among suppliers because smaller ones, which may already work near or below minimum optimal scale, may be driven out of business if they cannot reduce prices further. Such a case probably causes a significant restriction of competition which may not be outweighed by possible efficiency gains from bundling volume.

136. Example 3

**Situation:** 150 small retailers conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation which accounts for roughly 50 % of each retailer's total costs. The retailers can buy more than the minimum volume through the organisation, and they may also buy outside the cooperation. They have a combined market share of 20 % on each of the purchasing and the selling market(s). A and B are their two large competitors, A has a 25 % share on each of the markets concerned, B 35 %. The remaining smaller competitors have also formed a buying group. The 150 retailers achieve economies by combining a significant amount of volume and buying tasks.

**Analysis:** The retailers may achieve a high degree of commonality of costs if they ultimately buy more than the agreed minimum volume together. However, together they only have a moderate market position on the buying and the selling market. Furthermore, the cooperation brings about some economies of scale. This cooperation is likely to be exempted.

137. Example 4

**Situation:** Two supermarket chains conclude an agreement to jointly buy products which account for roughly 50 % of their total costs. On the relevant buying markets for the different categories of products the parties have shares between 25 % and 40 %, on the relevant selling market (assuming there is only one geographic market concerned) they achieve 40 %. There are five other significant retailers each with 10-15 % market share. Market entry is not likely.

**Analysis:** It is likely that this joint buying arrangement would have an effect on the competitive behaviour of the parties because coordination would give them significant market power. This is particularly the case if entry is weak. The incentive to coordinate behaviour is higher if the costs are similar. Similar margins of the parties would add an incentive to have the same prices. Even if efficiencies are caused by the cooperation, it is not likely to be exempted due to the high degree of market power.

138. Example 5

**Situation:** small cooperatives conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation. The parties can buy more than the minimum volume through the organisation, but they may also buy outside the cooperation. Each of the parties has a total market share of 5 % on each of the purchasing and selling markets, giving a combined market share of 25 %. There are two other significant retailers each with 20-25 % market share and a number of smaller retailers with market shares below 5 %.

**Analysis:** The setting up of the joint buying organisation is likely to give the parties a market position on both the purchasing and selling markets of a degree which enables them to compete with the two largest retailers. Moreover, the presence of these two other players with similar levels of market position is likely to result in the efficiencies of the agreement being passed on to consumers. In such a scenario the agreement is likely to be exempted.

## 5. COMMERCIALISATION AGREEMENTS

### 5.1. Definition

139. The agreements covered in this section involve cooperation between competitors in the selling, distribution or promotion of their products. These agreements can have a widely varying scope, depending on the marketing functions which are being covered by the cooperation. At one end of the spectrum, there is joint selling that leads to a joint determination of all commercial aspects related to the sale of the product including price. At the other end, there are more

limited agreements that only address one specific marketing function, such as distribution, service, or advertising.

140. The most important of these more limited agreements would seem to be distribution agreements. These agreements are generally covered by the Block Exemption Regulation and Guidelines on Vertical Restraints unless the parties are actual or potential competitors. In this case, the Block Exemption Regulation only covers non-reciprocal vertical agreements between competitors, if (a) the buyer, together with its connected undertakings, has an annual turnover not exceeding EUR 100 million, or (b) the supplier is a manufacturer and a distributor of products and the buyer is a distributor who is not also a manufacturer of products competing with the contract products, or (c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services ([45]). If competitors agree to distribute their products on a reciprocal basis there is a possibility in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to collusion. The same is true for non-reciprocal agreements between competitors exceeding a certain size. These agreements have thus first to be assessed according to the principles set out below. If this assessment leads to the conclusion that a cooperation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. This assessment should be based on the principles set out in the Guidelines on Vertical Restraints.

141. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another cooperation. This can be for instance the case as regards joint production or joint purchasing. These agreements will be dealt with as in the assessment of those types of cooperation.

## 5.2. Relevant markets

142. To assess the competitive relationship between the cooperating parties, first the relevant product and geographic market(s) directly concerned by the cooperation (i.e. the market(s) to which products subject to the agreement belong) have to be defined. Secondly, a commercialisation agreement in one market may also affect the competitive behaviour of the parties in a neighbouring market closely related to the market directly concerned by the cooperation.

## 5.3. Assessment under Article 81(1)

### 5.3.1. *Nature of the agreement*

#### 5.3.1.1. Agreements that do not fall under Article 81(1)

143. The commercialisation agreements covered by this section only fall under the competition rules if the parties to the agreements are competitors. If the parties clearly do not compete with regard to the products or services covered by the agreement, the agreement cannot create competition problems of a horizontal nature. However, the agreement can fall under Article 81(1) if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc. This also applies if a cooperation in commercialisation is objectively necessary to allow one party to enter a market it could not have entered individually, for example because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to mount a credible tender for projects that they would not be able to fulfil, or would not have bid for, individually. As they are therefore not potential competitors for the tender, there is no restriction of competition.

#### 5.3.1.2. Agreements that almost always fall under Article 81(1)

144. The principal competition concern about a commercialisation agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of coordinating the pricing policy of competing manufacturers. In this case they not only eliminate price competition between the parties but also restrict the volume of products to be delivered by the participants within the framework of the system for allocating orders. They therefore restrict competition between the parties on the supply side and limit the choice of purchasers and fall under Article 81(1).

145. This appreciation does not change if the agreement is non-exclusive. Article 81(1) continues to apply even where the parties are free to sell outside the agreement, as long as it can be presumed that the agreement will lead to an overall coordination of the prices charged by the parties.

#### 5.3.1.3. Agreements that may fall under Article 81(1)

146. For commercialisation arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost

structure of the commercialisation, a significant input to the parties' final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties' final cost.

147. A specific concern related to distribution arrangements between competitors which are active in different geographic markets is that they can lead to or be an instrument of market partitioning. In the case of reciprocal agreements to distribute each other's products, the parties to the agreement allocate markets or customers and eliminate competition between themselves. The key question in assessing an agreement of this type is if the agreement in question is objectively necessary for the parties to enter each other's market. If it is, the agreement does not create competition problems of a horizontal nature. However, the distribution agreement can fall under Article 81(1) if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc. If the agreement is not objectively necessary for the parties to enter each other's market, it falls under 81(1). If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It needs however to be assessed if the non-reciprocal agreement constitutes the basis for a mutual understanding to not enter each other's market or is a means to control access to or competition on the 'importing' market.

5.3.2. *Market power and market structure*

148. As indicated above, agreements that involve price fixing will always fall under Article 81(1) irrespective of the market power of the parties. They may, however, be exemptable under Article 81(3) under the conditions described below.

149. Commercialisation agreements between competitors which do not involve price fixing are only subject to Article 81(1) if the parties to the agreement have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15 %. In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

150. If the parties' combined market share is greater than 15 %, the likely impact of the joint commercialisation agreement on the market must be assessed. In this respect market concentration, as well as market shares will be a significant factor. The more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information ([44]).

## 5.4. Assessment under Article 81(3)

5.4.1. *Economic benefits*

151. The efficiencies to be taken into account when assessing whether a joint commercialisation agreement can be exempted will depend upon the nature of the activity. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies. The size of the efficiencies generated depends *inter alia* on the importance of the joint marketing activities for the overall cost structure of the product in question. Joint distribution is thus more likely to generate significant efficiencies for producers of widely distributed consumer products than for producers of industrial products which are only bought by a limited number of users.

152. In addition, the claimed efficiencies should not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency that would make an agreement exemptable.

153. Claimed efficiency benefits must be demonstrated. An important element in this respect would be the contribution by both parties of significant capital, technology, or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. If, on the other hand, the joint commercialisation represents no more than a sales agency with no investment, it is likely to be a disguised cartel and as such cannot fulfil the conditions of Article 81(3).

5.4.2. *Indispensability*

154. A commercialisation agreement cannot be exempted if it imposes restrictions that are not indispensable to the attainment of the abovementioned benefits. As discussed above, the question of indispensability is especially important for those agreements involving price fixing or the allocation of markets.

5.4.3. *No elimination of competition*

155. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. In making this assessment, the combined market shares of the parties can be regarded as a starting point. One then needs to evaluate whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as the potential for market entry. Where as a consequence of a commercialisation agreement an undertaking is dominant or becoming dominant, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted.

5.5. **Examples**

156. Example 1

**Situation**: 5 small food producers, each with 2 % market share of the overall food market, agree to: combine their distribution facilities; market under a common brand name; and sell their products at a common price. This involves significant investment in warehousing, transport, advertising, marketing and a sales force. It significantly reduces their cost base, representing typically 50 % of the price at which they sell, and allows them to offer a quicker, more efficient distribution system. The customers of the food producers are large retail chains.

Three large multinational food groups dominate the market, each with 20 % market share. The rest of the market is made up of small independent producers. The product ranges of the parties to this agreement overlap in some significant areas, but in no product market does their combined market share exceed 15 %.

**Analysis**: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement cannot be considered as having market power. However, the integration of the marketing and distribution appears to provide significant efficiencies which are of benefit to customers both in terms of improved service, and lower costs. The question is therefore whether the agreement is exemptable under Article 81(3). To answer this question it must be established whether the price fixing is indispensable for the integration of the other marketing functions and the attainment of the economic benefits. In this case, the price fixing can be regarded as indispensable, as the clients — large retail chains — do not want to deal with a multitude of prices. It is also indispensable, as the aim — a common brand — can only be credibly achieved if all aspects of marketing, including price, are standardised. As the parties do not have market power and the agreement creates significant efficiencies it is compatible with Article 81.

157. Example 2

**Situation**: 2 producers of ball bearings, each having a market share of 5 %, create a sales joint venture which will market the products, determine the prices and allocate orders to the parent companies. They retain the right to sell outside this structure. Deliveries to customers continue to be made directly from the parents' factories. They claim that this will create efficiencies as the joint sales force can demonstrate the parties' products at the same time to the same client thus eliminating a wasteful duplication of sales efforts. In addition, the joint venture would, wherever possible, allocate orders to the closest factory possible, thus reducing transport costs.

**Analysis**: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement cannot be considered as having market power. It is not exemptable under Article 81(3), as the claimed efficiencies are only cost reductions derived from the elimination of competition between the parties.

158. Example 3

**Situation**: 2 producers of soft drinks are active in 2 different, neighbouring Member States. Both have a market share of 20 % in their home market. They agree to reciprocally distribute each other's product in their respective geographic market.

Both markets are dominated by a large multi-national soft drink producer, having a market share of 50 % in each market.

**Analysis**: The agreement falls under Article 81(1) if the parties can be presumed to be potential competitors. Answering this question would thus require an analysis of the barriers to entry into the respective geographic markets. If the parties could have entered each other's market independently, then their agreement eliminates competition between them. However, even though the market shares of the parties indicate that they could have some market power, an analysis of the market structure indicates that this is not the case. In addition, the reciprocal distribution agreement benefits customers as it increases the available choice in each geographic market. The agreement would thus be exemptable even if it were considered to be restrictive of competition.

## 6. AGREEMENT ON STANDARDS

### 6.1. Definition

159. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply ([47]). Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard.

160. Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these guidelines.

### 6.2. Relevant markets

161. Standardisation agreements produce their effects on three possible markets, which will be defined according to the Commission notice on market definition. First, the product market(s) to which the standard(s) relates. Standards on entirely new products may raise issues similar to those raised for R & D agreements, as far as market definition is concerned (see Point 2.2). Second, the service market for standard setting, if different standard setting bodies or agreements exist. Third, where relevant, the distinct market for testing and certification.

### 6.3. Assessment under Article 81(1)

162. Agreements to set standards ([48]) may be either concluded between private undertakings or set under the aegis of public bodies or bodies entrusted with the operation of services of general economic interest, such as the standards bodies recognised under Directive 98/34/EC ([49]). The involvement of such bodies is subject to the obligations of Member States regarding the preservation of non-distorted competition in the Community.

#### 6.3.1. *Nature of the agreement*

##### 6.3.1.1. Agreements that do not fall under Article 81(1)

163. Where participation in standard setting is unrestricted and transparent, standardisation agreements as defined above, which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by the recognised standards bodies which are based on non-discriminatory, open and transparent procedures.

164. No appreciable restriction exists for those standards that have a negligible coverage of the relevant market, as long as it remains so. No appreciable restriction is found either in agreements which pool together SMEs to standardise access forms or conditions to collective tenders or those that standardise aspects such as minor product characteristics, forms and reports, which have an insignificant effect on the main factors affecting competition in the relevant markets.

##### 6.3.1.2. Agreements that almost always fall under Article 81(1)

165. Agreements that use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors will almost always be caught by Article 81(1). For instance, an agreement whereby a national association of manufacturers set a standard and put pressure on third parties not to market products that did not comply with the standard would be in this category.

##### 6.3.1.3. Agreements that may fall under Article 81(1)

166. Standardisation agreements may be caught by Article 81(1) insofar as they grant the parties joint control over production and/or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or purchasers of the standardised products. The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardisation, as defined above, on the other.

167. The existence of a restriction of competition in standardisation agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardisation agreements may restrict competition where they prevent the parties from either developing alternative standards or commercialising products that do not comply with the standard. Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.

*6.3.2. Market power and market structures*

168. High market shares held by the parties in the market(s) affected will not necessarily be a concern for standardisation agreements. Their effectiveness is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may discriminate or foreclose third parties or segment markets according to their geographic scope of application. Thus, the assessment whether the agreement restricts competition will focus, necessarily on an individual basis, on the extent to which such barriers to entry are likely to be overcome.

## 6.4. Assessment under Article 81(3)

*6.4.1. Economic benefits*

169. The Commission generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. To materialise those economic benefits, the necessary information to apply the standard must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in a transparent manner. It will be for the parties to demonstrate that any restrictions on the setting, use or access to the standard provide economic benefits.

170. In order to reap technical or economic benefits, standards should not limit innovation. This will depend primarily on the lifetime of the associated products, in connection with the market development stage (fast growing, growing, stagnant ...). The effects on innovation must be analysed on a case-by-case basis. The parties may also have to provide evidence that collective standardisation is efficiency-enhancing for the consumer when a new standard may trigger unduly rapid obsolescence of existing products, without objective additional benefits.

*6.4.2. Indispensability*

171. By their nature, standards will not include all possible specifications or technologies. In some cases, it would be necessary for the benefit of the consumers or the economy at large to have only one technological solution. However, this standard must be set on a non-discriminatory basis. Ideally, standards should be technology neutral. In any event, it must be justifiable why one standard is chosen over another.

172. All competitors in the market(s) affected by the standard should have the possibility of being involved in discussions. Therefore, participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation or unless recognised procedures are foreseen for the collective representation of interests, as in formal standards bodies.

173. As a general rule there should be a clear distinction between the setting of a standard and, where necessary, the related R & D, and the commercial exploitation of that standard. Agreements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality. For instance, it should be very clearly demonstrated why it is indispensable to the emergence of the economic benefits that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.

*6.4.3. No elimination of competition*

174. There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.

175. To the extent that private organisations or groups of companies set a standard or their proprietary technology becomes a de facto standard, then competition will be eliminated if third parties are foreclosed from access to this standard.

## 6.5. Examples

176. Example 1

**Situation:** EN 60603-7:1993 defines the requirements to connect television receivers to video-generating accessories such as video recorders and video games. Although the standard is not legally binding, in practice manufacturers both of television receivers and of video games use the standard, as the market requires so.

**Analysis:** Article 81(1) is not infringed. The standard has been adopted by recognised standards bodies, at national, European and international level, through open and transparent procedures, and is based on national consensus reflecting the position of manufacturers and consumers. All manufacturers are allowed to use the standard.

177. Example 2

**Situation**: A number of videocassette manufacturers agree to develop a quality mark or standard to denote the fact that the videocassette meets certain minimum technical specifications. The manufacturers are free to produce videocassettes which do not conform to the standard and the standard is freely available to other developers.

**Analysis**: Provided that the agreement does not otherwise restrict competition, Article 81(1) is not infringed, as participation in standard setting is unrestricted and transparent, and the standardisation agreement does not set an obligation to comply with the standard. If the parties agreed only to produce videocassettes which conform to the new standard, the agreement would limit technical development and prevent the parties from selling different products, which would infringe Article 81(1).

178. Example 3

**Situation**: A group of competitors active in various markets which are interdependent with products that must be compatible, and with over 80 % of the relevant markets, agree to jointly develop a new standard that will be introduced in competition with other standards already present in the market, widely applied by their competitors. The various products complying with the new standard will not be compatible with existing standards. Because of the significant investment needed to shift and to maintain production under the new standard, the parties agree to commit a certain volume of sales to products complying with the new standard so as to create a 'critical mass' in the market. They also agree to limit their individual production volume of products not complying with the standard to the level attained last year.

**Analysis**: This agreement, owing to the parties' market power and the restrictions on production, falls under Article 81(1) while not being likely to fulfil the conditions of paragraph 3, unless access to technical information were provided on a non-discriminatory basis and reasonable terms to other suppliers wishing to compete.

## 7. ENVIRONMENTAL AGREEMENTS

### 7.1. Definition

179. Environmental agreements [30] are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations [31]. This excludes agreements that trigger pollution abatement as a by-product of other measures.

180. Environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes [32]. Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.

181. Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character. To the extent that these arrangements contain vertical restraints they are not subject to these guidelines.

### 7.2. Relevant markets

182. The effects are to be assessed on the markets to which the agreement relates, which will be defined according to the Notice on the definition of the relevant market for the purposes of Community competition law. When the pollutant is not itself a product, the relevant market encompasses that of the product into which the pollutant is incorporated. As for collection/recycling agreements, in addition to their effects on the market(s) on which the parties are active as producers or distributors, the effects on the market of collection services potentially covering the good in question must be assessed as well.

### 7.3. Assessment under Article 81(1)

183. Some environmental agreements may be encouraged or made necessary by State authorities in the exercise of their public prerogatives. The present guidelines do not deal with the question of whether such State intervention is in conformity with the Member State's obligations under the Treaty. They only address the assessment that must be made as to the compatibility of the agreement with Article 81.

#### 7.3.1. *Nature of the agreement*

##### 7.3.1.1. Agreements that do not fall under Article 81(1)

184. Some environmental agreements are not likely to fall within the scope of the prohibition of Article 81(1), irrespective of the aggregated market share of the parties.

185. This may arise if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target. In this latter case, the assessment will focus on the discretion left to the parties as to the means that are technically and economically available in order to attain the environmental objective agreed upon. The more varied such means, the less appreciable the potential restrictive effects.

186. Similarly, agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions do not fall under Article 81(1). Where some categories of a product are banned or phased out from the market, restrictions cannot be deemed appreciable in so far as their share is minor in the relevant geographic market or, in the case of Community-wide markets, in all Member States.

187. Finally, agreements which give rise to genuine market creation, for instance recycling agreements, will not generally restrict competition, provided that and for as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist.

7.3.1.2. Agreements that almost always come under Article 81(1)

188. Environmental agreements come under Article 81(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, or if the cooperation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors.

7.3.1.3. Agreements that may fall under Article 81(1)

189. Environmental agreements covering a major share of an industry at national or EC level are likely to be caught by Article 81(1) where they appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each other's production or sales. In addition to restrictions between the parties, an environmental agreement may also reduce or substantially affect the output of third parties, either as suppliers or as purchasers.

190. For instance, environmental agreements, which may phase out or significantly affect an important proportion of the parties' sales as regards their products or production processes, may fall under Article 81(1) when the parties hold a significant proportion of the market. The same applies to agreements whereby the parties allocate individual pollution quotas.

191. Similarly, agreements whereby parties holding significant market shares in a substantial part of the common market appoint an undertaking as exclusive provider of collection and/or recycling services for their products, may also appreciably restrict competition, provided other actual or realistic potential providers exist.

## 7.4. Assessment under Article 81(3)

### 7.4.1. *Economic benefits*

192. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty as well as in Community environmental action plans [53], provided such agreements are compatible with competition rules [54].

193. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs [55].

194. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.

### 7.4.2. *Indispensability*

195. The more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision might be deemed indispensable to the attainment of the environmental goal within its economic context.

196. An objective evaluation of provisions which might 'prima facie' be deemed not to be indispensable must be supported with a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits, would be more economically or financially costly, under reasonable assumptions. For instance, it should be very clearly demonstrated that a uniform fee, charged irrespective of individual costs for waste collection, is indispensable for the functioning of an industry-wide collection system.

7.4.3. *No elimination of competition*

197. Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run. For instance, in the case of exclusive collection rights granted to a collection/recycling operator who has potential competitors, the duration of such rights should take into account the possible emergence of an alternative to the operator.

7.5. **Examples**

198. Example

**Situation:** Almost all Community producers and importers of a given domestic appliance (e.g. washing machines) agree, with the encouragement of a public body, to no longer manufacture and import into the Community products which do not comply with certain environmental criteria (e.g. energy efficiency). Together, the parties hold 90 % of the Community market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g. electric utilities, suppliers of components incorporated in the products phased out).

**Analysis:** The agreement grants the parties control of individual production and imports and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Consumer choice, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is caught by Article 81(1). The involvement of the public authority is irrelevant for this assessment.

However, newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environmentally friendly products have lower running costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Varied technical means are economically available to the parties in order to manufacture products which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the conditions for an exemption under Article 81(3) are fulfilled.

(1) OJ L 53, 22.2.1985, p. 1.

(2) OJ L 306, 11.11.1997, p. 12.

(3) OJ L 53, 22.2.1985, p. 5.

(4) OJ L 304, 5.12.2000, p. 3.

(5) OJ L 304, 5.12.2000, p. 7.

(6) OJ C 75, 29.7.1968, p. 3.

(7) OJ C 43, 16.2.1993, p. 2.

(8) A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). The same reasoning may lead to the grouping of different geographic areas. However, when supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, to make additional investments, to take strategic decisions or to incur time delays, a company will not be treated as a competitor but as a potential competitor (see below). See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p. 5, paragraphs 20-23).

(9) A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient (see Commission Notice on the definition of the relevant market for the purposes of Community competition law (paragraph 24); see also the Commission's Thirteenth Report on Competition Policy, point 55 and Commission Decision 90/410/EEC in case Elopak/Metal Box-Odin (OJ L 209, 8.8.1990, p. 15). Market entry needs to take place sufficiently fast so that the threat of potential entry is a constraint on the market participants' behaviour. Normally, this means that entry has to occur within a short period. The Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1, paragraph 26, consider a period of maximum 1 year for the purposes of application of the Block Exemption Regulation on Vertical Restraints (see footnote 11). However, in individual cases longer time periods can be taken into account. The time period needed by companies already active on the market to adjust their capacities can be used as a yardstick to determine this period.

(10) OJ L 336, 29.12.1999, p. 21.

(11) OJ C 291, 13.10.2000, p. 1.

(12) The delineation between horizontal and vertical agreements will be further developed in the chapters on joint purchasing (Chapter 4) and joint commercialisation (Chapter 5). See also the Guidelines on Vertical Restraints, paragraph 26 and 29.

(13) OJ L 395, 30.12.1989, p. 1. Corrected version OJ L 257, 21.9.1990, p. 13.

(14) OJ L 180, 9.7.1997, p. 1.

(15) Council Regulation 26/62 (OJ 30, 20.4.1962, p. 993) (agriculture).
Council Regulation (EEC) No 1017/68, (OJ L 175, 23.7.1968, p. 1) (transport by rail road and inland waterway);
Council Regulation (EEC) No 4056/86, (OJ L 378, 31.12.1986, p. 4) (maritime transport);
Council Regulation (EEC) No 3975/87, (OJ L 374, 31.12.1987, p. 1) (air transport);
Council Regulation (EEC) No 3976/87, (OJ L 374, 31.12.1987, p. 9) (air transport);
Commission Regulation (EEC) No 1617/93, (OJ L 155, 26.6.1993, p. 18) (Block exemption concerning joint planning and coordination of schedules, joint operations, consultation on passenger and cargo tariffs on scheduled air services and slot allocation at airports);
Council Regulation (EEC) No 479/92, (OJ L 55, 29.2.1992 p. 3) (Liner shipping companies):
Commission Regulation (EC) No 870/95, (OJ L 89, 21.4.1995, p. 7) (Block exemption covering certain agreements between liner shipping companies);
Council Regulation (EEC) No 1534/91, (OJ L 143, 7.6.1991, p. 1) (insurance sector);
Commission Regulation (EEC) No 3932/92, (OJ L 398, 31.12.1992, p. 7) (Block exemption covering certain agreements in the insurance sector).

(16) See Notice on agreements of minor importance (OJ C 372, 9.12.1997, p. 13).

(17) Companies may have significant market power below the level of market dominance, which is the threshold for the application of Article 82.

(18) This does, however, exceptionally not apply to a production joint venture. It is inherent to the functioning of such a joint venture that decisions on output are taken jointly by the parties. If the joint venture also markets the jointly manufactured goods, then decisions on prices need to be taken jointly by the parties to such an agreement. In this case, the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market to determine the applicability of Article 81(1) (see paragraph 90).

(19) See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

(20) Market shares should normally be calculated on the basis of the market sales value (see Article 6 of the R & D Block Exemption Regulation and Article 6 of the Specialisation Block Exemption Regulation). In determining the market share of a party in a given market, account must be taken of the undertakings which are connected to the parties (see point 2 of Article 2 of the R & D Block Exemption Regulation and point 2 of Article 2 of the Specialisation Block Exemption Regulation).

(21) If there are more than two parties, then the collective share of all cooperating competitors has to be significantly greater than the share of the largest single participating competitor.

(22) A market consisting of four firms with shares of 30 %, 25 %, 25 % and 20 %, has a HHI of 2550 (900+625+625+400) pre-cooperation. If the first two market leaders would cooperate, the HHI would change to 4050 (3025+625+400) post-cooperation. The HHI post-cooperation is relevant for the assessment of the possible market effects of a cooperation.

(23) E.g. the three-firm concentration ratio CR3 is the sum of the market shares of the leading three competitors in a market.

(24) For market definition see the Commission Notice on the definition of the relevant market.

(25) See Commission Notice on the definition of the relevant market; see also, for example, Commission Decision 94/811/EC of 8 June 1994 in Case No IV/M269 — Shell/Montecatini (OJ L 332, 22.12.1994, p. 48).

(26) Article 4(2) of the R & D Block Exemption Regulation.

(27) Article 4(1) of the R & D Block Exemption Regulation.

(28) Article 7(e) of the R & D Block Exemption Regulation.

(29) Article 4(3) of the R & D Block Exemption Regulation.

(30) An R & D cooperation between non-competitors can however produce foreclosure effects under Article 81(1) if it relates to an exclusive exploitation of results and if it is concluded between firms, one of which has significant market power with respect to key technology.

(31) Pursuant to Article 4(2)(3) of Regulation No 17, agreements which have as their sole object joint research and development need not to, but may, be notified to the Commission.

(32) See Art. 3(2) of the R & D Block Exemption Regulation.

(33) See Art. 3(2) of the R & D Block Exemption Regulation.

(34) As indicated above, joint ventures which fall under the Merger Regulation are not the subject of these guidelines. Full-function joint ventures below Community dimension are normally dealt with by the competition authorities of the Member States. The application of Regulation No 17 could be relevant only where such a full-function joint venture would lead to a restriction of competition resulting from the coordination of the parent companies outside the joint venture ('spill-over effect'). In this respect, the Commission has declared that it will leave the assessment of such operations to the Member States as far as possible (see Statement for the Council Minutes on Regulation (EC) No 1310/97, pt. 4).

(35) Article 2(4) of the Block Exemption Regulation on Vertical Restraints.

(36) Article 2(3) of the Block Exemption Regulation on Vertical Restraints. See also Guidelines on Vertical Restraints, paragraph 33, which notes that subcontracting arrangements between non-competitors under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied are covered by the Block Exemption Regulation on Vertical Restraints.

(37) If a subcontracting agreement between competitors stipulates that the contractor will cease production of the product to which the agreement relates, the agreement constitutes a unilateral specialisation agreement which is covered, subject to certain conditions, by the Specialisation Block Exemption Regulation.

(38) Notice concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, OJ C 1, 3.1.1979, p. 2.

(39) As also referred to in Article 2(4) of the Merger Regulation.

(40) As any subcontracting agreement such an agreement can however fall under Article 81(1) if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc.

(41) A production joint venture which also carries out joint distribution is, however, in most of the cases a full-function joint venture.

(42) Pursuant to Article 4(2)(3) of Council Regulation No 17, agreements which have as their sole object specialisation in the manufacture of products need, under certain conditions, not to be notified to the Commission. They may, however, be notified.

(43) See Guidelines on Vertical Restraints, paragraph 29.

(44) Article 2(2) of Block Exemption Regulation on Vertical Restraints.

(45) Article 2(4) of Block Exemption Regulation on Vertical Restraints.

(46) The exchange of sensitive and detailed information which takes place in an oligopolistic market might as such be caught by Article 81(1). The judgments of 28 May 1998 in the 'Tractor' cases (C-8/958 P: New Holland Ford and C-7/95 P: John Deere) and of 11 March 1999 in the 'Steel Beams' cases (T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94) provide useful clarification in this respect.

(47) Standardisation can take different forms, ranging from the adoption of national consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between single companies. Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.

(48) Pursuant to Article 4(2)(3) of Regulation No 17, agreements which have as their sole object the development or the uniform application of standards and types need not to, but may, be notified to the Commission.

(49) Directive 98/34/EC of the European Parliament and of the Council on 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, p. 37).

(50) The term 'agreement' is used in the sense defined by the Court of Justice and the Court of First instance in the case law on Article 81. It does not necessarily correspond to the definition of an 'agreement' in Commission documents dealing with environmental issues such as the Communication on environmental agreements COM(96) 561 final of 27.11.1996.

(51) For instance, a national agreement phasing out a pollutant or waste identified as such in relevant Community directives may not be assimilated to a collective boycott on a product which circulates freely in the Community.

(52) To the extent that some environmental agreements could be assimilated to standardisation, the same assessment principles for standardisation apply to them.

(53) Vth Environmental Action Programme (OJ C 138, 17.5.1993), p. 1; European Parliament and Council Decision No 2179/98/EC of 24 September 1998 (OJ L 275, 10.10.1998, p. 1).

(54) Communication on environmental agreements COM(96) 561 final of 27.11.1996, paragraphs 27-29 and Article 3(1)f of EP and Council Decision *ut supra*. The communication includes a 'Checklist for Environmental Agreements' identifying the elements that should generally be included in such an agreement.

(55) This is consistent with the requirement to take account of the potential benefits and costs of action or lack of action set forth in Article 174(3) of the Treaty and Article 7(d) of European Parliament and Council Decision *ut supra*.

**Schedule IV**

EUROPEAN COMMISSION

Brussels, 28.04.1999

# WHITE PAPER

# ON

# MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY

**COMMISSION PROGRAMME No 99/027**

**WHITE PAPER ON MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY**

## Executive summary

1. In the field of competition law applicable to undertakings, the EC Treaty sets out general rules applicable to restrictive practices (Article 85) and abuses of dominant position (Article 86). The Treaty empowers the Council to give effect to these provisions (Article 87).

2. In 1962, the Council adopted Regulation 17, the first Regulation implementing Articles 85 and 86. This Regulation laid down the system of supervision and enforcement procedures, which the Commission has applied for over 35 years without any significant change.

3. Regulation 17 created a system based on direct applicability of the prohibition rule of Article 85 (1) and prior notification of restrictive practices for exemption under Article 85 (3). While the Commission, national courts and national authorities can all apply Article 85(1), the power to grant exemptions under Article 85(3) was granted exclusively to the Commission. Regulation 17 thus established a centralised authorisation system for all restrictive practices requiring exemption.

4. This centralised authorisation system was necessary and proved very effective for the establishment of a "culture of competition" in Europe. It should not be forgotten that in the early years competition policy was not widely known in many parts of the Community. At the time when the interpretation of Article 85 (3) was still uncertain and when the Community's primary objective was the integration of national markets, centralised enforcement of the EC competition rules by the Commission was the only appropriate system. It enabled the Commission to establish the uniform application of Article 85 throughout the EC and to promote market integration by preventing companies from recreating barriers which Member States themselves had gradually eliminated. It created a body of rules which is now accepted by all Member States and by industry as fundamental for the proper functioning of the internal market. The importance of competition policy today is borne out by the fact that each Member State now has a national competition authority to enforce both national and (where empowered to do so) Community competition law.

5. However, this system, which has worked so well, is no longer appropriate for the Community of today with 15 Member States, 11 languages and over 350 million inhabitants. The reasons for this are to be found in the Regulation 17 system itself and in external factors relating to the development of the Community.

6. As to the reasons inherent in the Regulation 17 system the centralised authorisation system based on prior notification and the Commission's exemption monopoly has led companies to notify large numbers of restrictive practices to Brussels. Since national competition authorities and courts have no power to apply Article 85 (3), companies have used this centralised authorisation system not only to get legal security but also to block private action before national courts and national competition authorities. This has undermined efforts to promote decentralised application of EC competition rules. As a result, the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted. In an ever more integrated Community market, this lack of rigorous enforcement and the failure to apply one common set of rules harms the interests of European industry.

7. The development of the Community since 1962 has been extraordinary. The Community of 6 Member States has become a Union of 15 and is likely to become even larger as applicant countries join. The internal market with all its imperfections is a reality and Economic and Monetary Union is under way.

8. The role of the Commission in this new environment has changed. At the beginning the focus of its activity was on establishing rules on restrictive practices interfering directly with the goal of market integration. As law and policy have been clarified, the burden of enforcement can now be shared more equitably with national courts and authorities, which have the advantage of proximity to citizens and the problems they face. The Commission has now come to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures. It has also risen to the challenges of merger control, liberalisation of hitherto monopolised markets and internationalcooperation.

9. The Commission can cope with all these developments only by focussing its attention on the most important cases and on those fields of activity where it can operate more efficiently than national bodies. To this end it has already adopted various measures such as the "de minimis" Notice for agreements of minor importance and block exemption regulations.

10. However, these measures are not sufficient to meet the new challenges outlined above. It is no longer possible to maintain a centralised enforcement system requiring a decision by the Commission for restrictive practices which fulfil the conditions of Article 85 (3). To make such an authorisation system work in the Community of today and tomorrow would require enormous resources and impose heavy costs on companies. It is essential to adapt the system so as to relieve companies from unnecessary bureaucracy, to allow the Commission to become more active in the pursuit of serious competition infringements and to increase and stimulate enforcement at national level. Our Community requires a more efficient and simpler system of control.

11. In the White Paper, the Commission discusses several options for reform. It proposes a system which meets the objectives of rigorous enforcement of competition law, effective decentralisation, simplification of procedures and uniform application of law and policy development throughout the EU.

12. The proposed reform involves the abolition of the notification and exemption system and its replacement by a Council Regulation which would render the exemption rule of Article 85 (3) directly applicable without prior decision by the CommissionArticle 85 as a whole would be applied by the Commission, national competition authorities and national courts, as is already the case for Articles 85(1) and 86.

13. This reform would allow the Commission to refocus its activities on the most serious infringements of Community law in cases with a Community interest. It would pave the way for decentralised application of the EC competition rules by national authorities and courts and eliminate unnecessary bureaucracy and compliance costs for industry. It would also stimulate the application of the EC competition rules by national authorities.

14. In the new system, the Commission would keep a leading role in determining EC competition policy. It would continue to adopt Regulations and Notices setting out the principal rules of interpretation of Articles 85 and 86. The Commission would also

continue to adopt prohibition decisions and positive decisions to set out guidance for the implementation of these provisions. It is also envisaged that production joint ventures involving sizeable investments would not be included in the new system, but submitted instead to the procedural rules of the Community merger regulation.

15. In this system of concurrent jurisdiction of the Commission, national authorities and national courts, it would be necessary to maintain certain measures enabling the Commission to ensure coherent application of the rules throughout the Community. In particular, it is proposed that the Commission maintain the power to remove a case from the jurisdiction of national competition authorities and to deal with a case itself if there is a risk of divergent policy. There should also be a clear obligation for national courts to avoid conflicts with Commission decisions. Additional measures are explained in the White Paper.

16. The Commission invites the Member States, all other institutions and interested parties to submit comments on the White Paper by 30.09.1999 to the address on the last page.

# Introduction

1. The Commission has been responsible for the development of Community competition policy since the inception of the European Coal and Steel Community (ECSC) in 1952. The Europe of those days was very different from what it is today, as we approach the end of the century and the new millennium. After having taken its first tentative steps within the ECSC, the Commission began in earnest to implement competition policy after the adoption of Regulation No 17 in 1962, under the Treaty establishing the European Economic Community. The challenge was enormous: to create a completely new policy on a continental scale, without any direct point of reference in most of the then Member States, in order to meet two needs: the integration of national markets into a single economic area and the development of competition as the driving force of the economy.

2. Little by little, by means of decisions and notices and, later, regulations, the Commission established a competition policy covering the major aspects of economic life. The Court of Justice played its part to the full: sometimes upholding, sometimes annulling, but always contributing to a better understanding of the competition rules as they affected the everyday life of consumers and undertakings in the nascent common market.

3. The result of those first years of effort is remarkable: a comprehensive policy, abundant case-law, clearly established basic principles and well-defined details. Community policy provides solutions to the problems of the modern economy, whether in terms of action against the most harmful cartels or as regards technology licences or the distribution of goods and services. Over the years, Community policy has been supplemented by policies on merger control, liberalisation of monopoly sectors, international cooperation and an array of specific measures designed to cope with the new economic challenges.

4. Competition policy in 1999 is applied in a world which is very different to that known by the authors of the basic texts. Fifteen Member States, a single currency and a single market, a globalised economy, enlargement to include the countries of central and eastern Europe and Cyprus: no one could have predicted these developments in 1962. The changes in competition have been no less remarkable. The policy established by the Commission covers the entire range of economic activities, whilst the national competition policies set up in each Member State form part of a coherent whole with the Community system. The fact that it is now necessary to modernise that system does not detract from its merits: created from nothing, Community competition policy made it possible to lay the foundations of the single market and to dynamise the European economy. The task now is to adapt the system in order to face up to the challenges of the years ahead.

5. The first Regulation implementing Articles 85 and 86, Council Regulation No 17, was adopted over 35 years ago. It was designed for a Community of 170 million inhabitants and six Member States working in four different languages. It is still being applied, without having been substantially modified, in a Community of 380 million inhabitants and 15 Member States whose markets have already been extensively integrated. In addition, the internationalisation of the European economy has speeded up in recent years, so that competition policy is now for the most part conducted in a global context. Adjustments have of course been made to the existing legal framework, but they now appear to have reached their limits. The need for reform is all the more pressing as

the coming decade will present two major challenges for competition policy: economic and monetary union and the enlargement of the Community to include the countries of central and eastern Europe and Cyprus.

6. Economic and monetary union is certain to have major consequences for competition policy. It will first entail further economic integration and, in the long term, will strengthen the effects of the internal market by helping to remove the last economic barriers between Member States. It also will help to cut the overall costs of intra-Community trade by reducing transaction costs. Such factors will encourage undertakings to develop trade and thus increase competition throughout the Union. A single currency will also increase price transparency and thus highlight price differences still existing between MemberStates. Economic operators may, when faced with stronger competition, be tempted to take a protectionist attitude to avoid the constraints of adapting to the new conditions, thereby compensating for their lack of competitiveness in a new environment. Lastly, the fact that some MemberStates are, at least for the time being, not part of monetary union may encourage undertakings to partition markets.

7. The enlargement of the Community will also make it necessary to strengthen competition policy with regard to cartels and abuses of dominant positions. Dominant positions held by undertakings which inherited state monopolies are particularly numerous in the applicant countries, and such undertakings might to be tempted to abuse those positions so as to make up for their lack of economic competitiveness. The tradition of the planned economy is also a potential danger inasmuch as it encouraged agreements between "competitors". Any proposal to amend the competition rules of procedure must take account of the fact that those countries, with administrative structures that are still not very familiar with the concepts of market and free enterprise, will have to apply them as part of the "acquis communautaire". The enlargement will also have a mechanical effect in increasing the number of restrictive practices and abuses of dominant positions potentially subject to Community law. In a European Union with more than 20 Member States, the rules for implementing Articles 85 and 86 must be modernised if competition policy is to continue to operate eff. ently.

8. The globalisation of the economy is another challenge for the competition authorities. Although this trend is theoretically beneficial to competition because of the opening-up and integration of markets on a scale going beyond the Community, it confronts the competition authorities with cartels or restrictive practices aimed at erecting artificial barriers between the major regions of the world market. This can happen when large undertakings set up vertical restrictions impeding access to their market, share markets among themselves or conclude anti-competitive contracts on a world scale. Such practices are generally complex in nature, require indepth investigation and cooperation with other competition authorities and, if they go unpunished, are particularly harmful to the economy and consumers because of the vast geographical scale involved.

9. Given this new Community and global economic environment, the continued application of Regulation No 17 as drawn up in 1962, with its highly centralised system of prior authorisation, is no longer consistent with the effective supervision of competition. This White Paper sets out the Commission's views on the subject and is intended to elicit reactions from all interested parties, a prerequisite for the formal presentation of a proposal for a new regulation to the Council.

# Chapter I - Background

## I. The establishment of a system for the implementation of Community competition law

10. The chapter in the Spaak Report[1] concerning competition policy highlighted the need for the Treaty to prevent monopolies or monopolistic practices from impeding the fundamental aims of the common market[2]. The authors of the report defined the concept of a "monopoly" as both a dominant position held by an undertaking and the concluding of agreements restricting competition. This approach was adopted by the Treaty of Rome, which prohibits undertakings from abusing a dominant position (Article 86) and from engaging in "restrictive practices" (all agreements between undertakings, decisions by associations of undertakings and concerted practices). Such practices are void *ab initio* (Article 85). Article 85(1) and (2) provide that *"1. The following shall be prohibited as incompatible with the common 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 common market, .... 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void."*

11. Whilst the national delegations meeting inMessina were very much in favour of a system based on the prohibition principle, chiefly because of its dissuasive effect, the Treaty negotiators had considerable difficulty in defining the conditions in which the prohibition in Article 85(1) could be lifted. Two systems were feasible: an authorisation system or a directly applicable exception system In an authorisation system, the prohibition imposed by law may be lifted only by an appropriately empowered public authority which, by constitutive decision, declares that it is lifted. Under the authorisation system, restrictive practices are void until they have been authorised by the competent authority. Under a directly applicable exception system, the prohibition on restrictive practices is not applicable to those which satisfy certain conditions defined by law. Taken as a whole, such conditions may be regarded as an exception to the prohibition principle. Restrictive practices which satisfy the conditions are therefore valid as soon as they have been concluded.

12. Article 85(3) is the result of a compromise between the delegations favouring a directly applicable exception system and those favouring a prior authorisation system. Whilst those in favour of an authorisation system proposed wording along the lines of "restrictive agreements may be declared valid", agreement was eventually reached on a negative wording: "the provisions of paragraph 1 may, however, be declared

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[1] Report of the Heads of Delegation of the Governmental Committee set up by the Messina Conference and addressed to the Ministers for Foreign Affairs on 21 April 1956 (pp. 53-60).

[2] The report stated that the principles laid down in the Treaty should enable the European Commission to adopt general implementing regulations (...) aimed at the drawingup of detailed rules concerning discrimination, organising the control of mergers and implementing a prohibition on restrictive agreements having the effect of sharing or exploiting markets, restricting production or technical progress (Spaak report, *op. cit.*, p. 56).

inapplicable". By opting for this negative approach, Article85(3) allows the Community legislator the freedom to choose between an authorisation system and a directly applicable exception system.

13. Thus, the final choice of a system for controlling restrictive practices was left to the Community legislator: Article87 entrusts the Council, acting on a proposal from the Commission and after consulting the European Parliament, with the task of laying down detailed rules for the application of Article85(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. In doing so, the Council may institute a system of prior authorisation or make Article 85(3) directly applicable, without the need for a prior administrative act.

14. Article 87(1) also gave the Council the power to adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. The Commission presented the Council with a proposal for a Regulation to that end on 28 October 1960.[3] The short explanatory memorandum accompanying the proposal listed the three principal objectives that had guided its drafting: providing greater information to the supervisory authorities, ensuring a sufficiently uniform regime for the application of Article 85 in the six countries and establishing the conditions for providing businesses with adequate legal certainty. Given the prevailing circumstances at the beginning of the 1960s, it was not easy to achieve these three objectives.

15. First, ensuring that the competition authorities, both national and Community, were provided with the necessary information was a difficult matter at a time when the Commission services, and in particular the DirectorateGeneral with responsibility for competition policy, were not sufficiently familiar with markets and the nature of restrictive practices. The victims of breaches of the competition rules gave little thought to lodging complaints with the Commission and only gradually was recourse had to Community law. In addition, the competition authorities of the MemberStates, where they existed, had been set up recently and had little experience in the field of competition. The caselaw of the national courts was also very limited in the competition field.

16. Accordingly, in order to provide the Commission with information and businesses with legal certainty, Regulation No17 set up an authorisation system which normally requires the Commission to be informed in advance, in the form of a notification. The Regulation does not make prior notification of restrictive practices compulsory, but undertakings which wish to benefit from Article85(3) must notify their restrictive practices to the Commission (apart from restrictive practices exempted from notification under Article 4(2)). Decisions granting exemption are constitutive in nature and may be backdated to the date of notification but no earlier (Article 6(1) of Regulation No 17).

17. Secondly, the coherent development of the interpretation of Article85(3) initially required a certain centralisation of control. This was achieved by giving the Commission sole power to declare that Article 85(1) is inapplicable to restrictive practices (Article9(1) of Regulation No 17). This sole power was then strengthened by the mechanism which automatically removes the jurisdiction of the national authorities as soon as the Commission initiates procedures (Article9(3) of Regulation No 17).

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[3] Document IV/COM(60) 158 final, 28.10.1960.

18. Thirdly, the legal certainty of businesses was weakened by the fact that Article 85(2) stipulates that prohibited restrictive practices are automatically void, as well as by the very general wording of Article85, whose scope had not yet been defined by Community case-law, block exemption regulations and Commission decision-making practice. What is more, at that time, national laws, which either did not exist or were heterogeneous, were unable to guide undertakings or courts in their interpretation of Community law. Whilst neither Italy nor Luxembourg had any competition law, Belgium and the Netherlands had opted for a system of controlling abuses[4] which allowed illegal agreements to be penalised only from the date on which the infringement was recorded by the competition authority. Only German and French law were based, like Community law, on the prohibition principle , although German law had introduced an authorisation system for agreements between competitors (GWB (Restriction of Competition Act) of 27 July 1957), whilst French law had set up a system of directly applicable exception (French Order No 45-1483 of 30 June 1945).

## II. Development of the role of the Commission

19. Since the 1960s, the role of the Commission and the number of cases have expanded considerably owing to the combined effects of market integration, the accession of new Member States, the adoption of cooperation agreements with third countries and the globalisation of the economy.

20. It should be recalled that the scope of Community competition law is based on the criterion of effect on trade between Member States. An inevitable result of the completion of the internal market and the progressive integration of national markets was an increase in the number of cases covered by Community law. In an integrated market, even restrictive practices between undertakings established in one and the same Member State may have a direct or indirect, actual or potential influence on intra-Community trade and may thus fall within the scope of Community law.

21. The series of accessions of new Member States has had a mechanical effect on the geographical scope of the Commission's competence. Founded in 1957 by six countries, the Community currently has 15 members and will soon have more than 20. The enlargements did not bring any major changes to Regulation No 17. The accession of the United Kingdom, Ireland and Denmark[5] resulted simply in the incorporation of an Article 25 providing that the date of accession was the date of entry into force of the Regulation and that agreements, decisions and concerted practices which, as a result of the accession, were covered by Article 85, should be notified within a period of six months. When Greece,[6] Spain and Portugal[7] acceded, it was simply stated that the rules

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[4] The Belgian Law of 20 May 1960 on protection against the abuse of economic power, and the Dutch Law of 28 June 1956.

[5] See documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, OJ Special Edition L 73, 27.3.1972, p. 92.

[6] See documents concerning the accession of the Hellenic Republic to the European Communities, OJ L 291, 19.11.1979, p. 93.

applicable to previous accessions would also apply. The same rules were retained for the accessions of Austria, Sweden and Finland[8], except as regards agreements, decisions and concerted practices which, on the date of accession, were covered by the Agreement on the European Economic Area (the EEA Agreement).[9]

22. The Commission's geographical jurisdiction over competition was further expanded by the agreements concluded with third countries, either prior to accession, or simply as free trade agreements. The EEA Agreement contains rules based on Articles 85 and 86 and empowers the Commission to deal with a majority of the cases in which trade within the territory covered by the Agreement is affected.

23. Thus, while the Commission's role has expanded considerably since the 1960s, its means of action have not changed. Procedural rules that were designed for a Community of six Member States are still being applied, without any significant changes, to 15 Member States.

## III. Adjustments and their limits

24. The authorisation system provided for in Regulation No 17 met the three main requirements identified at the time by the Commission (provision of information to competition authorities, uniform application of the competition rules in the Community and legal certainty for undertakings). It allowed a coherent corpus of rules to be developed and applied uniformly in the Community, thus contributing significantly to the completion of the internal market. Nevertheless, it is now showing signs of its limitations. The *ex ante* control mechanism inherent in the authorisation system set up by Regulation No 17 resulted in undertakings systematically notifying their restrictive practices to the Commission which, with limited administrative resources, was very soon faced with the impossibility of dealing by formal decision with the thousands of cases submitted. Under Regulation No 17, the adoption of an exemption decision requires, in addition to the appropriate investigative measures, the publication of a notice in the Official Journal in, at present, 11 languages (Article 19(3) of Regulation No 17) to allow other interested parties to submit their observations, consultation of the Advisory Committee on the draft decision, adoption by the Commission and publication of the decision in the Official Journal in the 11 languages.

25. The combination of the *ex ante* control system provided for in Regulation No 17, the Commission's limited administrative resources and the complexity of decision-making procedures meant that, as early as 1967, the Commission was faced with a mass of 37450 cases that had accumulated since the entry into force of the Regulation four years earlier. It was thus essential to make certain adjustments to the system then in force in order to

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[7] See documents concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, OJ L 302, 15.11.1985, p. 165.

[8] See documents concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, OJ C 241, 29.8.1994,p. 57.

[9] OJ L 1, 3.1.1994, p. 1.

limit individual notifications, speed up the processing of applications for authorisation and, in certain cases, encourage complainants to turn to the national courts or authorities.

## A. Reduction in individual notifications

26. The Commission has taken a number of measures over the years to reduce notifications seeking negative clearance or exemption.

27. In its first formal decision under Article85,[10] the Commission introduced the concept of appreciable effect on competition, which allowed more minor cases to be removed from the scope of Article 85(1). The concept was upheld by the Court of Justice in *Völk v Vervaeke.*[11] On the basis of that judgment, the Commission quantified the concept for guidance purposes in a notice on agreements of minor importance published in 1970,[12] the second paragraph of which states that *"in the Commission's opinion, agreements whose effects on trade between Member States or on competition are negligible do not fall under the prohibition on restrictive agreements.(...). Only those agreements are prohibited which have an appreciable impact on market conditions (...)".* The notice, which was updated in 1977,[13] 1986[14] and 1997,[15] helped to reduce the number of notifications of restrictive practices that were not harmful to competition.

28. The Commission started using general notices in 1962 in order to clarify the conditions under which certain restrictive practices would not normally have the object or effect of restricting competition and would not therefore be caught by Article85(1). A notice on exclusive dealing contracts with commercial agents[16] was published in 1962, followed by a notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises[17] adopted in 1968. In addition, a notice concerning the assessment of certain subcontracting agreements in relation to Article85(1) was adopted in 1978.[18] A notice concerning the assessment of cooperative joint ventures pursuant to Article 85[19] was adopted in 1993. Intended to allow undertakings, if necessary with the help of their legal advisers, to determine themselves whether the restrictive practices to which they were parties were compatible with Community law, the

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[10] Commission Decision 64/344/EEC of 1 June 1964 concerning a request for negative clearance pursuant to Article 2 of Regulation No 17 (Grosfillex-Fillistorf case), OJ L 64, 10.6.1964, p. 1426.

[11] Case 5/69 *Franz Völk* v *SPRL Ets Vervaecke* [1969] ECR 295, paragraph 7.

[12] OJ C 64, 2.6.1970, p. 1.

[13] Commission notice of 19 December 1977 (OJ C 313, 29.12.1977, p. 3).

[14] OJ C 231, 12.9.1986, p. 2.

[15] OJ C 372, 9.12.1997, p. 13.

[16] OJ 139, 24.12.1962, p. 2921.

[17] OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.

[18] OJ C 1, 3.1.1979, p. 2.

[19] OJ C 43, 16.2.1993, p. 2.

notices to some extent helped to reduce the number of applications for negative clearance under Article 2 of Regulation No 17.

29. In an effort to reduce the number of individual applications for exemption, the Commission, empowered by the Council, adopted a series of block exemption regulations. Under Article 85(3), the provisions of Article 85(1) may be declared inapplicable to categories of agreements, decisions of associations of undertakings or concerted practices. The "declaration of inapplicability" thus stems from the rules defining the characteristics which the restrictive agreements in question must have in order to be regarded, without prior assessment, as qualifying for exemption under Article 85(3). Article 87 of the Treaty provides that the Council shall adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. On that basis, the Council has to date adopted three enabling regulations, Regulation No 19/65/EEC[20], Regulation No 2821/71/EEC[21] and Regulation (EEC) No 1534/91[22] which empower the Commission to declare the prohibition in Article 85(1) inapplicable to certain categories of agreements.

30. There are currently five block exemption regulations for vertical and technology transfer agreements, adopted by the Commission on the basis of Regulation No 19/65/EEC:

- Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) to categories of exclusive distribution agreements;[23]
- Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) to categories of exclusive purchasing agreements;[24]
- Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) to certain categories of motor vehicle distribution and servicing agreements;[25]
- Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) to categories of franchise agreements;[26]
- Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) to certain categories of technology transfer agreements.[27]

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[20] OJ 36, 6.3.1965, p. 533.

[21] Council Regulation (EEC) No 2821/71 (OJ L 285, 29.12.1971), as amended by Regulation (EEC) No 2473/72 of 19 December 1972 (OJ L 191, 29.12.1972).

[22] Council Regulation (EEC) No 1534/91 (OJ L 143, 7.6.1991, p.1.

[23] OJ L 173, 30.6.1983, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ L 214, 6.8.1997, p. 2).

[24] OJ L 173, 30.6.1983, as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ L 214, 6.8.1997, p. 2).

[25] OJ L 145, 29.6.1995, p. 25.

[26] OJ L 359, 28.12.1988, p. 46.

[27] OJ L 31, 9.2.1996, p. 2.

In connection with its review of policy concerning vertical restraints, the Commission presented the Council with a proposal for a Regulation amending Regulation No 19/65/EEC in order to give the Commission the necessary powers to adopt a block exemption regulation covering all vertical agreements.[28]

31. Under the powers conferred by the Council by virtue of Regulation (EEC) No 2821/71, the Commission adopted two block exemption regulations for horizontal agreements:

- Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article85(3) to categories of specialisation agreements;[29]

- Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article85(3) to categories of research and development agreements.[30]

32. Lastly, Regulation(EEC) No 1534/91 empowered the Commission to adopt a block exemption regulation specifically for the insurance industry: Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article85(3) to certain categories of agreements, decisions and concerted practices in the insurance sector.[31]

33. These block exemption regulations produced a considerable reduction in the number of individual applications for exemption.

## B. Quicker processing of individual notifications

34. As stated above, the adoption of formal decisions by the Commission involves particularly cumbersome procedures which very rapidly proved difficult to apply to all the cases submitted for assessment to the Commission. Accordingly, in order to speed up the processing of applications for authorisation, since the early 70s the Commission services have used the technique of "comfort" letters. These letters informed undertakings that, according to the information in the Commission's possession, the notified agreement either did not meet the conditions for the application of Article85(1) (negative clearance letter) or qualified for exemption (exemption letter). They are signed by a director of the Directorate-General for Competition. They help to speed up the processing of cases considerably as they generally eliminate the publication requirement provided for in Articles 19 and 21 of Regulation No 17 and the formal consultation of the Advisory Committee, as well as reducing the amount of translation required. The use of such letters developed very rapidly, and they currently total some 150200 a year. Today, over

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[28] OJ C 365, 26.11.1998, p. 27

[29] OJ L 53, 22.2.1985, p. 1, as amended by Commission Regulation (EC) No 2236/97 of 10 November 1997 (OJ L 306, 11.11.1997, p. 12)

[30] OJ L 53, 22.2.1985, p. 5, as amended by Commission Regulation (EC) No 2236/97 of 10 November 1997 (OJ L 306, 11.11.1997, p. 12)

[31] OJ L 398, 31.12.1992, p. 7

90% of notifications are closed informally (comfort letter or simply filed without further action[32]).

35. The comfort letter system has worked very well and won general acceptance, but it has two major drawbacks. First, the requirement that administrative acts must in principle be published and transparent is not met by comfort letters as they are only rarely preceded by the publication of a notice in the Official Journal enabling interested parties to put forward their comments in accordance with Article 19(3) of Regulation No 17. Secondly, the Court of Justice defined their legal value in a judgment delivered on 10 July 1980,[33] holding that they constitute neither a decision granting negative clearance nor a decision in application of Article85(3) of the Treaty and that they do not have the effect of binding the national courts before which the restrictive practices in question are alleged to be incompatible with Article85. They constitute an element of fact which the national courts and authorities may take into account.

## C. Encouraging the decentralised processing of complaints

36. Article 9(1) of Regulation No 17 gives the Commission sole power only to declare Article 85(1) inapplicable pursuant to Article85(3). The national courts and the competent authorities of the Member States may apply Article 85(1) and Article 86 of the Treaty and, in particular, rule on applications based on Community law. The Commission has frequently expressed its wish for more decentralised application by both national authorities and national courts.

37. The Court of Justice had already ruled in 1974 in *BRT*[34] that, as the prohibitions of Articles 85 and 86 tend by their very nature to produce direct effects in relations between individuals, the Articles create rights directly in respect of the individuals concerned which the national courts must safeguard. Ten years before adopting the notice on cooperation with the national courts,[35] the Commission in its 1983 Competition Report[36] stressed the role which national legal channels could play in establishing infringements of the Community competition rules. In most of its subsequent Reports, the Commission expressed regret at the slow progress in this respect .[37] In addition, in *Delimitis*,[38] the Court confirmed that a national court could directly apply Article85(1) if it was beyond doubt that Article 85(3) was not applicable to the case in question. The Court also

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[32] A large number of cases are filed each year without a decision. they may concern complaints or notifications withdrawn or no longer relevant.

[33] Case 99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV* [1980] ECR 2511.

[34] Case 127/73 *BRT I* [1974] ECR 51.

[35] Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C 39, 13.2.1993, p. 6.

[36] 1983 Competition Report, point 217.

[37] See in particular the 1985 Competiti n Report, point 38, the 1986 Competition Report, point 40, the 1987 Competition Report, point 55 and the 1991 Competition Report, point 69.

[38] Case C-234/89 *Stergios Deli. lenninger Bräu AG* [1991] ECR I-935.

acknowledged that a national court has the power *"to adopt interim measures pursuant to its national rules of procedure"*[39] and to carry out a positive assessment as to the application of Article85(3). Lastly, it stated that, in order to limit the risk of national courts taking decisions which conflict with those adopted or planned by the Commission, national courts could apply to the Commission to obtain the information they require, provided that the Commission was in a position to provide it. Following that judgment, the Commission adopted the above-mentioned notice on cooperation between itself and national courts in 1993. The notice clarifies the general legal framework and sets out the practical measures for increasing the involvement of national courts in the application of Articles 85 and 86. In particular, it defines the conditions in which the courts may apply to the Commission to seek information of a procedural, legal or factual nature.

38. In the same vein, the notice on cooperation between the Commission and national authorities,[40] published in 1997, sets out guidelines for the allocation of cases between the national authorities and the Commission and invites undertakings to make greater use of the national competition authorities to obtain enforcement of Articles 85(1) and 86. The chief aim of the notice is to reduce the number of complaints addressed to the Commission if they can be dealt with effectively by the national authorities.

39. The two above-mentioned notices concerning decentralisation have now reached their limits within the existing legal framework. Complainants remain reluctant to apply to the national courts or competition authorities when they consider they have been harmed by an infringement of Community law. Undertakings involved in national proceedings are still able to notify their restrictive practices to the Commission in order to thwart the actions of the body to which the matter has been referred. As already noted above, as soon as the Commission initiates procedures, the competition authorities automatically lose their jurisdiction (Article9(3)) and the courts c. ; stay proceedings until the Commission has taken a decision. Aware of this problem, the Commission referred, in point 57 of the notice on cooperation with competition authorities, to notifications chiefly aimed at suspending national proceedings, stating that it considered it was justified in not examining them as a matter of priority. However, it must be said that the mechanisms for cooperation with national authorities have not to date encountered the success expected, owing to the Commission's monopoly for the application of Article85(3) of the Treaty.

## Conclusion

40. The Commission has therefore managed to stem the flood of notifications, but at the cost of focusing less on the most serious restrictions of competition which, generally, are never notified. In addition, the Commission is not able to close all of the cases which it handles by formal decision, to the detriment of undertakings' legal certainty. It is clear from the foregoing that the measures taken have reached their limits and that more radical reforms must be considered. The need is all the more pressing as the closer integration of

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[39] *Ibid.*, paragraph 52, footnote 38.

[40] Commission notice on cooperation between the national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ C 313, 25.10.1997, p. 3.

national markets aggravates the effects of restrictions of competition, compelling the Commission to take stronger measures against the most harmful restrictive practices. In a Union with over 20 Member States, it will no longer be possible to retain a centralised prior authorisation system in Brussels, involving the individual assessment of thousands of cases. Such a system would be cumbersome, inefficient and impose excessive burdens on economic operators.

# Chapter II - The need for reform

## I. The objectives

41. Article 87(2)(a) stipulates that the regulations or directives adopted to give effect to Articles 85 and 86 shall be designed to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments. Article 87(2)(b) provides that the rules for the application of Article 85(3) must take into account the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other. The need to ensure a balance between effectiveness of policy and simplification of control must therefore be the guiding principle in choosing between the various options for reform.

42. The Commission considers that, in seeking such a balance and in order to accomplish its institutional mission, it must have a procedural framework that enables it, in the first place, to refocus its activities on combating the most serious restrictions of competition and, secondly, to allow decentralised application of the Community competition rules while at the same time maintaining consistency in competition policy throughout the Community. Lastly, the Commission considers that the procedural framework should ease the administrative constraints on undertakings while at the same time providing them with sufficient legal certainty.

### A. Ensuring effective supervision

#### *1. Refocusing the Commission's implementation of Article 85*

43. In an opinion delivered in 1961,[41] the Economic and Social Committee pointed to the risks inherent in the obligatory notification and authorisation system set out in the Commission proposal for a Regulation. In its opinion of 28March 1961, the Economic and Social Committee observed that, although some might see the authorisation system as a means of obtaining better knowledge of the existence of agreements that were harmful to competition, such a system risked diverting the Commission from its true mission by overloading it with administrative work that would prevent it from carrying out a serious, in-depth examination of agreements between undertakings and of their real effects[42]

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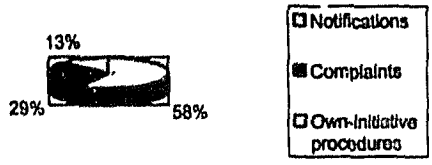
[41] Opinion of 28 March 1961 on the first Regulation implementing Articles85 and 86 of the Treaty.

[42] Emphasis added.

44. The Economic and Social Committee's warning did indeed prove to be correct. A look at the recent statistics on the Commission's work shows that the number of notifications makes it very difficult to pursue a proactive policy of combating restrictive practices. In the period 1988-98, own-initiative procedures[43] accounted for only 13% of new cases registered, with the Commission gradually having been reduced to a reactive role in handling the large number of notifications and complaints it receives. Similarly, formal Commission decisions account on average for only 6% of cases closed.

**New cases 1988-98**




45. There is today an obvious need to refocus the Commission's implementation of Article 85, allowing it to use its resources to combat cartels, particularly in concentrated markets and in markets which are being liberalised. Instead of having to adopt a reactive stance in the face of the large number of notifications it has to handle, the Commission should be able to be proactive and to pursue own-initiative procedures against restrictive practices and abuses of dominant positions that seriously restrict competition and threaten market integration.

### *2. Decentralising the application of the competition rules*

46. In an enlarged Community with more than twenty MemberStates, centralised detection of, and action against, infringements of the competition rules will be increasingly inefficient and inappropriate. Application of the rules will have to be decentralised more to the Member States' competition authorities and to the national courts. The competition authorities are well placed to take effective action in certain types of case: they are normally well acquainted with local markets and national operators, some of them have an infrastructure covering the whole of the relevant country and can carry out investigations rapidly, and most of them have the human[44] and legal resources needed to take action against infringements whose centre of gravity is in their territory. Lastly, they are closer to complainants, who will more readily turn to a national authority than to the

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[43] These are proceedings instigated by the Commission on its own initiative where it wishes to investigate and take action against infringements.

[44] In 1998, there were around 1,222 officials responsible for investigating cases involving mergers, restrictive practices and abuses of dominant positions in the Member States as opposed to 153 in the Commission. These figures must be treated with the greatest caution and are merely indicative, since comparisons between one Member State and another are very difficult to make.

Figures taken from the XVIIIth FIDE Congress, Stockholm, 3-6 June 1998, National Application of Community Competition Law, general report by J.Temple Lang, page 265 (for the detailed figures by Member State, see the report).

Commission. Where complainants invoke provisions both of Community law and of national law the national competition authorities, like the national courts, can apply the two sets of rules. The national courts for their part are in a better position than the Commission to accede to certain requests by complainants: they can act rapidly through interlocutory proceedings and, unlike the Commission, can grant damages to those who have been the victims of infringements.

47. Modernisation of the procedural rules should, therefore, allow decentralised application of Community law by removing the obstacle posed at present by the Commission's sole power to apply Article85(3). Community law could then be implemented by the body that was able to do so most effectively. However, any such move must not compromise uniform interpretation of Community law or result in a number of national authorities being able to adopt contradictory decisions in one and the same case.

## B. Simplifying administration

### *1. No need for an authorisation system*

48. A system of prohibition of restrictive practices does not need to have an authorisation system in order to work properly. Other systems exist which, like Community law, are based on the principle that restrictive practices are prohibited, but which do not have a system involving notification and authorisation. A prohibition system does not mean that all restrictive practices must be presumed to be illegal, but rather only those that restrict competition to an appreciable extent and do not satisfy the conditions for exemption. It is not therefore necessary for undertakings to have their restrictive practices validated by an administrative authority. The prohibition rule laid down in Article 85 can also be met by *ex post* control in which action would be taken only against restrictive practices that infringe Article85 as a whole. This is all the more relevant since, after 35 years of application, the law has been clarified and thus become more predictable for undertakings. At all events, it is inconceivable that, in an enlarged European Union, undertakings should have to notify, and the Commission examine, thousands of restrictive practices.

49. Lastly, the current division between paragraph 1 and paragraph 3 in implementing Article 85 is artificial and runs counter to the integral nature of Article85, which requires economic analysis of the overall impact of restrictive practices.[45]

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[45] Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd* v *Robert Bosch GmbH and others* [1962] ECR 89, and Case 59/77 *Etablissements A. de Bloos SPRL* v *Société en Commandite par Actions Bouyer* [1977] ECR 2359.

### 2. *Easing the constraints on undertakings while at the same time providing them with a sufficient degree of legal certainty*

50. While in 1962 it was necessary to ensure that the Commission was informed through a system of notification, the situation is now very different and provides less justification for the constraints imposed by notification. The legal environment is one of the factors determining the competitiveness of undertakings, and their competitiveness must be fostered as much as possible. At present, in pursuing their industrial and business strategies, undertakings must take account of the need to notify their restrictive practices to the Commission in order to obtain assurance that they do not infringe the competition rules. This requirement generates major costs, particularly for mediumsized undertakings. One of the objectives in modernising the competition rules must therefore be to avoid impeding cooperation between undertakings, where such cooperation does not pose any threat to competition, by freeing them from the constraints imposed by the current notification system.

51. Undertakings also at present enjoy a satisfactory level of legal certainty thanks to the set of clear rules that have been developed and refined through more than 30years of Commission decision-making practice and Court of Justice case-law and by the many different kinds of general instruments that have been adopted (block exemption regulations, notices and guidelines). Any reform must endeavour to ensure that a reasonable level of legal certainty is maintained for undertakings. This means, on the one hand, that the rules must be defined as clearly as possible so that undertakings can assess their restrictive practices themselves and, on the other, that consistency of application by the various bodies responsible (Commission, national competition authorities and courts) is ensured by appropriate preventive and corrective mechanisms.

## II. The options

52. The options available for reforming the system of control of restrictive practices must be assessed in the light of the requirements of effective supervision and simplification of administration. The reform options considered must also be such as to ensure consistency and uniformity in the application of the competition rules and to maintain a reasonable level of legal certainty for undertakings.

53. In a system under which restrictive practices are prohibited, the legislator is confronted with a fundamental choice: adoption of an authorisation system or one of directly applicable exception. Authorisation systems are based on the principle that the prohibition on restrictive practices (in Community law, Article 85(1)) can be lifted only by an act of a public authority empowered to do so, its authorisation decision being constitutive. Where the prohibition on restrictive practices is sanctioned by their being void, logic dictates that such practices are void until such time as the authority has authorised them. In directly applicable exception systems, by contrast, the prohibition on restrictive practices does not apply to those which meet certain criteria specified by law. Such criteria taken as a whole represent an exception to the principle of prohibition.

54. The reasons which led to the adoption of an authorisation system in Community law in 1962 have been explained above. Today, changes in the circumstances in which the

Commission acts lead one to ask whether it is necessary to change the system. Various suggestions have been made in recent years by interested parties: some suggestions maintain the authorisation system approach and try to make it more efficient and less time-consuming, while others pursue a more far-reaching reform through the adoption of a directly applicable exception system.

## A. Improving the authorisation system

55. A number of suggestions have been made for improving the operation of the present system, whose main disadvantages are, first, the fact that the Commission cannot focus its resources on dealing with the most serious restrictions of competition, secondly, the fact that it is difficult for the Commission to deal with the cases referred to it within reasonable deadlines by means of formal decisions that provide satisfactory legal certainty for undertakings and, thirdly, the obstacles to decentralised application of the Community competition rules by national courts and competent authorities in the MemberStates.

### *1. Interpretation of Article 85*

56. One option that is sometimes put forward is to change the interpretation of Article 85 so as to include analysis of the harmful and beneficial effects of an agreement in the assessment under Article 85(1). Application of the exemption provided for in Article 85(3) would then be restricted to those cases in which the need to ensure consistency between competition policy and other Community policies took precedence over the results of the competition analysis. It would in a way mean interpreting Article 85(1) as incorporating a "rule of reason".[46] Such a system would ease the notification constraints imposed on undertakings, since they would not be required to notify agreements in order to obtain negative clearance.

57. The Commission has already adopted this approach to a limited extent and has carried out an assessment of the pro- and anti-competitive aspects of some restrictive practices under Article 85(1). This approach has been endorsed by the Court of Justice.[47] However, the structure of Article 85 is such as to prevent greater use being made of this approach: if more systematic use were made under Article85(1) of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article85(3) would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside Article85(3) when that provision in fact contains all the elements of a "rule of reason". It would moreover be dangerous if modernisation of the competition rules were to be based on developments in decision-making practice, subject to such developments being upheld by the Community Courts. Any such approach would mean that modernisation was contingent upon the cases submitted to the Commission and could take many years. Lastly, this option would

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[46] Approach in which the authorities or courts responsible for competition law balance the pro-competitive aspects of an agreement against its anti-competitive aspects in deciding whether to prohibit it.

[47] See, for example, Case 258/78 *L.C. Nungesser KG and Kurt Eisele* v *Commission of the European Communities* [1982] ECR 2015, and Case 161/84 *Pronuptia de Paris GmbH* v *Pronuptia de Paris Irmgard Schillgalis* [1986] ECR 353.

run the risk of diverting Article 85(3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.

### 2. *Decentralisation of the application of Article 85(3)*

58. One of the causes of the Commission's difficulty in focusing its action on cases involving a real Community interest lies in its monopoly on the application of Article 85(3). It has accordingly sometimes been suggested that Article 9(1) of Regulation No 17 should be abolished, so as to change the current attribution of powers and enable national competition authorities to fully apply Article 85 by adopting constitutive exemption decisions. There are several variants of this option depending on the power-sharing criteria applied.

59. The first variant of this option involves sharing the power to apply Article 85(3) and allocating cases between the Commission and national competition authorities on the basis of their centre of gravity ("Schwerpunkttheorie")[48]. The criteria for determining the centre of gravity of a case would be not only the effects of the agreement or practice, but also the need to safeguard competition effectively. Some cases of Community relevance would be reserved to the Commission: these would include cases that raised a new legal issue and cases involving application of Article 90 of the Treaty.

60. This option does not reduce the total number of notifications, but merely redistributes the total number of current and future cases between the Commission and the national competition authorities. It does not make it possible to increase action against the most serious infringements of the competition rules, which are almost never notified. Its effectiveness is further limited by the fact that notifications liable to be handled by the national competition authorities are few in number: the decisions of a national authority are enforceable only within its own territory, which means that cases involving several countries cannot be handled in this way.

61. In addition, the proposed criterion for allocating cases is not sufficiently precise to allow notifications to be allocated along clear lines. The centreof-gravity concept is well suited to the allocation of complaints between competition authorities, but would be difficult to apply in allocating notifications. Furthermore, any such system would continue to impede the application of Community law by national courts, since it would not remove the blocking effect of any system involving authorisation by an administrative authority, whether national or Community.

62. The second variant would involve allocating responsibilities between the Commission and national competition authorities on the basis of turnover thresholds, along the lines of Regulation (EEC) No 4064/89.[49] Below the thresholds, the competition

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[48] This variant was set out in a working document of the *Bundeskartellamt:* Arbeitsunterlage für die Sitzung des Arbeitskreises Kartellrecht am 8. und 9. Oktober 1998 : "Praxis und Perspektiven der dezentralen Anwendung des EG-Wettbewerbsrechts" (http://www.bundeskartellamt.de).

[49] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1).

authorities would be able to apply either their own national law, as in the case of mergers, or Community law. Whereas the thresholds provided for in Regulation (EEC) No 4064/89 establish both the scope of application of Community law and the exclusive competence of the Commission, the thresholds to be used for the purposes of applying Article 85 would be confined to defining competences, with the criterion for the application of Community law being the effect on trade between Member States. If the national authorities were to apply national law, there would be a risk of forum shopping and the renationalisation of competition policy.[50] Such a situation would be detrimental to undertakings. If the national authorities were to apply Community law and had the power to adopt constitutive exemption decisions, there would be a major risk to the uniform application of Community law, particularly in the event of multiple notifications being submitted to different national authorities. This option would mean that all national competition authorities would have to introduce notification systems, though the establishment of such systems could prove particularly difficult for the new Member States, whose administrative structures might not be up to such a task.

### *3. Broadening the scope of application of Article 4(2) of Regulation No 17*

63. Article 4(2) of Regulation No 17 waives the prior notification requirement for a number of types of agreement. Consequently, Article 6(1), under which the date on which an exemption decision takes effect may not be earlier than the date of notification, does not apply to them. The purpose of this provision is to reduce the number of notifications involving restrictive practices whose main impact is in a single Member State.

64. One option might be to extend further the exception to the notification requirement provided for in Article 4(2) of Regulation No 17. The advantage of such a change for the undertakings concerned would be that, even in the event of late notification, the Commission could assess whether the restrictive practices satisfied the conditions of Article 85(3) and, if so, could adopt an exemption decision that would be effective from the date on which the agreement was concluded. Thus, undertakings' legal certainty would be enhanced as this would prevent agreements falling within the scope of Article 85(1) which have not been notified from being automatically void, as is the case under the present system. This type of change would not entail any relaxation in Commission supervision, since Article 4(2) does not prevent it from prohibiting restrictive practices covered by Article 85(1) that do not meet the tests of Article 85(3).

65. Nevertheless, this option is not wholly satisfactory: it limits the Commission's scope for refocusing its activities on the most serious restrictions of competition, since it maintains the Commission's monopoly on granting exemption and thus poses an obstacle to decentralisation.

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[50] See the opinion of the European Parliament on the 1996 Competition Report.

### 4. *Procedural simplification*

66. One of the reasons for the Commission's difficulties in handling cases by formal decision pursuant to Regulation No 17 is the complexity of the procedures laid down in that Regulation. Simplification of these procedures is sometimes proposed, in order to allow the Commission to deal with cases rapidly and provide undertakings with legal certainty. The simplifications discussed include abolishing the requirement of translation into all Community languages, both in the case of Article19(3) notices and in the case of decisions, and the simplification of Advisory Committee consultation procedures. Whatever the simplifications envisaged and regardless of how they should be viewed, they will not reduce the number of cases notified and will not therefore enable the Commission to focus on the most serious restrictions of competition, which are notified only in exceptional circumstances. This option would indeed have a perverse effect in that all notifications would be dealt with by decision, and undertakings would therefore be encouraged to notify.

67. A variant of this option would be the general application of opposition procedures. A number of block exemption regulations currently provide for nonopposition procedures, under which agreements involving restrictions that are neither expressly exempted by the regulation nor expressly prohibited may be notified to the Commission.[51] If the Commission does not oppose exemption within a period of sixmonths, the agreement is exempt. It has been proposed that this system should be applied generally to all restrictive practices.

68. This option, however, has major disadvantages. As already emphasised in the Green Paper on vertical restraints in EC competition policy,[52] the general application of such a procedure would have an extremely centralising effect, creating a powerful incentive for undertakings to notify their restrictive practices to the Commission. It would not therefore allow decentralised application of the competition rules. In addition, the Commission does not have the necessary resources to handle large numbers of cases under non-opposition procedures, and notification costs would remain high for undertakings. This option would not therefore allow the Commission to refocus its work on combating the most serious restrictions of competition.

## B. Switching to a directly applicable exception system

69. Within the framework of the prohibition system provided for in the Treaty, there exists another option for reform, which would be to adopt a directly applicable exception system allowing *ex post* supervision of restrictive practices. The switch to such a system can be achieved by a Council Regulation, based on Article 87 of the Treaty, which would stipulate that all national authorities or courts before which the applicability of Article

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[51] These are Commission Regulation (EEC) No4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements (OJ L 359, 28.12.1988, p. 46), Commission Regulation (EEC) no 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements (OJ L 53, 22.2.1985, p. 1) and Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements (OJ L 53, 22.2.1985, p. 5).

[52] Document COM(96) 721 final, 22.1.1997.

85(1) of the Treaty was invoked would also consider the applicability of Article 85(3). Article 85 would then become a unitary norm comprising a rule establishing the principle of prohibition, unless certain conditions are met The whole of Article 85 would then become a directly applicable provision which individuals could invoke in court or before any authority empowered to deal with such matters. This interpretation would have the effect of making restrictive practices which are prohibited by Article85(1), but which meet the tests of Article 85(3) lawful as from the time they were concluded, without the need for any prior decision. Similarly, restrictive practices that restricted competition would be unlawful once the conditions of Article85(3) are no longer fulfilled. This new framework would mean that restrictive practices would no longer have to be notified in order to be validated. The arrangements for implementing Article85 as a whole would then be identical to those for Article85(1) and Article 86.

70. The adoption of such a system in Community law is now possible because of the changes and developments that have occurred in Community competition law since 1962. The legislative framework in the competition policy area has been considerably strengthened, and the reforms currently under way on vertical restrictions and horizontal cooperation agreements will help to simplify and clarify it further. While there were legitimate doubts in 1960 as to the scope of the conditions for exemption under Article 85, the Commission's decision-making practice, the case-law of the Court of Justice and the Court of First Instance and the various block exemption regulations and general notices have made the conditions governing exemption much clearer. Furthermore, the national authorities and courts, undertakings and their legal advisers have progressively gained a better knowledge of Community competition law. These changes now make it possible to overcome obstacles which, at the time when Regulation No 17 was adopted, prevented the establishment of a system of *ex post* control and stemmed essentially from uncertainties as to the precise scope of the exemption conditions provided for in Article85(3).

71. The reforms currently under way in the area of vertical restrictions and horizontal cooperation agreements will help to simplify the legislative framework and to define more precisely the scope of application of Article85(1) and (3). The simplification results from the Commission's intention to adopt a new type of block exemption regulation that will no longer be based on an approach that restricts exemption to certain specific agreements and clauses identified in the regulation. The new type of exemption will provide general exemption for all agreements and all clauses in a given category, subject only to a list of prohibited restrictions ("blacklisted clauses") and specific conditions of application, on the one hand, and a restriction of the benefit of general exemption through a market-share threshold criterion, on the other. This exemption arrangement will provide legal certainty for a wider category of agreements and will restore greater freedom of contract to undertakings, while at the same time continuing to safeguard competition effectively as regards agreements concluded between undertakings holding significant market power. The new generation of regulations will thus help to simplify the applicable rules for most undertakings. Notices will also be issued to clarify the conditions governing the application of Article85 to cases not covered by the block exemption regulations.

72. Adopting a directly applicable exception system and *ex post* control could help to meet the challenges facing competition policy in the coming decades. Under such a system, any administrative authority or court endowed with the necessary powers could carry out a full assessment of restrictive practices referred to it, examining both their restrictive effects under Article85(1) and any economic benefits under Article85(3).

Adopting a directly applicable exception system would thus mean removing the sole power conferred on the Commission by Article9(1) of Regulation No 17 as regards the application of Article 85(3). This would facilitate decentralised application of the competition rules. A directly applicable exception system would also remove the bureaucratic constraint of notification for undertakings, since authorisation would no longer be required to make restrictive practices that meet the tests of Article 85(3) legally enforceable. Freed from the burden of having to process notifications, the Commission for its part could concentrate on taking action against the most serious infringements.

73. Under a system of directly applicable exception, application of Article 85 would be similar to that for Article 86, which the Commission, the national authorities and the courts already apply in parallel and concurrently.

74. The Commission believes, then, that a directly applicable exception system is the option most likely to achieve the stated objectives of refocusing the Commission's activity, decentralising the application of the competition rules, and easing the administrative burden on undertakings.

75 The reform proposed in this White Paper, namely the introduction of such a directly applicable exception system, has three main elements : the ending of the system of notification and authorisation, decentralised application of the competition rules, and intensified *ex post* control The approach taken to the application of Article 85 will continue to be rigorously economic.

## i. The ending of the notification and authorisation system

76 The notification system established by Regulation No17 has enabled the Commission to build up a coherent body of precedent cases, and to ensure that the competition rules are applied consistently throughout the MemberStates of the Community But it has several disadvantages that make it questionable today. The requirement that undertakings wishing to invoke Article85(3) must notify their restrictive practices to the Commission acts as a curb on their commercial strategy and represents a considerable cost. The drafting of notifications, and collection of the necessary information, imposes a heavy burden of work and expense on undertakings, whether they carry out the task in-house or entrust it to outside legal advisers. In a directly applicable exception system they would be freed from this obligation to notify, and their position would be strengthened if they had to seek the enforcement of their r ve practices in the courts, as they would now be able to plead that their restri ractices were covered by Article 85(3)

77 The notification system proved useful as long as the interpretation of Article85 and in particular of paragraph 3 was uncertain, but it no longer makes it possible to detect the most serious infringements of the competition rules, and thus to ensure "effective supervision" within the meaning of Article87. As evidence of this, it is only extremely rarely that notifications lead to prohibition decisions,[51] and the Commission has made only exceptional use of Article 15(6) of Regulation No 17, which empowers it to withdraw notifying undertakings' immunity from fines In a system of*ex post* control, undertakings would have to make their own assessment of the compatibility of their restrictive practices with Community law, in the light of the legislation in force and the caselaw, this would certainly lighten the administrative burden weighing on them, but it would also require them to take on added responsibility

78 In the new enforcement system, undertakings' legal certainty will remain at a globally satisfactory level, and in certain respects will even be strengthened Thus, instead of depending on the Commission adopting an exemption decision, undertakings will be

[51] In more than 35 years of application of Regulation No 17 there have been only 9 decisions in which a notified agreement was prohibited without a complaint having been lodged against it

able to obtain immediate execution of their contracts before national courts, with effect from the date of their conclusion, provided that the conditions of Article 85(3) are satisfied. There is no presumption that restrictive practices are void under Article 85: the prohibition contained in this provision is applicable only when the conditions of prohibition are met. After 40 years of implementation, these conditions have been largely clarified by case-law and decision-making practice and are known to undertakings. In addition, the Commission intends to adopt block exemption regulations with a wider scope of application. The use of market share thresholds will allow the Commission to eliminate the straight-jacket effect of the current regulations and to cover the vast majority of agreements, and in particular those concluded by small and medium-sized undertakings. The Commission will adopt guidelines and individual decisions to clarify the scope of application of Articles 85(1) and 85(3) outside the block exemptions. In its handling of individual cases, the Commission will adopt a more economic approach to the application of Article 85(1), which will limit the scope of its application to undertakings with a certain degree of market power. Moreover, the application of Community competition law by national authorities and courts will be strengthened. This will accelerate the convergence of national laws and Community law, and thus simplify undertakings' determination of commercial strategy. Finally, preventive and corrective mechanisms will exist in order to ensure consistent and uniform application of Community law by national authorities and courts.

79. The directly applicable exception system ought to apply to all the restrictive practices currently covered by Article 85. However, it would appear desirable to maintain the prior authorisation requirement for partial-function production joint ventures. Operations of this kind generally require substantial investment and far-reaching integration of operations, which makes it difficult to unravel them afterwards at the behest of a competition authority. For this particular category of transaction, therefore, effective supervision would probably be better served by a system of compulsory prior notification.

80. In order to avoid imposing unnecessary constraints on undertakings, only production joint ventures to which a certain minimum level of assets was to be contributed would be subject to prior control, and then always provided that no block exemption applied.

81. It does not seem expedient to create a special procedure to deal with this one category of transaction. The procedures established by the Merger Regulation allow rapid and effective prior control. The Commission accordingly envisages extending the scope of that Regulation to include partial-function joint production ventures, which would be subjected both to the dominance test, under Article 2(3) of the Regulation, and to the Article 85 test, under Article 2(4).

## II. Decentralised application of the competition rules

82. The Regulation No 17 system is based on centralised application of Article 85(3). Article 9(1) of the Regulation states that the Commission is to have sole power to exempt restrictive practices. Under a directly applicable exception system this allocation of responsibilities would be changed, and competition authorities and courts would likewise have jurisdiction to consider the compatibility of restrictive practices coming before them with Article 85 as a whole.

## A. A new division of responsibilities

### *1. Competition policy to be determined by the Commission*

83. Decentralisation must not be allowed to result in inconsistent application of Community competition law. Competition policy will thus continue to be determined at Community level, both by means of the adoption of legislative texts and individual decisions. The Commission, as guardian of the Treaties and guarantor of the Community interest subject to the supervision of the Court of Justice, has a special role to play in the application of Community law and in ensuring the consistent application of the competition rules.

84. In a directly applicable exception system, the legislative framework is of primary importance. The application of the rules must be sufficiently reliable and consistent to allow businesses to assess whether their restrictive practices are lawful. The Commission would keep the sole right to propose legislative texts, in whatever form - regulations, notices, guidelines etc. - and would act whenever necessary in order to ensure consistency and uniformity in the application of the competition rules.

85. Block exemptions are the first of these legislative texts. Given the importance of legislation in the new directly applicable exception system, legal certainty for undertakings demands that an agreement exempted by a block exemption should not then be held contrary to national law. This can be achieved by invoking Article 87(2)(e): a Community regulation should be enacted to prevent national legislation from prohibiting or varying the effects of agreements exempted by Community regulation. Some Member States have already entered this principle in their own legislation. For example, the Belgian Law No 91/2790 of 5 August 1991 provides that Community exemptions are a bar to action by the Belgian authorities, and that agreements so exempted need not be notified under domestic law. Danish law excludes restrictive practices covered by a Community exemption regulation from the scope of the prohibition that it lays down. Spanish and UK laws make similar provision.

86. The Commission also intends to draw up more notices and guidelines to explain its policy and provide guidance for the application of the Community competition rules by national authorities. These instruments are particularly well suited to the interpretation of rules of an economic nature, because they make it easier to take account of the range of criteria that are relevant to an examination under the competition rules. They might not be binding on national authorities, but they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out. Provided those individual decisions were upheld by the Court of Justice, then, notices and guidelines would come to form part of the rules that must be applied by national authorities.

87. In a directly applicable exception system, Commission policy on competition would continue to be reflected in prohibition decisions in individual cases and these would be of great importance as precedents. As the Commission would be concentrating its attention on the most serious restrictions, the number of individual prohibition decisions can be expected to increase substantially.

88. It is true that the Commission would no longer adopt exemption decisions under Article 85(3) as it does now, but it should nevertheless be able to adopt individual decisions that are not prohibition decisions. Where a transaction raises a question that is new, it may be necessary to provide the market with guidance regarding the Commission's approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest.

89. These positive decisions would confine themselves to a finding that an agreement is compatible with Article 85 as a whole, whether because it falls outside Article 85(1), or because it satisfies the tests of Article 85(3). They would be of a declaratory nature, and would have the same legal effect as negative clearance decisions have at present.

90. In the course of procedures that might otherwise end with a prohibition, it can happen that the undertakings concerned propose to give the Commission undertakings that would overcome the objections raised against their agreement. It is useful that the Commission should be able to make such commitments binding, both in order to oblige the undertakings to comply with them and to enable the parties and others to rely on them before their national courts. In the new Regulation applying Articles 85 and 86, therefore, the Commission intends to make provision for a new kind of individual decision, subject to the ordinary publication requirements, in which the Commission would take note of the commitments entered into by the parties and render them binding. Such a decision would allow the procedure to be terminated while ensuring that the commitments were respected. As a corollary to this change, a clause would be included in the system of penalties in the Regulation providing for fines and periodic penalty payments in the event of failure on the part of undertakings to meet such commitments.

### 2. *National authorities to play an enhanced role in the application of the competition rules*

91. The actions of competition authorities, at both national and Community level, are guided by considerations of public policy in the economic sphere: unlike the national courts, they do not set out to decide disputes between parties, but rather to guarantee the maintenance of a system ensuring that competition is not distorted. Cooperation between the Commission and the national competition authorities has hitherto been on a pragmatic footing, and has been limited by the Commission's exclusive right to apply Article 85(3). After 35 years of application of the Community competition rules, the time has come to make better use of the complementarity that exists between the national authorities and the Commission, and to facilitate the application of the rules by a network of authorities operating on common principles and in close collaboration.

92. If such a network is to work properly, however, measures of three kinds will be needed: (a) the Commission must give up its monopoly of exemption; (b) the national authorities must be empowered to withdraw the benefit of a Community block exemption regulation; and (c) an authority considering a case, whether at Community or national level, must be in a position to pass a file on it to another authority, including any confidential information that might be used in procedures for infringement of the Community competition rules.

93. In a directly applicable exceptionsystem the national authorities would themselves be able to assess whether or not a restrictive practice meets the conditions of

Article 85(3), and would no longer have to refer the question to the Commission. They could investigate cases of application of Community law, in response to complaints or on their own initiative, without fear that the parties to a restrictive practice might invoke a notification pending before the Commission.

94. To allow the role of the national authorities to be strengthened in this way, Regulation No 17 would have to be amended to remove the monopoly of exemption and to make it quite clear that any authority considering a case of application of Article 85 must consider whether the tests for exemption are satisfied. If this reform is really to improve the application of the competition rules, the seven Member States that have not yet done so will have to empower their competition authorities to apply Community law.

95. As a logical consequence of the abandonment of the Commission's monopoly of exemption, the national authorities would have to be able to withdraw the benefit of a block exemption on their own territory if that territory or part of it constituted a separate market. The authorities of the Member States are particularly well placed to assess whether, in a particular case provided for in the block exemption, there are in their territory agreements covered by the Regulation which do not satisfy the tests of Article 85(3), and which consequently do not qualify for exemption. This possibility has already been provided for in the Commission's communication on vertical restraints,[54] and could be generalised in the new Regulation applying Articles 85 and 86.

96. A national competition authority may encounter difficulties when it seeks to act on a complaint requiring investigation in several Member States. Cases may also come before the Commission whose effects are essentially concentrated in a single Member State. The most effective solution in such situations would be for the authority considering the case to pass it on to the authority best placed to deal with it. This implies that the authority to whom the documents in the case are forwarded must be able to use them directly as evidence. Article 20 of Regulation No 17 currently prevents the national competition authorities from using as evidence information supplied by the Commission.[55]

97. If the Commission finds that the effects of a disputed practice are felt primarily in one Member State, therefore, it should be entitled under the new Regulation to send the whole of the file, including any confidential information, to the competent authority in that Member State, so that that authority can continue the investigation making direct use in evidence of the information supplied. Conversely, if after investigation a national authority comes to the conclusion that a case has a Community dimension and requires action by the Commission, it should be able to forward its file to the Commission, on the model of what can already be done by the EFTA Surveillance Authority.[56] The only limitation that must be retained is that imposed by the terms of the original mandate: whatever the authority that made the earlier enquiries, the information could be used only for the purpose for which it was originally collected and for the application of Articles 85 and 86 or of national competition law as the case might be.

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[54] OJ C 365, 26.11.1998, p. 3.

[55] Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4820, at paragraphs 37 *et seq*.

[56] Protocol 23 concerning the cooperation between the surveillance authorities (Article 58 of the Agreement on the European Economic Area), OJ L 1, 3.1.1994, p. 186.

98. This extension of the use of information should be counterbalanced by the incorporation in the new Regulation of the principle that separate penalties could not be imposed by a national authority and by the Commission, and that separate commitments would not have to be entered into to satisfy objections raised by the two levels.

### 3. *The national courts to play an enhanced role in the application of the competition rules*

99. National courts are close to European citizens, and since the inception of the Treaty they have had a specific role in safeguarding the rights of individuals within their jurisdiction which are conferred directly by Community law[57]. The Court of Justice has accepted that the national courts are vital to the effective application of Community law, including competition law. They apply Article85 in proceedings of three kinds: contractual liability proceedings (disputes between parties to an agreement), non-contractual liability proceedings (disputes between a third party and one or more parties to the agreement), and applications for injunctions.

100. Because of the exclusive right to exempt that is conferred on the Commission by Regulation No 17, national courts cannot themselves apply Article85(3) so as to exempt an agreement. And because the courts have no jurisdiction to apply Article85(3), undertakings can, in practice, bring court proceedings to a halt by lodging a notification with the Commission. This phenomenon is a major obstacle to more extensive application of the competition rules by national courts. In a directly applicable exception system, undertakings would be able to invoke the direct applicability of Article85(3) as an argument in their defence before the courts. This new ground of defence would allow them to obtain immediate civil enforcement of those of their restrictive practices which satisfy the conditions of Article 85(3). Their legal certainty would thus be strengthened. Complainants, on the other hand, would be able to obtain damages more quickly where they are victims of illegal agreements. Except where an appeal was lodged, thejudgments of national courts would have the force of *res judicata*. These judgments are recognised by the courts of all MemberStates under the Brussels[58] and Lugano[59] Judgments Conventions.

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[57] Judgment of the Court of Justice in Case 26/62 *Van Gend & Loos* [1963] ECR 1, and *BRT* v *SABAM*, see footnote 34.

[58] Brussels Convention on jurisdiction and the enforcement ofjudgments in civil and commercial matters, OJ L 304, 30.10 1978, p. 36; last amended by the 1997 Accession Convention, OJ C15, 15.1.1997, p. 1.

[59] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded in Lugano on 16 September 1988 (OJ L 319, 25.11.88, p. 9)

## B. Consistent and uniform application of the competition rules

### *1. Risk of inconsistencies and principles for their resolution*

101. Decentralised application of the competition rules and abandonment of the prior authorisation system must not be allowed to stand in the way of the maintenance of conditions of competition that are consistent throughout the Community. The principle of the primacy of Community law prevents the application of national law from undermining the full and uniform application of Community law and the effectiveness of measures implementing it.[60] But where Community law is being applied by several bodies at once (Commission, national authorities and national courts), there are potential conflicts of two kinds:

(1) A national authority or court may take a favourable approach to a restrictive practice prohibited by the Commission (by rejecting a complaint on the ground that the agreement is not caught by Article 85(1) or that it satisfies the tests of Article 85(3), or by a judgment ordering its enforcement);

(2) an authority may prohibit a restrictive practice, or a court may refuse to enforce it, despite a positive approach taken by the Commission (rejection of a complaint against it or a positive decision.)

102. It should be pointed out, first of all, that parallel application of Article85(1) and Article 86 has existed since 1962, and has given rise to very few problems. The principles for resolution of conflicts are as follows:

(1) The Court of Justice held in *Delimitis*[61] that once the Commission has initiated procedures, and *a fortiori* when it has adopted a decision no longer open to appeal or which has been confirmed on appeal, the national courts are bound to avoid conflicting decisions, if necessary by suspending the proceedings before them to ask the Commission for information, or by making a reference for a preliminary ruling under Article 177 of the Treaty; the same principle can by analogy be applied to national competition authorities, although the avenue of a reference under Article 177 is not open to them.

(2) When a national authority has adopted a positive decision which is either no longer open to appeal or which has been confirmed on appeal, or a court has delivered a positive judgment (for example rejection of a complaint on the ground that a restrictive practice satisfies the tests of Article85(3)) which is either no longer open to appeal or has been confirmed on appeal, the Commission can always intervene to prohibit the agreement, subject only to the principle of *res judicata* that applies to the dispute between the parties themselves, which has been decided once and for all by the national court.

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[60] See Case 14/68 *Walt Wilhelm* [1969] ECR 1.

[61] See footnote 38.

(3) Where an authority or a national court takes a negative decision in respect of a restrictive practice, the Commission believes that it should not normally seek to intervene otherwise than as an intervener on a reference for a preliminary ruling under Article 177, if any such reference is made.

(4) For as long as a decision of a national authority or court is still open to appeal or the decision on appeal is pending, the Commission may at any time adopt a contrary decision. In that case the principle that conflicting decisions must be avoided will apply to the appeal body.

103. If conflicts should arise between the different bodies applying Community competition law, these principles should allow them to be resolved. It may also be necessary to strengthen the principle that the application of national or Community law by national courts or authorities should be consistent with the application of Community competition law by the Commission, subject to the supervision of the Court of Justice. But it would nevertheless be advisable to establish mechanisms to avoid such conflicts in the first place.

### 2. *Information and cooperation mechanisms*

104. To ensure the consistent application of the rules, and the preservation of the unity of competition policy, there are two main instruments that already exist in Community law: these are Article 169 and Article 177 of the Treaty. Article 169 empowers the Commission to refer to the Court of Justice cases of infringement of Community law by Member States, while Article 177 requires courts of last instance to refer questions of interpretation of Community law to the Court of Justice for a preliminary ruling. These two procedures are certainly effective, but they can be a very slow way of maintaining or restoring consistency in competition policy, which calls for day-to-day cooperation between competent authorities. There is a need for flexible and rapid mechanisms for the exchange of information and cooperation between competition authorities, courts and the Commission.

105. As regards competition authorities, it is proposed that the amended Regulation No 17 should include an obligation to inform the Commission of cases in which Articles 85 and 86 are applied by the competition authorities of the MemberStates; this would correspond to the obligation imposed on the Commission by Article10 of the present Regulation.[62] The Commission would have to be informed of the initiation of procedures and before their termination. The Commission would also have to be informed if an authority planned to withdraw the benefit of a block exemption. Information of this kind together with any correspondence that might take place with the national authorities should ensure that the consistency of competition policy can be preserved without requiring machinery to impose solutions to conflicts in the application of Community law. But the Commission would still have the possibility of taking a case out of the jurisdiction of the national competition authorities, by means of a mechanism equivalent to that in

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[62] German law already provides that the Commission is to be informed of cases of application of Community law so as to enable it to state a view: see paragraph 50(3) of the Restriction of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* - "GWB"), as amended by the Sixth Amendment, which entered into force on 1 January 1999.

Article 9(3) of the present Regulation No 17. To ensure consistency between proceedings under Community law and proceedings under domestic law, the national authorities would also be required to inform the Commission, on their own initiative or at the Commission's request, of any proceedings they were conducting under national law that might have implications for Community proceedings.

106. The proper functioning of the network between the Commission and the Member States clearly implies a reinforcement of the role of the Advisory Committee on Restrictive Practices and Dominant Positions. It would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with them. It would continue to be consulted on legislation drafted by the Commission and on draft Commission decisions in the same way as today, but the Commission, acting on its own initiative or at the request of a Member State, could also be empowered to ask the Committee for its opinion on cases of application of Community law by national authorities. In the context of pre-accession strategy, the Commission will devote particular attention to the development of competition in the candidate countries and will provide their competition authorities with increased assistance.

107. As regards national courts, in order to maintain consistency of interpretation when the application of the rules is decentralised, and to lend support to the national courts in the exercise of their functions, mechanisms would have to be set up for cooperation between the Commission and the courts. It is vital, first of all, that the Commission should be aware of proceedings in which Articles85 and 86 are invoked before the courts, so that it is made aware of any problems of textual interpretation or lacunae in the legislative framework. It is therefore proposed that the regulation should require courts to supply such information. A similar obligation already exists in German law, for example[63]. The Commission should also be allowed, subject to the leave of the court, to intervene in judicial proceedings that come to its attention as a result of information supplied in this way. Allowing it to intervene as amicus curiae would be an effective way of helping to maintain consistency in the application of the law. It is consequently proposed that a specific provision to this effect should be included in the regulation. It is also proposed that the amended Regulation No 17 should incorporate the rules now set out in the Commission notice on cooperation between the Commission and national courts, which provides that in the course of proceedings before them courts may address themselves to the Commission to ask for information of a procedural, legal or economic nature. Moreover, in certain Member States, there exist co-operation mechanisms between national courts hearing a competition law question and national competition authorities (for example, the possibility for the *Bundeskartellamt* to intervene in Germany, or for the *Conseil de la Concurrence* to give expert testimony in France).

## III. Intensified *ex post* control

108. As an indispensable corollary to the introduction of a directly applicable exception system, there would have to be a reinforcement of *ex post* control to ensure that the competition rules were being respected. Under the proposed reform the Commission's

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[63] Paragraph 96 of the Restriction of Competition Act, read in conjunction with paragraph 90, requires courts to inform the Bundeskartellamt of cases in which Community law is applied.

powers of enquiry would be strengthened, it would be made easier to lodge complaints, and the system of penalties would be reorganised.

## A. Strengthening the Commission's powers of enquiry

109. If the Commission is to be able to act effectively against undisclosed restrictions of competition, it is not enough that it should be able to concentrate its resources on investigating cases arising out of complaints or taken up on its own initiative: it is also important that its powers of enquiry should be increased.

110. When the Commission wishes to carry out investigations under Article 14(3), the national authorities assisting it must, in most MemberStates[64], secure authorisation from a judge in order to overcome any opposition on the part of the undertaking.[65] Where there are several undertakings involved, investigations most often have to be conducted in several Member States, and authorisation has therefore to be sought from several judges, whose role is confined to satisfying themselves that the decision ordering the investigation is authentic and that the investigation envisaged is not arbitrary or excessive.[66]

111. There are several possible ways to ensure that the investigations are simultaneous and consistent, and to strengthen the guarantees offered to undertakings under investigation. The element of judicial review could be centralised, and entrusted to one of the Community courts. This method of safeguarding the rights of undertakings under investigation would have the advantage of greatly simplifying investigation procedures, and resolving once and for all the problems of inconsistency and lack of simultaneity. Another possibility would be to harmonise and simplify the procedural law in the Member States, so as to ensure that in any Member States where orders were needed they could be obtained rapidly and simultaneously. This second option is a great deal more complex, and would require far-reaching amendment of judicial procedural law in certain Member States.

112. During investigations, the right of authorised Commission officials to ask questions of an undertaking's representatives or staff which are not directly related to documents found on the premises has sometimes been questioned. In addition, the system of administrative penalties for supplying incorrect information is silent on this point.

113. It is therefore proposed that Article 14 of Regulation 17 should be amended to make it quite clear that in the course of an investigation the authorised Commission officials are empowered to ask the undertaking's representatives or staff any questions that are justified by and related to the purpose of the investigation, and to demand a full and precise answer. A further provision could be introduced under which the authorised officials would be empowered to draw up official minutes of the answers given in the course of the investigation. These minutes would be included in the file, and could be used

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[64] Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, Portugal, Spain and the United Kingdom.

[65] This situation is in line with the judgment in *Hoechst*, which leaves it to national law to define the procedures guaranteeing that the rights of the undertakings concerned are respected (judgment of the Court of Justice in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859).

[66] *Hoechst*, see footnote 65, at paragraph 35 of the judgment.

at later stages of the procedure. As a corollary to this new provision, the answers given in the course of investigations would be brought within the scope of the penalties for supplying incorrect information.

114. In order to increase the effectiveness of its enquiries the Commission should also be empowered to summon to its own premises any person likely to be able to provide information that might be helpful to its enquiries, and to take minuted statements.[67] This possibility could be used with respect to the undertakings that are the subject of the procedure: it would serve to complement Article 14 by allowing persons to be questioned who were not present at the time of the investigation. It could also be used with respect to complainants and third parties.

115. In a directly applicable exception system the detection of infringements would rely largely on surveillance of the market. Inquiries into sectors of the economy provide a tool which has been very little used since 1962, but which will take on greater importance in the new context. The present provision should accordingly be maintained.

116. Experience has shown that requests for information addressed by the Commission to undertakings under Article 11 do not raise any major difficulty. The principle that undertakings are bound to reply has repeatedly been upheld by the Court of Justice, which has allowed an exception only in the case of directly incriminating questions.[68] The procedures for the imposition of penalties in the event of incorrect or incomplete information are effective. The only point that needs to be considered here concerns Article 11(4), which provides that the information requested is to be supplied by *"the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution"*. This wording prevents lawyers from replying to requests for information from the Commission on their clients' behalf, even though it may very often be the same lawyers who actually draft the answers given. It is therefore proposed that the wording of Article 11 should be amended to allow properly authorised lawyers to reply on behalf of their clients if their clients so desire.

## B. The increased importance of complaints in the new system

117. Formal complaints currently account for almost 30% of new cases dealt with by the Commission, and most own-initiative procedures begin with information sent to the Commission informally. Information supplied in this way is a very valuable means of detecting infringements of the competition rules. It must therefore be ensured that any person, natural or legal, who identifies a competitive practice that might *prima facie* be caught by Article 85 or 86, and who can show a legitimate interest, should continue to be entitled to lodge a complaint with the Commission.

118. As the Commission concentrates its activities on the most serious restrictions of competition, complaints will take on even greater importance than at present. The new

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[67] Most of the national systems of competition law give the authorities power to summon persons likely to be able to give information relevant to the investigation. This is the case for example in Belgium, France and Germany.

[68] Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

system ought therefore to facilitate the lodging of complaints. A series of measures could be taken to help to encourage the victims of infringements to approach the Commissio . In particular, the Commission could publish an explanatory notice on complaints; time limits could be introduced for their handling; the procedure for rejecting complaints could be simplified; and rules could be laid down regarding interim measures.

119. The Commission should improve the information available to potential complainants regarding its likely course of action. The caselaw accepts that the Commission is entitled to lay down priorities governing the action it takes against infringements, on the basis of the concept of sufficient Community interest[69]. It now seems advisable to publish a notice clarifying this concept, so that complainants can more easily determine whether they would be better advised to address their complaint to the national or to the Community authority. This notice could thus guide complainants' choice of the forum in which to pursue their complaint. The notice should also indicate what the complainant can hope for from the Commission, namely a cease-and-desist order, valid *erga omnes*, but no award of damages. The notice could help complainants to draft their complaints by indicating the sort of information the Commission usually needs in order to establish that an infringement has been committed. Finally, it should draw attention to the Commission's severity in imposing fines on undertakings that have taken reprisals against complainants.

120. At present the Commission's only obligation is to consider complaints within a reasonable timeframe. But complainants who believe they are the victims of an infringement of the Community competition rules need to know quickly whether the Commission will be taking up their complaint, that is to say whether it will be carrying out investigations or sending requests for information in order to establish whether the alleged practices exist, or whether it intends to reject the complaint on the grounds that the complainant has no legitimate interest or that the complaint is unfounded or lacks a Community interest. If there is in fact no Community interest, it is imperative that the complainant should be able to turn quickly to the national competition authority or law court that may be able to deal with the matter. It is proposed that a time limit of four months should be introduced, by the end of which the Commission would be required to inform the complainant of the action it proposed to take on the complaint. If it did not propose to take up the complaint, the Commission would write to the complainant stating why it did not intend to proceed. That letter could be challenged before the Court of First Instance. If it took the view that the case should be investigated further, the Commission would inform the complainant accordingly, again within four months, without prejudice to the subsequent procedure. If after more detailed enquiries, which cannot exceed a reasonable timeframe[70], the Commission concluded that it could not proceed further with the complaint, it would write to the complainant stating its reasons. This letter would also be open to challenge before the Court of First Instance.

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[69] Case T-24/90 *Automec v Commission* [1992] ECR II-2223.

[70] Cases T-213/95 T-18/96, *SCK and FNK v. Commission* [1997] ECR II-1739 Case C-185/95 *Baustahlgewebe GmbH v. Commission*, not yet published.

121. The present procedure is rendered cumbersome by the obligation under Regulation (EC) No 2842/98[71] to send the complainant a letter setting out the Commission's provisional view, to consider the complainant's comments, and to adopt a formal decision. This is a demanding procedure, and takes up a considerable proportion of the Commission's resources. Decisions rejecting complaints accounted for over half of the formal decisions adopted by the Commission in recent years. The introduction of a four-month time limit should therefore be accompanied by a simplification of the procedure for rejecting complaints, and in particular more flexible arrangements for hearing the complainant and the undertaking(s) complained against.

122. A complaint will very often be accompanied by an application for interim measures aimed at putting an immediate end to the infringement at issue. Although Regulation No 17 does not expressly empower the Commission to adopt interim measures, the case-law accepts that it may do so where it finds *prima facie* that there is an infringement, that the matter is urgent, and that there is danger of serious and irreparable damage.[72] It would appear necessary now to spell out in Regulation No 17 not merely the circumstances in which interim measures may be granted, but also the procedure for their adoption, and the duration of their validity. The present practice has proven to be efficient.

## C. Penalties

123. Article 15(2) of Regulation No 17 provides that the Commission may impose fines of up to 10% of the turnover in the preceding business year of each of the undertakings taking part in an infringement of Article 85(1) or Article 86. The Commission's policy on fines has gradually been clarified in its decisions, in the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty,[73] and in the notice on the non-imposition or reduction of fines in cartel cases.[74] The 10% ceiling has proved appropriate, and it is not proposed that it should be changed. But the introduction of a system of directly applicable exception would require the removal of the immunity from fines conferred by notification, as notification would have disappeared. The prohibition on restrictive practices would thereby be rendered more effective, and its dissuasive effect would be increased.

124. Procedural fines do need amendment. Regulation No 17 currently provides for a fine of € 100 to € 5 000 where an undertaking supplies incorrect information or produces books and records in incomplete form during an investigation. These figures have remained unchanged since 1962, and are too small today to have any real dissuasive

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[71] Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty: OJ L 354, 30.12.1998, p. 18.

[72] Order of the Court of 17 January 1980 in Case 792/79R *Camera Care* v *Commission* [1980] ECR 119.

[73] OJ C 9, 14.1.1998, p. 3.

[74] OJ C 207, 18.7.1996, p. 4.

effect. It is proposed that they should be aligned on the Merger Regulation, where the corresponding provisions provide for fines of€ 1 000 to € 50 000 in such cases.[75]

125. The same applies to the levels of periodic penalty payments that may be imposed on an undertaking that does not supply information requested by decision, or refuses to submit to an investigation ordered under Article 14(3). The corresponding provisions in the Merger Regulation provide for periodic penalty payments of up to € 25 000 per day. The new regulation applying Articles 85 and 86 could set the same figure.

126. The Merger Regulation makes provision for a second category of periodic penalty payment, to be imposed on undertakings that fail to comply with an obligation imposed by decision (Article 15(2)). These payments may not exceed € 100 000 per day. There is a similarity between the imposition of obligations on undertakings in connection with the authorisation of a concentration and the decisions accepting commitments that it is proposed to introduce. On the model of the Merger Regulation, therefore, a second category of periodic penalty payments could be established.

127. When fines are imposed on associations of undertakings, the turnover to be considered is the turnover of the undertakings that are members of the association. But Article 15 of Regulation No 17 does not provide that the members are to be liable jointly and severally, and this can prevent collection of the fine.[76]

128. It is therefore proposed that the new Regulation implementing Articles 85 and 86 of the Treaty should state that where an association of undertakings is responsible for an infringement the undertakings that were members of that association at the time the infringement was committed are to be liable jointly and severally for payment of the fine. To protect the members' rights of defence, they would have to be informed of the initiation of the proceedings and a statement of objections would have to be notified to them by publication in the *Official Journal*. If necessary the association could supply fuller information to members who requested it.

## IV. Transition to the directly applicable exception system

129. When the new regulation applying Articles 85 and 86 enters into force there will be notifications still pending before the Commission that were lodged by undertakings with a view to obtaining exemption under Article 85(3). In the new system Article 85 would be directly applicable in its entirety, and the lawfulness of restrictive practices would no longer depend on whether or not the Commission had taken a decision. Notifications still pending would no longer serve any purpose. In the time between the publication of this White Paper and the entry into force of the new regulation, the Commission will continue to work on exemptions at the same pace and in accordance with the same procedures as at present.

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[75] Council Regulation (EEC) No 4064/89, see above.

[76] The problem has arisen for example in connection with Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] II-1739.

## V. Sectoral Rules

130 In the case of agriculture, Article 42 of the Treaty states that *"the provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council"*. Articles 85 to 90 of the Treaty were made applicable to agriculture in 1962 by Council Regulation No 26.[77] Article 1 of that Regulation states that Articles 85 to 90 of the Treaty and the measures taken to implement them, including Regulation No 17, are to apply to production of and trade in agricultural products. The reference in Article 1 of Regulation No 26 to the measures implementing Articles 85 and 86 means that amendments to Regulation No 17 will automatically apply to agriculture. The specific exceptions foreseen in Article 2 of Regulation No 26 will not be affected and the Commission will retain the sole power to apply them.

131 The competition rules applying to transport are identical to those applicable to other industries,[78] and restrictions of competition and markets are defined in the same way. There is therefore no reason why the transport regulations[79] should not undergo the same reform as Regulation No 17, and the same changes should accordingly be made.

132. However, Regulations (EEC) Nos 1017/68 (transport by rail, road and inland waterway), 4056/86 (maritime transport) and 3975/87 (air transport) also contain further provisions which are not found in Regulation No 17. These concern block exemptions on the one hand,[80] and special procedural rules on the other.[81] The main procedural differences can be summarised as follows:

(1) The Commission can grant exemption without notification, following a complaint, for example, or on its own initiative.

(2) Regulation (EEC) No 1017/68 includes a clause on crisis cartels.

(3) Neither the land transport regulation nor the sea transport regulation makes any specific provision for negative clearance.

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[77] OJ 30, 20.4.1962, p. 993.

[78] Case 167/73 *Commission* v *France* [1974] ECR 359, at paragraph 32, Joined Cases 209 to 213/84 *Ministère Public* v *Asjes* [1986] ECR 1425 (the *Nouvelles Frontières* case), at paragraphs 42 to 45; and Case 66/86 *Ahmed Saeed and Others* v *Zentrale zur Bekampfung unlauteren Wettbewerbs* [1989] 803, at paragraphs 32 and 33.

[79] Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, OJ L 175, 23.7.1968, p. 1; Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ L 378, 31.12.1986, p. 4, and Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 374, 31.12.1987, p. 1.

[80] See Articles 4, 6, 9 and 14 of Regulation (EEC) No 1017/68 and Articles 1, 3, 4, 5, 6 and 8 of Regulation (EEC) No 4056/86.

[81] See Articles 17 and 18 of Regulation (EEC) No 1017/68 and Article 9 of Regulation (EEC) No 4056/86.

(4) All of the transport regulations provide for opposition procedures. When an application for exemption is received, a summary is published in the *Official Journal*, and interested parties are asked to comment. If the Commission does not object to the notified agreement within 90 days of publication of the summary, the agreement is deemed to be exempt.

(5) Regulation (EEC) No 3975/87 makes special arrangements for some interim measures.

(6) Regulation (EEC) 4056/86 is legally based on two Treaty provisions, Articles 84(2) and 87, and has a clause dealing specifically with conflicts of law with non-Community countries. Regulation (EEC) 1017/68 is based on Articles 75 and 87.

(7) Under Regulation (EEC) 1017/68, the Commission may not adopt a decision within 20 days of the meeting of the Advisory Committee. This is to allow Member States to ask for a meeting of the Council to consider a question of principle. In that event the Commission must in its decision take into account the policy guidelines that emerge from the meeting.

(8) Tramp vessel services and international air services between the Community and non-member countries continue to be subject to the transitional arrangements in Article 89.

133. There can be no doubt that the differences between the procedures laid down by the transport regulations and Regulation No 17 reflect the political concerns that presided at the time of their adoption. The land transport regulation, Regulation (EEC) No 1017/68, was the first regulation applying the competition rules to transport, and was adopted before the Court of Justice had expressly confirmed that the competition rules did apply to transport. Since the various transport regulations were adopted, considerable progress has been made in the liberalisation of air and rail transport, and sea transport has been liberalised for a long time. The concerns specific to these sectors have largely disappeared.

134. The application of the procedural rules in the amended Regulation No 17 to transport will automatically remove the first five differences noted above. For the remainder it is proposed that the following action be taken:

(1) The dual legal bases of Regulations (EEC) 1017/68 and 4056/86 have never been invoked, and there is no reason to preserve them.

(2) The provision allowing the Council to intervene in individual cases following the meeting of the Advisory Committee has never been invoked, and should be removed, which would be in line with Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.

(3) The regulation that would replace Regulation No 17 should make it quite clear that it does not apply to tramp vessel services and international air services between the Community and non-member countries.

135. When the ECSC Treaty expires, in July 2002, the restrictive practices currently subject to Article 65 of the ECSC Treaty will also come within the scope of the regulation applying Articles 85 and 86 of the EC Treaty.

## Conclusion

136. Competition policy has an important part to play in the process of economic integration called for by the founding Treaties: and the place occupied by the "Rules on Competition" in the part of the Treaty dealing with "Community policies" is no coincidence. The importance given to secondary legislation in the founding Treaty shows that the drafters of the Treaty were well aware of the need to adapt the rules governing the application of competition policy to changes and developments in economic life, business and the geographic dimension of Europe. Now that Regulation No 17 has been in operation for more than 35 years there are a large number of provisions implementing the competition rules that are manifestly no longer suited to business as it has now become, nor to the imperatives of an enlarged Community facing the prospect of further accessions and whose national markets are already extensively integrated.

137. The considerations that led to the adoption of a centralised authorisation system no longer carry the same weight today: both Community and national competition authorities are now familiar with the operation of a system of competition law which has been refined by the Commission's decisions, the case law of the Court and legislative texts. The prospect of the completion of economic and monetary union, and further enlargement, also demands the reform of a system that was designed for a Community of six Member States.

138. This White Paper sets out the Commission's thinking, and describes the system it believes is best suited to the Union at the dawn of the twenty-first century. The system has three main elements: the abolition of the system of notification and authorisation to be replaced by a directly applicable exception system; the development of decentralised application of the competition rules; and intensified *ex post* control. The Commission is convinced that only a radical reform of the present system along the lines set out here can ensure the effective application of the competition rules throughout the Community, while easing the administrative burden on undertakings as far as possible, and at the same time providing them with a satisfactory level of legal certainty.

139. This reform will require far-reaching amendment not only of Regulation No 17, but also of the transport regulations and of measures adopted in implementation thereof. It should also be accompanied by a reinforcement of the legislative framework, which has already begun with the amendment of the rules governing vertical restraints, and is to continue with a study of horizontal cooperation agreements.

140. The White Paper is intended as a point of departure of a wide-ranging debate between the Commission, the Member States and all interested parties. The Commission would welcome observations on any aspect of the reform proposed and on the options outlined in this document.

141. Observations on the White Paper should be sent by 30.09.1999:

**By post, to the following address:**

Directorate-General for Competition
European Commission
White Paper on Modernisation
C150
Rue de la Loi/Wetstraat 200
B-1049 Brussels
Belgium

**By electronic mail, to the following address:**

modernisation@dg4.cec.be

142. This White Paper is also available on the World Wide Web, in all the official languages of the Community, at the following address:

http://europa.eu.int/comm/dg04/entente/other.htm#dgiv_pdf_wb_modernisation

# Schedule V - Australia

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**TRADE PRACTICES ACT 1974**
**- SECT 45**
**Contracts, arrangements or understandings that restrict dealings or affect competition**

(1) If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977*:

(a) is an exclusionary provision; or
(b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation

(2) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or
(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section and section 45A, *competition*, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

(5) This section does not apply to or in relation to:

(a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;
(b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or
(c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:

(i) conduct that contravenes section 48; or
(ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
(iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or

(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.

(9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:

(a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and

(b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

**TRADE PRACTICES ACT 1974**
**- SECT 45A**
**Contracts, arrangements or understandings in relation to prices**

(1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

(2) Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract of arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;
(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or
(c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or
(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

(A) a person who is the owner of shares in the capital of the body corporate; or
(B) a body corporate that is related to such a person.

(4) Subsection (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:

(a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or
(b) for the joint advertising of the price for the re-supply of goods or services so acquired.

(5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

(a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or
(b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.

(6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

(7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or

maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

(8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

**TRADE PRACTICES ACT 1974**
**- SECT 45B**
**Covenants affecting competition**

(1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.

(2) A corporation or a person associated with a corporation shall not:

(a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:

(i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or

(ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the corporation;

(b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or

(c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(3) Where a person:

(a) issues an invitation to another person to enter into a contract containing a covenant;
(b) makes an offer to another person to enter into a contract containing a covenant; or
(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms;

the first-mentioned person shall, by issuing that invitation, making that offer or making that fact known, be deemed to require the giving of the covenant.

(4) For the purposes of this section, a covenant or proposed covenant shall be deemed to have, or to be likely to have, the effect of substantially lessening competition in a market if the covenant or proposed covenant, as the case may be, would have, or be likely to have, that effect when taken together with the effect or likely effect on competition in that market of any other covenant or proposed covenant to the benefit of which:

(a) a corporation that, or person who, is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or
(b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragraph;

is or would be, or but for subsection (1) would be, entitled.

(5) The requiring of the giving of, or the giving of, a covenant does not constitute a contravention of this section by reason that giving effect to the covenant would, or would but for the operation of subsection 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to engaging in conduct in relation to a covenant by way of:

(a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or
(b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:

(i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or

(ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or

(iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.

(7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:

(a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions wishes of the corporation in relation to the covenant or proposed covenant; or

(b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A (1)(a)(ii).

(8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:

(a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and

(b) the person applies for the grant of such an authorization within 14 days after the covenant is given;

but nothing in this subsection affects the application of paragraph (2)(b) or (c) in relation to the covenant.

(9) This section does not apply to or in relation to a covenant or proposed covenant if:

(a) the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;

(b) the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution; or

(c) the covenant was or is required to be given in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.

**TRADE PRACTICES ACT 1974**
**- SECT 45C**
**Covenants in relation to prices**

(1) In the application of subsection 45B(1) in relation to a covenant that has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who are, or but for that subsection would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them, in competition with each other, that subsection has effect as if the words "if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services" were omitted.

(2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words "require the giving of a covenant, or give a covenant" were omitted.

(3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

(a) the form of the covenant or proposed covenant; or
(b) any description given to the covenant by any of the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant or any description given to the proposed covenant by any of the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant.

(4) For the purposes of the preceding provisions of this section, but without limiting the generality of those provisions:

(a) a covenant shall be deemed to have, or to be likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the covenant has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them; and
(b) a proposed covenant shall be deemed to have the purpose, or to have, or to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (2) if the proposed covenant has the purpose, or would have or be likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are supplied by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them.

(5) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

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**TRADE PRACTICES ACT 1974**
**- SECT 45D**
**Secondary boycotts for the purpose of causing substantial loss or damage**

(1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

(3) Subsection (1) applies if the fourth person is a corporation.

(4) Subsection (1) also applies if:

(a) the third person is a corporation and the fourth person is not a corporation; and

(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

**TRADE PRACTICES ACT 1974**
**- SECT 45DA**
**Secondary boycotts for the purpose of causing substantial lessening of competition**

(1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

(3) Subsection (1) applies if:

(a) the third person or the fourth person is a corporation, or both of them are corporations; and
(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

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**TRADE PRACTICES ACT 1974**
**- SECT 45DB**
**Boycotts affecting trade or commerce**

(1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

**TRADE PRACTICES ACT 1974**
**- SECT 45DD**
**Situations in which boycotts permitted**

*Dominant purpose of conduct relates to employment matters—conduct by a person*

(1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

*Dominant purpose of conduct relates to employment matters—conduct by employee organisation and employees*

(2) If:

(a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:

(i) an organisation of employees; or
(ii) an officer of an organisation of employees; and

(b) the conduct is only engaged in by the persons covered by paragraph (a); and
(c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a);

the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB (1) by engaging in the conduct.

*Dominant purpose of conduct relates to environmental protection or consumer protection*

(3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and
(b) engaging in the conduct is not industrial action.

Note 1: If an environmental organisation or a consumer organisation is a body corporate:

(a) it is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption; and
(b) each of its members is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

Note 2: If an environmental organisation or a consumer organisation is not a body corporate:

(a) it is not a "person" and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but
(b) each of its members is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

*Meaning of industrial action—basic definition*

(4) In subsection (3), *industrial action* means:

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:

(i) the terms and conditions of the work are prescribed, wholly or partly, by an industrial instrument or an order of an industrial body; or
(ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or

(b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by an industrial instrument or by an order of an industrial body; or
(c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or
(d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

For this purpose, *industrial body*, *industrial dispute* and *industrial instrument* have the meanings given by subsection 298B(1) of the *Workplace Relations Act 1996*.

*Meaning of industrial action—further clarification*

(5) For the purposes of subsection (3):

(a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and
(b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

*Subsections (1), (2) and (3) do not protect people not covered by them*

(6) In applying subsection 45D(1), 45DA(1) or 45DB(1) to a person who is not covered by subsection (1), (2) or (3) in respect of certain conduct, disregard the fact that other persons may be covered by one of those subsections in respect of the same conduct.

*Defences to contravention of subsection 45DB(1)*

(7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:

(a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or
(b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

*Each person to prove defence*

(8) If:

(a) a person engages in conduct in concert with another person; and
(b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct;

in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

Note: Section 170MT of the *Workplace Relations Act 1996* limits the right to bring actions under this Act in respect of industrial action that is protected action for the purposes of that section.

**TRADE PRACTICES ACT 1974**
**- SECT 75B**
**Interpretation**

(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB or V, or of section 75AU or 75AYA, shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;
(b) has induced, whether by threats or promises or otherwise, the contravention;
(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
(d) has conspired with others to effect the contravention.

(2) In this Part, unless the contrary intention appears:

(a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;
(b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
(c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

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**TRADE PRACTICES ACT 1974**
**- SECT 76**
**Pecuniary penalties**

(1) If the Court is satisfied that a person:

(a) has contravened any of the following provisions:

(i) a provision of Part IV;
(ii) section 75AU or 75AYA;

(b) has attempted to contravene such a provision;
(c) has aided, abetted, counselled or procured a person to contravene such a provision;
(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
(f) has conspired with others to contravene such a provision;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

Note: Section 87AA provides that, if boycott conduct is involved in proceedings, the Court must have regard to certain matters in exercising its powers under this Part. (*Boycott conduct* is defined in subsection 87AA(2).)

(1A) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed:

(a) for each act or omission to which this section applies that relates to section 45D, 45DB, 45E or 45EA—$750,000; and
(b) for each other act or omission to which this section applies—$10,000,000.

(1B) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed $500,000 for each act or omission to which this section applies.

(2) Nothing in subsection (1) authorises the making of an order against an individual because the individual has contravened or attempted to contravene, or been involved in a contravention of, section 45D, 45DA, 45DB, 45E or 45EA.

(3) If conduct constitutes a contravention of two or more provisions of Part IV, a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

(4) The single pecuniary penalty that may be imposed in accordance with subsection (3) in respect of conduct that contravenes provisions to which the 2 limits in subsection (1A) apply is an amount up to the higher of those limits.

**TRADE PRACTICES ACT 1974**
**- SECT 78**
**Criminal proceedings not to be brought for contraventions of Part IV or section 75AU or 75AYA**

Criminal proceedings do not lie against a person by reason only that the person:

(a) has contravened any of the following provisions:

(i) a provision of Part IV;
(ii) section 75AU or 75AYA;

(b) has attempted to contravene such a provision;
(c) has aided, abetted, counselled or procured a person to contravene such a provision;
(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
(f) has conspired with others to contravene such a provision.

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**TRADE PRACTICES ACT 1974**
**- SECT 79A**
**Enforcement and recovery of certain fines**

(1) Where a person on whom a fine has been imposed for an offence against section 65Q, 65R, 79 or 155 or subsection 65F(9) or 87A (5) defaults in payment of the fine, a Court may:

(a) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or
(b) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

(2) Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

(3) Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

(a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and
(b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.

(4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:

(a) on payment of the fine; or
(b) if the fine is not paid—on full compliance with the order.

(5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 18A of the *Crimes Act 1914* in respect of a fine shall be calculated at the rate of one day's imprisonment for each $25 of the amount of the fine that is from time to time unpaid.

(6) Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.

(7) Subject to subsection (8), where:

(a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and
(b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

(8) Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.

(9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).

(10) Paragraphs 18A(1)(b), (c) and (d) of the *Crimes Act 1914* do not apply with respect to fines referred to in subsection (1).

(11) This section applies only in relation to fines imposed for offences committed after the commencement of this section.

**TRADE PRACTICES ACT 1974**
**- SECT 87D**
**Definitions**

(1) In this Division:

*industry code of practice* means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

*minor variation*, in relation to an authorization, is a single variation that does not involve a material change in the effect of the authorization.

(2) A reference in this Division to a proposal of the Commission is a reference to a notice of the Commission:

(a) so far as the revocation of an authorization is concerned—under subsection 91B(3); and
(b) so far as the revocation of an authorization and the substitution of another—under subsection 91C(3).

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**TRADE PRACTICES ACT 1974**
**- SECT 88**
**Power of Commission to grant authorisations**

(1) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorization to the corporation:

(a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45; or

(b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45;

and, while such an authorization remains in force:

(c) in the case of an authorization to make a contract or arrangement or to arrive at an understanding—subsection 45 (2) does not prevent the corporation from making the contract or arrangement or arriving at the understanding in accordance with the authorization and giving effect in accordance with the authorization to any provision of the contract or arrangement so made or of the understanding so arrived at;

(d) in the case of an authorization to give effect to a provision of a contract:

(i) the provision is not unenforceable by reason of subsection 45(1); and
(ii) subsection 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorization; or

(e) in the case of an authorization to give effect to a provision of an arrangement or understanding—subsection 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorization.

(5) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorization to the person:

(a) to require the giving of, or to give, a covenant where the proposed covenant would have the purpose, or would have or might have the effect, of substantially lessening competition in a market referred to in paragraph 45B(2)(a); or

(b) to enforce the terms of a covenant;

and, while such an authorization remains in force:

(c) in the case of an authorization to require the giving of, or to give, a covenant:

(i) the covenant is not unenforceable by reason of subsection 45B(1); and
(ii) subsection 45B(2) does not apply in relation to the covenant; or

(d) in the case of an authorization to enforce the terms of a covenant:

(i) the covenant is not unenforceable by reason of subsection 45B(1); and
(ii) paragraphs 45B(2)(b) and (c) do not apply in relation to the covenant.

(6) An authorization granted by the Commission to a person under any of the preceding provisions of this section to:

(a) make a contract or arrangement or arrive at an understanding;
(b) give effect to a provision of a contract, arrangement or understanding;
(c) require the giving of, or give, a covenant; or
(d) enforce the terms of a covenant;

has effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the authorization as a party to the contract, arrangement or understanding or as a proposed party to the proposed contract, arrangement or understanding, or as a person who is or would be bound by, or entitled to the benefit of, the covenant or the proposed covenant, as the case

**TRADE PRACTICES ACT 1974**
**- SECT 90**
**Determination of applications for authorisations**

(1) The Commission shall, in respect of an application for an authorization:

(a) make a determination in writing granting such authorization as it considers appropriate; or
(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

(6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
(b) the proposed covenant were given, and were complied with; or
(c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the convenant.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
(ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
(iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;
(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

(10) Subject to subsections (10A), (12), (13), (14) and (15), if:

(a) the Minister, by notice published in the *Gazette*, fixes a date for the purposes of the application of this subsection in relation to applications for authorizations under subsection 88(1), (5), (7), (7A), (8) or (8A); and
(b) the Commission does not determine an application for an authorization under a subsection in relation to which a date is so fixed within 4 months from that date or the date on which the application was or is received by the Commission, whichever is the later;

the Commission shall be deemed to have granted, at the expiration of that period, the authorization applied for.

(10A) If, within the latest occurring 4 month period referred to in paragraph (10)(b) in relation to an application for an authorisation, the Commission gives to the applicant a written notice requesting the applicant to give to the Commission additional information relevant to the determination of the application, the reference in that paragraph to 4 months shall be taken to be a reference to a period consisting of 4 months increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide.

(11) Subject to subsections (12), (13) and (15), if the Commission does not determine an application for an authorisation under subsection 88(9) within:

(a) 30 days from the day on which the application is received by the Commission; or
(b) if the Commission, before the end of that period of 30 days, gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application—the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide;

the Commission shall be deemed to have granted, at the end of that period, the authorisation applied for.

(11A) The Commission may, within the 30 day period mentioned in subsection (11), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (11) to 30 days are to be treated as references to 45 days.

(12) If the applicant for an authorization informs the Commission in writing before the expiration of the period referred to in subsection (10) or (11) (in this subsection and in subsection (13) referred to as the *base period*) that the applicant agrees to the Commission taking a specified longer period for the determination of the application, a reference to that longer period shall be deemed for the purposes of that application to be substituted in subsection (10) or (11), as the case may be, for the reference in that subsection to the base period.

(13) For the purposes of any application of subsection (12), a reference in that subsection to the base period shall, if a reference to another period is deemed by any other application or applications of that subsection to have been substituted in subsection (10) or (11) for the reference in subsection (10) or (11) to the base period, be construed as a reference to that other period.

(14) If a person to whom a notice has been sent under subsection 90A(2) in relation to a draft determination in respect of an application for an authorization notifies the Commission in accordance with subsection 90A(6) that he or she wishes the Commission to hold a

conference in relation to the draft determination, the period referred to in subsection (10) of this section shall be deemed to be increased by a period equal to the period commencing on the day on which the

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**TRADE PRACTICES ACT 1974**
**- SECT 90A**
**Commission to afford opportunity for conference before determining application for authorisation**

(1) Before determining an application for an authorization (other than an application for an authorisation under subsection 88(9)), the Commission shall prepare a draft determination in relation to the application.

(2) The Commission shall, by notice in writing sent to the applicant and to each other interested person, invite the applicant or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.

(3) If:

(a) the draft determination provides for the granting of the application unconditionally; and
(b) no person has made a written submission to the Commission opposing the application;

each notice by the Commission under subsection (2) shall inform the person to whom the notice is sent that the draft determination so provides.

(4) If:

(a) the draft determination does not provide for the granting of the application or provides for the granting of the application subject to conditions; or
(b) the draft determination provides for the granting of the application unconditionally but a written submission has, or written submissions have, been made to the Commission opposing the application;

the Commission shall send with each notice under subsection (2) a copy of the draft determination and:

(c) in a case to which paragraph (a) applies—a summary of the reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or
(d) in a case to which paragraph (b) applies—a summary of the reasons why it is satisfied that the application should be granted unconditionally.

(5) If each of the persons to whom a notice was sent under subsection (2):

(a) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the Commission to hold a conference in relation to the draft determination; or
(b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference;

the Commission may make the determination at any time after the expiration of that period.

(6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(7) At the conference:

(a) the Commission shall be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft determination) nominated by the Chairperson; and
(b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate; and

(c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and

(e) no other person is entitled to be present.

(8) A member of the Commission participating in the conference shall make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(9) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson:

(a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;

(b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

(c) shall give a certificate certifying the day on which the first notification under subsection (6) in relation to the draft determination was received by the Commission and the day on which the conference terminated;

and any such certificate shall be received in all courts as evidence of the matters certified.

(10) A document purporting to be a certificate referred to in subsection (9) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(11) The Commission shall take account of all matters raised at the conference and may at any time after the termination of the conference make a determination in respect of the application.

(12) For the purposes of this section, *interested person* means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that, in the opinion of the Commission, is real and substantial.

(13) Where the Commission is of the opinion that two or more applications for authorizations that are made by the same person, or by persons being bodies corporate that are related to each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application and may prepare one draft determination in relation to the applications and hold one conference in relation to that draft determination.

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**TRADE PRACTICES ACT 1974**
**- SECT 91**
**Grant and variation of authorisations**

(1) An authorization may be expressed to be in force for a period specified in the authorization and, if so expressed, remains in force for that period only.

(1A) An authorisation, other than an authorisation deemed to have been granted under subsection 90(10) or (11), comes into force on the day specified for the purpose in the authorisation, not being a day earlier than, and an authorisation deemed to have been granted under subsection 90(10) or (11) comes into force on:

(a) where paragraph (b) or (c) does not apply—the end of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorisation;
(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review;
(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(1B) A minor variation of an authorization comes into force on a day specified by the Commission in the determination making the variation, not being a day earlier than:

(a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of the determination of the Commission in respect of the application for the minor variation; or
(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or
(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(1C) If an authorization (the *prior authorization*) is revoked and another authorization is made in substitution for it, that other authorization comes into force on the day specified for the purpose in that other authorization, not being a day earlier than:

(a) if neither paragraph (b) nor (c) applies—the end of the period in which an application may be made to the Tribunal for a review of an application, or the Commission's proposal, for the revocation of the prior authorization and the substitution of that other authorization; or
(b) if such an application is made to the Tribunal and the application is not withdrawn—the day on which the Tribunal makes a determination on the review; or
(c) if such an application is made to the Tribunal and the application is withdrawn—the day on which the application is withdrawn.

(2) If the Commission considers that it is appropriate to do so:

(a) for the purpose of enabling due consideration to be given to:

(i) an application for an authorization; or
(ii) an application for a minor variation of an authorization; or
(iii) an application for the revocation of an authorization and the substitution of a new one; or

(b) pending the expiration of the time allowed for the making of an application to the Tribunal for review of a determination by the Commission of an application referred to in paragraph (a) and, if such an application for a review is made, pending the making of a determination by the Tribunal on the review; or
(c) for any other reason;

the Commission may at any time:

(d) in the case of an application for an authorization—grant an authorization that is expressed to be an interim authorization; and
(e) in the case of an application for a minor variation of an authorization—grant an authorization that is expressed to be an interim authorization dealing only with the matter the subject of the application for a variation; and
(f) in the case of an application for the revocation of an authorization and the substitution of another—suspend the

operation of the authorization sought to be revoked and grant an authorization that is expressed to be an interim authorization in substitution for the authorization suspended.

(2AA) An authorization granted under paragraph 91(2)(d), (e) or (f) and expressed to be an interim authorization comes into force on such a date, not being a date before the grant of the interim authorization, as is specified by the Commission in the interim authorization.

(2AB) The Commission may, at any time, revoke an authorization that is expressed to be an interim authorization and, where that interim authorization is in substitution for an authorization the operation of which has been suspended, the revocation of the interim authorization has the effect of reviving the operation of the suspended authorization.

(2A) Subsections 90(4) to (9), inclusive, do not apply in relation to an authorization that is expressed to be an interim authorization.

(3) An authorization may be expressed to be subject to such conditions as are specified in the authorization.

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**TRADE PRACTICES ACT 1974**
**- SECT 91A**
**Minor variations of authorizations**

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a minor variation of the authorization.

(2) On receipt of an application, the Commission must, if it is satisfied that the variation sought in the application is a minor variation, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate the nature of the variation applied for; and
(b) invite submissions in respect of the variation within a period specified by the Commission.

(3) After considering the application and any submissions received within the period specified, the Commission may make a determination in writing varying the authorization or dismissing the application.

(4) The Commission must not make a determination varying an authorization to which, if it were a new authorization, subsection 90(6) or (7) would apply, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorization outweighs any detriment to the public caused by the authorization.

(5) The Commission must not make a determination varying an authorization to which, if it were a new authorization, subsection 90(8) or (9) would apply, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorization.

(6) Nothing in this section prevents a person from applying for 2 or more variations in the same application.

(7) If:

(a) a person applies for 2 or more variations:

(i) at the same time; or
(ii) in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and

(b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorization;

the Commission may deal with all of those variations together as if they were a single minor variation.

(8) An application for a minor variation may be withdrawn by notice in writing to the Commission at any time.

**TRADE PRACTICES ACT 1974**
**- SECT 91B**
**Revocation of an authorization**

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization.

(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorization has been applied for; and
(b) indicate the basis on which the revocation has been applied for; and
(c) invite submissions in respect of the revocation within a period specified by the Commission.

(3) If, at any time after granting an authorization, it appears to the Commission that:

(a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or
(b) a condition to which the authorization was expressed to be subject has not been complied with; or
(c) there has been a material change of circumstances since the authorization was granted;

the Commission may, by notice in writing given to any persons who appear to the Commission to be interested:

(d) inform those persons that it is considering the revocation of the authorization; and
(e) indicate the basis on which the revocation is being proposed; and
(f) invite submissions in respect of the revocation within a period specified by the Commission.

(4) After considering any submissions invited under subsection (2) or (3) that are received within the period specified by the Commission under that subsection, the Commission may make a determination in writing:

(a) revoking the authorization; or
(b) deciding not to revoke the authorization.

(5) If an objection to the revocation is included in any submission

(a) that was invited under subsection (2) or (3); and
(b) that is received within the period specified by the Commission under that subsection;

the Commission must not make a determination revoking the authorization unless the Commission is satisfied that it would, if the authorization had not already been granted, be prevented under subsection 90(6), (7), (8) or (9) from making a determination granting the authorization in respect of which the revocation is sought.

(6) An application for revocation may be withdrawn by notice in writing to the Commission at any time.

(7) The Commission may disregard any objection that, in its opinion, is either vexatious or frivolous.

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**TRADE PRACTICES ACT 1974**
**- SECT 91C**
**Revocation of an authorization and substitution of a replacement**

(1) A person to whom an authorization was granted, or another person on behalf of such a person, may apply to the Commission for a revocation of the authorization and the substitution of a new authorization for the one revoked.

(2) On receipt of such an application, the Commission must, by notice in writing given to any persons who appear to the Commission to be interested:

(a) indicate that the revocation of the authorization, and the substitution of another authorization for it, has been applied for; and
(b) indicate the basis upon which the revocation and substitution has been applied for and the nature of the substituted authorization so applied for; and
(c) invite submissions in respect of the revocation and substitution within a period specified by the Commission.

(3) If, at any time after granting an authorization, it appears to the Commission that:

(a) the authorization was granted on the basis of evidence or information that was false or misleading in a material particular; or
(b) a condition to which the authorization was expressed to be subject has not been complied with; or
(c) there has been a material change of circumstances since the authorization was granted;

the Commission may, by notice in writing given to any persons who appear to be interested:

(d) inform those persons that it is considering the revocation of the authorization and the substitution of a new authorization; and
(e) indicate the basis on which the revocation and substitution is being proposed and the nature of the substituted authorization proposed; and
(f) invite submissions in respect of the proposed action within a period specified by the Commission.

(4) After considering any submissions invited under subsection (2) or (3) in relation to an authorization that are received within the period specified by the Commission under that subsection and after compliance with the requirements of section 90A in accordance with subsection (5), the Commission may make a determination in writing:

(a) revoking the authorization and granting another such authorization that it considers appropriate, in substitution for it; or
(b) deciding not to revoke the authorization.

(5) Before making a determination under subsection (4) in relation to an application, or a proposal, for the revocation of an authorization and the substitution of another, the Commission must comply with the requirements of section 90A.

(6) For the purposes of complying with section 90A in accordance with subsection (5), section 90A has effect:

(a) as if the reference in subsection (1) to an application for an authorization (other than an application for an authorization under subsection 88(9)) were a reference to an application, or to a proposal, for the revocation of an authorization (other than an authorization granted on an application granted under subsection 88(9)) and the substitution of another authorization; and
(b) as if references in other provisions of that section to an application, or to an application for an authorization, were references either to an application, or to a proposal, for the revocation of an authorization and the substitution of another; and
(c) as if subsection 90A(2) had provided, in its operation in relation to a proposal for the revocation of an authorization and the substitution of another, that:

(i) the reference to the applicant and to each other interested person were a reference only to each interested person; and
(ii) each reference to the applicant or other person were a reference only to the other person.

(7) The Commission must not make a determination revoking an authorization and substituting another authorization unless the Commission is satisfied that it would not be prevented under subsection 90(6), (7), (8) or (9) from making a determination granting the substituted authorization, if it were a new authorization sought under section 88.

(8) An application for the revocation of an authorization and the substitution of another authorization may be withdrawn by notice in writing to the Commission at any time.

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**TRADE PRACTICES ACT 1974**
**- SECT 101**
**Applications for review**

(1) A person dissatisfied with a determination by the Commission:

(a) in relation to an application for an authorization or a minor variation of an authorization; or
(b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

(1AA) If:

(a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for the minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and the substitution of another authorization; or
(b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

(1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(6), (7), (8) or (9).

(1B) A presidential member may, on the application of a person concerned:

(a) in an application for an authorization under subsection 88(9); or
(b) in an application for a minor variation or a revocation of such an authorization; or
(c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

(2) A review by the Tribunal is a re-hearing of the matter and subsections 90(6), (7), (8) and (9), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

**TRADE PRACTICES ACT 1974**
**- SECT 102**
**Functions and powers of Tribunal**

(1) On a review of a determination of the Commission in relation to:

(a) an application for an authorization; or
(b) an application for a minor variation of an authorization; or
(c) an application for, or the Commission's proposal for, the revocation of an authorization; or
(d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

(1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:

(a) the grant of an authorisation under subsection 88(9); or
(b) the minor variation, or the revocation, of an authorization granted under that subsection; or
(c) the revocation of an authorization granted under that subsection and the substitution of another authorization;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

(1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.

(1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.

(2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission in relation to:

(a) an application for an authorization; or
(b) an application for a minor variation of an authorization; or
(c) an application for, or the Commission's proposal for, the revocation of an authorization; or
(d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

(4) Upon a review of the giving of a notice by the Commission under subsection 93(3):

(a) if the person who applied for the review satisfies the Tribunal that in all the circumstances:

(i) the conduct or proposed conduct to which the notice relates has resulted or is likely to result, or would result or be likely to result, as the case may be, in a benefit to the public; and
(ii) that benefit would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct;

the Tribunal shall make a determination setting aside the notice; or
(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal shall make a determination affirming the notice.

(5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.

(5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.

(5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).

(5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:

(a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and

(b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.

(6) For the purposes of a review by the Tribunal, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

(7) For the purposes of a review, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

Commerce Act 1986 005
Commenced: 1 May 1986
II: Restrictive Trade Practices
Practices Substantially Lessening Competition

# 27 Contracts, arrangements, or understandings substantially lessening competition prohibited

PART II
RESTRICTIVE TRADE PRACTICES

Practices Substantially Lessening Competition

27. Contracts, arrangements, or understandings substantially lessening competition prohibited---(1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.

(4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

Cf. Trade Practices Act 1974 (Aust.), s. 45 (1), (2)

proposed covenant; or

(b) The persons are interconnected bodies corporate.

Cf. Trade Practices Act 1974 (Aust.), s. 45B (1)-(3), (7)

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# 28 Covenants substantially lessening competition prohibited

28. Covenants substantially lessening competition prohibited---(1) No person, either on his own or on behalf of an associated person, shall---
(a) Require the giving of a covenant; or
(b) Give a covenant---that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person, either on his own or on behalf of an associated person, shall carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) of this section applies to a covenant whether given before or after the commencement of this Act.

(4) No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

(5) No person shall---
(a) Threaten to engage in particular conduct if a pers no, but for subsection (4) of this section, would be bound b covenant, does not comply with the terms of the covenant;
(b) Engage in particular nduct because a person who, but for subsection (4) of this section, would be bound by a covenant, has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(6) Where a person---
(a) Issues an invitation to another person to enter into a contract containing a covenant; or
(b) Makes an offer to another person to enter into a contract containing a covenant; or
(c) Makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms,---

that person shall, by issuing that invitation, making that offer, or making that fact known, be deemed to require the giving of the covenant.

(7) For the purposes of this section, 2 persons shall be taken to be associated with each other in relation to a covenant or proposed covenant if, but only if,---
(a) One person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with the directions, instructions, or wishes of the other person in relation to the covenant or

proposed covenant; or

(b) The persons are interconnected bodies corporate.

Cf. Trade Practices Act 1974 (Aust.), s. 45B (1)-(3), (7)

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# 29 Contracts, arrangements, or understandings containing exclusionary provisions prohibited

29. Contracts, arrangements, or understandings containing exclusionary provisions prohibited---(1) For the purposes of this Act, a provision of a contract, arrangement, or understanding is an exclusionary provision if---

(a) It is a provision of a contract or arrangement entered into, or understanding arrived at, between persons of whom any 2 or more are in competition with each other; and

(b) It has the purpose of preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons, either generally or in particular circumstances or on particular conditions, by all or any of the parties to the contract, arrangement, or understanding, or if a party is a body corporate, by a body corporate that is interconnected with that party.

(2) For the purposes of subsection (1) (a) of this section, a person is in competition with another person if that person or any interconnected body corporate is, or is likely to be, or, but for the relevant provision, would be or would be likely to be, in competition with the other person, or with an interconnected body corporate, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

(3) No person shall enter into a contract, or arrangement, or arrive at an understanding, that contains an exclusionary provision.

(4) No person shall give effect to an exclusionary provision of a contract, arrangement, or understanding.

(5) Subsection (4) of this section applies to an exclusionary provision of a contract or arrangement made, or understanding arrived at, whether before or after the commencement of this Act.

(6) No exclusionary provision of a contract, whether made before or after the commencement of this Act, is enforceable.

Cf. Trade Practices Act 1974 (Aust.), ss. 4D, 45 (1)-(3)

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# 30 Certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition

Price Fixing

30. Certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition---(1) Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are---

(a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or

(b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.

(2) The reference in subsection (1) (a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

Cf. Trade Practices Act 1974 (Aust.), s. 45A (1), (7), (8)

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# 31 Joint venture pricing exempt from application of section 30

31. Joint venture pricing exempt from application of section 30---(1) For the purposes of this section---

(a) Joint venture means an activity in trade---

(i) Carried on by 2 or more persons, whether or not in partnership; or

(ii) Carried on by a body corporate for the purpose of enabling 2 or more persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate or an interconnected body corporate:

(b) A reference to a contract or arrangement entered into, or an understanding arrived at for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate in terms of paragraph (a) (ii) of this subsection, be read as including a reference to the memorandum and articles of association, rules, or other document that constitute or constitutes, or is or are to constitute, that body corporate.

(2) Nothing in section 30 of this Act applies to a provision of a contract or arrangement entered into, or an understanding arrived at for the purposes of a joint venture, to the extent that the provision relates to---

(a) The joint supply by the parties to the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by those parties in pursuance of the joint venture; or

(b) The joint supply by the parties to the joint venture of services in pursuance of the joint venture, or the supply by the parties to the joint venture in proportion to their respective interests in the joint venture, of services in pursuance of, and made available as a result of, the joint venture; or

(c) In the case of a joint venture carried on by a body corporate in terms of subsection (1) (a) (ii) of this section,---

(i) The supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) The supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by a person who is the owner of shares in the capital of the body corporate, or a body corporate that is interconnected with such a person.

Cf. Trade Practices Act 1974 (Aust.), ss. 4J, 45A (2)

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# 32 Certain recommendations as to prices for goods and services exempt from application of section 30

32. Certain recommendations as to prices for goods and services exempt from application of section 30---Nothing in section 30 of this Act applies to a provision of a contract, arrangement, or understanding, to the extent that the provision recommends or provides for the recommending of the price for, or a discount, allowance, rebate or credit in relation to goods or services where the parties to the contract, or arrangement, or understanding include not less than 50 persons (bodies corporate that are interconnected being counted as a single person) who supply or acquire, in trade, goods or services to which the provision applies.

Cf. Trade Practices Act 1974 (Aust.), s. 45A (3)

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# 33 Joint buying and promotion arrangements exempt from application of section 30

33. Joint buying and promotion arrangements exempt from application of section 30---Nothing in section 30 of this Act applies to a provision of a contract, arrangement, or understanding that---

(a) Relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement, or understanding; or

(b) Provides for joint advertising of the price for the resupply of goods so acquired.

Cf. Trade Practices Act 1974 (Aust.), s. 45A (4)

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# 34 Certain provisions of covenants with respect to prices deemed to substantially lessen competition

34. Certain provisions of covenants with respect to prices deemed to substantially lessen competition---(1) Without limiting the generality of section 28 of this Act, a covenant shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the covenant has the purpose or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling or maintaining of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are---

(a) Supplied or acquired by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by bodies corporate that are interconnected with any of them, in competition with each other; or

(b) Resupplied by persons to whom the goods are supplied by the persons giving the covenant or the persons entitled to the benefit of the covenant, or by any of them, or by bodies corporate that are interconnected with any of them, in competition with each other.

(2) The reference in subsection (1) (a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for the covenant, would be in competition with each other in relation to the supply or acquisition of the goods or services.

Cf. Trade Practices Act 1974 (Aust.), s. 45C

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# 35 Contracts or covenants subject to authorisation not prohibited under certain conditions

Practices Substantially Lessening Competition Conditional Upon Authorisation

35. Contracts or covenants subject to authorisation not prohibited under certain conditions---(1) Notwithstanding anything in this Act, but subject to subsection (3) of this section,---

(a) A contract to which section 27 or section 29 of this Act applies may be entered into if the requirements of subsection (2) of this section are complied with:

(b) A covenant to which section 28 of this Act applies may be required to be given, or may be given, if the requirements of subsection (2) of this section are complied with.

(2) For the purposes of subsection (1) of this section, the requirements that must be met are---

(a) In the case of a contract to which section 27 or section 29 of this Act applies, that the contract shall be subject to a condition that the provision, or exclusionary provision, as the case may be, shall not come into force unless and until authorisation is granted to give effect to the provision, or exclusionary provision and that application shall be made for that authorisation within 15 working days after the contract is entered into:

(b) In the case of a covenant to which section 28 of this Act applies, that the covenant is subject to the condition that it shall not have effect unless and until authorisation is granted to give effect to it and that application shall be made for that authorisation within 15 working days after the covenant is made.

(3) Nothing in this section---

(a) Prevents the giving effect to a provision of a contract or an exclusionary provision, as the case may be, from constituting a contravention of section 27 or section 29 of this Act, as the case may be:

(b) Prevents the giving effect to a covenant from constituting a contravention of section 28 of this Act.

Cf. Trade Practices Act 1974 (Aust.), ss. 45 (9), 45B (8)

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# 58 Commission may grant authorisation for certain restrictive trade practices

PART V
AUTHORISATIONS AND CLEARANCES

Restrictive Trade Practices

58. Commission may grant authorisation for certain restrictive trade practices---(1) Subject to the provisions of this Part of this Act, the Commission may, upon application by or on behalf of any person, grant an authorisation for that person---

(a) To enter into a contract or arrangement, or arrive at an understanding, to which section 27 of this Act applies:

(b) To give effect to a provision of a contract or arrangement or understanding to which section 27 of this Act applies:

(c) To require the giving of, or to give, a covenant to which section 28 of this Act applies:

(d) To carry out or enforce a covenant to which section 28 of this Act applies:

(e) To enter into a contract or arrangement, or arrive at an understanding, to which section 29 of this Act applies:

(f) To give effect to an exclusionary provision of a contract or arrangement or understanding to which section 29 of this Act applies.

(2) While any such authorisation remains in force---

(a) In the case of an authorisation to enter into a contract or arrangement, or arrive at an understanding, to which section 27 or section 29 of this Act applies, nothing in those sections shall prevent any person from---

(i) Entering into, or in accordance with the authorisation, giving effect to or enforcing any provision of the contract; or

(ii) Entering into, or in accordance with the authorisation, giving effect to the arrangement; or

(iii) Arriving at, or in accordance with the authorisation, giving effect to the understanding:

(b) In the case of an authorisation to give effect to a provision of a contract, arrangement, or understanding to which section 27 or section 29 of this Act applies, nothing in those sections shall prevent any person from---

(i) In accordance with the authorisation, giving effect to or enforcing the contract; or

(ii) In accordance with the authorisation, giving effect to the arrangement or understanding:

(c) In the case of an authorisation for requiring the giving of, or to give, a covenant to which section 28 of this Act applies,

nothing in that section shall prevent any person from---
(i) Requiring the giving of, or giving, the covenant; or
(ii) Carrying out or enforcing the terms of the covenant in accordance with the authorisation:

(d) In the case of an authorisation to carry out or enforce the terms of a covenant to which section 28 of this Act applies, nothing in that section shall prevent any person from carrying out or enforcing the terms of the covenant in accordance with the authorisation.

(3) Every authorisation granted by the Commission to a person under any of the preceding provisions of this section to---

(a) Enter into a contract or arrangement or arrive at an understanding; or
(b) Give effect to a provision of a contract, arrangement, or understanding; or
(c) Require the giving of, or give, a covenant; or
(d) Carry out or enforce the terms of a covenant---

shall have effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as a party to the contract, arrangement, or understanding, or as a person who is or would be bound by, or entitled to the benefit of, the covenant, as the case may be.

(4) An authorisation to a person under subsection (1) of this section may be expressed to apply to or in relation to another person who,---

(a) In the case of an authorisation to enter into a contract or arrangement or arrive at an understanding, becomes a party to the proposed contract or arrangement at a time after it is entered into or becomes a party to the proposed understanding at a time after it is arrived at:
(b) In the case of an authorisation to give effect to a provision of a contract, arrangement, or understanding, becomes a party to the contract, arrangement, or understanding at a time after the authorisation is granted:
(c) In the case of an authorisation to require the giving of, or to give, a covenant, becomes bound by, or entitled to the benefit of, the covenant at a time after the covenant is given:
(d) In the case of an authorisation to carry out or enforce the terms of a covenant, becomes bound by, or entitled to the benefit of, the covenant at a time after the authorisation is granted.

(5) Where an application is made to the Commission under section 60 of this Act for an authorisation in relation to a particular contract and is expressed to be made also in relation to another contract that is or will be in similar terms to the first-mentioned contract, the Commission may grant a single authorisation in respect of all the contracts or may grant a separate authorisation in respect of any one or more of the contracts.

(6) In subsection (5) of this section the term ``contract'' includes an arrangement, understanding, or covenant.

Cf. Trade Practices Act 1974 (Aust.), s. 88 (1), (5), (6), (10), (11), (13), (15)

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# 59 Authorisation not to be granted in relation to contracts, etc., made before determination by Commission

59. Authorisation not to be granted in relation to contracts, etc., made before determination by Commission---(1) Subject to section 35 of this Act, but notwithstanding anything in section 58 of this Act, the Commission shall not grant an authorisation to any person---

(a) To enter into a contract or arrangement, or to arrive at an understanding if the contract or arrangement has been entered into, or the understanding has been arrived at before the Commission makes a determination in respect of the application for that authorisation; or

(b) To require the giving of or to give a covenant if the covenant has been given before the Commission makes a determination in respect of the application for that authorisation.

(2) Nothing in subsection (1) of this section shall prevent the Commission granting an authorisation to any person---

(a) To give effect to a provision of a contract or arrangement entered into, or understanding arrived at, before the commencement of this Act; or

(b) To carry out or enforce a covenant given before the commencement of this Act.

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# 60 Procedure for applications for authorisation of restrictive trade practices

60. Procedure for applications for authorisation of restrictive trade practices---(1) Every application for an authorisation under section 58 of this Act shall be made in the prescribed form, shall contain such particulars as may be specified in the form and shall be accompanied by payment of such fee as may be prescribed.

(2) On receipt of an application that complies with subsection (1) of this section, the Commission shall forthwith---

(a) Record the application in the register to be kept by the Commission for the purpose:

(b) Give written notice of the date of registration to the person by or on whose behalf the application was made:

(c) Give notice of the application to any other person who, in the Commission's opinion, is likely to have an interest in the application:

(d) Give public notice of the application in such manner as the Commission thinks fit.

(3) Any person who has an interest in any application in respect of which a notice is given under subsection (2) (d) of this section may give written notice to the Commission of that person's interest and the reason therefor.

(4) On receipt of an application that does not comply with subsection (1) of this section, the Commission may, at its discretion, either---

(a) Accept the application and take the steps referred to in subsection (2) of this section in respect of that application; or

(b) Return the application to the person by or on whose behalf it was made; or

(c) Decline to register the application until it complies with subsection (1) of this section.

(5) Where the Commission declines to register an application under subsection (4) (c) of this section, it shall forthwith notify the person by or on whose behalf the application was made.

(6) The person making the application under subsection (1) of this section, and any person on whose behalf it was made, and any person to whom the application relates, shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as it may specify, such further documents or information in relation to the application as may be required by the Commission for the purpose of enabling it to exercise its functions under this Part of this Act.

(7) Notwithstanding anything in subsection (2) or subsection (4) of this section, where the Commission is of the opinion that the matters to which an application relates are, for reasons other than arising from the application of any provision of this Act, unlikely to be proceeded with, the Commission may, in its discretion, return the application to the person by or on whose behalf the application was made.

(8) Any person who has made an application to the Commission for an authorisation may, at any time, by notice in writing to the Commission, withdraw the application.

Cf. 1975, No. 113, s. 70; 1983, No. 144, s. 26; Trade Practices Act 1974 (Aust.), s. 89 (1), (2)

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# 61 Determination of applications for authorisation of restrictive trade practices

61. Determination of applications for authorisation of restrictive trade practices---(1) The Commission shall, in respect of an application for an authorisation under section 58 of this Act, make a determination in writing---

(a) Granting such authorisation as it considers appropriate:
(b) Declining the application.

(2) Any authorisation granted pursuant to section 58 of this Act may be granted subject to such conditions not inconsistent with this Act and for such period as the Commission thinks fit.

(3) The Commission shall take into account any submissions in relation to the application made to it by the applicant or by any other person.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorisation, the Commission shall comply with the requirements of section 62 of this Act.

(6) The Commission shall not make a determination granting an authorisation under section 58 (1) (a) to (d) of this Act unless it is satisfied that---

(a) The entering into of the contract or arrangement or the arriving at the understanding; or
(b) The giving effect to the provision of the contract, arrangement or understanding; or
(c) The giving or the requiring of the giving of the covenant; or
(d) The carrying out or enforcing of the terms of the covenant---

as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom.

(7) The Commission shall not make a determination granting an authorisation under section 58 (1) (e) or (f) of this Act unless it is satisfied that---

(a) The entering into of the contract or arrangement or the arriving at the understanding; or
(b) The giving effect to the exclusionary provision of the contract, or arrangement or understanding---

as the case may be, to which the application relates, will in all the

circumstances result, or be likely to result, in such a benefit to the public that---

(c) The contract or arrangement or understanding should be permitted to be entered into or arrived at; or

(d) The exclusionary provision should be permitted to be given effect to.

Cf. Trade Practices Act 1974 (Aust.), s. 90 (1), (2), (4), (5), (6), (7), (8)

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# 62 Commission to prepare draft determination in relation to restrictive trade practices

62. Commission to prepare draft determination in relation to restrictive trade practices---(1) Before determining an application for an authorisation under section 58 of this Act, the Commission shall prepare a draft determination in relation to the application.

(2) The Commission shall send a copy of the draft determination and a summary of the reasons therefor to---

(a) The applicant:

(b) Any person to whom a notice has been given pursuant to section 60 (2) (c) of this Act:

(c) Any person who has given a notice pursuant to section 60 (3) of this Act and who in the opinion of the Commission has such an interest in the application as to justify the Commission sending a copy of the draft determination to that person:

(d) Any other person who in the opinion of the Commission may assist the Commission in its determination of the application.

(3) The applicant and each other person to whom a copy of the draft determination is sent shall notify the Commission within 10 working days after a date fixed by the Commission (not being a date earlier than the day on which the notice is sent) whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.

(4) If each of the persons to whom a draft determination was sent under subsection (2) of this section---

(a) Notifies the Commission within the period of 10 working days prescribed in subsection (3) of this section that the person does not wish the Commission to hold a conference in relation to the draft determination; or

(b) Does not notify the Commission within that period that the person wishes the Commission to hold such a conference---

the Commission may make the determination at any time after the expiration of that period.

(5) If any of the persons to whom a draft determination was sent under subsection (2) of this section notifies the Commission, in writing, within the period of 10 working days prescribed in subsection (3) of this section that he wishes the Commission to hold a conference in relation to the draft determination, the Commission shall appoint a date (not being a date later than 20 working days after the expiration of that period), time, and place for the holding of the conference and give notice of the date, time, and place so appointed to each of the persons to whom a draft determination was sent under subsection (2) of this

section.

(6) The Commission may, of its own motion, determine to hold a conference in relation to the draft determination and shall appoint a date (not being a date later than 20 working days after the expiration of the period referred to in subsection (3) of this section), time, and place for the holding of the conference and give notice of the date, time, and place so appointed to each of the persons to whom the draft determination was sent under subsection (2) of this section.

(7) Where the Commission is of the opinion that 2 or more applications for authorisations that are made by the same person, or by bodies corporate that are interconnected with each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constitute a single application, and may prepare a single draft determination in relation to the applications and hold a single conference in relation to that draft determination.

Cf. Trade Practices Act 1974 (Aust.), s. 90A (1), (2), (5), (6), (13)

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# 63 Commission may grant provisional authorisation

63. Commission may grant provisional authorisation---(1) Where, in relation to an application for an authorisation under section 58 (1) (a) to (d) of this Act, the Commission is not satisfied that---

(a) The entering into of a contract or arrangement or the arriving at an understanding; or

(b) The giving effect to a provision of a contract, arrangement, or understanding; or

(c) The giving or the requiring the giving of a covenant; or

(d) The carrying out or enforcing of the terms of a covenant---

as the case may be, to which the application relates will, or will be likely to, result in a benefit to the public which would outweigh the lessening in competition that would result or would be likely to result or would be deemed to result therefrom, the Commission may, notwithstanding section 61 of this Act, grant a provisional authorisation for a period prescribed in the authorisation.

(2) Where, in relation to an application for an authorisation under section 58 (1) (e) or (f) of this Act, the Commission is not satisfied in all the circumstances that---

(a) The entering into of a contract, or arrangement, or the arriving at an understanding; or

(b) The giving effect to an exclusionary provision,---

as the case may be, to which the application relates, will result or will be likely to result in such a benefit to the public that the contract or arrangement or understanding should be permitted to be entered into or arrived at, or that the exclusionary provision should be permitted to be given effect to, the Commission may, notwithstanding section 61 of this Act, grant a provisional authorisation for a period prescribed in the authorisation.

(3) The Commission shall not grant an authorisation under this section unless it considers that granting an authorisation will materially assist it in determining the application.

(4) The Commission shall, as soon as practicable, make a final determination of the application under section 61 of this Act.

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# 64 Procedure at conference

64. Procedure at conference---(1) At every conference called under section 62 of this Act,---

(a) The Commission shall be represented by a member or members nominated by the Chairman:

(b) Each person to whom a draft determination was sent under section 62 (2) of this Act, and any other person whose presence at the conference is considered by the Commission to be desirable, is entitled to attend and participate personally or, in the case of a body corporate, be represented by a person who, or by persons each of whom, is a director, officer, or employee of the body corporate:

(c) A person participating in the conference in accordance with paragraph (b) of this subsection is entitled to have another person or other persons present to assist him:

(d) No other person is entitled to be present.

(2) The Commission may require any officer of the Commission to attend a conference called under section 62 of this Act where in the opinion of the Commission that officer may assist the Commission in the determination of the application.

(3) At every conference called under section 62 of this Act the Commission shall provide for as little formality and technicality as the requirements of this Act and a proper consideration of the application permits.

(4) The Commission shall cause such record of the conference to be made as is sufficient to set out the matters raised by the persons participating in the conference.

(5) Any member of the Commission attending the conference may terminate the conference when that member is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

(6) The Commission shall have regard to all matters raised at the conference, and may at any time after the termination of the conference make a determination in respect of the application.

Cf. Trade Practices Act 1974 (Aust.), s. 90A (7), (8), (9), (11)

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Commerce Act 1986 005
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V: Authorisations and Clearances
Restrictive Trade Practices

# 65 Commission may vary or revoke authorisations

65. Commission may vary or revoke authorisations---(1) Subject to subsection (2) of this section, if at any time after the Commission has granted an authorisation under section 58 of this Act the Commission is satisfied that---

(a) The authorisation was granted on information that was false or misleading in a material particular; or

(b) There has been a material change of circumstances since the authorisation was granted; or

(c) A condition upon which the authorisation was granted has not been complied with---

the Commission may revoke or amend the authorisation or revoke the authorisation and grant a further authorisation in substitution for it.

(2) The Commission shall not revoke or amend an authorisation or revoke an authorisation and substitute a further authorisation pursuant to subsection (1) of this section unless the person to whom the authorisation was granted and any other person who in the opinion of the Commission is likely to have an interest in the matter is given a reasonable opportunity to make submissions to the Commission and the Commission has regard to those submissions.

Cf. Trade Practices Act 1974 (Aust.), s. 91 (4)

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Restrictive Trade Practices

# 80 Pecuniary penalties

Restrictive Trade Practices

80. Pecuniary penalties---(1) If the Court is satisfied on the application of the Commission that a person---

(a) Has contravened any of the provisions of Part II of this Act; or

(b) Has attempted to contravene such a provision; or

(c) Has aided, abetted, counselled, or procured any other person to contravene such a provision; or

(d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or

(e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or

(f) Has conspired with any other person to contravene such a provision,---

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate, not exceeding $100,000 in the case of a person not being a body corporate, or $300,000 in the case of a body corporate, in respect of each act or omission.

(2) In determining an appropriate penalty under this section, the Court shall have regard to all relevant matters, including---

(a) The nature and extent of the act or omission:

(b) The nature and extent of any loss or damage suffered by any person as a result of the act or omission:

(c) The circumstances in which the act or omission took place:

(d) Whether or not the person has previously been found by the Court in proceedings under this Part of this Act to have engaged in any similar conduct.

(3) The standard of proof in proceedings under this section shall be the standard of proof applying in civil proceedings.

(4) In any proceedings under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

(5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention arose.

(6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part II of this Act, proceedings may be instituted under this Act against that person in relation to the contravention of any one or more of the provisions; but no person shall be liable to more than one pecuniary penalty under this section in respect of the same conduct.

Cf. Trade Practices Act 1974 (Aust.), ss. 76, 77

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Restrictive Trade Practices

# 81 Injunctions may be granted by Court for contravention of Part II

81. Injunctions may be granted by Court for contravention of Part II---The Court may, on the application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute any of the following---

(a) A contravention of any of the provisions of Part II of this Act:
(b) Any attempt to contravene such a provision:
(c) Aiding, abetting, counselling, or procuring any other person to contravene such a provision:
(d) Inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to contravene such a provision:
(e) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision:
(f) Conspiring with any other person to contravene such a provision.

Cf. Trade Practices Act 1974 (Aust.), s. 80 (1), (2)

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# 82 Actions for damages for contravention or Part II

82. Actions for damages for contravention or Part II---(1) Every person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following---

(a) A contravention of any of the provisions of Part II of this Act:

(b) Aiding, abetting, counselling, or procuring the contravention of such a provision:

(c) Inducing by threats, promises, or otherwise the contravention of such a provision:

(d) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of such a provision:

(e) Conspiring with any other person in the contravention of such a provision.

(2) An action under subsection (1) of this section may be commenced at any time within 3 years from the time when the cause of action arose.

Cf. Trade Practices Act 1974 (Aust.), s. 82

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Commerce Act 1986 005
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VI: Enforcement, Remedies, and Appeals
Injunctions Generally

# 88 General provisions relating to granting of injunctions

Injunctions Generally

88. General provisions relating to granting of injunctions---(1) The Court may at any time rescind or vary an injunction granted under this Part of this Act.

(2) Where an application is made to the Court under this Part of this Act for the grant of an injunction restraining a person from engaging in conduct of a particular kind the Court may,---

(a) If it is satisfied that the person has engaged in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or

(b) If in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind,---

whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind.

(3) Where an application is made to the Court under this Part of this Act for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the Court may,---

(a) If it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or

(b) If in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind,---

whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(4) In any proceeding under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

Cf. Trade Practices Act 1974 (Aust.), s. 80 (3), (4), (5)

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Commerce Act 1986 005
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Injunctions Generally

# 89 Other orders

89. Other orders---(1) Where, is any proceedings under this Part of this Act, the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of any of the provisions of Part II of this Act, the Court may, whether or not it grants an injunction or makes any other order under this Part of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct, or any other person who in relation to the contravention did any act referred to in section 81 (b) to (f) of this Act.

(2) Where a contract is entered into in contravention of this Act, or as the case may be, a contract contains a provision which if given effect to would contravene this Act, the Court may, in any proceedings under this Part of the Act, or on application made for the purpose by a party to the contract or any person claiming through or under any party to the contract, make an order---

(a) Varying the contract, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Act:
(b) Cancelling the contract:
(c) Requiring any person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract.

(3) Where a covenant is given in contravention of this Act, or as the case may be, the enforcement of the terms of a covenant would contravene this Act, the Court may, in any proceedings under this Part of this Act, or on application made for the purpose by a person who,

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# 82 Actions for damages for contravention or Part II

82. Actions for damages for contravention or Part II---(1) Every person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following---

(a) A contravention of any of the provisions of Part II of this Act:

(b) Aiding, abetting, counselling, or procuring the contravention of such a provision:

(c) Inducing by threats, promises, or otherwise the contravention of such a provision:

(d) Being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of such a provision:

(e) Conspiring with any other person in the contravention of such a provision.

(2) An action under subsection (1) of this section may be commenced at any time within 3 years from the time when the cause of action arose.

Cf. Trade Practices Act 1974 (Aust.), s. 82

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# 88 General provisions relating to granting of injunctions

Injunctions Generally

88. General provisions relating to granting of injunctions---(1) The Court may at any time rescind or vary an injunction granted under this Part of this Act.

(2) Where an application is made to the Court under this Part of this Act for the grant of an injunction restraining a person from engaging in conduct of a particular kind the Court may,---

(a) If it is satisfied that the person has engaged in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or

(b) If in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind,---

whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind.

(3) Where an application is made to the Court under this Part of this Act for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the Court may,---

(a) If it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind, grant an injunction restraining the person from engaging in conduct of that kind; or

(b) If in the opinion of the Court it is desirable to do so, grant an interim injunction restraining the person from engaging in conduct of that kind,---

whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(4) In any proceeding under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

Cf. Trade Practices Act 1974 (Aust.), s. 80 (3), (4), (5)

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# 89 Other orders

89. Other orders---(1) Where, is any proceedings under this Part of this Act, the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of any of the provisions of Part II of this Act, the Court may, whether or not it grants an injunction or makes any other order under this Part of this Act, make such order or orders as it thinks appropriate against the person who engaged in the conduct, or any other person who in relation to the contravention did any act referred to in section 81 (b) to (f) of this Act.

(2) Where a contract is entered into in contravention of this Act, or as the case may be, a contract contains a provision which if given effect to would contravene this Act, the Court may, in any proceedings under this Part of the Act, or on application made for the purpose by a party to the contract or any person claiming through or under any party to the contract, make an order---

(a) Varying the contract, in such manner as it thinks fit, not being a manner inconsistent with the provisions of this Act:
(b) Cancelling the contract:
(c) Requiring any person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract.

(3) Where a covenant is given in contravention of this Act, or as the case may be, the enforcement of the terms of a covenant would contravene this Act, the Court may, in any proceedings under this Part of this Act, or on application made for the purpose by a person who,

(xii) 'interest' means a member's interest as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984); (l)

(xiii) 'market power' means the power of firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers; (xii)

(xiv) 'Minister' means the Minister of Trade and Industry; (xiii)

(xv) 'organ of state' has the meaning set out in section 239 of the Constitution; (xxiii)

(xvi) 'premises' includes land, any building, structure, vehicle, ship, boat, vessel, aircraft or container; (xvii)

(xvii) 'prescribed' means prescribed from time to time by regulation in terms of section 78; (xxviii)

(xviii) 'private dwelling' means any part of a structure that is occupied as a residence, or any part of a structure or outdoor living area that is accessory to, and used wholly for the purposes of, a residence; (xviii)

(xix) 'prohibited practice' means a practice prohibited in terms of Chapter 2; (xxv)

(xx) 'public regulation' means any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority; (xvi)

(xxi) 'regulation' means a regulation made under this Act; (xix)

(xxii) 'regulatory authority' means an entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry; (xx)

(xxiii) 'respondent' means a firm against whom a complaint of a prohibited practice has been initiated in terms of this Act; (xxi)

(xxiv) 'restrictive horizontal practice' means any practice listed in section 4; (ii)

(xxv) 'restrictive vertical practice' means any practice listed in section 5; (iii)

(xxvi) 'small business' has the meaning set out in the National Small Business Act, 1996 (Act No. 102 of 1996); (xi)

(xxvii) 'this Act' includes the regulations and Schedules; (ix)

(xxviii) 'vertical relationship' means the relationship between a firm and its suppliers, its customers or both. (xxvi)

(2) This Act must be interpreted-

(a) in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2; and

(b) in compliance with the international law obligations of the Republic.

(3) Any person interpreting or applying this Act may consider appropriate foreign and international law.

Purpose of Act

2. The purpose of this Act is to promote and maintain competition in the Republic in order-

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Application of Act

3. (1) This Act applies to all economic activity within, or having an effect within, the Republic, except-

(a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);

(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995;

(c) the rules of a professional association to the extent that they are exempted in terms of Schedule 1;

(d) acts subject to or authorised by public regulation; or

(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

(2) For all purposes of this Act, a person is a historically disadvantaged person if that person-

(a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;

(b) is an association, a majority of whose members are individuals referred to in paragraph (a);

(c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes; or

(d) is a juristic person or association, and persons referred to in paragraph (a ). (b or © own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes.

CHAPTER 2

PROHIBITED PRACTICES

PART A

RESTRICTIVE PRACTICES

Restrictive horizontal practices prohibited

4. (1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if-

(a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

(2) An agreement to engage in a restrictive horizontal practice referred to in subsection (1)(b) is presumed to exist between two or more firms if-

(a) any one of those firms owns a substantial shareholding, interest or similar right in the other, or they have at least one director or substantial shareholder in common; and

(b) any combination of those firms engages in that restrictive horizontal practice.

(3) A presumption contemplated in subsection (2) may be rebutted if firm, director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market.

(4) For the purposes of subsection (2), "director" means-

(a) a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973);

(b) a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);

(c) a trustee of a trust; or

(d) a person holding an equivalent position in firm.

(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by,-

(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

Restrictive vertical practices prohibited

5. (1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited.

(3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided-

(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

(b) if the product has its price stated on it, the words "recommended price" appear next to the stated price.

**PART B**

ABUSE OF A DOMINANT POSITION

Restricted application of Part

(c) it involves discriminating between those purchasers in terms of

(I) the price charged for the goods or services;

(Ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(Iii) the provision of services in respect of the goods or services; or

(Iv) payment for services provided in respect of the goods or services.

(2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph © of that subsection is not prohibited price discrimination if the dominanti firm establishes that the differential treatment-

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(c) is in response to changing conditions affecting the market for the goods or services concerned, including-

(I) any action in response to the actual or imminent deterioration of perishable goods;

(Ii) any action in response to the obsolescence of goods;

(Iii) a sale pursuant to a liquidation or sequestration procedure; or

(Iv) a sale in good faith in discontinuance of business in the goods or services concerned.

**PART C**

EXEMPTIONS FROM APPLICATION OF CHAPTER

Exemption

10. (1) firm, may apply to the Competition Commission to exempt an agreement, or practice, or category of either agreements, or practices, from the application of this Chapter.

(2) Upon receiving an application in terms of subsection (1), the Competition Commission may-

(a) advise the applicant in writing that the agreement, or practice, or category of either agreements, or practices, does not constitute a prohibited practice in teens of this Chapter;

(b) grant a conditional or unconditional exemption for a specified term, if the agreement, or practice, or category of either agreements, or practices concerned meets the requirements of subsection (3); or

(c) refuse to grant an exemption.

(3) The Competition Commission may grant an exemption in terms of subsection (2)(b), if-

(a) any restriction imposed on the firms concerned by the agreement, or practice, or category of either agreements, or practices, concerned, is required to attain an objective mentioned in paragraph (b); and

(b) the agreement, or practice, or category of either agreements, or practices, concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports;

(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

(iii) change in productive capacity necessary to stop decline in an industry; or

(iv) the economic stability of any industry designated by the Minister, after consulting the minister responsible for that industry.

(4) In addition to the provisions of subsections (2) and (3), the Competition Commission may exempt an agreement, or practice, or category of either agreements, or practices, that relates to the exercise of a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeder's Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993) and the Designs Act, 1993 (Act No. 195 of 1993).

(5) The Competition Commission may revoke its written advice given in terms of subsection 2(a), or an exemption granted in terms of subsection (2)(b), if-

(a) the advice was given, or the exemption was granted, on the basis of false or incorrect information;

(b) a condition of the exemption is not fulfilled; or

(c) the reason for granting the exemption no longer exists.

(6) Before granting an exemption in terms of subsection (2) or (4), or revoking an exemption in terms of subsection (5), the Competition Commission must-

(a) give notice in the Gazette of the application for an exemption, or of its intention to revoke that exemption; and

(b) allow interested parties 30 days from the date of that notice to make written representations as to why the exemption should not be granted or revoked.

(7) The Competition Commission must, by notice in the Gazette, give notice of any exemption granted or revoked in terms of this section.

(8) The firm concerned, or any other person with a substantial material interest affected by a decision of the Competition Commission in terms of subsection (2)(b) or (c), or subsections (4) or (5), may appeal against that decision to the Competition Tribunal in the prescribed manner.

## CHAPTER 3

## MERGER CONTROL

### Restricted application of Chapter

11. (1) As soon as practicable after this Act comes into operation, and at intervals of not less than five years thereafter, the Minister must, in consultation with the Competition Commission, and by notice in the Gazette-

(a) determine a threshold of combined annual turnover, or assets, in the Republic, either in general or in relation to specific industries, at or below which this Chapter does not apply to a merger;

(b) determine a second threshold of combined annual turnover, or assets, in the Republic, either in general or in relation to specific

Liability

43. (1) The State Liability Act, 1957 (Act No. 20 of 1957), read with the changes required by the context, applies to the Competition Commission and to the Competition Tribunal, but a reference in that Act to "the Minister of the Department concerned" must be interpreted as referring to the Commissioner, or to the Chairperson, as the case may be.

(2) No Competition Tribunal member, Competition Appeal Court member, Commissioner, staff person or contractor is liable for any report, finding, point of view or recommendation that is given in good faith and is submitted to Parliament, or made known, under the Constitution or this Act.

CHAPTER 5

COMPETITION TRIBUNAL PROCEDURES

Initiating a complaint

44. A complaint against a prohibited practice by a firm may be initiated by the Commissioner, or submitted to the Competition Commission by any person in the prescribed manner.

Investigation by Competition Commission

45. (1) Upon initiating or receiving a complaint in terms of section 44, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.

(2) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector conducting the investigation.

(3) A person questioned by an inspector conducting an investigation must answer each question truthfully and to the best of that person s ability, but a person is not obliged to answer any question if the answer is self-incriminating.

(4) At any time during an investigation, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject-

(a) to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object referred to in paragraph (a) at a time and place specified in the summons.

(5) No self-incriminating answer given or statement made by any person to an inspector exercising powers in terms of this section will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.

Authority to enter and search under warrant

46. (1) A judge of the High Court, a regional magistrate or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that-

(a) a prohibited practice has taken place, is taking place or is likely to take place on or in those premises: or

(6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.

(7) A police officer who is authorised to enter and search premises under section 46. or who is assisting an inspector who is authorised to enter and search premises under section 46 or 47, may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.

(8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.

(9) The Competition Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

Outcome of complaint

50. After completing its investigation, the Competition Commission must-

(a) refer the matter to the Competition Tribunal, if it determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.

Referral to Competition Tribunal

51. (1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Competition Tribunal.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(a), or by a complainant in terms of subsection (1), must be in the prescribed form.

(3) The Chairperson of the Competition Tribunal must, by notice in the Gazette, publish each referral made to the Tribunal.

(4) The notice published in terms of subsection (3) must include-

(a) the name of the firm whose conduct is the subject of the referral; and

(b) the nature of the conduct that is the subject of the referral.

Hearings before Competition Tribunal

52. (1) The Competition Tribunal must conduct a hearing into every matter referred to it in terms of section 50(a) or section 51(1).

(2) The Competition Tribunal must conduct its hearings in public-

(a) in an inquisitorial manner;

(b) as expeditiously as possible;

(c) as informally as possible; and

(d) in accordance with the principles of natural justice.

(3) Despite subsection (2), the Tribunal member presiding at a hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings-

(a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;

(b) if the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable in civil proceedings in a High Court.

(4) At the conclusion of a hearing, the Competition Tribunal must make any order permitted in terms of Chapter 6, and must issue written reasons for its decision.

(5) The Competition Tribunal must provide the participants and other members of the public reasonable access to the record of each hearing, subject to any ruling to protect confidential information made in terms of subsection (3)(a).

Right to participate in hearing

53. The following persons may participate in a hearing contemplated in section 52, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

(a) the Commissioner, or any person appointed by the Commissioner;

(b) the complainant;

(c) the firm whose conduct forms the basis of the hearing; and

(d) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant.

Powers of member presiding at hearing

54. The member of the Competition Tribunal presiding at a hearing may-

(a) direct or summon any person to appear at any specified time and place;

(b) question any person under oath or affirmation;

(c) summon or order any person-

(i) to produce any book, document or item necessary for the purposes of the hearing; or

(ii) to perform any other act in relation to this Act; and

(d) give directions prohibiting or restricting the publication of any evidence given to the Competition Tribunal.

Rules of procedure

55. Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).

Witnesses

56. (1) Every person giving evidence at a hearing of the Competition Tribunal must answer any relevant question.

(2) The law regarding a witness' privilege in a criminal case in a court of law applies equally to a person who provides information during a hearing.

(3) The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

(4) Section 45(5) applies to evidence given by a witness in terms of this

section.

Costs

57. (1) Subject to subsection (2), each party participating in a hearing must bear its own costs. (2) If the Competition Tribunal-

(a) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section 51 (1); or

(b) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 51 (1).

Appeals

58. (1) Subject to the rules of the Competition Appeal Court, a participant in a hearing referred to in section 53 may-

(a) appeal against any decision of the Competition Tribunal, other than a decision in terms of section 62(3), to the Competition Appeal Court; or

(b) apply to the Competition Appeal Court to review a decision of the Competition Tribunal.

(2) The Competition Appeal Court may make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.

(3) A judgment of the Competition Appeal Court is binding on the Competition Tribunal, and the Competition Commission.

CHAPTER 6

REMEDIES AND ENFORCEMENT

Interim relief

59. (1) At any time, whether or not a hearing has commenced into an alleged prohibited practice, a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if-

(a) there is evidence that a prohibited practice has occurred;

(b) an interim order is reasonably necessary to-

(i) prevent serious, irreparable damage to that person; or

(ii) to prevent the purposes of this Act being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favours the granting of the order.

(2) An interim order in terms of this section must not extend beyond the earlier of-

the conclusion of a hearing into the alleged prohibited practice; or

the date that is six months after the date of issue of the interim order.

(3) If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.

Orders of Competition Tribunal

60. (1) In addition to its other powers in terms of this Act, the Competition Tribunal may-

(a) make an appropriate order in relation to a prohibited practice, including-

(i) interdicting any prohibited practice;

(ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;

(iii) imposing an administrative fine, in terms of section 61, with or without the addition of any other order in terms of this section;

(iv) ordering divestiture, subject to section 62;

(v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65;

(vi) declaring the whole or any part of an agreement to be void;

(vii) ordering access to an essential facility on terms reasonably required;

(b) confirm a consent agreement in terms of section 63 as an order of the Tribunal; or

(c) condone any breach of its rules and procedures on good cause shown.

(2) At any time, the Competition Tribunal may adjourn a hearing for a reasonable period of time, if there is reason to believe that the hearing relates to a prohibited practice that might qualify for exemption in terms of section 10.

(3) Despite any other provision of this Act, if the Competition Tribunal adjourns a hearing in terms of subsection (2), the respondent may apply for an exemption during that adjournment.

Administrative fines

61. (1) The Competition Tribunal may impose an administrative penalty only-

(a) for a prohibited practice in terms of sections 4(1)(b), 5(2) or 8(a), (b) and (d);

(b) for a prohibited practice in terms of sections 4(1)(a), 5(1), 8© or 9(1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice; or

(c) if the parties to a merger have-

(i) failed to give notice of the merger as required by section 13;

(ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or the Competition Tribunal to prohibit that merger;

(iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Commission in terms of section 14, or the Tribunal in terms of section 15; or

(iv) proceeded to implement the merger without the approval of the Commission or the Tribunal.

(2) An administrative fine imposed in terms of subsection (1) may not exceed 10% of the firm 's annual turnover in the Republic and its exports from the Republic during the firm s preceding financial year.

(3) When determining an appropriate fine, the Competition Tribunal must

consider the following factors:

(a) the nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) the degree to which the respondent has co-operated with the Competition Commission and the Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act.

(4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

Divestiture

62. (1) If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may-

(a) order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or

(b) declare void any provision of an agreement to which the merger was subject.

(2) The Competition Tribunal, in addition to or in lieu of making an order under section 60, may make an order directing any firm, or any other person to sell any shares, interest or assets of the firm if-

(a) it has contravened section 8, and

(b) the prohibited practice-

(i) cannot adequately be remedied in terms of another provision of this Act; or

(ii) is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice.

(3) An order made by the Competition Tribunal in terms of subsection (2) is of no force or effect unless confirmed by the Competition Appeal Court.

(4) An order made in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned.

Consent orders

63. (1) If a complaint of a prohibited practice has been investigated by the Competition Commission, and the Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 60.

(2) With the consent of a complainant, a consent order confirmed in terms of subsection (1) may include an award of damages to that complainant.

(3) A consent order does not preclude a complainant applying for-

(a) a declaration in terms of section 60(1)(a)(v) or (vi); or

(b) an award of civil damages in terms of section 65, unless the consent

order includes an award of damages to the complainant.

Status and enforcement of orders

64. (1) Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.

(2) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal.

(3) A proceeding under subsection (2) may not be initiated more than three years after the imposition of the administrative penalty.

Civil actions and jurisdiction

65. (1) Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

(3) The Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

(a) interpretation and application of the provisions of Chapters 2, 3, and 6, other than this section; and

(b) the functions referred to in sections 21(1), 27(1) and 37(1).

(4) The Competition Appeal Court has final jurisdiction in respect of any matter referred to in subsection (3) that may be appealed to it or reviewed by it.

(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice.

(6) A person who has suffered loss or damage as a result of a prohibited practice-

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 63(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or from the Judge President of the Competition Appeal Court, in the prescribed form-

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding;

order includes an award of damages to the complainant.

Status and enforcement of orders

64. (1) Any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.

(2) The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal.

(3) A proceeding under subsection (2) may not be initiated more than three years after the imposition of the administrative penalty.

Civil actions and jurisdiction

65. (1) Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

(3) The Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

(a) interpretation and application of the provisions of Chapters 2, 3, and 6, other than this section; and

(b) the functions referred to in sections 21(1), 27(1) and 37(1).

(4) The Competition Appeal Court has final jurisdiction in respect of any matter referred to in subsection (3) that may be appealed to it or reviewed by it.

(5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice.

(6) A person who has suffered loss or damage as a result of a prohibited practice-

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 63(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or from the Judge President of the Competition Appeal Court, in the prescribed form-

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding;

and

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a civil court.

(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 60 suspends any right to commence an action in a civil court with respect to the same matter.

(9) A person's right to damages arising out of a prohibited practice comes into existence-

(a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or

(b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded. (10) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).

Variation of order

66. (1) The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order-

(a) erroneously sought or erroneously granted in the absence of any party affected by it;

(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or

(c) made or granted as a result of a mistake common to all of the parties to the proceeding.

Limitations of bringing action

67. (1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.

(2) A complaint may not be initiated against any firm that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

Standard of proof

68. In any proceedings in terms of Chapter 3 or this Chapter, the standard of proof is on a balance of probabilities.

CHAPTER 7

**OFFENCES**

Breach of confidence

69. (1) It is an offence to disclose any confidential information concerning the affairs of any person or firm obtained-

(a) in carrying out any function in terms of this Act; or

(b) as a result of initiating a complaint or participating in any proceedings in terms of this Act.

(2) Subsection (1) does not apply to information disclosed-

(2) A guideline prepared in terms of subsection (1)-

(a) must be published in the Gazette; but

(b) is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of this Act.

Official seal

80. The President, by proclamation in the Gazette, may prescribe an official seal for each of the Competition Commission, Competition Tribunal and the Competition Appeal Court.

Act binds State

81. This Act binds the State.

Information exchange with foreign agencies

82. The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency.

Transitional arrangements and repeal of laws

83. (1) Subject to Schedule 3, the laws specified in Schedule 2, and all proclamations, regulations or notices promulgated or published in terms of those laws, are repealed.

(2) The repeal of those laws specified in Schedule 2 does not affect any transitional arrangements made in Schedule 3.

Short Title and commencement of Act

84. (1) This Act is called the Competition Act and comes into operation on a date fixed by the President by proclamation in the Gazette.

(2) The President may set different dates for different provisions of this Act to come into operation.

(3) Unless the context otherwise indicates, a reference in a section of this Act to a time when this Act comes into operation must be construed as a reference to the time when that section comes into operation.

SCHEDULE 1

EXEMPTION OF PROFESSIONAL RULES IN TERMS OF SECTION 2©

**PART A**

1. A professional association may apply in the prescribed manner to the Competition Commission to have all or part of its rules exempted from the provisions of Part A of Chapter 2 of this Act, provided-

(a) the rules do not contain any restriction that has the effect of substantially preventing or lessening competition in a market; or

(b) if the rules do contain a restriction contemplated in paragraph (a), that restriction, having regard to internationally applied norms, is reasonably required to maintain-

(i) professional standards; or

(ii) the ordinary function of the profession.

2. Upon receiving an application in terms of item 1, the Competition Commission may exempt the rules concerned after it has-

(a) given notice of the application in the Gazette;

(b) allowed Interested parties 30 days from the date of that notice to make representations concerning the application; and

(c) consulted the responsible Minister, or member of the Executive Council.

3. The Competition Commission, in the prescribed manner, may revoke an exemption granted under item 2 on good cause shown, at any time after it has-

(a) given notice in the Gazette of its intention to revoke the exemption;

(b) allowed interested parties 30 days from the date of that notice to make representations concerning the exemption; and

(c) consulted the responsible Minister, or member of the Executive Council.

4. A professional rule is exempt, or its exemption revoked, only as of the date that notice of the exemption or revocation, as the case may be, is published in the Gazette.

5. The Competition Commission must maintain for public inspection a record of all professional rules that have received exemption, or for which exemption has been revoked.

6. In this Schedule- 'professional association' means an association referred to in Part B of this Schedule; 'professional rules' means rules regulating a professional association that are binding on its members; 'rules' includes regulations, codes of practice and statements of principle;

**PART B**

For the purpose of this Act, a professional association is-

(a) for each of the following professions, a governing body of that profession registered in terms of an Act mentioned below the name of that profession; or

(b) any other association, if the Competition Commission is satisfied that it represents the interests of members of a profession referred to in paragraph (a)

Accountants and Auditors

Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991).

Architects

Architects Act, 1970 (Act No. 35 of 1970).

Engineering

Engineering Profession of South Africa Act, 1990 (Act No. 114 of 1990)

Estate Agents

Estate Agents Act, 1976 (Act No. 112 of 1976)

Attorneys and Advocates

Attorneys Act, 1979 (Act No. 53 of 1979)

Admission of Advocates Act, 1964 (Act No. 74 of 1964)

Natural sciences

Natural Scientific Professions Act, 1993 (Act No. 106 of 1993)

Quantity Surveyors

Quantity Surveyors Act, 1970 (Act No. 36 of 1970)

Surveyors

Professional and Technical Surveyors Act, 1984 (Act No. 40 of 1984)

Town and Regional Planners

Town and Regional Planners Act, 1984 (Act No. 19 of 1984)

Valuers

Valuers Act, 1982 (Act No. 23 of 1982)

Medical

Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974)

Nursing Act, 1978 (Act No. 50 of 1978)

Dental Technicians Act, 1979 (Act No. 19 of 1979)

Pharmacy Act, 1974 (Act No. 53 of 1974)

Veterinary and Para-veterinary Professions Act, 1982 (Act No. 19 of 1982)

Chiropractors Homeopaths and Allied Health Service Professions Act, 1982 (Act No. 63 of 1982)

**Miscellaneous**

Any other professional association to whom the provisions of this Schedule have been declared applical Minister by notice in the Gazette.

**SCHEDULE 2**

**REPEAL OF LAWS**

(SECTION 83)

| No and Year of Law | Short Title | Extent of Repeal |
|---|---|---|
| Act No. 96 of 1979 | Maintenance and Promotion of Competition Act, 1979 | The whole |
| Act No. 58 of 1980 | Maintenance and Promotion of Competition Amendment Act, 1980 | The whole |
| Act No. 62 of 1983 | Maintenance and Promotion of Competition Amendment Act, 1983 | The whole |
| Act No. 12 of 1985 | Maintenance and Promotion of Competition Amendment Act, 1985 | The whole |
| Act No. 5 of 1986 | Maintenance and Promotion of Competition Amendment Act, 1986 | The whole |
| Act No. 96 of 1987 | Maintenance and Promotion of Competition Amendment Act, 1987 | The whole |
| Act No. 88 of 1990 | Maintenance and Promotion of Competition Amendment Act, 1990 | The whole |

**SCHEDULE 3**

**Transitional Arrangements**

1. A ruling issued in terms of section 6(1)(a) of the Maintenance and Promotion of Competition Act, 1979 (Act No. 86 of 1979), or notice issued in terms of section 14(1)(a) of that Act, in relation to an "acquisition" as defined in that Act, must be regarded for purposes of this Act to be a conditional approval of a merger as if it had been granted after this Act came into operation by the Competition Commission in terms of section 14(1)(b), or by the Competition Tribunal in terms of section 16(2)(b).