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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2016/195

of 14 August 2015

on State aid measures SA.33083 (12/C) (ex 12/NN) implemented by Italy providing for reduced taxes and contributions linked to natural disasters (all sectors except agriculture) and SA.35083 (12/C) (ex 12/NN), implemented by Italy providing for reduced taxes and contributions linked to the earthquake in Abruzzo in 2009 (all sectors except agriculture)

(notified under document C(2015) 5549)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ("TFEU"), and in particular the second subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

State aid measure SA.33083 (12/NN) — Reduced taxes and contributions linked to natural disasters in Sicily, northern Italy and other regions

- (1) On 21 February 2011, the Commission received a request for information from a judge of the labour division of the ordinary court of Cuneo in Piedmont ⁽²⁾, made in accordance with the Commission notice on the enforcement of State aid law by national courts ⁽³⁾. In the request, the judge drew the Commission's attention to the existence of a series of laws, dating from 2002, 2003 and 2007, which appeared to introduce State aid measures in the form of a 90 % reduction in taxes and compulsory social security contributions and premiums for insurance against accidents at work, linked to the earthquake that hit eastern Sicily (the provinces of Siracusa, Catania and Ragusa) on 13-16 December 1990 and the floods in northern Italy in November 1994; the judge asked (though the questions were ordered slightly differently) whether these measures: (i) had been notified by Italy pursuant to Article 108(3) of the TFEU, (ii) had been assessed by the Commission, (iii) had been the subject of a formal investigation, (iv) had been the subject of a decision, or (v) if no decision had been adopted, when a

⁽¹⁾ Commission Decision C(2012) 7128 final (OJ C 381, 11.12.2012, p. 32).

⁽²⁾ Order (*ordinanza*) of the ordinary court (*tribunale*) of Cuneo, 18 February 2011, making a request for information in accordance with the Commission notice on the enforcement of State aid law by national courts.

⁽³⁾ OJ C 85, 9.4.2009, p. 1.

decision would be adopted. On 21 March 2011, the Commission departments replied that these measures did not appear to have been notified by the Italian authorities and that the Commission had not yet opened any proceeding or formal investigation.

- (2) On 27 May 2011 the case was registered at the Commission under the reference number SA.33083 (11/CP).
- (3) On 25 July 2011 the Commission sent a request for information to the Italian authorities. After a reminder on 8 September 2011, the Italian authorities replied on 6 October 2011. By letter of 14 October 2011, the Commission requested additional information, to which the Italian authorities replied by letter dated 7 December 2011.
- (4) By letter of 19 June 2012, the Commission requested additional information regarding the measures linked to the natural disasters in eastern Sicily and northern Italy, and other similar measures linked to natural disasters that had occurred in Italy since 1990 ⁽⁴⁾; the Commission asked the Italian authorities to submit comments relating in particular to whether these measures were lawful, whether they constituted State aid, and whether they might be justified under the State aid rules. The Commission departments also informed the Italian authorities that the Commission was considering issuing an injunction requiring the suspension of any unlawful aid granted under the aforementioned measures. Italy replied by letter dated 25 July 2012.
- (5) Meanwhile, on 6 July 2012, the Commission received a request for information regarding this proceeding from the ordinary court of Vercelli in Piedmont ⁽⁵⁾. The Commission departments replied on 20 July 2012.
- (6) As the aid scheme had not been notified pursuant to Article 108(3) of the TFEU, and had been put into effect before the Commission had taken a decision authorising it, the measures were entered in the Commission's State aid register as non-notified aid, under the number SA.33083 (12/NN).
- (7) On the basis of information gathered during the preliminary assessment phase, the Commission decided to divide the case, separating the agricultural sector. The present Decision, therefore, does not concern activities connected with the production, processing and marketing of agricultural products as listed in Annex I to the Treaty, with the exception of fisheries and aquaculture products.

State aid measure SA.35083 (12/NN) — Reduced taxes and contributions linked to the earthquake in Abruzzo in 2009

- (8) By electronic notification of 2 July 2012, registered by the Commission the same day under the reference number SA.35083 (12/NN), the Italian authorities notified a measure providing for aid in the form of reduced taxes and contributions linked to the earthquake in Abruzzo in 2009: the Commission had already requested information on this measure in its letter of 19 June 2012 under number SA.33083 (12/NN).
- (9) In the notification, the Italian authorities argued that the compatibility of the measure should be assessed in the light of Article 107(2)(b) of the TFEU ('aid to make good the damage caused by natural disasters') or Article 107(3)(c) of the TFEU ('aid to facilitate the development of certain ... economic areas'), because its purpose was to compensate for the macroeconomic impact of the natural disaster in terms of a decrease in GDP. The Italian authorities referred in particular to a significant decline in the GDP of the region of Abruzzo between 2008 and 2009 ⁽⁶⁾.
- (10) By letter dated 17 August 2012, the Commission informed the Italian authorities that it considered the measure to be a non-notified aid measure, which it would assess together with case SA.33083 (12/NN).

⁽⁴⁾ The letter mentioned measures linked to earthquakes affecting the regions of Umbria and Marche in 1997, Molise and Puglia in 2002, and Abruzzo in 2009, or any other similar measures put in place by Italy.

⁽⁵⁾ Record (*verbale di udienza*) of the hearing before the ordinary court of Vercelli, 19 June 2012, making a request for information regarding the proceeding pending in case SA.33083 (11/CP).

⁽⁶⁾ According to ISTAT (Istituto Nazionale di Statistica), GDP fell from EUR 26 314,5 million in 2008 to EUR 25 343,2 million in 2009 (i.e. minus 3,7 %).

- (11) As the legal basis had entered into force before the Commission had taken a decision authorising the scheme, the measure was entered in the Commission's State aid register as non-notified aid under the number SA.35083 (12/NN).
- (12) On the basis of information provided in the notification, the Commission decided to divide the case, separating the agricultural sector. The present Decision, therefore, does not cover activities connected with the production, processing and marketing of agricultural products as listed in Annex I of the Treaty, with the exception of fisheries and aquaculture products.

Joint proceeding in State aid cases SA.33083 (12/C) (ex 12/NN) and SA.35083 (12/C) (ex 12/NN) following the initiation of the procedure laid down in Article 108(2) of the TFEU

- (13) By letter dated 17 October 2012 the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the TFEU in respect of the aid measures ⁽⁷⁾. The cases were registered respectively under numbers SA.33083 (12/C) (ex 12/NN) and SA.35083 (12/C) (ex 12/NN).
- (14) The Commission's decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* ⁽⁸⁾ and interested parties were invited to submit their comments on the measures.
- (15) By letter of 13 November 2012 the Italian authorities requested an extension of the deadline for the submission of their comments. By letter of 15 November 2012, the Commission agreed to the request.
- (16) Italy submitted its comments on 11 January 2013. The Commission also received comments from four interested third parties: on 9 January 2013 from the law firm Studio Legale Prof. Avv. Mario P. Chiti ('Chiti'), on 10 January 2013 from the law firm Studio Legale Avvocato Roberto Preve — Katia Gavioli ('Preve-Gavioli'), and on 11 January 2013 from the industrial federation Confindustria. On 31 January 2013, after the expiry of the deadline of one month following the publication of the opening decision in the *Official Journal*, the Commission received comments from the trade union organisation CGIL L'Aquila.
- (17) On 17 January 2013, the Commission forwarded to the Italian authorities all the observations received from interested third parties within the deadline of one month following the publication of the opening decision in the *Official Journal*, and asked them to comment. Italy replied on 11 March 2013 that it had no comment to make on the third parties' observations.
- (18) On 23 March 2013 the Commission asked for clarification of the information received from Italy. Italy replied on 24 and 30 April 2013. On 12 June 2014 the Commission asked for further information, and sent a reminder on 17 October 2014. Italy replied to the request and the reminder by providing information on 20 and 24 June, 11 July, 4 August and 29 October 2014.

2. DESCRIPTION OF THE MEASURES

Measures and legal bases

- (19) The measures and schemes listed below are designed to reduce the taxes payable by undertakings based or otherwise located in areas affected by various natural disasters in Italy since the year 1990, along with their compulsory social insurance contributions (payable to the National Institute for Social Insurance (*Istituto Nazionale per la Previdenza Sociale* — 'INPS') and premiums for compulsory insurance against accidents at work (payable to the National Institute for Insurance against Accidents at Work (*Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro* — 'INAIL') (hereinafter referred to together as 'contributions').

⁽⁷⁾ See footnote 3.

⁽⁸⁾ See footnote 3.

Measures linked to the earthquake in eastern Sicily in 1990

- (20) Following the earthquake that hit eastern Sicily (the provinces of Siracusa, Catania and Ragusa) on 13-16 December 1990, the Italian authorities adopted a series of decisions and laws in the years from 1990 until 2002 granting to all undertakings ⁽⁹⁾ located in the municipalities affected by the earthquake ⁽¹⁰⁾ a suspension and deferral of payment of taxes and contributions, or permission to pay in instalments.
- (21) In 2001 a law provided that those who had still not paid their taxes or contributions could rectify their position (i.e. meet their payment obligations) by paying the full amounts still due, increased by 15 %, by 28 December 2001 ⁽¹¹⁾.
- (22) However, in 2002 Italy enacted legislation ⁽¹²⁾ allowing those who had still not paid their taxes for the years 1990, 1991 and 1992 to rectify their position automatically by paying only 10 % of the amount still due by 16 March 2003 ⁽¹³⁾. This Law No 289 of 27 December 2002, in other words, introduced the possibility of a 90 % rebate on amounts due in taxes to the State.
- (23) New laws in 2003 and 2004 ⁽¹⁴⁾ extended this possibility until 16 April 2004.
- (24) Under a new law enacted in 2005 ⁽¹⁵⁾, which referred back to the 2002 law ⁽¹⁶⁾, undertakings that had still not paid social security contributions (to INPS) and premiums for insurance against accidents at work (to INAIL) for the years 1990, 1991 and 1992 were allowed to rectify their position automatically by paying only 10 % of the amounts still due. The budget provided for this measure was EUR 52 million ⁽¹⁷⁾.
- (25) A law of 2007 extended the deadline for payment to 31 December 2007, but required a payment of 30 % of the amount still due in taxes ⁽¹⁸⁾. A further law of 2007 extended the deadline for payments to 30 June 2008, and re-established the previous position that required payment of only 10 % of the amount still due ⁽¹⁹⁾.

Measures linked to the floods in northern Italy in 1994

- (26) Similarly, following the floods in northern Italy in November 1994 (affecting 257 municipalities in the regions of Piedmont, Lombardy, Emilia-Romagna, Liguria, Tuscany and Veneto), the Italian authorities adopted a series of laws granting suspension and deferral of payment of taxes and contributions to undertakings ⁽²⁰⁾ that had suffered heavy damage ⁽²¹⁾ as a result of the floods.
- (27) In 2003, as in the case of the earthquake in eastern Sicily, Italy offered undertakings affected by the 1994 floods the chance to rectify their position by paying only 10 % of the amount due in taxes and contributions for the period 1995, 1996 and 1997 by July 2004 ⁽²²⁾.

⁽⁹⁾ Including undertakings in the industrial, commercial, crafts and agriculture sectors having an activity in the area affected by the earthquake.

⁽¹⁰⁾ Identified by an order (*decreto*) of the Prime Minister dated 15 January 1991.

⁽¹¹⁾ Article 138 of the Finance Law for 2001, as amended by Decree-law No 355 of 28 September 2011.

⁽¹²⁾ Law No 289 of 27 December 2002 (the Finance Law for 2003), Article 9(17).

⁽¹³⁾ In a single payment or, for sums above EUR 5 000, in instalments.

⁽¹⁴⁾ Article 23-*decies*(5) of Decree-law No 355 of 24 December 2003, converted into statute by Law No 47 of 27 February 2004 and by the Ministerial Order (*decreto*) of 8 April 2004.

⁽¹⁵⁾ Law No 266 of 23 December 2005 (the Finance Law for 2006), Article 1(363).

⁽¹⁶⁾ See footnote 12.

⁽¹⁷⁾ Law No 81 of 11 March 2006 converting into statute Decree-law No 2 of 10 January 2006.

⁽¹⁸⁾ Article 3-*quater*(2) of Law No 17 of 26 February 2007 converting into statute Decree-law No 300 of 28 December 2006.

⁽¹⁹⁾ Law No 248 of 31 December 2007, Article 36-*bis*.

⁽²⁰⁾ Excluding undertakings in the banking and insurance sector.

⁽²¹⁾ Damage was considered to be 'heavy' (*rilevante*) within the meaning of Article 16-*bis* of Law No 22 of 21 January 1995, which converted into statute Decree-law No 646 of 24 November 1994, if it exceeded one sixth of the income declared for the tax year 1993 and was in any event no less than LIT 2 million (approximately EUR 1 032,39).

⁽²²⁾ Law No 350 of 24 December 2003 (the Finance Law for 2004), Article 4(90).

- (28) Further laws of 2007 extended the deadline for payment of amounts still due in taxes and contributions to 31 March 2008 ⁽²³⁾.

Similar measures linked to other natural disasters in Italy which occurred between 1997 and 2002

- (29) In recent years, according to information available to the Commission, Italy has allowed similar reductions in other areas affected by natural disasters.
- (30) In 2006 Italy introduced ⁽²⁴⁾ a 50 % rebate on taxes and contributions ⁽²⁵⁾ for undertakings having their registered office or place of business in the municipalities of the province of Catania, Sicily, affected by the earthquake and eruptions of Mount Etna that took place in 2002 ⁽²⁶⁾.
- (31) In 2008, Italy introduced a 60 % rebate on taxes and contributions for undertakings having their registered office or place of business in the municipalities in the regions of Umbria and Marche affected by the earthquake in 1997 ⁽²⁷⁾.
- (32) In 2008, Italy introduced a 60 % rebate on taxes and contributions for undertakings having their registered office or place of business in the municipalities in the regions of Molise and Puglia affected by the earthquake in 2002 ⁽²⁸⁾.
- (33) The same 60 % rebate on taxes and contributions was introduced in 2011 for undertakings having their registered office or place of business in the municipalities in the region of Abruzzo affected by the earthquake of 6 April 2009 (for more detail see the next point) ⁽²⁹⁾.

Notified aid measure SA.35083 (12/NN) linked to the earthquake in Abruzzo in 2009

- (34) The measure notified by the Italian authorities and registered by the Commission under the number SA.35083 (12/NN) (see recital 8) provides for aid in the form of reduced taxes and contributions linked to the earthquake in Abruzzo in 2009.
- (35) Following the earthquake which hit the region of Abruzzo (the regional capital L'Aquila and several other municipalities) on 6 April 2009, the Italian authorities adopted a series of decisions and laws ⁽³⁰⁾ granting all undertakings ⁽³¹⁾ located in the municipalities affected by the earthquake ⁽³²⁾ a suspension and deferral until 30 November 2009 of the payment of taxes and contributions. This deadline was extended by further enactments to 30 June 2010 ⁽³³⁾, to 15 December 2010 ⁽³⁴⁾, to 31 October 2011 ⁽³⁵⁾ and finally to 16 December 2011 ⁽³⁶⁾.

⁽²³⁾ Article 3-*quater*(1) of Law No 17 of 26 February 2007 converting into statute Decree-law No 300 of 28 December 2006; Decree-law No 248 of 31 December 2007, Article 36-*bis*.

⁽²⁴⁾ Law No 296 of 27 December 2006, Article 1(1011), referring to order (*ordinanza*) of the Prime Minister No 3442 of 10 June 2005, in turn referring to order of the Prime Minister No 3254 of 29 November 2002.

⁽²⁵⁾ In Law No 296 of 27 December 2006, Article 1(1011) speaks of 'any tax or contribution ... reduced to 50 %'.

⁽²⁶⁾ Article 5 of Order of the Prime Minister No 3254 of 29 November 2002 suspended, for the first time, 'payments of social security and assistance contributions and of premiums for compulsory insurance against accidents at work and occupational illnesses' in respect of 'persons resident or having their registered office or place of business in the area'. Order of the Prime Minister No 3242 of 10 June 2005 confirmed the suspension for 'private employers having their registered office or place of business in the municipalities ...'.

⁽²⁷⁾ Article 2(1) of Decree-law No 61 of 8 April 2008, converted into statute by Law No 103 of 6 June 2008 (with financing provided for by Law No 244 of 24 December 2007, Article 2(109); Article 3(2) of Decree-law No 162 of 23 October 2008, converted into statute by Law No 201 of 22 December 2008.

⁽²⁸⁾ Article 6(4-*bis*) and (4-*ter*) of Decree-law No 185 of 29 November 2008, converted into statute by Law No 2 of 28 January 2009.

⁽²⁹⁾ Law No 183 of 12 November 2011, Article 33(28).

⁽³⁰⁾ Orders of the Prime Minister Nos 3753 and 3754 of 9 April 2009 and No 3780 of 6 June 2009; Decree-law No 39 of 28 April 2009, converted into statute by Law No 77 of 24 June 2009.

⁽³¹⁾ '... resident, having on the date of the earthquake' or 'having their residence for tax purposes or place of business ...'.

⁽³²⁾ Identified by order (*decreto*) of the Prime Minister No 3 of 16 April 2009.

⁽³³⁾ Order (*ordinanza*) of the Prime Minister No 3837 of 30 December 2009.

⁽³⁴⁾ Article 39 of Decree-law No 78 of 31 May 2010, converted into statute by Law No 122 of 30 July 2010.

⁽³⁵⁾ Decree-law No 225 of 29 December 2010, Article 3.

⁽³⁶⁾ Order (*decreto*) of the Prime Minister of 16 August 2011.

- (36) On 12 November 2011, Italy enacted a law stipulating that collection of the taxes and contributions suspended and deferred since the earthquake would recommence from January 2012, in 120 monthly instalments, and that the amount to be paid would be reduced to 40 % of the amount originally payable ⁽³⁷⁾.

Objective of the measures

- (37) The general objective of the schemes described (which reduced taxes and contributions by up to 90 %) was to support undertakings having their registered office or place of business in areas affected by natural disasters.

Geographical scope of the measures

- (38) The measures are applicable to areas in Italy affected by natural disasters, namely the earthquakes, floods or volcanic eruptions identified in the legislation.
- (39) The areas referred to in these measures are:
- the municipalities ⁽³⁸⁾ affected by the earthquake that hit eastern Sicily (the provinces of Siracusa, Catania and Ragusa) on 13-16 December 1990;
 - the municipalities ⁽³⁹⁾ in the regions of Piedmont, Lombardy, Emilia-Romagna, Liguria, Tuscany and Veneto affected by the floods of November 1994;
 - the municipalities ⁽⁴⁰⁾ in the province of Catania, Sicily, affected by the earthquake and eruptions of Mount Etna that took place in 2002;
 - the municipalities ⁽⁴¹⁾ in the provinces of Ancona (in the region of Marche) and Perugia (in the region of Umbria) affected by the earthquake in 1997;
 - the municipalities ⁽⁴²⁾ in the provinces of Campobasso (in the region of Molise) and Foggia (in the region of Puglia) affected by the earthquake in 2002;
 - the municipalities ⁽⁴³⁾ in the region of Abruzzo affected by the earthquake of 6 April 2009.

Beneficiaries

- (40) The schemes are open to undertakings operating in all sectors, including agriculture, forestry, fisheries and aquaculture ⁽⁴⁴⁾, with the exception of the measure linked to the floods in northern Italy in 1994, which excludes undertakings in the banking and insurance sector.
- (41) In the case of the earthquakes and volcanic eruptions in Sicily, Umbria, Marche, Molise, Puglia and Abruzzo, the beneficiaries are all undertakings having their registered office or place of business in the municipalities affected by the natural disaster that are identified by the specific legislation.
- (42) In the case of the floods in northern Italy, the beneficiaries are undertakings based or operating in the municipalities affected by the natural disaster, but only if they can prove that they have suffered heavy damage ⁽⁴⁵⁾.

⁽³⁷⁾ Law No 183 of 12 November 2011 (the Stability Law for 2012), Article 33(28).

⁽³⁸⁾ Identified by an order (*decreto*) of the Prime Minister of 15 January 1991.

⁽³⁹⁾ Identified by two orders of the Prime Minister of 26 and 29 November 1994.

⁽⁴⁰⁾ Identified by an order of the Prime Minister of 29 October 2002.

⁽⁴¹⁾ Identified by orders (*ordinanze*) Nos 2668 or 28 September 1997, 2694 of 13 October 1997 and 2719 of 28 November 1997.

⁽⁴²⁾ Identified by orders (*decreti*) of the Prime Minister of 31 October 2002 and 8 November 2002.

⁽⁴³⁾ Identified by orders (*decreti*) of the Prime Minister Nos 3 of 16 April 2009 and 11 of 17 July 2009.

⁽⁴⁴⁾ However, as mentioned at recital 7, the present Decision does not apply to activities linked to the production, processing and marketing of agricultural products as listed in Annex I of the Treaty, with the exception of fisheries and aquaculture products.

⁽⁴⁵⁾ For the definition of 'heavy' damage, please see recital 26.

Duration of the measures

- (43) The Commission considers that the schemes introducing the rebates started to run when their legal bases entered into force. The Commission acknowledges that the implementation of the measures may have begun at a different time, as provided in the implementing measures (such as the orders implementing the various legal bases, see the comments from Italy on the opening decision summarised in recitals 87 to 94).
- (44) The Commission considers that the rebate measures entered into force on the following dates:
- in the case of the earthquake of 13-16 December 1990 in eastern Sicily (the provinces of Siracusa, Catania and Ragusa), 1 January 2003 for taxes ⁽⁴⁶⁾ and 1 January 2006 for contributions ⁽⁴⁷⁾;
 - in the case of the 1994 floods in northern Italy, 1 January 2004 ⁽⁴⁸⁾;
 - in the case of the 2002 earthquake and eruptions of Mount Etna, 1 January 2007 ⁽⁴⁹⁾;
 - in the case of the 1997 earthquake in the regions of Umbria and Marche, 1 January 2008 ⁽⁵⁰⁾;
 - in the case of the 2002 earthquake in the regions of Molise and Puglia, 29 November 2008 ⁽⁵¹⁾; and
 - in the case of the 2009 earthquake in the region of Abruzzo, 1 January 2012 ⁽⁵²⁾.
- (45) As for the period for which these rebates were applicable, the periods of suspension of the payment of taxes and contributions are referred to in the respective legislation. The Commission takes note of the fact that the various schemes applied to different periods for the different types of taxes and contributions. On the basis of information provided by Italy to the Commission during the formal investigation phase (see Italy's comments on the opening decision summarised in recitals 87 to 94), these periods were as follows.
- (a) In the case of the earthquake in eastern Sicily (the provinces of Siracusa, Catania and Ragusa) on 13-16 December 1990, the period of suspension spans the years 1990, 1991 and 1992. The Italian Revenue Agency (*Agenzia delle Entrate*) speaks of the period 13 December 1990 until 31 July 1993, and according to both the INPS and the INAIL the period of suspension for contributions was 13 December 1990 until 31 December 1992.
 - (b) In the case of the floods in northern Italy in November 1994, the legislation indicates as the reference period the years 1995, 1996 and 1997, while the Revenue Agency speaks of the period 4 November 1994 until 31 October 1995; the INPS sets the end of the period at 30 November 1995; and according to the INAIL the whole period extended from 1 January 1995 until 31 December 1997.
 - (c) In the case of the earthquake in Umbria and Marche in 1997, the relevant suspension period would appear to be from 26 September 1996 until 30 June 1999 (31 March 1998 for certain beneficiaries).
 - (d) In the case of the earthquake in Molise and Puglia in 2002, the Revenue Agency states that the suspension period began on 31 October 2002 and ended on 30 June 2008, while the INPS and the INAIL indicate the period from 31 October 2002 until 31 December 2007.
 - (e) In the case of the earthquake and eruptions of Mount Etna that took place in 2002, the suspension period was from 29 October 2002 until 31 March 2004.
 - (f) In the case of the Abruzzo earthquake in 2009, the relevant suspension period depends on the nature of the beneficiary: for all undertakings with an annual turnover above EUR 200 000, the period of application would appear to be from 6 April 2009 until 3 June 2010; for undertakings with an annual turnover below

⁽⁴⁶⁾ The date of entry into force of Law No 289 of 27 December 2002 (the Finance Law for 2003).

⁽⁴⁷⁾ The date of entry into force of Law No 266 of 29 December 2005 (the Finance Law for 2006), Article 1(363).

⁽⁴⁸⁾ The date of entry into force of Law No 350 of 24 December 2003 (the Finance Law for 2004).

⁽⁴⁹⁾ The date of entry into force of Law No 296 of 27 December 2006 (the Finance Law for 2007).

⁽⁵⁰⁾ The date of entry into force of Law No 244 of 24 December 2007 (the Finance Law for 2008).

⁽⁵¹⁾ The date of entry into force of Law No 185 of 29 November 2008 (the Crisis Measures Law for 2009).

⁽⁵²⁾ The date of entry into force of Law No 183 of 12 November 2011 (the Stability Law for 2012), and specifically of Article 33(28), notified by the Italian authorities in case SA.35083 (12/NN).

EUR 200 000, and for individuals with income from business activity or self-employment, the period would appear to be 6 April 2009 until 15 December 2010.

- (46) As regards the duration of the rebate measures, each legal basis indicates a different final deadline after which the reduction is no longer to be available. The Commission's understanding is that the period of application was extended as a result of the judgments of the Italian Supreme Court of Cassation, as explained below in recitals 49 to 53 (see also Italy's comments on the opening decision summarised in recitals 91 to 93).

Eligible costs

- (47) The costs eligible under the measures are taxes, compulsory social security contributions (payable to the INPS) and compulsory premiums for insurance against accidents at work (payable to the INAIL) to be paid by undertakings in a defined period of time following the natural disaster (as determined in the legal basis of each measure).

Form of the aid and aid intensity

- (48) The aid is awarded in form of a rebate on taxes and contributions. The rebate amounts to 90 % for the measures for Sicily and northern Italy, to 60 % for Marche, Umbria, Molise, Puglia and Abruzzo, and to 50 % for Catania. The outstanding balance can be settled in one payment or in instalments (e.g. up to 120 monthly instalments in the case of the measure for Abruzzo). These instalments sometimes include interest payments, depending on the individual measure.

Judgments of the Supreme Court of Cassation

- (49) The request for information from the ordinary court of Cuneo (see recital 1) also brought to the Commission's attention a number of judgments delivered by the Italian Supreme Court of Cassation in 2007 and 2010, in which the Court held that the reduction to 10 % of the amounts due in taxes and contributions had to be applied to all those eligible even if in the meantime they had already paid the full amount ⁽⁵³⁾.
- (50) In effect the Supreme Court of Cassation held that all undertakings eligible for the benefit of the measures for Sicily or northern Italy were entitled to the same rebate of 90 % on taxes and contributions; otherwise there would be an 'unjustified disparity in treatment'.
- (51) The interpretation given by the Supreme Court of Cassation was confirmed by the Italian authorities in their letters of 7 December 2011 and 25 July 2012. In this last letter the Italian authorities refer to a further judgment of the Supreme Court of Cassation, delivered in 2012, which held that an appeal brought by the Revenue Agency was inadmissible because there was already settled case-law ⁽⁵⁴⁾.
- (52) The Commission is aware of the importance of these judgments for numerous cases pending before various courts in Italy in which proceedings have been brought by parties potentially benefiting under the different measures.
- (53) In the light of the judgments of the Supreme Court of Cassation, the measures would seem to be applicable retrospectively for the benefit of all the undertakings, including those that paid taxes and contributions in the ordinary way, at least in the case of the measures for eastern Sicily and northern Italy to which the judgments refer. Thus there would seem to be no time-limit for the application of the schemes, as long as an undertaking can prove that it is entitled to the aid.

⁽⁵³⁾ Judgment of the Supreme Court of Cassation, Fifth Civil Division, 1 October 2007, No 20641; judgment of the Supreme Court of Cassation, Labour Division, 7 May 2010, No 11133; judgment of the Supreme Court of Cassation, Labour Division, 10 May 2010, No 11247.

⁽⁵⁴⁾ Judgment of the Supreme Court of Cassation, 12 June 2012, No 9577.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION

- (54) The Commission initiated the formal investigation procedure laid down in Article 108(2) of the TFEU into the measures in question, as described in Section 2 of this Decision, because they appeared to constitute State aid within the meaning of Article 107(1) of the TFEU. The Commission also issued a suspension injunction under Article 11(1) of Council Regulation (EC) No 659/1999 requiring Italy to suspend all payments under any of the aid measures referred to in cases SA.33083 (12/NN) and SA.35083 (12/NN) ⁽⁵⁵⁾.
- (55) In the decision to initiate the Article 108(2) procedure ('the opening decision') ⁽⁵⁶⁾, the Commission considered the measures in the light of the exemption in Article 107(2)(b) of the TFEU, which states that 'aid to make good the damage caused by natural disasters or exceptional occurrences' is compatible with the internal market.
- (56) The Commission also considered whether the measures might qualify for any of the other exemptions in Article 107(2) and 107(3) of the TFEU.

Unlawfulness of the aid measures

- (57) In the opening decision, the Commission pointed out that the Italian authorities had not fulfilled their obligation to notify the schemes in accordance with Article 108(3) of the TFEU, as the Italian authorities had acknowledged during the preliminary investigation phase.

Analysis of the measures under Article 107(2) and 107(3) of the TFEU

- (58) The Commission has examined the aid schemes in the light of Article 107(2)(b) of the TFEU, which states that 'aid to make good the damage caused by natural disasters' is compatible with the internal market.
- (59) When assessing aid schemes of the kind contemplated in Article 107(2)(b), the Commission must verify (i) that the circumstances relied upon to justify the granting of aid do indeed constitute a natural disaster, and (ii) that the following conditions are met:
- the damage for which the compensation is granted is a direct consequence of the natural disaster;
 - the aid does not result in overcompensation of damage, but only makes good the damage caused by the natural disaster.
- (60) The Italian legislation identifies areas affected by natural disasters of three kinds: earthquakes, floods, and volcanic eruptions. The Commission has consistently taken the view that earthquakes, floods and volcanic eruptions constitute natural disasters within the meaning of Article 107(2)(b) of the TFEU ⁽⁵⁷⁾; consequently, undertakings that have suffered damage due to these natural disasters may in principle qualify for aid up to the amount of the damage suffered.
- (61) However, the schemes in question do not lay down any definition of damage (whether material or economic), nor do they establish any link between the aid and the damage suffered as a result of the natural disaster ⁽⁵⁸⁾. Furthermore, the schemes do not confine the compensation to the damage actually suffered by the beneficiaries, nor are the eligible costs determined on the basis of the damage suffered by the undertakings as a consequence of the natural disaster.

⁽⁵⁵⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽⁵⁶⁾ See footnote 3.

⁽⁵⁷⁾ See Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

⁽⁵⁸⁾ With the partial exception of the measures linked to the 1994 floods in northern Italy, which set a minimum level of damage as a condition of any aid.

Doubts and grounds for initiating the investigation

- (62) In light of the above and on the basis of the available information, given that the measures had been implemented without being notified to the Commission, the Commission considered that they constituted unlawful aid within the meaning of Article 1 of Regulation (EC) No 659/1999.
- (63) Furthermore, as a consequence of its preliminary assessment, the Commission seriously doubted whether the measures introduced by Italy since 2002 were compatible with the internal market. It was not possible to conclude from the preliminary assessment that the aid measures were in line with the principles of the TFEU, and in particular with Article 107(2)(b), which allows aid to make good the damage caused by natural disasters ⁽⁵⁹⁾. In particular, the Commission doubted whether the information provided by the Italian authorities was enough to demonstrate that the measures in question were, by their nature and operational arrangements, designed to make good the damage caused by natural disasters.
- (64) In particular, the Commission was unable to conclude from the operational arrangements described in the measures that:
- the beneficiaries were undertakings that had in fact suffered damage (with the partial exception of the measure for northern Italy, which required that the undertaking must have suffered a minimal amount of damage, see recital 26),
 - the damage was caused exclusively by the natural disasters referred to in the legislation,
 - the aid given to the undertaking was confined solely to making good the damage caused by the natural disaster, excluding any overcompensation of the damage suffered by the individual beneficiary.
- (65) Moreover, the Commission doubted whether any of the other exemptions in Articles 107(2) and 107(3) of the TFEU were applicable ⁽⁶⁰⁾.
- (66) The Italian authorities and interested third parties were therefore asked to provide in their comments on the opening decision all information necessary to carry out a full assessment, and to submit the appropriate documentation to the Commission.

4. COMMENTS FROM INTERESTED PARTIES

Comments submitted by the law firm Chiti

- (67) Chiti is a law firm based in Florence which represents 58 private undertakings and public organisations and administrative departments affected in various ways by the floods in Piedmont in 1994. The aim of its submission is to demonstrate that the case of Piedmont is different from other cases of benefits granted after natural disasters.
- (68) After giving an account of the facts and the legislative developments in the case, Chiti focuses on the judgments of the Supreme Court of Cassation. It contends that following the judgments given in 2007, 2010 and 2012, all undertakings affected by the floods in Piedmont have been able to rectify their position *ex post* by paying 10 % of the amount due or, if they had already paid the full amount, by requesting a refund of 90 %, as provided by Article 3(90) of Law No 350/2003. Of the 233 court cases regarding compensation for damage caused by the floods, 96 have ended with judgments that are now definitive, while most of the others are suspended as a result of the suspension injunction issued by the Commission on 17 October 2012.
- (69) Chiti states that in order to obtain the benefit of these schemes in the courts, the undertakings have had to demonstrate *in concreto* the amount of the actual damage and the causal link between the event and the damage.

⁽⁵⁹⁾ In Case C-278/00 *Greece v Commission* [2004] ECR I-03997, the Court of Justice held that 'only economic disadvantages directly caused by natural disasters or by exceptional occurrences qualify for compensation as provided for in that provision' (paragraph 82 of the judgment) and 'A provision with so broad a scope cannot be regarded as aid to make good the damage caused by natural disasters or exceptional occurrences' (paragraph 85).

⁽⁶⁰⁾ Opening decision, points 3.3.2 and 3.3.3.

The evidence accepted has consisted of technical assessments ordered by the court, certified reports by experts, or official documents from the INPS and the INAIL. The undertakings have obtained compensation only for the actual damage they are able to prove or for loss established by the court itself.

(70) Chiti submits that the compensation scheme for damage caused by the floods in Piedmont in 1994 is related to a natural disaster, and ought therefore to be examined under Article 107(2)(b) of the TFEU. If measures of this kind are to be compatible with the internal market, it must be shown that there is a causal link between the event and the damage, and that there is no overcompensation of the damage. As far as the profile of the clients it represents is concerned, Chiti claims that the compensation has not been granted indiscriminately to every undertaking in Piedmont, but only to those meeting the following conditions:

(a) The undertaking must be located in the areas identified as flooded in specific government orders. In this sense the measures are selective, but in Chiti's view they do not fall under Article 107(1) of the TFEU. The geographical delimitation of the aid derives not from a political or economic assessment (e.g. referring to unemployment rates or to less developed areas), but from unpredictable natural events that are not under human control. The beneficiaries are identified on the basis of criteria that are outside the exercise of any sort of discretion. There is in fact no selectivity, because there is no distortion of competition: the aim of the legislation is to remedy the disadvantage to undertakings affected by the natural disaster. This is a consequence of the principle of equal treatment.

(b) In order to obtain the compensation there must be proof that the damage was 'heavy'. This condition distinguishes the case of Piedmont from other cases. The only loss that may be compensated is material damage above the threshold of LIT 2 billion fixed by the law, which must be established by certified technical assessments.

(c) There must be a causal link between the event and the damage. According to Italian law, the demonstration of a causal link is an essential prerequisite for obtaining compensation; hence the undertakings concerned have had to establish a causal link before a court in every case. This means that there has not been any overcompensation, since the damage has had to be shown in a certified report or an official report from the authorities involved. Moreover, it is a general principle of Italian law that compensation for extra-contractual loss must never be a source of gain (Article 2043 of the Civil Code).

(71) In the case of Piedmont, therefore, Chiti asks the Commission to reconsider its general statement that the measures under investigation do not appear to be aimed at making good the damage caused by natural disasters. According to Chiti the Piedmont case has features that distinguish it from the other cases treated jointly in the opening decision. Chiti further argues that the benefits granted to the undertakings concerned are compatible with the internal market under Article 107(2)(b) of the TFEU because:

— the compensation relates exclusively to damage resulting directly from the natural disaster;

— the damage is quantified in terms of its importance to the undertaking concerned;

— there has been no overcompensation, since the compensation has been set exactly in line with the proven damage;

— there is no overlapping with other benefits.

(72) In the event that the aid were to be considered incompatible, and its recovery were to be ordered, Chiti takes the view that Article 15 of Regulation (EC) No 659/1999 would apply. Under that provision, Chiti argues, the Commission cannot order the recovery of aid once 10 years have elapsed from the day on which the aid was awarded to the beneficiary. The benefits were granted beginning in the period immediately after the floods in November 1994, under Decree-law No 646 of 24 November 1994. The arrangements for assisting the undertakings affected by the floods in Piedmont were merely refined by successive laws adopted in the period between 2003 and 2007. In other words, the opening decision refers to 1 January 2004 as the starting date for the application of the benefits, but the moment when the aid was actually granted in the case of Piedmont was November 1994.

- (73) Chiti contends that Article 14(1) of Regulation (EC) No 659/1999 also applies: it provides that the Commission is not to require recovery of the aid if this would be contrary to a general principle of Union law. Two principles are at stake here. First, the principle of legal certainty requires respect for final judgements delivered by national courts, and prevents any possibility of recovery of the sums received by the undertakings. While recognising that the principle of *res judicata* has no absolute value in Union law, Chiti considers that the special conditions that led the Court of Justice to its judgments on this principle in the past ⁽⁶¹⁾ do not apply in the case at hand. Second, Chiti invokes the principle of legitimate expectations: from late 1994 until 2011 not a single national or Union authority raised questions about the lawfulness of the benefits. Throughout that entire period the undertakings concerned received benefits which the competent authorities did not consider to be State aid. Chiti concludes that this is a typical situation in which the principle of legitimate expectations applies.

Comments submitted by the law firm Preve-Gavioli

- (74) Preve-Gavioli is a law firm based in Turin. After summarising the development of the Italian legislation under consideration and the circumstances leading to the Commission proceeding, Preve-Gavioli submits that the benefits conferred upon the undertakings affected by the floods in Piedmont in 1994 are not selective, as they do not in any way favour specific enterprises by relieving them of costs that they would usually have to bear. The measures are aimed only at compensating undertakings for damage suffered as a result of a natural disaster. Moreover, the benefits provided for by law do not strengthen the competitive position of the beneficiaries over their competitors, since the compensation they have received has merely enabled them to return to the market on an equal footing with undertakings that did not suffer any damage or income loss. In other words, the benefits do not distort competition in any way, but correct a situation of financial disadvantage, and restore the commercial competitiveness of the undertakings affected by the floods.
- (75) Preve-Gavioli takes the view that the benefits granted to the undertakings affected by the floods in Piedmont in 1994 cannot be described as State aid, because the conditions set in Article 107(1) of the TFEU are not met. However, even if the measures were to be regarded as State aid, they should be classed as aid to compensate the damage caused by a natural disaster under Article 107(2)(b). They are therefore compatible with the internal market under the terms of the Treaty itself, and are not subject to the prior notification obligation or to prior assessment by the Commission.

Comments submitted by Confindustria

- (76) Confindustria is the largest Italian employers' federation, founded in 1910. It is a voluntary organisation comprising approximately 150 000 undertakings that employ a total of nearly 5 500 000 people. It has submitted comments as an interested party under Article 108(2) of the TFEU both in case SA.33083 and in case SA.35083.
- (77) Confindustria is concerned that Italy's failure to comply with its obligation to notify State aid to the Commission might penalise undertakings that have availed themselves in good faith of measures aimed at repairing the damage caused by natural disasters.
- (78) Confindustria submits that the Commission should consider some facts of a general nature relating to the overall context. In particular, the measures relate to events that date back 20 years (longer in some cases); for this reason, current practice with regard to decisions on State aid does not provide proper protection of the interested parties. Even where one has doubts about the compatibility of certain measures adopted by a national legislature,

⁽⁶¹⁾ Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini* [2007] ECR I-6199 (ECLI:EU:C:2007:434).

it is difficult to obtain information from the competent authorities; and in the current economic context most enterprises, especially SMEs, continue to have serious problems of liquidity. To order the recovery of aid granted decades ago at this stage would jeopardise the survival of many of these undertakings. Moreover, Confindustria does not understand the reasons for the doubts regarding the compatibility of the measures.

- (79) Confindustria suggests that an alternative solution should be found in order to avoid penalising the undertakings concerned in an unjustified and dangerous fashion.
- (80) First, Confindustria considers that for every measure and case concerned, a careful assessment should be made of the existence of exceptional circumstances that might show that there was no aid or that any aid should not be recovered. The exceptional circumstances are (i) the ten-year limitation period, (ii) the principle of the protection of legitimate expectations, and (iii) the applicability of exemptions other than those set out in Article 107(3)(c) TFEU.
- (81) Second, Confindustria asks the Commission to specify expressly in its decision in which cases money paid to enterprises as compensation for damage directly caused by natural disasters can be regarded as compatible with the Treaty. The measures at issue here are targeted at undertakings directly affected by events that the Commission has consistently considered to fall within the definition of natural disasters: earthquakes, floods, volcanic eruptions, etc. The wording of the legislation on which the measures are based makes it clear that they were adopted by the Italian authorities with the aim of making good the damage caused by these natural events. Confindustria argues that the beneficiaries are undertakings that suffered real damage as a result of natural disasters. Although it was only in a few cases that the benefit was granted expressly to undertakings that had suffered 'heavy' damage, it should be acknowledged that the damage was heavy in other cases too: the very fact that an undertaking is located in an area affected by a natural disaster necessarily leads to economic loss, independently of any material damage. Confindustria also contends that there may be cases in which the beneficiaries have documents demonstrating the amount of damage effectively suffered, and showing that the loss is significantly higher than the compensation received. As a result, Confindustria believes that all the measures under investigation fall within the scope of Article 107(2) of the TFEU.
- (82) As for the conditions relied upon by the Commission, Confindustria acknowledges that for some of the measures at issue a formal definition of damage would seem to be missing; the same applies to the determination of the correlation and proportion between the amount of damage suffered and the amount of the aid. However, Confindustria suggests that such a correlation does exist *de facto* — that in the event of a natural disaster all undertakings suffer damage (at least economic loss), and that a simplified method for estimating the damage and the corresponding aid could be devised. Such a method should take into account, for example, the capacity to create revenue and the number of people employed by each undertaking. The problem is therefore related to cases of overcompensation rather than to the compatibility of the measures with the State aid rules. It is important to avoid a situation in which action against a few cases of overcompensation might lead to the penalisation of a large majority of undertakings which have received benefits in good faith and in compliance with the law. Confindustria therefore suggests that undertakings should be allowed to keep the aid despite the fact that at the time of its approval, if the Italian authorities had complied with the Treaty and the notification obligation, the aid ought to have been notified to the Commission.
- (83) In sum, Confindustria asks the Commission:
- (a) to confirm expressly that any decision of the Commission is without prejudice to specific cases of aid that are compatible on the basis of Article 107(2)(b) of the TFEU, the *de minimis* regulation, or other provisions;
 - (b) to intensify formal or informal cooperation between, on the one hand, the Commission and the national authorities and, on the other hand, the beneficiary undertakings, to work out a method and a mechanism to prevent cases of overcompensation; this would avoid the recovery of aid allowed by the *de minimis* regulation and of aid that does in fact correspond to material and economic loss effectively suffered by beneficiaries;

- (c) to consider the advisability of introducing a simplified method of quantifying loss suffered as a result of natural disasters.

Comments submitted by Confederazione Generale Italiana del Lavoro (CGIL)

- (84) The Italian General Confederation of Labour (Confederazione Generale Italiana del Lavoro, CGIL) is the largest trade union organisation in Italy, with a membership of about six million. In response to the opening decision the CGIL branch in L'Aquila, Abruzzo ('CGIL L'Aquila'), submitted observations outside the deadline of one month following the publication of the decision. The Commission is not obliged to consider observations from interested third parties submitted after the deadline, but it may do so exceptionally, and will do so in this case.
- (85) CGIL L'Aquila considers that a suspension of the scheme of concessions introduced by Italy, a demand for full recovery of the sums granted and a requirement for certification of the damage suffered might push the undertakings concerned out of the market. This is all the more problematic as other cases of compensation for damage caused by natural disasters have been treated differently. As a result, L'Aquila, despite being the area hardest hit by the earthquake, still suffers from distorted competition as compared with competitors not affected by such a disaster. In sum, the suspension of the benefits and the absence of any graduation mechanism and of proper verification procedures (for which CGIL L'Aquila blames the State) may further weaken the local manufacturing sector, with all the associated negative consequences in terms of unemployment and social security.

5. COMMENTS FROM ITALY

- (86) In response to the opening decision, the Italian authorities submitted comments on 11 January 2013. The Commission departments received submissions from the following Italian authorities and agencies:
- (a) the Ministry of Economic Affairs and Finance;
 - (b) the Revenue Agency;
 - (c) the INPS;
 - (d) the INAIL;
 - (e) the Department of Civil Protection; but the Department of Civil Protection claims that it has no information of the kind requested in the decision.

Rebates and period of application for each area and measure

- (87) In paragraph 71 of the opening decision, the Commission requested the Italian authorities to provide it with information concerning 'the rebates for each area and measure, and the period for which the rebates are applicable'.
- (88) The INPS submits in the first place that the difficulties encountered by the Commission in identifying the exact suspension periods for payments in taxes and contributions (see Section 2.5 of the opening decision) derive from differences in the time-frames set in the rules laid down by each institution. A distinction has to be drawn between the duration of the suspension of payments of contributions (payable to the INPS and INAIL) and the duration of the suspension of tax payments (payable to the Revenue Agency). A further distinction has to be drawn between the periods of suspension of taxes and contributions and the periods of application of the rebate measures.
- (89) With regard to the starting date of the schemes, the INAIL argues that contrary to what the Commission says in paragraph 34 of the opening decision, the starting date of a scheme does not always coincide with the entry into

force of the legislation making provision for it. The starting date of the rebate measure may come at a later stage — in the case of Piedmont, only after a court judgment found that undertakings were entitled to rebates with retroactive effect. The Revenue Agency, on the other hand, agrees with the Commission that the beneficiary's entitlement to a tax advantage begins with the entry into force of the legislation that introduces the advantage.

(90) The INPS and the INAIL provide precise periods for each scheme of reduction of contributions:

- (a) For the earthquake that hit **eastern Sicily** (the provinces of Siracusa, Catania and Ragusa) on 13-16 December 1990, documents prepared by the INPS and the INAIL identify the suspension period as 13 December 1990 to 31 December 1992. The period of availability of the rebate was 1 January 2006 to 30 September 2006 for payments below EUR 5 000 (to be paid in one instalment) or 1 October 2006 onwards for amounts above EUR 5 000 (to be paid in eight six-monthly instalments, with interest).
- (b) For the floods in **northern Italy** in November 1994, the INPS identifies the suspension period as 4 November 1994 until 30 November 1995. In the view of the INAIL, however, the suspension period runs from 1 January 1995 to 31 December 1997, with reference to the years 1995, 1996 and 1997. In both cases, the period of availability of the rebates is said to be from 1 January 2004 onwards. However, the INPS specifies that the rebate on social insurance contributions applies only from the moment that the final court judgments become enforceable, and not automatically, as in the case of the INAIL.
- (c) For the earthquake in **Umbria and Marche** in 1997, the document prepared by the INPS and the INAIL specifies that the suspension period runs from 26 September 1997 until 31 March 1998 for residents in 'municipalities in disaster areas' (*comuni disastrati*) identified in the legislation, and from 26 September 1997 until 30 June 1999 for residents in 'municipalities in damaged areas' (*comuni danneggiati*) likewise identified in the legislation. The INPS and the INAIL indicate that the rebate is available in respect of the period from 1 January 2009 until 30 June 2009. The Revenue Agency considers that the starting date for the application of the tax rebate is 23 October 2008, i.e. the date of the entry into force of Decree-law No 162/2008.
- (d) For the earthquake in **Molise and Puglia** in 2002, the INPS and the INAIL submit that the suspension period runs from 31 October 2002 until 31 December 2007. Both institutions say that beneficiaries were able to apply the rebates from 1 January 2009 until 30 June 2009, following the extension of the application of the measures introduced for the 1997 earthquake in Umbria and Marche by Decree-law No 162 of 2008. The Revenue Agency says that the starting date for the application of the tax rebate is 29 January 2009, i.e. the date of the entry into force of Decree-law No 185 of 2008.
- (e) In the case of the earthquake and eruptions of **Mount Etna** that took place in 2002, both the INPS and the INAIL say that the suspension period runs from 29 October 2002 until 31 March 2004, and that the period of the rebate runs from 1 January 2007 until 30 June 2008.
- (f) For the earthquake in **Abruzzo** in 2009, the relevant period depends on the nature of the beneficiary: for undertakings with an annual turnover above EUR 200 000, the documents prepared by the INPS, the INAIL and the Revenue Agency say that the suspension period runs from 6 April 2009 until 30 June 2010; and for undertakings with an annual turnover below EUR 200 000, and for individuals who have an income from business activity or who are self-employed, the suspension period runs from 6 April 2009 until 15 December 2010 (and not 31 December 2010, as stated in paragraph 36(f) of the opening decision). The rebate is applicable from January 2012, but both INPS and INAIL declare in their submissions that the reduction applies only to aid that complies with the *de minimis* requirements, pending a Commission decision on aid going beyond the *de minimis* level.

(91) In paragraph 71 of the opening decision, the Commission also requested Italy 'to confirm the Commission's understanding that, as a consequence of the latest judgments of the Italian Supreme Court of Cassation of 2007, 2010 and 2012 ... these measures could potentially make the aid available (without a limit in time) to all undertakings identified as beneficiaries under the legal basis for each measure.' Here the Italian authorities present two different views.

- (92) The INPS and the INAIL contend that the Commission's interpretation does not appear to be correct. In their opinion, although the Supreme Court of Cassation's judgments might potentially extend the aid without a limit in time to all beneficiaries identified under the relevant legislation, the judgments in fact merely make it clear that the benefit of the measures can be granted in two ways: if the undertaking has not yet paid, it need pay only 10 % of what is due; if it has already paid, it can obtain reimbursement of 90 % of what has been paid. The two institutions assert that this interpretation derives from the legislation that introduced the rebates. That legislation is *jus superveniens*, supervening law, which legitimises the refund of the amounts previously paid in excess. However, the INPS and the INAIL point out that in the first case (payment of 10 %) several judgments have found that taxpayers were not entitled to the benefit of the measure because they applied after the deadline of 31 July 2007 set by the law. In the second case (refund of 90 %), entitlement to the refund is subject to a period of limitation, which is normally 10 years from the moment when the entitlement can be exercised (Article 2946 of the Civil Code), i.e. from the entry into force of the law introducing the measure. Moreover, contrary to what is affirmed in paragraph 45 of the opening decision, the principles formulated by the Supreme Court of Cassation refer only to specific cases (Sicily and Piedmont) and cannot be applied generally to all other disasters, as suggested by the Commission.
- (93) The Revenue Agency takes the view that the Commission's interpretation is correct. As a general rule applications for a refund of tax made by those who have already paid must be submitted within 48 months of the date of the payment (Article 38 of Presidential Order No 602 of 20 September 1973). Nonetheless, recent rulings of the Supreme Court of Cassation have accepted that the beneficiaries are entitled to be refunded sums previously paid in excess, subject to the ordinary period of limitation referred to above.
- (94) With regard to the percentage rebate applicable to each measure and each tax or contribution, Italy confirms the percentages listed in Section 2.2 of the opening decision.

Combination of different natural disaster aid schemes

- (95) In paragraph 71 of the opening decision, the Commission requested the Italian authorities to indicate 'The existence (or not) of natural disaster aid schemes already providing the beneficiaries with aid aimed at making good the damage suffered as a consequence of that specific natural disaster.'
- (96) Of the three institutions that have submitted comments, only the INPS has replied to this question. It asserts that the value of the rebates has been strictly limited to the amounts actually due to the institution for the corresponding suspension periods. Thus the measures are confined to a percentage reduction in the contributions due. According to the INPS, therefore, the sums involved cannot overcompensate the eligible costs. The INPS states that the disaster aid schemes for the 2002 earthquake in Molise (aid scheme N 174a/2004) and for the 2009 earthquake in Abruzzo (aid scheme N 459a/2009) did not provide for any compensation in respect of labour costs (wages and contributions). Those schemes provided only for compensation for direct and indirect or economic damage deriving from a temporary suspension of economic activity caused by the disaster or by the need to relocate the activity following the disaster. But as far as contributions are concerned the aid schemes under discussion here apply only to undertakings which continued their operations after the disaster, and which would otherwise have had to pay the contributions required by law. Moreover, the aid schemes for both Molise and Abruzzo authorised by the Commission included measures for the monitoring of overlapping aid in order to exclude any possibility of overcompensation.

Estimate of damage for each beneficiary

- (97) In paragraph 71 of the opening decision, the Commission also asked 'if and how damage was estimated for each beneficiary located in the areas affected by the natural disasters, and whether the necessity and proportionality of the support has been considered at some moment in time, and in which manner.'

- (98) As with the previous point, only the INPS submitted a reply. The INPS affirms that the beneficiaries of the suspension of social security contribution payments consist of all undertakings operating in a specific geographic area identified by civil protection decisions. However, the legislation introducing the measures did not provide for any mechanism for verifying the existence of a causal link between the damage suffered and the measure.

Estimated number of beneficiaries of each measure and aid amounts

- (99) According to paragraph 72 of the opening decision, 'the Italian authorities are requested to provide the estimated number of beneficiaries of each measure and the aid amounts involved.'
- (100) In 2013 the INPS, the INAIL and the Revenue Agency provided figures for the estimated numbers of beneficiaries of the aid, but only the INPS and the INAIL also indicated the amounts granted.

Further information and clarification provided by Italy

- (101) Following the Commission's requests for clarification (see recital 18), the Revenue Agency replies that the taxes contemplated by the measures include all types of tax without distinction. The Agency also explains the difficulty of providing an exact estimate of the number of beneficiaries and the total amount of the rebates under the different measures: it says this is due to the absence of data in electronic form, mainly because applications for rebates have to be submitted on paper rather than through the electronic tax declaration system. It has been possible to perform an analysis on the basis of annual tax returns only for the measure in respect of the Abruzzo earthquake in 2009. Even there, however, the data cannot be extracted directly, but require a case-by-case analysis. A further complication is the fact that the data for the reduced social contributions include the amounts payable both by the employer and by the employee. A rebate on the amount due by the employee does not constitute State aid for purposes of Article 107(1) of the TFEU, because it benefits individuals rather than undertakings.
- (102) Only in 2014, after establishing a methodology for each agency involved in the analysis (the Revenue Agency, the INPS, the INAIL), was Italy finally in a position to produce an approximate overall estimate of the beneficiaries of the measures. It provided a number of tables showing beneficiaries and aid amounts. In its letter of 4 August 2014, Italy states that it has identified 80 577 beneficiaries. Of these, (i) 33 831 have received a rebate amounting to less than EUR 1 000, (ii) 66 704 have received a rebate amounting to less than EUR 10 000 and (iii) 75 469 have received a rebate amounting to less than EUR 100 000. Only 539 undertakings have received rebates amounting to more than EUR 200 000.
- (103) For the measures at issue in case SA.33083 (natural disasters between 1990 and 2002), the number of beneficiaries is approximately 59 500, of which 23 303 are no longer active. For the measure at issue in case SA.35083 (the Abruzzo earthquake in 2009), the number of beneficiaries is approximately 21 000, of which 4 000 are no longer active.

Comments submitted by Italy regarding supporting documentation for compensation for damage due to the natural disaster

- (104) In the same letter of 4 August 2014, Italy gives a detailed account of the difficulty of obtaining documents showing: (i) whether the beneficiaries of the measures under investigation have or have not suffered damage as a consequence of a natural disaster; (ii) whether or not the beneficiaries have been compensated for any such loss; and (iii) the amount of any such compensation received.
- (105) The Italian authorities consider that the opening decision did not explicitly require proof of the damage suffered by the beneficiaries of the measures under investigation. The Italian authorities did not, therefore, gather

documents proving the actual damage suffered by individual beneficiaries. The Italian authorities would need to take fresh steps to contact both public authorities (to verify whether compensation payments for damage had already been granted and/or paid out) and the beneficiaries of the measures under investigation (to verify whether they had suffered damage and whether they had been compensated for this damage by insurance companies).

(106) In its letter Italy explains the following:

- (a) In response to the Commission's specific request that Italy provide evidence of the damage suffered by the individual beneficiaries of the aid under investigation, the Italian authorities have launched an investigation to gather documents establishing losses due to natural disasters and any compensation granted by public or private bodies.
- (b) However, this investigation is to be carried out only in respect of beneficiaries still in business (excluding, therefore, those which have ceased their activity and are therefore no longer able to distort competition in the market).
- (c) A statement declaring the damage caused by the natural disaster was not one of the conditions for the granting of the alleged unlawful aid under investigation. Consequently, this documentation is not held by any of the administrative departments that have granted the aid (the Revenue Agency, the INPS and the INAIL). Further specific investigations would have to be launched in each of the areas concerned in respect of each of the measures under investigation.
- (d) These investigations concern documents relating both to the proof of damage and to the compensation possibly granted on that basis. Since a statement of damage caused by a natural disaster was not one of the conditions for the granting of the alleged unlawful aid under investigation, any evidence of damage required by public or private bodies in order to obtain compensation must refer to the event to which it relates and, therefore, also to the time when the event occurred.
- (e) The statement of damage must have been drawn up only when the damage was recent and still verifiable, since otherwise it would not be possible to establish that it was direct damage, or to verify the causal link with the natural disaster. Consequently, the search for documentation for any certificate or statement of damage, and for any possible compensation, is inseparably linked to the date when the natural disaster occurred.
- (f) The possibility of tracing documents providing proof of the damage suffered and compensation paid and received is limited by the legal requirements to keep and maintain records in Italy. Articles 2220 and 2946 of the Italian Civil Code require that records be kept for 10 years (and in some cases for less). It follows that administrative action to trace this documentation, more than 10 years after the disaster, would lack proper legal means of ensuring that beneficiaries and public authorities produce it.
- (g) The analysis of the national legal framework governing record-keeping suggests that it is objectively impossible to collect evidence of damage suffered by individual undertakings dating back more than 10 years, i.e. in any of the natural disasters covered by the measures under investigation other than the 2009 earthquake in Abruzzo, for which the 10-year period has not yet elapsed.

(107) With regard to the Abruzzo earthquake in 2009, which is the subject of case SA.35083 (12/C), the Italian authorities indicate that a precise and detailed inquiry will be needed in order to determine accurately both the identity of the beneficiaries and the amount of unlawful aid they have received. The data collected by Italy until 2014 also include a large number of individuals who may have benefited from the scheme in respect of taxes on revenues that are not related (in part or at all) to their business activity. Of the approximately 21 000 beneficiaries identified by Italy, 17 500 are individuals, for whom the data on taxes refer both to income from professional and business activity and to other forms of income. For all these a more detailed assessment would have to be carried out in order to quantify the extent to which the rebates they received should be regarded as State aid within the meaning of Article 107(1) of the TFEU, given that rebates that do not benefit undertakings do not constitute State aid.

- (108) Finally, Italy provided detailed information and documentation regarding the systemic impact of the Abruzzo earthquake of 2009 on the economic fabric of the region. The documentation includes macroeconomic data and lists of damaged local infrastructures.

6. ASSESSMENT OF THE MEASURES

State aid character of the measures

- (109) In the opening decision, the Commission took the view that the measures at issue appeared to constitute State aid (the measures being the rebate schemes introducing a reduction of up to 90 % of taxes and compulsory social security contributions and premiums for insurance against accidents at work payable by undertakings based or located in the areas affected by natural disasters: Article 9(17) of Law No 289 of 27 December 2012, as amended; Article 4(90) of Law No 350 of 24 December 2003, as amended; Article 1(363) of Law No 266 of 23 December 2005, as amended; Article 1(1011) of Law No 296 of 27 December 2006, as amended; Article 2(109) of Law No 244 of 24 December 2007, as amended; Article 6(4-bis) and (4-ter) of Decree-law No 185 of 29 November 2008, as amended; Article 33(28) of Law No 183 of 12 November 2011, as amended; and all the executive measures provided for in those Laws, referred to in recitals 20 to 36 of this Decision). In what follows the Commission will examine whether the measures under investigation do indeed constitute State aid within the meaning of Article 107(1) of the TFEU.
- (110) In order to assess whether the rebate measures constitute aid within the meaning of Article 107(1), it is necessary to determine whether they favour certain undertakings, whether the advantage is conferred by the State through State resources, and whether the measures are capable of affecting competition and trade between Member States.
- (111) As the rebates are granted only to undertakings having establishments in the geographical areas affected by certain types of natural disaster (earthquakes, volcanic eruptions and floods) (the areas are listed in recital 39), the measures are selective. By reducing taxes and contributions the Italian State relieves these undertakings of operating costs that they would have to bear in the normal course of business. Therefore, the undertakings benefit from an economic advantage which may distort or at least threaten to distort competition. As the measures cover undertakings that can be supposed to be involved in trade between Member States, they are capable of affecting such trade.
- (112) The support provided by public authorities through State resources takes the form of revenue forgone by the public authorities: the reduction in income tax reduces the tax revenue accruing to the State. Similarly, the reduction of contributions to be paid to State agencies (the INPS and the INAIL) requires an increased transfer of State resources to these agencies in order to compensate for their forgone revenue.
- (113) Therefore, as already provisionally concluded in the opening decision, all the measures adopted by Italy since 2002 which are the subject of State aid cases SA.33083 (12/C) and SA.35083 (12/C), and which reduce the charges for taxes and contributions by 90 %, 50 % or 60 % as the case may be, constitute State aid within the meaning of Article 107(1) of the TFEU.
- (114) The aid measures under investigation are in principle prohibited by Article 107(1), and may be considered compatible with the internal market only if they qualify for one of the exemptions laid down in the Treaty.
- (115) The Commission considers, however, that aid granted to individual undertakings under the measures in question does not constitute State aid if it satisfies all the tests in the applicable *de minimis* regulation ⁽⁶²⁾.

⁽⁶²⁾ The applicable *de minimis* regulations are Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1), and Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45).

Unlawfulness of the aid measures

- (116) The measures granting the aid have already entered into force; the Commission regrets that the Italian authorities have not fulfilled their obligation to notify the schemes in accordance with Article 108(3) of the TFEU.

Appraisal of the compatibility of the aid with the internal market in the light of the comments by interested parties

- (117) Having concluded that the rebate schemes referred to in recital 109 constitute State aid within the meaning of Article 107(1) of the TFEU, the Commission has to establish whether the aid can be declared compatible with the internal market pursuant to Article 107(2) or (3) of the TFEU.
- (118) On the question of the applicability of the exemptions provided for in the Treaty, the Commission took the view in the opening decision that the aid did not qualify for exemption under Article 107(2)(a), because it was not aid having a social character, and that it did not fall within Article 107(2)(c). For obvious reasons, the exemptions in Article 107(3)(b) and (d) were not applicable either. Italy did not dispute these findings during the formal investigation. As regards a possible reliance on the exemptions in Article 107(3)(a) and (c), the Commission would refer to the doubts it expressed in the opening decision (see Section 3.3.2 of the opening decision). In its comments, the Member State did not argue that the aid might qualify for exemption under Article 107(3)(a) or (c), nor did it provide any information in the course of the formal investigation that would enable the Commission to assess the compatibility of the schemes in question in the light of those exemptions. Instead, Italy (and the interested third parties who submitted comments) argued that the aid was meant to make good the damage caused by natural disasters, thus implying that it should be assessed on the basis of the exemption in Article 107(2)(b). This conclusion is without prejudice to the possibility that individual aid granted under the schemes may be declared compatible following a case-by-case examination, or may be covered by an exemption regulation adopted pursuant to Article 1 of Council Regulation (EC) No 994/98 ⁽⁶³⁾.
- (119) Since all the rebate measures do indeed relate to undertakings having their registered office or place of business in areas affected by natural disasters, the Commission will consider whether the measures might qualify for exemption under Article 107(2)(b) as ‘aid to make good the damage caused by natural disasters or exceptional occurrences’.

Aid to make good the damage caused by natural disasters

- (120) The Commission has examined the aid schemes in question in the light of Article 107(2)(b) of the TFEU, which stipulates that ‘aid to make good the damage caused by natural disasters or exceptional occurrences’ is compatible with the internal market.
- (121) The Commission has to verify whether the disasters indicated by Italy do indeed qualify as ‘natural disasters’ within the meaning of Article 107(2)(b), and whether the following conditions are met:
- (a) the damage for which the compensation is granted is a direct consequence of the natural disaster in question;
 - (b) the aid only makes good the damage caused by the natural disaster and does not result in overcompensation of the damage suffered by the beneficiaries.

⁽⁶³⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 [now 87 and 88] of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

- (122) The Italian legislation identifies areas affected by one of three types of natural disasters: earthquakes, floods and volcanic eruptions. The Commission has consistently taken the view that earthquakes, floods and volcanic eruptions constitute natural disasters within the meaning of Article 107(2)(b); consequently, every undertaking that actually suffered damage as a result of these natural disasters may qualify for aid up to an amount necessary to make good such damage ⁽⁶⁴⁾.
- (123) However, the schemes in question do not lay down any definition of damage (whether material or economic), nor do they establish any link between the aid and the damage actually suffered as a result of the natural disaster ⁽⁶⁵⁾. Furthermore, the schemes do not confine the compensation to the amount necessary to make good the direct damage actually suffered by the particular beneficiary. Finally, the eligible costs are not determined on the basis of the damage suffered by the undertakings as a direct consequence of the natural disaster. This was confirmed by the Italian authorities during the formal investigation (see comments by the INPS at recital 98).
- (124) The Commission concludes that the schemes provided benefits not just to undertakings that suffered actual damage, but to all companies having their registered office or place of business in the areas designated as disaster areas by the Italian authorities, irrespective of whether they actually did suffer any damage as a result of the respective disaster.
- (125) In the light of the above, the measures under investigation are not, by their nature and operational arrangements, designed to ensure that the aid granted is limited to the amount needed to make good the damage caused by natural disasters.
- (126) It must therefore be concluded that the formal investigation has not allayed the Commission's doubts about the compatibility of the measures with the internal market.
- (127) Therefore, as the aid does not qualify for any of the exemptions in Article 107(2) and (3) of the TFEU, the Commission finds that the schemes are incompatible with the internal market.
- (128) The compatibility of the measures with Union legislation when they are applied to fisheries and aquaculture has to be assessed in the light of the guidelines for the examination of State aid to the fishery and aquaculture sector that were current at the date of the entry into force of the particular scheme. The Commission has published such guidelines, indicating how it intends to apply the Treaty to State aid to fisheries and aquaculture, since 2001.
- (129) Under the guidelines the requirements for aid to make good the damage caused by natural disasters are largely the same as those set out above, and the Commission concludes that the observations made in this section also apply to any aid granted under the measures in the fishery and aquaculture sector.

Comments by interested parties

- (130) Comments on the doubts expressed by the Commission in the opening decision were sent by the Italian authorities and by four other interested parties: Chiti, Preve-Gavioli, Confindustria, and CGIL L'Aquila.
- (131) All of the interested parties pointed out that under Article 107(2)(b) of the TFEU aid to make good the damage caused by natural disasters is compatible with the internal market. The measures in question were addressed to

⁽⁶⁴⁾ In line with the findings in the following judgments: Case C-303/09 *Commission v Italy* [2011] ECR I-102* (ECLI:EU:C:2011:483); Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* [2011] ECR I-4727 (ECLI:EU:C:2011:368); Joined Cases C-346/03 and C-529/03 *Atzeni and Others v Regione autonoma della Sardegna* [2006] ECR I-1875 (ECLI:EU:C:2006:130); Case C-73/03 *Spain v Commission*, 11 November 2004 (ECLI:EU:C:2004:711); Case C-278/00 *Greece v Commission* [2004] ECR I-3997 (ECLI:EU:C:2004:239); and Case C-364/90 *Italy v Commission* [1993] ECR I-2097 (ECLI:EU:C:1993:157).

⁽⁶⁵⁾ With the exception of the measures linked to the floods in northern Italy in 1994, which set a minimum level of damage as a condition of any aid.

undertakings located in areas hit by earthquakes, floods and volcanic eruptions. However, in the preceding section ('Aid to make good the damage caused by natural disasters'), the Commission finds that the measures in question were not by their nature and operational arrangements designed to make good the damage caused by the aforementioned natural disasters within the meaning of Article 107(2)(b).

- (132) Chiti and Confindustria also say that the aid provided for by some of the measures was granted only after the actual damage suffered by each undertaking had been verified. The possibility cannot be ruled out that in specific cases the aid granted under the measures did not exceed the amount needed to make good the actual damage suffered by the beneficiary as a direct result of the disaster, so that the aid granted to the particular undertaking should be regarded as compatible with the internal market under Article 107(2)(b). However, the measures in question are not, by their nature and operational arrangements, designed to rule out any form of overcompensation of damage, and only to make good the damage caused by the natural disaster. As explained in the preceding section ('Aid to make good the damage caused by natural disasters'), their scope is far wider, because they do not require that the aid be linked directly to the damage suffered as a result of the natural disaster. By failing to make such a link, they fail to confine the compensation to the amount needed to make good the damage actually suffered by the undertakings. Even where beneficiaries are required to prove that they have suffered heavy damage, as in the case of Piedmont, the legislation does not limit the amount of aid to the ascertained loss caused by the floods. As for the Italian authorities' comments regarding the impact of the 2009 earthquake on the social and economic fabric of Abruzzo, and more specifically on the area affected by this exceptionally violent and destructive earthquake, the Commission points out once again that, according to the Treaty and in line with the Commission's settled practice ⁽⁶⁶⁾, there must be a clear and direct link between the event that caused the damage and the State aid intended to remedy it. Such a link must be established at the level of the individual undertaking, and not at the macroeconomic level, as in the case of the measure under investigation (for the Abruzzo earthquake of 2009, the notified measure that is the subject of case SA.35083 (12/C)).
- (133) It must therefore be concluded that the comments provided by interested third parties during the formal investigation have not allayed the Commission's doubts, and that the measures in question constitute aid that is incompatible with the internal market.

Consequences of this Decision

- (134) This Decision requires immediate implementation, which among other things means that aid granted unlawfully and declared incompatible should be recovered. The Commission observes that a negative decision on an aid scheme does not detract from the possibility that certain advantages granted under the scheme may not themselves constitute aid, or may in whole or in part be considered aid compatible with the internal market on their own merits (for example because the benefit is granted to individuals who are not carrying on an economic activity, and who are therefore not to be regarded as undertakings, or because in the particular case the benefit is within the limits of the applicable *de minimis* regulation, or because the benefit is granted in conformity with an approved aid scheme or an exemption regulation).
- (135) Italy must cancel any outstanding payments of aid under any of the schemes referred to in recital 109 to this Decision, with effect from the date of adoption of the Decision. From that date none of these schemes may be used as a basis of reference for the granting or the payment of aid in the future.
- (136) In respect of aid paid to individual undertakings under the measures examined here before the date of the opening decision and the suspension injunction (see recital 54), the scheme should be considered compatible

⁽⁶⁶⁾ See, for example, Commission Decision 2005/315/EC of 20 October 2004 on the aid scheme implemented by Italy for firms investing in municipalities seriously affected by natural disasters in 2002 (OJ L 100, 20.4.2005, p. 46).

with the internal market under Article 107(2)(b) of the TFEU provided that a clear and direct link can be established between the damage suffered by the particular undertaking as a result of the natural disaster and the State aid granted ⁽⁶⁷⁾. Care should be taken to avoid any overcompensation of the damage suffered by the individual undertaking. Furthermore, any compensation for such damage received from any source must be deducted, and it must be ensured that there is no overlapping of aid under the scheme in question and aid provided under other measures towards the same eligible costs.

Recovery

- (137) According to the Treaty and the settled case-law of the Court of Justice, when the Commission finds that aid is incompatible with the internal market, it is competent to decide that the State concerned must abolish or alter it ⁽⁶⁸⁾. The Court has also consistently held that the obligation on a State to abolish aid that the Commission finds to be incompatible with the internal market is designed to re-establish the previously existing situation ⁽⁶⁹⁾. The Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage that it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽⁷⁰⁾.
- (138) In line with that case-law, Article 14(1) of Regulation (EC) No 659/1999 stipulates that ‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary’.
- (139) Thus, once the aid under investigation is found to constitute unlawful and incompatible State aid, it must in principle be recovered in order to re-establish the situation that existed on the market prior to the granting of the aid. However, Regulation (EC) No 659/1999 imposes limits on the provision for recovery. Article 14(1) provides that ‘The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law’, which might for example be the protection of legal certainty or of legitimate expectations. The Court of Justice has also recognised one exception to the obligation for a Member State to implement a recovery decision addressed to it, namely the existence of exceptional circumstances that make it absolutely impossible for the Member State to execute the decision properly ⁽⁷¹⁾.
- (140) In the course of the formal investigation, exceptions of this kind were raised by interested parties (Confindustria and Chiti) and by the Italian authorities, and the Commission must examine whether they apply to the present case in order to determine whether recovery is required.
- (141) Confindustria invokes legitimate expectations (recital 80); the Commission points out that, in principle, the beneficiary of an aid measure that was not notified cannot challenge a recovery order by submitting that it holds a legitimate expectation that the grant of aid is lawful ⁽⁷²⁾, as a diligent businessman should normally be able to determine whether the aid was notified ⁽⁷³⁾. Moreover, in the cases at hand the Commission itself has not given the Italian authorities or the beneficiaries any grounds for entertaining legitimate expectations ⁽⁷⁴⁾.

⁽⁶⁷⁾ For example, in cases of aid granted to individual undertakings in the area affected by the Abruzzo earthquake of 2009, the aid should be considered compatible pursuant to Article 107(2)(b) of the TFEU if the eligible costs are calculated in line with Commission Decision C(2009) 8042 of 16 October 2009 in State aid case N 459/A/2009 — Aid scheme for compensation for damage caused by the earthquake in Abruzzo of 6 April 2009 (OJ C 289, 18 November 2009, p. 3).

⁽⁶⁸⁾ Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13 (ECLI:EU:C:1973:87).

⁽⁶⁹⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75 (ECLI:EU:C:1994:325).

⁽⁷⁰⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraphs 64 and 65 (ECLI:EU:C:1999:311).

⁽⁷¹⁾ Case C-404/00 *Commission v Spain* [2003] ECR I-6695 (ECLI:EU:C:2003:373).

⁽⁷²⁾ Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 104 (ECLI:EU:C:2005:774).

⁽⁷³⁾ Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 14 (ECLI:EU:C:1990:320).

⁽⁷⁴⁾ Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 147 (ECLI:EU:C:2006:416).

- (142) In its comments (see recital 80) Confindustria also invokes the 10-year period of limitation laid down in Article 15 of Regulation (EC) No 659/1999. The Regulation provides that when it adopts a negative decision in a case of unlawful aid, the Commission is to require the Member State to take all necessary measures to recover the aid from the beneficiary; however, the powers of the Commission to recover aid are subject to a period of limitation of 10 years. The limitation period is interrupted by any action taken with regard to the unlawful aid by the Commission, or by a Member State acting at the Commission's request, and starts running afresh after each interruption. The Commission was informed of the existence of the measures in 2011, and took action with regard to the unlawful aid by requesting information from the Italian authorities on 25 July 2011. The Commission adopted the decision opening the formal investigation on 17 October 2012; the law introducing the first of the measures under investigation had been adopted by Italy on 27 December 2002 (see recital 22). Thus the limitation period for recovery of the aid which is laid down in Article 15 of Regulation (EC) No 659/1999 has not expired in respect of any of the rebate measures dealt with in this Decision.
- (143) Chiti argues (see recital 73) that from late 1994 until 2011 no national or Community authority raised any questions about the lawfulness of the benefits; the Commission observes that the aid under investigation was granted only when the rebate measures entered into force. Until then undertakings had an obligation to pay the full amount due for taxes and contributions. Undertakings began to benefit from the reduction in the amounts due in taxes and contributions only in 2003. In these circumstances, there can be no claim either of limitation (invoked by Confindustria, see recital 142) or of legitimate expectations (as put forward in Confindustria's further submissions, see recital 141); it should be borne in mind that mere inaction on the part of national or Community institutions cannot provide grounds for legitimate expectations. On the basis of the reasoning presented in the preceding recitals, therefore, the argument on this point put forward by the interested party is rejected.
- (144) As for Chiti's argument invoking the principle of legal certainty (see recital 73), there is no reason to distinguish this case from the *Lucchini* case ⁽⁷⁵⁾. The Commission therefore considers that the existence of final judgments by national Courts does not prevent recovery.

Exceptional circumstances: absolute impossibility of recovery

- (145) Under Article 288 of the TFEU, the Member State to which a recovery decision is addressed is obliged to implement the decision. As indicated above, the Court has identified one exception to this obligation, namely where the Member States demonstrates the existence of exceptional circumstances that make it absolutely impossible to execute the decision.
- (146) Member States usually raise this argument in discussions with the Commission after the adoption of a decision ordering recovery ⁽⁷⁶⁾. However, in this case, Italy has argued prior to the adoption of the decision that for certain measures recovery should not be ordered because it would be absolutely impossible to implement the order. Since Italy raised this issue in the course of the formal investigation, and since a general principle of law states that no-one can be required to do the impossible, the Commission considers it appropriate to deal with the question in the Decision itself ⁽⁷⁷⁾.
- (147) It should first be recalled that the Court of Justice has consistently given a very strict interpretation to the concept of 'absolute impossibility'. The condition that recovery must be absolutely impossible is not fulfilled where the Member State merely informs the Commission of the legal, political or practical difficulties involved in

⁽⁷⁵⁾ Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini* [2007] ECR I-6199 (ECLI:EU:C:2007:434).

⁽⁷⁶⁾ Case C-214/07 *Commission v France* [2008] ECR I-8357, paragraphs 13 and 22 (ECLI:EU:C:2008:619).

⁽⁷⁷⁾ Commission Decision 2013/284/EU of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy (OJ L 166, 18.6.2013, p. 24).

implementing the decision ⁽⁷⁸⁾. The only instance where 'absolute impossibility' can be accepted is where recovery would, from the beginning, be impossible in objective and absolute terms ⁽⁷⁹⁾.

- (148) In the case at hand, the Italian authorities have repeatedly argued that a precise calculation of the amount of incompatible aid to be recovered is absolutely impossible. Under the Italian Civil Code (Article 2200) and tax law, they say, undertakings have a duty to keep business and accounting records only for 10 years. The documentary evidence of damage caused by a natural disaster has to be assembled on the basis of official documents (business and accounting records) drawn up at the time of the event. For events that happened more than 10 years ago, therefore, it is no longer possible to determine the amount of damage suffered by individual beneficiaries, or the amount already compensated from other sources, such as insurance or other aid measures. For most of the measures under investigation, more than 10 years have elapsed since the natural disaster. This is the case for all the events relating to case SA.33083 (12/C), i.e. the earthquake in eastern Sicily in 1990, the floods in northern Italy in 1994, the earthquake in Marche and Umbria in 1997, the earthquake in Molise and Puglia in 2002, and the earthquake and eruptions of Mount Etna in the province of Catania in 2002. Italy thus contends that for these events it is no longer possible to trace records proving the damage (or any compensation received).
- (149) Under Article 107(2)(b) of the TFEU, aid 'to make good damage caused by natural disasters' is compatible with the internal market, and aid is incompatible and must be recovered only if it exceeds the damage suffered. However, the vast majority of beneficiaries that have suffered damage as a result of natural disasters that occurred more than 10 years ago no longer have the documents needed to show that they suffered damage, or to prove the amount of the damage suffered, because under Italian law companies are not required to keep business and accounting records for more than 10 years. As a result, if the Commission were to order the recovery of the amount of aid exceeding the level of damage for which the beneficiaries can still provide proof, the Member State would be required to recover aid which was compatible with the internal market under Article 107(2)(b) and to which undertakings that had suffered damage as a consequence of a natural disaster were in reality entitled.
- (150) In principle, the Commission ought to order the recovery of the incompatible aid granted by Italy under the measures referred to in recital 109. However, (a) the beneficiaries of the measures are undertakings located in areas affected by natural disasters; (b) aid to make good the damage caused by natural disasters constitutes aid which is, in law, compatible with the internal market under Article 107(2)(b) of the TFEU; (c) most of these natural disasters happened more than 10 years before the date of the present Decision; and finally, (d) under national law the beneficiaries of the aid are not required to keep records for longer than 10 years, so that it would be impossible in objective and absolute terms to determine the precise amount of damage they suffered as a direct consequence of the natural disaster. In the very specific circumstances of the aid measures that are the subject of this Decision, therefore, the Commission accepts that for natural disasters that occurred more than 10 years before the date of the present Decision it is legally and factually impossible to obtain the information necessary to calculate the precise amount of incompatible aid to be recovered. To enforce a recovery order under these conditions would therefore be impossible in objective and absolute terms.
- (151) However, the impossibility of calculating the precise amount of incompatible aid to be recovered does not apply to undertakings that did not have a place of business (such as their principal place of business or another business unit) in the area affected by the natural disaster at the time of the event. These beneficiaries of the measures referred to in recital 109 must not be excluded from recovery, since they could not have suffered any direct damage caused by the natural disaster, and consequently could not be entitled to aid that was compatible with the internal market under Article 107(2)(b) of the TFEU. The Italian authorities must establish whether there was a place of business by consulting the information in the public registers for the time of the event.
- (152) In conclusion, the Commission finds that, given the specific nature of the cases in question, it would be absolutely impossible for Italy to recover any aid unlawfully granted under the measures under investigation where the natural disaster occurred more than 10 years before the date of the present Decision, with the exception of beneficiaries without a place of business in the area affected by the natural disaster at the time of the

⁽⁷⁸⁾ Case C-404/00 *Commission v Spain* [2003] ECR I-6695, paragraph 47 (ECLI:EU:C:2003:373).

⁽⁷⁹⁾ Case C-75/97 *Belgium v Commission* ('Maribel I') [1999] ECR I-3671, paragraph 86 (ECLI:EU:C:1999:311); Case C-214/07 *Commission v France* [2008] ECR I-8357, paragraphs 13, 22 and 48 (ECLI:EU:C:2008:619).

event. Apart from that group, no order should be made requiring recovery of the aid granted under the unlawful and incompatible schemes where the natural disaster occurred more than 10 years before the date of this Decision.

7. CONCLUSION

- (153) The Commission finds that Italy has unlawfully put into effect the aid measures referred to in recital 109 in breach of Article 108(3) of the TFEU.
- (154) Since no grounds can be identified for finding the measures to be compatible with the internal market, they must be held to be incompatible.
- (155) Article 14 of Regulation (EC) No 659/1999 states that ‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ... The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law’ ⁽⁸⁰⁾.
- (156) In the light of the exceptional circumstances discussed in recitals 147 to 152, recovery should not be ordered where the aid was granted under the measures in question to individual beneficiaries in areas hit by natural disasters more than 10 years before the date of the present Decision, except where the beneficiary had no place of business in the area affected by the natural disaster at the time of the event. Italy has demonstrated that it would be absolutely impossible to calculate the precise amount of incompatible aid to be recovered. Individual beneficiaries who are eligible for aid that is compatible with the internal market under the exemption in Article 107(2)(b) of the TFEU may no longer have at their disposal the documents needed to provide evidence of the damage caused by the natural disaster, and to show whether or not they have already received compensation for all or part of the damage suffered. However, aid must be recovered if it was granted under any of the measures in question to individual beneficiaries without a place of business in the area affected by the natural disaster at the time of the event (even where the natural disaster happened more than 10 years before the date of the present Decision). Italy must establish whether there was a place of business by consulting the information in the public registers for the time of the event.
- (157) The Commission will therefore require Italy to take all necessary measures to recover only the incompatible aid granted and paid out to individual undertakings under the measures referred to in recital 109 otherwise than in individual cases that satisfy the tests of compatibility with the internal market by virtue of the exemption in Article 107(2)(b) of the Treaty, as explained in recital 136, or cases where the individual grant is in line with the applicable *de minimis* regulation, or cases where the individual benefit is granted in conformity with an approved aid scheme or an exemption regulation, as explained in recital 134. Within two months of the notification of this Decision, Italy must order aid recipients to repay the aforementioned unlawful and incompatible State aid.
- (158) In compliance with Article 14(2) of Regulation (EC) No 659/1999, the amount to be recovered must bear interest, calculated in compliance with Article 9 of Commission Regulation (EC) No 794/2004 ⁽⁸¹⁾, from the date on which it was put at the disposal of the beneficiary and until full recovery.
- (159) The Commission requests Italy to return the attached form recording progress in the recovery procedure, to draw up a list of beneficiaries, and to specify clearly the measures taken for the immediate and effective recovery of the aid. It also requests Italy to send, within two months of the date of notification of this Decision, any documents showing that procedures have been initiated to recover illegal and incompatible aid from the beneficiaries (for example, administrative documents, circulars, recovery orders issued, etc.).

⁽⁸⁰⁾ See footnote 3.

⁽⁸¹⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

The State aid schemes in question (Article 9(17) of Law No 289 of 27 December 2012, as amended; Article 4(90) of Law No 350 of 24 December 2003, as amended; Article 1(363) of Law No 266 of 23 December 2005, as amended; Article 1(1011) of Law No 296 of 27 December 2006, as amended; Article 2(109) of Law No 244 of 24 December 2007, as amended; Article 6(4-bis) and (4-ter) of Decree-law No 185 of 29 November 2008, as amended; Article 33(28) of Law No 183 of 12 November 2011, as amended; and all the relevant measures enacted under those Laws), which reduce taxes and contributions payable by undertakings in areas hit by natural disasters in Italy since 1990, and which were unlawfully put into effect by Italy in breach of Article 108(3) of the Treaty on the Functioning of the European Union, are incompatible with the internal market.

Article 2

Aid granted in individual cases under the measures referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by Regulation (EU) No 1407/2013 or Regulation (EU) No 717/2014.

Article 3

Aid granted in individual cases under the measures referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98, or by any other approved aid scheme, is compatible with the internal market up to the maximum aid intensity applicable to that type of aid.

Article 4

1. Italy shall recover from the beneficiaries the incompatible aid granted under the scheme introduced by Article 33(28) of Law No 183 of 12 November 2011, as amended, and all relevant implementing measures enacted under that Law.
2. Italy shall also recover the incompatible aid granted under the other schemes referred to in Article 1 from all beneficiaries without a place of business in the area affected by the natural disaster at the time of the event.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and with Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.
5. Moreover, Italy shall cancel all outstanding payments of aid under all schemes referred to in Article 1 with effect from the date of adoption of this Decision.

Article 5

1. The recovery of the aid referred to in Article 4 shall be immediate and effective.
2. Italy shall ensure that this Decision is implemented within four months following the date of notification of the Decision.

Article 6

1. Within two months following notification of this Decision, Italy shall submit the following information:
 - (a) the list of beneficiaries that have received aid to be recovered under Article 4, and the total amount of aid received by each of them under the relevant scheme;
 - (b) the total amount (principal and interest) to be recovered from each beneficiary;
 - (c) a detailed description of the measures already taken and planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 4 has been completed. It shall on request by the Commission immediately submit information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Italian Republic.

Done at Brussels, 14 August 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission

ANNEX

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received under the scheme (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already reimbursed (*)	
			Principal	Recovery interest

(*) In million units of national currency.

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION

No 38/15/COL

of 4 February 2015

adopting a notice: ‘Guidelines on the applicability of Article 53 of the EEA Agreement to technology transfer agreements’ [2016/196]

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice, in particular Articles 5(2)(b) and 25(1) thereof,

Whereas:

Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements ⁽¹⁾ has been incorporated into the EEA Agreement as point 5 of Annex XIV to the EEA Agreement.

The European Commission has issued a communication entitled ‘Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements’ ⁽²⁾.

The European Commission’s guidelines are also of relevance for the European Economic Area.

Uniform application of the EEA competition rules is to be ensured throughout the European Economic Area.

According to point II under the heading ‘General’ at the end of Annex XIV to the EEA Agreement, the EFTA Surveillance Authority is to adopt, after consultation with the European Commission, acts corresponding to those adopted by the European Commission in order to maintain equal conditions of competition.

The Advisory Committee on Restrictive Practices and Dominant Positions and the European Commission have been consulted,

HAS ADOPTED THIS DECISION:

1. The following notice, which is annexed to this Decision: ‘Guidelines on the applicability of Article 53 of the EEA Agreement to technology transfer agreements’, shall be issued.
2. The Decision, including the notice set out in the Annex, shall be authentic in the English language.
3. The notice shall be published in the EEA Section of the *Official Journal of the European Union* and in the EEA Supplement thereto.

⁽¹⁾ OJ L 93, 28.3.2014, p. 17, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 293/2014 of 12 December 2014 (not yet published).

⁽²⁾ OJ C 89, 28.3.2014, p. 3.

4. The EFTA states shall be informed by means of a copy of the Decision, including the Annex.
5. The European Commission shall be informed by means of a copy of the Decision, including the Annex.

Done at Brussels, 4 February 2015.

For the EFTA Surveillance Authority

Oda Helen SLETNES

President

Helga JÓNSDÓTTIR

College Member

ANNEX

EFTA SURVEILLANCE AUTHORITY NOTICE

Guidelines on the applicability of Article 53 of the EEA Agreement to technology transfer agreements

- A. This notice is issued pursuant to the rules of the Agreement on the European Economic Area ('EEA Agreement') and the Agreement between the EFTA states on the establishment of a Surveillance Authority and a Court of Justice ('Surveillance and Court Agreement').
- B. The European Commission ('Commission') has issued a notice entitled 'Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements' ⁽¹⁾. That non-binding act sets out the principles which the Commission follows for the assessment of technology transfer agreements under Article 101 of the Treaty on the Functioning of the European Union ('TFEU').
- C. The EFTA Surveillance Authority ('Authority') considers the Commission guidelines to be EEA relevant. In order to maintain equal conditions of competition and to ensure uniform application of the EEA competition rules throughout the European Economic Area ('EEA'), the Authority has adopted the present notice under the powers conferred upon it by Article 5(2)(b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA rules in a particular case.
- D. In particular, this notice sets out the principles for the assessment of technology transfer agreements under Article 53 of the EEA Agreement and provides guidance on their application.
- E. This notice applies to cases where the Authority is the competent surveillance authority under Article 56 of the EEA Agreement.
- F. This notice replaces the Authority's previous notice of 2005 on the application of Article 53 of the EEA Agreement to technology transfer agreements ⁽²⁾.

⁽¹⁾ OJ C 89, 28.3.2014, p. 3.

⁽²⁾ OJ L 259, 4.10.2007, p. 1 and EEA Supplement No 46, 4.10.2007, p. 1.

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1. INTRODUCTION

- (1) These guidelines set out the principles for the assessment of technology transfer agreements under Article 53 of the EEA Agreement ('Article 53'). Technology transfer agreements concern the licensing of technology rights where the licensor permits the licensee to exploit the licensed technology rights for the production of goods or services, as defined in Article 1(1)(c) of the act referred to in point 5 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements ('TTBER')) ⁽³⁾.
- (2) The purpose of these guidelines is to provide guidance on the application of the TTBER as well as on the application of Article 53 to technology transfer agreements that fall outside the scope of the TTBER. The TTBER and the guidelines are without prejudice to the possible parallel application of Article 54 of the EEA Agreement ('Article 54') to technology transfer agreements ⁽⁴⁾.
- (3) The standards set forth in these guidelines must be applied in the light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and these guidelines must be applied reasonably and flexibly. Examples given serve as illustrations only and are not intended to be exhaustive. The Authority will keep under review the functioning of the TTBER and the guidelines in the enforcement system created by Chapter II of Protocol 4 to the Surveillance and Court Agreement ('Protocol 4') ⁽⁵⁾ to consider whether changes need to be made.

⁽³⁾ OJ L 93, 28.3.2014, p. 17, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 293/2014 of 12 December 2014 (not yet published). The TTBER replaces the act previously referred to in point 5 of Annex XIV to the EEA Agreement, i.e. Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 11), incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 42/2005 of 11 March 2005 (OJ L 198, 28.7.2005, p. 42 and EEA Supplement No 38, 28.7.2005, p. 24).

⁽⁴⁾ See by analogy Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge* [2000] ECR I-1365, paragraph 130, and point 106 of the Authority guidelines on the application of Article 53(3) of the EEA Agreement (OJ C 208, 6.9.2007, p. 1 and EEA Supplement No 42, 6.9.2007, p. 1).

⁽⁵⁾ Following the Agreement amending Protocol 4 to the Agreement of the EFTA states on the establishment of a Surveillance Authority and a Court of Justice of 24 September 2004, which entered into force on 20 May 2005, Chapter II of Protocol 4 to the Surveillance and Court Agreement reflects to a large extent in the EFTA pillar Council Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

- (4) These guidelines are without prejudice to the interpretation of Article 53 and the TTBER that may be given by the EFTA Court, the Court of Justice and the General Court.

2. GENERAL PRINCIPLES

2.1. Article 53 and intellectual property rights

- (5) The aim of Article 53 as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources. Article 53(1) prohibits all agreements and concerted practices between undertakings and decisions by associations of undertakings⁽⁶⁾ which may affect trade between Contracting Parties ('EEA States')⁽⁷⁾ and which have as their object or effect the prevention, restriction or distortion of competition⁽⁸⁾. As an exception to this rule Article 53(3) provides that the prohibition contained in Article 53(1) may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.
- (6) Intellectual property laws confer exclusive rights on holders of patents, copyright, design rights, trademarks and other legally protected rights. The owner of intellectual property is entitled under intellectual property laws to prevent unauthorised use of its intellectual property and to exploit it, for example, by licensing it to third parties. Once a product incorporating an intellectual property right, with the exception of performance rights⁽⁹⁾, has been put on the market inside the EEA by the holder or with its consent, the intellectual property right is exhausted in the whole territory of the EEA including the EFTA states in the sense that the holder can no longer use it to control the sale of the product (principle of EEA exhaustion)⁽¹⁰⁾. The right-holder has no right under intellectual property laws to prevent sales by licensees or buyers of such products incorporating the licensed technology. The principle of EEA exhaustion is in line with the essential function of intellectual property rights, which is to grant the holder the right to exclude others from exploiting its intellectual property without its consent.
- (7) The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Article 53 is in particular applicable to agreements whereby the holder licenses another undertaking to exploit its intellectual property rights⁽¹¹⁾. Nor does it imply that there is an inherent conflict between intellectual property rights and the EEA competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.

⁽⁶⁾ In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

⁽⁷⁾ See Authority guidelines on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement (OJ C 291, 30.11.2006, p. 46 and EEA Supplement No 59, 30.11.2006, p. 18).

⁽⁸⁾ In the following the term 'restriction' includes the prevention and distortion of competition.

⁽⁹⁾ Which includes rental rights. See in this respect Case 158/86, *Warner Brothers and Metronome Video* [1988] ECR 2605 and Case C-61/97, *Foreningen af danske videogramdistributører* [1998] ECR I-5171.

⁽¹⁰⁾ This principle of EEA exhaustion is for example enshrined in Article 7(1) of the act referred to in point 9h of Annex XVII to the EEA Agreement, i.e. Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ L 299, 8.11.2008, p. 25, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 56/2007 of 9 June 2007 (OJ L 266, 11.10.2007, p. 17 and EEA Supplement No 48, 11.10.2007, p. 13)), which provides that the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the territory covered by the EEA Agreement under that trade mark by the proprietor or with its consent, and Article 4(2) of the act referred to in point 5 of Annex XVII to the EEA Agreement, i.e. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 39/2011 of 1 April 2011 (OJ L 171, 30.6.2011, p. 40 and EEA Supplement No 37, 30.6.2011, p. 47)), which provides that the first sale in the territory covered by the EEA Agreement of a copy of a program by the right-holder or with its consent shall exhaust the distribution right within the territory covered by the EEA Agreement of that copy, with the exception of the right to control further rental of the program or a copy thereof.

⁽¹¹⁾ See, e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig* [1966] ECR 429.

- (8) In the assessment of licence agreements under Article 53 it must be kept in mind that the creation of intellectual property rights often entails substantial investment and that this is often a risky endeavour. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should be free to seek appropriate remuneration for successful projects that is sufficient to maintain investment incentives, taking failed projects into account. Technology rights licensing may also require the licensee to make significant sunk investments (that is to say, that upon leaving that particular field of activity the investment cannot be used by the licensee for other activities or sold other than at a significant loss) in the licensed technology and production assets necessary to exploit it. Article 53 cannot be applied without considering such *ex ante* investments made by the parties and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed may thus lead to the agreement falling outside Article 53(1) or fulfilling the conditions of Article 53(3), as the case may be, for the period of time required to recoup the investment.
- (9) In assessing licensing agreements under Article 53, the existing analytical framework is sufficiently flexible to take due account of the dynamic aspects of technology rights licensing. There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation by the licensor and licensee(s). In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under Article 53(3) and balanced against the negative effects on competition ⁽¹²⁾. The great majority of licence agreements are therefore compatible with Article 53.

2.2. The general framework for applying Article 53

- (10) Article 53(1) prohibits agreements which have as their object or effect the restriction of competition. Article 53(1) applies both to restrictions of competition between the parties to an agreement and to restrictions of competition between any of the parties and third parties.
- (11) The assessment of whether a licence agreement restricts competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions ⁽¹³⁾. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-technology competition (that is to say, competition between undertakings using competing technologies) and on intra-technology competition (that is to say, competition between undertakings using the same technology) ⁽¹⁴⁾. Article 53(1) prohibits restrictions of both inter-technology competition and intra-technology competition. It is therefore necessary to assess to what extent the agreement affects or is likely to affect these two aspects of competition on the market.
- (12) The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-technology competition while the second question relates to the impact of the agreement on intra-technology competition. As restrictions may be capable of affecting both inter-technology competition and intra-technology competition at the same time, it may be necessary to analyse a restriction in the light of the two questions in points (a) and (b) before it can be concluded whether or not competition within the meaning of Article 53(1) is restricted:
- (a) Does the licence agreement restrict actual or potential competition that would have existed without the contemplated agreement? If so, the agreement may be caught by Article 53(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different EEA States cross-license competing technologies and undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a licensor imposes obligations on its licensees not to use competing technologies and these obligations foreclose third-party technologies, actual or potential competition that would have existed in the absence of the agreement is restricted.

⁽¹²⁾ The methodology for the application of Article 53(3) is set out in the Authority guidelines on the application of Article 53(3) of the EEA Agreement cited in footnote 4.

⁽¹³⁾ See Case 56/65, *Société Technique Minière* [1966] ECR 337, and Case C-7/95 P, *John Deere* [1998] ECR I-3111, paragraph 76.

⁽¹⁴⁾ See in this respect, e.g. the judgment in *Consten and Grundig* cited in footnote 11.

- (b) Does the licence agreement restrict actual or potential competition that would have existed only in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 53(1). For instance, where a licensor restricts its licensees, who were not actual or potential competitors before the agreement, from competing with each other, (potential) competition that could have existed between the licensees in the absence of the restraints is restricted. Such restrictions include vertical price fixing and territorial or customer sales restrictions between licensees. However, certain restraints may in certain cases not be caught by Article 53(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature ⁽¹⁵⁾. Such exclusion of the application of Article 53(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether, given the nature of the agreement and the characteristics of the market, a less restrictive agreement would not have been concluded by undertakings in a similar setting ⁽¹⁶⁾. Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.
- (13) The fact that Article 53(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect should be taken into account in the application of the analytical framework set out in point (12) of these guidelines. An agreement or contractual restraint is only prohibited by Article 53(1) if its object or effect is to restrict inter-technology competition and/or intra-technology competition.
- (14) Restrictions of competition by object are those that by their very nature restrict competition. These are restrictions which in the light of the objectives pursued by the EEA competition rules have such a high potential for negative effects on competition that it is not necessary for the purposes of applying Article 53(1) to demonstrate any effects on the market ⁽¹⁷⁾. Moreover, the conditions of Article 53(3) are unlikely to be fulfilled in the case of restrictions by object. The assessment of whether or not an agreement has as its object a restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied or the actual conduct and behaviour of the parties on the market ⁽¹⁸⁾. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction by object of competition. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives ⁽¹⁹⁾. For licence agreements, the Authority considers that the restrictions covered by the list of hardcore restrictions of competition set out in Article 4 of the TTBER are restrictive by their very object ⁽²⁰⁾.
- (15) If an agreement is not restrictive of competition by object it is necessary to examine whether it has restrictive effects on competition. Account must be taken of both actual and potential effects ⁽²¹⁾. In other words the agreement must have likely anti-competitive effects. For licence agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a

⁽¹⁵⁾ See in this respect the judgment in *Société Technique Minière* cited in footnote 13 and Case 258/78, *Nungesser* [1982] ECR 2015.

⁽¹⁶⁾ For examples see points (126) to (127).

⁽¹⁷⁾ See in this respect, e.g. Case C-49/92 P, *Anic Participazioni* [1999] ECR I-4125, paragraph 99.

⁽¹⁸⁾ See Joined Cases 29/83 and 30/83, *CRAM and Rheinzink* [1984] ECR 1679, paragraph 26, and Joined Cases 96/82 and others, *Anseau-Naveva* [1983] ECR 3369, paragraphs 23-25. Case T-491/07 *Groupeement des cartes bancaires v Commission*, judgment of 29 November 2012, paragraph 146.

⁽¹⁹⁾ Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 21.

⁽²⁰⁾ Further guidance with regard to the notion of restriction of competition by object can be obtained in the Authority guidelines on the application of Article 53(3) of the EEA Agreement cited in footnote 4. See also Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraphs 59 to 64. Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraphs 21 to 39. Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraphs 31 and 36 to 39 and Case C-32/11 *Allianz Hungária Biztosító and Others*, judgment of 14 March 2013, paragraphs 33 to 38.

⁽²¹⁾ See the judgment in *John Deere* cited in footnote 13.

reasonable degree of probability. The likely negative effects on competition must be appreciable ⁽²²⁾. Appreciable anti-competitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time ⁽²³⁾. The degree of market power normally required for a finding of an infringement under Article 53(1) is less than the degree of market power required for a finding of dominance under Article 54 ⁽²⁴⁾.

- (16) For the purposes of analysing restrictions of competition by effect it is normally necessary to define the relevant market and to examine and assess, in particular, the nature of the products and technologies concerned, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases.
- (17) However, licence agreements may also have substantial pro-competitive potential and the vast majority of those agreements are indeed pro-competitive. Licence agreements may promote innovation by allowing innovators to earn returns to cover at least part of their research and development costs. Licence agreements also lead to a dissemination of technologies, which may create value by reducing the production costs of the licensee or by enabling it to produce new or improved products. Efficiencies at the level of the licensee often stem from a combination of the licensor's technology with the assets and technologies of the licensee. Such integration of complementary assets and technologies may lead to a cost/output configuration that would not otherwise be possible. For instance, the combination of an improved technology of the licensor with more efficient production or distribution assets of the licensee may reduce production costs or lead to the production of a higher quality product. Licensing may also serve the pro-competitive purpose of removing obstacles to the development and exploitation of the licensee's own technology. In particular in sectors where large numbers of patents are prevalent licensing often occurs in order to create design freedom by removing the risk of infringement claims by the licensor. When the licensor agrees not to invoke its intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition.
- (18) In cases where a licence agreement is caught by Article 53(1) the pro-competitive effects of the agreement must be balanced against its restrictive effects in the context of Article 53(3). When all four conditions of Article 53(3) are satisfied, the restrictive licence agreement in question is valid and enforceable, with no prior decision to that effect being required ⁽²⁵⁾. Hardcore restrictions are unlikely to fulfil the conditions of Article 53(3). Such agreements generally fail (at least) one of the first two conditions of Article 53(3). In general they do not create objective economic benefits or benefits for consumers. Moreover, these types of agreements generally fail the indispensability test (under the third condition). For example, if the parties fix the price at which the products produced under the licence must be sold, this will in principle lead to a lower output and a misallocation of resources and higher prices for consumers. The price restriction is also not indispensable to achieve the possible efficiencies resulting from the availability to both competitors of the two technologies.

⁽²²⁾ Guidance on the issue of appreciability can be found in the Authority notice on agreements of minor importance which do not appreciably restrict competition under Article 53(1) of the EEA Agreement (OJ C 67, 20.3.2003, p. 20 and EEA Supplement No 15, 20.3.2003, p. 11.). The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the *de minimis* notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.

⁽²³⁾ Case T-321/05 *Astra Zeneca v Commission* [2010] ECR II-2805, paragraph 267.

⁽²⁴⁾ The Authority's guidelines on the application of Article 53(3) of the EEA Agreement, point 26, cited in footnote 4.

⁽²⁵⁾ See Article 1(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement.

2.3. Market definition

- (19) The EFTA Surveillance Authority's approach to defining the relevant market is laid down in its notice on the definition of the relevant market for the purposes of EEA competition law ⁽²⁶⁾. These guidelines only address aspects of market definition that are of particular importance in the field of technology rights licensing.
- (20) Technology is an input, which is integrated either into a product or a production process. Technology rights licensing can therefore affect competition both upstream in input markets and downstream in output markets. For instance, an agreement between two parties which sell competing products downstream and which also cross-license technology rights relating to the production of these products upstream may restrict competition on the downstream goods or services market concerned. The cross-licensing may also restrict competition on the upstream market for technology and possibly also on other upstream input markets. For the purposes of assessing the competitive effects of licence agreements it may therefore be necessary to define the relevant product market(s) as well as the relevant technology market(s) ⁽²⁷⁾.
- (21) The relevant product market comprises the contract products (incorporating the licensed technology) and products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use. Contract products can be part of a final and/or an intermediate product market.
- (22) The relevant technology markets consist of the licensed technology rights and its substitutes, that is to say, other technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology rights, by reason of the technologies' characteristics, their royalties and their intended use. Starting from the technology which is marketed by the licensor, it is necessary to identify those other technologies to which licensees could switch in response to a small but permanent increase in relative prices, that is to say, to the royalties. An alternative approach is to look at the market for products incorporating the licensed technology rights (cf. point (25) below).
- (23) The term 'relevant market' used in Article 3 of the TTBER and defined in Article 1(1)(m) refers to the relevant product market and the relevant technology market in both their product and geographic dimension.
- (24) The 'relevant geographic market' is defined in Article 1(1)(l) of the TTBER and comprises the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. The geographic market of the relevant technology market(s) can differ from the geographic market of the relevant product market(s).
- (25) Once relevant markets have been defined, market shares can be assigned to the various sources of competition in the market and used as an indication of the relative strength of market players. In the case of technology markets, one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a merely theoretical and not a practical way to proceed because of lack of clear information on royalties. Another approach, which is the one used for calculating the safe harbour, as explained in Article 8(d) of the TTBER, is to calculate market shares on the technology market on the basis of sales of products incorporating the licensed technology on downstream product markets (see for more details point (86) ff.). In individual cases outside the safe harbour of the TTBER it may be necessary, where practically possible, to apply both of the described approaches in order to assess the market strength of the licensor more accurately and to take into account other available factors which give a good indication of the relative strength of the available technologies (see for more factors points (157) and (159) ff.) ⁽²⁸⁾.

⁽²⁶⁾ Notice of the EFTA Surveillance Authority on the definition of the relevant market for the purpose of competition law within the European Economic Area (EEA) (OJ L 200, 16.7.1998, p. 48 and EEA Supplement No 28, 16.7.1998, p. 3).

⁽²⁷⁾ See for example Commission Decision COMP/M.5675 *Syngenta/Monsanto* where the Commission analysed the merger of two vertically integrated sunflower breeders by examining both: (i) the upstream market for the trading (namely the exchange and licensing) of varieties (parental lines and hybrids); and (ii) the downstream market for the commercialisation of hybrids. In COMP/M.5406, *IPIC/MAN Ferrostaal AG*, the Commission defined besides a market for the production of high-grade melamine also an upstream technology market for the supply of melamine production technology. See also COMP/M.269, *Shell/Montecatini*.

⁽²⁸⁾ See also Commission Decision COMP/M.5675 *Syngenta/Monsanto* and Decision COMP/M.5406, *IPIC/MAN Ferrostaal AG*.

- (26) Some licence agreements may affect competition in innovation. In analysing such effects, however, the Authority will normally confine itself to examining the impact of the agreement on competition within existing product and technology markets ⁽²⁹⁾. Competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In such cases innovation is a source of potential competition which must be taken into account when assessing the impact of the agreement on product markets and technology markets. In a limited number of cases, however, it may be useful and necessary to also analyse the effects on competition in innovation separately. This is particularly the case where the agreement affects innovation aiming at creating new products and where it is possible at an early stage to identify research and development poles ⁽³⁰⁾. In such cases it can be analysed whether after the agreement there will be a sufficient number of competing research and development poles left for effective competition in innovation to be maintained.

2.4. The distinction between competitors and non-competitors

- (27) In general, agreements between competitors pose a greater risk to competition than agreements between non-competitors. However, competition between undertakings that use the same technology (intra-technology competition between licensees) constitutes an important complement to competition between undertakings that use competing technologies (inter-technology competition). For instance, intra-technology competition may lead to lower prices for the products incorporating the technology in question, which may not only produce direct and immediate benefits for consumers of these products, but also spur further competition between undertakings that use competing technologies. In the context of licensing the fact that licensees are selling their own product must also be taken into account. They are not re-selling a product supplied by another undertaking. There may thus be greater scope for product differentiation and quality-based competition between licensees than in the case of vertical agreements for the resale of products.
- (28) In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.
- (29) In principle, the parties to an agreement are not considered competitors if they are in a one-way or two-way blocking position. A one-way blocking position exists where a technology right cannot be exploited without infringing upon another valid technology right, or where one party cannot be active in a commercially viable way on the relevant market without infringing the other party's valid technology right. This is, for instance, the case where one technology right covers an improvement of another technology right and the improvement cannot be legally used without a licence of the basic technology right. A two-way blocking position exists where neither technology right can be exploited without infringing upon the other valid technology right or where neither party can be active in a commercially viable way on the relevant market without infringing the other party's valid technology right and where the parties thus need to obtain a licence or a waiver from each other ⁽³¹⁾. However, in practice there will be cases where there is no certainty whether a particular technology right is valid and infringed.
- (30) The parties are actual competitors on the product market if prior to the agreement both are already active on the same relevant product market. The fact that both parties are already active on the same relevant product market, without having entered into a licensing arrangement, is a strong indicator that the parties are not blocking each other. In such a scenario, the parties can be presumed to be actual competitors, until a blocking position is proven (in particular by a final court judgment).
- (31) The licensee can be considered a potential competitor on the product market if it is likely that, in the absence of the agreement, it would undertake the necessary additional investments to enter the relevant market in response to a small but permanent increase in product prices. Likely entry should be assessed on realistic grounds, that is to say based on the facts of the case at hand. Entry is more likely if the licensee possesses assets that can easily be used to enter the market without incurring significant sunk costs or if it has already developed plans, or started to invest otherwise, to enter the market. There have to be real concrete possibilities for the licensee to enter the

⁽²⁹⁾ See also points (119) to (122) of the Authority guidelines on the applicability of Article 53 of the EEA Agreement to horizontal cooperation agreements ('Horizontal Guidelines') (OJ C 362, 12.12.2013, p. 3 and EEA Supplement No 69, 12.12.2013, p. 1).

⁽³⁰⁾ See also point (157).

⁽³¹⁾ In a scenario where undertakings have given a general commitment to license certain intellectual property rights, the parties cannot be considered to be in a blocking position on the basis of these intellectual property rights.

relevant market and compete with established undertakings ⁽³²⁾. Accordingly, the licensee cannot be described as a potential competitor if its entry into a market is not an economically viable strategy ⁽³³⁾.

- (32) In the specific context of intellectual property rights, an additional factor for assessing whether the parties are potential competitors on a particular market is the possibility that their intellectual property rights are in a blocking position, that is to say that the licensee cannot enter the respective market without infringing the intellectual property rights of the other party.
- (33) In the absence of certainty in the form of a final court decision that a blocking position exists and therefore of certainty on this point, the parties, when addressing the question whether they are potential competitors, will have to base themselves on all the available evidence at the time, including the possibility that intellectual property rights are infringed and whether there are, in a specific case, effective possibilities to work around existing intellectual property rights. Substantial investments already made or advanced plans to enter a particular market, can support the view that the parties are at least potential competitors, even if a blocking position cannot be excluded. Particularly convincing evidence of the existence of a blocking position may be required where the parties have a common interest in claiming the existence of a blocking position in order to be qualified as non-competitors, for instance where the alleged blocking position concerns technologies that are technological substitutes (see point (22) above) or if there is a significant financial inducement from the licensor to the licensee.
- (34) In order to constitute a realistic competitive constraint entry has to be likely to occur within a short period ⁽³⁴⁾. Normally a period of one to two years is appropriate. However, in individual cases longer periods can be taken into account. The period of time needed for undertakings already on the market to adjust their capacities can be used as a yardstick to determine this period. For instance, the parties are likely to be considered potential competitors on the product market where the licensee produces on the basis of its own technology in one geographic market and starts producing in another geographic market on the basis of a licensed competing technology. In such circumstances, it is likely that the licensee would have been able to enter the second geographic market on the basis of its own technology, unless such entry is precluded by objective factors, including the existence of blocking intellectual property rights.
- (35) The parties are actual competitors on the technology market if they are either already both licensing out substitutable technology, or the licensee is already licensing out its technology and the licensor enters the technology market by granting a licence for a competing technology to the licensee.
- (36) The parties are considered to be potential competitors on the technology market if they own substitutable technologies and the licensee is not licensing-out its own technology, provided that it would be likely to do so in the event of a small but permanent increase in technology prices. In the case of technology markets, it is generally more difficult to assess whether the parties are potential competitors. This is why, for the application of the TTBER, potential competition on the technology market is not taken into account (see point (83) below) and the parties are treated as non-competitors.
- (37) In some cases it may also be possible to conclude that while the licensor and the licensee produce competing products, they are non-competitors on the relevant product market and the relevant technology market because the licensed technology represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive. In such cases the licensor's technology either creates a new market or excludes the licensee's technology from the existing market. It is, however, often not possible to come to this conclusion at the time the agreement is concluded. It is usually only when the technology or the products incorporating it have been available to consumers for some time that it becomes apparent that the older technology has become obsolete or uncompetitive. For instance, when CD technology was developed and players and discs were put on the market, it was not obvious that this new technology would replace LP technology. This only became apparent some years later. The parties will therefore be considered to be competitors if at the time of the conclusion of the agreement it is not obvious that the licensee's technology is obsolete or uncompetitive. However, given that both Articles 53(1) and Article 53(3) must be applied in the light of the actual context in which the agreement occurs, the assessment is sensitive to material changes in the facts. The classification of the relationship between the parties will therefore change into a relationship of non-competitors, if at a later point in time the licensee's technology becomes obsolete or uncompetitive on the market.

⁽³²⁾ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and Others v Commission* [1998] ECR II-3141, paragraph 137.

⁽³³⁾ Case T-461/07, *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-1729, paragraph 167.

⁽³⁴⁾ Case T-461/07, *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-1729, paragraph 189.

- (38) In some cases the parties may become competitors subsequent to the conclusion of the agreement because the licensee develops or acquires and starts exploiting a competing technology. In such cases the fact that the parties were non-competitors at the time of conclusion of the agreement and that the agreement was concluded in that context must be taken into account. The Authority will therefore mainly focus on the impact of the agreement on the licensee's ability to exploit its own (competing) technology. In particular, the list of hardcore restrictions applying to agreements between competitors will not be applied to such agreements unless the agreement is subsequently amended in any material respect after the parties have become competitors (see Article 4(3) of the TTBER).
- (39) The undertakings party to an agreement may also become competitors subsequent to the conclusion of the agreement where the licensee was already active on the relevant market where the contract product is sold prior to the licence and where the licensor subsequently enters the relevant market either on the basis of the licensed technology rights or a new technology. In this case also the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (see Article 4(3) of the TTBER). A material amendment includes the conclusion of a new technology transfer agreement between the parties concerning competing technology rights which can be used for the production of products competing with the contract products.

3. APPLICATION OF THE TTBER

3.1. The effects of the TTBER

- (40) Categories of technology transfer agreements that fulfil the conditions set out in the TTBER are exempted from the prohibition rule contained in Article 53(1). Block-exempted agreements are legally valid and enforceable. Such agreements can only be prohibited for the future and only upon withdrawal of the block exemption by the Authority and the competition authorities of the EFTA states. Block-exempted agreements cannot be prohibited under Article 53 by national courts in the context of private litigation.
- (41) Block exemption of categories of technology transfer agreements is based on the presumption that — to the extent that they are caught by Article 53(1) — those agreements fulfil the four conditions laid down in Article 53(3). It is thus presumed that the agreements give rise to economic efficiencies, that the restrictions contained in the agreements are indispensable to the attainment of these efficiencies, that consumers within the affected markets receive a fair share of the efficiency gains and that the agreements do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. The market share thresholds (Article 3), the hardcore list (Article 4) and the excluded restrictions (Article 5) set out in the TTBER aim at ensuring that only restrictive agreements that can reasonably be presumed to fulfil the four conditions of Article 53(3) are block-exempted.
- (42) As set out in Section 4 of these guidelines, many licence agreements fall outside Article 53(1), either because they do not restrict competition at all or because the restriction of competition is not appreciable ⁽³⁵⁾. To the extent that such agreements would anyhow fall within the scope of the TTBER, there is no need to determine whether they are caught by Article 53(1) ⁽³⁶⁾.
- (43) Outside the scope of the block exemption it is relevant to examine whether in the individual case the agreement is caught by Article 53(1) and if so, whether the conditions of Article 53(3) are satisfied. There is no presumption that technology transfer agreements falling outside the block exemption are caught by Article 53(1) or fail to satisfy the conditions of Article 53(3). In particular, the mere fact that the market shares of the parties exceed the market share thresholds set out in Article 3 of the TTBER is not a sufficient basis for finding that the agreement is caught by Article 53(1). Individual assessment of the likely effects of the agreement is required. It is only where agreements contain hardcore restrictions of competition, that it can normally be presumed that they are prohibited by Article 53.

⁽³⁵⁾ See in this respect the notice on agreements of minor importance cited in footnote 22.

⁽³⁶⁾ According to Article 3(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement, agreements which may affect trade between EFTA states, but which are not prohibited by Article 53, cannot be prohibited by national competition law.

3.2. Scope and duration of the TTBER

3.2.1. *The concept of technology transfer agreements*

- (44) The TTBER and these guidelines cover agreements for the transfer of technology. According to Article 1(1)(b) of the TTBER the concept of 'technology rights' covers know-how as well as patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, plant breeder's certificates and software copyrights or a combination thereof as well as applications for these rights and for registration of these rights. The licensed technology rights should allow the licensee, with or without other input, to produce the contract products. The TTBER only applies in EEA States where the licensor holds relevant technology rights. Otherwise, there are no technology rights to be transferred within the meaning of the TTBER.
- (45) Know-how is defined in Article 1(1)(i) of the TTBER as a package of practical information, resulting from experience and testing, which is secret, substantial and identified:
- (a) 'Secret' means that the know-how is not generally known or easily accessible.
 - (b) 'Substantial' means that the know-how includes information which is significant and useful for the production of the products covered by the licence agreement or the application of the process covered by the licence agreement. In other words, the information must significantly contribute to or facilitate the production of the contract products. In cases where the licensed know-how relates to a product as opposed to a process, this condition implies that the know-how is useful for the production of the contract product. This condition is not satisfied where the contract product can be produced on the basis of freely available technology. However, the condition does not require that the contract product is of higher value than products produced with freely available technology. In the case of process technologies, this condition implies that the know-how is useful in the sense that it can reasonably be expected at the date of conclusion of the agreement to be capable of significantly improving the competitive position of the licensee, for instance by reducing its production costs.
 - (c) 'Identified' means that it is possible to verify that the licensed know-how fulfils the criteria of secrecy and substantiality. This condition is satisfied where the licensed know-how is described in manuals or other written form. However, in some cases this may not be reasonably possible. The licensed know-how may consist of practical knowledge possessed by the licensor's employees. For instance, the licensor's employees may possess secret and substantial knowledge about a certain production process which is passed on to the licensee in the form of training of the licensee's employees. In such cases it is sufficient to describe in the agreement the general nature of the know-how and to list the employees that will be or have been involved in passing it on to the licensee.
- (46) Provisions in technology transfer agreements relating to the purchase of products by the licensee are only covered by the TTBER if, and to the extent that, those provisions are directly related to the production or sale of the contract products. Therefore the TTBER does not apply to those parts of a technology transfer agreement relating to input and/or equipment that are used for other purposes than the production of the contract products. For instance, where milk is sold together with licensing of technology to produce cheese, only the milk used for the production of cheese with the licensed technology will be covered by the TTBER.
- (47) Provisions in technology transfer agreements relating to the licensing of other types of intellectual property such as trademarks and copyright, other than software copyright (on software copyright see points (44) and (62)), are only covered by the TTBER if, and to the extent that, they are directly related to the production or sale of the contract products. This condition ensures that provisions covering other types of intellectual property rights are block-exempted to the extent that these other intellectual property rights serve to enable the licensee to better exploit the licensed technology rights. For instance, where a licensor authorises a licensee to use its trademark on the products incorporating the licensed technology, this trademark licence may allow the licensee to better exploit the licensed technology by allowing consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology rights. An obligation on the licensee to use the licensor's

trademark may also promote the dissemination of technology by allowing the licensor to identify itself as the source of the underlying technology. The TTBER covers technology transfer agreements in this scenario even if the principal interest of the parties lies in the exploitation of the trademark rather than the technology ⁽³⁷⁾.

- (48) The TTBER does not cover licensing of copyright other than software copyright (except for the situation set out in point (47)). The Authority will, however, as a general rule apply the principles set out in the TTBER and these guidelines when assessing licensing of copyright for the production of contract products under Article 53.
- (49) On the other hand, the licensing of rental rights and public performance rights protected by copyright, in particular for films or music, is considered to raise particular issues and it may not be warranted to assess such licensing on the basis of the principles developed in these guidelines. In the application of Article 53 the specificities of the work and the way in which it is exploited must be taken into account ⁽³⁸⁾. The Authority will therefore not apply the TTBER and the present guidelines by way of analogy to the licensing of these other rights.
- (50) The Authority will also not extend the principles developed in the TTBER and these guidelines to trademark licensing (except for the situation set out in point (47)). Trademark licensing often occurs in the context of distribution and resale of goods and services and is generally more akin to distribution agreements than technology licensing. Where a trademark licence is directly related to the use, sale or resale of goods and services and does not constitute the primary object of the agreement, the licence agreement is covered by the act referred to in point 2 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ('Vertical Block Exemption Regulation')) ⁽³⁹⁾.

3.2.2. *The concept of 'transfer'*

- (51) The concept of 'transfer' implies that technology must flow from one undertaking to another. Such transfers normally take the form of licensing whereby the licensor grants the licensee the right to use its technology rights against payment of royalties.
- (52) As set out in Article 1(1)(c) of the TTBER, assignments where part of the risk associated with the exploitation of the technology rights remains with the assignor are also deemed to be technology transfer agreements. In particular, this is the case where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology.
- (53) An agreement whereby the licensor commits not to exercise its technology rights against the licensee can also be seen as a transfer of technology rights. Indeed, the essence of a pure patent licence is the right to operate inside the scope of the exclusive right of the patent. It follows that the TTBER also covers so-called non-assertion agreements and settlement agreements whereby the licensor permits the licensee to produce within the scope of the patent ⁽⁴⁰⁾.

3.2.3. *Agreements between two parties*

- (54) According to Article 1(1)(c) of the TTBER, the Regulation only covers technology transfer agreements 'between two undertakings'. Technology transfer agreements between more than two undertakings are not covered by the TTBER. The decisive factor in terms of distinguishing between agreements between two undertakings and multiparty agreements is whether the agreement in question is concluded between more than two undertakings.

⁽³⁷⁾ The TTBER could now cover the technology transfer agreement assessed in the Commission Decision in *Moosehead/Whitbread* (OJ L 100, 20.4.1990, p. 32), see in particular paragraph 16 of that decision.

⁽³⁸⁾ See in this respect Case 262/81, *Coditel (II)* [1982] ECR 3381.

⁽³⁹⁾ OJ L 102, 23.4.2010, p. 1, incorporated into the EEA Agreement by Decision 77/2010 (OJ L 244, 16.9.2010, p. 35 and EEA Supplement No 49, 16.9.2010, p. 34).

⁽⁴⁰⁾ The terms 'licensing' or 'licensed' used in these guidelines does also include assignment, non-assertion or settlement arrangements as long as a transfer of technology rights takes place as described in this section. See further on settlement agreements points (234) ff.

- (55) Agreements concluded by two undertakings fall within the scope of the TTBER even if the agreement stipulates conditions for more than one level of trade. For instance, the TTBER applies to a licence agreement concerning not only the production stage but also the distribution stage, stipulating the obligations that the licensee must or may impose on resellers of the products produced under the licence ⁽⁴¹⁾.
- (56) Agreements establishing technology pools and licensing out from technology pools are generally multiparty agreements and are therefore not covered by the TTBER ⁽⁴²⁾. The notion of technology pools covers agreements whereby two or more parties agree to pool their respective technologies and license them as a package. The notion of technology pools also covers arrangements whereby two or more undertakings agree to license a third party and authorise it to license-on the package of technologies.
- (57) Licence agreements concluded between more than two undertakings often give rise to the same issues as licence agreements of the same nature concluded between two undertakings. In its individual assessment of licence agreements which are of the same nature as those covered by the block exemption but which are concluded between more than two undertakings, the Authority will apply by analogy the principles set out in the TTBER. However, technology pools and licensing out from technology pools are specifically dealt with in Section 4.4.

3.2.4. *Agreements for the production of contract products*

- (58) It follows from Article 1(1)(c) of the TTBER that for licence agreements to be covered by it they must be entered into 'for the purpose of the production of contract products', that is to say, products incorporating or produced with the licensed technology rights. The licence must permit the licensee and/or its sub-contractor(s) to exploit the licensed technology for the purpose of producing goods or services (see also recital 7 in the preamble of the TTBER).
- (59) Where the purpose of the agreement is not the production of contract products but, for instance, merely to block the development of a competing technology, the licence agreement is not covered by the TTBER and these guidelines may also not be appropriate for the agreement's assessment. More generally, if the parties refrain from exploiting the licensed technology rights, no efficiency enhancing activity takes place, in which case the very rationale of the block exemption is absent. However, exploitation does not need to take the form of an integration of assets. Exploitation also occurs where the licence creates design freedom for the licensee by allowing it to exploit its own technology without facing the risk of infringement claims by the licensor. In the case of licensing between competitors, the fact that the parties do not exploit the licensed technology may be an indication that the arrangement is a disguised cartel. For these reasons the Authority will examine cases of non-exploitation very closely.
- (60) The TTBER applies to licence agreements for the purpose of the production of contract products by the licensee and/or its subcontractor(s). Therefore, the TTBER does not apply to (those parts of) technology transfer agreements that allow for sublicensing. However, the Authority will apply by analogy the principles set out in the TTBER and these guidelines to 'master licensing' agreements between licensor and licensee (that is to say an agreement whereby the licensor allows the licensee to sublicense the technology). Agreements between the licensee and sublicensees for the production of contract products are covered by the TTBER.
- (61) The term 'contract products' encompasses goods and services produced with the licensed technology rights. This is the case both where the licensed technology is used in the production process and where it is incorporated into the product itself. In these guidelines the term 'products incorporating the licensed technology' covers both situations. The TTBER applies in all cases where technology rights are licensed for the purposes of producing goods and services. The framework of the TTBER and these guidelines is based on the premise that there is a direct link between the licensed technology rights and a contract product. In cases where no such link exists, that

⁽⁴¹⁾ See recital 6 of the TTBER and further Section 3.2.6.

⁽⁴²⁾ See for more details point (248).

is to say where the purpose of the agreement is not to enable the production of a contract product, the analytical framework of the TTBER and these guidelines may not be appropriate.

- (62) The licensing of software copyright for the purpose of mere reproduction and distribution of the protected work, that is to say, the production of copies for resale, is not considered to be 'production' within the meaning of the TTBER and thus is not covered by the TTBER and these guidelines. Such reproduction for distribution is instead covered by analogy by the Vertical Block Exemption Regulation ⁽⁴³⁾ and the guidelines on vertical restraints ⁽⁴⁴⁾. Reproduction for distribution exists where a licence is granted to reproduce the software on a carrier, regardless of the technical means by which the software is distributed. For instance, the TTBER and these guidelines do not cover the licensing of software copyright whereby the licensee is provided with a master copy of the software in order to reproduce and sell on the software to end-users. Nor do they cover the licensing of software copyright and distribution of software by means of 'shrink wrap' licences, that is, a set of conditions included in the package of the hard copy which the end-user is deemed to have accepted by opening the wrapping of the package, or the licensing of software copyright and distribution of software by means of online downloading.
- (63) However, where the licensed software is incorporated by the licensee in the contract product this is not considered as mere reproduction but production. For instance, the TTBER and these guidelines cover the licensing of software copyright where the licensee has the right to reproduce the software by incorporating it into a device with which the software interacts.
- (64) The TTBER covers 'subcontracting' whereby the licensor licenses technology rights to the licensee who undertakes to produce certain products on the basis thereof exclusively for the licensor. Subcontracting may also involve the supply of equipment by the licensor to be used in the production of the goods and services covered by the agreement. For the latter type of subcontracting to be covered by the TTBER as part of a technology transfer agreement, the supplied equipment must be directly related to the production of the contract products. Subcontracting is also covered by the Authority's notice concerning its assessment of certain subcontracting agreements in relation to Article 53(1) of the EEA Agreement ⁽⁴⁵⁾. According to that notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside Article 53(1). Subcontracting agreements whereby the contractor determines the transfer price of the intermediate contract product between subcontractors in a value chain of subcontracting generally also fall outside Article 53(1) provided the contract products are exclusively produced for the contractor. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development may be caught by Article 53 ⁽⁴⁶⁾.
- (65) The TTBER also applies to agreements whereby the licensee must carry out development work before obtaining a product or a process that is ready for commercial exploitation, provided that a contract product has been identified. Even if such further work and investment is required, the object of the agreement is the production of an identified contract product, that is to say, products produced with the licensed technology rights.
- (66) The TTBER and these guidelines do not cover agreements whereby technology rights are licensed for the purpose of enabling the licensee to carry out further research and development in various fields, including further developing a product arising out of such research and development ⁽⁴⁷⁾. For instance, the TTBER and the guidelines do not cover the licensing of a technological research tool used in the process of further research activity. Nor do they cover research and development subcontracting whereby the licensee undertakes to carry out research and development in the field of the licensed technology and to hand back the improved technology package to the licensor ⁽⁴⁸⁾. The main object of such agreements is the provision of research and development services aimed at improving the technology as opposed to the production of goods and services on the basis of the licensed technology.

⁽⁴³⁾ See footnote 39.

⁽⁴⁴⁾ OJ C 362, 22.11.2012, p. 1 and EEA Supplement No 65, 22.11.2012, p. 1.

⁽⁴⁵⁾ OJ L 153, 18.6.1994, p. 30 and EEA Supplement No 15, 18.6.1994, p. 29.

⁽⁴⁶⁾ See point 3 of the Authority notice on subcontracting agreements cited in footnote 44.

⁽⁴⁷⁾ See also Section 3.2.6.1.

⁽⁴⁸⁾ However, this last example is covered by Regulation (EU) No 1217/2010 cited in footnote 50, see also Section 3.2.6.1 below.

3.2.5. Duration

- (67) Subject to the duration of the TTBER, which expires on 30 April 2026, the block exemption applies for as long as the licensed property right has not lapsed, expired or been declared invalid. In the case of know-how the block exemption applies as long as the licensed know-how remains secret, except where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption applies for the duration of the agreement (see Article 2 of the TTBER).
- (68) The block exemption applies to each licensed technology right covered by the agreement and ceases to apply on the date of expiry, invalidity or the coming into the public domain of the last technology right within the meaning of the TTBER.

3.2.6. Relationship with other block exemption regulations

- (69) The TTBER covers agreements between two undertakings concerning the licensing of technology rights for the purpose of the production of contract products. However, technology rights can also be an element of other types of agreements. In addition, the products incorporating the licensed technology are subsequently sold on the market. It is therefore necessary to address the interface between the TTBER and the act referred to in point 6 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements ('Specialisation Block Exemption Regulation'))⁽⁴⁹⁾, the act referred to in point 7 of Annex XIV to the EEA Agreement (Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of the Treaty on the Functioning of the European Union to certain categories of research and development agreements ('Research and Development Block Exemption Regulation'))⁽⁵⁰⁾ and the Vertical Block Exemption Regulation⁽⁵¹⁾.

3.2.6.1. The Block Exemption Regulations on specialisation and R & D agreements

- (70) The TTBER does not apply to licensing in the context of specialisation agreements which are covered by the Specialisation Block Exemption Regulation or to licensing in the context of research and development agreements which are covered by the Research and Development Block Exemption Regulation (see recital 7 and Article 9 of the TTBER).
- (71) According to Article 1(1)(d) of the Specialisation Block Exemption Regulation, that Regulation covers, in particular, joint production agreements by virtue of which two or more parties agree to produce certain products jointly. The Regulation extends to provisions concerning the assignment or use of intellectual property rights, provided that they do not constitute the primary object of the agreement, but are directly related to and necessary for its implementation.
- (72) Where undertakings establish a production joint venture and license the joint venture to exploit technology, which is used in the production of the products produced by the joint venture, such licensing is subject to the Specialisation Block Exemption Regulation and not to the TTBER. Accordingly, licensing in the context of a production joint venture normally falls to be considered under the Specialisation Block Exemption Regulation. However, where the joint venture engages in licensing of the technology to third parties, the activity is not linked to production by the joint venture and therefore not covered by that Regulation. Such licensing arrangements, which bring together the technologies of the parties, constitute technology pools, which are dealt with in Section 4.4 of these guidelines.
- (73) The Research and Development Block Exemption Regulation covers agreements whereby two or more undertakings agree to jointly carry out research and development and to jointly exploit the results thereof. According to Article 1(1)(m) of that Regulation, research and development and the exploitation of the results are carried out jointly where the work involved is carried out by a joint team, organisation or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialisation in research, development, production and distribution, including licensing. That Regulation also covers paid-for research and development agreements whereby two or more undertakings agree that the research and development is carried out by one

⁽⁴⁹⁾ OJ L 335, 18.12.2010, p. 43, incorporated into the EEA Agreement by Decision 3/2011 (OJ L 93, 7.4.2011, p. 32 and EEA Supplement No 19, 7.4.2011, p. 7).

⁽⁵⁰⁾ OJ L 335, 18.12.2010, p. 36, incorporated into the EEA Agreement by Decision 3/2011 (OJ L 93, 7.4.2011, p. 32 and EEA Supplement No 19, 7.4.2011, p. 7).

⁽⁵¹⁾ See footnote 39.

party and financed by another party, with or without joint exploitation of the results thereof (see Article 1(1)(a)(vi) of the Research and Development Block Exemption Regulation).

- (74) It follows that the Research and Development Block Exemption Regulation covers licensing between the parties and by the parties to a joint entity in the context of a research and development agreement. Such licensing is subject only to the Research and Development Block Exemption Regulation and not to the TTBER. In the context of such agreements the parties can also determine the conditions for licensing the fruits of the research and development agreement to third parties. However, since third-party licensees are not party to the research and development agreement, the individual licence agreement concluded with third parties is not covered by the Research and Development Block Exemption Regulation. That licence agreement is covered by the block exemption in the TTBER if the conditions of it are fulfilled.

3.2.6.2. *The Vertical Block Exemption Regulation*

- (75) The Vertical Block Exemption Regulation covers agreements entered into between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. It thus covers supply and distribution agreements ⁽⁵²⁾.
- (76) Given that the TTBER only covers agreements between two parties and that a licensee, selling products incorporating the licensed technology, is a supplier for the purposes of the Vertical Block Exemption Regulation, those two block exemption regulations are closely related. The agreement between licensor and licensee is subject to the TTBER whereas agreements concluded between a licensee and buyers of the contract products are subject to the Vertical Block Exemption Regulation ⁽⁵³⁾.
- (77) The TTBER also exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which it must sell the products incorporating the licensed technology. In particular, the licensee can be obliged to establish a certain type of distribution system such as exclusive distribution or selective distribution. However, the distribution agreements concluded for the purposes of implementing such obligations must, in order to be covered by a block exemption, comply with the Vertical Block Exemption Regulation. For instance, the licensor can oblige the licensee to establish a system based on exclusive distribution in accordance with specified rules. However, it follows from Article 4(b) of the Vertical Block Exemption Regulation that generally distributors must be free to make passive sales into the territories of other exclusive distributors of the licensee.
- (78) Furthermore, under the Vertical Block Exemption Regulation distributors must in principle be free to sell both actively and passively into territories covered by the distribution systems of other suppliers, that is to say, other licensees producing their own products on the basis of the licensed technology rights. This is because for the purposes of the Vertical Block Exemption Regulation each licensee is a separate supplier. However, the reasons underlying the block exemption of active sales restrictions within a supplier's distribution system contained in that Regulation, may also apply where the products incorporating the licensed technology are sold by different licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. In such cases the Authority would be unlikely to challenge restraints where by analogy the requirements of the Vertical Block Exemption Regulation are fulfilled. For a common brand identity to exist the products must be sold and marketed under a common brand, which is predominant in terms of conveying quality and other relevant information to the consumer. It does not suffice that in addition to the licensees' brands the product carries the licensor's brand, which identifies it as the source of the licensed technology.

3.3. **The market share thresholds of the safe harbour**

- (79) According to Article 3 of the TTBER, the block exemption of restrictive agreements, or in other words the safe harbour of the TTBER, is subject to market share thresholds, confining the scope of the block exemption to agreements that although they may be restrictive of competition can generally be presumed to fulfil the conditions of Article 53(3). Outside the safe harbour created by the market share thresholds individual

⁽⁵²⁾ See also the brochure 'Competition policy in Europe — The competition rules for supply and distribution agreements', European Commission, Publications Office of the European Union 2012, Luxembourg.

⁽⁵³⁾ Respectively footnote 39 and footnote 44.

assessment is required. The fact that market shares exceed the thresholds does not give rise to any presumption either that the agreement is caught by Article 53(1) or that the agreement does not fulfil the conditions of Article 53(3). In the absence of hardcore restrictions as set out in Article 4 of the TTBER, market analysis is required.

Relevant market share thresholds

- (80) The market share threshold to be applied for the purpose of the safe harbour of the TTBER depends on whether the agreement is concluded between competitors or non-competitors.
- (81) The market share thresholds apply both to the relevant market(s) of the licensed technology rights and the relevant market(s) of the contract products. If the applicable market share threshold is exceeded on one or several product and technology market(s), the block exemption does not apply to the agreement for that relevant market(s). For instance, if the licence agreement concerns two separate product markets, the block exemption may apply to one of the markets and not to the other.
- (82) According to Article 3(1) TTBER the safe harbour provided for in Article 2 TTBER applies to agreements between competitors on condition that the combined market share of the parties does not exceed 20 % on any relevant market. The market share threshold of Article 3(1) of the TTBER is applicable if the parties are actual competitors or potential competitors on the product market(s) and/or actual competitors on the technology market (for the distinction between competitors and non-competitors, see point (27) ff.).
- (83) Potential competition on the technology market is not taken into account for the application of the market share threshold or the hardcore list relating to agreements between competitors. Outside the safe harbour of the TTBER potential competition on the technology market is taken into account but does not lead to the application of the hardcore list relating to agreements between competitors.
- (84) Where the undertakings party to the licensing agreement are not competitors, the market share threshold of Article 3(2) of the TTBER applies. An agreement between non-competitors is covered if the market share of each party does not exceed 30 % on the affected relevant technology and product markets.
- (85) Where the parties become competitors within the meaning of Article 3(1) TTBER at a later point in time, for instance where the licensee was already present, before the licensing, on the relevant market where the contract products are sold and the licensor subsequently becomes an actual or potential supplier on the same relevant market, the 20 % market share threshold will apply from the point in time when they became competitors. However, in that case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (see Article 4(3) of the TTBER and point (39) of these guidelines).

Calculating market shares for technology market(s) for the application of the safe harbour

- (86) The calculation of market shares on the relevant markets where the technology rights are licensed, under the TTBER, deviates from the usual practice for the reasons explained in point (87) of these guidelines. In the case of technology markets, it follows from Article 8(d) of the TTBER that, both for the product and the geographic dimension of the relevant market, the licensor's market share is to be calculated on the basis of the sales of the licensor and all its licensees of products incorporating the licensed technology. Under this approach the combined sales of the licensor and its licensees of contract products are calculated as part of all sales of competing products, irrespective of whether these competing products are produced with a technology that is being licensed.
- (87) This approach of calculating the market share of the licensor on the technology market as its 'footprint' at the product level, has been chosen because of the practical difficulties in calculating a licensor's market share based on royalty income (see point (25) above). In addition to the general difficulty of obtaining reliable royalty income data, the actual royalty income may also seriously underestimate a technology's position on the market in the event that royalty payments are reduced as a result of cross-licensing or of the supply of tied products. Basing the licensor's market share on the technology market on the products produced with that technology as compared with products produced with competing technologies would not carry that risk. Such a footprint at the product level will in general reflect the market position of the technology well.

- (88) Ideally that footprint would be calculated by excluding from the product market the products produced with in-house technologies that are not licensed out, as those in-house technologies are only an indirect constraint on the licensed technology. However, as it may be difficult in practice for licensor and licensees to know whether other products in the same product market are produced with licensed or in-house technologies, the calculation of the technology market share, for the purposes of the TTBER, is based on the products produced with the licensed technology as part of all products sold in that product market. This approach based on the technology's footprint on the overall product market(s) can be expected to reduce the calculated market share by including products produced with in-house technologies, but will nonetheless in general provide a good indicator of the strength of the technology. First, it captures any potential competition from undertakings that are producing with their own technology and that are likely to start licensing in the event of a small but permanent increase in the price for licenses. Secondly, even where it is unlikely that other technology owners would start licensing, the licensor does not necessarily have market power on the technology market even if it has a high share of licensing income. If the downstream product market is competitive, competition at this level may effectively constrain the licensor. An increase in royalties upstream affects the costs of the licensee, which makes it less competitive and thereby may cause it to lose sales. A technology's market share on the product market also captures this element and is thus normally a good indicator of licensor market power on the technology market.
- (89) To estimate the strength of the technology, the geographic dimension of the technology market has also to be taken into account. This might sometimes differ from the geographic dimension of the respective downstream product market. For the purpose of applying the TTBER, the geographic dimension of the relevant technology market is also determined by the product market(s). However, outside the TTBER safe harbour it may be appropriate to also consider a possibly wider geographic area, in which the licensor and licensees of competing technologies are involved in the licensing of these technologies, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.
- (90) In the case of new technologies that did not generate any sales in the preceding calendar year, a zero market share is assigned. When sales commence the technology will start accumulating market share. If the market share rises subsequently above the relevant threshold of 20 % or 30 %, the safe harbour will continue to apply for a period of two consecutive calendar years following the year in which the threshold was exceeded (see Article 8(e) of the TTBER).

Calculating market shares for product market(s) for the application of the safe harbour

- (91) In the case of relevant markets where the contract products are sold, the licensee's market share is to be calculated on the basis of the licensee's sales of products incorporating the licensor's technology and competing products, that is to say, the total sales of the licensee on the product market in question. Where the licensor is also a supplier of products on the relevant market, the licensor's sales on the product market in question must also be taken into account. In the calculation of market shares for product markets, however, sales made by other licensees are not taken into account when calculating the licensee's and/or licensor's market share.
- (92) Market shares should be calculated on the basis of sales value data of the preceding year where such data are available. Such data normally provide a more accurate indication of the strength of a technology than volume data. However, where value based data are not available, estimates based on other reliable market information may be used, including market sales volume data.
- (93) The principles set out in Section 3.3 of these guidelines can be illustrated by the following examples:

Licensing between non-competitors

Example 1

Company A is specialised in developing bio-technological products and techniques and has developed a new product Xeran. It is not active as a producer of Xeran, for which it has neither the production nor the distribution facilities. Company B is one of the producers of competing products, produced with freely available non-proprietary technologies. In year 1, B sold EUR 25 million's worth of products produced with the freely available technologies. In year 2, A gives a licence to B to produce Xeran. In that year B sells EUR 15 million

produced with the help of the freely available technologies and EUR 15 million of Xeran. In year 3 and the following years B produces and sells only Xeran worth EUR 40 million annually. In addition in year 2, A also licenses to C. C was not active on that product market before. C produces and sells only Xeran, EUR 10 million in year 2 and EUR 15 million in year 3 and thereafter. It is established that the total market of Xeran and its substitutes where B and C are active is worth EUR 200 million in each year.

In year 2, the year the licence agreements are concluded, A's market share on the technology market is 0 % as its market share has to be calculated on the basis of the total sales of Xeran in the preceding year. In year 3, A's market share on the technology market is 12,5 %, reflecting the value of Xeran produced by B and C in the preceding year 2. In year 4 and thereafter A's market share on the technology market is 27,5 %, reflecting the value of Xeran produced by B and C in the preceding year.

In year 2, B's market share on the product market is 12,5 %, reflecting B's EUR 25 million sales in year 1. In year 3, B's market share is 15 % because its sales have increased to EUR 30 million in year 2. In year 4 and thereafter B's market share is 20 % as its sales are EUR 40 million annually. C's market share on the product market is 0 % in year 1 and 2, 5 % in year 3 and 7,5 % thereafter.

As the licence agreements between A and B, and between A and C, are between non-competitors and the individual market shares of A, B and C are below 30 % each year, each agreement falls within the safe harbour of the TTBER.

Example 2

The situation is the same as in example 1, however now B and C are operating in different geographic markets. It is established that the total market of Xeran and its substitutes is worth EUR 100 million annually in each geographic market.

In this case, A's market share on the relevant technology markets has to be calculated on the basis of product sales data of each of the two geographic product markets separately. In the market where B is active, A's market share depends on the sale of Xeran by B. As in this example the total market is assumed to be EUR 100 million, that is to say, half the size of the market in example 1, the market share of A is 0 % in year 2, 15 % in year 3 and 40 % thereafter. B's market share is 25 % in year 2, 30 % in year 3 and 40 % thereafter. In years 2 and 3, both A's and B's market share does not exceed the 30 % threshold. The threshold is however exceeded from year 4 and this means that, in line with Article 8(e) of the TTBER, after year 6 the licence agreement between A and B can no longer benefit from the safe harbour but has to be assessed on an individual basis.

In the market where C is active, A's market share depends on the sale of Xeran by C. A's market share on the technology market, based on C's sales in the previous year, is therefore 0 % in year 2, 10 % in year 3 and 15 % thereafter. The market share of C on the product market is the same: 0 % in year 2, 10 % in year 3 and 15 % thereafter. The licence agreement between A and C therefore falls within the safe harbour for the whole period.

Licensing between competitors

Example 3

Companies A and B are active on the same relevant product and geographic market for a certain chemical product. They also each own a patent on different technologies used to produce this product. In year 1, A and B sign a cross-licence agreement licensing each other to use their respective technologies. In year 1, A and B produce only with their own technology: A sells EUR 15 million of the product and B sells EUR 20 million of the product. From year 2, they both use their own and the other's technology. From that year onward, A sells EUR 10 million of the product produced with its own technology and EUR 10 million of the product produced with B's technology. From year 2, B sells EUR 15 million of the product produced with its own technology and EUR 10 million of the product produced with A's technology. It is established that the total market of the product and its substitutes is worth EUR 100 million in each year.

To assess the licence agreement under the TTBER, the market shares of A and B have to be calculated both on the technology market and the product market. The market share of A on the technology market depends on the amount of the product sold in the preceding year that was produced, by both A and B, with A's technology. In year 2, the market share of A on the technology market is therefore 15 %, reflecting its own production and sales of EUR 15 million in year 1. From year 3, A's market share on the technology market is 20 %, reflecting the EUR 20 million sales of the product produced with A's technology and produced and sold by A and B (EUR 10 million each). Similarly, in year 2, B's market share on the technology market is 20 % and thereafter 25 %.

The market shares of A and B on the product market depend on their respective sales of the product in the previous year, irrespective of the technology used. The market share of A on the product market is 15 % in year 2 and 20 % thereafter. The market share of B on the product market is 20 % in year 2 and 25 % thereafter.

As the agreement is between competitors, their combined market share, both on the technology and on the product market, has to be below the 20 % market share threshold in order to benefit from the safe harbour. It is clear that this is not the case here. The combined market share on the technology market and on the product market is 35 % in year 2 and 45 % thereafter. This agreement between competitors will therefore have to be assessed on an individual basis.

3.4. Hardcore restrictions of competition under the Block Exemption Regulation

3.4.1. General principles

- (94) Article 4 of the TTBER contains a list of hardcore restrictions of competition. The classification of a restraint as a hardcore restriction of competition is based on the nature of the restriction and experience showing that such restrictions are almost always anti-competitive. In line with the case-law of the Court of Justice and the General Court ⁽⁵⁴⁾ such a restriction may result from the clear objective of the agreement or from the circumstances of the individual case (see point (14) above). Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature ⁽⁵⁵⁾ and therefore fall outside Article 53(1) of the EEA Agreement. In addition, undertakings can always plead an efficiency defence under Article 53(3) in an individual case ⁽⁵⁶⁾.
- (95) It follows from Article 4(1) and 4(2) of the TTBER that, when a technology transfer agreement contains a hardcore restriction of competition, the agreement as a whole falls outside the scope of the block exemption. For the purposes of the TTBER hardcore restrictions cannot be severed from the rest of the agreement. Moreover, the Authority considers that in the context of individual assessment it is unlikely that hardcore restrictions of competition fulfil the four conditions of Article 53(3) (see point (18) above).
- (96) Article 4 of the TTBER distinguishes between agreements between competitors and agreements between non-competitors.

3.4.2. Agreements between competitors

- (97) Article 4(1) TTBER lists the hardcore restrictions for licensing between competitors. According to Article 4(1), the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:
 - (a) the restriction of a party's ability to determine its prices when selling products to third parties;
 - (b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;

⁽⁵⁴⁾ See, e.g. the case-law cited in footnote 18.

⁽⁵⁵⁾ See point 18 of the Authority guidelines on the application of Article 53(3) of the EEA Agreement cited in footnote 4.

⁽⁵⁶⁾ Case T-17/93, *Matra* [1994] ECR II-595, paragraph 85.

- (c) the allocation of markets or customers except:
 - (i) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology rights within the exclusive territory reserved for the other party and/or not to sell, both actively and passively or only actively, into the exclusive territory or to the exclusive customer group reserved for the other party;
 - (ii) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence;
 - (iii) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
 - (iv) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
- (d) the restriction of the licensee's ability to exploit its own technology rights or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

Distinction between reciprocal and non-reciprocal agreements between competitors

- (98) For a number of hardcore restrictions the TTBER makes a distinction between reciprocal and non-reciprocal agreements. The hardcore list is stricter for reciprocal agreements than for non-reciprocal agreements between competitors. Reciprocal agreements are cross-licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products. A non-reciprocal agreement is an agreement where only one of the parties is licensing its technology rights to the other party or where, in the case of cross-licensing, the licensed technologies rights are not competing technologies and the rights licensed cannot be used for the production of competing products. An agreement is not reciprocal for the purposes of the TTBER merely because the agreement contains a grant-back obligation or because the licensee licenses back own improvements of the licensed technology. Where a non-reciprocal agreement subsequently becomes a reciprocal agreement due to the conclusion of a second licence between the same parties, those parties may have to revise the first licence in order to avoid the agreement containing a hardcore restriction. In the assessment of the individual case the Authority will take into account the time lapsed between the conclusion of the first and the second licence.

Price restrictions between competitors

- (99) The hardcore restriction of competition contained in Article 4(1)(a) TTBER concerns agreements between competitors that have as their object the fixing of prices for products sold to third parties, including the products incorporating the licensed technology. Price fixing between competitors constitutes a restriction of competition by its very object. Price fixing can take the form of a direct agreement on the exact price to be charged or on a price list with certain allowed maximum rebates. It is immaterial whether the agreement concerns fixed, minimum, maximum or recommended prices. Price fixing can also be implemented indirectly by applying disincentives to deviate from an agreed price level, for example, by providing that the royalty rate will increase if product prices are reduced below a certain level. However, an obligation on the licensee to pay a certain minimum royalty does not in itself amount to price fixing.
- (100) When royalties are calculated on the basis of individual product sales, the amount of the royalty has a direct impact on the marginal cost of the product and thus a direct impact on product prices⁽⁵⁷⁾. Competitors can therefore use cross-licensing with reciprocal running royalties as a means of coordinating and/or increasing prices on downstream product markets⁽⁵⁸⁾. However, the Authority will only treat cross-licences with reciprocal

⁽⁵⁷⁾ See in this respect point 98 of the guidelines on the application of Article 53(3) of the EEA Agreement cited in footnote 4.

⁽⁵⁸⁾ This is also the case where one party grants a licence to the other party and accepts to buy a physical input from the licensee. The purchase price can serve the same function as the royalty.

running royalties as price fixing where the agreement is devoid of any pro-competitive purpose and therefore does not constitute a bona fide licensing arrangement. In such cases where the agreement does not create any value and therefore has no valid business justification, the arrangement is a sham and amounts to a cartel.

- (101) The hardcore restriction contained in Article 4(1)(a) TTBER also covers agreements whereby royalties are calculated on the basis of all product sales irrespective of whether the licensed technology is being used. Such agreements are also caught by Article 4(1)(d) according to which the licensee must not be restricted in its ability to use its own technology rights (see point (116) of these guidelines). In general such agreements restrict competition since the agreement raises the cost of using the licensee's own competing technology rights and restricts competition that existed in the absence of the agreement ⁽⁵⁹⁾. This is so both in the case of reciprocal and non-reciprocal arrangements.
- (102) Exceptionally, however, an agreement whereby royalties are calculated on the basis of all product sales may fulfil the conditions of Article 53(3) in an individual case where on the basis of objective factors it can be concluded that the restriction is indispensable for pro-competitive licensing to occur. This may be the case where in the absence of the restraint it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for instance because the licensor's technology leaves no visible trace on the final product and practicable alternative monitoring methods are unavailable.

Output restrictions between competitors

- (103) The hardcore restriction of competition set out in Article 4(1)(b) TTBER concerns reciprocal output restrictions on the parties. An output restriction is a limitation on how much a party may produce and sell. Article 4(1)(b) does not apply to output limitations on the licensee in a non-reciprocal agreement or output limitations on one of the licensees in a reciprocal agreement provided that the output limitation only concerns products produced with the licensed technology. Article 4(1)(b) thus identifies as hardcore restrictions reciprocal output restrictions on the parties and output restrictions on the licensor in respect of its own technology. When competitors agree to impose reciprocal output limitations, the object and likely effect of the agreement is to reduce output in the market. The same is true of agreements that reduce the incentive of the parties to expand output, for example by applying reciprocal running royalties per unit which increase as output increases or by obliging each party to make payments if a certain level of output is exceeded.
- (104) The more favourable treatment of non-reciprocal quantity limitations is based on the consideration that a one-way restriction does not necessarily lead to a lower output on the market while the risk that the agreement is not a bona fide licensing arrangement is also lower when the restriction is non-reciprocal. When a licensee is willing to accept a one-way restriction, it is likely that the agreement leads to a real integration of complementary technologies or an efficiency enhancing integration of the licensor's superior technology with the licensee's productive assets. Similarly, in a reciprocal agreement an output restriction on only one of the licensees is likely to reflect the higher value of the technology licensed by one of the parties and may serve to promote pro-competitive licensing.

Market and customer allocation between competitors

- (105) The hardcore restriction of competition set out in Article 4(1)(c) TTBER concerns the allocation of markets and customers. Agreements whereby competitors share markets and customers have as their object the restriction of competition. An agreement whereby competitors agree, in a reciprocal agreement, not to produce in certain territories or not to sell, both actively and passively or only actively, into certain territories or to certain customers reserved for the other party, is considered a hardcore restriction. Thus for instance reciprocal exclusive licensing between competitors is considered market sharing.
- (106) Article 4(1)(c) applies irrespective of whether the licensee remains free to use its own technology rights. Once the licensee has tooled up to use the licensor's technology to produce a given product, it may be costly to maintain a separate production line using another technology in order to serve customers covered by the restrictions. Moreover, given the anti-competitive potential of the restraints the licensee may have little incentive to produce under its own technology. Such restrictions are also highly unlikely to be indispensable for pro-competitive licensing to occur.

⁽⁵⁹⁾ See in this respect Case 193/83, *Windsurfing International* [1986] ECR 611, paragraph 67.

- (107) Under Article 4(1)(c)(i) it is not a hardcore restriction for the licensor in a non-reciprocal agreement to grant the licensee an exclusive licence to produce on the basis of the licensed technology in a particular territory and thus agree not to produce itself the contract products in or provide the contract products from that territory. Such exclusive licences are block-exempted irrespective of the scope of the territory. If the licence is worldwide, the exclusivity implies that the licensor will abstain from entering or remaining on the market. The block exemption also applies if in a non-reciprocal agreement the licensee is not allowed to produce in an exclusive territory reserved for the licensor. The purpose of such agreements may be to give the licensor and/or licensee an incentive to invest in and develop the licensed technology. The object of the agreement is therefore not necessarily to share markets.
- (108) According to Article 4(1)(c)(i) and for the same reason, the block exemption also applies to non-reciprocal agreements whereby the parties agree not to sell actively or passively into an exclusive territory or to an exclusive customer group reserved for the other party. For the application of the TTBER, the Authority interprets 'active' and 'passive' sales as defined in the guidelines on vertical restraints ⁽⁶⁰⁾. Restrictions on licensee or licensor to sell actively and/or passively into the other party's territory or customer group are only block-exempted if that territory or customer group has been exclusively reserved to that other party. However, in some specific circumstances, agreements containing such sales restrictions may, in an individual case, also fulfil the conditions of Article 53(3) if the exclusivity is shared on an ad hoc basis, for instance if necessary to alleviate a temporary shortage in the production of the licensor or licensee to which the territory or customer group is exclusively allocated. In such cases, the licensor or licensee is still likely to be sufficiently protected against active and/or passive sales to have the incentive to license its technology or invest to work with the licensed technology. Such restraints, even where restrictive of competition, would promote pro-competitive dissemination and integration of that technology into the production assets of the licensee.
- (109) By implication the fact that the licensor appoints the licensee as its sole licensee in a particular territory, implying that third parties will not be licensed to produce on the basis of the licensor's technology in the territory in question, does not constitute a hardcore restriction either. In the case of such sole licences the block exemption applies irrespective of whether the agreement is reciprocal or not given that the agreement does not affect the ability of the parties to fully exploit their own technology rights in their respective territories.
- (110) Article 4(1)(c)(ii) excludes from the hardcore list, and thus block-exempts up to the market share threshold, restrictions in a non-reciprocal agreement on active sales by a licensee into the territory or to the customer group allocated by the licensor to another licensee. However, this presupposes that the protected licensee was not a competitor of the licensor when the agreement was concluded. It is not warranted to treat such restrictions in that situation as hardcore restrictions. By allowing the licensor to grant a licensee, who was not already on the market, protection against active sales by licensees which are competitors of the licensor and which for that reason were already established on the market, such restrictions are likely to induce the licensee to exploit the licensed technology more efficiently. On the other hand, if the licensees were to agree between themselves not to sell actively or passively into certain territories or to certain customer groups, the agreement would amount to a cartel amongst the licensees. Given that such an agreement does not involve any transfer of technology it would in addition fall outside the scope of the TTBER.
- (111) Article 4(1)(c)(iii) contains a further exception to the hardcore restriction of Article 4(1)(c), namely captive use restrictions, that is to say, requirements whereby the licensee may produce the products incorporating the licensed technology only for its own use. Where the contract product is a component the licensee can thus be obliged to produce that component only for incorporation into its own products and can be obliged not to sell the components to other producers. The licensee must be able, however, to sell the components as spare parts for its own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions may be necessary to encourage the dissemination of technology, particularly between competitors, and are covered by the block exemption. Such restrictions are also dealt with in Section 4.2.5.

⁽⁶⁰⁾ See footnote 44, point 51.

- (112) Finally, Article 4(1)(c)(iv) excludes from the hardcore list an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer with a view to creating an alternative source of supply for that customer. It is thus a condition for the application of Article 4(1)(c)(iv) that the licence is limited to creating an alternative source of supply for that particular customer. It is not a condition, however, that only one such licence is granted. Article 4(1)(c)(iv) also covers situations where more than one undertaking is licensed to supply the same specified customer. Article 4(1)(c)(iv) applies regardless of the duration of the licence agreement. For instance, a one-off licence to fulfil the requirements of a project of a particular customer is covered by this exception. The potential of such agreements to share markets is limited where the licence is granted only for the purpose of supplying a particular customer. In such circumstances it can, in particular, not be assumed that the agreement will cause the licensee to cease exploiting its own technology.
- (113) Restrictions in agreements between competitors that limit the licence to one or more product markets or technical fields of use ⁽⁶¹⁾ are not hardcore restrictions. Such restrictions are block-exempted up to the market share threshold of 20 % irrespective of whether the agreement is reciprocal or not. Such restrictions are not considered to have as their object the allocation of markets or customers. It is a condition for the application of the block exemption, however, that the field of use restrictions do not go beyond the scope of the licensed technologies. For instance, where licensees are also limited in the technical fields in which they can use their own technology rights, the agreement amounts to market sharing.
- (114) The block exemption applies irrespective of whether the field of use restriction is symmetrical or asymmetrical. An asymmetrical field of use restriction in a reciprocal licence agreement implies that both parties are allowed to use the respective technologies that they license-in only within different fields of use. As long as the parties are unrestricted in the use of their own technologies, there is no assumption that the agreement leads the parties to abandon or refrain from entering the field(s) covered by the licence to the other party. Even if the licensees tool up to use the licensed technology within the licensed field of use, there may be no impact on assets used to produce outside the scope of the licence. It is important in this regard that the restriction relates to distinct product markets, industrial sectors or fields of use and not to customers, allocated by territory or by group, who purchase products falling within the same product market or technical field of use. The risk of market sharing is considered substantially greater in the latter case (see point (106) above). In addition, field of use restrictions may be necessary to promote pro-competitive licensing (see point (212) below).

Restrictions on the parties' ability to carry out research and development

- (115) The hardcore restriction of competition set out in Article 4(1)(d) covers restrictions on any of the parties' ability to carry out research and development. Both parties must be free to carry out independent research and development. This rule applies irrespective of whether the restriction applies to a field covered by the licence or to other fields. However, the mere fact that the parties agree to provide each other with future improvements of their respective technologies does not amount to a restriction on independent research and development. The effect on competition of such agreements must be assessed in the light of the circumstances of the individual case. Article 4(1)(d) also does not extend to restrictions on a party to carry out research and development with third parties, where such restriction is necessary to protect the licensor's know-how against disclosure. In order to be covered by the exception, the restrictions imposed to protect the licensor's know-how against disclosure must be necessary and proportionate to ensure such protection. For instance, where the agreement designates particular employees of the licensee to be trained in and responsible for the use of the licensed know-how, it may be sufficient to oblige the licensee not to allow those employees to be involved in research and development with third parties. Other safeguards may be equally appropriate.

Restrictions on the use of the licensee's own technology

- (116) According to Article 4(1)(d) the licensee must also be unrestricted in the use of its own competing technology rights provided that in doing so it does not make use of the technology rights licensed from the licensor. In relation to its own technology rights the licensee must not be subject to limitations in terms of where it produces

⁽⁶¹⁾ Field of use restrictions are further dealt with in points (208) ff.

or sells, the technical fields of use or product markets within which it produces, how much it produces or sells and the price at which it sells. It must also not be obliged to pay royalties on products produced on the basis of its own technology rights (see point (101) above). Moreover, the licensee must not be restricted in licensing its own technology rights to third parties. When restrictions are imposed on the licensee's use of its own technology rights or its right to carry out research and development, the competitiveness of the licensee's technology is reduced. The effect of this is to reduce competition on existing product and technology markets and to reduce the licensee's incentive to invest in the development and improvement of its technology. Article 4(1)(d) does not extend to restrictions on the licensee's use of third-party technology which competes with the licensed technology. Although such non-compete obligations may have foreclosure effects on third-party technologies (see Section 4.2.7), they usually do not have the effect of reducing the incentive of licensees to invest in the development and improvement of their own technologies.

3.4.3. *Agreements between non-competitors*

(117) Article 4(2) TTBER lists the hardcore restrictions for licensing between non-competitors. According to this provision, the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility to impose a maximum sale price or recommend a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
 - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;
 - (ii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
 - (iii) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
 - (iv) the restriction of sales to end-users by a licensee operating at the wholesale level of trade;
 - (v) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

Price fixing

(118) The hardcore restriction of competition set out in Article 4(2)(a) concerns the fixing of prices charged when selling products to third parties. More specifically, that provision covers restrictions which have as their direct or indirect object the establishment of a fixed or a minimum selling price or a fixed or minimum price level to be observed by the licensor or the licensee when selling products to third parties. In the case of agreements that directly establish the selling price, the restriction is clear-cut. However, the fixing of selling prices can also be achieved through indirect means. Examples of the latter are agreements fixing margins, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties,

or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations. Similarly, direct or indirect price fixing can be made more effective when combined with measures that reduce the licensee's incentive to lower its selling price, such as the licensor obliging the licensee to apply a most-favoured-customer clause, that is to say, an obligation to grant a customer any more favourable terms granted to any other customer. The same means can be used to make maximum or recommended prices work as fixed or minimum selling prices. However, the provision of a list of recommended prices to or the imposition of a maximum price on the licensee by the licensor is not considered in itself as leading to fixed or minimum selling prices.

Restrictions on passive sales by the licensee

- (119) Article 4(2)(b) identifies as hardcore restrictions of competition agreements or concerted practices that have as their direct or indirect object the restriction of passive sales ⁽⁶²⁾ by licensees of products incorporating the licensed technology ⁽⁶³⁾. Passive sales restrictions on the licensee may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees. It may also result from indirect measures aimed at inducing the licensee to refrain from making such sales, such as financial incentives and the implementation of a monitoring system aimed at verifying the effective destination of the licensed products. Quantity limitations may be an indirect means to restrict passive sales. The Authority will not assume that quantity limitations as such serve this purpose. However, it will assume otherwise where quantity limitations are used to implement an underlying market partitioning agreement. Indications thereof include the adjustment of quantities over time to cover only local demand, the combination of quantity limitations and an obligation to sell minimum quantities in the territory, as well as minimum royalty obligations linked to sales in the territory, differentiated royalty rates depending on the destination of the products and the monitoring of the destination of products sold by individual licensees. The general hardcore restriction covering passive sales by licensees is subject to a number of exceptions, which are dealt with in points (120) to (125).
- (120) Exception 1: Article 4(2)(b) does not cover sales restrictions (both active and passive) on the licensor. All sales restrictions on the licensor are block-exempted up to the market share threshold of 30 %. The same applies to all restrictions on active sales by the licensee, with the exception of what is said on active selling in point (125). The block exemption of restrictions on active selling is based on the assumption that such restrictions promote investments, non-price competition and improvements in the quality of services provided by the licensees by solving free rider problems and hold-up problems. In the case of restrictions of active sales between licensees' territories or customer groups, it is not necessary that the protected licensee has been granted an exclusive territory or an exclusive customer group. The block exemption also applies to active sales restrictions where more than one licensee has been appointed for a particular territory or customer group. Efficiency enhancing investment is likely to be promoted where a licensee can be sure that it will only face active sales competition from a limited number of licensees inside the territory and not also from licensees outside the territory.
- (121) Exception 2: Restrictions on active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor do not constitute hardcore restrictions of competition (see Article 4(2)(b)(i)) and are block-exempted. It is presumed that up to the market share threshold such restraints, where restrictive of competition, promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee. For a territory or customer group to be reserved for the licensor, the licensor does not actually have to be producing with the licensed technology in the territory or for the customer group in question. A territory or customer group can also be reserved by the licensor for later exploitation.

⁽⁶²⁾ For a definition of passive sales, see point (108) of these guidelines and the Authority guidelines on vertical restraints cited in footnote 44, point 51.

⁽⁶³⁾ This hardcore restriction applies to technology transfer agreements concerning trade within the EEA. In so far as technology transfer agreements concern exports outside the EEA or imports/re-imports from outside the EEA see judgment of the Court of Justice in Case C-306/96, *Javico v Yves Saint Laurent* [1998] ECR I-1983. In that judgment the ECJ held in paragraph 20 that 'an agreement in which the reseller gives to the producer an undertaking that it will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States'.

- (122) Exception 3: Article 4(2)(b)(ii) brings under the block exemption a restriction whereby the licensee is obliged to produce products incorporating the licensed technology only for its own (captive) use. Where the contract product is a component the licensee can thus be obliged to use that product only for incorporation into its own products and can be obliged not to sell the product to other producers. The licensee must however be able to actively and passively sell the products as spare parts for its own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions are also dealt with in Section 4.2.5.
- (123) Exception 4: As in the case of agreements between competitors (see point (112) above) the block exemption also applies to agreements whereby the licensee is obliged to produce the contract products only for a particular customer in order to provide that customer with an alternative source of supply, regardless of the duration of the licence agreement (cf. Article 4(2)(b)(iii)). In the case of agreements between non-competitors, such restrictions are unlikely to be caught by Article 53(1).
- (124) Exception 5: Article 4(2)(b)(iv) brings under the block exemption an obligation on the licensee, if operating at the wholesale level of trade, not to sell to end-users and thus only to sell to retailers. Such an obligation allows the licensor to assign the licensee to the wholesale distribution function and normally falls outside Article 53(1) ⁽⁶⁴⁾.
- (125) Exception 6: Finally Article 4(2)(b)(v) brings under the block exemption a restriction on the licensee not to sell to unauthorised distributors. This exception allows the licensor to impose an obligation on the licensees to form part of a selective distribution system. In that case, however, the licensees must according to Article 4(2)(c) be permitted to sell both actively and passively to end-users, without prejudice to the possibility to restrict the licensee to a wholesale function as provided for in Article 4(2)(b)(iv) (see point (124) above). Within the territory where the licensor operates a selective distribution system, this system may not be combined with exclusive territories or exclusive customer groups where this would lead to a restriction of active or passive sales to end-users as that would lead to a hardcore restriction under Article 4(2)(c), without prejudice to the possibility of prohibiting a licensee from operating out of an unauthorised place of establishment.
- (126) Restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee, while normally a hardcore restriction, may fall outside Article 53(1) for a certain duration if the restraints are objectively necessary for the protected licensee to penetrate a new market. This may be the case where licensees have to commit substantial investments in production assets and promotional activities in order to start up and develop a new market. The risks facing a new licensee may therefore be substantial, in particular since promotional expenses and investment in assets required to produce on the basis of a particular technology are often sunk, that is to say, that upon leaving that particular field of activity the investment cannot be used by the licensee for other activities or sold other than at a significant loss. For instance, the licensee may be the first to produce and sell a new type of product or the first to apply a new technology. In such circumstances, it is often the case that licensees would not enter into the licence agreement without protection for a certain period of time against (active and) passive sales into their territory or to their customer groups by other licensees. Where substantial investments by the licensee are necessary to start up and develop a new market, restrictions of passive sales by other licensees into such a territory or to such a customer group fall outside Article 53(1) for the period necessary for the licensee to recoup those investments. In most cases a period of up to two years from the date on which the contract product was first put on the market in the exclusive territory by the licensee in question or sold to its exclusive customer group would be considered sufficient for the licensee to recoup the investments made. However, in an individual case a longer period of protection for the licensee might be necessary in order for the licensee to recoup the costs occurred.
- (127) Similarly, a prohibition imposed on all licensees not to sell to certain categories of end-users may not be restrictive of competition if such a restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.

⁽⁶⁴⁾ See in this respect Case 26/76, *Metro (I)* [1977] ECR 1875.

3.5. Excluded restrictions

- (128) Article 5 of the TTBER lists three types of restrictions that are not block-exempted and which thus require individual assessment of their anti-competitive and pro-competitive effects. The purpose of Article 5 is to avoid block exemption of agreements that may reduce the incentive to innovate. It follows from Article 5 that the inclusion in a licence agreement of any of the restrictions contained in that Article does not prevent the application of the block exemption to the rest of the agreement, if the remainder is severable from the excluded restriction(s). It is only the individual restriction in question that is not covered by the block exemption, implying that individual assessment is required.

Exclusive grant-backs

- (129) Article 5(1)(a) TTBER concerns exclusive grant-backs (that is to say an exclusive licence back to the licensor of the licensee's improvement) or assignments to the licensor of improvements of the licensed technology. An obligation to grant the licensor an exclusive licence to improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting the improvements, including by way of licensing to third parties. An exclusive grant-back is defined as a grant-back which prevents the licensee (which is the innovator and licensor of the improvement in this case) from exploiting the improvement (either for its own production or for licensing out to third parties). This is the case both where the improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology. According to Article 5(1)(a) such obligations are not covered by the block exemption.
- (130) The application of Article 5(1)(a) does not depend on whether or not the licensor pays consideration in return for acquiring the improvement or for obtaining an exclusive licence. However, the existence and level of such consideration may be a relevant factor in the context of an individual assessment under Article 53. When grant-backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate. In the assessment of exclusive grant-backs outside the scope of the block exemption the market position of the licensor on the technology market is also a relevant factor. The stronger the position of the licensor, the more likely it is that exclusive grant-back obligations will have restrictive effects on competition in innovation. The stronger the position of the licensor's technology the more important it is that the licensee can become an important source of innovation and future competition. The negative impact of grant-back obligations can also be increased in case of parallel networks of licence agreements containing such obligations. When available technologies are controlled by a limited number of licensors that impose exclusive grant-back obligations on licensees, the risk of anti-competitive effects is greater than where there are a number of technologies only some of which are licensed on exclusive grant-back terms.
- (131) Non-exclusive grant-back obligations are covered by the safe harbour of the TTBER. This is the case even where they are non-reciprocal, that is to say, only imposed on the licensee, and where under the agreement the licensor is entitled to feed-on the improvements to other licensees. A non-reciprocal grant-back obligation may promote the dissemination of new technology by permitting the licensor to freely determine whether and to what extent to pass on its own improvements to its licensees. A feed-on clause may also promote the dissemination of technology, in particular when each licensee knows at the time of contracting that it will be on an equal footing with other licensees in terms of the technology on the basis of which it is producing.
- (132) Non-exclusive grant-back obligations may in particular have negative effects on innovation in the case of cross-licensing between competitors where a grant-back obligation on both parties is combined with an obligation on both parties to share improvements of its own technology with the other party. The sharing of all improvements between competitors may prevent each competitor from gaining a competitive lead over the other (see also point (241) below). However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to permit them to develop their respective technologies and where the licence does not lead them to use the same technological base in the design of their products. This is the case where the purpose of the licence is to create design freedom rather than to improve the technological base of the licensee.

Non-challenge and termination clauses

- (133) The excluded restriction set out in Article 5(1)(b) TTBER concerns non-challenge clauses, that is to say, direct or indirect obligations not to challenge the validity of the licensor's intellectual property, without prejudice to the possibility, in the case of an exclusive licence, for the licensor to terminate the technology transfer agreement in the event that the licensee challenges the validity of any of the licensed technology rights.
- (134) The reason for excluding non-challenge clauses from the scope of the block exemption is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid. In the interest of undistorted competition and in accordance with the principles underlying the protection of intellectual property, invalid intellectual property rights should be eliminated. Invalid intellectual property stifles innovation rather than promoting it. Article 53(1) is likely to apply to non-challenge clauses where the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are prevented from using it or are only able to use it against payment of royalties. In such cases the conditions of Article 53(3) are unlikely to be fulfilled. However, if the licensed technology is related to a technically outdated process which the licensee does not use, or if the licence is granted for free, no restriction of competition arises ⁽⁶⁵⁾. As to non-challenge clauses in the context of settlement agreements see points (242) and (243) below.
- (135) Generally a clause obliging the licensee not to challenge the ownership of the technology rights does not constitute a restriction of competition within the meaning of Article 53(1). Whether or not the licensor has the ownership of the technology rights, the use of the technology by the licensee and any other party is dependent on obtaining a licence in any event, and competition would thus generally not be affected ⁽⁶⁶⁾.
- (136) Article 5(1)(b) TTBER also excludes from the safe harbour of the block exemption the right, in the context of non-exclusive licences, for the licensor to terminate the agreement in the event that the licensee challenges the validity of any of the intellectual property rights that the licensor holds in the EEA. Such a termination right can have the same effect as a non-challenge clause, in particular where switching away from the licensor's technology would result in a significant loss to the licensee (for example where the licensee has already invested in specific machines or tools which cannot be used for producing with another technology) or where the licensor's technology is a necessary input for the licensee's production. For example, in the context of standard essential patents the licensee producing a standard compliant product will necessarily have to use all patents reading on the standard. In such a case, challenging the validity of the relevant patents may result in a significant loss if the technology transfer agreement is terminated. Where the licensor's technology is not standard essential, but has a very significant market position, the disincentive to challenge may also be high considering the difficulty for the licensee in finding a viable alternative technology to license-in. The question whether the licensee's loss of profit would be significant, and therefore act as a strong disincentive to challenge, would need to be assessed on a case-by-case basis.
- (137) In the scenarios described in point (136), the licensee may be deterred from challenging the validity of the intellectual property right if it would risk the termination of the licensing agreement and thus face significant risks which go far beyond its royalty obligations. However, it should also be noted that, outside the context of these scenarios a termination clause will often not provide a significant disincentive to challenge and therefore not produce the same effect as a non-challenge clause.
- (138) The public interest of strengthening the incentive of the licensor to license out by not being forced to continue dealing with a licensee that challenges the very subject matter of the licence agreement has to be balanced against the public interest to eliminate any obstacle to economic activity which may arise where an intellectual property right was granted in error ⁽⁶⁷⁾. In balancing those interests it should be taken into account whether the licensee fulfils all the obligations under the agreement at the time of the challenge, in particular the obligation to pay the agreed royalties.
- (139) In the case of exclusive licensing, termination clauses are usually less likely on balance to have anti-competitive effects. Once the licence is granted, the licensor may find itself in a particular situation of dependency, as the licensee will be its only source of income as regards the licensed technology rights if royalties are dependent on production with the licensed technology rights, as may often be an efficient way to structure royalty payments. In this scenario, the incentives for innovation and for licensing out could be undermined if, for example, the

⁽⁶⁵⁾ See in this respect Case 65/86, *Bayer v Sülthofer* [1988] ECR 5249.

⁽⁶⁶⁾ Cf. in respect of challenging the ownership of a trademark Commission Decision in *Moosehead/Whitbread* (OJ L 100, 20.4.1990, p. 32).

⁽⁶⁷⁾ Case 193/83 *Windsurfing International* [1986] ECR 611, paragraph 92.

licensor were to be locked into an agreement with an exclusive licensee which no longer makes significant efforts to develop, produce and market the product (to be) produced with the licensed technology rights ⁽⁶⁸⁾. This is why the TTBER block-exempts termination clauses for exclusive licensing agreements as long as also the other conditions of the safe harbour, such as respecting the market share threshold, are fulfilled. Outside the safe harbour, a case-by-case assessment has to be carried out taking into account the different interests as described in the point (138) above.

- (140) Moreover, the Authority takes a more favourable view of non-challenge and termination clauses relating to know-how where the recovery of the licensed know-how is likely to be impossible or very difficult once it is disclosed. In such cases, an obligation on the licensee not to challenge the licensed know-how promotes dissemination of new technology, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee. Therefore, non-challenge and termination clauses solely concerning know-how are not excluded from the scope of the TTBER.

Limiting the licensee's use or development of its own technology (between non-competitors)

- (141) In the case of agreements between non-competitors, Article 5(2) excludes from the scope of the block exemption any direct or indirect obligation limiting the licensee's ability to exploit its own technology rights or limiting the ability of the parties to the agreement to carry out research and development, unless that restriction is indispensable to prevent the disclosure of licensed know-how to third parties. The content of this condition is the same as that of Article 4(1)(d) of the hardcore list concerning agreements between competitors, which is dealt with in points (115) and (116) of these guidelines. However, in the case of agreements between non-competitors it cannot be considered that such restrictions generally have negative effects on competition, or that the conditions of Article 53(3) are generally not satisfied ⁽⁶⁹⁾. Individual assessment is therefore required.
- (142) In the case of agreements between non-competitors, the licensee normally does not own a competing technology. However, there may be cases where for the purposes of the block exemption the parties are considered non-competitors despite the fact that the licensee does own a competing technology. This is the case where the licensee owns a technology but does not license it and the licensor is not an actual or potential supplier on the product market. For the purposes of the block exemption, in such circumstances, the parties are neither competitors on the technology market nor competitors on the downstream product market ⁽⁷⁰⁾. In such cases it is important to ensure that the licensee is not restricted in its ability to exploit its own technology and further develop it. This technology constitutes a competitive constraint in the market, which should be preserved. In such a situation restrictions on the licensee's use of its own technology rights or on research and development are normally considered to be restrictive of competition and not to satisfy the conditions of Article 53(3). For instance, an obligation on the licensee to pay royalties not only on the basis of products it produces with the licensed technology but also on the basis of products it produces only with its own technology will generally limit the ability of the licensee to exploit its own technology and thus be excluded from the scope of the block exemption.
- (143) In cases where the licensee does not own a competing technology or is not already developing such a technology, a restriction on the ability of the parties to carry out independent research and development may be restrictive of competition where only a few technologies are available. In that case the parties may be an important (potential) source of innovation in the market. This is particularly so where the parties possess the necessary assets and skills to carry out further research and development. In that case the conditions of Article 53(3) are unlikely to be fulfilled. In other cases where a number of technologies are available and where the parties do not possess special assets or skills, the restriction on research and development is likely either to fall outside Article 53(1) for lack of an appreciable restrictive effect or to satisfy the conditions of Article 53(3). The restraint may promote

⁽⁶⁸⁾ In the context of an agreement which is technically not an exclusive agreement, and where a termination clause is thus not covered by the safe harbour of the TTBER, the licensor may, in a specific case, be in a similar situation of dependency in relation to a licensee with considerable buyer power. Such dependency will be taken into account in the individual assessment.

⁽⁶⁹⁾ See point (14) above.

⁽⁷⁰⁾ See point (36) above.

the dissemination of new technology by assuring the licensor that the licence does not create a new competitor and by inducing the licensee to focus on the exploitation and development of the licensed technology. Moreover, Article 53(1) only applies where the agreement reduces the licensee's incentive to improve and exploit its own technology. This is, for instance, not likely to be the case where the licensor is entitled to terminate the licence agreement once the licensee commences to produce on the basis of its own competing technology. Such a right does not reduce the licensee's incentive to innovate, since the agreement can only be terminated when a commercially viable technology has been developed and products produced on the basis thereof are ready to be put on the market.

3.6. Withdrawal and non-application of the Block Exemption Regulation

3.6.1. Withdrawal procedure

- (144) According to Article 6 of the TTBER, the Authority and the competition authorities of the EFTA states may withdraw the benefit of the block exemption in respect of individual agreements that are likely to have anticompetitive effects (account must be taken of both actual and potential effects) and do not fulfil the conditions of Article 53(3). The power of the competition authorities of the EFTA states to withdraw the benefit of the block exemption is limited to cases where the relevant geographic market is no wider than the territory of the EFTA State in question.
- (145) The four conditions of Article 53(3) are cumulative and must all be fulfilled for the exception rule to be applicable ⁽⁷¹⁾. The block exemption can therefore be withdrawn where a particular agreement fails to fulfil one or more of the four conditions.
- (146) Where the withdrawal procedure is applied, the withdrawing authority bears the burden of proving that the agreement falls within the scope of Article 53(1) and that the agreement does not satisfy all four conditions of Article 53(3). Given that withdrawal implies that the agreement in question restricts competition within the meaning of Article 53(1) and does not fulfil the conditions of Article 53(3), withdrawal is necessarily accompanied by a negative decision based on Articles 5, 7 or 9 of Chapter II of Protocol 4.
- (147) According to Article 6 of the TTBER, withdrawal may in particular be warranted in the following circumstances:
- (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;
 - (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees or because the only technology owner ready to license out relevant technology rights concludes an exclusive licence with a licensee who is already active on the product market on the basis of substitutable technology rights. In order to qualify as relevant, the technology rights need to be both technically and commercially substitutable in order for the licensee to be active on the relevant product market.
- (148) Articles 4 and 5 of the TTBER, containing the list of hardcore restrictions of competition and excluded restrictions, aim at ensuring that block-exempted agreements do not reduce the incentive to innovate, do not delay the dissemination of technology, and do not unduly restrict competition between the licensor and licensee or between licensees. However, the list of hardcore restrictions and the list of excluded restrictions do not take into account all the possible impacts of licence agreements. In particular, the block exemption does not take account of any cumulative effect of similar restrictions contained in networks of licence agreements. Licence agreements may lead to foreclosure of third parties both at the level of the licensor and at the level of the licensee. Foreclosure of other licensors may stem from the cumulative effect of networks of licence agreements prohibiting the licensees from exploiting competing technologies, leading to the exclusion of other (potential) licensors. Foreclosure of licensors is likely to arise in cases where most of the undertakings on the market that could (efficiently) take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees face relatively high barriers to entry. Foreclosure of other licensees may stem from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and

⁽⁷¹⁾ See in this respect point 42 of the Authority guidelines on the application of Article 53(3) of the EEA Agreement, cited in footnote 4.

thereby preventing potential licensees from gaining access to the necessary technology. The issue of foreclosure is examined in more detail in Sections 4.2.2 and 4.2.7. In addition, the Authority is likely to withdraw the benefit of the block exemption where, in individual agreements, a significant number of licensors of competing technologies impose on their licensees to extend to them more favourable conditions agreed with other licensors.

3.6.2. *Non-application of the Block Exemption Regulation*

- (149) A special procedure for the disapplication of the TTBER in the EFTA states is set out in Article 7(2) of the TTBER as incorporated in the EEA Agreement. Whereas the Commission can disapply the TTBER by means of a regulation addressed to the EU Member States, Article 7(2) of the TTBER enables the Authority to declare by means of a recommendation that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market in the EFTA states, the TTBER shall not apply to technology transfer agreements containing specific restraints relating to that market. The recommendation is addressed to the EFTA state or EFTA states comprising the relevant market in question. Following the adoption of a recommendation by the Authority under Article 7, the EFTA states have three months to notify the Authority whether they accept the recommendation. Silence on the part of an EFTA State will be understood as acceptance. If an EFTA state accepts, or is deemed to accept, the recommendation, the EFTA State must implement the recommendation within three months from the day it was adopted ⁽⁷²⁾.
- (150) Whereas withdrawal of the benefit of the TTBER by the Authority under Article 6 implies the adoption of a decision under Articles 7 or 9 of Chapter II of Protocol 4 to the Surveillance and Court Agreement, the effect of the disapplication of the block exemption following an Authority recommendation and acceptance by the EFTA states under Article 7 of the TTBER is merely to remove, in respect of the restraints and the markets concerned, the benefit of the TTBER and to restore the full application of Article 53(1) and (3) of the EEA Agreement. Following the disapplication of the block exemption for a particular market in respect of agreements containing certain restraints, the criteria developed by the relevant case-law of the EFTA Court and the Union Courts and by notices and previous decisions adopted by the Authority will give guidance on the application of Article 53 to individual agreements. Where appropriate, the Authority will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
- (151) For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of licence agreements containing restraints, or combinations of restraints, producing similar effects on the market.
- (152) Article 7 of the TTBER does not entail an obligation on the part of the Authority to act where the 50 % market-coverage ratio is exceeded. In general, disapplication is appropriate when it is likely that access to the relevant market or competition therein is appreciably restricted. In assessing the need to apply Article 7, the Authority will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the EFTA states.
- (153) Any recommendation adopted under Article 7 must clearly set out its scope. This means, first, that the Authority must define the relevant product and geographic market(s) and, secondly, that it must identify the type of licensing restraint in respect of which the TTBER will no longer apply. As regards the latter aspect, the Authority may modulate the scope of its recommendation according to the competition concern which it intends to address. For instance, while all parallel networks of non-compete arrangements will be taken into account for the purpose of establishing the 50 % market coverage ratio, the Authority may nevertheless restrict the scope of the recommendation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, due to the lesser degree of foreclosure attributable to such restraints. Where appropriate, the Authority may also provide guidance by specifying the market share

⁽⁷²⁾ However, it follows from Article 7(2) of the TTBER that if an EFTA state addressee notifies the EFTA Surveillance Authority that it does not accept its recommendation, the Authority shall notify the Commission of this response. Should the Commission disagree with the position of the EFTA state in question, Article 92(2) of the EEA Agreement shall apply.

level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect. In general, when the market share of the products incorporating a technology licensed by an individual licensor does not exceed 5 %, the agreement or network of agreements covering that technology is not considered to contribute significantly to a cumulative foreclosure effect ⁽⁷³⁾.

- (154) The transitional period for the disapplication of the TTBER of not less than six months that the Authority will have to set in the recommendation under Article 7(2), should allow the undertakings concerned to adapt their agreements to take account of the disapplication of the TTBER. The Authority considers that the transitional period should run from the date of adoption by an EFTA state addressee of national implementing measures.
- (155) The recommendation and national implementing measures disapplying the TTBER will not affect the block exempted status of the agreements concerned for the period preceding the entry into force of the national implementing measures.

4. APPLICATION OF ARTICLE 53(1) AND 53(3) OUTSIDE THE SCOPE OF THE TTBER

4.1. The general framework for analysis

- (156) Agreements that fall outside the block exemption, for example because the market share thresholds are exceeded or the agreement involves more than two parties, are subject to individual assessment. Agreements that either do not restrict competition within the meaning of Article 53(1) or which fulfil the conditions of Article 53(3) are valid and enforceable. It is recalled that there is no presumption of illegality of agreements that fall outside the scope of the block exemption provided that they do not contain hardcore restrictions of competition. In particular, there is no presumption that Article 53(1) applies merely because the market share thresholds are exceeded. Individual assessment based on the principles described in these guidelines is always required.

Safe harbour if there are sufficient independently controlled technologies

- (157) In order to promote predictability beyond the application of the TTBER and to confine detailed analysis to cases that are likely to present real competition concerns, the Authority takes the view that outside the area of hardcore restrictions Article 53 is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user. In assessing whether the technologies are sufficiently substitutable the relative commercial strength of the technologies in question must be taken into account. The competitive constraint imposed by a technology is limited if it does not constitute a commercially viable alternative to the licensed technology. For instance, if due to network effects in the market consumers have a strong preference for products incorporating the licensed technology, other technologies already on the market or likely to come to market within a reasonable period of time may not constitute a real alternative and may therefore impose only a limited competitive constraint.
- (158) The fact that an agreement falls outside the safe harbour described in point (157) does not imply that the agreement is caught by Article 53(1) and, if so, that the conditions of Article 53(3) are not satisfied. As for the market share safe harbour of the TTBER, this additional safe harbour merely creates a presumption that the agreement is not prohibited by Article 53. Outside the safe harbour individual assessment of the agreement based on the principles developed in these guidelines is required.

4.1.1. *The relevant factors*

- (159) In the application of Article 53 to individual cases it is necessary to take due account of the way in which competition operates on the market in question. The following factors are particularly relevant in this respect:
 - (a) the nature of the agreement;
 - (b) the market position of the parties;

⁽⁷³⁾ See in this respect point 8 of the Authority notice on agreements of minor importance, cited in footnote 22.

- (c) the market position of competitors;
 - (d) the market position of buyers on the relevant markets;
 - (e) entry barriers; and
 - (f) maturity of the market.
- (160) The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.
- (161) Technology transfer agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the competitive relationship between the parties and the restraints that it contains. In the latter regard it is necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement has been implemented by the parties and from the incentives that they face.
- (162) The market position of the parties, including any undertakings *de facto* or *de jure* controlled by the parties, provides an indication of the degree of market power, if any, possessed by the licensor, the licensee or both. The higher their market share the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. These competitive advantages may for instance result from being a first mover in the market, from holding essential patents or from having superior technology. However, market shares are always only one factor in assessing market positions. For instance, in particular in the case of technology markets, market shares may not always be a good indicator of the relative strength of the technology in question and the market share figures may differ considerably depending on the different calculation methods.
- (163) Market shares and possible competitive advantages and disadvantages are also used to assess the market position of competitors. The stronger the actual competitors and the greater their number the less risk there is that the parties will be able to exercise market power individually. However, if the number of competitors is rather small and their market position (size, costs, R & D potential, etc.) is rather similar, this market structure may increase the risk of collusion.
- (164) The market position of buyers provides an indication of whether or not one or more buyers possess buyer power. The first indicator of buyer power is the market share of the buyer on the purchase market. This share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the buyer on its resale market, including characteristics such as a wide geographic spread of its outlets, and its brand image amongst final consumers. In some circumstances buyer power may prevent the licensor and/or the licensee from exercising market power on the market and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong buyers have the capacity and the incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where the strong buyers merely extract favourable terms from the supplier or simply pass on any price increase to their customers, the position of the buyers is not such as to prevent the exercise of market power by the licensee on the product market and therefore not such as to solve the competition problem on that market ⁽⁷⁴⁾.
- (165) Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low.

⁽⁷⁴⁾ See in this respect Case T-228/97, *Irish Sugar* [1999] ECR II-2969, paragraph 101.

- (166) Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage or brand loyalty of consumers created by strong advertising over a period of time. Restrictive agreements entered into by undertakings may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at all stages of the research and development, production and distribution process. The question whether certain of these factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs which have to be incurred to enter or be active on a market but which are lost when the market is exited. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.
- (167) In a mature market, that is to say a market that has existed for some time, where the technology used is well known and widespread and not changing very much and in which demand is relatively stable or declining, restrictions of competition are more likely to have negative effects than in more dynamic markets.
- (168) In the assessment of particular restraints other factors may have to be taken into account. Such factors include cumulative effects, that is to say, the coverage of the market by similar agreements, the duration of the agreements, the regulatory environment and behaviour that may indicate or facilitate collusion such as price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

4.1.2. *Negative effects of restrictive licence agreements*

- (169) The negative effects on competition on the market that may result from restrictive technology transfer agreements include the following:
- (a) reduction of inter-technology competition between the companies operating on a technology market or on a market for products incorporating the technologies in question, including facilitation of collusion, both explicit and tacit;
 - (b) foreclosure of competitors by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry; and
 - (c) reduction of intra-technology competition between undertakings that produce products on the basis of the same technology.
- (170) Technology transfer agreements may reduce inter-technology competition, that is to say, competition between undertakings that license or produce on the basis of substitutable technologies. This is particularly the case where reciprocal obligations are imposed. For instance, where competitors transfer competing technologies to each other and impose a reciprocal obligation to provide each other with future improvements of their respective technologies and where this agreement prevents either competitor from gaining a technological lead over the other, competition in innovation between the parties is restricted (see also point (241) below).
- (171) Licensing between competitors may also facilitate collusion. The risk of collusion is particularly high in concentrated markets. Collusion requires that the undertakings concerned have similar views on what is in their common interest and on how the coordination mechanisms function. For collusion to work the undertakings must also be able to monitor each other's market behaviour and there must be adequate deterrents to ensure that there is an incentive not to depart from the common policy on the market, while entry barriers must be high enough to limit entry or expansion by outsiders. Agreements can facilitate collusion by increasing transparency in the market, by controlling certain behaviour and by raising barriers to entry. Collusion can also exceptionally be facilitated by licensing agreements that lead to a high degree of commonality of costs, because undertakings that have similar costs are more likely to have similar views on the terms of coordination ⁽⁷³⁾.

⁽⁷³⁾ See in this respect point 36 of the Authority guidelines on horizontal cooperation agreements, cited in footnote 29.

- (172) Licence agreements may also affect inter-technology competition by creating barriers to entry for and expansion by competitors. Such foreclosure effects may stem from restraints that prevent licensees from licensing from third parties or create disincentives for them to do so. For instance, third parties may be foreclosed where incumbent licensors impose non-compete obligations on licensees to such an extent that an insufficient number of licensees are available to third parties and where entry at the level of licensees is difficult. Suppliers of substitutable technologies may also be foreclosed where a licensor with a sufficient degree of market power ties together various parts of a technology and licenses them together as a package while only part of the package is essential to produce a certain product.
- (173) Licence agreements may also reduce intra-technology competition, that is to say, competition between undertakings that produce on the basis of the same technology. An agreement imposing territorial restraints on licensees, preventing them from selling into each other's territory reduces competition between them. Licence agreements may also reduce intra-technology competition by facilitating collusion between licensees. Moreover, licence agreements that reduce intra-technology competition may facilitate collusion between owners of competing technologies or reduce inter-technology competition by raising barriers to entry.

4.1.3. Positive effects of restrictive licence agreements and the framework for analysing such effects

- (174) Even restrictive licence agreements often also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. The assessment of the possible pro-competitive effects takes place within the framework of Article 53(3), which contains an exception from the prohibition rule of Article 53(1). For that exception to be applicable the licence agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned. An undertaking that relies on Article 53(3) must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied ⁽⁷⁶⁾.
- (175) The assessment of restrictive agreements under Article 53(3) is made within the actual context in which they occur ⁽⁷⁷⁾ and on the basis of the facts existing at any given point in time. The assessment is therefore sensitive to material changes in the facts. The exception rule of Article 53(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case ⁽⁷⁸⁾. However, when applying Article 53(3) it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 53 cannot be applied without considering the *ex ante* investment and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 53(1) or fulfilling the conditions of Article 53(3), as the case may be, for the period of time required to recoup the investment.
- (176) The first condition of Article 53(3) requires an assessment of the objective benefits in terms of efficiencies produced by the agreement. In this respect, licence agreements have the potential of bringing together complementary technologies and other assets allowing new or improved products to be put on the market or existing products to be produced at lower cost. Outside the context of hardcore cartels, licensing often occurs because it is more efficient for the licensor to licence the technology than to exploit it itself. This may particularly be the case where the licensee already has access to the necessary production assets. The agreement then allows the licensee to gain access to a technology that can be combined with those assets, allowing it to exploit new or improved technologies. Another example of potentially efficiency-enhancing licensing is where the licensee already has a technology and the combination of this technology and the licensor's technology gives rise to synergies. When the two technologies are combined the licensee may be able to attain a cost/output configuration that would not otherwise be possible. Licence agreements may also give rise to efficiencies at the distribution stage in the same way as vertical distribution agreements. Such efficiencies can take the form of cost savings or the provision of valuable services to consumers. The positive effects of vertical agreements are described in the

⁽⁷⁶⁾ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 82.

⁽⁷⁷⁾ See Joined Cases 25/84 and 26/84, *Ford* [1985] ECR 2725; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 103.

⁽⁷⁸⁾ See in this respect for example Commission Decision of 3 March 1999, *TPS* (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 53(1) also only applies as long as the agreement has a restrictive object or restrictive effects.

Authority guidelines on vertical restraints ⁽⁷⁹⁾. A further example of possible efficiency gains is to be found in agreements whereby technology owners assemble a technology package for licensing to third parties. Such pooling arrangements may in particular reduce transaction costs, as licensees do not have to conclude separate licence agreements with each licensor. Pro-competitive licensing may also occur to ensure design freedom. In sectors where large numbers of intellectual property rights exist and where individual products may infringe upon a number of existing and future property rights, licence agreements whereby the parties agree not to assert their property rights against each other are often pro-competitive because they allow the parties to develop their respective technologies without the risk of subsequent infringement claims.

- (177) In the application of the indispensability test contained in Article 53(3) the Authority will in particular examine whether individual restrictions make it possible to perform the activity in question more efficiently than would have been the case in the absence of the restriction concerned. In making this assessment the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 53(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable. In some cases, it may also be necessary to examine whether the agreement as such is indispensable to achieve the efficiencies. This may for example be so in the case of technology pools that include complementary but non-essential technologies ⁽⁸⁰⁾, in which case it must be examined to what extent the inclusion of those technologies gives rise to particular efficiencies or whether, without a significant loss of efficiencies, the pool could be limited to technologies for which there are no substitutes. In the case of simple licensing between two parties it is generally not necessary to go beyond an examination of whether individual restraints are indispensable. Normally there is no less restrictive alternative to the licence agreement as such.
- (178) The condition that consumers must receive a fair share of the benefits implies that consumers of the products produced under the licence must at least be compensated for the negative effects of the agreement ⁽⁸¹⁾. This means that the efficiency gains must fully offset the likely negative impact on prices, output and other relevant factors caused by the agreement. They may do so by changing the cost structure of the undertakings concerned, giving them an incentive to reduce price, or by allowing consumers to gain access to new or improved products, compensating for any likely price increase ⁽⁸²⁾.
- (179) The last condition of Article 53(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 53(3) the relationship between Article 53(3) and Article 54 must be taken into account. In accordance with settled case-law concerning Article 101(3) and Article 102 of the Treaty, the application of Article 53(3) cannot prevent the application of Article 54 ⁽⁸³⁾. Moreover, since Articles 53 and 54 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 53(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position ⁽⁸⁴⁾.
- (180) The fact that the agreement substantially reduces one dimension of competition does not necessarily mean that competition is eliminated within the meaning of Article 53(3). A technology pool, for instance, can result in an

⁽⁷⁹⁾ Cited in footnote 44. See in particular paragraphs 106 et seq.

⁽⁸⁰⁾ As to these concepts see Section 4.4.1.

⁽⁸¹⁾ See point 85 of the Authority guidelines on the application of Article 53(3) of the EEA Agreement, cited in footnote 4.

⁽⁸²⁾ Idem, paragraphs 98 and 102.

⁽⁸³⁾ See by analogy paragraph 130 of Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, cited in footnote 4. Similarly, the application of Article 53(3) does not prevent the application of the EEA rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 53(1), see in this regard Case C-309/99, *Wouters* [2002] ECR I-1577, paragraph 120.

⁽⁸⁴⁾ See in this respect Case T-51/89, *Tetra Pak (I)* [1990] ECR II-309. See also point 106 of the Authority guidelines on the application of Article 53(3) of the EEA Agreement cited in footnote 4 above.

industry standard, leading to a situation in which there is little competition in terms of the technological format. Once the main players in the market adopt a certain format, network effects may make it very difficult for alternative formats to survive. This does not imply, however, that the creation of a *de facto* industry standard always eliminates competition within the meaning of the last condition of Article 53(3). Within the standard, suppliers may compete on price, quality and product features. However, in order for the agreement to comply with Article 53(3), it must be ensured that the agreement does not unduly restrict competition and does not unduly restrict future innovation.

4.2. Application of Article 53 to various types of licensing restraints

- (181) This section deals with various types of restraints that are commonly included in licence agreements. Given their prevalence it is useful to provide guidance as to how they are assessed outside the safe harbour of the TTBER. Restraints that have already been dealt with in the other sections of these guidelines, in particular Sections 3.4 and 3.5, are only dealt with briefly in this section.
- (182) This section covers both agreements between non-competitors and agreements between competitors. In respect of the latter a distinction is made — where appropriate — between reciprocal and non-reciprocal agreements. No such distinction is required in the case of agreements between non-competitors. Indeed, when undertakings are neither actual nor potential competitors on a relevant technology market or on a market for products incorporating the licensed technology, a reciprocal licence is for all practical purposes no different from two separate licences. The situation is different for arrangements whereby the parties assemble a technology package, which is then licensed to third parties. Such arrangements are technology pools, which are dealt with in Section 4 below.
- (183) This section does not deal with obligations in licence agreements that are generally not restrictive of competition within the meaning of Article 53(1). These obligations include but are not limited to:
- (a) confidentiality obligations;
 - (b) obligations on licensees not to sublicense;
 - (c) obligations not to use the licensed technology rights after the expiry of the agreement, provided that the licensed technology rights remain valid and in force;
 - (d) obligations to assist the licensor in enforcing the licensed intellectual property rights;
 - (e) obligations to pay minimum royalties or to produce a minimum quantity of products incorporating the licensed technology; and
 - (f) obligations to use the licensor's trade mark or indicate the name of the licensor on the product.

4.2.1. Royalty obligations

- (184) The parties to a licence agreement are normally free to determine the royalty payable by the licensee and its mode of payment without being caught by Article 53(1). This principle applies both to agreements between competitors and agreements between non-competitors. Royalty obligations may for instance take the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology. In cases where the licensed technology relates to an input which is incorporated into a final product it is as a general rule not restrictive of competition that royalties are calculated on the basis of the price of the final product, provided that it incorporates the licensed technology ⁽⁸⁵⁾. In the case of software licensing royalties based on the number of users and royalties calculated on a per machine basis are generally compatible with Article 53(1).
- (185) In the case of licence agreements between competitors it should be borne in mind (see points (100) to (101) and (116) above) that in a limited number of circumstances royalty obligations may amount to price fixing, which is considered a hardcore restriction (see Article 4(1)(a)). It is a hardcore restriction under Article 4(1)(a) if competitors provide for reciprocal running royalties in circumstances where the licence is a sham, in that its purpose is not to allow an integration of complementary technologies or to achieve another pro-competitive aim. It is also a hardcore restriction under Article 4(1)(a) and 4(1)(d) if royalties extend to products produced solely with the licensee's own technology rights.

⁽⁸⁵⁾ This is without prejudice to the possible application of Article 54 to the setting of royalties (see Case 27/76, *United Brands*, paragraph 250, see also Case C-385/07 P, *Der Grüne Punkt — Duales System Deutschland GmbH* [2009] ECR I-6155, paragraph 142).

- (186) Other types of royalty arrangements between competitors are block-exempted up to the market share threshold of 20 % even if they restrict competition. Outside the safe harbour of the block exemption Article 53(1) may be applicable where competitors cross-license and impose running royalties that are clearly disproportionate compared to the market value of the licence and where such royalties have a significant impact on market prices. In assessing whether the royalties are disproportionate it is necessary to examine the royalties paid by other licensees on the product market for the same or substitute technologies. In such cases it is unlikely that the conditions of Article 53(3) are satisfied.
- (187) Notwithstanding the fact that the block exemption only applies as long as the technology rights are valid and in force, the parties can normally agree to extend royalty obligations beyond the period of validity of the licensed intellectual property rights without falling foul of Article 53(1). Once these rights expire, third parties can legally exploit the technology in question and compete with the parties to the agreement. Such actual and potential competition will normally be sufficient to ensure that the obligation in question does not have appreciable anti-competitive effects.
- (188) In the case of agreements between non-competitors the block exemption covers agreements whereby royalties are calculated on the basis of both products produced with the licensed technology and products produced with technologies licensed from third parties. Such arrangements may facilitate the metering of royalties. However, they may also lead to foreclosure by increasing the cost of using third-party inputs and may thus have effects similar to those of a non-compete obligation. If royalties are paid not just on products produced with the licensed technology but also on products produced with third-party technology, then the royalties will increase the cost of the latter products and reduce demand for third-party technology. Outside the scope of the block exemption the question whether the restriction has foreclosure effects must therefore be considered. For that purpose it is appropriate to use the analytical framework set out in Section 4.2.7 below. In the case of appreciable foreclosure effects such agreements are caught by Article 53(1) and unlikely to fulfil the conditions of Article 53(3), unless there is no other practical way of calculating and monitoring royalty payments.

4.2.2. *Exclusive licensing and sales restrictions*

- (189) For the purpose of these guidelines, it is useful to distinguish between restrictions as to production within a given territory (exclusive or sole licences) and restrictions on the sale of products incorporating the licensed technology into a given territory and to a given customer group (sales restrictions).

4.2.2.1. *Exclusive and sole licences*

- (190) An 'exclusive licence' means that the licensor itself is not permitted to produce on the basis of the licensed technology rights, nor is it permitted to license the licensed technology rights to third parties, in general or for a particular use or in a particular territory. This means that, in general or for that particular use or in that particular territory, the licensee is the only one allowed to produce on the basis of the licensed technology rights.
- (191) Where the licensor undertakes not to produce itself or license others to produce within a given territory, this territory may cover the whole world or any part of it. Where the licensor undertakes only not to licence third parties to produce within a given territory, the licence is a sole licence. Exclusive or sole licensing is often accompanied by sales restrictions that limit the parties as to where they may sell products incorporating the licensed technology.
- (192) Reciprocal exclusive licensing between competitors falls under Article 4(1)(c) TTBER, which identifies market and customer sharing between competitors as a hardcore restriction. Reciprocal sole licensing between competitors is, however, block-exempted up to the market share threshold of 20 %. Under such an agreement the parties mutually commit not to license their competing technologies to third parties. In cases where the parties have a significant degree of market power such agreements may facilitate collusion by ensuring that the parties are the only sources of output in the market based on the licensed technologies.

- (193) Non-reciprocal exclusive licensing between competitors is block-exempted up to the market share threshold of 20 %. Above the market share threshold it is necessary to analyse the likely anti-competitive effects of such exclusive licensing. Where the exclusive licence is worldwide it implies that the licensor leaves the market. In cases where exclusivity is limited to a particular territory such as an EEA State the agreement implies that the licensor abstains from producing goods and services inside the territory in question. In the context of Article 53(1), the competitive significance of the licensor must, in particular, be assessed. If the licensor has a limited market position on the product market or lacks the capacity to effectively exploit the technology in the licensee's territory, the agreement is unlikely to be caught by Article 53(1). A special case exists where the licensor and the licensee only compete on the technology market and the licensor, for instance being a research institute or a small research based undertaking, lacks the production and distribution assets to effectively bring to market products incorporating the licensed technology. In such cases Article 53(1) is unlikely to be infringed.
- (194) Exclusive licensing between non-competitors — to the extent that it is caught by Article 53(1) ⁽⁸⁶⁾ — is likely to fulfil the conditions of Article 53(3). The right to grant an exclusive licence is generally necessary in order to induce the licensee to invest in the licensed technology and to bring the products to market in a timely manner. This is in particular the case where the licensee must make large investments in further developing the licensed technology. To intervene against the exclusivity once the licensee has made a commercial success of the licensed technology would deprive the licensee of the fruits of its success and would be detrimental to competition, the dissemination of technology and innovation. The Authority will therefore only exceptionally intervene against exclusive licensing in agreements between non-competitors, irrespective of the territorial scope of the licence.
- (195) However, if the licensee already owns a substitutable technology used for in-house production, the exclusive licence might not be necessary in order to give incentives to the licensee to bring a product to the market. In such a scenario, the exclusive licensing may instead be caught by Article 53(1), in particular where the licensee has market power on the product market. The main situation in which intervention may be warranted is where a dominant licensee obtains an exclusive licence to one or more competing technologies. Such agreements are likely to be caught by Article 53(1) and unlikely to fulfil the conditions of Article 53(3). However, for Article 53(1) to apply entry into the technology market must be difficult and the licensed technology must constitute a real source of competition on the market. In such circumstances an exclusive licence may foreclose third-party licensees, raise the barriers to entry and allow the licensee to preserve its market power.
- (196) Arrangements whereby two or more parties cross-licence each other and undertake not to licence third parties give rise to particular concerns when the package of technologies resulting from the cross-licences creates a *de facto* industry standard to which third parties must have access in order to compete effectively on the market. In such cases the agreement creates a closed standard reserved for the parties. The Authority will assess such arrangements according to the same principles as those applied to technology pools (see Section 4.4). There will normally be a requirement that the technologies which support such a standard be licensed to third parties on fair, reasonable and non-discriminatory terms ⁽⁸⁷⁾. Where the parties to the arrangement compete with third parties on an existing product market and the arrangement relates to that product market, a closed standard is likely to have substantial exclusionary effects. This negative impact on competition can only be avoided by licensing also to third parties.

4.2.2.2. Sales restrictions

- (197) Also as regards sales restrictions there is an important distinction to be made between licensing between competitors and between non-competitors.
- (198) Restrictions on active and passive sales by one or both parties in a reciprocal agreement between competitors are hardcore restrictions of competition under Article 4(1)(c) TTBER. Such sales restrictions are caught by Article 53(1) and are unlikely to fulfil the conditions of Article 53(3). Such restrictions are generally considered market sharing, since they prevent the affected party from selling actively and passively into territories and to customer groups which it actually served or could realistically have served in the absence of the agreement.

⁽⁸⁶⁾ See the judgment in *Nungesser* cited in footnote 15.

⁽⁸⁷⁾ See in this respect the Commission's notice in the *Canon/Kodak* Case (OJ C 330, 1.11.1997, p. 10) and the *IGR Stereo Television* Case mentioned in the XI Report on Competition Policy, paragraph 94.

- (199) In the case of non-reciprocal agreements between competitors the block exemption applies to restrictions on active and/or passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party (see Article 4(1)(c)(i) TTBER). Above the market share threshold of 20 % sales restrictions between licensor and licensee are caught by Article 53(1) when one or both of the parties have a significant degree of market power. Such restrictions may, however, be indispensable for the dissemination of valuable technologies and may therefore fulfil the conditions of Article 53(3). This may be the case where the licensor has a relatively weak market position in the territory where it exploits the technology itself. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence of such restrictions the licensor would risk facing active competition in its main area of activity. Similarly, restrictions on active sales by the licensor may be indispensable, in particular, where the licensee has a relatively weak market position in the territory allocated to it and has to make significant investments in order to efficiently exploit the licensed technology.
- (200) The block exemption also covers restrictions on active sales into the territory or to the customer group allocated to another licensee, which was not a competitor of the licensor at the time when it concluded the licence agreement with the licensor. This is, however, only the case when the agreement between the parties in question is non-reciprocal (see Article 4(1)(c)(ii) TTBER). Above the market share threshold such active sales restrictions are likely to be caught by Article 53(1) when the parties have a significant degree of market power. The restraint is nevertheless likely to be indispensable within the meaning of Article 53(3) for the period of time required for the protected licensee to penetrate a new market and establish a market presence in the allocated territory or vis-à-vis the allocated customer group. This protection against active sales allows the licensee to overcome the asymmetry, which it faces due to the fact that some of the licensees are competing undertakings of the licensor and thus already established on the market. Restrictions on passive sales by licensees into a territory or to a customer group allocated to another licensee are hardcore restrictions under Article 4(1)(c) of the TTBER.
- (201) In the case of agreements between non-competitors sales restrictions between the licensor and a licensee are block-exempted up to the market share threshold of 30 %. Above the market share threshold restrictions on active and passive sales by licensees to territories or customer groups reserved exclusively for the licensor may be indispensable for the dissemination of valuable technologies and therefore fall outside Article 53(1) or fulfil the conditions of Article 53(3). This may be the case where the licensor has a relatively weak market position in the territory where it exploits itself the technology. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence of such restrictions the licensor would risk facing active competition in its main area of activity. In other cases sales restrictions on the licensee may be caught by Article 53(1) and may not fulfil the conditions of Article 53(3). This is likely to be the case where the licensor individually has a significant degree of market power and also where a series of similar agreements concluded by licensors which together hold a strong position on the market have a cumulative effect.
- (202) Sales restrictions on the licensor, when caught by Article 53(1), are likely to fulfil the conditions of Article 53(3) unless there are no real alternatives to the licensor's technology on the market or such alternatives are licensed by the licensee from third parties. Such restrictions and in particular restrictions on active sales are likely to be indispensable within the meaning of Article 53(3) in order to induce the licensee to invest in the production, marketing and sale of the products incorporating the licensed technology. It is likely that the licensee's incentive to invest would be significantly reduced if it faced direct competition from the licensor whose production costs are not burdened by royalty payments, possibly leading to sub-optimal levels of investment.
- (203) As regards sales restrictions between licensees in agreements between non-competitors, the TTBER block-exempts restrictions on active selling between territories or customer groups. Above the market share threshold of 30 % restrictions on active sales between licensees' territories and customer groups limit intra-technology competition and are likely to be caught by Article 53(1) when the individual licensee has a significant degree of market power. However, such restrictions may fulfil the conditions of Article 53(3) where they are necessary to prevent free riding and to induce the licensee to make the investment necessary for efficient exploitation of the licensed technology inside its territory and to promote sales of the licensed product. Restrictions on passive sales are covered by the hardcore list of Article 4(2)(b) of the TTBER (see points (119) to (127) above).

4.2.3. Output restrictions

- (204) Reciprocal output restrictions in licence agreements between competitors constitute a hardcore restriction as set out in Article 4(1)(b) of the TTBER (see point (103) above). Article 4(1)(b) does not cover output restrictions on the licensor's technology imposed on the licensee in a non-reciprocal agreement or on one of the licensees in an reciprocal agreement. Such restrictions are block-exempted up to the market share threshold of 20 %. Above the market share threshold, output restrictions on the licensee may restrict competition where the parties have a significant degree of market power. However, Article 53(3) is likely to apply in cases where the licensor's technology is substantially better than the licensee's technology and the output limitation substantially exceeds the output of the licensee prior to the conclusion of the agreement. In that case the effect of the output limitation is limited even in markets where demand is growing. In the application of Article 53(3) it must also be taken into account that such restrictions may be necessary in order to induce the licensor to disseminate its technology as widely as possible. For instance, a licensor may be reluctant to license its competitors if it cannot limit the licence to a particular production site with a specific capacity (a site licence). Where the licence agreement leads to a real integration of complementary assets, output restrictions on the licensee may therefore fulfil the conditions of Article 53(3). However, this is unlikely to be the case where the parties have substantial market power.
- (205) Output restrictions in licence agreements between non-competitors are block-exempted up to the market share threshold of 30 %. The main anti-competitive risk flowing from output restrictions on licensees in agreements between non-competitors is reduced intra-technology competition between licensees. The significance of such anti-competitive effects depends on the market position of the licensor and the licensees and the extent to which the output limitation prevents the licensee from satisfying demand for the products incorporating the licensed technology.
- (206) When output restrictions are combined with exclusive territories or exclusive customer groups, the restrictive effects are increased. The combination of the two types of restraints makes it more likely that the agreement serves to partition markets.
- (207) Output limitations imposed on the licensee in agreements between non-competitors may also have pro-competitive effects by promoting the dissemination of technology. As a supplier of technology, the licensor should normally be free to determine the output produced with the licensed technology by the licensee. If the licensor were not free to determine the output of the licensee, a number of licence agreements might not come into existence in the first place, which would have a negative impact on the dissemination of new technology. This is particularly likely to be the case where the licensor is also a producer, since the licensee's output may find its way back into the licensor's main area of operation and thus have a direct impact on those activities. On the other hand, it is less likely that output restrictions are necessary in order to ensure dissemination of the licensor's technology when they are combined with sales restrictions on the licensee prohibiting it from selling into a territory or customer group reserved for the licensor.

4.2.4. Field of use restrictions

- (208) Under a field of use restriction the licence is either limited to one or more technical fields of application or one or more product markets or industrial sectors. An industrial sector may encompass several product markets but not part of a product market. There are many cases in which the same technology can be used to make different products or can be incorporated into products belonging to different product markets. A new moulding technology may for instance be used to make plastic bottles and plastic glasses, each product belonging to a separate product market. However, a single product market may encompass several technical fields of use. For instance a new engine technology may be employed in four-cylinder engines and six-cylinder engines. Similarly, a technology to make chipsets may be used to produce chipsets with up to four CPUs and more than four CPUs. A licence limiting the use of the licensed technology to produce, say, four-cylinder engines and chipsets with up to four CPUs constitutes a technical field of use restriction.

- (209) Given that field of use restrictions are covered by the block exemption and that certain customer restrictions are hardcore restrictions under Articles 4(1)(c) and 4(2)(b) of the TTBER, it is important to distinguish the two categories of restrictions. A customer restriction presupposes that specific customer groups are identified and that the parties are restricted in selling to such identified groups. The fact that a technical field of use restriction may correspond to certain groups of customers within a product market does not imply that the restraint is to be classified as a customer restriction. For instance, the fact that certain customers buy predominantly or exclusively chipsets with more than four CPUs does not imply that a licence which is limited to chipsets with up to four CPUs constitutes a customer restriction. However, the field of use must be defined objectively by reference to identified and meaningful technical characteristics of the contract product.
- (210) Because certain output restrictions are hardcore restrictions under Article 4(1)(b) of the TTBER, it is important to note that field of use restrictions are not considered to be output restrictions because a field of use restriction does not limit the output the licensee may produce within the licensed field of use.
- (211) A field of use restriction limits the exploitation of the licensed technology by the licensee to one or more particular fields of use without limiting the licensor's ability to exploit the licensed technology. In addition, as with territories, these fields of use can be allocated to the licensee under an exclusive or sole licence. Field of use restrictions combined with an exclusive or sole licence also restrict the licensor's ability to exploit its own technology, by preventing it from exploiting it itself, including by way of licensing to others. In the case of a sole licence only licensing to third parties is restricted. Field of use restrictions combined with exclusive and sole licences are treated in the same way as the exclusive and sole licenses dealt with in Section 4.2.2 above. In particular, for licensing between competitors, this means that reciprocal exclusive licensing is hardcore under Article 4(1)(c).
- (212) Field of use restrictions may have pro-competitive effects by encouraging the licensor to license its technology for applications that fall outside its main area of focus. If the licensor could not prevent licensees from operating in fields where it exploits the technology itself or in fields where the value of the technology is not yet well established, it would be likely to create a disincentive for the licensor to license or would lead it to charge a higher royalty. The fact that in certain sectors licensing often occurs to ensure design freedom by preventing infringement claims must also be taken into account. Within the scope of the licence the licensee is able to develop its own technology without fearing infringement claims by the licensor.
- (213) Field of use restrictions on licensees in agreements between actual or potential competitors are block-exempted up to the market share threshold of 20 %. The main competitive concern in the case of such restrictions is the risk that the licensee ceases to be a competitive force outside the licensed field of use. This risk is greater in the case of cross-licensing between competitors where the agreement provides for asymmetrical field of use restrictions. A field of use restriction is asymmetrical where one party is permitted to use the licensed technology within one industrial sector, product market or technical field of use and the other party is permitted to use the other licensed technology within another industrial sector, product market or technical field of use. Competition concerns may in particular arise where the licensee's production facility, which is tooled up to use the licensed technology, is also used to produce products outside the licensed field of use with its own technology. If the agreement is likely to lead the licensee to reduce output outside the licensed field of use, the agreement is likely to be caught by Article 53(1). Symmetrical field of use restrictions, that is to say, agreements whereby the parties are licensed to use each other's technologies within the same field(s) of use, are unlikely to be caught by Article 53(1). Such agreements are unlikely to restrict competition that existed in the absence of the agreement. Article 53(1) is also unlikely to apply in the case of agreements that merely enable the licensee to develop and exploit its own technology within the scope of the licence without fearing infringement claims by the licensor. In such circumstances field of use restrictions do not in themselves restrict competition that existed in the absence of the agreement. In the absence of the agreement the licensee also risked infringement claims outside the scope

of the licensed field of use. However, if the licensee terminates or scales back its activities in the area outside the licensed field of use without business justification, this may be an indication of an underlying market sharing arrangement amounting to a hardcore restriction under Article 4(1)(c) of the TTBER.

- (214) Field of use restrictions on licensee and licensor in agreements between non-competitors are block-exempted up to the market share threshold of 30 %. Field of use restrictions in agreements between non-competitors whereby the licensor reserves one or more product markets or technical fields of use for itself are generally either non-restrictive of competition or efficiency enhancing. They promote dissemination of new technology by giving the licensor an incentive to license for exploitation in fields in which it does not want to exploit the technology itself. If the licensor could not prevent licensees from operating in fields where the licensor exploits the technology itself, it would be likely to create a disincentive for the licensor to licence.
- (215) In agreements between non-competitors the licensor is normally also entitled to grant sole or exclusive licences to different licensees limited to one or more fields of use. Such restrictions limit intra-technology competition between licensees in the same way as exclusive licensing and are analysed in the same way (see Section 4.2.2.1 above).

4.2.5. *Captive use restrictions*

- (216) A captive use restriction can be defined as an obligation on the licensee to limit its production of the licensed product to the quantities required for the production of its own products and for the maintenance and repair of its own products. In other words, this type of use restriction takes the form of an obligation on the licensee to use the products incorporating the licensed technology only as an input for incorporation into its own production; it does not cover the sale of the licensed product for incorporation into the products of other producers. Captive use restrictions are block-exempted up to the respective market share thresholds of 20 % and 30 %. Outside the scope of the block exemption it is necessary to examine the pro-competitive and anti-competitive effects of the restraint. In this respect it is necessary to distinguish agreements between competitors from agreements between non-competitors.
- (217) In the case of licence agreements between competitors a restriction that imposes on the licensee to produce under the licence only for incorporation into its own products prevents it from supplying components to third-party producers. If prior to the conclusion of the agreement, the licensee was not an actual or likely potential supplier of components to other producers, the captive use restriction does not change anything compared to the pre-existing situation. In those circumstances the restriction is assessed in the same way as in the case of agreements between non-competitors. If, on the other hand, the licensee is an actual or likely supplier of components, it is necessary to examine what is the impact of the agreement on that activity. If by tooling up to use the licensor's technology the licensee ceases to use its own technology on a stand alone basis and thus to be a component supplier, the agreement restricts competition that existed prior to the agreement. It may result in serious negative market effects when the licensor has a significant degree of market power on the component market.
- (218) In the case of licence agreements between non-competitors there are two main competitive risks stemming from captive use restrictions: a restriction of intra-technology competition on the market for the supply of inputs and an exclusion of arbitrage between licensees enhancing the possibility for the licensor to impose discriminatory royalties on licensees.
- (219) Captive use restrictions, however, may also promote pro-competitive licensing. If the licensor is a supplier of components, the restraint may be necessary in order for the dissemination of technology between non-competitors to occur. In the absence of the restraint the licensor may not grant the licence or may do so only against higher royalties, because otherwise it would create direct competition with itself on the component market. In such cases a captive use restriction is normally either not restrictive of competition or covered by Article 53(3). However, the licensee must not be restricted in selling the licensed product as replacement parts for its own products. The licensee must be able to serve the after-market for its own products, including independent service organisations that service and repair the products produced by it.
- (220) Where the licensor is not a component supplier on the relevant product market, the above reason for imposing captive use restrictions does not apply. In such cases a captive use restriction may in principle promote the dissemination of technology by ensuring that licensees do not sell to producers that compete with the licensor on other product markets. However, a restriction on the licensee not to sell into certain customer groups reserved for the licensor normally constitutes a less restrictive alternative. Consequently, in such cases a captive use restriction is normally not necessary for the dissemination of technology to take place.

4.2.6. Tying and bundling

- (221) In the context of technology licensing tying occurs when the licensor makes the licensing of one technology (the tying product) conditional upon the licensee taking a licence for another technology or purchasing a product from the licensor or someone designated by it (the tied product). Bundling occurs where two technologies or a technology and a product are only sold together as a bundle. In both cases, however, it is a condition that the products and technologies involved are distinct in the sense that there is distinct demand for each of the products and technologies forming part of the tie or the bundle. This is normally not the case where the technologies or products are by necessity linked in such a way that the licensed technology cannot be exploited without the tied product or both parts of the bundle cannot be exploited without the other. In the following the term 'tying' refers to both tying and bundling.
- (222) Article 3 of the TTBER, which limits the application of the block exemption by market share thresholds, ensures that tying and bundling are not block-exempted above the market share thresholds of 20 % in the case of agreements between competitors and 30 % in the case of agreements between non-competitors. The market share thresholds apply to any relevant technology or product market affected by the licence agreement, including the market for the tied product. Above the market share thresholds it is necessary to balance the anti-competitive and pro-competitive effects of tying.
- (223) The main restrictive effect of tying is foreclosure of competing suppliers of the tied product. Tying may also allow the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time. Moreover, tying may allow the licensor to increase royalties, in particular when the tying product and the tied product are partly substitutable and the two products are not used in fixed proportion. Tying prevents the licensee from switching to substitute inputs in the face of increased royalties for the tying product. These competition concerns are independent of whether the parties to the agreement are competitors or not. For tying to produce likely anti-competitive effects the licensor must have a significant degree of market power in the tying product so as to restrict competition in the tied product. In the absence of market power in the tying product the licensor cannot use its technology for the anti-competitive purpose of foreclosing suppliers of the tied product. Furthermore, as in the case of non-compete obligations, the tie must cover a certain proportion of the market for the tied product for appreciable foreclosure effects to occur. In cases where the licensor has market power on the market for the tied product rather than on the market for the tying product, the restraint is analysed as a non-compete clause or quantity forcing, reflecting the fact that any competition problem has its origin on the market for the 'tied' product and not on the market for the 'tying' product ⁽⁸⁸⁾.
- (224) Tying can also give rise to efficiency gains. This is for instance the case where the tied product is necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that production under the licence conforms to quality standards respected by the licensor and other licensees. In such cases tying is normally either not restrictive of competition or covered by Article 53(3). Where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products is such that it does not undermine the value of its technology or its reputation as an economic operator. Moreover, where it is known to consumers that the licensees (and the licensor) produce on the basis of the same technology it is unlikely that licensees would be willing to take a licence unless the technology is exploited by all in a technically satisfactory way.
- (225) Tying is also likely to be pro-competitive where the tied product allows the licensee to exploit the licensed technology significantly more efficiently. For instance, where the licensor licenses a particular process technology the parties can also agree that the licensee buys a catalyst from the licensor which is developed for use with the licensed technology and which allows the technology to be exploited more efficiently than in the case of other catalysts. Where in such cases the restriction is caught by Article 53(1), the conditions of Article 53(3) are likely to be fulfilled even above the market share thresholds.

⁽⁸⁸⁾ For the applicable analytical framework see Section 4.2.7 and points 129 et seq. of the Authority guidelines on vertical restraints cited in footnote 44.

4.2.7. Non-compete obligations

- (226) Non-compete obligations in the context of technology licensing take the form of an obligation on the licensee not to use third-party technologies which compete with the licensed technology. To the extent that a non-compete obligation covers a product or an additional technology supplied by the licensor the obligation is dealt with in Section 4.2.6 on tying.
- (227) The TTBER exempts non-compete obligations both in the case of agreements between competitors and in the case of agreements between non-competitors up to the market share thresholds of 20 % and 30 % respectively.
- (228) The main competitive risk presented by non-compete obligations is foreclosure of third-party technologies. Non-compete obligations may also facilitate collusion between licensors when several licensors use it in separate agreements (that is in the case of cumulative use). Foreclosure of competing technologies reduces competitive pressure on royalties charged by the licensor and reduces competition between the incumbent technologies by limiting the possibilities for licensees to substitute between competing technologies. As in both cases the main problem is foreclosure, the analysis can in general be the same in the case of agreements between competitors and agreements between non-competitors. However, in the case of cross-licensing between competitors where both agree not to use third-party technologies the agreement may facilitate collusion between them on the product market, thereby justifying the lower market share threshold of 20 %.
- (229) Foreclosure may arise where a substantial proportion of potential licensees are already tied to one or, in the case of cumulative effects, more sources of technology and are prevented from exploiting competing technologies. Foreclosure effects may result from agreements concluded by a single licensor with a significant degree of market power or from the cumulative effect of agreements concluded by several licensors, even where each individual agreement or network of agreements is covered by the TTBER. In the latter case, however, a serious cumulative effect is unlikely to arise as long as less than 50 % of the market is tied. Above that threshold significant foreclosure is likely to occur when there are relatively high barriers to entry for new licensees. If barriers to entry are low, new licensees are able to enter the market and exploit commercially attractive technologies held by third parties and thus represent a real alternative to incumbent licensees. In order to determine the real possibility for entry and expansion by third parties it is also necessary to take account of the extent to which distributors are tied to licensees by non-compete obligations. Third-party technologies only have a real possibility of entry if they have access to the necessary production and distribution assets. In other words, the ease of entry depends not only on the availability of licensees but also the extent to which they have access to distribution. In assessing foreclosure effects at the distribution level the Authority will apply the analytical framework set out in Section VI.2.1 of the Authority guidelines on vertical restraints ⁽⁸⁹⁾.
- (230) When the licensor has a significant degree of market power, obligations on licensees to obtain the technology only from the licensor can lead to significant foreclosure effects. The stronger the market position of the licensor the higher the risk of foreclosing competing technologies. For appreciable foreclosure effects to occur the non-compete obligations do not necessarily have to cover a substantial part of the market. Even in the absence thereof, appreciable foreclosure effects may occur where non-compete obligations are targeted at undertakings that are the most likely to license competing technologies. The risk of foreclosure is particularly high where there is only a limited number of potential licensees and the licence agreement concerns a technology which is used by the licensees to make an input for their own use. In such cases the entry barriers for a new licensor are likely to be high. Foreclosure may be less likely in cases where the technology is used to make a product that is sold to third parties. Although in this case the restriction also ties production capacity for the input in question, it does not tie demand downstream of the licensees. To enter the market in the latter case licensors only need access to one or more licensee(s) that have suitable production capacity. Unless only few undertakings possess or are able to obtain the assets required to take a licence, it is unlikely that by imposing non-compete obligations on its licensees the licensor is able to deny competitors access to efficient licensees.
- (231) Non-compete obligations may also produce pro-competitive effects. First, such obligations may promote dissemination of technology by reducing the risk of misappropriation of the licensed technology, in particular know-how. If a licensee is entitled to license competing technologies from third parties, there is a risk that particularly

⁽⁸⁹⁾ See footnote 44.

licensed know-how would be used in the exploitation of competing technologies and thus benefit competitors. When a licensee also exploits competing technologies, it normally also makes monitoring of royalty payments more difficult, which may act as a disincentive to licensing.

- (232) Second, non-compete obligations possibly in combination with an exclusive territory may be necessary to ensure that the licensee has an incentive to invest in and exploit the licensed technology effectively. In cases where the agreement is caught by Article 53(1) because of an appreciable foreclosure effect, it may be necessary in order to benefit from Article 53(3) to choose a less restrictive alternative, for instance to impose minimum output or royalty obligations, which normally have less potential to foreclose competing technologies.
- (233) Third, in cases where the licensor undertakes to make significant client specific investments for instance in training and tailoring of the licensed technology to the licensee's needs, non-compete obligations or alternatively minimum output or minimum royalty obligations may be necessary to induce the licensor to make the investment and to avoid hold-up problems. However, normally the licensor will be able to charge directly for such investments by way of a lump sum payment, implying that less restrictive alternatives are available.

4.3. Settlement agreements

- (234) Licensing of technology rights in settlement agreements may serve as a means of settling disputes or avoiding that one party exercises its intellectual property rights to prevent the other party from exploiting its own technology rights ⁽⁹⁰⁾.
- (235) Settlement agreements in the context of technology disputes are, as in many other areas of commercial disputes, in principle a legitimate way to find a mutually acceptable compromise to a bona fide legal disagreement. The parties may prefer to discontinue the dispute or litigation because it proves to be too costly, time-consuming and/or uncertain as regards its outcome. Settlements can also save courts and/or competent administrative bodies effort in deciding on the matter and can therefore give rise to welfare-enhancing benefits. On the other hand, it is in the general public interest to remove invalid intellectual property rights as an unmerited barrier to innovation and economic activity ⁽⁹¹⁾.
- (236) Licensing, including cross-licensing, in the context of settlement agreements is generally not as such restrictive of competition since it allows the parties to exploit their technologies after the agreement is concluded. In cases where, in the absence of the licence, it is possible that the licensee could be excluded from the market, access to the technology at issue for the licensee by means of a settlement agreement is generally not caught by Article 53(1).
- (237) However, the individual terms and conditions of settlement agreements may be caught by Article 53(1). Licensing in the context of settlement agreements is treated in the same way as other licence agreements ⁽⁹²⁾. In these cases, it is particularly necessary to assess whether the parties are potential or actual competitors.

Pay-for-restriction in settlement agreements

- (238) 'Pay-for-restriction' or 'pay-for-delay' type settlement agreements often do not involve the transfer of technology rights, but are based on a value transfer from one party in return for a limitation on the entry and/or expansion on the market of the other party and may be caught by Article 53(1) ⁽⁹³⁾.

⁽⁹⁰⁾ The TTBER and its guidelines are without prejudice to the application of Article 53 to settlement agreements which do not contain a licensing agreement.

⁽⁹¹⁾ Case 193/83 *Windsurfing v Commission* [1986] ECR 611, paragraph 92.

⁽⁹²⁾ Cf. Case 65/86 *Bayer v Sulhofer* [1988], ECR 5259, paragraph 15.

⁽⁹³⁾ See, for instance, the Commission Decision in *Lundbeck*, not yet published.

- (239) If, however, a settlement agreement also includes a licensing of the technology rights concerned by the underlying dispute, and that agreement leads to a delayed or otherwise limited ability for the licensee to launch the product on any of the markets concerned, the agreement may be caught by Article 53(1) and would then need to be assessed in the light of Articles 4(1)(c) and 4(1)(d) of the TTBER (see Section 3.4.2 above). If the parties to such a settlement agreement are actual or potential competitors and there was a significant value transfer from the licensor to the licensee, the Authority will be particularly attentive to the risk of market allocation/market sharing.

Cross-licensing in settlement agreements

- (240) Settlement agreements whereby the parties cross-license each other and impose restrictions on the use of their technologies, including restrictions on the licensing to third parties, may be caught by Article 53(1). Where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what is required in order to unblock, the agreement is likely to be caught by Article 53(1) even if it is likely that a mutual blocking position exists. Article 53(1) is particularly likely to apply where the parties share markets or fix reciprocal running royalties that have a significant impact on market prices.
- (241) Where under the settlement agreement the parties are entitled to use each other's technology and the agreement extends to future developments, it is necessary to assess what is the impact of the agreement on the parties' incentive to innovate. In cases where the parties have a significant degree of market power the agreement is likely to be caught by Article 53(1) where the agreement prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. Such agreements are also unlikely to satisfy the conditions of Article 53(3). It is particularly unlikely that the restriction can be considered indispensable within the meaning of the third condition of Article 53(3). The achievement of the objective of the agreement, namely to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where the licence does not lead them to use the same technological solutions. Such agreements merely create design freedom by preventing future infringement claims by the other party.

Non-challenge clauses in settlement agreements

- (242) In the context of a settlement agreement, non-challenge clauses are generally considered to fall outside Article 53(1). It is inherent in such agreements that the parties agree not to challenge *ex post* the intellectual property rights which were the centre of the dispute. Indeed, the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes.
- (243) However, non-challenge clauses in settlement agreements can under specific circumstances be anti-competitive and may be caught by Article 53(1). The restriction of the freedom to challenge an intellectual property right is not part of the specific subject-matter of an intellectual property right and may restrict competition. For instance, a non-challenge clause may infringe Article 53(1) where an intellectual property right was granted following the provision of incorrect or misleading information⁽⁹⁴⁾. Scrutiny of such clauses may also be necessary if the licensor, besides licensing the technology rights, induces, financially or otherwise, the licensee to agree not to challenge the validity of the technology rights or if the technology rights are a necessary input for the licensee's production (see also point (136) above).

⁽⁹⁴⁾ Cf. Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR not yet published.

4.4. Technology pools

- (244) Technology pools are defined as arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. In terms of their structure technology pools can take the form of simple arrangements between a limited number of parties or of elaborate organisational arrangements whereby the organisation of the licensing of the pooled technologies is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.
- (245) There is no inherent link between technology pools and standards, but the technologies in the pool often support, in whole or in part, a *de facto* or *de jure* industry standard ⁽⁹⁵⁾. Different technology pools may support competing standards ⁽⁹⁶⁾. Technology pools can produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalisation. The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent and licences need to be obtained from a significant number of licensors in order to operate on the market. In cases where licensees receive on-going services concerning the application of the licensed technology, joint licensing and servicing can lead to further cost reductions. Patent pools can also play a beneficial role in the implementation of pro-competitive standards.
- (246) Technology pools may also be restrictive of competition. The creation of a technology pool necessarily implies joint selling of the pooled technologies, which in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel. Moreover, in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a *de facto* industry standard, result in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and a related technology pool may make it more difficult for new and improved technologies to enter the market.
- (247) Agreements establishing technology pools and setting out the terms and conditions for their operation are not — irrespective of the number of parties — covered by the block exemption, as the agreement to establish the pool does not permit a particular licensee to produce contract products (see Section 3.2.4 above). Such agreements are addressed only by these guidelines. Pooling arrangements give rise to a number of particular issues regarding the selection of the included technologies and the operation of the pool, which do not arise in the context of other types of licensing. Licensing out from the pool is generally a multiparty agreement, taking into account that the contributors commonly determine the conditions for such licensing out, and is therefore also not covered by the block exemption. Licensing out from the pool is dealt with in point (261) and in Section 4.4.2 below.

4.4.1. The assessment of the formation and operation of technology pools

- (248) The way in which a technology pool is formed, organised and operated can reduce the risk of it having the object or effect of restricting competition and provide assurances to the effect that the arrangement is pro-competitive. In assessing the possible competitive risks and efficiencies, the Authority will, inter alia, take account of the transparency of the pool creation process; the selection and nature of the pooled technologies, including the extent to which independent experts are involved in the creation and operation of the pool and whether safeguards against exchange of sensitive information and independent dispute resolution mechanisms have been put in place.

Open participation

- (249) When participation in a standard and pool creation process is open to all interested parties it is more likely that technologies for inclusion into the pool are selected on the basis of price/quality considerations than when the pool is set up by a limited group of technology owners.

⁽⁹⁵⁾ See concerning the treatment of standards and the treatment of standardisation agreements the Horizontal Guidelines, point 257 ff., cited in footnote 29.

⁽⁹⁶⁾ See in this respect the Commission's press release IP/02/1651 concerning the licensing of patents for third generation (3G) mobile services. This case involved five technology pools creating five different technologies, each of which could be used to produce 3G equipment.

Selection and nature of the pooled technologies

- (250) The competitive risks and the efficiency enhancing potential of technology pools depend to a large extent on the relationship between the pooled technologies and their relationship with technologies outside the pool. Two basic distinctions must be made, namely: (a) between technological complements and technological substitutes; and (b) between essential and non-essential technologies.
- (251) Two technologies are complements as opposed to substitutes when they are both required to produce the product or carry out the process to which the technologies relate. Conversely, two technologies are substitutes when either technology allows the holder to produce the product or carry out the process to which the technologies relate.
- (252) A technology can be essential either: (a) to produce a particular product or carry out a particular process to which the pooled technologies relate; or (b) to produce such a product or carry out such a process in accordance with a standard which includes the pooled technologies. In the first case, a technology is essential (as opposed to non-essential) if there are no viable substitutes (both from a commercial and technical point of view) for that technology inside or outside the pool and the technology in question constitutes a necessary part of the package of technologies for the purposes of producing the product(s) or carrying out the process(es) to which the pool relates. In the second case, a technology is essential if it constitutes a necessary part (that is to say, there are no viable substitutes) of the pooled technologies needed to comply with the standard supported by the pool (standard essential technologies). Technologies that are essential are by necessity also complements. The fact that a technology holder merely declares that a technology is essential does not imply that such a technology is essential according to the criteria described in this point.
- (253) When technologies in a pool are substitutes, royalties are likely to be higher than they would otherwise be, because licensees do not benefit from rivalry between the technologies in question. When the technologies in the pool are complements the technology pool reduces transaction costs and may lead to lower overall royalties because the parties are in a position to fix a common royalty for the package as opposed to each party fixing a royalty for its own technology while not taking into account that a higher royalty for one technology will usually decrease the demand for complementary technologies. If royalties for complementary technologies are set individually, the total of these royalties may often exceed what would be collectively set by a pool for the package of the same complementary technologies. The assessment of the role of substitutes outside the pool is set out in point (262) below.
- (254) The distinction between complementary and substitute technologies is not clear-cut in all cases, since technologies may be substitutes in part and complements in part. When, due to efficiencies stemming from the integration of two technologies, licensees are likely to demand both technologies, the technologies are treated as complements, even if they are partly substitutable. In such cases it is likely that, in the absence of the pool, licensees would want to licence both technologies due to the additional economic benefit of using both technologies as opposed to using only one of them. In the absence of such demand-based evidence on the complementarity of the pooled technologies, it is an indication that these technologies are complements if: (i) the parties contributing technology to a pool remain free to license their technology individually; and (ii) the pool is willing, besides licensing the package of technologies of all parties, to license the technology of each party also separately; and (iii) the total royalties charged when taking separate licences to all pooled technologies do not exceed the royalties charged by the pool for the whole package of technologies.
- (255) The inclusion of substitute technologies in the pool generally restricts inter-technology competition since it can amount to collective bundling and lead to price fixing between competitors. As a general rule the Authority considers that the inclusion of significant substitute technologies in the pool constitutes a violation of Article 53(1). The Authority also considers that it is unlikely that the conditions of Article 53(3) will be fulfilled in the case of pools comprising to a significant extent substitute technologies. Given that the technologies in question are alternatives, no transaction cost savings accrue from including both technologies in the pool. In the absence of the pool licensees would not have demanded both technologies. To alleviate the competition concerns it is not sufficient that the parties remain free to license independently. This is because the parties are likely to have little incentive to license independently in order not to undermine the pool's licensing activity, which allows them to jointly exercise market power.

Selection and function of independent experts

- (256) Another relevant factor in assessing the competitive risks and the efficiencies of technology pools is the extent to which independent experts are involved in the creation and operation of the pool. For instance, the assessment of whether or not a technology is essential to a standard supported by a pool is often a complex matter that requires special expertise. The involvement in the selection process of independent experts can go a long way in ensuring that a commitment to include only essential technologies is implemented in practice. Where the selection of technologies to be included in the pool is carried out by an independent expert this may also further competition between available technological solutions.
- (257) The Authority will take into account how experts are selected and the functions that they are to perform. Experts should be independent from the undertakings that have formed the pool. If experts are connected to the licensors (or the licensing activity of the pool) or otherwise depend on them, the involvement of the expert will be given less weight. Experts must also have the necessary technical expertise to perform the various functions with which they have been entrusted. The functions of independent experts may include, in particular, an assessment of whether or not technologies put forward for inclusion into the pool are valid and whether or not they are essential.
- (258) Finally, any dispute resolution mechanisms foreseen in the instruments setting up the pool are relevant and should be taken into account. The more dispute resolution is entrusted to bodies or persons that are independent of the pool and its members, the more likely it is that the dispute resolution will operate in a neutral way.

Safeguards against exchange of sensitive information

- (259) It is also relevant to consider the arrangements for exchanging sensitive information between the parties ⁽⁹⁷⁾. In oligopolistic markets exchanges of sensitive information such as pricing and output data may facilitate collusion ⁽⁹⁸⁾. In such cases the Authority will take into account to what extent safeguards have been put in place, which ensure that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets.
- (260) Special care should be taken to put in place such safeguards when interested parties participate simultaneously in efforts to form pools of competing standards where this may lead to exchange of sensitive information between competing pools.

Safe harbour

- (261) The creation and operation of the pool, including the licensing out, generally falls outside Article 53(1), irrespective of the market position of the parties, if all the following conditions are fulfilled:
- (a) participation in the standard and pool creation process is open to all interested technology rights owners;
 - (b) sufficient safeguards are adopted to ensure that only essential technologies (which therefore necessarily are also complements) are pooled;
 - (c) sufficient safeguards are adopted to ensure that exchange of sensitive information (such as pricing and output data) is restricted to what is necessary for the creation and operation of the pool;
 - (d) the pooled technologies are licensed into the pool on a non-exclusive basis;
 - (e) the pooled technologies are licensed out to all potential licensees on FRAND ⁽⁹⁹⁾ terms;

⁽⁹⁷⁾ For details on information sharing, see Horizontal Guidelines, point 55 pp., cited in footnote 29.

⁽⁹⁸⁾ See in this respect the judgment in *John Deere* cited in footnote 13.

⁽⁹⁹⁾ For details on FRAND see Horizontal Guidelines, point 287 pp., cited in footnote 29.

- (f) the parties contributing technology to the pool and the licensees are free to challenge the validity and the essentiality of the pooled technologies, and;
- (g) the parties contributing technology to the pool and the licensee remain free to develop competing products and technology.

Outside the safe harbour

- (262) Where significant complementary but non-essential patents are included in the pool there is a risk of foreclosure of third-party technologies. Once a technology is included in the pool and is licensed as part of the package, licensees are likely to have little incentive to license a competing technology when the royalty paid for the package already covers a substitute technology. Moreover, the inclusion of technologies which are not necessary for the purposes of producing the product(s) or carrying out the process(es) to which the technology pool relates or to comply with the standard which includes the pooled technology also forces licensees to pay for technology that they may not need. The inclusion of such complementary technology thus amounts to collective bundling. Where a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 53(1) where the pool has a significant position on any relevant market.
- (263) Given that substitute and complementary technologies may be developed after the creation of the pool, the need to assess essentiality doesn't necessarily end with the creation of the pool. A technology may become non-essential after the creation of the pool due to the emergence of new third-party technologies. Where it is brought to the attention of the pool that such a new third-party technology is offered to and demanded by licensees, foreclosure concerns may be avoided by offering to new and existing licensees a licence without the no-longer-essential technology at a correspondingly reduced royalty rate. However, there may be other ways to ensure that third-party technologies are not foreclosed.
- (264) In the assessment of technology pools comprising non-essential but complementary technologies, the Authority will in its overall assessment, *inter alia*, take account of the following factors:
 - (a) whether there are any pro-competitive reasons for including the non-essential technologies in the pool, for example due to the costs of assessing whether all the technologies are essential in view of the high number of technologies;
 - (b) whether the licensors remain free to license their respective technologies independently: where the pool is composed of a limited number of technologies and there are substitute technologies outside the pool, licensees may want to put together their own technological package composed partly of technology forming part of the pool and partly of technology owned by third parties;
 - (c) whether, in cases where the pooled technologies have different applications some of which do not require use of all of the pooled technologies, the pool offers the technologies only as a single package or whether it offers separate packages for distinct applications, each comprising only those technologies relevant to the application in question: in the latter case technologies which are not essential to a particular product or process are not tied to essential technologies;
 - (d) whether the pooled technologies are available only as a single package or whether licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties. The possibility to obtain a licence for only part of the package may reduce the risk of foreclosure of third-party technologies outside the pool, in particular where the licensee obtains a corresponding reduction in royalties. This requires that a share of the overall royalty has been assigned to each technology in the pool. Where the licence agreements concluded between the pool and individual licensees are of relatively long duration and the pooled technology supports a *de facto* industry standard, the fact that the pool may foreclose access to the market of new substitute technologies must also be taken into account. In assessing the risk of foreclosure in such cases it is relevant to take into account whether or not licensees can terminate at reasonable notice part of the licence and obtain a corresponding reduction of royalties.
- (265) Even technology pool arrangements that restrict competition may give rise to pro-competitive efficiencies (see point (245) above), which must be considered under Article 53(3) and balanced against the negative effects on competition. For example, if the patent pool includes non-essential patents but fulfils all the other criteria of the safe harbour listed in point (261), where there are pro-competitive reasons for including non-essential patents in the pool (see point (264) above) and where licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties (see point (264) above), the conditions of Article 53(3) are likely to be fulfilled.

4.4.2. Assessment of individual restraints in agreements between the pool and its licensees

- (266) Where the agreement to set up a technology pool does not infringe Article 53, the next step is to assess the competitive impact of the licences agreed by the pool with its licensees. The conditions under which these licences are granted may be caught by Article 53(1). The purpose of this section is to address a certain number of restraints that in one form or another are commonly found in licensing agreements from technology pools and which need to be assessed in the overall context of the pool. Generally the TTBER does not apply to licence agreements concluded between the pool and third-party licensees (see point (247) above). This section therefore deals with the individual assessment of licensing issues that are particular to licensing in the context of technology pools.
- (267) In making its assessment of technology transfer agreements between the pool and its licensees the Authority will be guided by the following main principles:
- (a) the stronger the market position of the pool the greater the risk of anti-competitive effects;
 - (b) the stronger the market position of the pool, the more likely that agreeing not to license to all potential licensees or to license on discriminatory terms will infringe Article 53;
 - (c) pools should not unduly foreclose third-party technologies or limit the creation of alternative pools;
 - (d) the technology transfer agreements should not contain any of the hardcore restrictions listed in Article 4 of the TTBER (see Section 3.4).
- (268) Undertakings setting up a technology pool that is compatible with Article 53, are normally free to negotiate and fix royalties for the technology package (subject to any commitment given to license on fair, reasonable and non-discriminatory terms, FRAND) and each technology's share of the royalties either before or after the standard is set. Such agreement is inherent in the establishment of the pool and cannot in itself be considered restrictive of competition. In certain circumstances it may be more efficient if the royalties of the pool are agreed before the standard is chosen, to avoid that the choice of the standard increases the royalty rate by conferring a significant degree of market power on one or more essential technologies. However, licensees must remain free to determine the price of products produced under the licence.
- (269) Where the pool has a dominant position on the market, royalties and other licensing terms should be non-excessive and non-discriminatory and licences should be non-exclusive ⁽¹⁰⁰⁾. These requirements are necessary to ensure that the pool is open and does not lead to foreclosure and other anti-competitive effects on down-stream markets. These requirements, however, do not preclude different royalty rates for different uses. It is in general not considered restrictive of competition to apply different royalty rates to different product markets, whereas there should be no discrimination within product markets. In particular, the treatment of licensees of the pool should not depend on whether or not they are also licensors. The Authority will therefore take into account whether licensors and licensees are subject to the same royalty obligations.
- (270) Licensors and licensees should be free to develop competing products and standards. They should also be free to grant and obtain licences outside the pool. These requirements are necessary in order to limit the risk of foreclosure of third-party technologies and ensure that the pool does not limit innovation and does not preclude the creation of competing technological solutions. Where pooled technology is included in a (*de facto*) industry standard and where the parties are subject to non-compete obligations, the pool creates a particular risk of preventing the development of new and improved technologies and standards.
- (271) Grant-back obligations should be non-exclusive and limited to developments that are essential or important to the use of the pooled technology. This allows the pool to feed on and benefit from improvements to the pooled technology. It is legitimate for the parties to ensure by grant-back obligations that the exploitation of the pooled technology cannot be held up by licensees, including subcontractors working under the licence of the licensee, that hold or obtain essential patents.

⁽¹⁰⁰⁾ However, if a technology pool has no market power, licensing out from the pool will normally not infringe Article 53(1) even if those conditions are not fulfilled.

- (272) One of the problems identified with regard to technology pools is the risk that they may shield invalid patents. Pooling may raise the costs/risks for a successful challenge, because the challenge might fail if only one patent in the pool is valid. The shielding of invalid patents in the pool may oblige licensees to pay higher royalties and may also prevent innovation in the field covered by an invalid patent. In this context, non-challenge clauses, including termination clauses ⁽¹⁰¹⁾, in a technology transfer agreement between the pool and third parties are likely to fall within Article 53(1).
- (273) Pools often include both patents and patent applications. If patent applicants who submit their patent applications to pools, where available, use the patent application procedures that allow for a faster granting, this will achieve faster certainty on the validity and scope of these patents.
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⁽¹⁰¹⁾ See Section 3.5.

