THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA, COMESA

COMESA GUIDELINES ON RESTRICTIVE BUSINESS PRACTICES

2ND APRIL 2019

PREPARED IN ACCORDANCE WITH THE COMESA COMPETITION REGULATIONS AND RULES OF 2004

DISCLAIMER

These Guidelines are for general guidance on the implementation of Article 16 of the COMESA Competition Regulations of 2004 ("the Regulations”) dealing with agreements between undertakings, decisions of associations of undertakings and concerted practices. These Guidelines do not constitute legal advice and should not be relied upon as a statement of law relating to the Regulations. Stakeholders are encouraged to seek legal advice should they have any doubt about whether any conduct may breach the Regulations.

INTERPRETATION

In these Guidelines, any word or expression to which a meaning has been ascribed in the Regulations bears the same meaning as in the said Regulations unless the context indicates otherwise.

CITATION

These Guidelines may be cited as: “The COMESA Guidelines on Restrictive Business Practices, 2019.”

Table of Contents

DEFINITIONS

In these Guidelines unless the context provides otherwise:

"**Anti-competitive**" means a conduct which appreciably restrains competition between the Member States and is not otherwise exempt by law or authorised in a manner required by the Regulations;

"**Arrangement**" includes a contract, agreement or understanding whether or not legally enforceable;

"**Board**" means the Board of Commissioners as established by Article 12 of these Regulations;

"**Commission**" means the COMESA Competition Commission established by Article 6 of these Regulations;

"**Commissioner**" means a member of the Board of Commissioners; "Commission" means the COMESA Competition Commission established by Article 6 of the COMESA Competition Regulation;

"**Common Market"** means the Common Market for eastern and Southern Africa (COMESA) established by Article 1 of the Treaty;

"**Competition**" means the striving or potential striving of two or more persons or organisations engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers;

"**Concerted practice**" means an action planned and done in unison by a firm or combination of firms which is anti-competitive;

"**Consumer**" includes any person -

(a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale; and

(b) to whom a service is rendered;

"**Goods**" when used with respect to particular goods, includes any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints;

"**Market**" means a market in the Common Market and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services;

"**Merger**" means merger as defined in Article 23 of these Regulations;

"**Member State**" means a Member State of the Common Market;

"**Person**" means a natural or legal person;

"**Parallel behaviour**" refers to similar but independent conduct by market players operating in the same market;

"**Services**" includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;

"**Trade**" includes any business, industry, profession or occupation relating to the supply or acquisition of "goods" or "services";

"**Treaty**" means the Treaty establishing the Common Market for Eastern and Southern Africa;

"**Undertaking**" includes any "person", public or private, involved in the production of, or the trade in, goods, or the provision of services.

SECTION 1 – PREAMBLE

1. The COMESA Competition Regulations of 2004 ("the Regulations") prohibit certain restrictive business practices as incompatible with the objectives of the Common Market. According to Article 2 of the Regulations, the purpose of the Regulations "…*is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market and to protect consumers against offensive conduct by market actors*."

2. Further, the Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities that are excluded pursuant to Article 4 of the Regulations.

3. These Guidelines set out how the Commission will exercise its powers when assessing agreements between undertakings, decisions of association of undertakings and concerted practice which may affect trade between Member States and which restrict competition by object or effect.

4. The Guidelines set out some of the relevant factors which the Commission will consider in determining whether a business practice is anti-competitive and prohibited under the Regulations. The Guidelines give guidance on how some practices, though anti-competitive in nature, could be permissible for a defined period by considering the factors laid down under Article 16(4) of the Regulations.

SECTION 2 – PURPOSE AND SCOPE OF THE GUIDELINES

5. These Guidelines apply to anti-competitive business practices set out under Article 16(1) of the Regulations. The aim of the Guidelines is to provide clarity, predictability and transparency as regards the general analytical framework of the Commission in determining cases of vertical and horizontal agreements. The Guidelines also aim to assist undertakings to make their own assessments regarding their vertical and horizontal practices *vis-à-vis* the provisions of Articles 16 (1) and 16(4) of the Regulations.

6. The application of these Guidelines will be case specific i.e. the Commission will look at the circumstances of each case by analyzing the object or effects or likely effects of each business practice on competition and consumer welfare.

SECTION 3 – GENERAL APPROACH TO VERTICAL AND HORIZONTAL AGREEMENTS

7. Article 16(1) of the Regulations prohibits "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which:*

   a) may affect trade between Member States; and
   b) *have as their object or effect the prevention, restriction or distortion of competition within the Common Market*."

8. This Article is supplemented by Article 16(2) of the Regulations which defines the geographic scope of the Regulations as follows: Article 16(1) *"applies only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market."*

9. The criterion for establishing whether an agreement has been 'implemented' will be construed to have been implemented in the Common Market on a case by case basis. Some of the factors which the Commission may consider in determining whether a business practice was implemented in the Common Market may include the following:
   a) whether the business practice takes place within the Common Market e.g. establishing direct sales of the relevant products to purchasers established in the Common Market, irrespective of the location of the sources of supply and the production plant, and of where the agreement was formed;
   b) whether the business practice involved companies established within the Common Market; or
   c) whether the business practice targeted, or intended to target, customers in the Common Market.

10. Pursuant to Article 16(3) of the Regulations, any agreement or decision which is prohibited under Article 16(1) of the Regulations is void unless all the requirements of Article 16(4) of the Regulations are met. Article 16(4) of the Regulations reads:

    "The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
    a) any agreement or category thereof between undertakings;
    b) any decision by associations of undertakings;
    c) any concerted practice or category thereof;

    which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
    a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
    b) afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question."

11. There are thus four cumulative requirements for a business practice to qualify for exemption under Article 16(4) of the Regulations to apply:
   a) whether the practice creates efficiencies-that is whether it contributes to improving the production or distribution of goods and services or to promoting technical or economic progress;
   b) whether consumers receive a fair share of the resulting benefits;
   c) whether the practice is indispensable to the creation of the efficiencies; and
   d) whether the practice does not eliminate competition in respect of a substantial market for the goods or services in question.

12. Where any of the four requirements of Article 16(4) of the Regulations are not met, an agreement, decision, or concerted practice falling within the scope of Article 16(1) of the Regulations is void. The conditions are cumulative, and this means that they must all be fulfilled for the anti-competitive practice to be permissible. When the four cumulative conditions are satisfied, then the agreement has the potential to create public benefits.

13. The burden of submitting claims to prove that a business practice satisfies the four cumulative conditions lies with the undertakings claiming justifications under Article 16(4). The Commission will have to satisfy itself that the submitted claims adequately justify the practice.

14. The Regulations provide a list of prohibited business practices that constitute a restriction by object which may fall within the scope of Article 16(1) but which, the Commission deems, cannot satisfy the cumulative conditions of Article 16(4) of the Regulations by their very nature. For restrictions by object, the presumption of harm is based on the serious nature of the restrictions and on experience which vindicates that such practices are likely to produce negative effects on the market and jeopardize the objectives of the Common Market.

15. The practices listed under Article 19 is treated separately from the provisions of Article 16 and shall be treated as per se offenses. For the avoidance of doubt, per se offenses are those where establishing the practice is enough, no need to establish its effect. Such practices include:
    a) *agreements fixing prices, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;*
    b) *collusive tendering and bid-rigging;*
    c) *market or customer allocation agreements;*
    d) *allocation by quota as to sales and production;*
    e) *collective action to enforce arrangements;*
    f) *concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or*
    g) *collective denials of access to an arrangement or association which is crucial to competition*.

16. These practices cannot benefit from the exemption under Article 16(4) of the Regulations.

SECTION 4 – MARKET DEFINITION

17. The assessment of the compatibility of any business practice with Article 16 of the Regulations requires the Commission to determine the relevant market within which competition occurs and the assessment of harm to competition shall be carried out. Market definition helps to assess the market power of the undertakings in question. It provides the framework for the calculation of market shares. It reflects whether there are competitors that are capable of constraining the undertakings' behaviour in the market.

18. Defining the relevant market is an important step in competition assessment. For more clarity on the Commission's assessment of the relevant market, refer to the Commission's Guidelines on Market Definition.

SECTION 5 – ASSESSMENT OF THE COMPATIBILITY OF A BUSINESS PRACTICE WITH ARTICLE 16(1) OF THE REGULATIONS

What constitutes an Agreement, Decision or Concerted Practice

19. When assessing the compatibility of a business practice with Article 16(1) of the Regulations, the first step is to determine whether that business practice can be described as an agreement, decision or concerted practice.

20. By definition, an **agreement** may be oral or written and need not be legally binding. The defining criterion of an "agreement" within the meaning of Article 16 of the Regulations is the existence of a concurrence of wills between the parties. Examples of agreements include, legally enforceable contracts, gentleman's agreements and oral agreements. Article 1 of the Regulations provides further that the term **arrangement** "*includes a contract, agreement or understanding, whether or not legally enforceable*." Article 16(1) is applicable to both horizontal agreements (i.e. between rival undertakings operating at the same level of the market) and to vertical agreements (i.e. between undertakings operating at different levels of the market).

21. **Concerted practice** is defined in Article 1 of the Regulations as "*an action planned and done in unison by a firm or combination of firms which is anti-competitive"*. The Commission considers that a "concerted practice" includes coordination between undertakings which, without reaching the stage where an "agreement" as defined above, has been concluded and knowingly substitutes practical cooperation between them for the risks of competition. In other words, there must be:-
    a) a mental consensus between the parties, which need not be verbal and may result from direct or indirect contact between the parties; and
    b) an intentional substitution of cooperation instead of competition.

22. A concerted practice is distinct from parallel behaviour which only results from unilateral decisions independently adopted by undertakings in response to prevailing market conditions. Elements such as the existence of direct or indirect contacts and the structure of the market are thus important to distinguish concerted practices from parallel behaviour. If a restrictive business practice contains elements of both an agreement and a concerted practice, the Commission is entitled to qualify it as an "agreement or concerted practice" without distinguishing between the two concepts.

23. **Decisions by associations of undertakings** include binding and non-binding decisions or recommendations adopted by trade associations and other established groups of undertakings. The concept of an association consists of undertakings of the same general type which makes itself responsible for representing and defending their common interests *vis-à-vis* other economic operators, government bodies and the public in general. Jurisprudence from the EU has held that an association does not have to engage in economic activity for it to be caught by the Regulations; professional bodies have been held to be associations. The concept of association has also been applied to trade associations which may provide a forum for competitors in a particular industry to discuss matters of mutual interest as well as coordinate their activity, e.g. an agricultural cooperative.

24. **Undertaking** is defined in Article 1 of the Regulations as any natural or legal person, public or private, involved in the production of, or the trade in goods, or the provision of services. Any economic entity engaged in an economic activity, regardless of its legal status and the way it is financed, constitutes an undertaking within the meaning of Article 1 of the Regulations.

25. Article 16(1) does not apply to agreements between two or more undertakings that form a single economic entity[1] and any agreement between them will not be caught by Article 16(1). The various legal entities belonging to the same single economic unit are not considered as independent undertakings. In assessing whether a subsidiary is independent of, or forms part of the same economic unit with its parent, the Commission will assess whether the parent can, and does in fact, exercise decisive influence over the subsidiary with the result that the latter does not enjoy 'real autonomy' in determining its commercial position on the market. Some of the factors that the Commission may consider in its assessment include:
   a) the parent's shareholding in the subsidiary;
   b) whether or not the parent has control of the board of directors of the subsidiary; and
   c) whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters.

26. Agreements made between undertakings belonging to the same economic unit fall outside the scope of Article 16 of the Regulations.

27. The assessment of a business practice under Article 16(1) of the Regulations to determine whether it results or is likely to result in anti-competitive effects must be made within the actual legal and economic context[2] in which competition would occur absent the business practice and the individual restrictions i.e. the counterfactual of the prevailing circumstances in the relevant market. The assessment must take into account the loss of existing or potential competition as well as other factors such as how and to what extent the agreement impacts on both inter-brand competition and intra-brand competition.

28. The general principle underlying Article 16(1) of the Regulations is that each undertaking must determine independently its policy on the market. Article 16(1) of the Regulations prohibits coordination or collusion between undertakings on the market. Any business practice which creates or significantly increases certainty as to undertakings' respective policy on the market tends to be caught by Article 16(1) of the Regulations. The definition of agreements, decisions of associations of undertakings and concerted practices delineates coordinated behavior of undertakings of Article 16 from the unilateral behavior of Article 18.

29. Agreements, decisions and concerted practices described in Article 16(1) of the Regulations in respect of which the parties seek application of Article 16(4) need to be notified to the Commission under Article 20 of the Regulations.

What constitutes effect on trade between Member States

30. The second aspect is to ascertain if a business practice **may affect trade between Member States** within the meaning of Article 16(1)(a) of the Regulations. The business practice may have a direct or indirect, actual or potential, appreciable influence on the pattern of trade between Member States. Practices that do not appreciably affect trade between Member States fall outside the scope of the Regulations.

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[1] In company law, companies belonging to the same group and having the status of parent and subsidiary may have distinct legal personalities; however they are considered to form one single economic entity for purpose of competition law, especially where the subsidiary has no real independence to determine its own course of action on the market.

[2] The legal context refers to an examination of the business practice in view of the applicable legal framework. Economic context means considering the business practice within the context of the market situation in terms of structure, concentration etc.

31. The objective ability of a given business practice to affect the pattern of trade between Member States suffices for it to fall within the scope of the Regulations, even in the absence of actual effect. However, purely speculative effects do not suffice for a business practice to fall within the scope of the Regulations. The required actual or potential effects on trade between Member States may occur on the directly related product market (direct effects) or on an indirectly related product market (indirect effects), such as the downstream or upstream markets.

32. The assessment must be carried out on the basis of objective factors such as the nature of the business practice, the nature of the products or services, the market position of the undertakings concerned. Furthermore, the assessment must take into account the legal and factual context of the business practice. Intent to affect trade between Member States is not required, although it constitutes a relevant factor to take into consideration where such intent is established.

33. The requirement that there must be an effect on trade 'between Member States' implies that there must be an impact on cross-border activity involving at least two Member States. It is not required that the business practice affects trade between the whole of one Member State, or the whole of another Member State. It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the practice may have an influence direct or indirect, actual or potential on the pattern of trade between Member States. The assessment of appreciability depends on the circumstances of the market; the stronger the market position of the parties, the more likely the practice is likely to affect trade between Member States.

34. Business practices regarding imports and exports or covering several Member States are presumed to affect trade between Member States; in addition, practices in a single Member State can also affect trade between Member States. For instance, an export ban imposed by a supplier on a distributor which prevents the distributor from re-importing into the Member State could have an effect on trade between Member States. This is especially true where there is a significant differential between prices in the different territories, where that differential could not be eroded by customs duties and transport costs and where significant volumes of a product could be exported from the third country to the Member State.

35. Business practices which affect establishment can also be held to affect trade between Member States. Establishment includes a situation where by undertakings present in one Member State seek to set-up agencies, branches or subsidiaries in another Member State. Settled EU case law has determined that the concept of trade also encompasses cases where agreements or practices affect the competitive structure of the market i.e. where agreements and practices affect the competitive structure of the Common Market by eliminating or threatening to eliminate competitors; or where agreements and practices affect the competitive structure of the Common Market by raising barriers to entry or expansion.

What constitutes "object or effect"

36. The third aspect is to ascertain whether the business practices have **as their object or effect the prevention, restriction or distortion of competition within the Common Market** as provided for by Article 16(1)(b) of the Regulations. This provision must be read disjunctively. There is no need for the Commission to prove actual or concrete restrictive effects of a business practice once the Commission has established that its object is the prevention, restriction or distortion of competition within the Common

Market. In this regard, anti- competitive effects of restrictive business practices by object are presumed.

37. The notion of “restriction of competition by object” refers to certain forms of coordination between undertakings that can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. An examination of the effects of harm to competition is not necessary when assessing business practices which restrict competition by object. The concept of “object” does not refer to the subjective intention of the parties but is assessed on the basis of the objective meaning and aims of the business practice considered within its legal and economic context. Although it is not necessary to prove the parties’ subjective intent to prevent, restrict or distort competition, evidence of the existence of such intent is a relevant factor to take into consideration.

38. If a practice does not constitute a restriction by object, it is necessary to examine whether it has restrictive effects on competition. Such practices may or may not be anti-competitive. It is necessary to prove that the business practice in question affects actual or potential competition to such an extent that negative effects on prices, output, innovation or the variety or quality of goods and services in the relevant market can be expected with a reasonable degree of probability.

39. Individual assessment of the likely effects of a business practice must be carried out within the actual legal and economic context. Anti-competitive effects are likely to occur when the parties individually or jointly have or obtain some degree of market power and the practice creates, maintains or strengthens that market power or allows the parties to exploit that market power e.g. through market foreclosure. It is necessary to define the relevant market and assess competition in that market (i.e. the nature of the products; the market position of the parties; the market positions of their suppliers, customers, competitors and potential competitors; the barriers to entry; the level of prices). However, it is sometimes possible to demonstrate anti-competitive effects directly by assessing the behaviour of parties in the market.

40. For business practices to be prohibited under Article 16(1) of the Regulations, they must be capable of appreciably restricting competition within the Common Market by object or effect. The concept of ‘appreciability’ relates to the position of the undertakings concerned on the market for the products in question. Agreements concluded between parties that do not have significant market shares are not caught by Article 16(1) on account of their likely insignificant effect on competition. The Commission will normally consider the ‘appreciable effect’ on competition by having regard to the market share thresholds as set out in the sections to follow. These market share thresholds provide guidance to undertakings to self-assess whether their practice is likely to have an ‘appreciable effect’ on competition. However, although market shares are useful in indicating the market position of undertakings, they are not conclusive. An assessment of whether an agreement appreciably restricts competition ultimately depends on the general economic and legal context of the agreement at hand.

41. The burden of proving that an agreement has the object or effect of restricting competition in the Common Market lies in the first place with the Commission or with any other person making such allegation. Only when it is established to the requisite legal standard that an agreement has the object or effect of restricting competition in the Common Market does the burden shift to the concerned parties to show that the conditions of Article 16(4) are met (except for practices listed under Article 19(3), for which an exemption under Article 16(4) is not available).

42. Where it is shown that the object of the agreement is to restrict competition, the onus will be on the parties to the agreement to defend it and to establish that it meets the

criteria of Article 16(4). However, where it is not found that the object of the agreement is to restrict competition, the Commission or any other person alleging the breach has the burden of proving that the effect of the agreement or practice is to restrict competition. Only where this is established does the burden shift to the parties to defend it under Article 16(4).

43. Ultimately, the burden of proof under Article 16(4) to explain that the efficiency benefits of the particular business practice satisfies the Article 16(4) rests with the undertakings involved; the standard of proof is on the balance of probabilities.

What constitutes "implemented within the Common Market"

44. The fourth aspect is to look at the geographic scope of the Regulations as determined by Article 16(2) of the Regulations, which provides that Article 16(1) "*applies only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market*". A business practice will be construed to have been implemented in the Common Market on a case by case basis. Some of the factors which the Commission may consider in determining whether a business practice was implemented in the Common Market may include the following:
    a. whether the business practice takes place within the Common Market, e.g. direct sales of the relevant products to purchasers established in the Common Market, irrespective of the location of the sources of supply and the production plant, and of where the agreement was formed;
    b. whether the business practice involved companies established within the Common Market; or
    c. Whether the business practice targeted, or intended to target, customers in the Common Market.

45. While indirect sales[3] are likely to have an effect in the Common Market, in the absence of direct sales to purchasers located in the Common Market, it cannot be construed that an agreement has been implemented in the Common Market.

46. Once it is established that a business practice has been, or has been intended to be, implemented within the Common Market, the Commission has jurisdiction to enforce the Regulations against any undertaking involved in such a business practice, even if that undertaking is not established within the Common Market.

SECTION 6 – RELEVANT FACTORS FOR ASSESSMENT UNDER ARTICLE 16(4) OF THE REGULATIONS

Broad Assessment Procedure

47. The Commission may, upon application from the Parties, consider whether an anti-competitive agreement, decision or concerted practice which contravenes Article 16(1) can be permissible pursuant to Article 16(4). Article 16(4) of the Regulations only becomes relevant if a business practice falls within the scope of Article 16(1). Such practices are prohibited and void unless all the four cumulative requirements of Article 16(4) of the Regulations are met. The burden of proving that the conditions of Article 16(4) of the Regulations are satisfied lies with the undertaking concerned.

[3] Indirect sales occur when undertakings within the Common Market sell goods to undertakings outside the Common Market, which then incorporate the goods into the production of final goods which are then sold into the Common Market.

48. The assessment under Article 16(4) of the Regulations as regards efficiencies created by a business practice is normally made within the relevant product and geographic market(s) where the business practice produces its anti-competitive effects. Efficiencies achieved in a different, but related market (e.g. downstream or upstream market, may also be taken into account, provided that such efficiencies benefit consumers who are affected by the anti-competitive effects of the business practice.

49. The assessment under Article 16(4) of the Regulations is also made within the actual legal and economic context in which the business practice occurs at any given point in time. The assessment of a given business practice may thus change when the market circumstances evolve i.e. the permission granted ceases in a particular case should the market conditions no longer fulfil the conditions of Article 16(4). The conditions of Article 16(4) of the Regulations are as follows:
    a) Whether the practice creates efficiencies, that is whether it contributes to improving the production or distribution of goods or to promoting technical or economic progress;
    b) Whether consumers receive a fair share of the resulting benefits;
    c) Whether the practice imposes restrictions which are indispensable to create the efficiencies; and
    d) Whether the practice does not eliminate competition in respect of a substantial market for the goods or services in question.

What constitutes "contribute to improving the production or distribution of goods or promoting technical or economic progress"

50. Pursuant to Article 16(4) of the Regulations, a practice that falls within the scope of Article 16(1) of the Regulations has to "*contribute to improving the production or distribution of goods or to promoting technical or economic progress*" for it to be permissible. The benefit produced by an agreement must be something of objective value to a substantial part of the Common Market and not necessarily a private benefit to the parties themselves.

51. EU case law has established that there are generally two acceptable tests to determine 'substantial part' of the Common Market; the territorial test and the economic relativism approach. With regards to the territorial test, for instance the size of the defined geographic market in question may be substantial relative to, or in comparison to, the size of the Common Market. Under economic relativism, the size of the economic activity or operations of a particular sector or industry as a whole in a single Member State, may be regarded as constituting a substantial part of the Common Market e.g. the volume of traffic in a port and its importance in relation to maritime import and export operations as a whole in a Member State may be regarded as constituting a substantial part of the common market. [4]

52. The concepts of contributing to *improving the production or distribution of goods or to promoting technical or economic progress* may overlap and may not always be satisfied all at the same time. For example, research and development agreements would lead to *technical and economic progress* while vertical agreements between suppliers and distributors could be considered under *improving distribution.*

53. The assessment is carried out objectively and not necessarily from the point of view of the parties. Cost savings that result from the exercise of market power are not taken into account if they benefit only the undertakings; the cost savings must be shown to be

[4] See for example EU cases; CaseC-179/90 Merci convenzionali porto di Genova SpA v Siderugica Gabrielli SpA [1991] para 15.

passed on to the consumer. Only benefits that are linked with the practice are taken into consideration to assess whether the pro-competitive effects of a practice outweigh its anti-competitive effects.

54. Efficiencies can either be static i.e. resulting in cost reduction using existing technologies; or dynamic i.e. arising from gains in innovation. Competition analysis is more concerned with the dynamic efficiencies as drivers of economic growth. Efficiencies can also take the form of cost reductions due to superior production technology or can be qualitative in the case of improved quality of products or services offered on the market.

55. The undertakings concerned must demonstrate the following elements:
    a) The efficiencies are objective in nature and not merely cost reductions resulting from the exercise of market power (e.g. ability to increase price or exclusion of competitors; a reduction in advertising costs; better access for product placement etc).
       The efficiencies may be cost efficiencies such as:
       i) synergies resulting from an integration of assets or technologies,
       ii) economies of scale,
       iii) cost savings resulting from the production of different products on the basis of the same input,
       iv) cost reductions from better planning of production
       v) better capacity utilization.
       The efficiencies may also be qualitative efficiencies such as technological advances or synergies that lead to new products, products of higher quality or improved products with novel features being introduced on the market quicker or at a lower cost;
    b) There is a direct causal link between the practice and the efficiencies. Indirect effects linked to a claimed utilisation of increased profits are generally not sufficient;
    c) The efficiencies have already materialized or are likely to materialize. The undertakings must describe precisely how and when the efficiencies would be achieved; and
    d) The magnitude of the efficiencies outweighs the anti-competitive effects of the practice. The undertakings concerned must estimate the efficiencies and explain the reasoning underlying their estimation and further demonstrate how the efficiencies outweigh any anti-competitive effects.

What constitutes "fair share of the resulting benefits for consumers"

56. Pursuant to Article 16(4) of the Regulations, a practice that falls within the scope of Article 16(1) of the Regulations has to "allow consumers a fair share of the resulting benefits" to be permissible. In other words, consumers must receive a fair share of the benefits created by the practice. Since competition policy is concerned with consumer welfare, the resulting benefits must accrue to consumers for the practice to benefit from Article 16(4). Efficiencies generated by the restrictive business practice within the relevant market must be sufficient to outweigh the anti-competitive effects produced by it i.e. no cross reference of benefits between unrelated markets

57. The term "consumers" is defined in Article 1 of the Regulations as including "any person who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale; and to whom a service is rendered". In other words, final users of the finished product must directly or indirectly benefit from the efficiencies created, not only producers or wholesalers.

58. The efficiency gains created by a business practice must be passed on to consumers to the extent necessary at least to compensate them for any negative effects produced by the practice in question. When the positive effects of the business practice are balanced against its negative effects, the overall impact on consumers of the products within the relevant market must be positive. It is not required that every individual consumer benefits from a fair share of the resulting benefits provided that the overall impact on all consumers, viewed together as a group, is positive.

59. Assessment of the likelihood that efficiency gains are passed on to consumers must be made within the actual legal and economic context. If the efficiencies consist of cost savings, the assessment requires taking into account the characteristics and structure of the market (especially the remaining degree of competition in the market), the nature and the magnitude of the efficiency gains, the elasticity of the demand and the magnitude of the restriction of competition. If the efficiencies are qualitative, accordingly the assessment involves carrying out a value judgment rather than the comparison of two money amounts.

60. Article 16(4) of the Regulations provides for a sliding scale. It is likely that consumers will receive a fair share of the benefits if the restrictive effects are limited and the cost savings substantial. By contrast, it is unlikely that consumers will receive a fair share of the benefits if the restrictive effects are substantial whereas the costs savings are limited. If there is a time-lag between the creation of the negative effects and the passing-on of the benefits to consumers, this must be reflected in the assessment by reducing the value attributed to efficiencies that will only be achieved in the future.

Indispensability

61. Pursuant to Article 16(4) of the Regulations, for a business practice that falls within the scope of Article 16(1) of the Regulations to be permissible, it must not "*impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives*". In other words, the restrictions must be indispensable, i.e. the business practice must not impose restrictions where there are other less anticompetitive means of attaining the very same efficiencies.

62. An assessment should look at whether, given the nature of the agreement and the characteristics of the market, a less restrictive scenario was not feasible to the attainment of similar efficiencies. Restrictive agreements must, therefore, be reasonably necessary to the attainment of the efficiencies and the restrictions must also be reasonably necessary to the attainment of the efficiencies.

63. The undertakings concerned must demonstrate that both the business practice and all the individual restrictions are reasonably necessary in order to achieve the efficiencies. The test is two-fold:
    a) First, it must be assessed whether the business practice enables the economic activity to be performed more efficiently so that more efficiencies are produced with the business practice than in its absence. There must not be other realistic, economically practicable and significantly less restrictive means of achieving the efficiencies;
    b) Second, after it has been established that a practice is necessary, it must still be assessed whether the individual restrictions are themselves indispensable so that their absence would eliminate or significantly reduce the efficiencies or the likelihood for them to materialize. The assessment should be made within the confines of the relevant market to which the practice relates.

64. The more restrictive the restraint, the stricter is the test. Furthermore, the assessment is carried out in the actual legal and economic context of the business practice, taking into account factors such as the market structure, the economic risks and the incentives of the parties to pass on the efficiencies.

No elimination of Competition in respect of a substantial market for the goods or services

65. Pursuant to Article 16(4) of the Regulations, a practice that falls within the scope of Article 16(1) of the Regulations must not "*afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question*" in order to be permissible. This condition accords priority to the protection of the competitive process over the potential pro-competitive efficiencies. Rivalry among market players is recognized as the prime driver of economic efficiency. Loss of competition may not be healthy for long term dynamic efficiency gains which are the driver of economic growth.

66. Whether competition is being eliminated in the relevant market depends on the degree of existing competitive constraints on the parties to an agreement. The greater the loss of competition caused by the business practice, the greater the likelihood of competition in respect of a substantial part of the market being eliminated. Assessment of the likelihood of elimination of competition should follow similar procedure as outlined in the assessment Guidelines on Abuse of Dominant Position.

67. In order to assess the last condition of Article 16(4), it is necessary to carry out a detailed analysis of the market and the sources of actual and potential competition. In addition to market shares, the assessment must take account of the history of competition, entry barriers and the possibility for competing undertakings from entering into the market.

SECTION 7 – RELEVANT FACTORS FOR ASSESSMENT UNDER ARTICLE 20 OF THE REGULATIONS

Request for Authorisation of Agreements

68. Under Article 20, parties may request the Commission to authorise them to enter and/or to give effect to contracts, arrangements, or understandings even if they are anti-competitive, depending on whether there are public benefits outweighing the anti-competitive detriment of the contract, arrangement or understanding. If granted, the authorization shall be for a defined period at the end of which the authorization ceases to be in effect. Should the parties wish to apply for authorization for another period, they may submit a new application for the defined period.

69. Upon receipt of such an application, the Commission will determine whether the Agreement passes the test of Article 16(1) read together with Article 16(4) as described in the Sections above. In addition, when considering the Request for Authorisation the Commission will consider there are public benefits arising from the agreement.

Broad Assessment Procedure

70. Article 20 contemplates that the Commission may accept applications from parties to enter and/or give effect to contracts. This means that parties may approach the Commission before entering into agreements, to obtain the Commission's guidance. This may particularly be useful for parties contemplating entering into horizontal agreements, given the risk of horizontal arrangements becoming cartels.

71. According to Rule 34(2) of the Rules, agreements, decisions and concerted practices do not need to be notified to the Commission in the following circumstances:

   a) *[where] the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States;*
   b) *[where] not more than two undertakings are party thereto, and the agreements only:*
   c) *restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold; or*
   d) *impose restrictions on the exercise of the rights of the assignee or user of industrial property rights – in particular patents, utility models, designs or trademarks – or of the person entitled under a contract to the assignment, or grant, of the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes;*
   e) *[where] they have as their sole object:*
      i. *the development of uniform applications of standards or types: or*
      ii. *joint research and development;*
      iii. *specialization in the manufacture of products, including agreements necessary for achieving this;*
         - *where the products which are subject of specialization do not, in a substantial part of the Common Market, represent more than 15% of the volume of business done in identical products, or those considered by consumers to be similar by reason of their characteristics, price and use*.

72. In assessing the agreements, the Commission will be guided by the provisions of Article 16 on the treatment of agreements. As such, parties may submit efficiency justifications envisaged by Article 16(4) of the Regulations, to defend the restrictive clauses contained in their agreements.

73. Similar to the process under Article 16, the burden to justify the restrictive clauses in the agreements lies with the parties, and the Commission will have to satisfy itself that the pro-competitive characteristics of the business practice out-weigh the anti-competitive detriment.

74. If the Commission finds that the agreements are not compatible with the Regulations and have no public benefits that outweigh their anti-competitive detriments, the Commission may advise the parties to remove or amend the offending provisions in order for the agreement to be compatible with the Regulations. Otherwise the provisions of the Regulations shall apply.

75. If however, applicants under Article 20 fail to comply with the Commission's recommendation to remove or amend agreements to make them compatible with the Regulations, the Commission may dismiss the application and institute an investigation under Article 22 of the Regulations.

76. Pursuant to Article 20(1)(a) of the Regulations, "while the authorization remains in force no party to the contract, arrangement or understanding will be in breach of the applicable Articles of [the] Regulations by entering or giving effect to it."

77. The Commission's determination on an agreement shall be without prejudice to the applicants' rights under any action by third parties i.e. the parties' application for

authorisation shall not be construed to be an admission of breach of the Regulations that can be used by third parties who want to pursue a civil claim against the parties.

Form of Notification and Procedure for Submission

78. Pursuant to Rule 61, parties seeking authorization must apply to the Commission in the requisite form, by submitting the Application for Exemption/Authorisation Form 7, together with the necessary documentation, and paying the applicable application fee. An application will be deemed 'complete' on the date that the Commission receives all the information and supporting documents required by Form 7 and the application fee is paid in full. Upon receipt of a complete application, the Registrar shall cause a file number to be allotted to the application.

79. Notifications must be made either by post and email to the Commission's prescribed email address attaching or otherwise providing effective electronic access to Form and all supporting documents in PDF format and including the email addresses of each party comprising the applicants, or submitting an electronic version of the Form and all supporting documents. The application will be deemed submitted upon receipt of such electronic application by the Commission. *One hard copy of the Form 7 and all supporting documents should be sent to the Commission within seven (7) days thereafter.* If there are any discrepancies between the two formats of the notification, the hard copy version will control.

80. Within seven (7) days following receipt of an application, the Commission shall publish on its website, short particulars of the application, including the applicant's name, address, date of application, file number, and a brief description of the matter.

81. In accordance with Rule 40, the Commission shall transmit to the competent authorities of the affected Member States a copy of the application together with copies of the most important documentation lodged, calling upon them to submit their views on the matter.

82. Pursuant to Rule 61(5) a draft report shall be submitted to the Director within 30 days following receipt of the application. The Director considers the report within 7 days and prepares a draft decision. The draft decision is sent to the applicant and all other persons who have expressed an interest in the application with an invitation to indicate whether a public hearing is required before the matter is finalized.

83. If so requested by the applicant or an interested party, a public hearing may be held at the Commission's offices or any place within the Common Market as the Director may decide and the applicant and those interested are entitled to attend and put further submissions to the Director either in support of or opposition to the draft decision.

84. Pursuant to Rule 29, the Commission in conducting its hearing and making recommendations and/or determinations shall give the undertakings (s) which are the subject of the proceedings the opportunity of being heard. Recommendations and/or decisions shall be only based on matters on which the parties concerned have been able to comment. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the file, subject to the legitimate interests of undertakings in the protection of their business secrets. That legitimate interest may not constitute an obstacle to the disclosure and use of information necessary to prove an infringement. The right to access to the file shall not extend to confidential information and internal documents of the Commission and/or the Board

85. If no public hearing is requested, the Director will ratify its draft decision and send formal confirmation to the applicant 15 days following the forwarding of the draft decision to the applicant and other interested parties. If a public hearing is held, the Director makes a final decision 7 days following the forum and a copy is sent to the applicant and to all interested parties who participated in the public hearing.

86. The decision of the Director shall be published in a manner that ensures the widest circulation in the Common Market.

Confidential Information

87. The applicants may request that any documents or information submitted be treated as confidential by submitting a reasoned request for confidentiality in the Request for Confidentiality Form 2. Parties may consult with the Commission prior to notification regarding such a request. If the Commission determines that disclosure of such information or documents or parts thereof would likely result in disclosure of business secrets, destruction or appreciable diminution of the commercial value of any information or cause serious injury, it will confirm within a reasonable time to the notifying party that the Commission will treat such information or documents as confidential and not disclose them publicly. To the extent that the Commission refers to confidential information in its decisions, it will respect the confidential nature of such information by redacting it.

88. The applicants should not make blanket requests for confidential treatment of the application, as the Commission will likely reject such requests. The applicants should make requests relating to specific documents, or identified information contained in documents, and provide the related reasons for the request. Such reasons should be detailed, in particular showing the nature and materiality of the harm that will result from public disclosure in order to convince the Commission of the importance of confidential treatment.

89. The Commission will only disclose information or documents designated as confidential to a Member State or authority of a Member State or any other nation where such Member State or authority is obliged to respect the confidentiality of such information or documents under their national laws. The Commission shall procure that the Member State or authority of a Member State confirms that the information shall be treated with confidentiality.

Appeal

90. Any person aggrieved by the decision of the Commission will have the right to appeal to the Board in the manner set forth in the relevant Rules. An appeal to the Board must be made within 60 days of receipt of notification of the decision. The appeal process shall be guided by the COMESA Competition Commission (Appeals Board Procedure) Rule.

SECTION 8 – HORIZONTAL BUSINESS PRACTICES

Positive and Negative Effects of Horizontal Business Practices

91. Horizontal business practices are business practices entered into between two or more undertakings, each of which operates at the same level of the production or distribution chain.

Restrictions by object

92. Article 19(3) of the Regulations provides a list of business practices that constitute restrictive business practices by object. Restrictions of competition *by object* are those that by their very nature have the potential to restrict competition within the meaning of Article 16(1). Such business practices will not benefit from the Article 20 Authorisation procedures. It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.

93. In order to assess whether an agreement has an anti-competitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the Commission may nevertheless take this aspect into account in its analysis.

Restrictive effects on competition

94. If a horizontal agreement does not restrict competition by object, it must be examined whether it has appreciable restrictive effects on competition. Account must be taken of both actual and potential effects. In other words, the agreement must at least be likely to have anti-competitive effects.

95. For an agreement to have restrictive effects on competition within the meaning of Article 16(1), it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce the parties' decision-making independence, either due to obligations contained in the agreement which regulate the market behaviour of at least one of the parties; or by influencing the behaviour of at least one of the parties by causing a change in its incentives.

96. The assessment of whether a horizontal agreement has restrictive effects on competition within the meaning of Article 16(1) must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment). Hence, in order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the agreement. This comparison does not take into account any potential efficiency gains generated by the agreement as these will only be assessed under Article 16(4).

97. Restrictive effects on competition within the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.

98. Horizontal agreements can be pro-competitive and create substantial economic efficiencies, especially through the combination of complementary activities, know-how or assets, for example research and development (‘R&D’) and the production and/or commercialisation of its results. Two factors are relevant in the assessment of the co-operation: firstly, the starting point of the co-operation, and, secondly, the degree of integration of the different functions which are combined.

99. The analysis of horizontal co-operation agreements has certain common elements with the analysis of horizontal mergers pertaining to the potential restrictive effects, in particular as regards joint ventures. There is often only a fine line between full-function joint ventures that fall under the Merger Regulation and non-full-function joint ventures that are assessed under Article 16. Hence, their effects can be quite similar

Safe Harbour

100. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 16(1): If the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); or Above the market share threshold of 10%, an individual examination is necessary to determine first whether the horizontal business practice falls within Article 16(1) of the Regulations and, if so, whether the conditions of Article 16(4) of the Regulations are fulfilled.

101. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effect on the market), the market share thresholds are reduced to 5%. Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects.

102. The Commission also holds the view that agreements are not restrictive of competition if, during two successive years, the market shares do not exceed the thresholds of 10%, and 5% (respectively as set out in the preceding paragraphs) by more than 2 percentage points.

103. However, restrictive practices by object listed in Article 19(3) are prohibited regardless of the aggregate market shares held by the parties involved.

The Competition Assessment of Horizontal Agreements

104. In order to assess Horizontal Business Practices under Article 16(1), the Commission will consider the following factors, among others:
   a) The nature and content of an agreement: this relates to factors such as the area and objective of the co-operation, the competitive relationship between the parties and the extent to which they combine their activities.
   b) The market power of the parties: market power is the ability to profitably maintain prices above competitive levels for an extended (rather than transient) period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time.

c) Other characteristics of the market: depending on the market position of the parties and the concentration in the market, other factors such as the stability of market shares over time, entry barriers and the likelihood of market entry, and the countervailing power of buyers/suppliers also have to be considered.

Analysis of Specific Types of Horizontal Restraints

Information Exchange Agreements

105. Information exchange agreements are business practices whereby two or more undertakings exchange market information. Information exchanges may be independent or ancillary to another business practice. The assessment of information exchanges that form part of another business practice will be carried out in the context of the assessment of the main horizontal business practice itself. In that case, it is thus necessary to assess (a) whether the information exchange is ancillary to some other agreement and (b) whether the exchange of information is reasonably necessary to the accomplishment of the main agreement.

106. Information exchange is a widespread practice and may lead to efficiencies. For instance, it may solve asymmetries of information or help undertakings to improve their internal efficiency through benchmarking. It may also help consumers to reduce search costs or foster investments.

107. However, the exchange of market information may also facilitate coordination and reduce the independence of the market actors. It may also lead to foreclosure if some market players do not have access to the information that is indispensable to compete on the market. The assessment will depend on the characteristics of the relevant market and the type of information exchanged. First, as regards market characteristics; the more transparent, homogeneous, stable and concentrated a market is, the more likely that an information exchange will be restrictive.

108. Second, as regards the type of exchanged information; exchange of strategic data, such as information on price and quantities, tends to reduce uncertainty in the market and is more likely to be restrictive. This is particularly the case if the exchanged information is individualized and relates to the future strategy of undertakings. By contrast, the exchange of aggregated industry data (which makes it difficult to identify company-specific information), historic information (older than several times the average length of contracts in the industry) and genuinely public information (easy to collect from the market) is less likely to be restrictive of competition.

Research and Development (R&D) Agreements

109. Research and Development agreements (“R&D agreements”) are agreements whereby two or more undertakings cooperate to undertake research, develop a product and, sometimes, bring that product to the market.

110. Most R&D agreements do not fall within the scope of Article 16(1) of the Regulations. R&D agreements between non-competitors are unlikely to give rise to competition concerns. Similarly, pure R&D agreements that do not entail joint commercialization and are far from product commercialization are also unlikely to give rise to competition concerns unless they reduce the number of remaining independent R&D poles.

111. R&D agreements that include joint exploitation need to be examined more closely. R&D agreements aimed at developing an entire new product are unlikely to give rise to competition concerns.

112. The assessment of other R&D agreements should take into account the position of the parties, the repercussions on both existing markets and innovation markets and the necessity for the parties to cooperate to achieve the intended innovation. R&D agreements might lead to a restriction of competition if the agreement was not necessary to bring the intended innovation to the market and parties have market power in some of the relevant markets.

Production Agreements

113. Production agreements are agreements whereby two or more undertakings agree either to produce jointly or agree to specialize with one of the parties subcontracting production to the other.

114. Production agreements may lead to synergies, economies of scale and cost savings.

115. Production agreements may also lead to coordination between the parties and, in particular, an alignment in terms of prices and input due to a high commonality of costs. Production agreements may also lead to foreclosure of third parties in a related downstream market. Production agreements that also entail joint commercialization carry higher risks for loss of competition.

116. Production agreements are unlikely to give rise to competition concerns if the parties do not have market power in the relevant markets. In addition, production agreements are unlikely to give rise to competition concerns where they are necessary to bring, more efficiently, a new product to the market.

Purchasing Agreements

117. Purchasing agreements are agreements whereby two or more undertakings jointly purchase an input.

118. Purchasing agreements generally lead to lower input price or better quality input due to the efficiencies linked to volume purchasing (lower transaction costs; ability of suppliers to ensure higher, more efficient levels of production; etc.).

119. Purchasing agreements may produce restrictive effects on competition in both the purchasing and downstream selling markets. In the upstream market, purchasing agreements may force suppliers to reduce the quality or range of their products if the parties have a significant degree of market power. In the downstream market, purchasing agreements may foreclose competitors or lead to collusion due to high commonality of costs.

120. However, in the absence of significant market power, joint purchasing agreements are generally pro-competitive, as they may lead to efficiencies to be passed on to consumers. In addition, if the parties are not active in the same downstream market, it is unlikely that a joint purchasing agreement would give rise to any competition concerns.

Commercialization Agreements

121. Commercialization agreements are agreements whereby two or more undertakings cooperate to sell, distribute or promote substitutable products. Commercialization agreements may be limited to certain aspects of the sale, distribution and promotion or relate to all aspects, including the determination of the price.

122. Commercialization agreements may lead to efficiencies in the distribution of products.

123. Commercialization agreements may also lead to anti-competitive effects. In particular, commercialization agreements may lead to or facilitate price-fixing, market partitioning and output limitation.

124. In order to assess commercialization agreements, the content of the agreement and the degree of cooperation must be taken into account. Commercialization agreements are considered overall pro-competitive if the parties could not have entered the market individually. Commercialization agreements are also considered not to give rise to significant competition concerns if the parties do not have significant market power.

SECTION 9 – VERTICAL BUSINESS PRACTICES

Positive and Negative Effects of Vertical Business Practices

125. Vertical business practices are business practices entered into between two or more undertakings, each of which operates at a different level of the production or distribution chain. Vertical business practices may lead to significant efficiencies, especially when the supplier does not have significant market power.

126. Vertical restraints may solve the free-rider problem. The free rider occurs whereby some distributors free ride on the efforts made by another distributor to market and advertise the products. Vertical restraints such as exclusive distribution would be acceptable to solve this problem. However, this is only acceptable in limited circumstances, and the context of the business practice needs to be taken into account, e.g. the investment must be relationship-specific i.e. cannot be used to supply other customers after the termination of the contract etc.

127. A vertical restraint in the form of maximum resale price maintenance may solve the problem of double marginalization. By setting a maximum resale price, manufacturers are able to ensure that their products don't suffer the negative externality caused by very high prices charged by the retailer. Vertical restraints may also reward investments made by either the supplier or distributors. They may also help suppliers to enter into a new product or geographic market.

128. Vertical business practices may also have restrictive effects on competition: First, vertical business practices tend to reduce intra-brand competition, i.e. the competition between a supplier's distributors. It is generally admitted that restrictions of intra-brand competition are less serious than restrictions of inter-brand competition (i.e. competition between suppliers), provided that inter-brand competition remains fierce. However, restrictions of intra-brand competition become more serious the higher market power the supplier has.

129. Second, vertical business practices may also directly restrict inter-brand competition by increasing the transparency in the market and creating barriers to entry.

130. Third, vertical business practices may create obstacles to market integration

Vertical Business Practices Broad Assessment Procedure

131. In order to assess vertical business practices under Article 16 of the Regulations, the Commission may consider elements such as the following:
    a) The nature of the agreement looking at the specific restraints imposed by the agreement, duration and percentage of actual sales in the relevant market affected by the restraint;
    b) The market position of the parties which provides an understanding of the degree of market power. The higher the market shares for instance, the greater the likelihood of the parties having market power;
    c) The market position of competitors e.g. the stronger the competitors, the greater their numbers and disciplinary power over the parties, then the less is the risk of the parties to exercise market power and foreclose the market;
    d) The market positions of buyers e.g. the greater the countervailing power of the customer on the buyer side of the market, the greater is the influence of its demand and hence the greater its disciplinary power over the parties to an agreement;
    e) Barriers to entry which determine the extent to which incumbent parties to an agreement can increase prices above the competitive level without attracting new entry or expansion by existing competitors;
    f) Nature of market e.g. if the market is mature, innovation does not change much and demand is relatively stable and to some extent declining, it is more vulnerable to the negative effects of vertical agreements than dynamic markets;
    g) Level of trade i.e. the negative effects of vertical restraints depend on whether the market is for intermediate or final products. Buyers of intermediate products (inputs) are well informed about product characteristics and not so reliant on brands, hence the negative effects of vertical restraints are less experienced than in the market for final products;
    h) Nature of the product i.e. the effects of vertical restraints depend on whether the product is homogeneous or heterogeneous, whether it is expensive or less expensive, whether it is easily accessible, or whether it constitutes a relatively once off purchase or repeated purchase. Vertical restraints are more likely to have negative effects on heterogeneous, less expensive product markets and once off purchases;
    i) The size of the affected portion of the market, duration of the vertical restraints and the market power of the supplier and distributors are the additional factors that will be taken into account.

Safe Harbour

132. Business practices that are not capable of appreciably restricting competition by object or effect within the Common Market do not fall within the scope of Article 16(1) of the Regulations. Moreover, in the absence of significant market power of the parties, it is more likely that a business practice be permissible under Article 16(4) of the Regulations.

133. The commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 16(1) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors). For agreements with the market share threshold exceeding 15% an individual examination is required to determine whether the conditions of Article 16(4) are met.

134. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effect on the market), the market share threshold is reduced to 5%. Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects.

135. The Commission also holds the view that agreements are not restrictive of competition if during two successive years, the market shares do not exceed the thresholds of 15% and 5% (respectively as set out in the preceding paragraphs) by more than 2 percentage points.

Analysis of Selected Vertical Business Practices

Resale Price Maintenance

136. Resale price maintenance is a restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

137. Resale price maintenance increases price transparency on the market, which may facilitate collusion, and eliminate intra-brand price competition. However, resale price maintenance may lead to efficiencies when it is introduced to help the introduction of a new product or to organize a short term low price campaign. In such cases, resale price maintenance may benefit from the exemption under Article 16(4) of the Regulations.

138. In assessing the effects of Resale Price Maintenance on the market, it is vital to assess the position of the supplier. The stronger the position of the supplier, the higher the risk that the recommended price may be a focal price thus leading to a uniform referral price for a substantial part of the market. This is particularly the case if the supplier has substantial market power on both the upstream and downstream market.

Single Branding

139. Single branding means vertical agreements whereby the buyer is obliged to procure all or most of its requirements for a particular product from a single supplier.

140. Single branding agreements may have restrictive effects on competition. In particular, they may result in the foreclosure of competing suppliers by denying them access to unavoidable trading partners, softening competition and facilitating collusion. The higher the affected portion of the market and the longer the duration of the single branding obligation are the more restrictive single branding may result in anti-competitive effects. The anti-competitive effect is also more likely to occur at retail level than at intermediate level.

141. When assessing the effects of single branding on competition, the Commission will look at the market position of the parties *vis-à-vis* their competitors to ascertain anti-competitive foreclosure, countervailing power to ascertain the power of the buyers to discipline the parties and the level of trade. Anti-competitive foreclosure is less likely in the market for intermediate products as buyers of inputs are less reliant on brands.

Exclusive Distribution

142. Exclusive distribution means vertical agreements whereby the supplier agrees to sell a particular product to only one distributor in a particular territory or to a particular group of customers.

143. Exclusive distribution may result in anti-competitive effect if the supplier has a significant market power which may reduce or eliminate intra-brand competition, lead to market partitioning, facilitate price discrimination, soften competition and facilitate collusion in a scenario where there are many suppliers involved in exclusive distribution of substitutable products. In the absence of market power, the loss of intra-brand competition is generally compensated by existing inter-brand competition. Furthermore, exclusive distribution is less problematic at wholesale level and where the market is dynamic.

144. Territorial restrictions may help by encouraging the distributor to focus its efforts on its allocated territory. However, preventing distributors from responding to unsolicited requests from customers established outside their allocated territories (so-called "passive sales") impedes the establishment of the Common Market by recreating contractually the national borders. Thus, a restriction on passive sales and parallel imports may impede trade between Member States and infringe Article 16(1)(a) of the Regulations.

145. The practical assessment of the effects of exclusive distribution will look at the market position of the parties relative to their competitors to assess if loss of intra-brand competition can raise competition risks; entry barriers that may hinder the creation of new distributors or entry of alternative distributors; buyer power which may risk the possibility of collusion between important buyers and the supplier; and maturity of the market and the level of trade, among other factors.

Selective Distribution

146. Selective distribution means vertical agreements whereby the supplier appoints authorized distributors on the basis of predefined selection criteria. The restriction imposed by selective distribution is two-fold: restrictions on the number of authorized distributors and a restriction on the possibility of resale to non-authorized distributors.

147. Selective distribution may stifle intra- brand competition, soften competition, facilitate collusion between suppliers and buyers and precipitate market foreclosure. The risk of anticompetitive effects is greater where the supplier has significant market power so that inter-brand competition is weakened as well. By contrast, in the absence of market power, the loss of intra-brand competition is generally compensated by existing inter-brand competition. Furthermore, foreclosure of competing suppliers is unlikely unless selective distribution is combined with single branding obligations.

148. An assessment of selective distribution will take into account the purely qualitative distribution selection which is based on special know how and training of the distributor as required by certain kinds of products, rather than a quantitative selection which restricts the number distributors based on minimum sales requirements. Qualitative Selection Distribution does not often raise competition concerns so long as the selection criteria is objective enough and the conditions do not exceed what is objectively acceptable. The market position of the supplier and its competitors is vital in the assessment process to ascertain loss of intra-brand competition. The number of selected distribution networks available in the market is also an important factor in

ascertaining the anti-competitive nature of the distribution arrangement. An assessment of entry barriers is also vital in case of foreclosure of the market to non-authorized dealers. The efficiency justification laid down by the undertaking(s) needs critical analysis as well to ascertain whether same efficiencies could be obtainable at comparable cost by other distribution means.

Exclusive Supply

149. Exclusive supply means vertical agreements whereby the supplier agrees to sell a particular product only to one buyer, either in general or for a particular use.

150. Exclusive supply may have restrictive effects on competition. In particular, it may lead to foreclosure of competing buyers. The duration and the portion of the affected market are therefore important factors to take into account, as well as entry barriers and suppliers' countervailing power. The assessment of anti-competitive foreclosure on exclusive supply will take into account the market power of the buyer on the upstream purchase market, the duration and extent of the application of the obligation. Market position of competing buyers on the upstream market is also important to the determination of the possibility of foreclosure. Entry barriers at supplier level are important to establish the extent to which alternative suppliers can enter the market.

151. Further, it is vital to assess the countervailing power of the supplier as important suppliers may not succumb to the scenario of being cut off from alternative buyers. Foreclosure, in this arrangement, becomes a problem where there are weak suppliers and strong buyers. Additional factors such as the level of trade and nature of product need also be taken into account as foreclosure is less likely in the market for intermediate products and homogeneous products.

Franchise Agreements

152. Franchising is a business model premised on contractual relationship between two business partners where both parties contribute to the production and/or distribution of a product or a service. The arrangement is between a franchisor and a franchisee where the franchisor allows the franchisee to use the franchisor's patent, trademark, distribution network, technical and commercial know how etc. The franchisee is expected to pay a royalty fee to a franchisor as articulated in the license. The Commission will acknowledge an arrangement as being a franchise agreement only when it is satisfied that there is substantial transfer of know-how and continuous assistance to the contracted party. This is to distinguish franchise arrangements from exclusive distribution.

153. Franchise agreements exemplify vertical coordination where the franchisor controls decisions as regards pricing, quality, distribution, choice and source of inputs, etc. The agreements also may restrict incentives and exert tie-ins on the franchisee. For instance, to ascertain homogeneity in the presentation of the products or services to consumers, the franchise agreements may contain clauses pertaining to Minimum Resale Price Maintenance which limits intra brand competition, exclusive territory which again limits intra brand competition, exclusive dealing which limits inter brand competition, tying and bundling, refusal to license an Intellectual Property Right (IPR), etc. The efficiencies that arise from franchise arrangements include the entry of new products/undertakings into the market and increased participation of emerging businesses in the distribution of goods and services utilizing the access to distribution networks are many.

154. In analyzing the applications for authorization of franchise agreements, the Commission will take consideration of the structure and dynamics of the market and the level of inter-brand competition from other franchises or sellers of substitutable products/ services. The Commission will also look at conditions of entry for potential sellers/franchises into the relevant market. The Commission will further explore the long run effects of the agreement as such agreements, though seemingly anti-competitive in the short term, may lead to dynamic efficiencies in the long run through increased investment in Intellectual Property.

SECTION 10- MISCELLANEOUS

General Penalties and Fines

155. Pursuant to Article 8(5) of the Regulations any person who contravenes or fails to comply with any regulations or any Rules made or any directive or order lawfully given or any lawfully imposed under the Regulations or any Rules made for which no penalty is provided shall be determined to have breached the Regulations and shall be liable pursuant to that determination to fine in an amount as determined by the Rules and or such other penalty as may be assessed.

Review of the Guidelines

156. These Guidelines may be reviewed from time to time to reflect changing market circumstances and law governing their implementation.

Entry into Force

29. These Guidelines shall enter into force upon approval by the Board.

APPROVED by the Board at Mombasa, Kenya on the 2nd of April 2019.