



Brussels, 25.6.2014
SWD(2014) 198 final

COMMISSION STAFF WORKING DOCUMENT

Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice

Accompanying the document

COMMUNICATION FROM THE COMMISSION

Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)

{C(2014) 4136 final}

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1. FINDING GUIDANCE ON RESTRICTIONS OF COMPETITION "BY OBJECT"

The Commission's De Minimis Notice¹ provides a safe harbour for agreements between undertakings which the Commission considers to have non-appreciable effects on competition. This safe harbour applies on condition that the market shares of the undertakings concluding those agreements do not exceed the market share thresholds set out in that Notice and provided that the agreements do not have as their object to restrict competition. For the purposes of the application of the De Minimis Notice, hardcore restrictions listed in the Commission block exemption regulations are generally considered to constitute restrictions by object.² Therefore, agreements containing restrictions listed as hardcore restrictions in any current or future Commission block exemption regulation cannot benefit from the market share safe harbour set out in that Notice.³

Article 101(1) of the Treaty on the Functioning of the European Union (the Treaty) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.⁴ The distinction between "restrictions by object" and "restrictions by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.⁵ Restrictions of competition "by object" are those that by their very nature have the potential to restrict competition. These are restrictions which in the light of the objectives pursued by the Union competition rules have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) of the Treaty to demonstrate any actual or likely anti-competitive effects on the market. This is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU Union competition rules.

In order to determine with certainty whether an agreement involves a restriction of competition "by object", regard must, according to the case law of the Court of Justice of the European Union, be had to a number of factors, such as the content of its provisions, its objectives and the economic and legal context of which it forms a part.⁶ In addition,

¹ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the functioning of the European Union (De Minimis Notice) [add reference when Notice published].

² See point 23 of the Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 24.4.2004, p. 97), (the General Guidelines).

³ See point 13 of the De Minimis Notice.

⁴ For the purposes of this document, the term "agreements" also includes concerted practices and decisions by associations of undertakings.

⁵ See the judgment of the Court of Justice of 13 December 2012 in Case C-226/11 *Expedia*, not yet reported, paragraph 36 and case law cited.

⁶ See the judgments of the Court of Justice in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline* [2009] ECR I-9291, paragraph 58, Joined Cases 96/82 to 102/82, 104/82,

although the parties' intention is not a necessary factor in determining whether an agreement restricts competition "by object", the Commission may nevertheless take this aspect into account in its analysis.⁷

The types of restrictions that are considered to constitute restrictions "by object" differ depending on whether the agreements are entered into between actual or potential competitors or between non-competitors (for example between a supplier and a distributor). In the case of agreements between competitors (horizontal agreements), restrictions of competition by object include, in particular, price fixing, output limitation and sharing of markets and customers. As regards agreements between non-competitors (vertical agreements), the category of restrictions by object includes, in particular, fixing (minimum) resale prices and restrictions which limit sales into particular territories or to particular customer groups.⁸

The fact that an agreement contains a restriction "by object", and thus falls under Article 101(1) of the Treaty, does not preclude the parties from demonstrating that the conditions set out in Article 101(3) of the Treaty are satisfied. However, practice shows that restrictions by object are unlikely to fulfil the four conditions set out in Article 101(3).⁹

In exceptional cases, a restriction "by object" may also be compatible with Article 101 of the Treaty not because it benefits from the exception provided for in Article 101(3) of the Treaty, but because it is objectively necessary for the existence of an agreement of a particular type or nature or for the protection of a legitimate goal, such as health and safety, and therefore falls outside the scope of Article 101(1) of the Treaty.¹⁰

Types of practices that generally constitute restrictions of competition "by object" can be found in the Commission's guidelines, notices and block exemption regulations. These refer to restrictions by object or contain lists of so-called "hardcore" restrictions that describe certain types of restrictions which do not benefit from a block exemption on the basis of the nature of those restrictions and the fact that those restrictions are likely to produce negative effects on the market. Those so called "hardcore" restrictions are generally restrictions "by object" when assessed in an individual case. Agreements containing one or more "by object" or hardcore restrictions cannot benefit from the safe harbour of the De Minimis Notice.

105/82, 108/82 and 110/82 IAZ International Belgium and Others [1983] ECR 3369, paragraph 25, Case C-209/07 Beef Industry Development Society (BIDS) [2008] ECR I-8637, paragraph 16 and Case C-32/11 Allianz Hungária Biztosító Zrt and Others (judgement of 14 May 2013), paragraph 36. For further guidance, see points 19 to 22 of the General Guidelines.

⁷ See for example the judgments of the Court of Justice in Joined Cases C-501/06 P and Others GlaxoSmithKline [2009] ECR I-9291, paragraph 58 and Case C-209/07 Beef Industry Development Society (BIDS) [2008] ECR I-8637, paragraphs 15 et seq.

⁸ See point 23 of the General Guidelines.

⁹ See point 46 of the General Guidelines. For an example of how Article 101(3) of the Treaty applies to restrictions by object, see point 225 of the Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p.1), (the Vertical Guidelines).

¹⁰ See e.g. point 18 of the General Guidelines and points 60, 61 and 62 of the Vertical Guidelines.

For the purpose of assisting undertakings in their assessment of whether agreements can benefit from the market share safe harbour of the De Minimis Notice, this document lists the restrictions of competition that are described as "by object" or "hardcore" in the various Commission regulations, guidelines and notices, supplemented with some particularly illustrative examples taken from the case law of the Court of Justice of the European Union and the Commission's decisional practice.¹¹

This document is without prejudice to any developments in the case law and in the Commission's decisional practice. It does not prevent the Commission from finding restrictions of competition by object that are not identified below. DG Competition intends to regularly update the examples listed below in the light of such further developments that may expand or limit the list of restrictions "by object".

2. "BY OBJECT" RESTRICTIONS IN AGREEMENTS BETWEEN COMPETITORS

The three classical "by object" restrictions in agreements between competitors are price fixing, output limitation and market sharing (sharing of geographical or product markets or customers).

However, restrictions of that kind may not constitute restrictions "by object" where they are part of a wider cooperation agreement between two competitors in the context of which the parties combine complementary skills or assets. For example, in the context of production agreements, it is not considered a "by object" restriction where the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that other parameters of competition are not eliminated. Another example is a production agreement that also provides for the joint distribution of the jointly manufactured products and envisages the joint setting of the sales prices for those products, and only those products, provided that the restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place. In those scenarios the agreement on output or prices will not be assessed separately, but will be assessed in the light of the overall effects of the entire production agreement on the market.¹²

¹¹ All Commission's decisions are available at DG Competition's webpage: <http://ec.europa.eu/competition> under their respective case number. For cases decided by the Court of Justice (case numbers beginning with C-...) or the General Court (case numbers beginning with T-...), see <http://curia.europa.eu>. Judgements of national courts and decisions of national competition authorities have not been included in this document.

¹² For example, in the context of a joint-venture created by competitors, a non-compete clause with respect to the parties' activities after the expiry of the joint-venture agreement in markets where the joint-venture was not active has been considered a restriction "by object" infringing Article 101 of the Treaty, whereas proportionate and objectively necessary non-compete clauses preventing the parties from competing on activities falling within the scope of joint-venture may be considered as not infringing Article 101 (See Case 39736 Siemens/Areva).

2.1. Price fixing

2.1.1. General principles

Restrictions whereby competitors agree to fix prices of products which they sell or buy are, as a matter of principle, restrictions by object. It is not necessary that the agreement expressly or directly fixes the selling or purchasing price: it is sufficient if the parties agree on certain parameters of the price composition, such as the amount of rebates given to customers.

<i>Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ICI v Commission</i> A cartel in which target prices and target quotas were fixed, and there were concerted initiatives to raise price levels and monitor the operation of the collusive arrangements.
<i>Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, Österreichische Volksbanken v Commission</i> A cartel in which banks fixed deposit and lending rates.
<i>Case T-208/08, Gosselin Group v Commission</i> A cartel on the international removal services market that related to the direct or indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders.
<i>Joined Cases T-217/03 and T-245/03, French Beef</i> Agreement concluded by federations representing farmers and federations representing slaughterers aimed at fixing minimum prices for the purchase of cows by slaughterers and suspending beef imports.
<i>Case 38549 Architectes Belges</i> Recommended minimum fees (i.e. recommended minimum prices) of a national association of architects. Like fixed prices, recommended prices reduce competition because they facilitate price coordination.
<i>Case 39847 Ebooks</i> Coordination between publishers and a distributor, to jointly switch from a wholesale model, in which retail prices were determined by retailers, to agency contracts, as part of a common strategy aimed at raising retail prices for e-books or preventing the introduction of lower retail prices on a global scale.
<i>Case 39398 Visa Multilateral Interchange Fees</i> Joint setting by banks of so called Multilateral Interchange Fees (MIFs) in the payment card market was considered price fixing. ¹³

2.1.2. Price fixing which can benefit from the De Minimis Notice

The following restrictions do not prevent an agreement from benefitting from the safe harbour of the De Minimis Notice:

¹³ MIFs are fees charged by a cardholder's bank (the issuing bank) to a merchant's bank (the acquiring bank) for each sales transaction made at a merchant outlet with a payment card. In payment schemes such as Visa and MasterCard, which are associations of banks, these fees are multilaterally agreed by member banks.

- In the context of joint purchasing agreements (that is to say, a number of competitors openly coming together to make joint purchases on the market), where the parties agree on the purchasing price that their "joint purchasing arrangement" may pay to its suppliers for the products subject to the supply contract.¹⁴

- In the context of specialisation agreements (including joint production agreements) covered by Commission Regulation (EU) No 1218/2010, where the parties agree on the fixing of prices charged to immediate customers in the context of joint distribution.¹⁵

- In the context of research and development (R&D) agreements¹⁶ covered by Commission Regulation (EU) No 1217/2010, where the parties agree on the fixing of prices or the licence fee charged to immediate customers or immediate licensees¹⁷ in those cases where the parties' joint exploitation of the results of the joint R&D includes certain forms of joint distribution of the products, or joint licensing of the technologies or processes, arising out of the joint R&D.¹⁸

2.2. Market sharing

2.2.1. General principles

Any arrangement by which competitors allocate markets (geographic markets or product markets) or customers is considered a restriction by object if it takes place in the context of a pure market sharing agreement between competitors (that is to say, a cartel not linked to any wider cooperation between the parties). If the conduct of the parties to an agreement (for example, a distribution agreement between actual or potential competitors) shows that their objective was to share the market, that objective may be taken into account in deciding whether the agreement is a restriction by object.¹⁹ Allocation of markets can also be achieved through restrictions on where the parties may sell (actively and/or passively)²⁰ or through restrictions on production.

¹⁴ See point 206 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation guidelines (OJ C 11, 14.1.2011, p.1), (the Horizontal Guidelines).

¹⁵ See 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 (OJ L 335, 18.12.2010, p.43), Article 4(a).

¹⁶ As regards R&D agreements it should be noted that the same hardcore restrictions and exceptions apply regardless of whether the parties are competitors or not.

¹⁷ See Commission Regulation (EU) No 1217/2010 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 research and development agreements (OJ L 335, 18.12.2010, p.36), Article 5(c).

¹⁸ This only applies to joint distribution or joint licensing as described in Article 1(1) point (m) (i) and (ii) of Commission Regulation (EU) No 1217/2010.

¹⁹ See for example point 236 of the Horizontal Guidelines, describing the competition concerns concerning distribution agreements between competitors in the context of commercialisation agreements.

²⁰ "Active" sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or

<p><i>Case C-41/96 ACF Chemie farma NV v Commission</i> A cartel in which undertakings agreed to retain their respective domestic markets and fix prices and quotas for the export of quinine.</p>
<p><i>Joined cases 29/83 and 30/83 CRAM v Commission</i> Concerted action on market sharing with a view to protect markets against parallel imports of certain products in the market for zinc (cartel).</p>
<p><i>Cases T-370/09, GDF Suez v Commission and T-360/09, E.ON Ruhrgas and E.ON v Commission</i> In the context of an agreement to jointly build a pipeline to import gas into EU Member States, competitors agreed not to sell gas transported over this pipeline in each other's home markets and maintained that market sharing agreement after the liberalisation of the gas market.</p>
<p><i>Case 39226 Lundbeck</i> An agreement whereby a competitor pays a significant amount to an actual (or potential) competitor to stay out of a particular market was considered to be a form of market sharing.</p>
<p><i>Case 39839 Telefónica and Portugal Telecom</i> A non-compete clause between competitors (in this case a clause between the parties to stay out of each other's activities in a certain geographic area) was seen as market sharing.</p>
<p><i>Case 39685 Fentanyl</i> Potential competitors concluded a "co-promotion" agreement (where very little or nothing was done to promote the drug) which provided for significant payments on a monthly basis for as long as the competitor stayed out of the market. This practice was considered a form of market sharing ("market exclusion") since the aim of the agreement was to keep the potential competitor out of the market.</p>

2.2.2. *Market sharing which can benefit from the De Minimis Notice*

The following restrictions do not prevent an agreement from benefitting from the safe harbour of the De Minimis Notice:

- In the context of R&D agreements covered by Commission Regulation (EU) 1217/10, where parties allocate between them individual tasks (such as production or distribution) or impose restrictions on each other regarding the exploitation of the results (such as restrictions in relation to certain territories or customers), this is not considered a hardcore restriction.²¹ Another example would be where the parties agree on the

customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. "Passive" sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. See point 51 of the Vertical Guidelines.

²¹ Commission Regulation (EU) 1217/10, Article 5(b)(iii). This practice is referred to as "specialisation in the context of exploitation".

limitation of active sales of the contract products²², or contract technologies²³, in territories (or to customers) which have been exclusively allocated to one of the parties by way of specialisation in the context of exploitation.²⁴

Although passive sales restrictions agreed between the parties to an R&D agreement are considered hardcore restrictions, the requirement to exclusively license the results of the joint R&D to another party is not.²⁵ The parties may also restrict their freedom to sell, assign or license products, technologies or processes which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results.²⁶

- As to technology transfer agreements²⁷ covered by Commission Regulation (EU) 316/2014, the limitation of active and passive sales of the contract products in territories (or to customers) which have been exclusively allocated to one of the parties, if it is part of a non-reciprocal agreement, is not considered a hardcore restriction.²⁸ Another example would be, in a non-reciprocal agreement, prohibiting a party from producing within the exclusive territory of the other party.²⁹

A licensor may have several licensees, where some were already a competitor of the licensor at the time of concluding their license while others were not. In such a scenario, it is not considered a hardcore restriction if, in a non-reciprocal agreement, active sales by a licensee are restricted in order to protect the exclusive territory (or customer group) allocated to another licensee which was not a competitor of the licensor when it concluded its licence.³⁰ Finally, an obligation on the licensee to produce the contract products only for its own use (provided that the licensee is not restricted in selling the

²² See Commission Regulation (EU) No 1217/10 Article 1(1)(f), which defines "contract product" as a product arising out of the joint research and development or manufactured or provided applying the contract technologies.

²³ See Commission Regulation (EU) No 1217/10 Article 1(1)(e), which defines "contract technology" as a technology or process arising out of the joint research and development.

²⁴ Commission Regulation (EU) No 1217/10, Article 5(e) in conjunction with Article 1(1)(o).

²⁵ Commission Regulation (EU) No 1217/10, Art. 5(d).

²⁶ Commission Regulation (EU) No 1217/10, Art. 5(b)(iv).

²⁷ Technology transfer agreements are agreements whereby a licensor licenses out intellectual property rights to a licensee for the purpose of producing goods or services. See 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, (OJ L 93, 28/03/2014, p. 17), Article 1(c).

²⁸ Article 4(1)(c)(i) of Commission Regulation (EU) No 316/2014. Article 1(d) of Commission Regulation 316/2014 defines "non-reciprocal agreement" as a technology transfer agreement where one undertaking grants another undertaking a technology rights licence, or where two undertakings grant each other such a licence but where those licences do not concern competing technologies and cannot be used for the production of competing products.

²⁹ Article 4(1)(c)(i) of Commission Regulation (EU) No 316/2014.

³⁰ Article 4(1)(c)(ii) of Commission Regulation (EU) No 316/2014.

contract products as spare parts for its own products) is not considered a hardcore restriction.³¹ The same is true for an 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 (so-called dual sourcing).³²

2.3. Output restrictions

2.3.1. General principles

Competitors agreeing to restrict the volume of their supply or production capacity (either for one or both of the parties) is seen as a restriction of output, which in turn is considered a restriction by object.

Case C-209/07 Beef Industry Development Society (BIDS)
Agreement to reduce production capacity within the context of a cartel on the market for beef and veal

2.3.2. Output restrictions which can benefit from the De Minimis Notice

The following restrictions do not prevent an agreement from benefitting from the safe harbour of the De Minimis Notice:

- As regards production agreements covered by Commission Regulation (EU) No 1218/2010, where the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products).³³
- As regards specialisation (and joint production) agreements covered by Commission Regulation (EU) 1218/2010, provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement. Another example would be the setting of sales targets where the parties have agreed to jointly distribute the products covered by their cooperation.³⁴
- As regards R&D agreements covered by Commission Regulation (EU) 1217/2010, the setting of production targets where the contract products are jointly produced,³⁵ and setting of sales targets where the parties agreed on certain forms of joint distribution of the contract products or joint licensing of the contract technologies.³⁶

³¹ Article 4(1)(c)(iii) of Commission Regulation (EU) No 316/2014.

³² Article 4(1)(c)(iv) of Commission Regulation (EU) No 316/2014.

³³ See point 160 of the Horizontal Guidelines.

³⁴ See Commission Regulation (EU) No 1218/2010, Article 4(b).

³⁵ See Commission Regulation (EU) No 1217/2010, Article 5(b)(i).

³⁶ See Commission Regulation (EU) No 1217/2010, Article 5(b) (ii); this only applies for joint distribution or joint licensing as described in Article 1(1) point (m) (i) and (ii) of this regulation.

- For consortia agreements between liner shipping companies covered by Commission Regulation (EU) 906/2009, certain capacity adjustments.³⁷

- In technology transfer agreements covered by Commission Regulation (EU) 316/2014, the limitation of output of contract products imposed only on the licensee (either on the licensee in a non-reciprocal agreement or on only one of the licensees in a reciprocal agreement).³⁸

2.4. Bid rigging

Bid-rigging occurs when two or more companies agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, withdraw a bid or submit a bid at artificially high prices arrived at by agreement. This form of collusion is generally considered to restrict competition by object. It is a form of price fixing and market allocation which may, for example, take place in the case of public procurement contracts.

Case T-21/99 Dansk Rorindustri v Commission

A cartel agreement between producers of district heating pipes allocating individual projects to designated producers and manipulating the bidding procedure to ensure that the designated producer was awarded the assigned project.

2.5. Collective boycott agreements

A collective boycott occurs when a group of competitors agree to exclude an actual or potential competitor. This practice generally constitutes a restriction by object.

Case C-68/12 Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.

Three banks monitored a competitor's activity, conferred with each other and decided, by common agreement, to terminate in a coordinated manner the contracts they had concluded with that competitor.

Case IV/35.691 Pre-insulated pipes

Competitors used norms and standards (agreed on by the industry) to prevent or delay the introduction of new technology which would result in price reductions.

Case 39510 Ordre national des pharmaciens en France

The association for pharmacists sanctioned groups of laboratories in the market for clinical laboratory testing with the aim of hindering the development of a new business format.

2.6. Information sharing – future prices and quantities

Information exchanges between competitors of individualised data regarding intended future prices or quantities are considered a restriction by object.³⁹

³⁷ See Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), Articles 4(2) and 3(2).

³⁸ See Commission Regulation (EU) No 316/2014, Article 4(1)(b).

³⁹ See point 72 to 74 of the Horizontal Guidelines.

Where information exchange is part of a monitoring or implementation mechanism for an existing cartel it will be assessed as part of that cartel (irrespective of whether it covers current/past or future prices or quantities).

<i>Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others</i> Information exchange facilitating implementation of cartel – market for cement.
<i>Cases T-587/08, Fresh Del Monte Produce v Commission and T-588/08, Dole Food and Dole Germany v Commission</i> Pre-pricing communications in which undertakings discussed price setting factors relevant to the setting of future quotation prices for bananas.
<i>Case T-380/10, Wabco Europe and Others v Commission</i> Coordination of price increases and exchange of sensitive business information in a cartel - bathroom fixtures and fittings market.
<i>Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV</i> Information exchange between competitors on future prices to be paid to sales representatives.

2.7. Restrictions on carrying out R&D or using own technology

2.7.1. General principles

Restrictions in agreements between competitors which aim at restricting the parties' ability to carry out R&D or to continue to use their own technology for further R&D are also hardcore restrictions and generally considered a restriction by object.⁴⁰

2.7.2. Restrictions on carrying out R&D or using own technology which can benefit from the De Minimis Notice

The following restrictions do not prevent an agreement from benefitting from the safe harbour of the De Minimis Notice:

- In the context of R&D agreements covered by Commission Regulation (EU) 1217/2010, where the parties agree to restrict their freedom, during the period of the agreement, to carry out, independently or in cooperation with third parties, research and development in the field covered by the R&D cooperation.⁴¹

- In the context of technology transfer agreements covered by Commission Regulation (EU) No 316/2014, where the parties agree to restrict the licensee's ability to exploit its own technology or the ability of any of the parties to carry out research and development when this is indispensable to prevent disclosure of know-how to third parties.⁴²

⁴⁰ Commission Regulation (EU) No 1217/2010, Article 5(a); Commission Regulation (EU) No 316/2014, Article 4(1)(d).

⁴¹ Commission Regulation (EU) No 1217/2010, Article 5(a).

⁴² Commission Regulation (EU) No 316/2014, Article 4(1)(d).

3. “BY OBJECT” RESTRICTIONS IN AGREEMENTS BETWEEN NON-COMPETITORS

Restrictions by object in agreements between non-competitors can be distinguished as to whether they relate to market partitioning by territory and/or customer group or to limitations on the buyer's ability to determine its resale price. The first category can be further divided into restrictions limiting the buyer's freedom to sell and restrictions limiting the supplier's freedom to sell. Moreover, the restrictions by object differ depending on whether they are agreed between a supplier and a buyer or between a licensor and a licensee.

3.1. Sales restrictions on buyers

3.1.1. General principles

A restriction on a buyer as to where (the territory) or to whom (the customers) the buyer can sell the contract products, actively and/or passively⁴³, is a hardcore restriction and generally considered a restriction by object.⁴⁴ Such a restriction may result from direct obligations on the buyer but also from indirect measures aimed at inducing the buyer not to sell to particular customers or territories, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported, etc.⁴⁵ However restrictions which restrict the buyer's place of establishment are not hardcore restrictions.⁴⁶

<i>Case C-70/93 BMW v ALD Autoleasing</i>
A motor vehicle manufacturer with a selective distribution system was prohibiting its authorized dealers from delivering vehicles to independent leasing companies if those companies would make them available to lessees outside the contract territory of the dealer in question.
<i>Joined Cases 32, 36 and 82/78 BMW Belgium v Commission</i>
A motor vehicle manufacturer issued circulars prohibiting its dealers from exporting vehicles to authorized dealers in other countries.
<i>Case C-439/09 Pierre Fabre</i>
A manufacturer of cosmetics and personal care products with a selective distribution

⁴³ See footnote 21 for a definition of active and passive sales. See also point 51 of the Vertical Guidelines.

⁴⁴ See Article 4(b)(i) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p.1).

⁴⁵ For further examples, see point 50 of the Vertical Guidelines.

⁴⁶ This means that the buyer can be required to restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory. See point 50 of the Vertical Guidelines.

system was prohibiting its authorised distributors from selling via the internet.
<i>Case C-551/03 P General Motors BV v Commission</i> A distribution agreement restricting or prohibiting dealers in one Member State from exporting to consumers in another Member State, not only through direct export prohibitions but also through indirect measures such as a restrictive supply or a bonuses policy which excludes exports to final consumers from retail bonus campaigns.
<i>Case 37975 Yamaha</i> An obligation on authorised dealers operating in different Member States to sell exclusively to final consumers, with the object of preventing cross supplies within the network of dealers. This restricted dealers from competing for sales to other dealers and impeded trade within the selective distribution network.
<i>Case C-501/06 P GlaxoSmithKline Services v Commission</i> A pharmaceutical company's dual pricing policy according to which higher prices were charged to wholesalers for products to be exported to other Member States was considered to limit parallel trade and partition markets.

3.1.2. *Sales restrictions on buyers which can benefit from the De Minimis Notice*

The following restrictions do not prevent an agreement from benefitting from the safe harbour of the De Minimis Notice:

- Where a supplier operates an exclusive distribution system and does not at the same time operate a selective distribution system for the same product, it is not a hardcore restriction to prohibit the buyer from actively selling in the territory or to the customer group allocated exclusively to another distributor or reserved for the supplier.⁴⁷
- Within selective distribution systems it is not a hardcore restriction to prohibit authorized distributors, within the territory where the selective distribution system operates, from selling to distributors who are not members of the selective distribution system.⁴⁸ This does not apply to restrictions on selected distributors on reselling spare parts for motor vehicles to independent repairers.⁴⁹
- As regards restrictions on the resale of components⁵⁰ it is not a hardcore restriction if the buyer is prohibited from selling components, supplied for the purpose of incorporation in another product, to customers who would use them to manufacture the same type of goods as those produced by the supplier. An example would be a situation in which a producer of photocopiers supplies components to a producer of printers for the

⁴⁷ See Article 4(b)(i) of Commission Regulation (EU) No 330/2010 and point 51 of the Vertical Guidelines.

⁴⁸ See Article 4(b)(iii) of Commission Regulation (EU) No 330/2010.

⁴⁹ See Article 5(a) of Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector (OJ L 129, 28.5.2010, p.52).

⁵⁰ The term "component" includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods. See Article 4(b)(iv) of Commission Regulation No (EU) 330/2010 and point 55 of the Vertical Guidelines.

purpose of incorporating those components into the printers. The producer of photocopiers can prohibit the producer of printers from reselling the components to producers of photocopiers without the risk that the prohibition will be seen as a restriction by object.

- Similarly, it is not a hardcore restriction to prohibit a buyer, who operates as a wholesaler, from reselling passively or actively to end users.⁵¹

3.2. Sales restrictions on licensees

3.2.1. General principles

In the case of technology transfer agreements, it is only restrictions of the licensee's passive sales (and not of its active sales) to a particular territory or customer group that are hardcore restrictions and which are generally considered restrictions by object.⁵² However, when the licensee is a member of a selective distribution system and operates at the retail level, restrictions of both the licensee's active and passive sales to end users are hardcore restrictions, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

Joined Cases C-403/08 and C-429/08, Football Association Premier League and Others
Licence agreement prohibiting or limiting broadcasters from supplying decoder cards to television viewers seeking to watch the broadcasts outside the Member State for which the licence was granted. Such clauses prohibit the broadcasters from effecting any cross-border provision of services and enable each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence.

3.2.2. Sales restrictions on licensees which can benefit from the De Minimis Notice

The following restrictions do not prevent an agreement from benefitting from the safe harbour of the De Minimis Notice:

- to restrict the licensee's passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor.⁵³

- to agree with the licensee that the contract products may only be produced 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).⁵⁴

⁵¹ See Article 4(b)(ii) of Commission Regulation (EU) No 330/2010 and point 55 of the Vertical Guidelines.

⁵² However, licensing of copyright for the purpose of reproduction and licensing of trademarks are subject to the rules applicable to vertical restraints.

⁵³ Article 4(2)(b)(i) of Commission Regulation (EU) No 316/2014.

⁵⁴ Article 4(2)(b)(ii) of Commission Regulation (EU) No 316/2014.

- to agree that the licensee may only produce the contract products for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer (so called dual sourcing).⁵⁵

- to prohibit a licensee operating at the wholesale level from selling to end-users.⁵⁶

- to prohibit members of a selective distribution system from selling to unauthorised distributors.⁵⁷

3.3. Sales restrictions on the supplier

Restrictions, agreed between a supplier of components and a buyer who incorporates those components, on the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods, are hardcore restrictions which are generally considered to be restrictions by object.⁵⁸

Certain hardcore restrictions are specific to the motor vehicle sector. A first type may arise in the context of an agreement between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles, and a supplier of such components. In this context, restrictions on the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts are hardcore restrictions and generally considered restrictions by object.⁵⁹ A second type of restrictions specific to the motor vehicle sector may arise in the context of an agreement between a supplier of spare parts, repair tools or diagnostic tools or other equipment and a manufacturer of motor vehicles. In this context, restrictions of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users are considered hardcore restrictions.⁶⁰

3.4. Resale price maintenance

Restrictions of a buyer's ability to determine its minimum sale price generally constitute restrictions by object.

Restrictions imposing maximum sale prices or recommending sale prices are not restrictions by object, provided that they do not amount to fixed or minimum sale prices as a result of pressure from, or incentives offered by, any of the parties.⁶¹

⁵⁵ Article 4(2)(b)(iii) of Commission Regulation (EU) No 316/2014.

⁵⁶ Article 4(2)(b)(iv) of Commission Regulation (EU) No 316/2014.

⁵⁷ Article 4(2)(b)(v) of Commission Regulation (EU) No 316/2014.

⁵⁸ Article 4(e) of the Commission Regulation (EU) No 330/2010.

⁵⁹ Article 5(c) of Commission Regulation (EU) No 461/2010.

⁶⁰ Article 5(b) of Commission Regulation (EU) No 461/2010.

⁶¹ Article 4(a) of Commission Regulation (EU) No 330/2010.

As regards technology transfer agreements, any restrictions on the licensor's or the licensee's ability to determine their sale prices are hardcore restrictions which are generally considered to be restrictions by object, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price.⁶²

Fixing of prices or setting a minimum sale price may be directly imposed by means of a contractual provision but may also result from indirect measures. For example, an agreement may oblige the buyer to add a specific amount or percentage on top of its purchase price to establish its sale price. Similarly, an agreement may require that the buyer complies with maximum discount levels. Such indirect means of vertical price fixing also constitute restrictions by object.

Case 243/83 SA Binon Cie v SA Agence et Messageries de la Presse

Provisions which fix the prices to be observed in contracts with third parties.

Case 37975 Yamaha

Imposition of minimum resale prices on distributors selling musical instruments either directly, by a prohibition on publishing, advertising or announcing prices different from the official price lists, or indirectly, by providing dealers with a formula for calculating their resale prices and with guidelines on recommended retail prices while making clear that advertising and promotion actions with more than 15% rebates would not be considered normal, which *de facto* amounted to an obligation to respect minimum prices.

⁶² Article 4(2)(a) of Commission Regulation (EU) No 316/2014.