COMMISSION NOTICE

Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty

(2004/C 101/07)

(Text with EEA relevance)

1. INTRODUCTION

1. Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements and practices on the part of undertakings which 'may affect trade between Member States'.

2. In their interpretation of Articles 81 and 82, the Community Courts have already substantially clarified the content and scope of the concept of effect on trade between Member States.

3. The present guidelines set out the principles developed by the Community Courts in relation to the interpretation of the effect on trade concept of Articles 81 and 82. They further spell out a rule indicating when agreements are in general unlikely to be capable of appreciably affecting trade between Member States (the non-appreciable affectation of trade rule or NAAT-rule). The guidelines are not intended to be exhaustive. The aim is to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations. Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of the effect on trade concept contained in Articles 81 and 82.

4. The present guidelines do not address the issue of what constitutes an appreciable restriction of competition under Article 81(1). This issue, which is distinct from the ability of agreements to appreciably affect trade between Member States, is dealt with in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty [1] (the *de minimis* rule). The guidelines are also not intended to provide guidance on the effect on trade concept contained in Article 87(1) of the Treaty on State aid.

5. These guidelines, including the NAAT-rule, are without prejudice to the interpretation of Articles 81 and 82 which may be given by the Court of Justice and the Court of First Instance.

2. THE EFFECT ON TRADE CRITERION

2.1. General principles

6. Article 81(1) provides that 'the following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. For the sake of simplicity the terms 'agreements, decisions of associations of undertakings and concerted practices' are collectively referred to as 'agreements'.

7. Article 82 on its part stipulates that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.' In what follows the term 'practices' refers to the conduct of dominant undertakings.

8. The effect on trade criterion also determines the scope of application of Article 3 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2].

9. According to Article 3(1) of that Regulation the competition authorities and courts of the Member States must apply Article 81 to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, when they apply national competition law to such agreements, decisions or concerted practices. Similarly, when the competition authorities and courts of the Member States apply national competition law to any abuse prohibited by Article 82 of the Treaty, they must also apply Article 82 of the Treaty. Article 3(1) thus obliges the competition authorities and courts of the Member States to also apply Articles 81 and 82 when they apply national competition law to agreements and abusive practices which may affect trade between Member States. On the other hand, Article 3(1) does not oblige national competition authorities and courts to apply national competition law when they apply Articles 81 and 82 to agreements, decisions and concerted practices and to abuses which may affect trade between Member States. They may in such cases apply the Community competition rules on a stand alone basis.

10. It follows from Article 3(2) that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States, however, are not under Regulation 1/2003 precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

11. Finally it should be mentioned that Article 3(3) stipulates that without prejudice to general principles and other provisions of Community law, Article 3(1) and (2) do not apply when the competition authorities and the courts of the Member States apply national merger control laws, nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

12. The effect on trade criterion is an autonomous Community law criterion, which must be assessed separately in each case. It is a jurisdictional criterion, which defines the scope of application of Community competition law ([3]). Community competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States.

13. The effect on trade criterion confines the scope of application of Articles 81 and 82 to agreements and practices that are capable of having a minimum level of cross-border effects within the Community. In the words of the Court of Justice, the ability of the agreement or practice to affect trade between Member States must be 'appreciable' ([4]).

14. In the case of Article 81 of the Treaty, it is the agreement that must be capable of affecting trade between Member States. It is not required that each individual part of the agreement, including any restriction of competition which may flow from the agreement, is capable of doing so ([5]). If the agreement as a whole is capable of affecting trade between Member States, there is Community law jurisdiction in respect of the entire agreement, including any parts of the agreement that individually do not affect trade between Member States. In cases where the contractual relations between the same parties cover several activities, these activities must, in order to form part of the same agreement, be directly linked and form an integral part of the same overall business arrangement ([6]). If not, each activity constitutes a separate agreement.

15. It is also immaterial whether or not the participation of a particular undertaking in the agreement has an appreciable effect on trade between Member States ([7]). An undertaking cannot escape Community law jurisdiction merely because of the fact that its own contribution to an agreement, which itself is capable of affecting trade between Member States, is insignificant.

16. It is not necessary, for the purposes of establishing Community law jurisdiction, to establish a link between the alleged restriction of competition and the capacity of the agreement to affect trade between Member States. Non-restrictive agreements may also affect trade between Member States. For example, selective distribution agreements based on purely qualitative selection criteria justified by the nature of the products, which are not restrictive of competition within the meaning of Article 81(1), may nevertheless affect trade between Member States. However, the alleged restrictions arising from an agreement may provide a clear indication as to the capacity of the agreement to affect trade between Member States. For instance, a distribution agreement prohibiting exports is by its very nature capable of affecting trade between Member States, although not necessarily to an appreciable extent ([8]).

17. In the case of Article 82 it is the abuse that must affect trade between Member States. This does not imply, however, that each element of the behaviour must be assessed in isolation. Conduct that forms part of an overall strategy pursued by the dominant undertaking must be assessed in terms of its overall impact. Where a dominant undertaking adopts various practices in pursuit of the same aim, for instance practices that aim at eliminating or foreclosing competitors, in order for Article 82 to be applicable to all the practices forming part of this overall strategy, it is sufficient that at least one of these practices is capable of affecting trade between Member States ([9]).

18. It follows from the wording of Articles 81 and 82 and the case law of the Community Courts that in the application of the effect on trade criterion three elements in particular must be addressed:

(a) The concept of 'trade between Member States',

(b) The notion of 'may affect', and

(c) The concept of 'appreciability'.

2.2. **The concept of 'trade between Member States'**

19. The concept of 'trade' is not limited to traditional exchanges of goods and services across borders [10]. It is a wider concept, covering all cross-border economic activity including establishment [11]. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.

20. According to settled case law the concept of 'trade' also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be subject to the Community competition rules [12]. When an undertaking is or risks being eliminated the competitive structure within the Community is affected and so are the economic activities in which the undertaking is engaged.

21. The requirement that there must be an effect on trade 'between Member States' implies that there must be an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State. Articles 81 and 82 may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable [13].

22. The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national [14].

2.3. **The notion 'may affect'**

23. The function of the notion 'may affect' is to define the nature of the required impact on trade between Member States. According to the standard test developed by the Court of Justice, the notion 'may affect' implies that 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 agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States [15] [16]. As mentioned in paragraph 20 above the Court of Justice has in addition developed a test based on whether or not the agreement or practice affects the competitive structure. In cases where the agreement or practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established.

24. The 'pattern of trade'-test developed by the Court of Justice contains the following main elements, which are dealt with in the following sections:

    (a) 'A sufficient degree of probability on the basis of a set of objective factors of law or fact',

    (b) An influence on the 'pattern of trade between Member States',

    (c) 'A direct or indirect, actual or potential influence' on the pattern of trade.

2.3.1. *A sufficient degree of probability on the basis of a set of objective factors of law or fact*

25. The assessment of effect on trade is based on objective factors. Subjective intent on the part of the undertakings concerned is not required. If, however, there is evidence that undertakings have intended to affect trade between Member States, for example because they have sought to hinder exports to or imports from other Member States, this is a relevant factor to be taken into account.

26. The words 'may affect' and the reference by the Court of Justice to 'a sufficient degree of probability' imply that, in order for Community law jurisdiction to be established, it is not required that the agreement or practice will actually have or has had an effect on trade between Member States. It is sufficient that the agreement or practice is 'capable' of having such an effect [17].

27. There is no obligation or need to calculate the actual volume of trade between Member States affected by the agreement or practice. For example, in the case of agreements prohibiting exports to other Member States there is no need to estimate what would have been the level of parallel trade between the Member States concerned, in the absence of the agreement. This interpretation is consistent with the jurisdictional nature of the effect on trade criterion. Community law jurisdiction extends to categories of agreements and practices that are capable of having cross-border effects, irrespective of whether a particular agreement or practice actually has such effects.

28. The assessment under the effect on trade criterion depends on a number of factors that individually may not be decisive [18]. The relevant factors include the nature of the agreement and practice, the nature of the products covered by the agreement or practice and the position and importance of the undertakings concerned [19].

29. The nature of the agreement and practice provides an indication from a qualitative point of view of the ability of the agreement or practice to affect trade between Member States. Some agreements and practices are by their very nature capable of affecting trade between Member States, whereas others require more detailed analysis in this respect. Cross-border cartels are an example of the former, whereas joint ventures confined to the territory of a single Member State are an example of the latter. This aspect is further examined in section 3 below, which deals with various categories of agreements and practices.

30. The nature of the products covered by the agreements or practices also provides an indication of whether trade between Member States is capable of being affected. When by their nature products are easily traded across borders or are important for undertakings that want to enter or expand their activities in other Member States, Community jurisdiction is more readily established than in cases where due to their nature there is limited demand for products offered by suppliers from other Member States or where the products are of limited interest from the point of view of cross-border establishment or the expansion of the economic activity carried out from such place of establishment ([20]). Establishment includes the setting-up by undertakings in one Member State of agencies, branches or subsidiaries in another Member State.

31. The market position of the undertakings concerned and their sales volumes are indicative from a quantitative point of view of the ability of the agreement or practice concerned to affect trade between Member States. This aspect, which forms an integral part of the assessment of appreciability, is addressed in section 2.4 below.

32. In addition to the factors already mentioned, it is necessary to take account of the legal and factual environment in which the agreement or practice operates. The relevant economic and legal context provides insight into the potential for an effect on trade between Member States. If there are absolute barriers to cross-border trade between Member States, which are external to the agreement or practice, trade is only capable of being affected if those barriers are likely to disappear in the foreseeable future. In cases where the barriers are not absolute but merely render cross-border activities more difficult, it is of the utmost importance to ensure that agreements and practices do not further hinder such activities. Agreements and practices that do so are capable of affecting trade between Member States.

2.3.2. *An influence on the 'pattern of trade between Member States'*

33. For Articles 81 and 82 to be applicable there must be an influence on the 'pattern of trade between Member States'.

34. The term 'pattern of trade' is neutral. It is not a condition that trade be restricted or reduced ([21]). Patterns of trade can also be affected when an agreement or practice causes an increase in trade. Indeed, Community law jurisdiction is established if trade between Member States is likely to develop differently with the agreement or practice compared to the way in which it would probably have developed in the absence of the agreement or practice ([22]).

35. This interpretation reflects the fact that the effect on trade criterion is a jurisdictional one, which serves to distinguish those agreements and practices which are capable of having cross-border effects, so as to warrant an examination under the Community competition rules, from those agreements and practices which do not.

2.3.3. *A 'direct or indirect, actual or potential influence' on the pattern of trade*

36. The influence of agreements and practices on patterns of trade between Member States can be 'direct or indirect, actual or potential'.

37. Direct effects on trade between Member States normally occur in relation to the products covered by an agreement or practice. When, for example, producers of a particular product in different Member States agree to share markets, direct effects are produced on trade between Member States on the market for the products in question. Another example of direct effects being produced is when a supplier limits distributor rebates to products sold within the Member State in which the distributors are established. Such practices increase the relative price of products destined for exports, rendering export sales less attractive and less competitive.

38. Indirect effects often occur in relation to products that are related to those covered by an agreement or practice. Indirect effects may, for example, occur where an agreement or practice has an impact on cross-border economic activities of undertakings that use or otherwise rely on the products covered by the agreement or practice ([23]). Such effects can, for instance, arise where the agreement or practice relates to an intermediate product, which is not traded, but

which is used in the supply of a final product, which is traded. The Court of Justice has held that trade between Member States was capable of being affected in the case of an agreement involving the fixing of prices of spirits used in the production of cognac ([24]). Whereas the raw material was not exported, the final product — cognac — was exported. In such cases Community competition law is thus applicable, if trade in the final product is capable of being appreciably affected.

39. Indirect effects on trade between Member States may also occur in relation to the products covered by the agreement or practice. For instance, agreements whereby a manufacturer limits warranties to products sold by distributors within their Member State of establishment create disincentives for consumers from other Member States to buy the products because they would not be able to invoke the warranty ([25]). Export by official distributors and parallel traders is made more difficult because in the eyes of consumers the products are less attractive without the manufacturer's warranty ([26]).

40. Actual effects on trade between Member States are those that are produced by the agreement or practice once it is implemented. An agreement between a supplier and a distributor within the same Member State, for instance one that prohibits exports to other Member States, is likely to produce actual effects on trade between Member States. Without the agreement the distributor would have been free to engage in export sales. It should be recalled, however, that it is not required that actual effects are demonstrated. It is sufficient that the agreement or practice be capable of having such effects.

41. Potential effects are those that may occur in the future with a sufficient degree of probability. In other words, foreseeable market developments must be taken into account ([27]). Even if trade is not capable of being affected at the time the agreement is concluded or the practice is implemented, Articles 81 and 82 remain applicable if the factors which led to that conclusion are likely to change in the foreseeable future. In this respect it is relevant to consider the impact of liberalisation measures adopted by the Community or by the Member State in question and other foreseeable measures aiming at eliminating legal barriers to trade.

42. Moreover, even if at a given point in time market conditions are unfavourable to cross-border trade, for example because prices are similar in the Member States in question, trade may still be capable of being affected if the situation may change as a result of changing market conditions ([28]). What matters is the ability of the agreement or practice to affect trade between Member States and not whether at any given point in time it actually does so.

43. The inclusion of indirect or potential effects in the analysis of effects on trade between Member States does not mean that the analysis can be based on remote or hypothetical effects. The likelihood of a particular agreement to produce indirect or potential effects must be explained by the authority or party claiming that trade between Member States is capable of being appreciably affected. Hypothetical or speculative effects are not sufficient for establishing Community law jurisdiction. For instance, an agreement that raises the price of a product which is not tradable reduces the disposable income of consumers. As consumers have less money to spend they may purchase fewer products imported from other Member States. However, the link between such income effects and trade between Member States is generally in itself too remote to establish Community law jurisdiction.

2.4. **The concept of appreciability**

2.4.1. *General principle*

44. The effect on trade criterion incorporates a quantitative element, limiting Community law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. Agreements and practices fall outside the scope of application of Articles 81 and 82 when they affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question ([29]). Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned ([30]).

45. The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned. When by its very nature the agreement or practice is capable of affecting trade between Member States, the appreciability threshold is lower than in the case of agreements and practices that are not by their very nature capable of affecting trade between Member States. The stronger the market position of the undertakings concerned, the more likely it is that an agreement or practice capable of affecting trade between Member States can be held to do so appreciably ([31]).

46. In a number of cases concerning imports and exports the Court of Justice has considered that the appreciability requirement was fulfilled when the sales of the undertakings concerned accounted for about 5 % of the market [32]. Market share alone, however, has not always been considered the decisive factor. In particular, it is necessary also to take account of the turnover of the undertakings in the products concerned [33].

47. Appreciability can thus be measured both in absolute terms (turnover) and in relative terms, comparing the position of the undertaking(s) concerned to that of other players on the market (market share). This focus on the position and importance of the undertakings concerned is consistent with the concept 'may affect', which implies that the assessment is based on the ability of the agreement or practice to affect trade between Member States rather than on the impact on actual flows of goods and services across borders. The market position of the undertakings concerned and their turnover in the products concerned are indicative of the ability of an agreement or practice to affect trade between Member States. These two elements are reflected in the presumptions set out in paragraphs and 53 below.

48. The application of the appreciability test does not necessarily require that relevant markets be defined and market shares calculated [34]. The sales of an undertaking in absolute terms may be sufficient to support a finding that the impact on trade is appreciable. This is particularly so in the case of agreements and practices that by their very nature are liable to affect trade between Member States, for example because they concern imports or exports or because they cover several Member States. The fact that in such circumstances turnover in the products covered by the agreement may be sufficient for a finding of an appreciable effect on trade between Member States is reflected in the positive presumption set out in paragraph below.

49. Agreements and practices must always be considered in the economic and legal context in which they occur. In the case of vertical agreements it may be necessary to have regard to any cumulative effects of parallel networks of similar agreements [35]. Even if a single agreement or network of agreements is not capable of appreciably affecting trade between Member States, the effect of parallel networks of agreements, taken as a whole, may be capable of doing so. For that to be the case, however, it is necessary that the individual agreement or network of agreements makes a significant contribution to the overall effect on trade [36].

2.4.2. *Quantification of appreciability*

50. It is not possible to establish general quantitative rules covering all categories of agreements indicating when trade between Member States is capable of being appreciably affected. It is possible, however, to indicate when trade is normally not capable of being appreciably affected. Firstly, in its notice on agreements of minor importance which do not appreciably restrict competition in the meaning of Article 81(1) of the Treaty (the *de minimis* rule) [37] the Commission has stated that agreements between small and medium-sized undertakings (SMEs) as defined in the Annex to Commission Recommendation 96/280/EC [38] are normally not capable of affecting trade between Member States. The reason for this presumption is the fact that the activities of SMEs are normally local or at most regional in nature. However, SMEs may be subject to Community law jurisdiction in particular where they engage in cross-border economic activity. Secondly, the Commission considers it appropriate to set out general principles indicating when trade is normally not capable of being appreciably affected, i.e. a standard defining the absence of an appreciable effect on trade between Member States (the NAAT-rule). When applying Article 81, the Commission will consider this standard as a negative rebuttable presumption applying to all agreements within the meaning of Article 81(1) irrespective of the nature of the restrictions contained in the agreement, including restrictions that have been identified as hardcore restrictions in Commission block exemption regulations and guidelines. In cases where this presumption applies the Commission will normally not institute proceedings either upon application or on its own initiative. Where the undertakings assume in good faith that an agreement is covered by this negative presumption, the Commission will not impose fines.

51. Without prejudice to paragraph below, this negative definition of appreciability does not imply that agreements, which do not fall within the criteria set out below, are automatically capable of appreciably affecting trade between Member States. A case by case analysis is necessary.

52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:

(a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and

(b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned [39] in the products covered by the agreement does not exceed 40 million euro. In the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement.

In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro. In the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products. In cases involving agreements concluded between a buyer and several suppliers the relevant turnover shall be the buyer's combined purchases of the products covered by the agreements.

The Commission will apply the same presumption where during two successive calendar years the above turnover threshold is not exceeded by more than 10 % and the above market threshold is not exceeded by more than 2 percentage points. In cases where the agreement concerns an emerging not yet existing market and where as a consequence the parties neither generate relevant turnover nor accumulate any relevant market share, the Commission will not apply this presumption. In such cases appreciability may have to be assessed on the basis of the position of the parties on related product markets or their strength in technologies relating to the agreement.

53. The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs 52 and 54 exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5 % threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State (see paragraph 90 below).

54. With regard to the threshold of 40 million euro (cf. paragraph 52 above), the turnover is calculated on the basis of total Community sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded [40].

55. In order to apply the market share threshold, it is necessary to determine the relevant market [41]. This consists of the relevant product market and the relevant geographic market. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

56. In the case of networks of agreements entered into by the same supplier with different distributors, sales made through the entire network are taken into account.

57. Contracts that form part of the same overall business arrangement constitute a single agreement for the purposes of the NAAT-rule [42]. Undertakings cannot bring themselves inside these thresholds by dividing up an agreement that forms a whole from an economic perspective.

3. THE APPLICATION OF THE ABOVE PRINCIPLES TO COMMON TYPES OF AGREEMENTS AND ABUSES

58. The Commission will apply the negative presumption set out in the preceding section to all agreements, including agreements that by their very nature are capable of affecting trade between Member States as well as agreements that involve trade with undertakings located in third countries (cf. section 3.3 below).

59. Outside the scope of negative presumption, the Commission will take account of qualitative elements relating to the nature of the agreement or practice and the nature of the products that they concern (see paragraphs and above). The relevance of the nature of the agreement is also reflected in the positive presumption set out in paragraph 53 above relating to appreciability in the case of agreements that by their very nature are capable of affecting trade between Member States. With a view to providing additional guidance on the application of the effect on trade concept it is therefore useful to consider various common types of agreements and practices.

60. In the following sections a primary distinction is drawn between agreements and practices that cover several Member States and agreements and practices that are confined to a single Member State or to part of a single Member State. These two main categories are broken down into further subcategories based on the nature of the agreement or practice involved. Agreements and practices involving third countries are also dealt with.

3.1. **Agreements and abuse covering or implemented in several Member States**

61. Agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States. When the relevant turnover exceeds the threshold set out in paragraph above it will therefore in most cases not be necessary to conduct a detailed analysis of whether trade between Member States is capable of being affected. However, in order to provide guidance also in these cases and to illustrate the principles developed in section 2 above, it is useful to explain what are the factors that are normally used to support a finding of Community law jurisdiction.

3.1.1. *Agreements concerning imports and exports*

62. Agreements between undertakings in two or more Member States that concern imports and exports are by their very nature capable of affecting trade between Member States. Such agreements, irrespective of whether they are restrictive of competition or not, have a direct impact on patterns of trade between Member States. In Kerpen & Kerpen, for example, which concerned an agreement between a French producer and a German distributor covering more than 10 % of exports of cement from France to Germany, amounting in total to 350 000 tonnes per year, the Court of Justice held that it was impossible to take the view that such an agreement was not capable of (appreciably) affecting trade between Member States ([43]).

63. This category includes agreements that impose restrictions on imports and exports, including restrictions on active and passive sales and resale by buyers to customers in other Member States ([44]). In these cases there is an inherent link between the alleged restriction of competition and the effect on trade, since the very purpose of the restriction is to prevent flows of goods and services between Member States, which would otherwise be possible. It is immaterial whether the parties to the agreement are located in the same Member State or in different Member States.

3.1.2. *Cartels covering several Member States*

64. Cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States. Cross-border cartels harmonise the conditions of competition and affect the interpenetration of trade by cementing traditional patterns of trade ([45]). When undertakings agree to allocate geographic territories, sales from other areas into the allocated territories are capable of being eliminated or reduced. When undertakings agree to fix prices, they eliminate competition and any resulting price differentials that would entice both competitors and customers to engage in cross-border trade. When undertakings agree on sales quotas traditional patterns of trade are preserved. The undertakings concerned abstain from expanding output and thereby from serving potential customers in other Member States.

65. The effect on trade produced by cross-border cartels is generally also by its very nature appreciable due to the market position of the parties to the cartel. Cartels are normally only formed when the participating undertakings together hold a large share of the market, as this allows them to raise price or reduce output.

3.1.3. *Horizontal cooperation agreements covering several Member States*

66. This section covers various types of horizontal cooperation agreements. Horizontal cooperation agreements may for instance take the form of agreements whereby two or more undertakings cooperate in the performance of a particular economic activity such as production and distribution ([46]). Often such agreements are referred to as joint ventures. However, joint ventures that perform on a lasting basis all the functions of an autonomous economic entity are covered by the Merger Regulation ([47]). At the level of the Community such full function joint ventures are not dealt with under Articles 81 and 82 except in cases where Article 2(4) of the Merger Regulation is applicable ([48]). This section therefore does not deal with full-function joint ventures. In the case of non-full function joint ventures the joint entity does not operate as an autonomous supplier (or buyer) on any market. It merely serves the parents, who themselves operate on the market ([49]).

67. Joint ventures which engage in activities in two or more Member States or which produce an output that is sold by the parents in two or more Member States affect the commercial activities of the parties in those areas of the Community. Such agreements are therefore normally by their very nature capable of affecting trade between Member States compared to the situation without the agreement ([50]). Patterns of trade are affected when undertakings switch their activities to the joint venture or use it for the purpose of establishing a new source of supply in the Community.

68. Trade may also be capable of being affected where a joint venture produces an input for the parent companies, which is subsequently further processed or incorporated into a product by the parent undertakings. This is likely to be the case where the input in question was previously sourced from suppliers in other Member States, where the parents previously produced the input in other Member States or where the final product is traded in more than one Member State.

69. In the assessment of appreciability it is important to take account of the parents' sales of products related to the agreement and not only those of the joint entity created by the agreement, given that the joint venture does not operate as an autonomous entity on any market.

3.1.4. *Vertical agreements implemented in several Member States*

70. Vertical agreements and networks of similar vertical agreements implemented in several Member States are normally capable of affecting trade between Member States if they cause trade to be channelled in a particular way. Networks of selective distribution agreements implemented in two or more Member States for example, channel trade in a particular way because they limit trade to members of the network, thereby affecting patterns of trade compared to the situation without the agreement ([51]).

71. Trade between Member States is also capable of being affected by vertical agreements that have foreclosure effects. This may for instance be the case of agreements whereby distributors in several Member States agree to buy only from a particular supplier or to sell only its products. Such agreements may limit trade between the Member States in which the agreements are implemented, or trade from Member States not covered by the agreements. Foreclosure may result from individual agreements or from networks of agreements. When an agreement or networks of agreements that cover several Member States have foreclosure effects, the ability of the agreement or agreements to affect trade between Member States is normally by its very nature appreciable.

72. Agreements between suppliers and distributors which provide for resale price maintenance (RPM) and which cover two or more Member States are normally also by their very nature capable of affecting trade between Member States ([52]). Such agreements alter the price levels that would have been likely to exist in the absence of the agreements and thereby affect patterns of trade.

3.1.5. *Abuses of dominant positions covering several Member States*

73. In the case of abuse of a dominant position it is useful to distinguish between abuses that raise barriers to entry or eliminate competitors (exclusionary abuses) and abuses whereby the dominant undertaking exploits its economic power for instance by charging excessive or discriminatory prices (exploitative abuses). Both kinds of abuse may be carried out either through agreements, which are equally subject to Article 81(1), or through unilateral conduct, which as far as Community competition law is concerned is subject only to Article 82.

74. In the case of exploitative abuses such as discriminatory rebates, the impact is on downstream trading partners, which either benefit or suffer, altering their competitive position and affecting patterns of trade between Member States.

75. When a dominant undertaking engages in exclusionary conduct in more than one Member State, such abuse is normally by its very nature capable of affecting trade between Member States. Such conduct has a negative impact on competition in an area extending beyond a single Member State, being likely to divert trade from the course it would have followed in the absence of the abuse. For example, patterns of trade are capable of being affected where the dominant undertaking grants loyalty rebates. Customers covered by the exclusionary rebate system are likely to purchase less from competitors of the dominant firm than they would otherwise have done. Exclusionary conduct that aims directly at eliminating a competitor such as predatory pricing is also capable of affecting trade between Member States because of its impact on the competitive market structure inside the Community ([53]). When a dominant firm engages in behaviour with a view to eliminating a competitor operating in more than one Member State, trade is capable of being affected in several ways. First, there is a risk that the affected competitor will cease to be a source of supply inside the Community. Even if the targeted undertaking is not eliminated, its future competitive conduct is likely to be affected, which may also have an impact on trade between Member States. Secondly, the abuse may have an impact on other competitors. Through its abusive behaviour the dominant undertaking can signal to its competitors that it will discipline attempts to engage in real competition. Thirdly, the very fact of eliminating a competitor may be sufficient for trade between Member States to be capable of being affected. This may be the case even where the undertaking that risks being eliminated mainly engages in exports to third countries ([54]). Once the effective competitive market structure inside the Community risks being further impaired, there is Community law jurisdiction.

76. Where a dominant undertaking engages in exploitative or exclusionary abuse in more than one Member State, the capacity of the abuse to affect trade between Member States will normally also by its very nature be appreciable. Given the market position of the dominant undertaking concerned, and the fact that the abuse is implemented in several Member States, the scale of the abuse and its likely impact on patterns of trade is normally such that trade between Member States is capable of being appreciably affected. In the case of an exploitative abuse such as price discrimination, the abuse alters the competitive position of trading partners in several Member States. In the case of exclusionary abuses, including abuses that aim at eliminating a competitor, the economic activity engaged in by competitors in several Member States is affected. The very existence of a dominant position in several Member States implies that competition in a substantial part of the common market is already weakened ([55]). When a dominant undertaking further weakens competition through recourse to abusive conduct, for example by eliminating a competitor, the ability of the abuse to affect trade between Member States is normally appreciable.

3.2. Agreements and abuses covering a single, or only part of a, Member State

77. When agreements or abusive practices cover the territory of a single Member State, it may be necessary to proceed with a more detailed inquiry into the ability of the agreements or abusive practices to affect trade between Member States. It should be recalled that for there to be an effect on trade between Member States it is not required that trade is reduced. It is sufficient that an appreciable change is capable of being caused in the pattern of trade between Member States. Nevertheless, in many cases involving a single Member State the nature of the alleged infringement, and in particular, its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between Member States. The examples mentioned hereafter are not exhaustive. They merely provide examples of cases where agreements confined to the territory of a single Member State can be considered capable of affecting trade between Member States.

3.2.1. *Cartels covering a single Member State*

78. Horizontal cartels covering the whole of a Member State are normally capable of affecting trade between Member States. The Community Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the Treaty is designed to bring about ([56]).

79. The capacity of such agreements to partition the internal market follows from the fact that undertakings participating in cartels in only one Member State, normally need to take action to exclude competitors from other Member States ([57]). If they do not, and the product covered by the agreement is tradable ([58]), the cartel risks being undermined by competition from undertakings from other Member States. Such agreements are normally also by their very nature capable of having an appreciable effect on trade between Member States, given the market coverage required for such cartels to be effective.

80. Given the fact that the effect on trade concept encompasses potential effects, it is not decisive whether such action against competitors from other Member States is in fact adopted at any given point in time. If the cartel price is similar to the price prevailing in other Member States, there may be no immediate need for the members of the cartel to take action against competitors from other Member States. What matters is whether or not they are likely to do so, if market conditions change. The likelihood of that depends on the existence or otherwise of natural barriers to trade in the market, including in particular whether or not the product in question is tradable. In a case involving certain retail banking services ([59]) the Court of Justice has, for example, held that trade was not capable of being appreciably affected because the potential for trade in the specific products concerned was very limited and because they were not an important factor in the choice made by undertakings from other Member States regarding whether or not to establish themselves in the Member State in question ([60]).

81. The extent to which the members of a cartel monitor prices and competitors from other Member States can provide an indication of the extent to which the products covered by the cartel are tradable. Monitoring suggests that competition and competitors from other Member States are perceived as a potential threat to the cartel. Moreover, if there is evidence that the members of the cartel have deliberately fixed the price level in the light of the price level prevailing in other Member States (limit pricing), it is an indication that the products in question are tradable and that trade between Member States is capable of being affected.

82. Trade is normally also capable of being affected when the members of a national cartel temper the competitive constraint imposed by competitors from other Member States by inducing them to join the restrictive agreement, or if their exclusion from the agreement places the competitors at a competitive disadvantage ([61]). In such cases the agreement either prevents these competitors from exploiting any competitive advantage that they have, or raises their costs, thereby having a negative impact on their competitiveness and their sales. In both

cases the agreement hampers the operations of competitors from other Member States on the national market in question. The same is true when a cartel agreement confined to a single Member State is concluded between undertakings that resell products imported from other Member States [62].

3.2.2. *Horizontal cooperation agreements covering a single Member State*

83. Horizontal cooperation agreements and in particular non-full function joint ventures (cf. paragraph 66 above), which are confined to a single Member State and which do not directly relate to imports and exports, do not belong to the category of agreements that by their very nature are capable of affecting trade between Member States. A careful examination of the capacity of the individual agreement to affect trade between Member States may therefore be required.

84. Horizontal cooperation agreements may, in particular, be capable of affecting trade between Member States where they have foreclosure effects. This may be the case with agreements that establish sector-wide standardisation and certification regimes, which either exclude undertakings from other Member States or which are more easily fulfilled by undertakings from the Member State in question due to the fact that they are based on national rules and traditions. In such circumstances the agreements make it more difficult for undertakings from other Member States to penetrate the national market.

85. Trade may also be affected where a joint venture results in undertakings from other Member States being cut off from an important channel of distribution or source of demand. If, for example, two or more distributors established within the same Member State, and which account for a substantial share of imports of the products in question, establish a purchasing joint venture combining their purchases of that product, the resulting reduction in the number of distribution channels limits the possibility for suppliers from other Member States of gaining access to the national market in question. Trade is therefore capable of being affected [63]. Trade may also be affected where undertakings which previously imported a particular product form a joint venture which is entrusted with the production of that same product. In this case the agreement causes a change in the patterns of trade between Member States compared to the situation before the agreement.

3.2.3. *Vertical agreements covering a single Member State*

86. Vertical agreements covering the whole of a Member State may, in particular, be capable of affecting patterns of trade between Member States when they make it more difficult for undertakings from other Member States to penetrate the national market in question, either by means of exports or by means of establishment (foreclosure effect). When vertical agreements give rise to such foreclosure effects, they contribute to the partitioning of markets on a national basis, thereby hindering the economic interpenetration which the Treaty is designed to bring about [64].

87. Foreclosure may, for example, occur when suppliers impose exclusive purchasing obligations on buyers [65]. In Delimitis [66], which concerned agreements between a brewer and owners of premises where beer was consumed whereby the latter undertook to buy beer exclusively from the brewer, the Court of Justice defined foreclosure as the absence, due to the agreements, of real and concrete possibilities of gaining access to the market. Agreements normally only create significant barriers to entry when they cover a significant proportion of the market. Market share and market coverage can be used as an indicator in this respect. In making the assessment account must be taken not only of the particular agreement or network of agreements in question, but also of other parallel networks of agreements having similar effects [67].

88. Vertical agreements which cover the whole of a Member State and which relate to tradable products may also be capable of affecting trade between Member States, even if they do not create direct obstacles to trade. Agreements whereby undertakings engage in resale price maintenance (RPM) may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question [68]. Agreements involving RPM may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States this price level is only sustainable if imports from other Member States can be controlled.

3.2.4. *Agreements covering only part of a Member State*

89. In qualitative terms the assessment of agreements covering only part of a Member State is approached in the same way as in the case of agreements covering the whole of a Member State. This means that the analysis in section 2 applies. In the assessment of appreciability, however, the two categories must be distinguished, as it must be taken into account that only part of a Member State is covered by the agreement. It must also be taken into account what proportion of the national territory is susceptible to trade. If, for example, transport costs or the operating radius of equipment render it economically unviable for undertakings from other Member States to serve the entire territory of another Member State, trade is capable of being affected if the agreement forecloses access to the part of the territory of a Member State that is susceptible to trade, provided that this part is not insignificant [69].

90. Where an agreement forecloses access to a regional market, then for trade to be appreciably affected, the volume of sales affected must be significant in proportion to the overall volume of sales of the products concerned inside the Member State in question. This assessment cannot be based merely on geographic coverage. The market share of the parties to the agreement must also be given fairly limited weight. Even if the parties have a high market share in a properly defined regional market, the size of that market in terms of volume may still be insignificant when compared to total sales of the products concerned within the Member State in question. In general, the best indicator of the capacity of the agreement to (appreciably) affect trade between Member States is therefore considered to be the share of the national market in terms of volume that is being foreclosed. Agreements covering areas with a high concentration of demand will thus weigh more heavily than those covering areas where demand is less concentrated. For Community jurisdiction to be established the share of the national market that is being foreclosed must be significant.

91. Agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States. This is the case even if the local market is located in a border region. Conversely, if the foreclosed share of the national market is significant, trade is capable of being affected even where the market in question is not located in a border region.

92. In cases in this category some guidance may be derived from the case law concerning the concept in Article 82 of a substantial part of the common market [70]. Agreements that, for example, have the effect of hindering competitors from other Member States from gaining access to part of a Member State, which constitutes a substantial part of the common market, should be considered to have an appreciable effect on trade between Member States.

3.2.5. *Abuses of dominant positions covering a single Member State*

93. Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected [71]. In Michelin [72], for example, the Court of Justice held that a system of loyalty rebates foreclosed competitors from other Member States and therefore affected trade within the meaning of Article 82. In Rennet [73] the Court similarly held that an abuse in the form of an exclusive purchasing obligation on customers foreclosed products from other Member States.

94. Exclusionary abuses that affect the competitive market structure inside a Member State, for instance by eliminating or threatening to eliminate a competitor, may also be capable of affecting trade between Member States. Where the undertaking that risks being eliminated only operates in a single Member State, the abuse will normally not affect trade between Member States. However, trade between Member States is capable of being affected where the targeted undertaking exports to or imports from other Member States [74] and where it also operates in other Member States [75]. An effect on trade may arise from the dissuasive impact of the abuse on other competitors. If through repeated conduct the dominant undertaking has acquired a reputation for adopting exclusionary practices towards competitors that attempt to engage in direct competition, competitors from other Member States are likely to compete less aggressively, in which case trade may be affected, even if the victim in the case at hand is not from another Member State.

95. In the case of exploitative abuses such as price discrimination and excessive pricing, the situation may be more complex. Price discrimination between domestic customers will normally not affect trade between Member States. However, it may do so if the buyers are engaged in export activities and are disadvantaged by the discriminatory pricing or if this practice is used to prevent imports [76]. Practices consisting of offering lower prices to customers that are the most likely to import products from other Member States may make it more difficult for competitors from other Member States to enter the market. In such cases trade between Member States is capable of being affected.

96. As long as an undertaking has a dominant position which covers the whole of a Member State it is normally immaterial whether the specific abuse engaged in by the dominant undertaking only covers part of its territory or affects certain buyers within the national territory. A dominant firm can significantly impede trade by engaging in abusive conduct in the areas or vis-à-vis the customers that are the most likely to be targeted by competitors from other Member States. For example, it may be the case that a particular channel of distribution constitutes a particularly important means of gaining access to broad categories of consumers. Hindering access to such channels can have a substantial impact on trade between Member States. In the assessment of appreciability it must also be taken into account that the very presence of the dominant undertaking covering the whole of a Member State is likely to make market penetration more difficult. Any abuse which makes it more difficult to enter the national market should therefore be considered to appreciably affect trade. The combination of the market position of the dominant undertaking and the anti-competitive nature of its conduct implies that such abuses have normally by their very nature an appreciable effect on trade. However, if the abuse is purely local in nature or

involves only an insignificant share of the sales of the dominant undertaking within the Member State in question, trade may not be capable of being appreciably affected.

3.2.6. *Abuse of a dominant position covering only part of a Member State*

97. Where a dominant position covers only part of a Member State some guidance may, as in the case of agreements, be derived from the condition in Article 82 that the dominant position must cover a substantial part of the common market. If the dominant position covers part of a Member State that constitutes a substantial part of the common market and the abuse makes it more difficult for competitors from other Member States to gain access to the market where the undertaking is dominant, trade between Member States must normally be considered capable of being appreciably affected.

98. In the application of this criterion regard must be had in particular to the size of the market in question in terms of volume. Regions and even a port or an airport situated in a Member State may, depending on their importance, constitute a substantial part of the common market ([77]). In the latter cases it must be taken into account whether the infrastructure in question is used to provide cross-border services and, if so, to what extent. When infrastructures such as airports and ports are important in providing cross-border services, trade between Member States is capable of being affected.

99. As in the case of dominant positions covering the whole of a Member State (cf. paragraph 95 above), trade may not be capable of being appreciably affected if the abuse is purely local in nature or involves only an insignificant share of the sales of the dominant undertaking.

3.3. **Agreements and abuses involving imports and exports with undertakings located in third countries, and agreements and practices involving undertakings located in third countries**

3.3.1. *General remarks*

100. Articles 81 and 82 apply to agreements and practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community ([78]). Articles 81 and 82 apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is either implemented inside the Community ([79]), or produce effects inside the Community ([80]). Articles 81 and 82 may also apply to agreements and practices that cover third countries, provided that they are capable of affecting trade between Member States. The general principle set out in section 2 above according to which the agreement or practice must be capable of having an appreciable influence, direct or indirect, actual or potential, on the pattern of trade between Member States, also applies in the case of agreements and abuses which involve undertakings located in third countries or which relate to imports or exports with third countries.

101. For the purposes of establishing Community law jurisdiction it is sufficient that an agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the Community. Import into one Member State may be sufficient to trigger effects of this nature. Imports can affect the conditions of competition in the importing Member State, which in turn can have an impact on exports and imports of competing products to and from other Member States. In other words, imports from third countries resulting from the agreement or practice may cause a diversion of trade between Member States, thus affecting patterns of trade.

102. In the application of the effect on trade criterion to the above mentioned agreements and practices it is relevant to examine, inter alia, what is the object of the agreement or practice as indicated by its content or the underlying intent of the undertakings involved ([81]).

103. Where the object of the agreement is to restrict competition inside the Community the requisite effect on trade between Member States is more readily established than where the object is predominantly to regulate competition outside the Community. Indeed in the former case the agreement or practice has a direct impact on competition inside the Community and trade between Member States. Such agreements and practices, which may concern both imports and exports, are normally by their very nature capable of affecting trade between Member States.

3.3.2. *Arrangements that have as their object the restriction of competition inside the Community*

104. In the case of imports, this category includes agreements that bring about an isolation of the internal market ([82]). This is, for instance, the case of agreements whereby competitors in the Community and in third countries share markets, e.g. by agreeing not to sell in each other's home markets or by concluding reciprocal (exclusive) distribution agreements ([83]).

105. In the case of exports, this category includes cases where undertakings that compete in two or more Member States agree to export certain (surplus) quantities to third countries with a view to co-ordinating their market conduct inside the Community. Such export agreements serve to reduce price competition by limiting output inside the Community, thereby affecting trade between Member States. Without the export agreement these quantities might have been sold inside the Community ([84]).

3.3.3. *Other arrangements*

106. In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.

107. In this regard it is relevant to examine the effects of the agreement or practice on customers and other operators inside the Community that rely on the products of the undertakings that are parties to the agreement or practice ([85]). In Compagnie maritime belge ([86]), which concerned agreements between shipping companies operating between Community ports and West African ports, the agreements were held to be capable of indirectly affecting trade between Member States because they altered the catchment areas of the Community ports covered by the agreements and because they affected the activities of other undertakings inside those areas. More specifically, the agreements affected the activities of undertakings that relied on the parties for transportation services, either as a means of transporting goods purchased in third countries or sold there, or as an important input into the services that the ports themselves offered.

108. Trade may also be capable of being affected when the agreement prevents re-imports into the Community. This may, for example, be the case with vertical agreements between Community suppliers and third country distributors, imposing restrictions on resale outside an allocated territory, including the Community. If in the absence of the agreement resale to the Community would be possible and likely, such imports may be capable of affecting patterns of trade inside the Community ([87]).

109. However, for such effects to be likely, there must be an appreciable difference between the prices of the products charged in the Community and those charged outside the Community, and this price difference must not be eroded by customs duties and transport costs. In addition, the product volumes exported compared to the total market for those products in the territory of the common market must not be insignificant ([88]). If these product volumes are insignificant compared to those sold inside the Community, the impact of any re-importation on trade between Member States is considered not to be appreciable. In making this assessment, regard must be had not only to the individual agreement concluded between the parties, but also to any cumulative effect of similar agreements concluded by the same and competing suppliers. It may be, for example, that the product volumes covered by a single agreement are quite small, but that the product volumes covered by several such agreements are significant. In that case the agreements taken as a whole may be capable of appreciably affecting trade between Member States. It should be recalled, however (cf. paragraph 49 above), that the individual agreement or network of agreements must make a significant contribution to the overall effect on trade.

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(1) OJ C 368, 22.12.2001, p. 13.

(2) OJ L 1, 4.1.2003, p. 1.

(3) See e.g. Joined Cases 56/64 and 58/64, Consten and Grundig, [1966] ECR p. 429, and Joined Cases 6/73 and 7/73, Commercial Solvents, [1974] ECR p. 223.

(4) See in this respect Case 22/71, Béguelin, [1971] ECR p. 949, paragraph 16.

(5) See Case 193/83, Windsurfing, [1986] ECR p. 611, paragraph 96, and Case T-77/94, Vereniging van Groothandelaren in Bloemkwekerijprodukten, [1997] ECR II-759, paragraph 126.

(6) See paragraphs 142 to 144 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukteten cited in the previous footnote.

(7) See e.g. Case T-2/89, Petrofina, [1991] ECR II-1087, paragraph 226.

(8) The concept of appreciability is dealt with in section 2.4 below.

(9) See in this respect Case 85/76, Hoffmann-La Roche, [1979] ECR p. 461, paragraph 126.

(10) Throughout these guidelines the term 'products' covers both goods and services.

(11) See Case 172/80, Züchner, [1981] ECR p. 2021, paragraph 18. See also Case C-309/99, Wouters, [2002] ECR I-1577, paragraph 95, Case C-475/99, Ambulanz Glöckner, [2001] ECR I-8089, paragraph 49, Joined Cases C-215/96 and 216/96, Bagnasco, [1999] ECR I-135, paragraph 51, Case C-55/96, Job Centre, [1997] ECR I-7119, paragraph 37, and Case C-41/90, Höfner and Elser, [1991] ECR I-1979, paragraph 33.

(12) See e.g. Joined Cases T-24/93 and others, Compagnie maritime belge, [1996] ECR II-1201, paragraph 203, and paragraph 23 of the judgment in Commercial Solvents cited in footnote.

(13) See e.g. Joined Cases T-213/95 and T-18/96, SCK and FNK, [1997] ECR II-1739, and sections 3.2.4 and 3.2.6 below.

(14) See section 3.2 below.

(15) See e.g. the judgment in Züchner cited in footnote 11 and Case 319/82, Kerpen & Kerpen, [1983] ECR 4173, Joined Cases 240/82 and others, Stichting Sigarettenindustrie, [1985] ECR 3831, paragraph 48, and Joined Cases T-25/95 and others, Cimenteries CBR, [2000] ECR II-491, paragraph 3930.

(16) In some judgments mainly relating to vertical agreements the Court of Justice has added wording to the effect that the agreement was capable of hindering the attainment of the objectives of a single market between Member States, see e.g. Case T-62/98, Volkswagen, [2000] ECR II-2707, paragraph 179, and paragraph 47 of the Bagnasco judgment cited in footnote 11, and Case 56/65, Société Technique Minière, [1966] ECR 337. The impact of an agreement on the single market objective is thus a factor which can be taken into account.

(17) See e.g. Case T-228/97, Irish Sugar, [1999] ECR II-2969, paragraph 170, and Case 19/77, Miller, [1978] ECR 131, paragraph 15.

(18) See e.g. Case C-250/92, Gøttrup-Klim [1994] ECR II-5641, paragraph 54.

(19) See e.g. Case C-306/96, Javico, [1998] ECR I-1983, paragraph 17, and paragraph 18 of the judgment in Béguelin cited in footnote 4.

(20) Compare in this respect the judgments in Bagnasco and Wouters cited in footnote 11.

(21) See e.g. Case T-141/89, Tréfileurope, [1995] ECR II-791, Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO), [1995] ECR II-289, as far as exports were concerned, and Commission Decision in Volkswagen (II) (OJ L 264, 2.10.2001, p. 14).

(22) See in this respect Case 71/74, Frubo, [1975] ECR 563, paragraph 38, Joined Cases 209/78 and others, Van Landewyck, [1980] ECR 3125, paragraph 172, Case T-61/89, Dansk Pelsdyravler Forening, [1992] ECR II-1931, paragraph 143, and Case T-65/89, BPB Industries and British Gypsum, [1993] ECR II-389, paragraph 135.

(23) See in this respect Case T-86/95, Compagnie Générale Maritime and others, [2002] ECR II-1011, paragraph 148, and paragraph 202 of the judgment in Compagnie maritime belge cited in footnote 12.

(24) See Case 123/83, BNIC v Clair, [1985] ECR 391, paragraph 29.

(25) See Commission Decision in Zanussi, OJ L 322, 16.11.1978, p. 36, paragraph 11.

(26) See in this respect Case 31/85, ETA Fabrique d'Ébauches, [1985] ECR 3933, paragraphs 12 and 13.

(27) See Joined Cases C-241/91 P and C-242/91 P, RTE (Magill), [1995] ECR I-743, paragraph 70, and Case 107/82, AEG, [1983] ECR 3151, paragraph 60.

(28) See paragraph 60 of the AEG judgment cited in the previous footnote.

(29) See Case 5/69, Völk, [1969] ECR 295, paragraph 7.

(30) See e.g. paragraph 17 of the judgment in Javico cited in footnote 19, and paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.

(31) See paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.

(32) See e.g. paragraphs 9 and 10 of the Miller judgment cited in footnote 17, and paragraph 58 of the AEG judgment cited in footnote 27.

(33) See Joined Cases 100/80 and others, Musique Diffusion Française, [1983] ECR 1825, paragraph 86. In that case the products in question accounted for just above 3 % of sales on the national markets concerned. The Court held that the agreements, which hindered parallel trade, were capable of appreciably affecting trade between Member States due to the high turnover of the parties and the relative market position of the products, compared to those of products produced by competing suppliers.

(34) See in this respect paragraphs 179 and 231 of the Volkswagen judgment cited in footnote 16, and Case T-213/00, CMA CGM and others, [2003] ECR I-, paragraphs 219 and 220.

(35) See e.g. Case T-7/93, Langnese-Iglo, [1995] ECR II-1533, paragraph 120.

(36) See paragraphs 140 and 141 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukten cited in footnote 5.

(37) See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13, paragraph 3).

(38) OJ L 107, 30.4.1996, p. 4. With effect from 1.1.2005 this recommendation will be replaced by Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

(39) The term 'undertakings concerned' shall include connected undertakings as defined in paragraph 12.2 of the Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (OJ C 368, 22.12.2001, p. 13).

(40) See the previous footnote.

(41) When defining the relevant market, reference should be made to the notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

(42) See also paragraph 14 above.

(43) See paragraph 8 of the judgment in Kerpen & Kerpen cited in footnote 15. It should be noted that the Court does not refer to market share but to the share of French exports and to the product volumes involved.

(44) See e.g. the judgment in Volkswagen cited in footnote 16 and Case T-175/95, BASF Coatings, [1999] ECR II-1581. For a horizontal agreement to prevent parallel trade see Joined Cases 96/82 and others, IAZ International, [1983] ECR 3369, paragraph 27.

(45) See e.g. Case T-142/89, Usines Gustave Boël, [1995] ECR II-867, paragraph 102.

(46) Horizontal cooperation agreements are dealt with in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2). Those guidelines deal with the substantive competition assessment of various types of agreements but do not deal with the effect on trade issue.

(47) See Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

(48) The Commission Notice on the concept of full-function joint ventures under the Merger Regulation (OJ C 66, 2.3.1998, p. 1) gives guidance on the scope of this concept.

(49) See e.g. the Commission Decision in Ford/Volkswagen (OJ L 20, 28.1.1993, p. 14).

(50) See in this respect paragraph 146 of the Compagnie Générale Maritime judgment cited in footnote 23 above.

(51) See in this respect Joined Cases 43/82 and 63/82, VBVB and VBBB, [1984] ECR 19, paragraph 9.

(52) See in this respect Case T-66/89, Publishers Association, [1992] ECR II-1995.

(53) See in this respect the judgment in Commercial Solvents cited in footnote 3, in the judgment in Hoffmann-La Roche, cited in footnote, paragraph 125, and in RTE and ITP cited in footnote, as well as Case 6/72, Continental Can, [1973] ECR 215, paragraph 16, and Case 27/76, United Brands, [1978] ECR 207, paragraphs 197 to 203.

(54) See paragraphs 32 and 33 of the judgment in Commercial Solvents cited in footnote 3.

(55) According to settled case law dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to act to an appreciable extent independently of its competitors, its customers and ultimately of the consumers, see e.g. paragraph 38 of the judgment in Hoffmann-La Roche cited in footnote 9.

(56) See for a recent example paragraph 95 of the Wouters judgment cited in footnote 11.

(57) See e.g. Case 246/86, Belasco, [1989] ECR 2117, paragraph 32-38.

(58) See paragraph 34 of the Belasco judgment cited in the previous footnote and more recently Joined Cases T-202/98 a.o., British Sugar, [2001] ECR II-2035, paragraph 79. On the other hand this is not so when the market is not susceptible to imports, see paragraph 51 of the Bagnasco judgment cited in footnote 11.

(59) Guarantees for current account credit facilities.

(60) See paragraph 51 of the Bagnasco judgment cited in footnote 11.

(61) See in this respect Case 45/85, Verband der Sachversicherer, [1987] ECR 405, paragraph 50, and Case C-7/95 P, John Deere, [1998] ECR I-3111. See also paragraph 172 of the judgment in Van Landewyck cited in footnote 22, where the Court stressed that the agreement in question reduced appreciably the incentive to sell imported products.

(62) See e.g. the judgment in Stichting Sigarettenindustrie, cited in footnote 15, paragraphs 49 and 50.

(63) See in this respect Case T-22/97, Kesko, [1999] ECR II-3775, paragraph 109.

(64) See e.g. Case T-65/98, Van den Bergh Foods, [2003] ECR II-. . ., and the judgment in Langnese-Iglo, cited in footnote 35 paragraph 120.

(65) See e.g. judgment of 7.12.2000, Case C-214/99, Neste, ECR I-11121.

(66) See judgment of 28.2.1991, Case C-234/89, Delimitis, ECR I-935.

(67) See paragraph 120 of the Langnese-Iglo judgment cited in footnote 35.

(68) See e.g. Commission Decision in Volkswagen (II), cited in footnote 21, paragraphs 81 *et seq*.

(69) See in this respect paragraphs 177 to 181 of the judgment in SCK and FNK cited in footnote 13.

(70) See as to this notion the judgment in Ambulanz Glöckner, cited in footnote 11, paragraph 38, and Case C-179/90, Merci convenzionali porto di Genova, [1991] ECR I-5889, and Case C-242/95, GT-Link, [1997] ECR I-4449.

(71) See e.g. paragraph 135 of the judgment in BPB Industries and British Gypsum cited in footnote.

(72) See Case 322/81, Nederlandse Banden Industrie Michelin, [1983] ECR 3461

(73) See Case 61/80, Coöperative Stremsel- en Kleurselfabriek, [1981] ECR 851, paragraph 15.

(74) See in this respect judgment in Irish Sugar, cited in footnote 17 paragraph 169.

(75) See paragraph 70 of the judgment in RTE (Magill) cited in footnote 27.

(76) See the judgment in Irish Sugar cited in footnote 17.

(77) See e.g. the case law cited in footnote 70.

(78) See in this respect Case 28/77, Tepea, [1978] ECR 1391, paragraph 48, and paragraph 16 of the judgment in Continental Can cited in footnote 53.

(79) See Joined Cases C-89/85 and others, Ahlström Osakeyhtiö (Woodpulp), [1988] ECR 651, paragraph 16.

(80) See in this respect Case T-102/96, Gencor, [1999] ECR II-753, which applies the effects test in the field of mergers.

(81) See to that effect paragraph 19 of the judgment in Javico cited in footnote 19.

(82) See in this respect Case 51/75, EMI v CBS, [1976] ECR 811, paragraphs 28 and 29.

(83) See Commission Decision in Siemens/Fanuc (OJ L 376, 31.12.1985, p. 29).

(84) See in this respect Joined Cases 29/83 and 30/83, CRAM and Rheinzinc, [1984] ECR 1679, and Joined Cases 40/73 and others, Suiker Unie, [1975] ECR 1663, paragraphs 564 and 580.

(85) See paragraph 22 of the judgment in Javico cited in footnote 19.

(86) See paragraph 203 of the judgment in Compagnie maritime belge cited in footnote 12.

(87) See in this respect the judgment in Javico cited in footnote 19.

(88) See in this respect paragraphs 24 to 26 of the Javico judgment cited in footnote 19.