GUIDELINES ON THE GENERAL PRINCIPLES OF EXEMPTION

1. INTRODUCTION

(1) According to Article 4 of the Act no 4054 on the Protection of Competition (the Act) agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. On the other hand, Article 5 of the Act empowers the Competition Board (the Board) to exempt agreements and concerted practices between undertakings, and decisions of associations of undertakings from the application of the provisions in Article 4 provided that all of the conditions listed in Article 5 are met.

(2) The Act dated 2.7.2005 and numbered 5388 abolished the obligation to notify the Board of the agreements, concerted practices and decisions of associations of undertakings that are under the scope of Article 4 of the Act. Since the obligation to notify was abolished, in principle, undertakings and associations of undertakings should make the assessment for exemption on their own without notifying the Board; nevertheless, it is possible that undertakings may submit a notification voluntarily[1]. These guidelines are prepared to help undertakings, associations of undertakings and enforcers with the assessment of exemption. The purpose of these guidelines is to draw a general framework about the scope of Article 4 and the principles for the application of the conditions listed in Article 5 as well as to set out the criteria used in the assessment of exemption.

(3) The Board block exempts, under the scope of Article 5, certain types of agreements in certain sectors provided that they fulfill the requirements covered by the relevant communiqués from the prohibition in Article 4 according to the Block Exemption Communiqué on Vertical Agreements, the Block Exemption Communiqué on Research and Development Agreements, the Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicles Sector, the Block Exemption Communiqué on Insurance Sector, the Block Exemption Communiqué on Technology Transfer Agreements. Besides, the Board issued enlightening guidelines about relevant topics such as Guidelines on Certain Subcontracting Agreements Between Non-Competitors, Guidelines on Vertical Agreements, Guidelines on the Explanation of the Block Exemption Communiqué no 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicles Sector and Guidelines on the Application of Articles 4 and 5 of the Act to Technology Transfer Agreements. These guidelines aim to explain the general principles for the assessment of exemption concerning agreements, concerted practices and decisions of associations of undertakings (hereinafter "agreement" is used to refer to those three different

[1] See Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings

concepts) that are not covered by block exemptions. Explanations and examples include guiding principles for undertakings and draw a general framework.

2. The Provision and General Principles of Article 4

(4) Article 4 prohibits agreements between undertakings restrictive of competition whereas article 5 exempts such agreements from the prohibition in article 4 provided that certain conditions are met. Within this framework, first of all, whether the agreement in question violates article 4 should be analyzed and in case it is found to constitute an infringement under article 4, an assessment of exemption according to article 5 should be made.

(5) According to article 4 of the Act, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. The article also lists certain practices that are prohibited. However, the approach in the Act is not restrictive and the practices caught by that prohibition is not limited to the examples listed in the article.

(6) The important point here is that infringements of competition caused by a single undertaking are not under the scope of the prohibition of article 4. Infringements of competition that may occur as a result of one undertaking's practices in the market generally constitute abuse of dominant position, which is individually regulated under article 6 of the Act. Whether agreements are made in oral or written form does not make any difference with respect to competition law. Any settlement, irrespective of being oral or written, is accepted as an "agreement" and can be proved by any evidence obtained legally.

(7) Within this framework, the assessment to be made under article 4 will look into restriction by object and/or effect. It should be noted that it is not necessary that both of those factors exist but agreements that have only as their object or only as their effect the restriction of competition are assessed within the scope of article 4.

(8) In some cases, it is obvious that the object of an agreement is to restrict competition. Within the framework of Board decisions, with respect to horizontal agreements, restrictions of competition by object include price fixing, sharing market and customers and agreements concerning the control of supply. As regards vertical agreements, resale price maintenance, imposing a minimum resale price limit and exclusivity agreements including passive sales are under this category. Certain agreements may still be restrictive of competition by object even if they do not include the above-mentioned provisions. For the assessment of whether or not an agreement has as its object as the restriction of competition, the content of the agreement, the aims pursued by it, the structure and the grounds that form the basis of the agreement should be taken into account. Although it is not a necessary factor to determine whether the agreement has its object as the restriction of competition, the parties' intent can also be considered.

(9) If the agreement is found to violate article 4 "by object", it is not necessary to examine further the effects created/to be created by it in the market to "claim the violation of article 4". In cases where the agreement is found to have as its object the restriction of competition, further analysis towards the effects of the agreement is intended to demonstrate the gravity of the infringement and to determine administrative sanctions.

(10) Some agreements may not be restrictive of competition by object but they may be restrictive by effect, in which case, the Act requires that the effects of the agreement be examined and prohibits agreements "that have as their effect or likely effect the restriction of competition". At this point, the Board examines both "actual" and "potential" effects of the agreements in question. Therefore, beside the actual anticompetitive results, restrictive effects that have not occurred yet but are expected to occur within a reasonable probability are sufficient to claim that the agreement violates article 4. An agreement must have or is expected with a reasonable probability to have negative effects on one of the competition parameters in the market such as price, output, quality or variety of products or innovation to be restrictive by effect.

(11) The fact that the agreement has not been implemented or has been partially implemented is only relevant to the sanction to be imposed on the parties but not to the fact that article 4 is violated. To this end, the conditions of each individual case should be taken into account. Briefly, an agreement restrictive "by object" or "effect" violates article 4 and requires an assessment of exemption even if it has not been put into practice.

(12) It is important to define the relevant market for analyzing the restrictive effects of the agreement in question. Relevant product markets need to be defined and there should not be any hesitations about which undertaking operate in which markets. However, according to the Board's approach in practice, in case of agreements restrictive by object, it is not necessary to define the relevant product market and an assessment could be made depending on the behavior that constitutes an infringement. "Guidelines on the Definition of the Relevant Market" can help undertakings and enforcers in identifying the relevant market.

(13) Agreements assessed under the scope of article 4 can be made not only between undertakings that produce or sell similar products and services in the same market but also between a supplier (producers) and wholesalers and retailers.

(14) Within this framework, the Block Exemption Communiqué no 2002/2 on Vertical Agreements deals particularly with vertical agreements. Agreements satisfying other conditions listed in the said Communiqué benefit from block exemption; however, vertical agreements between undertakings with a market share more than 40% is subject to individual assessment of exemption. Similarly, the Board issued communiqués which regulate the conditions for block exemption for "R&D agreements", "technology transfer agreements" and agreements in insurance and motor vehicles sector". Therefore, undertakings are advised to analyze the relevant block exemption communiqué before making an individual assessment of exemption. With respect to horizontal cooperation agreements, undertakings may benefit from

"Guidelines on Horizontal Cooperation Agreements" issued by the Board for the assessment of exemption.

3. General Principles of Exemption

(15) Article 4 of the Act aims to prevent undertakings from restricting competition in a market for goods or services by means of agreements. On the other hand, agreements that restrict competition may at the same time enhance welfare by way of efficiency gains. When the effects of the agreement that enhance welfare outweigh its anticompetitive effects, the net effect of the agreement may be an increase in consumer welfare and strengthening the competitive process, which constitutes the basis of the exemption regime. With the recognition that the net effect of an agreement fulfilling the conditions of article 5 of the Act on economic/consumer welfare is positive or at least neutral, the agreement is exempted from the implementation of article 4.

(16) The application of the exemption protection is subject to four cumulative conditions, two positive and two negative:

a) The agreement must promote developments and improvements or technical or economic progress for the production and distribution of goods and provision of services,
b) Consumers must benefit from the results
c) The agreement must not eliminate competition in a substantial part of the market
d) Competition must not be restricted more than necessary to achieve the objectives listed in (a) and (b)

(17) The power to determine that an agreement fulfills those cumulative conditions and grant exemption to an agreement falling under the scope of article 4 exclusively resides in the Board. At the same time, the Board has the power to withdraw both individual and block exemption decisions as well as negative clearance decisions in the following cases listed in article 13 of the Act:

a) Change in any event constituting the basis of the decision
b) Failure to fulfill the terms or obligations resolved
c) Having taken the decision on the basis of incorrect or incomplete information concerning the agreement in question

(18) All kinds of agreements within the scope of article 4 can be subject to assessment of exemption according to article 5. However, since it is presumed that an agreement benefiting from a protection provided by a block exemption communiqué fulfils the conditions set out in article 5, the parties do not have an obligation to make an assessment and prove that those conditions are fulfilled. The obligation to prove with sufficient information and documents that the agreement is under the scope of block exemption resides in the parties to the agreement. Similarly, if it is found that an agreement does not fulfill the conditions of article 5, it is not necessary to make an assessment for block exemption.

(19) Starting from this point, it is clear that an analysis according to the Act should cover those stages:

1. Finding whether the agreement is restrictive of competition within the meaning of article 4,
2. If the agreement is under the scope of article 4, evaluating whether it may benefit from block exemption,
3. If the agreement cannot benefit from the protection provided by block exemption communiqués, an analysis of whether it meets individual exemption criteria.

(20) The Act does not include a provision that excludes certain types of agreements restrictive of competition from the protection in article 5. In theory, any agreement or provision restrictive of competition can benefit from the protection of exemption provided that they meet the conditions in article 5. However, it is presumed that an agreement that unduly restricts competition because of its legal and economic characteristics and is unlikely to create economic benefits to outweigh its negative effects on competition will probably fail to meet the conditions for exemption. Past Board decisions, block exemption communiqués and guidelines are helpful about which types of restrictions are under this category.

Price fixing, allocation of territories or customers, resale price maintenance are examples of such restrictions. For instance, a horizontal agreement fixing prices decreases consumer welfare by limiting output, leading to a misallocation of resources and increasing prices in the relevant market on unreasonable grounds.

3.1. Implementation of the Conditions for Exemption

(21) As stated above, the conditions listed in article 5 are cumulative and failure to meet only one of those renders an analysis for others unnecessary. Therefore, conditions for exemption may be assessed in a different order depending on the characteristics of each case.

3.1.1. First Condition: Efficiency gains

(22) As stated in subparagraph (a) of article 5, in order for an agreement restrictive of competition to benefit from the protection of exemption, first of all, it must produce gains by way of ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services to such an extent that its negative effects on competition are removed.

(23) It is necessary that the efficiency gains should be objective and not be assessed from subjective point of view of the parties. Cost efficiencies that arise from the mere use of market power by the parties cannot be taken into account. For instance, if parties agree to fix prices or share markets they may reduce output and thereby production costs. Reduced competition may also lead to lower sales and marketing expenditures. Those cost reductions are a direct consequence of a reduction in the output and economic value created by the parties. Those cost reductions do not produce any pro-competitive

effects in the market and in particular, they do not lead to an increase in value through an integration of assets and activities. Such cost reductions merely increase the profits of undertakings concerned and therefore are not qualified as efficiency gains according to article 5.

(24) On the other hand, the purpose of the first condition of exemption is to define the types of efficiency gains generated by the agreement and will be tested with respect to other conditions of exemption. Consequently, the benefits created by the agreement and what the economic importance of such efficiencies is must be clearly defined and verified. In order to define the efficiency gains generated by the agreement, the following points must be considered:

a) The nature of the claimed efficiencies

b) The casual link between the agreement and the efficiencies

c) The likelihood and magnitude of each claimed efficiency

d) How and when each claimed efficiency would be achieved.

(25) Subparagraph (a) requires an assessment whether the claimed efficiencies are objective in nature.

(26) An analysis within the scope of subparagraph (b) allows the verification of whether there is a causal link between the restrictive agreement and the claimed efficiencies. This condition requires that the efficiencies result from the activities (i.e. joint production, research or development) that form the object of the agreement.

(27) At the same time, the causal link between the agreement and the claimed efficiencies must be direct. As a general rule, uncertain and hypothetical claims based on indirect effects are not taken into account. A direct causal link exists for instance in a technology transfer agreement which allows the licensees to produce new or improved products or a distribution agreement which allows products to be distributed at lower cost or valuable services to be produced. An example of an indirect effect would be an argument where it is claimed that a restrictive agreement allows the undertaking to increase its profits, enabling it to invest more in research and development and therefore consumers would benefit at the end. While there may be a link between profitability and increase in research and development activities, this link is not sufficient to be the subject of an assessment under Article 5.

(28) In case of measurable efficiencies, undertakings making an assessment or application within the scope of the first condition must as accurately as possible estimate the value of the efficiencies and describe in detail how the amount has been computed if necessary. The data used in the calculation must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialized or are likely to materialize.

(29) If efficiencies in the form of new or improved products or other non-cost based efficiencies are suggested, undertakings claiming economic benefit must explain in detail the nature and grounds of the efficiencies.

Types of Efficiencies

(30) The types of efficiencies to be taken into account for the exemption analysis cover all objective economic efficiencies. It is presumed that there is considerable overlap between the various types of efficiencies in question and one agreement may fall within more than one efficiency category. It is therefore not appropriate to draw clear distinctions between the various categories yet a general distinction can be made between cost efficiencies and qualitative efficiencies.

(31) In general, efficiency gains stem from a combination of assets to achieve the objects that undertakings could not achieve efficiently on their own or acquisition/assuming by another undertaking the tasks that it can perform more efficiently than the other undertaking.

Cost Efficiencies

(32) Cost efficiencies resulting from agreements between undertakings can have different sources. One of the most frequently encountered factors that provide cost efficiencies is the development of new production technologies and methods. For instance, introduction of an assembly line may lead to substantial cost advantages.

(33) Synergy resulting from an integration of existing assets may also provide significant cost efficiencies. When the parties combine their respective assets they may be able to attain a cost/output configuration that would not be possible on their own. The combination of two existing technologies that have complementary strengths may reduce production costs or enable the production of higher quality products. For instance, firm A has a production facility with an automation system that allows production at lower costs whereas firm B has an efficient electronic order management system. Combination of those two facilities leads to production to be tailored to customer demand, timely delivery and reduction in warehousing costs. By combining their systems, firms A and B may improve their cost structures.

(34) Cost efficiencies may also be the result of economies of scale. Production at larger scales makes it possible to share work and lower costs per unit.

(35) Another source of cost efficiencies is economies of scope which occur when firms produce two or more products related to each other (especially products where the same input is used). For instance a producer of ice-cream and a producer of frozen vegetables may obtain economies of scope by jointly distributing their products. Both groups of products must be distributed in cold chain and it is likely that there are overlaps in terms of customers demanding those products. By combining their distribution operations, the two firms may obtain lower costs per unit.

(36) Efficiencies in the form of cost reductions can also result from agreements that allow for better planning of production, reducing the costs of inventory and for better capacity utilization. Also, agreements that allow the parties to rationalize production across their facilities create cost advantages.

(37) It is for the parties to make estimations if there is a lack of sufficient data to determine and precisely calculate the cost efficiencies arising from the agreement. If the parties

claim efficiency gains within the scope of their assessment or assessment by the Board, they should clearly express how the claimed cost efficiency will be achieved and its magnitude.

Qualitative Efficiencies

(38) Qualitative efficiencies may take the form of the production of a new or advanced products, greater product variety and higher quality.

(39) By cooperating, undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost. Agreements capable of producing efficiencies of this nature are, in particular, research and development agreements. For instance, firms A and B establish a joint venture for product development to produce a tire that can be used after it is punctured. This new technology aims to remove the risk of collapse of the tire in case of puncture. The tire is thus safer than traditional tire, there is no need for immediate action in case of puncture and thus to carry a spare. Those constitute efficiency gains that can be considered under the first condition of exemption.

(40) Similarly, the combination of complementary assets can increase cost efficiencies and also create synergies that give rise to efficiency gains of a qualitative nature. This may for instance be the case in particular for license agreements that ensure more rapid dissemination of new technology and enable the licensees to employ new production techniques that lead to the production of new products or quality improvements. Also joint production agreements may allow new or improved products or services to be introduced on the market more quickly and at lower cost. This may be the case for cooperation agreements to make new global services available in the market more quickly in the telecommunications sector. For instance if competing internet service providers make an agreement to install a new internet backbone infrastructure, the infrastructure will be completed more rapidly, which will enable consumers to achieve internet services in shorter time.

(41) Distribution agreements may also give rise to qualitative efficiencies. Specialized distributors, for example, may be able to offer services that are better tailored to customer needs and provide quicker delivery and better quality assurance throughout the distribution chain.

3.1.2. Second Condition: Consumer Benefit

The Concepts of Consumer and Consumer Benefit

(42) According to the second condition of exemption, consumers must also benefit from the efficiency gains generated.

(43) With respect to the assessment of exemption, the concept of "consumer" should be read as encompassing all direct or indirect users of the products or services in the relevant market covered by the agreement. Producers that use the products in question as an input, wholesalers, retailers and dealers that make resales can be defined as consumer. The concept of consumer covers not only end users but also those who

purchase the products for resale purposes. Consumers can be real persons or legal entities.

(44) In order for an agreement restrictive of competition under article 4 to benefit from exemption, the resulting efficiency gains must compensate consumers for the actual or potential negative impact of the agreement on competition or consumers. Consequently, as a matter of principle, the net effect of the agreement on consumers must at least be neutral. If the agreement worsen the conditions prior to the agreement for consumers, the second condition of exemption is not fulfilled.

(45) Consumers as a whole may benefit from lower production costs, production of new and advanced products or services and more efficient allocation of resources thanks to efficiency gains. In terms of consumer benefit, the overall impact on consumers not the impact on a group of consumers should be taken into account. A certain period of time may be required before the efficiencies are passed on to consumers. The longer the transition period is, the lesser the actual net value of the benefits that the consumers will gain. Thus, the length of the transition period is considered as a criterion in the assessment. The longer the transition period is, the more benefits are needed to compensate for the period when consumers are adversely affected. Similarly, the greater the restriction of competition, the greater must be the efficiencies and the pass-on to consumers. If the restriction of competition generated by the agreement is substantial and the efficiency gains are insignificant, it is unlikely that the agreement will be exempted from the prohibition in article 4.

(46) It is not required to demonstrate that all of the efficiency gains expected from the agreement are passed on to consumers. It is important that sufficient benefits be passed on to compensate for the negative effects of the agreement.

Passing the efficiency gains on to consumers

(47) The resulting efficiency gains may be in the form of not only cost efficiencies but also qualitative efficiencies such as the introduction of new products and technological progress. For instance, a producer of drinks whose distribution network is relatively smaller may make a distribution agreement with another one that has a country-wide distribution network and reduce its distribution costs. An example for a qualitative efficiency is the case where two pharmaceutical firms make joint research and development activities and consequently introduce a new medicine more quickly.

(48) The characteristics of the market, the nature of the efficiency gains, the elasticity of demand, and the magnitude of the restriction of competition caused by the agreement are important with respect to passing cost efficiencies on to consumers.

(49) The degree of competition in the market is relevant with respect to passing cost efficiencies to consumers. In markets that are not perfectly competitive (most of the markets are not perfectly competitive), firms may decrease prices by increasing output. The degree of competition in the market is relevant with respect to passing cost efficiencies to consumers. Under market conditions where undertakings compete on price and there are not capacity constraints, parties to the agreement increase output and pass the cost efficiencies to the consumers more rapidly. If there are capacity

constraints and an increase in output is necessary for capacity increase, passing cost efficiencies on to consumers requires a transition period. In case the structure of the relevant market facilitates collusion between undertakings (there are few undertakings in the market, the relevant product is homogeneous, there are barriers to entry, etc.), it will be more difficult to pass cost efficiencies to consumers.

(50) High elasticity of demand increases the extent to which cost efficiencies are passed on. Although undertakings are not expected to pass on all of the cost efficiencies, it is accepted that the pass-on rate will be higher in markets where elasticity of demand is high. The fact that consumers are sensitive to price makes it attractive for firms to decrease their prices. If the additional sales caused by a price reduction are high enough, the loss of revenue caused by the lower price will be offset. In markets where price discrimination is possible, since only price sensitive consumers will benefit from a decrease in price, its overall effect on all of the consumers will be relatively low.

(51) The nature of the efficiency gains also plays an important role with respect to passing the cost efficiencies on consumers. According to theory, undertakings maximize their profits at the amount of output where marginal revenue equals marginal cost. Marginal cost is the cost of the last unit produced by the firm and marginal revenue is the revenue to be gained from the last unit produced. This assumption suggests that firms take into account variable costs rather than fixed costs in their output and pricing decisions. Within this framework, in case of efficiency gains reduce marginal costs, the possibility that this will pass on to consumers in the form of lower prices is stronger compared to efficiency gains related to fixed costs.

(52) Such assessment concerning qualitative efficiencies is subjective in nature. It is more difficult to demonstrate qualitative efficiencies than cost efficiencies. However, the important point for the assessment whether the second condition is fulfilled is whether the efficiencies are passed on to the extent that the negative effects born by the consumers due to the restriction of competition are compensated. Under those circumstances, it should be proved that the qualitative efficiency generated countervails negative effects of the agreement.

(53) Development of new products and improvement of existing ones will increase consumer welfare. In case the benefit stemming from such improvements exceeds the harm from the restrictive agreement, consumers will be better off than without the agreement and consumer benefit requirement will be fulfilled. In cases where the likely result of the agreement is to increase prices in the market, it must be carefully assessed whether the claimed efficiencies are sufficient to compensate for the losses that the consumers have to bear because of the restrictive agreement.

3.3. Third Condition: No elimination of competition in a substantial part of the market

(54) The third condition of Article 5 is that the agreement must not eliminate competition in respect of a substantial part of the market. The basic principle of the assessment is the maintenance of the competitive process in the market. When competition is eliminated in the relevant market, even if short-term efficiency gains are created, they will not be

able to outweigh longer-term negative effects such as higher prices, reduced innovation and misallocation of resources.

(55) Whether competition is being eliminated depends on the degree of competition existing prior to the agreement and on the restrictive impact of the agreement on competition. The greater the restrictive effect on competition caused by the agreement is, the higher the risk of eliminating competition in a substantial part of the relevant market is.

(56) The analysis whether this condition is fulfilled requires an evaluation of the position of competitors in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on the existing competitive structure. Not only actual but also potential competition in the market must be considered.

(57) While competitors' market shares are important indicators with respect to actual competition, the assessment should not be based exclusively on market share. The capacity and incentive of actual competitors to compete must be examined. If, for example, competitors face capacity constraints and it takes a long time to increase capacity, it will be difficult for actual competitors to respond by increasing the amount of production in the market. Such factors may limit competitive actions by actual competitors.

(58) The assessment the agreement's impact on competition also requires an examination of its effect on the various parameters of competition. When an agreement entirely eliminates the basic parameters of competition such as price competition, innovation and development of new products, the third condition of article 5 cannot be fulfilled.

(59) The conduct of the parties in the market can provide insight into the effects of the agreement. If following the conclusion of the agreement the parties have implemented and maintained substantial price increases or engaged in other conduct indicating the existence of a considerable degree of market power, it may be an indication that the parties are not subject to competition in the market and that competition has been eliminated in a substantial part of the relevant market.

(60) Actual competitive conduct of the parties in the market can provide insight into the effects of the agreement. An important source of competition might have been removed after an undertaking holding significant market power with aggressive pricing and marketing conduct previously - for instance a maverick firm[2]- concluded an agreement with another undertaking. Such an agreement may eliminate the incentive and the capability of the competitor to compete and thereby decrease competition in the market substantially.

(61) Whether undertakings party to the agreement provide differentiated products is relevant in terms of the effect of the agreement on competition. Close substitutes, that is, products deemed as close alternatives to each other by consumers, impose more competitive pressure on each other compared to those that are not substitutable. In

[2] For the characteristics of a maverick firm please see the Mey İçki-Burgaz decision dated 18.11.2009 and numbered 09-56/1325-331.

other words, the more substitutable the products offered by the parties to the agreement are the more restrictive the effects of the agreement will be.

(62) The actual condition in the market is an important factor as it is measurable. However, potential competition should not be ignored. With respect to potential competition, an analysis of barriers to entry facing undertakings that are not already competing within the relevant market is made. In markets with low entry barriers, potential competition may constitute competitive pressure on the parties. For this assessment, the source of potential competition and the competitive pressure imposed on the parties by competition should be clarified.

(63) In the assessment of entry barriers and the possibility for new entry it is relevant to examine, inter alia, the following factors that are also included in the secondary legislation and Board decisions:

- The impact of legal regulations in the market on new entries (if legal regulations limit or complicate entries, the possibility of potential competition will be lower)
- The cost of entry including sunk costs (High entry costs, especially the existence of high sunk costs compared to the size of the market will be an important barrier to entry)
- The minimum efficient scale (the minimum efficient scale is the smallest scale where average costs are minimized The larger the minimum efficient scale is the more difficult it will be to enter the market)
- The characteristics of potential entrants
- The position of buyers in the market and their ability to compete (The presence of strong buyers and their support for entrants may facilitate entry)
- The likely competitive response of incumbents to entrants
- The structure and the development of the market (Stagnating and declining markets may not be attractive)

  -Past entries on a significant scale and their success (The absence of entries for a long time may indicate that the abovementioned facts may constitute barriers to entry)

(64) Let's assume that Firm A is a producer of carbonated drinks, holding 70% of the relevant market, selling its products through retail channels such as buffets and markets and on-trade premises like restaurant and cafés. There are three other competitors in the market, with market shares of 20%, 5% and 5%. The market share of undertakings have remained at the same level for a long time and the size of the market has not changed. There is an obligation not to sell competing products in the agreements firm A signed with points of sale in the retail and on-trade channels. Given the high levels of market power held by firm A, the absence of new entry in the past, the stability of the market, the size of production and distribution scale necessary to enter the market, foreclosure of a substantial part of the market due to the agreements by the firm A is likely.

3.4. Fourth Condition: Not limiting competition more than necessary

(65) According to the last condition of article 5, the agreement should not restrict competition more than necessary to achieve the efficiencies aimed by the agreement. This condition requires a two-stage test. First stage is related to whether the agreement as such is necessary and indispensable in order to achieve the efficiencies. The second stage is the individual assessment of whether each restriction caused by the agreement is necessary.

(66) In the context of the last condition of article 5, the decisive factor is the relation between the agreement together with individual restrictions and the activities within the scope of the agreement. If it is possible to perform the activities under the scope of the agreement more efficiently in the absence of the restrictions concerned, the restrictions cannot be deemed necessary and indispensable. The question is whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction.

(67) Indispensability of the agreement depends on whether the desired efficiency gains could be achieved through alternative means that are less restrictive of competition. If the efficiency gains could be attained by way of less restrictive alternatives, the last condition will not be fulfilled. Under those conditions, whether the alternative is economical and practical should be taken into account.

(68) Commercial decisions of the parties will not be examined and parties are not required to consider theoretical and hypothetical alternatives. However, the parties are required to explain and demonstrate why less restrictive, economically rational and practical alternatives would be significantly less efficient.

(69) Whether the parties achieved the efficiencies on their own is also important. For instance, the claimed efficiency gains may take the form of cost reduction thanks to economies of scope or economies of scale. However, the undertakings concerned must explain and substantiate why the same efficiencies would not occur through internal growth and price competition. An agreement creating efficiency gains that the parties can attain on their own would not fulfill this condition.

(70) While doing this analysis, it is relevant to consider what the minimum efficient scale is. The larger the minimum efficient scale compared to the size of the parties, the more likely it is that the efficiencies will be attained due to the agreement. The agreement is necessary for efficiency gains to the extent that it produces synergies through the combination of complementary assets and capabilities.

(71) Once it is found that the agreement is necessary in order to produce the efficiency gains, the indispensability of each restriction of competition flowing from the agreement must be assessed.

(72) A restriction can be deemed indispensable for the claimed efficiencies if its absence would significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialize. The assessment of alternative solutions must take into account the actual and potential positive effects on competition by the elimination of a particular restriction or the application of a less restrictive

alternative. The more restrictive the restraint is the stricter the test under the third condition will be. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in guidelines and communiqués are unlikely to be considered indispensable.

(73) The assessment of indispensability must be made within the market conditions in which the agreement will operate. The more the risks and uncertainty implied by the agreement, the more a restriction may be required to ensure the efficiencies. Restrictions may also be indispensable in order to align the parties with the same object and ensure that they work jointly for the implementation of the agreement. For instance, in a vertical agreement, a supplier may make a substantial specific investment for the agreement with its customer and the supplier may impose an obligation to purchase products or not to compete on its customer.

(74) In some cases a restriction may be indispensable only for a certain period of time in which case the exemption only applies during that period. In making this assessment it is necessary to take account of the period of time required for the parties to achieve the efficiencies. In cases where the efficiency gains cannot be achieved without considerable investment, account must be taken of the period of time required to compensate such investment.