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TECHNOLOGY TRANSFER AGREEMENTS IN THE EUROPEAN COMPETITION LAW

DOKTORA TEZİ

HALİSAN YENGİN

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ABBREVIATIONS

Board	Turkish Competition Board
C.M.L.R.	Common Market Law Reports
C.M.L.Rev.	Common Market Law Review
Commission	European Commission
Community Courts	European Court of Justice and European Court of First Instance
E.C.L.R.	European Competition Law Review
ECR	European Court Reports
EC Treaty	Treaty Establishing the European Community
E.I.P.R.	European Intellectual Property Review
E.L.R.	European Law Review
EU	European Union
IPRs	Intellectual Property Rights
O.J.	Official Journal of the European Communities
SSNIP	Small but Significant Non-transitory Increase in Price
p.	page(s)
para(s).	paragraph(s)

TURKISH SUMMARY

Avrupa Topluluk Antlaşması'nın gerek 101(1). gerekse 102. maddesi (eski 81(1). ve 82. maddeleri) rekabeti kısıtlayabilecek eylemlerin neler olabileceğini örnek olarak saymaktadır. Antlaşma'nın 102. maddesini 101. maddesinden ayıran en önemli fark, kötüye kullanma eylemlerinin sadece hakim durumdaki bir teşebbüs tarafından gerçekleştirilmesidir. Antlaşma'nın 101. maddesi ise amacı veya etkisi itibariyle rekabeti kısıtlayan teşebbüsler arası anlaşmaları yasaklamakta olup, anlaşma rekabeti etkilese dahi maddenin 3. fıkrası uyarınca 101. madde yasaklamasından muafiyet süresince kurtulabilecektir. Antlaşma'nın 101(3). maddesi doğrultusunda çıkarılacak olan blok muafiyet tüzükleri yoluyla anlaşmalar blok olarak 101. madde yasaklamasından muaf kılınabilecekleri gibi, 101(3) maddesi doğrultusunda da anlaşmaların bireysel inceleme ve muafiyet sonucunda 101. madde yasağından kurtulmaları mümkündür. Bu çerçevede teknoloji transferi anlaşmalarına uygulanmak üzere Teknoloji Transferi Tüzük'ü ve Teknoloji Transferi Kılavuzu yayınlamıştır. Ayrıca 101. maddenin ne şekilde uygulanacağını göstermek amacıyla 2005 yılında bir Kılavuz yayınlanmış ve hangi anlaşmaların hangi şartlar altında 101(1). madde bağlamında rekabeti kısıtlayacağı ve hangi şartlarla 101(3) muafiyet kriterlerine uygun olabileceği ayrıntılı bir şekilde kaleme alınmıştır. Teknoloji transferi anlaşmasının anılan Tüzük kapsamında olmaması durumunda ilgili anlaşmanın 101(3) kriterleri çerçevesinde değerlendirilmesi gerekmektedir. Anılan Kılavuzlar uyarınca anlaşmanın rekabete aykırılığının tespitinde ekonomik yaklaşım ilkesi benimsenmiş olup, getirilen yeni kriterler Antlaşma'nın 102. maddesi uyarınca hakim durumun tespiti esnasında kullanılan kriterlerle örtüşmektedir. Her iki madde de aslında aynı amacı farklı metodolojiler uygulayarak korumakta olduğundan, biz bu tezde, 101. madde uygulamasından muaf olan bir teknoloji transferi anlaşmasının 102. madde yasaklamasına neden maruz kalmaması gerektiğini tespit etmeye çalışırken, aynı zamanda teknoloji transferi anlaşmaları ile ilgili olarak Avrupa Birliği ve Türkiye'deki gelişmeler üzerine ayrıntılı bir çalışmayı okuyuculara sunmayı hedefledik.

ENGLISH SUMMARY

Both Article 101(1) and 102 of the EC Treaty have illustrated conducts which may be anticompetitive. One of the most important differences of Article 102 from Article 101 is that abusive conducts may be eventuated solely by undertakings having dominant position. Agreements between undertakings having as their object or effect the prevention of competition are prohibited; however they may escape from that prohibition during the exemption period if they fulfill criteria under Article 101(3). Agreements may be exempted from prohibition in Article 101 either by way of block exemption or by way of individual exemption through individual assessment of agreements. In that regard, Technology Transfer Regulation and Technology Transfer Guidelines have been launched. Furthermore, Guidelines have been published in 2005 to show the application of Article 101 and envisages which agreements under which conditions may be assumed to be anticompetitive under Article 101(1) and under which conditions may be assumed to be fulfilled criteria under Article 101(3). In accordance with the said Guidelines, economic based approach has been adopted and the new criteria launched thereby overlap to that of the criteria followed for the determination of dominant position. Since both of the Articles protect the same aim via different methodology, while we have presented reasons to disregard the application of Article 102 in case technology transfer agreements are exempted under Article 101, we also aim to present to readers a detailed study with respect to technology transfer agreements within the framework of developments in the European Union and Turkey.

INTRODUCTION

The importance of innovation on, inter alia, the productivity, global competitiveness of the multinational companies and on the economic growth of the countries cannot be disregarded. Those are the main reasons for the protection intellectual property rights ("**IPRs**") and thus for the encouragement of innovation. Promoting innovation and fostering economic development and thereby enhancing, inter alia, consumer welfare and a fair return for innovators are the most important objectives of the protection of intellectual property. Leading to this end, IPRs provide incentives for innovation by establishing enforceable and exclusive property rights for the creators of new and useful products, more efficient processes and original work of expression[1]. Such exclusive rights grant rights to the holders of those rights including but not limited to prevent third parties from exercising or exploiting those IPRs for a period of time and to license those IPRs to a third party.

Competition law, on the other side, promotes innovation and efficiency and consumer welfare[2] by prohibiting certain actions that may harm or 'restrict, distort or prevent'[3] competition. What competition law tries to avoid is that the abusive conducts or restrictive practices of undertakings which may be resulted by holding, inter alia, any exclusive right by aiming to achieve allocative efficiency in order to establish competitive markets and thereby bring the consumers the widest variety of choices with the possible lowest prices[4].

Even they have the same objectives at the end, since they try to achieve their goals in different ways[5], scholars have thought for many years that they create a

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[1] Lemley, A. Mark. "Property, Intellectual Property, and Free Riding", Texas Law Review, 83 Tex. L. Rev. 1031, March, 2005, p. 2-13.

[2] For further information with respect to the objectives of competition law and policy see Gürkaynak, Gönenç. Türk Rekabet Hukuku Uygulaması İçin "Hukuk ve İktisat" Perspektifinden "Amaç" Tartışması, 1. Baskı, Ankara: Rekabet Kurumu, 2003, p. 98-100.

[3] For the purpose of this Thesis, we will use the phrase "restrict" so as to include "distort and prevent".

[4] Balto, A. David and Andrew M. Wolman. "Intellectual Property and Antitrust: General Principles", PTC Research Foundation of Franklin Pierce Law Center IDEA: The Journal of Law and Technology, 2003, p. 2.

[5] For further information with respect to the relations between IP laws and competition laws, see Ateş, Mustafa. "Fikri Mülkiyet Koruması ve Rekabet Hukuku", Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-VII, Rekabet Kurumu, 17-18 Nisan 2009, p. 59-61.

conflict[6]. The interactions between the IPRs policy and the competition policy and the positive correlation thereof on innovation have, however, been nowadays mostly agreed by the scholars[7].

One of the main issues in this regard is to find the equilibrium between the IPRs protection policy and competition policy. Since, if competition laws impose extensive constraints on IPRs, they may fail to generate adequate incentives to innovate[8] and thus innovators will not focus to create without any expectation of any reward. On the other hand, if IPRs will be defined too broadly, initial innovators may be overcompensated and competition may be restricted by the holder of those rights due to the way of exploitation or the exercise of those rights.

There are more than hundred systems which define or frame the equilibrium between the IPRs policy and the competition policy. This study is, however, devoted to the balance which the European Union has put forward with respect to the technology transfer agreements under the evolving case law of the Community Courts in accordance with or by taking into account of the needs of both the Member States and the European Union.

In the first part of this Thesis, the interaction between the competition rules of the EC Treaty and IPRs as the 'derogation' to free movement provisions will be focused by presentation of the main rulings of the Community Courts in this respect. However, the substantive law of IPRs will not be scrutinized under this Thesis. The interaction

[6] Carrier, A. Michael, "Resolving the Patent-Antitrust Paradox Through Tripartite Innovation", Vanderbilt Law Review, 1047, May, 2003, p. 1-19; Swanson, G. Daniel and William J. Baumol. "Reasonable and Nondiscriminatory (Rand) Royalties, Standards Selection, and Control of Market Power", Antitrust Law Journal, Issue 1, 2005, p. 1-2; Barton, H. John, "Antitrust Treatment Of Oligopolies with Mutually Blocking Patent Portfolios", American Bar Association, Antitrust Law Journal, Issue 3, 2002, p. 1-2.
[7] Kovacic, E. William and Andreas P. Reindl, "The European Union: Dedicated to Professor Valentine Korah: Article: An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy", Fordham University School of Law, Fordham International Law Journal, April, 2005, p. 1-4; Langenfeld, James. "Antitrust: New Economy, New Regime Second Annual Symposium Of The American Antitrust Institute: Intellectual Property and Antitrust: Steps Toward Striking a Balance", Case Western Reserve Law Review, Fall, 2001, p. 1-6; Azcuenaga, L. Mary. "Address To Boston University School Of Law: Recent Issues in Antitrust and Intellectual Property", Trustees of Boston University, Boston University Journal of Science and Technology Law, Winter, 2001, p. 1-3.
[8] Rill, F. James and Mark C. Schechter. Selected Symposium Article: "International Antitrust and Intellectual Property Harmonization of the Interface", Law and Policy in International Business Law and Policy in International Business, Summer, 2003, p. 1-2.

between the IPRs and the competition rules, in particular Articles 81 and 82 of the EC Treaty, will also be focused for the sake of this Thesis.

In the second part of this study, since both Article 81 and Article 82[9] may be applicable to the agreements between the undertakings, the main focuses will be on the abusive conducts of a dominant position within the meaning of Article 82 of the EC Treaty which are identical to the anticompetitive terms envisaged in Article 81 of the EC Treaty. As most of the abusive conducts of the dominant undertakings such as the unfair non-pricing trading conditions, output restrictions and tying may be envisaged by the parties in their technology transfer agreements, before analysing the overlapping issues and concerns in Article 82 and Article 81 of the EC Treaty in detail, we will show the jurisprudence and decisions of the Community Institutions[10] with respect to those restrictive abusive practices of the dominant undertakings.

In the third part of this study, focus will be on the technology transfer agreements within the meaning of and defined as in the Commission Regulation (EC) No 772/2004 of 27 April 2004 on the Application of Article 81 (3) of the Treaty to categories of technology transfer agreements (the "**Technology Transfer Regulation**"). In this part of the Thesis, we will evaluate the new regime brought by the said Regulation.

In the fourth part of the Thesis, we will explain, in detail, the new economic based approach followed by the Community Institutions and how this approach affects the outcome in case the technology transfer agreements will not be exempted by and thus fall outside the scope of the Technology Transfer Regulation. In this respect, we will show the legal grounds to disregard the application of Article 82 and instead to apply Article 81 to the technology transfer agreements due to the requirement, under the new modernized regime of Article 81, to assess the relevant market, market shares of the parties, the nature of the products and technologies concerned, the market position

[9] It should be noted that although Article 81 and Article 82 have been changed as Article 101 and Article 102 in accordance with the Consolidated Version Of The Treaty On The Functioning Of The European Union, dated 30.03.2010, Official Journal C 83/47, since all the references have been made to Article 81 and Article 82 of the EC Treaty under the soft law, we will use Article 81 and Article 82 under this Thesis.
[10] For the purpose of the Thesis, we will use the words 'Community Institutions' in a way to include only the Community Courts and the Commission.

of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. We will also show the legal status of those anticompetitive terms and conditions in case those technology transfer agreement in full or in part will not be exempted under the Technology Transfer Regulation or Article 81 (3) of the EC Treaty.

In the fifth part of the Thesis, due to the economic and legal background between the European Union and Turkey, Block Exemption Communiqué on the Technology Transfer Agreements, numbered 2008/2 (the "**Communiqué**") which came into force in Turkey will be presented. We will also show the legal status of anticompetitive terms and conditions in case those technology transfer agreements in full or in part will not be exempted under the Communiqué or Article 5 of the Act on Competition[11].

While technology transfer agreements executed between the competitors, say, the horizontal agreements and the agreements between the non-competitors, which may be vertical agreements or may be the agreements which have no vertical relation at all, will be examined herein, the distribution and the supply agreements which fall under the Vertical Agreements Block Exemption Regulation will not be overviewed in the Thesis.

We have also limited the scope of this study to the technology transfer agreement[12] which is defined in Article 1 the Technology Transfer Regulation as "a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the

[11] The Act on the Protection of Competition, Act No: 4054 Date of Adoption: 7/12/1994 Official Gazette of Its Publication: Date:13/12/1994 Number: 22140 (the "**Act on Competition**").

[12] For the purpose of the Thesis, we will use the terms "license agreement" as the synonym of technology transfer agreement as defined herein.

exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements." Therefore, the agreements containing other IPRs which are not included in this definition will not be focused under this Thesis.

It should be noted that although the technology transfer agreement have been defined as "an agreement, a decision of an association of undertakings or a concerted practice" in Article 1 of the Technology Transfer Regulation, for the purpose of this Thesis and due to their rare application, decisions and concerted practices will not be examined hereinunder.

1. COMPETITION RULES AND OTHER PROVISIONS IN THE EC TREATY

1.1. IPRs As "Derogation" To Free Movement Provisions

Article 28 and 29 of the EC Treaty envisage a fundamental obligation on Member States that quantitative restrictions and all measures having equivalent effects on imports and exports are prohibited between the Member States by preserving, in Article 30 of the EC Treaty, the right of the Member States to impose prohibitions or restrictions on imports and exports required to protect their industrial and commercial property as long as those restrictions or prohibitions are neither a means of ***arbitrary discrimination nor disguised restriction on trade*** between the Member States. Article 222 of the EC Treaty sets forth that "the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership", thereby leaving the policy on intellectual property protection to the domestic law of the Member States. The EC Treaty has envisaged a free area for the Member States to frame their substantial intellectual property laws by stressing the importance of the establishment of the internal market without internal frontier, which at the end one of the main objectives of the European Union.

Therefore, while the EC Treaty sets the Member States free to envisage the rules and to determine the extent and scope of their protection of intellectual property rights, it puts forward its reservation that any means of arbitrary discrimination or a disguised restriction on trade between the Member States will certainly be caught by the EC laws and finally by the Community Institutions[13].

In one of the leading case, Centrafarm[14], the Court of Justice has discussed the right of the licensee to prevent the import by the other licensee of the patented product to the former's country and concluded by the reference to Article 30 of the EC Treaty that "…. whilst the Treaty does not affect the existence of rights recognized by the legislation of a Member State in matters of industrial and commercial property, yet the *exercise of these rights*[15] … be affected by the prohibitions of the Treaty … in relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements"[16]. The Court of Justice, in Centrafarm case has pointed out the specific subject matter of the IPRs covers:

- **i.** to manufacture the industrial products either directly by itself or through its licensee,
- **ii.** first putting onto the market thereof,
- **iii.** to prevent its intellectual property rights from any violation by the third parties.

[13] Gifford, J. Daniel. "Government Policy Towards Innovation in the United States, Canada, and the European Union as Manifested in Patent, Copyright, and Competition Laws", SMU Law Review, Fall, 57, 1339, 2004, p. 6-10.
[14] Case 15/74, Centrafarm BV v. Sterlin Drug Inc., ECR 1147 ("Centrafarm Case"), para. 7, 9.
[15] See for further information with respect to the exercise of IPRs, Ruping, Karl. "Copyright and an Integrated European Market: Conflicts with Free Movement of Goods, Competition Law and National Discrimination", Temple International and Comparative Law Journal, Spring, 1997, p. 3; Govaere, Inge. The Use and Abuse of Intellectual Property Rights in EC Law. Sweet and Maxwell, 1996, p. 74-99.
[16] Centrafarm Case, paras. 7, 9.

The first two rights derived from as being the owner of the intellectual property right, as can be inferred by jurisprudence of the Court of Justice, will be exhausted[17], once the industrial product has been lawfully introduced to the market either by the holder of the IPRs or through its licensee[18]. Once those two rights will be exhausted, the owner of the right or the licensee will not, as a general rule, be in a position to restrict the importation to or exportation from its country of the industrial products by the other licensee or by any third party obtained the industrial products either from owner of the IPRs or the latter licensee. Therefore, the Court of Justice has launched the ***doctrine of exhaustion*** of rights[19] in this case by emphasizing also the difference between the existence of the right and the exercise of the right.

It, therefore, may be correct to foresee that once the two aforementioned rights would be exhausted, the third right, the right to object any violation by a third party of the IPRs protected under the national laws of the Member States, may be strictly applied to the extent that such objection by the holder of the IPRs would not be a means of arbitrary discrimination nor disguised restriction on trade between the Member States.

In order to stress upon the importance of the single market[20], the Court of Justice has continued by mentioning that "… the question should therefore be answered to the effect that the exercise by a patentee of the right given him by the laws of a Member State to prohibit the marketing in that State of a product protected by the patent and put on the market in another Member State by such patentee or with his consent would be incompatible with the rules of the EEC Treaty relating to the free movement

[17] The same reasoning has been upheld by the Court of Justice in the Case C-337/95, Parfums Christian Dior SA v. Evora BV, ECR I-6013, 1998, paras. 35-36 ("Christian Dior Case") where the Court of Justice has underlined that "… the exhaustion of the rights conferred by a trade mark, provides that a trade mark is not to entitle its proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by its proprietor or with his consent. If the right to prohibit the use of his trade mark in relation to goods … is exhausted once the goods have been put on the market by himself or with his consent, the same applies as regards the right to use the trade mark for the purpose of bringing to the public's attention the further commercialization of those goods".

[18] For further information with respect to the exhaustion of IPRs under Turkish law regime, see Arıkan, A. Saadet and Hamdi Pınar and Fahrettin Kayhan. "Fikri Mülkiyet Hakları ve Rekabet Hukuku-Hakkın Tüketilmesi", Perşembe Konferansları, Rekabet Kurumu, p. 105-149; See for further information with respect to the IPRs system under World Trade Organization, Ongun, Tuba. "Günümüzde Fikri - Sınai Mülkiyet Hakları", Perşembe Konferansları, Rekabet Kurumu, p. 37-50; Bakırcı, M. Enes. "Teknoloji Transferinde 'Patent ve Know-How Lisansı' Sözleşmeleri", Master Thesis, Istanbul Üniversitesi, Sosyal Bilimler Enstitüsü, 1999, p. 47-51.

[19] Ruping, p. 4; Korah, Valentine. "The Interface Between Intellectual Property and Antitrust: The European Experience", American Bar Association, Antitrust Law Journal, Issue 3, 2002, ("Korah, *Interface*") p. 4.

[20] Internal Market has been defined in Article 2 of the EC Treaty as "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

of goods in the common market".[21] Therefore, the Court of Justice has pointed out that the exercise of IPRs will be within the scope of competition rules and thus enable the Community Institutions to intervene the disposal of such rights.

The same view regarding the importance of the internal market has been put forward by the Court in the Pharman case that "if a patent proprietor could preclude the importation of protected products marketed in another Member States by him or with his consent, he would be able to partition the national markets and thus restrict trade between Member States, although such a restriction is not necessary to protect the substance of the exclusive rights under the patents"[22].

The Court, in the Pharman case, has also draw attention to the importance of the "consent"[23] of the IPRs holder by highlighting that "it is necessary to point out that where, as in this instance, the competent authorities of a Member State grant a third party a compulsory licence which allows him to carry out manufacturing and marketing operations which the patentee would normally have the right to prevent, the patentee cannot be deemed to have consented to the operation of that third party. Such a measure deprives the patent proprietor of his right to determine freely the conditions under which he markets his products."[24]

In Deutsche Grammophon v. Metro[25], the Court of Justice emphasizes that, while the existence of a national copyright is not subject to EU regulations under Article 222 of the EC Treaty, the copyright holder must exercise his or her rights in a manner consistent with the free movement of goods requirements. The Court of Justice, therefore, points out that a national copyright cannot be used as a restriction on trade

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[21] Centrafarm Case, para. 15.
[22] Case 19/84, Pharmon BV v. Hoechst AG, 1985, ECR 2281 ("Pharmon Case"), para. 23.
[23] The Court of Justice has ruled that "the proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product which has been lawfully marketed in another Member State by the proprietor himself or with his consent. The same applies as respects copyright, commercial exploitation of which raises the same issues as that of any other industrial or commercial property right. Accordingly neither the copyright owner or his licensee, nor a copyright management society acting in the owner's or licensee's name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another Member State by the owner himself or with his consent." See Cases 55 and 57/80, Musik-Vertrieb Membran GmbH v. Gesellschat für Musikalische Aufführungs und Mechanische Vervielfaltigungsrechte, 1981, ECR 147 ("Musik-Vertrieb Case"), para. 3.
[24] Pharmon Case, para. 25.
[25] Case 78/70, Deutsche Grammophon v. Metro, 1971, E.C.R. 487 ("Deutsche Grammophon Case"), para. 11.

between the Member States. The leading discussion launched by the Deutsche Grammophon case is the "***specific subject-matter***" doctrine[26] where the Court of Justice has underlined that "… although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the *specific subject-matter* of such property"[27]. The Court of Justice again emphasizes that the free movement of goods is a fundamental principle of the EC Treaty and that any exception from that principle should be narrowly construed in a way that it does not frustrate the objectives and purposes of the Treaty.

The Court of Justice in Coditel case has reiterated the importance of the exercise of IPRs by mentioning that "…a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 85 *(now Article 101)*[28] of the Treaty. It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market"[29]. Therefore, the Court of Justice has underlined that the existence of IPRs will not be affected by the EC Treaty prohibition, however, the exercise of IPRs should not restrict competition in order not to be caught by the prohibition envisaged in the EC Treaty.

[26] For further information see Steiner, Josephine and Lorna Woods. Textbook on EC Law. 8th Edition, Oxford University Press, 2003, p. 490-491.
[27] Deutsche Grammophon Case, para. 11.
[28] Italics are added.
[29] Case 262/81, Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v. Ciné-Vog Films SA and others (1982), ECR 3381 ("Coditel Case"), para. 20.

Therefore, it will not be incorrect to deduct that while the Community Courts have accepted the freedom of the Member States to shape their intellectual property policy, they also stress the importance of the trade between the Member States and thus the establishment and the maintenance of the internal market.

As discussed in the above cases, the Community Institutions will not deal with the existence of the IPRs, but once the exercise by the holder of those rights would amount to an arbitrary discrimination or disguised restriction on trade between the Member States, the Community Courts has undoubtedly declared that such a practice will be incompatible with the common market. Therefore, the existence of an agreement, in particular a licence agreement, as in the case of the sole existence of IPRs has not been dealt with by the Community Courts, but the terms and provisions having the object or effect of restriction of competition within the common market have been painstakingly put forward by the Comminity Courts. Those rulings[30] will be discussed in detail in the subsequent parts of this Thesis.

Being one of a derogation of the free movement provisions of the EC Treaty, IPRs has established the bridge between free movement provisions and competition law provisions. Since both the competition policy and the free movement policy has served for, inter alia, the purpose of the establishment and maintenance of the internal market and the protection of trade between the Member States and thus maintenance of competition by prohibiting an arbitrary discrimination or disguised restriction on trade.

Therefore, after putting the effect, on trade between the Member States, of the exploitation of IPRs as the derogation to free movement provisions, it would be better to highlight how the competition rules protect trade and competitive market and the interaction between the IPRs and competition rules in the EC Treaty.

[30] See i.e. Cases 56 & 58/64, Consten & Grunding v. Commission, 1966, ECR 299 ("Consten & Grunding Case"); Case 258/78, L.C Nungesser KG and Kurt Eisele v. Commission, 1982, ECR 2015 ("Nungesser Case"); Case 161/84, Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard, Schillgallis, 1986, ECR 353 ("Pronuptia Case"); Case 193/83, Windsurfing International Inc. v. Commission, 1986, ECR 611 ("Windsurfing Case"); Case 40/70, Sirena Srl v. Eda Srl, ECR 69, 1971 ("Sirena Case").

1.2. IPRs And The Competition Rules Of The EC Treaty

It should be borne in mind that the free movement provisions are not mainly designed to protect the competition in the market, but are framed for the maintenance of trade between the Member States and of the internal market. Competition rules in the EC Treaty, in particular Article 81 and 82, are also envisaged for, inter alia, the protection of trade between the Member States or in the substantial part thereof. The interdependency between the competition rules and the IPRs as the derogation of free movement will exist when there is an arbitrary discrimination or disguised restriction on trade through, inter alia, the licence agreement which contains restrictive and anticompetitive provisions. IPRs and the competition laws, on the other hand, have substantial interface[31] in that IPRs have the effects on shaping the disciplines of competition laws and competition laws deals with the post-grant use of IPRs[32]. It should be pointed out that IPRs are "fully subject to general antitrust principles since, what is conferred upon its owner is precisely that autonomy of decision and freedom of contracting according to individual preferences that result from any private property, no matter tangible or intangible and that is the object of and connecting factor for restraints of competition"[33].

It is defended that IPRs restricts competition in that they grant an exclusive right to their holder and the holder of those rights may restrict competition through its monopol rights on intellectual property. It should, however, be noted that even the holder of those IPRs inherently holds exclusive rights[34], i.e. bargaining power while drafting the licence agreements, right to put those intellectual property related products first onto the market, etc., competition laws are not, in general, dealt with the exclusive

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[31] See Jacobsen, A. Raymond and Stefan M. Meisner, McDermott and Will & Emery. "Antitrust Principles Applicable to Intellectual Property", Intellectual Property 7, The Antitrust Review of the Americas, 2003, p. 31-34 with respect to the US approach to the interface between the IPRs and the competition rules.

[32] Pham, Alice. "Competition Laws and Intellectual Property Rights: Controlling Abuse or Abusing Control?", Cuts Center for Competition, Investment & Economic Regulation, 2008, www.cuts-ccier.org, p. 2-9; Pitofsky, Robert. "Antitrust at the Millennium (Part II): Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property", American Bar Association, 2001, Antitrust Law Journal, Issue 3, 2001, p. iii (in Executive Summary).

[33] Pham, p. 2-9.

[34] See for further information with respect to the rights of the holder of intellectual property under EC Law Regime Cornish, W. R. Intellectual Property: Patents, Copyright, Trade Marks And Allied Rights, London, 1996, p. 5-6; See for further information with respect to the rights of the holder of IPRs under Turkish regime, Arıkan, *"Fikrî-Sınai Haklar ve Rekabet Hukuku"*, p. 121-164; Tekinalp, Ünal. Fikri Mülkiyet Hukuku. 3. Bası, Istanbul: Beta Yayınları, 2004, p. 149-209.

nature of those rights until and to the extent competition in the market will be restricted. To put it differently, the competition authorities will not react if any competitor or a potential competitor or a third party will not be affected and/or the competition is not restricted due to this exclusive power the holder has possessed on its intellectual property. Since, it should be borne in mind that the competition rules are designed for the maintanace and protection of competition in the market.

As pointed above, competition law's concern is not the existence of IPRs but the exercise of those rights. Article 81 and Article 82 of the EC Treaty may focus on the IPRs related issues when and if, inter alia, there exist restrictive terms and conditions in the agreements or restrictive conducts of the undertakings affecting the competitive nature of the market and/or IPRs are disposed in order to foster the abuse of dominant position. Therefore, the most essential thing is to find out as to whether the competition in the market concerned has been restricted as a result of the object or the effect of the IPRs-related practices. Once the answer will be given that the competition is restricted, the authorities having a say on the application of competition rules may immunize the agreement in case the agreement fulfills the criteria under Article 81 (3) of the EC Treaty or may be declared such agreement as anticompetitive or incompatible with the common market. It is now, however, undebatable following the case law of the Community Courts that the competition rules will be applicable to the IPRs related practices. In Consten & Grundig, the Court has underlined the application of the IPRs will be compatible to the extent that the prohibition under Article 81 will not be avoided[35]. Therefore, it becomes definite by this ruling that Article 81 will be applicable to the agreements which relate provisions concerning the disposal of IPRs.

It is undoubtedly that the disposal of the IPRs may be caught by Article 82 of the EC Treaty. In Parke Davis case, the Court of Justice has highlighted that the exercise of the IPRs may be caught by Article 82 of the EC Treaty by setting forth that

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[35] The Court of Justice has ruled that "Article 36, which limits the scope of the rules on the liberalization of trade contained in Title I, Chapter 2, of the Treaty, cannot limit the field of application of Article 85. Article 222 confines itself to stating that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1)". See Consten & Grundig Case, p. 345.

"… for this prohibition to apply it is thus necessary that three elements shall be present together: the existence of a dominant position, the abuse of this position and the possibility that trade between Member States may be affected thereby. Although a patent confers on its holder a special protection at national level, it does not follow that the exercise of the rights thus conferred implies the presence together of all three elements in question. It could only do so if the use of the patent were to degenerate into an abuse of the abovementioned protection" [36]. The Community Courts repeatedly[37] have put forward that not the existence but the exercise, the way the IPRs has been disposed by the holder of the right, is the main concern to be focused on[38].

The negative effects on competition through the disposal of IPRs may arise in the market due to the restrictive technology transfer agreements including restrictive provisions such as reduction of inter-technology competition between the companies operating on a technology market or on a market for products incorporating the technologies concerned and/or by foreclosure of competitors by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry and/or reduction of intra-technology competition by imposing in the agreement territorial restraints on licensees, preventing them from selling into each other's territory[39]. Technology transfer agreements may also restrict competition by reducing inter-technology competition between undertakings that license or produce on the basis of substitutable technologies[40], i.e. by the imposition of reciprocal obligations for the provision of future improvements of their respective technologies or may create barriers to entry and expansion by competitors, i.e. by the imposition of non-compete obligation

[36] Case 24/67, Parke Davis & Co. v. Probel and Centrafarm, 1968, ECR 55, ("Parke Davis Case"), para. 72.
[37] Case 53/87, Consorzio Italiano della Componentistica di Ricambio per Autoveicoli and Maxicar v. Regie Nationale des Usines Renault, 1988, ECR 6039 ("Consorzio Italiano Case"), paras. 1, 4; Joined Cases C-241/91 and C-242/91, Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission, (1995), ECR I-743 ("Radio Telefis Case"), paras. 25, 50; Case 192/73, Van Zuylen Freres v. Hag AG, ECR 731, 1974 ("Van Zuylen Case"), para. 8.
[38] Reagan, T. Doherty. "Recent Development: The Ascendancy of European Community Law-The Implications of the Court of Justice Decision in Magill on the Balance Between National and EC Intellectual Property Law", The Georgia Journal of International and Comparative Law, 681, Summer, 1996, p. 1-7.
[39] The application of Article 81 of the EC Treaty to technology transfer agreements, (2004/C 101/02), (the "**Technology Transfer Guidelines**"), paras. 142-145.
[40] It has been envisaged that the suppliers of substitutable technologies may also be foreclosed if a licensor with a sufficient degree of market power ties together various parts of a technology and licenses them together as a package while only part of the package is essential to produce a certain product. See Technology Transfer Guidelines, para. 143.

on the licensee[41]. Licensing between competitors may also facilitate collusion[42] between the undertakings in question.

Technoloy transfer agreements, however, may also have substantial pro-competitive effects by promoting innovation by allowing innovators to earn returns to cover at least part of their research and development costs, leading to a dissemination of technologies, which may create value by reducing the production costs of the licensee or by enabling him to produce new or improved products, may also removes obstacles to the development and exploitation of the licensee's own technology[43]. Therefore, in that regard, finding the equilibrium between the IPRs and the competition rules is essential.

1.3. Relations Between Article 81 And 82 Of The EC Treaty

In order for the maintenance of the internal market and to protect the trade between the Member States and competition in the market, the EC Treaty stipulates in Article 81 that:

i. "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by association 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, and in particular those which:

  a. directly or indirectly fix purchase or selling prices or any other trading conditions,

  b. limit or control production, markets, technical developments, or investment,

  c. share markets or sources of supply,

[41] Technology Transfer Guidelines, para. 142.

[42] Agreements may facilitate collusion by increasing transparency in the market, by controlling certain behaviour and by raising barriers to entry. See Technology Transfer Guidelines, para. 143.

[43] For instance when the licensor agrees not to invoke his intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition. See Technology Transfer Guidelines, para. 17.

d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,

e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

ii. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

iii. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

a. any agreement or category of agreements between undertakings,

b. any decision or category of decisions by associations of undertaking,

c. any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,
- afford such undertakings the possibility of eliminating compensation in respect of a substantial part of the products in question"[44].

Therefore, any practices having the object or the effect restricting competition between the Member States will be incompatible with the common market and thus will be a breach of the EC Treaty if all terms are fulfilled and unless any derogation exists.

Article 82 of the EC Treaty stipulates that "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part

[44] Article 81 of the EC Treaty.

of it shall be prohibited as incompatible with the common market in so far as it may affect trade between the Member States. Such abuse may, in particular, consist in:

- **i.** directly or indirectly imposing unfair purchase or selling prices or other unfair trading condition;
- **i.** limiting production, markets or technical development to the prejudice of consumers;
- **ii.** applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- **iii.** making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"[45].

The EC Treaty has put forward in Article 81 and Article 82 the general instances which may be abusive in nature. As long as those anticompetitive terms or practices will have the object or the effect of restricting trade between the Member State and competition in the common market, those terms and practices will be scrutinized closely by the competition authorities.

In order to understand the relations between Article 81 and 82 of the EC Treaty, the below-sided issues should be taken into consideration:

- **i.** As can be inferred by solely looking at the texts of both of the Articles, examples of abusive conducts in Article 82 and the anticompetitive conducts in Article 81, albeit being illustrative examples, are almost identical to each other.

- **ii.** It should be, first, noted that both of the Articles should be interpreted in the light of the general principles of the EC Treaty. Those are, inter alia, right to defense, subsidiarity, proportionality, rule of law, legal certainity, uniformity of law and equality. Those are essential and

[45] Article 82 of the EC Treaty.

general principles of Community Law which have been either envisaged in the EC Treaty or developed through the jurisprudence of Community Courts[46]. Secondly, it should be borne in mind that the Community Courts have respected the fundamental rights[47] arising out of both the constitutions of the Member States and international treaties, in particular the European Convention of Human Rights[48] (the "**ECHR**").

iii. It should be also noted that both of the Articles try to achieve the same aim, namely the maintenance and the protection of competition in the common market, albeit by different means[49]. Since both of the Articles have the common aims, there should be also consistency in their application if applied to the same cases[50] and that the outcome should not be in contradiction.

iv. As aforementioned, both of the Articles may be applied in parallel to the same matters. However, it should be noted that while Article 81 of the EC Treaty is the main provision which governs the contractual relations, Article 82 may also be applicable for the restrictive agreements or the restrictive provisions therein due to the abusive nature of those agreements or restrictive provisions[51]. However, it should be clarified that the main target[52] under Article 82 is to catch the abusive and

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[46] For further information with regard to the evolving case law of the Community Courts see Craig, Paul and Grainne Burca. EU Law Texts, Cases and Materials. 3rd Edition, Oxford Press, 2003, p. 317-397.

[47] Slater, Donald, Sébastien Thomas and Denis Waelbroeck. "Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?", The Global Competition Law Centre, GCLC Working Paper 04/08, p. 3-44.

[48] In its rulings, the Community Courts have stressed upon the importance of the protection of fundamental rights. See Case C-199/92 P, Hüls AG v. Commission (1999), ECR I-4287 ("Hüls AG Case"), paras. 148-149; Case T-22/02 & T-23/02, Sumitomo Chemical Co. Ltd. and Sumika Fine Chemicals Co. Ltd. v. Commission (2005), ECR II-nyr ("Sumitomo Case"), paras. 69, 104.

[49] Case T-51/89 Tetra Pak Rausing SA v. Commission (1990), ECR II-309 ("Tetra Pak 51/89"), paras. 22, 25; Case 6/72 Europemballage and Continental Can v. Commission (1973) ECR 215 ("Continental Can Case"), para. 25.

[50] Case 85/76 Hoffmann-La Roche v. Commission (1979) ECR 461 ("Hoffmann-La Roche Case"), para. 116.

[51] Case C-277/87 Sandoz Prodotti Farmaceutici SpA v. Commission (1990), ECR I-45 ("Sandoz Case"), para. 1; Case T-41/96 Bayer AG v. Commission (2000), ECR II-3383 ("Bayer Case"), para. 71; Case T-208/01, Volkswagen AG v. Commission (2003), ECR II-5141 ("Volkswagen Case"), para. 35.

[52] See Eilmansberger, Thomas. "How to Distinguish Good from Bad Competition under Article 82: In search of clearer and more coherent standards for anticompetitive abuses", 42 C.M.L.Rev. 129, 2005, p. 2-4 for the objectives of Article 82.

unilateral conducts of the dominant undertaking without the need to have an agreement at hand[53].

v. It is unfortunately accepted that immunity from the prohibition under Article 81 will not automatically immunize the conduct of the undertaking from the application of Article 82 of the EC Treaty[54]. However, due to the evolving attitude of the Community Institutions, it should be noted that the greater the degree of the market power held by the undertaking, the less likely that an exemption will be granted under Article 81 regime[55].

vi. Unlike Article 81 of the EC Treaty, Article 82 does not contain in its text a sanction of voidness against the anticompetitive and abusive conduct of the undertakings. However, since Article 82 is directly applicable and enforceable in the national courts of the Member States, the anticompetitive provisions in the agreement imposed by way of an abuse may be declared void and unenforceable by national courts of the Member States[56].

vii. It is defended that while identification of the relevant market is not important for the application of Article 81 to the cases, the definition of the relevant market is very important for the application of Article 82 to the matters[57]. However, we believe that due to the evolving case law and the changing attitude of the Community Institutions[58], one should also

[53] Goyder, D.G. EC Competition Law. 4th Edition, Oxford Press, 2003, p. 324-326.
[54] Tetra Pak 51/89 Case, para. 25; Joined Cases T-191/98, T-212/98 to T-214/98 Atlantic Container Line AB and Others v. Commission (2003) ECR II-3275 ("Atlantic Container Case"), paras. 594-602, 629-630, 652; Joined Cases C-395/96 & C-396/96P Compagnie Maritime Belge Transport SA, Compagnie Maritime Belge SA & Dafra Lines A/S v. Commission (2000), ECR I-1365 ("Compagnie Maritime Belge Case"), paras. 33, 130.
[55] See Section '4.4. Simultaneous Application of Article 82 and Article 81 of the EC Treaty to the Restrictive Technology Transfer Agreements' of the Thesis.
[56] Goyder, p. 324-326.
[57] Goyder, p. 324-326.
[58] See Communication from the Commission - Guidelines on the Application of Article 81 (3), 2004, O.J. C 101 (the "**Guidelines on Article 81**"); Technology Transfer Guidelines; Council Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002 (the "**Council Regulation 1/2003**").

identify the relavant market and the market power[59] of the undertakings concerned, in order to determine as to whether the agreement concerned is within the scope of Article 81 or is immunized from the prohibition of Article 81 (1) by fulfilling the criteria under Article 81 (3) of the EC Treaty.

viii. It is also defended that the prohibitive action in Article 82 is the "abuse" of dominant position and that there may be no exception to this rule[60] as exists under Article 81 (3) of the EC Treaty. We do not share this idea and would like to note that although Article 82 of the EC Treaty does not provide such an immunity regime in its text, the evolving jurisprudence of the Community Courts and the changing attitude of the Community Institutions have made clear that the dominant undertakings will have the opportunity to defend theirselves and submit efficiency defenses as done under Article 81 (3) of the EC Treaty[61]. By the same token, we do not share the idea that unlike Article 81, the breach of Article 82 will eventuate even if there will be no elimination of competition[62]. Since even if an undertaking may be in a dominant position, solely commiting i.e. tying or bundling arrangement may not be enough for the establishment that the undertaking under consideration abuses its dominant position. In both of the Articles, as to whether competition is restricted or not will be of great importance.

2. ABUSE OF DOMINANT POSITION

2.1. Introduction

Article 3 (1) of the EC Treaty stipulates that the competition in the internal market shall not be distorted. Competition rules in the EC Treaty, therefore, try to establish a system in which competition will be maintained. Article 82 prohibits the

[59] Park, Sangin. "Market Power in Competition for the Market", Journal of Competition Law & Economics, 5(3), February 2009, p. 571-579.
[60] Goyder, p. 324-326.
[61] See our arguments and explainations under Section '4.2.3. Defenses under Competition Cases' of the Thesis.
[62] Goyder, p. 324-326.

abusive conducts of the undertakings having a dominant position in the concerned market and thus controlled the abusive exercise of the market strength[63]. Article 82, however, does not ban undertakings to have a market power[64] in the relevant market. As the Court of Justice has rightly pointed out in Michelin case "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market"[65]. The same view has been held by the Court of First Instance in Matra Hachette[66] case that having or strengthening a dominant position was not conclusive itself for the application of Article 81 and/or Article 82 of the EC Treaty since neither of Articles have put bans on the undertaking to have a market power in the relevant market.

In order to find out as to whether the undertaking concerned is in a dominant position or not, it is, first, required to determine the relevant market[67]. Following the determination of the relevant market, the next step to be taken is the assessment of the market position, say, the market power, of the said undertaking in the defined relevant market. Market power of an undertaking will be determined by, inter alia, the determination of the market shares of the undertaking(s) concerned, barriers to entry and the countervailing buying power in the relevant market[68].

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[63] Whish, Richard. Competition Law. 5th Edition, Oxford Press, 2005, p. 179-180; Bellamy and Child. European Community Law of Competition, Edited by: Peter Roth QC and Vivien Rose, Sixth Edition, Oxford University Press, 2008, p. 910.

[64] The term "dominance" is related to the terms "market power" and/or "market strength" in the economic literature. However, we will use those terms as they have the same meanings by disregarding the possible different economical meanings.

[65] Case 322/81 Michelin v. Commission (1983), ECR 3461 ("Michelin 322/81"), para. 57. See for further information regarding dominant position Tardiff, J. Timothy and Dennis L. Weisman "The Dominant Firm Revisited", Journal of Competition Law & Economics, 5(3), February 2009, p. 517-536.

[66] Case T-17/93 Matra Hachette v. Comission (1994) ECR II-595 ("Matra Hachette Case"), para. 153; See also Case C-250/92 Gottrup-Klim v. Dansk Landbrugs 1994) ECR I-5641 ("Gottrup-Klim Case"), para. 47.

[67] However, it should be noted that it is not that easy to define the relevant market in each case. See Kate, Adriaan and Gunnar Niels. "The Relevant Market: A Concept Still in Search of A Definition", Journal of Competition Law & Economics, 5(2), September 2008, p. 297–333.

[68] Determination of market power of the undertakings will be explained in great detail in Section '4.2.1. Impact Assessment of Technology Transfer Agreements' of the Thesis. Therefore, in order to avoid duplication, we will not scrutinize herein.

2.2. Market Definition

Dominant position is a term related with economic strength of the undertaking concerned in the relevant market and that the determination of the relevant market is a precondition of determining as to whether the undertaking concerned has an economical strength or not. Additionally, in order to calculate the market shares and to determine market power of an undertaking, the determination of relevant market is the first step to be taken[69]. The Community Courts have emphasized the importance of reaching, first, the definition of the relevant market before establishing that the undertaking, individually or collectively, concerned has a dominant position and urged the Commission to identify clearly the relevant market before sanctioning the conduct of the undertakings[70] under Article 82 of the EC Treaty. Failure to define the product market and/or the geographic market may lead by the Community Courts to dismiss or annul the findings of the Commission[71]. Furthermore, defining the relevant market plays a crucial role in order to, inter alia, identify and assess the actual or likely affects of the alleged abusive conduct[72].

Determination of the relevant market, however, is a complex and risky process since if the relevant market will be defined narrowly, undertakings in the supply side may confront with the sanctions under the competition rules due to the higher market shares it has possessed. On the other hand, should the relevant market be drawn broadly, due to the smaller market shares, the same undertakings in the supply side may escape from the scrutiny of competition rules even if they have a dominant position and thus abuse its market power.

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[69] Since the Technology Transfer Regulation has granted an exemption to the technology transfer agreement on condition that the market shares of the undertaking(s) shall not exceed the thresholds envisaged in the said Regulation, the importance of determining the relevant market becomes crucial also for the cases under Article 81 of the EC Treaty. See Article 3 of the Technology Transfer Regulation.

[70] Case T-61/99, Adriatica di Navigazione v. Commission (2003), ECR II-5349 ("Adriatica Case"), para. 27; Case T-68/89, Societa Italiana Vetor v. Commission (1992), ECR II-1403 ("Societa Italiana Case"), paras. 29, 159; Case T-29/92 Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v. Commission (1995) ECR II-289 ("SPO Case"), para. 74.

[71] Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services v. Commission (1998) ECR II-3141 ("European Night Services Case"), para. 105.

[72] O'Donoghue, Robert and Jorge A. Padilla. The Law and Economics of Article 82 EC, 1st Edition, Hart Publishing, 2006, p. 107.

2.3. Dominant Position

Following the determination of the relevant market on which the undertaking concerned is alleged to have a dominant position, market shares of the said undertaking is to be found out. Since, in the event that the said undertaking will not have the market power and thus not be in a dominant position in the determined relevant market, it would be no use to find out as to whether the conduct of the undertaking is abusive or not. To put it differently, provided that the said undertaking would be dominant in the relevant market, the third step, say, the assessment of as to whether the abusive conduct has been eventuated or not, will be important for the application of Article 82 of the EC Treaty. Holding a dominant position is one of the crucial, may be the most crucial, precondition for the application of Article 82 and that one of the most important distinctive feature from the terms and conditions of Article 81 of the EC Treaty[73].

The term "dominant" has not been defined in the EC Treaty. However, the case law and the decisions of the Commission have provided for several clues as indicators for the establishment of dominant position and guidance crucial during the assessment of the strength of the undertaking under consideration. In United Brands, it has been ruled that a dominance "… relates to position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[74]. Such a strength held by the undertaking "… at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment"[75]. While the stipulations of the Community Courts are of great importance, it should be noted that the above-sided definition and the terms and conditions saved therein have some deficiencies and is not totally satisfactory. Since an undertaking may not be in a position to behave totally

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[73] Howeer, it should be noted that Article 81 will also be applicable for the agreements concluded between the dominant undertakings. See i.e. Case 27/76 United Brands Company and United Brands Continental BV v. Commission (1978) ECR 207 ("United Brands Case"), para. 141; Tetra Pak 51/89 Case, paras. 28-29; Hoffmann-La Roche Case, paras. 90, 116; Atlantic Container Case, paras. 610, 1441-1443. However, this does not mean that Article 81 will only be applicable in case the undertaking holds a dominant position. On the other hand, Article 82 will be applicable only when and if the undertakings under consideration hold dominant position.
[74] United Brands Case, para. 65; Hoffmann-La Roche Case, para. 38; Michelin 322/81, para. 30.
[75] Hoffmann-La Roche Case, para. 39.

independently of its competitors and/or customers and/or its consumers even if it may hold a dominant position in the relevant market. It may be possible that its customers and/or its consumers may have the possibility to switch to another substitute product in case of price increase in the said undertaking's product or the undertaking concerned may not act freely due to the buyers' power in the relevant market. Furhermore, behaving independently of its competitors, customers and consumers cannot in itself be a basis to distinguish the dominant undertaking from the non-dominant ones[76], since as aforementioned, each undertaking, either dominant or the non-dominant one, but for the monopolist one, should have taken into account its demand-side substitution. An undertaking may only increase its prices up to a level at which further price increase will make its purchasers to switch to another product[77].

Therefore it would be very difficult for the said undertaking to behave regardless of its competitors and/or its purchasers. Such a definition may, however, be useful to find out the dominance for a monopolist. Since, it should be borne in mind that "only monopolist operating in a market protected by insurmountable barriers to entry and facing a completely inelastic demand would be able to behave independently of its competitors, customers and ultimately of its consumers"[78].

In the first part of the United Brands ruling, it has been stressed that dominant position "relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market"[79], to put it differently, the Court of Justice stipulates that the undertaking should have and/or use its economic strength in order to impede effective competition in the relevant market. In other words, as long as an undertaking will have an economic strength and provided that the said undertaking disposes its economic strength to impede the effective competition, it may be concluded that the undertaking has a dominant position. This part of the definition is not satisfactory in itself, neither. Since effective

[76] Geradin, D. Hofer, P. F. Louis, N. Petit, and M. Walker, "The Concept of Dominance", GCLC Research Papers on Article 82 EC, Global Competition Law Center, College of Europe, July 2005, p. 7.
[77] Whish has pointed that "the ability to restrict output and increase the price derives from interdependence or, to put the matter in another way, freedom from competitive constraint". See Whish, p. 179. However, then a problem may emerge as to whether the competitive price level may be calculated correctly? Some authors have stressed that such a calculation is impossible on both conceptual and data grounds, See Geradin and Others, p. 7-8.
[78] O'Donoghue and Padilla, p. 108-109.
[79] United Brands Case, para. 65.

competition may not be established or may be impeded not because of the economic strength of the undertaking concerned, but due to different features of the market concerned.

Therefore, the sole application of the aforementioned definition in all Article 82 cases would not lead to a correct determination of the market power or the dominance of the undertaking in question and that other criteria should be taken into account in accordance with the facts of the cases concerned. It should be, however, taken into consideration that some indicators deriving out of United Brand ruling has arisen, in particular, impediment of effective competition and the economic strength of the undertaking concerned which leads to the requirement of a deeper assessment with respect to the determination of dominance.

It has been defended that an effective competition may deem to be existed when no undertaking, either individually or collectively, has the ability to exercise a market power[80]. Market power has been defined as "the ability to profitably raise price through the restriction of output above the level that would prevail under competitive conditions"[81]. Since there may exist other undertakings having market power, it has been defended that undertakings having a *significant* market power should be considered to have a dominant position[82]. We also believe that if other conditions are also met[83], an undertaking having significant degree of market power may be considered to be in a dominant position in the relevant market. As the Commission has pointed out in its Guidelines on Article 81 "Market power is a *question of degree*. The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for finding of dominance under Article 82"[84].

Then a question will come to mind as to whether it would be possible to calculate the degree or significance of market power. As explained above, price is one

[80] Geradin and Others, p. 8.
[81] Geradin and Others, p. 8.
[82] Geradin and Others, p. 9.
[83] For instance, barrier to entry is high and there is no countervailing buying power.
[84] Guidelines on Article 81, para. 26.

of the most important cornerstones during the determination of market power. In this respect, the Commission has applied SSNIP test as defined below[85] in order to find out as to whether the undertaking concerned has the ability to profitably increase the price by 5-10% and thus have a dominant position in the relevant market[86]. While there have been an ongoing debate on the accurate application and efficiency of price test, say SSNIP test, it should be borne in mind that maintenance of "output in terms of product quantities, product qualities and variety or innovation below competitive level for a significant period of time"[87] and degree of power held by the undertaking under consideration to exclude others[88] from the market are determinative indicators in addition to pricing power of the undertaking alleged to have a dominant position.

It should also be pointed out that the Court of Justice in this case also has ruled that abusive conducts of allegedly dominant undertakings should be taken into account as a supporting evidence of dominance. However, one should not forget that Article 82 puts preconditions, inter alia, that the abusive conducts shall be eventuated only by the dominant firm, a firm having the market power individually or collectively. On the other hand Article 81 prohibits, if all conditions have met, the conduct of the undertakings itself by disregarding as to whether the said undertakings are dominant or not.

Therefore, we are of the view[89] that if the conduct of the undertaking, say, abusive practices, would be stipulated as a condition to conclude that the undertaking has a market power, this would lead to the misapplication of Article 82 and thus creation of confusion with respect to the application of Article 81 and Article 82. This

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[85] See Section '4.2.1.1.1. Product Market' of the Thesis.

[86] It has been discussed by some authors that such a finding would not lead to a correct application of dominance, since determination of the competitive price level is not possible and if it was so, there would be no need to determine the dominance. For further discussion see Geradin and Others, p. 10.

[87] The Guidelines on Article 81, para. 25; See also Azevedo, J. P. and M. Walker. "Dominance: Meaning and Measurement", E.C.L.R., 2002, p. 363-367.

[88] Exclusionary power of the undertaking has been explained as "firm or group of firms may rise price above the competitive level or prevent it from falling to a lower competitive level by raising its rivals' costs and thereby causing them to restrict output. Such allegations are at the bottom of most antitrust cases in which one firm or group of firms is claimed to have harmed competition by foreclosing or excluding its competitors." See Krattenmaker, T. G., R. H. Lande and S. C. Salop. "Monopoly Power and Market Power in Antitrust Law", Georgetown Law Journal, 1987, p. 241-269.

[89] On the contrary, some authors have argued that since some of the conducts may only be committed by dominant undertaking, abusive behaviour may be taken into account as entry barriers and thus to conclude that the undertaking concerned has a dominant position. See Jones, Alison and Brenda Sufrin. EC Competition Law: Text Cases and Materials. Oxford University Press, 2004, p. 363.

confusion would mostly be confronted in cases where there would be agreements, including terms and conditions with regard to i.e. predatory pricing or loyalty rebates, concluded by the undertakings having market power either individually or collectively.

2.3.1. Indicators For The Establishment Of Dominance

It is currently undebatable that there are several factors assessed by the respective authorities before the establishment of dominance. Those factors should be evaluated in accordance with the facts of each case and the features of the relevant market concerned. In United Brands ruling the Court has concluded that "… a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative. In order to find out whether … an undertaking (holds) a dominant position on the relevant market, it is necessary, first of all, to examine its structure and then the situation on the said market as far as competition is concerned"[90]. Any such factors affecting the market power or the degree of the market power or the basis of the structure of the relevant market in which the said undertaking operates should be painstakingly taken into consideration while making the assessment.

It is commonly accepted that there are three essential indicators showing the dominance, say, market shares of the undertakings in the relevant market, barriers to entry[91] and the countervailing buying powers[92]. Once it is established that the undertaking under consideration has a dominant position in the relevant market, as to whether the conduct of the undertaking is abusive or not will be evaluated by the respective competition authorities.

Finally, it should be noted that there is currently almost no discussion that the causality relation between the abusive conducts and the dominant position is not required for the application of Article 82 of the EC Treaty[93]. As the Court of Justice in Continental Can ruling has pointed out "the question of the link of causality raised by the applicants which in their opinion has to question exist between the dominant

[90] United Brands Case, para. 67.
[91] Since barriers to entry have been examined in Section '4.2.1.2. Entry Barriers', this issue will not be scrutinized herein this part of the Thesis.
[92] Since Countervailing Buying Power have been examined in 'Section 4.2.1.3. Countervailing Buying Power', this issue will not be scrutinized herein this part of the Thesis.
[93] Eilmansberger, p. 140-141.

position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 *(now Article 102)*[94]of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above"[95]. By the same token, in Hoffman La Roche, the Court of Justice has mentioned that "for the purpose of rejecting the finding that there has been an abuse of a dominant position the interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted"[96]. Therefore, in both cases, the Court of Justice has underlined that in order for the application of Article 82 of the EC Treaty, establishment of the causality relation between the abuse and dominant position will not make sense and that it is not a reason for the annulment of the decision of the Commission.

2.4. Abusive Conducts

Definition of abuse[97] has not been envisaged in Article 82 of the EC Treaty. However, few illustrations[98] of conducts which may be abusive in nature have been envisaged in Article 82 (a) – (d) of the EC Treaty. Those illustrative abusive conducts committed by the dominant undertaking(s) are unfair pricing and trading conditions, output restrictions, discriminatory conducts between the trading parties and imposing supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. In its ruling, Hoffmann La Roche, the Court of Justice has defined the abusive conducts as "an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the

[94] Italics are added.
[95] Continental Can Case, para. 27.
[96] Hoffmann-La Roche Case, para. 91.
[97] For an interesting debate regarding the test to determine abuse see Gormsen, L. Lovdahl. "Article 82 EC: Where are we coming from and where are we going to?", The Competition Law Review, Volume 2 Issue 2 March 2006, p. 16-17.
[98] We use the phrase "illustration" intentionally. Since the Court of Justice has emphasized that the examples given in Article 82 are merely illustrative and that the abusive practices set out in Article 82 is not exhaustive. See Continental Can Case, par. 26 and Case C-333/94 Tetra Pak v. Commission (1996) ECR I-5951 ("Tetra Pak 333/94"), para. 37. We also believe that those examples are not given exhaustively due to the phrases "… in particular…" used in Article 82. It should be, however, noted that some of the authors have pointed out that, for the sake of legal certainty and due to the broad scope of the current abusive conducts envisaged in Article 82 of the EC Treaty, it should be accepted that the definitions of abusive conducts have been given exhaustively in Article 82 of the EC Treaty. See O'Donoghue and Padilla, p. 213-215.

undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[99]. In this ruling, it should be noted that the Court of Justice has been affected by the ordoliberal thinking in that changes in the market structure, even if an insignificant change, have been considered as abusive whenever restriction of competitors from the market has been eventuated[100]. To put it differently, the Court of Justice has mentioned that due to the market power held by the dominant undertaking, the degree of competition is already weakened and thus any further effect by the dominant undertaking on the market is likely to eliminate competition. In this respect, the conduct of the dominant undertaking will be caught by Article 82 without further assessment and that it would not matter as to whether the conduct of the dominant undertaking in question "might concominantly have the effect of lowering prices or improving product"[101].

In Michelin case, the Court of Justice has pointed out that "irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market"[102]. It is also obvious that the Court of Justice has shown the responsibility differing between the dominant undertaking and the non-dominant one in that conduct which may be permissible in normal competitive market may be assumed as "abusive" in case such conduct has been committed by a dominant undertaking. In other words, the dominant undertaking has a 'special responsibility' not to dispose of its market power or rights to the prejudice of its purchasers, competitors and consumers and abstain from taking measures which may not be caught under competition rules if committed by a non-dominant undertaking. Since, according to the Court of Justice, due to the market power held by the dominant undertaking, the degree of competition is

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[99] Hoffmann-La Roche Case, para. 91.
[100] Gormsen, p. 17-18; Rousseva, Ekaterina. "Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints", C.M.L.R. 42: 587-638, Kluwer Law International, 2005, ("Rousseva, *Modernizing by Eradicating*"), p. 592.
[101] Rousseva, *Modernizing by Eradicating*, p. 594.
[102] Michelin 322/81, para. 57.

already weakened and thus any further effect by the dominant undertaking on the market is likely to restrict competition[103].

Even if a special responsibility principle has not been clearly defined by the Community Courts, this principle has been followed by the Court of Justice in Tetra Pak case in which it has been envisaged that Article 82 "imposed on an undertaking in a dominant position, irrespective of the reasons for which it has such a dominant position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market, in accordance with the general objective set out in Article 3(f) of the Treaty as it was then worded. Thus Article 86 *(now Article 102)*[104] covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened. The actual scope of the special responsibility imposed on an undertaking in a dominant position must therefore be considered in the light of the specific circumstances of each case, reflecting a weakened competitive situation, as an analysis of the case-law confirms"[105]. The Court of Justice has further added that "… Article 86 *(now Article 102)*[106] of the Treaty applies where an undertaking holding a dominant position on a particular market reserves to itself, without any objective necessity, an ancillary or dependent activity on a neighbouring but separate market where it is not in a dominant position, with the possibility of eliminating all competition on that market"[107].

These rulings bring two outcomes in that in case the undertakings hold a dominant position, they will be under a special responsibility to take care of their conducts. Therefore, any conducts of the dominant undertakings may be abusive due to the disposal of market power or rights to the prejudice of its purchasers, competitors and consumers, since the dominant undertakings are under a special responsibility not to restrict competition which is already weakend by the mere existence of the dominant undertakings. However, it should be noted that putting the undertakings under a special

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[103] Rousseva, *Modernizing by Eradicating*, p. 592-593.
[104] Italics are added.
[105] Case T-83/91, Tetra Pak v. Commission (1994) ECR II-755 ("Tetra Pak 83/91"), paras. 114-115.
[106] Italics are added.
[107] Tetra Pak 83/91, paras. 115.

responsibility irrespective of the degree of dominance they hold or declaring all such conducts of the dominant undertakings as abusive due to the existence of dominant undertakings in the relevant market[108] are very excessive intervention to the undertaking holding dominant position.

Secondly, it may be concluded that by the application of 'special responsibility' and 'normal competition' principles, efficiency considerations has been disregarded by the Community Courts in that either the effects of the conduct of the undertaking in the relevant market or the efficiency grounds which might be pursued by the undertakings have not been evaluated in Article 82 cases by the effect of ordoliberal thinking.

It should also be pointed out that the Court of Justice has, in its leading cases[109], ruled that abusive conducts of allegedly dominant undertakings should be taken into account as a supporting evidence of dominance. However, we are of the view[110] that the indicators and/or the evidences of dominance and abusive conducts are different terms which need to be separately evaluated in accordance with their own terms and conditions. It should also be pointed that some authors[111] have argued that the assessment of the conducts of the allegedly dominant undertaking should be limited to the conducts which are not feasible and profitable by taking into account the structure and characteristics of the relevant market. However, such approach should also be applied cautiously and the public authorities should not decide instead of or by disregarding the undertakings' own assessments and commercial decisions. If otherwise, the undertakings may not act independently which may also hinder the establishment of an open competitive and liberal market.

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[108] Since the Court of Justice, in Micheline case, has ruled that "… Article 86 prohibits any abuse by an undertaking of a dominant position … in so far as it may affect trade between Member States, that is to say in so far as it prohibits any abuse of a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market". Therefore, what the Court of Justice prohibits is that any conduct which hinders competition in case such conducts are committed by the dominant undertakings. See Michelin 322/81, para. 30.

[109] See i.e. United Brands Case, paras. 68, 300; Case T-30/89 Hilti AG v. Commission (1994) ECR-II1439 ("Hilti Case"), para. 87, 93.

[110] For the opposite views see Jones and Sufrin, p. 363.

[111] For further discussion see Geradin and Others, p. 26.

While some of the abusive conducts may be exclusionary in nature in that dominant undertaking's intention is mainly to exclude its competitors or limit their ability to compete and thus indirectly cause a loss to the consumers, some of the abusive conducts may be exploitative in its nature in that the dominant undertaking's intention may tend to take advantage of its market power to get or earn more from its purchasers that it could not have earned in case it does not possess market power. Therefore, we prefer to analyse the abusive conducts under the below headings[112]:

(i) Exploitative Abuses: Those are the conducts which directly or indirectly imposing unfair pricing and other trading conditions. As explained above, those conducts mainly arises out of the market power of the undertakings in that such a dominant undertaking exploits its market power in order to impose conditions, i.e. excessive pricing[113], exclusive right to repair and maintenance, excessive duration of the agreement, prior permission of the dominant undertaking for transfer and/or any disposal of any right or facilities as such, of which a non-dominant undertaking could not impose in case of a lack of market power.

(ii) Exclusionary Abuses: It may be usual that a dominant undertaking may tend to exclude its competitors from the market by using different strategies. Article 82 (b) of the EC Treaty has emphasized some

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[112] Some authors tend to categorize those abusive conducts under different headings and separate abusive conducts of the undertakings in Article 82 in accordance with their headings. Since, they believe that the legal and economic principles applicable to those conducts are differing in accordance with their classification and headings. However, we will not divide the abusive conducts under the said headings. Since we believe that abusive conducts may either be exploitative or exclusionary conducts or both and that the conduct of the undertaking concerned should be evaluated in accordance with the differing merits and factual circumstances of each case. Otherwise, even if it would sometimes be practical to divide the conducts into headings, such division may lead to an incorrect application of conditions to the conducts in question. We believe that, in case of classification, if required, the sole division should be between the "exclusionary and the exploitative" abusive conducts. Since we think that the essential issue is that the effect on the market and the competition and thus the consumer welfare. To put it differently, we believe that the division, if need be, should be made not due to the conduct itself but be made in accordance with the effects eventuated on the market, parties affected and competition. See for different classifications and reasons O'Donoghue and Padilla, p. 195-212; Jones and Sufrin, 371-527; Bellamy and Child, p. 954; Şimşek, Alp Tolga. "Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması", Master Thesis, Ankara Üniversitesi Sosyal Bilimler Enstitüsü, 2003, p. 62-86; Ulaş, Emine. "Rekabet Hukukunda Hakim Durum ve Hakim Durumdaki Teşebbüsler", Master Thesis, Bahçeşehir Üniversitesi, SBE, 2007, p. 77-133.

[113] For further information regarding excessive pricing see Ezrachi, Ariela and David Gilo. "Are Excessive Prices Really Self-Correcting?", Journal of Competition Law & Economics, 5(2), October 2008, p. 249-268.

illustrations[114] which prohibits the dominant undertaking conducts leading to a limitation in production, markets or technical development to the prejudice of consumers. In 2005, the Commission has launched a discussion paper[115] with regard to the exclusionary abuses of dominant undertakings and, in 2008, it has launched the guidance on its enforcement priorities in applying Article 82 Treaty to abusive exclusionary conduct by dominant undertakings[116]. In accordance with this Discussion Paper on Article 82[117], the Commission has highlighted the importance of the application of a test on actual or possible anticompetitive effects of such conducts on the market and on the likely harm which consumers may confront due to such conducts. While applying this test, the Commission tends to analyze the 'foreclosure' impact of the abusive conduct on the competitors and the market and thus the possible detrimental effects on the consumers.

The second essential outcome of the Discussion Paper on Article 82 is the acceptance by the Commission of possible efficiency justifications that may be raised by the dominant undertaking. Such an acknowledgement is important in that different than Article 81 of the EC Treaty, there exists no justification defense mechanism provided under Article 82 of the EC Treaty. Along with the economical thinking development and the jurisprudence of the Community Courts, the

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[114] We use the word 'illustrations' intentionally. Since we believe that if, as the Court of Justice has pointed out in its Hoffman-La Roche Case, the Court of Justice thinks that Article 82 of the EC Treaty has only provided some illustrations and set in the said Article some conducts as examples, this may lead to the conclusion that Article 82 (b) also provides some examples as exclusionary conducts and there may occur different strategies and tactics of the dominant undertaking which may result in the exclusion of their competitors from the market.

[115] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels, December 2005 (the "**Discussion Paper on Article 82**").

[116] DG Competition, Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Brussels, 3 December 2008, (the "**Guidance**").

[117] It should be noted that since the Guidance is solely limited to unilateral conducts of the undertakings which are not the subject-matter of our Thesis and that it does not cover exploitative abuses or exclusionary abuses in situations of collective dominance, we will not deal with the Guidance under this Thesis and instead, albeit not binding, we will scrutinize the defense mechanism launched by the Discussion Paper on Article 82 in Section '4.2.3. Defenses Under Competition Cases' of the Thesis.

Commission tends to frame those views and tries to overlap those current economical developments with that of legal ones.

The third welcoming issue is with respect to the classification of some conducts under the big heading of ‘exclusionary’ conducts. The Discussion Paper on Article 82 draws a line between the pricing and non-pricing exclusionary conducts and emphasizes predatory pricing, loyalty discounts and margin squeeze[118] under the former heading and tying, refusal to deal and exclusive dealing under the latter heading. Since we will analyze the welcoming parts of the Discussion Paper on Article 82[119] more in detail in the concerned below headings with respect to the specific conducts of the dominant undertaking, reference is given here to the related parts of the Thesis.

In this part of our Thesis, common abusive conduct types will be evaluated and consideration will be attributed merely on the abusive conduct types which may be confronted in technology transfer agreements. Abusive conduct type such as refusal to deal or refusal to supply[120] or predatory pricing will not be dealt by under this Thesis since such conducts may mainly eventuated as a unilateral conduct of the undertaking.

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[118] Carlton, W. Dennis. “Should Price Squeeze be a Recognized Form Of Anticompetitive Conduct?”, Journal of Competition Law & Economics, 4(2), April 2008, p. 271–278.

[119] See for further information with respect to the content of the Discussion Paper on Article 82, Hançer, Hande and Özge İçöz. “Roma Anlasmasının 82. Maddesinde Öngörülen Revizyon Hakkında Değerlendirme ve Türk Rekabet Hukuku Bakımından Etkileri”, Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-V, Rekabet Kurumu, 6-7 Nisan 2007, p. 125-175.

[120] For further information with respect to refusal to deal and refusal to supply see Humpe, Ch. and C. Ritter. “Refusal to Deal”, GCLC Research Papers on Article 82 EC, Global Competition Law Center, College of Europe, July 2005, p. 134-165; Shah, Aashit. “The Abuse of Dominant Position under Article 82 of the Treaty of the European Community: Impact on Licensing of Intellectual Property Rights”, Chicago-Kent Intellectual Property Law Society Chicago-Kent Journal of Intellectual Property, Fall, 2003, p. 1-12; Messina, Michele. “Article 82 and the New Economy: Need for Modernisation?”, The Competition Law Review, Volume 2 Issue 2 March 2006, p. 89-95; Semeraro, Steven. “The Efficiency and Fairness of Enforced Sharing: An Examination of the Essence of Antitrust”, Kansas Law Review, November, 2003, p. 2-15; Demiröz, Ali. “Sozleşme Yapmayı Reddetme Bağlamında Hakim Durumdaki Tesebbuslere Getirilen Yükümlülüklerin Sınırları”, Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-VII, Rekabet Kurumu, 17-18 Nisan 2009, p. 317-385; O’Donoghue and Padilla, p. 407-477; Jones and Sufrin, p. 493-518; Bellamy and Child, p. 1004-1021; Hatzopoulos, Vassilis. “Refusal to Deal”, Edited by Ehlermann, C. D. and Giuliano Amato (Ed.). EC Competition Law, A Critical Assessment. Hart Publishing, 2007, p. 333-375; Korah, Valentine. Intellectual Property Rights and the EC Competition Rules. Hart Publishing, 2006 (“Korah, *Intellectual Property*”), p. 134-157; Anderman, S., EC Competition Law and Intellectual Property Rights: The Regulation of Innovation, Oxford University Press, 1998 (“Anderman, *Regulation of Innovation*”), p. 195-221; Kaya, Yüksel. Hakim Durum ve Fikri Mülkiyet Hakları, Ankara: Rekabet Kurumu, 2001, p. 10-27; Güçer, Sülün. Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması Çerçevesinde Sınai Mülkiyet Hakları. Ankara: Rekabet Kurumu, 2005, p. 42, 120; Gadre, V. Tanuja. “Supporting Innovation in Targeted Treatments: Licenses of Right to

2.4.1. Tying And Bundling

Tying and bundling may be defined as the sale of a product or service with the combination of other product(s) and/or service(s). Tying and bundling differ from each other in consideration of product(s)' or service(s)' combination and as to whether those product(s) or service(s) are sold individually or in bundled.

In pure bundling, the products[121] are sold together and none of the items in the bundle are sold individually. In tying[122], some items in the bundle are sold individually (the "tied product"), however the purchasers do not have the opportunity to buy the other product(s) in the bundle individually (the "tying products")[123]. In mixed bundling cases, the purchasers have the opportunity to buy the items in the bundle both individually and in bundle. Due to the leverage concern, which involves an undertaking which is dominant on one market using that position to interfere with competition on another market, strengthening its position there, and creating barriers to entry[124], Community Institutions have approached tying cases very cautiously.

In accordance with the economical thinking developments[125] and debates regarding the efficiency of tying and bundling of products, the EC law has also been

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Nih-Funded Research Tools", Michigan Telecommunications and Technology Law Review, Spring, 2005, p. 2-13; Tekinalp, Ünal. "ATAD Kararları Işığında Hakim Durumun Kötüye Kullanılması Halleri", Perşembe Konferansları, Rekabet Kurumu ("Tekinalp, *ATAD Kararları*"), p. 79-81; Fine, Frank. "European Community Compulsory Licensing Policy: Heresy versus Common Sense", Northwestern Journal of International Law & Business, Spring, 2004, ("Fine, *Compulsory Licensing*"), p. 1-14; Gitter, M. Dona. "The Conflict In The European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine", American Business Law Journal, 217, Winter, 2003 ("Gitter, *Intellectual Property Rights*"), p. 1-22; Gitter, M. Dona. "Strong Medicine For Competition Ills: The Judgment Of The European Court Of Justıce In The IMS Health Action and Its Implications For Microsoft Corporation", Duke Journal of Comparative & International Law, Fall / Winter, 2004 ("Gitter, *Strong Medicine*"), p. 2-13; Reichenberger, J. Melanie. "The Role of Compulsory Licensing in Unilateral Refusals to Deal: Have the United States and European Approaches Grown Further Apart After IMS?", The Journal of Corporation Law, 549, Winter, 2006, p. 2-5; Korah, *Interface*, p. 6-23; Bozdağ, Özay. Rekabet Hukukunda Sınai Mülkiyet Hakları Sorunu: 'Per Se' ve 'Rule of Reason' Açısından Bir İnceleme, Master Thesis (not yet published), Atatürk Üniversitesi, Sosyal Bilimler Enstitüsü, 2007, p. 125-129.

[121] For the purpose of the Thesis, we will use the phrase "products" as covering both the products and the services, where applicable.

[122] It has been commonly accepted that tying may be eventuated either through the imposition of contractual obligations in the agreements or through technologically by merging the products and place them on sale for the consumers. See for further information O'Donoghue and Padilla, p. 477-478; Jones and Sufrin, p. 452-461; Bellamy and Child, p. 998-1003; Anderman, *Regulation of Innovation*, p. 221-224; Ahlborn, C. Bailey and H. D. Crossley. "An Antitrust Analysis of Tying: Position Paper", GCLC Research Papers on Article 82 EC, Global Competition Law Center, College of Europe, July 2005, p. 166-215.

[123] For further information see O'Donoghue and Padilla, p. 477-478.

[124] Messina, p. 85.

[125] For more information regarding the economical stages and developments see Motta, Massimo. Competition Policy: Theory and Practice. 1st Edition, Cambridge University Press, 2004, p. 460-483; O'Donoghue and Padilla, p.

affected and evolved throughout those debates. There are three stages[126] dealing with the effects of tying and bundling cases. In the first stage[127], tying practices were per se illegal in that purchasers were assumed to have bought the tied product in case the products in the bundle would be sold individually. Furthermore, since an undertaking having a dominant position in product A market may have an intention to earn second monopoly in the other product B market, tying cases had been mostly intervened by the Community Institutions. In other words, in accordance with the leveraging theory, tying and bundling might operate for the dominant undertaking so as to transfer its market power in the main market A into the adjacent market B with the aim of obtaining market power in market B and/or to protect its market power in the market A[128]. Therefore, in the first stage, tying had been treated as per se illegal.

In the second stage[129], it had been accepted that tying may have anticompetitive effects on the market and at the same time may result in efficiencies, i.e. increasing convenience, reducing production and distribution costs, improving quality, lowering transaction costs and thus lowering prices of the products. Furthermore, in the second stage it was accepted that the dominant position might not intend to have a market power in the second market and that the dominant undertaking might use the tying practices for the sake of efficiency purposes.

In the last stage[130], the focus has been on the "foreclosure" effect of the tying and bundling practices in that, as alleged by the commonly accepted economists, tying deprives the dominant undertaking's competitors in the tied product market of 'adequate scale'[131] and thus leads its competitors to exit from the concerned product market by reducing the competitor's profit and/or deters the new entrant to the concerned product market. Finally, the economists in the third stage have the view that all antitrust cases

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491-509; Langer, Jurian. "A Four-step Test to Assess the Exclusionary Effects of Bundling under Article 82 EC", Edited by Ehlermann, C. D. and Giuliano Amato (Ed.). EC Competition Law, A Critical Assessment. Hart Publishing, 2007, p. 297-331.

[126] For further information regarding the economical thinking developments see O'Donoghue and Padilla, p. 491-508; Ahlborn and Crossley, 169-177.

[127] Commonly known as the "Classical Approach". But some of the authors have called as "Ordoliberal Thinking". See Rousseva, *Modernizing by Eradicating*, p. 587-638.

[128] Jurian, p. 297-298.

[129] Commonly known as the "Chicago Thinking".

[130] Commonly known as the "Post Chicago Thinking".

[131] Ahlborn and Crossley, p. 174.

and all such effects and possible outcomes arising out of the tying and bundling practices should deeply be analyzed by considering the foreclosure effects of tying and bundling.

While the economical debates and developments have continued, the Community Institutions' views on and approaches to the tying and bundling practices have also evolved[132]. Under the influence of the first stage in economical thinking, the Community Institutions have regarded tying and bundling practices as per se illegal[133], since it is thought that such conducts, in particular tying, will have a negative effect on consumers since such conducts may exclude the dominant undertaking's competitor(s) from the market.

In its ruling, Hilti, the Court of Justice reached to a conclusion that, inter alia, tying the sale of cartridge strips to the sale of nails, reducing the discounts on cartridge when the customer does not order nail, refusing to give guarantee on nail guns in case nails which are not produced by Hilti constitute an abuse of the dominant position and adds that "These policies leave consumer with no choice over the source of nails and as such abusively exploit him. In addition, these policies all have the object or effect of excluding independent nail makers who may threaten the dominant position Hilti holds"[134].

Similar reasoning has been given by the Commission in British Sugar[135] where the Commission has come to the conclusion that since the consumers has been left with no choice between the purchasing on an ex-factory and delivered price basis, competition in the delivery product has been distorted[136].

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[132] Messina, p. 85-89.
[133] See i.e. Hoffmann-La Roche Case; Michelin 322/81; Commission Decision De Post-La Poste, (2002) OJ L61/32, December, 2001; Case IV/29.290 Vaessen/Morris (1979) OJ L/19/32; Windsurfing Case.
[134] Eurofix-Banco v. Hilti, OJ 1988 L65/19, 4 C.M.L.R. 677 ("Hilti Decision"), para. 75. The Commission in its first reasoning has pointed out that the strategy which Hilti has pursued was aimed to deter new entrants into the market and 'to prevent otherwise profitable arbitrage'. Hilti Decision, para 74. Such a reasoning has found its origins in Classical Approach.
[135] Case No IV/30.178 Napier Brown/British Sugar, OJ 1988 L284/41 ("British Sugar Decision"), para. 32.
[136] Similar reasoning has been launched in Tetra Pak 83/91, para. 137, where the Court of First Instance has concluded that the customers are not left with economic choice and thus brought dependent on the dominant undertaking.

In its Alsatel ruling, the Court of Justice has emphasized that as long as the undertaking concerned has a dominant position and provided that the trade between the Member States has been affected, it may be assumed that the undertaking under consideration has abused its dominant position[137]. As can be understood from the decisions and jurisprudence of the Community Institutions, in the first stage, there was no requirement to establish that there is a "foreclosure" in the market concerned[138].

Finally, an important ruling has been given by the Court of First Instance in Tetra Pak case in which it has been decided that "… the tied sale of filling machines and cartons cannot be considered to be in accordance with commercial usage … even if such a usage were shown to exist, it would not be sufficient to justify recourse to a system of tied sales by an undertaking in a dominant position. Even a usage which is acceptable in a normal situation, on a competitive market, cannot be accepted in the case of a market where competition is already restricted … *(and)*[139] where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market"[140]. From this ruling, several outcomes have emerged. First, abusive practices are not exhaustively listed in Article 82 of the EC Treaty. Secondly, even if two products were tied in accordance with their commercial usage, such a practice may still be considered as "abusive". Since the undertaking concerned has a dominant position and by taking into account its special responsibility, the undertaking concerned should not tie the products even if there is a commercial usage between the products unless there is an objective reason to tie the products which have commercially usage link. Such an approach and ruling cannot be acceptable and is inconsistent with the current text of Article 82 of the EC Treaty. In this ruling, the importance of being in a dominant position can be easily seen to conclude that the undertaking has abused its dominant position. This is obviously a per se illegal approach which the Court of First Instance

[137] Case 247/86 Societe Alsacienne Et Lorraine Telecommunications Et D'electronique v. SA Novasam (1988) ECR 5987 ("Societe Alsacienne Case"), paras. 11-14.
[138] Unfortunately, the Community Institutions tends to establish that the undertaking concerned have abused its dominant position by solely finding out that (i) market power of the undertaking under consideration, (ii) there are separate products in the bundle, (iii) leaving the consumers without choice but to buy the bundle (coercion).
[139] Italics are added.
[140] Tetra Pak 83/91, para. 137.

has rejected any efficiency defense. However, the Court of First Instance also tries to give hints which also conflict with its said approach in the different paragraph of the ruling by saying that "… in the absence of any argument by the applicant which might provide objective justification for its pricing policy, such disparities were unquestionably discriminatory"[141].

In the following era of the Community Courts' jurisprudence and under the influence of economical thinking developments, the Community Courts tend to analyze the economic efficiency justifications submitted by the dominant undertakings which may lie behind the tying and bundling practices and the 'foreclosure' effects[142] on competition in addition to the market power, separate product and coercion factors which the Community Institutions have taken into account in the first stage. All gathering indicators have showed that the approach followed by the Commission is a 'rule of reason' approach[143].

It should be pointed out that the application by the Community Institutions of rule of reason approach recalls the terms and conditions of Article 81 (3) of the EC Treaty. As explained below, in order to immunize from the prohibition under Article 81 (1) of the EC Treaty, the agreement concerned, if not exempted by one of a block exemption regulation, should be evaluated under the foreclosure regime. To put it differently, in order for an agreement to escape from the prohibition, the agreement should not affect the trade between the Member States and thus not have as its object or effect of restricting competition in the common market or if restricts competition, the agreement should fulfill the criteria under Article 81 (3) of the EC Treaty.

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[141] Tetra Pak 83/91, para. 207.

[142] For instance see Case T-201/04 Microsoft v. Commission, ECR- II-03601 ("Microsoft Decision"), paras. 866, 868-869, 1036-1037; Case T-65/98 Van Den Bergh Foods Ltd. v. Commission, (2003), ECR II-4653 ("Van Den Bergh Case"), para. 77.

[143] Some of the authors have objected that the approach followed by the Commission in Microsoft decision is a rule of reason approach, since, in rule of reason, it is the plaintiff who is under burden to prove that there exist anticompetitive effects on the market and the defendant who is under the burden to prove that there exist efficiencies and finally it is the plaintiff under the burden to prove that anticompetitive effects outweigh the efficiency gains. See Evans, D.S. and A.J. Padilla. "Tying Under 82 EC and Microsoft Decision: A Comment on Dolmans and Graft", World Competition, 2004 ("Padilla, *Tying*"), p. 2-11. For further information with respect to the "rule of reason" approach applied in US see Hovenkamp, Herbert. "IP Ties and Microsoft's Rule of Reason", The Antitrust Bulletin, Summer-Fall 2002, p. 369-422.

One of these regimes regulated by the Commission is with respect to the technology transfer agreements. In the Technology Transfer Guidelines, which will be dealt with in the following Sections, has also provided clauses with regard to the application of tying and bundling practices. As long as the parties concerned will comply with terms and conditions of the said Guidelines, those technology transfer agreements will be exempted from the application of Article 81 (1). However, it should be noted that even if the agreement would be exempted under the Technology Transfer Regulation and thus the application of Article 81 (1) of the EC Treaty, it is undisputable that the agreement may be caught under Article 82 ban. In such cases we are of the firm view that the possible justifications and the approaches of the Community Institutions under Article 81 regime should be applicable during the assessment of technology transfer agreement under Article 82[144].

2.4.2. Exclusive Dealing Arrangements

Article 81 and 82 of the EC Treaty may simultaneously[145] be applied to exclusive dealing[146] cases, since an arrangement or an agreement concluded between the parties is required to be assessed under both of the regimes[147]. As both of Article 81 and 82 of the EC Treaty have protected a common goal, say the protection of competition in the market[148], correct application of those Articles is required and either the application of Article 81 or of Article 82 should lead to the same outcomes due to their common shared aims[149].

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[144] Restrictive terms and conditions in the technology transfer agreements will be explained more in detail in Section '3.3.3.1. Hardcore Restrictions' of the Thesis.

[145] Continental Can Case, para. 25; Hoffman La Roche, para. 116; Compagnie Maritime Belge, para. 33. For further information see Fine, Frank. The EC Competition Law on Technology Licensing. London: Sweet and Maxwell, 2006, p. 117.

[146] Since the technology transfer agreements are the subject-matter of the Thesis, for the purpose of this Thesis, we will only deal with the loyalty discounts or other types of arrangements, which may amount to or work as an exclusive dealing structure, which may be envisaged by an agreement and/or as de facto commitments by the purchasers to buy a large quantity of their products from the supplier or producer of those products.

[147] For instance one or both of the undertakings to the agreement may be dominant one(s) in the relevant market and at the same time such an agreement may be caught by Article 81(1) of the EC Treaty due to the anticompetitive terms in and foreclosure effects of the agreement on the relevant market.

[148] Council Regulation 1/2003, para. 9.

[149] It may be argued that although both Articles have followed the same objective, the protection of competition, they have achieved the same aim via different means. This argument is *(or may be "was")* correct. However, it should be clarified here that due to the recent developments in the EC Competition regime and the current evolving jurisprudence of the Community Courts, such claims lost their importance. Since, now, both Articles have achieved

Before explaining the recent developments in the EC Competition regime with respect to the restrictive exclusivity clauses, it should be useful to look at the attitudes by the Community Institutions towards such type of clauses.

The Community Institutions regarded those types of exclusivity arrangements or other such arrangements, by their applications or practices[150], leading to an exclusivity arrangement as per se illegal[151]. In the leading cases, the Community Courts have not analyzed whether competition in the market has been restricted, since, the main concern by the Community Courts was that being a dominant undertaking in the relevant market has *already* restricts the competition and therefore such type of agreements concluded by the dominant undertaking(s) will not require an impact assessment on the relevant market[152]. In these rulings, the Community Courts have disregarded to apply the efficiency test which has been applied under Article 81 cases[153] on the ground that the dominant undertaking has a special responsibility and further added that "… those considerations, which apply in a normal competitive market situation, cannot be unreservedly accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted. An undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market"[154].

In the current stage, an approach similar to a rule of reason approach has framed the jurisprudence and attitudes of the Community Institutions[155] and thus in one

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the same aim via the same methodology. The reasons and the evolving regime will be sucrutinized both in this Section and in the following Sections in detail.

[150] For instance, any de facto commitments or practices by the purchasers to buy a large quantity of their products from the supplier those products.

[151] This attitude is felt mostly in the cases evaluated under Article 82 of the EC Treaty and such an approach by the Community Institutions have found its origins in the Post-Chicago School views. See, i.e. Case T-203/01 Michelin v. Commission (2003) ECR II-4071 ("Michelin 203/01"), para. 57; Case T-219/99, British Airways plc. v. Commission (2003), ECR II-5917 ("British Airways 219/99"), para. 245; Hoffmann-La Roche Case, para. 90. For a further discussion with respect to post-Chicago School views, see O'Donoghue and Padilla, p. 358-368.

[152] See i.e. Case T-65/89 BPB Industries plc. and British Gypsum Ltd. v. Commission (1993), ECR II-389 ("BPB Case"), para. 134. Furthermore, per-se illegal approach has been underlined in British Airways 219/99, para. 245 where the Court of Justice has pointed out that "… a system of rebates which has the effect of preventing customers from obtaining supplies from market competitors will be regarded as contrary to Article 82 EC if it is applied by an undertaking in a dominant position".

[153] See i.e. Case C-234/89, Delimitis v. Henninger Brau AG, (1991), ECR I-935 ("Delimitis Case"), para. 44.

[154] BPB Case, para. 67.

[155] Discussion Paper on Article 82, paras. 80-92.

of the leading case, Van Den Bergh[156], the Court of First Instance has concluded that even if the agreement including an exclusivity clause has some efficiencies, such efficiency was not indispensable and that does not outweigh the anticompetitive effects arising out of the agreement. Therefore, the new approach followed by the Community Institutions is similar to the 'rule of reason' approach and thus an actual or likely effects of the agreement or restrictive clause(s) in the agreement on the relevant market will be evaluated before the prohibiting those arrangements.

By the application of such approach to the exclusive dealings and loyalty discounts for the cases which are assessed under Article 82 of the EC Treaty, the Community Institutions have showed its willingness to apply, in fact, identical analysis as they make under Article 81 (3) regime. In the recent regime, exclusive dealing and loyalty discount practices leading to an outcome as an exclusive dealing arrangement are presumed to have the foreclosure capacity, since such arrangements impose on the purchasers to buy all or almost all part of their necessary products from those dominant undertakings that are party to the agreements or the arrangements in question.

Therefore, as for the cases assessed by the Community Courts under Article 82 regime, the main analysis is made as to whether such arrangements have the capability actually or likely to have a foreclosure effect on the relevant market. In this respect, the lack of access by a purchaser to some of the supplier or distributor will not be sufficient in analysing the actual or likely foreclosure effects in the relevant market,[157] save as exceptional circumstances in the specific cases. It should be recalled that during the impact assessment, the harm given to the competition and thus the consumers, but not the harm solely given to the competitors, will be important and decisive one. Since under the EC Competition regime, it is the competition but not the competitors itself which is protected. However, it should be clarified that while the harm given to the consumers is important during the evaluation, such a statement should not lead to the conclusion that the harm given to the competitors will not be taken into account. Since in the exclusive dealing cases, competition may be restricted by limiting competitors' capability to compete and thus may lead to harm for consumers.

[156] Van Den Bergh Case, para. 107.
[157] For further information see O'Donoghue and Padilla, p. 361-368, 381-393.

The Commission points out in the Discussion Paper on Article 82 that when the undertaking in question have possessed a higher market share percentage, such a higher market share percentage may lead to a stronger foreclosure potential. Furhermore, if a dominant company envisages in its agreement an exlusive dealing arrangement to a good part of its purchasers and such an obligation affects, if not most, at least a substantial part of market demand, the arrangement in question may have a market distorting foreclosure effect and thus constitutes an abuse of the dominant position[158]. In this respect, inter alia, the degree of dominance and the level of the tied market share will also be taken into consideration during the evaluation. In case the dominant company does not impose such an obligation to a good part of its buyers, but only selectively to some and not to others, as to whether these selected buyers are of particular importance for the possibilities of entry or expansion of competitors will be taken into account[159].

Following this impact assessment, if it is alleged and proved by the undertakings that such arrangements creates efficiency[160] and that they are required in order to achieve such efficiency gains, albeit the existence of foreclosure effects, it may be concluded that such arrangements are not illegal, albeit 'abusive'[161] in nature. In this respect, the undertakings concerned are under the burden to prove that:

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[158] The Discussion Paper on Article 82, paras. 145, 162.
[159] The Discussion Paper on Article 82, para. 162.
[160] Such efficiency gains may be i.e. 'encouragement of the undertakings for their loyal sales effort, preventing free-riders, providing quality assurance, ensuring reliable sources of supply, guarantee the sellers' economies of scale, reducing transaction and other costs, providing a more efficient alternative to vertical integration by the dominant firm, preventing the flow of confidential information to rival firms'. See O'Donoghue and Padilla, p. 403-405. Possible defenses which may be submitted by the undertakings concerned will be dealt with under the below Section '4.2.3. Defenses Under Competition Cases'.
[161] Some authors have come to the conclusion that such arrangement should be declared as they are not "abusive" in nature. See i.e. Monti, Giorgio. EC Competition Law. 1st Edition, Cambridge University Press, 2007, p. 203-213; Rousseva, Ekaterina. "Abuse of Dominant Position Defences-Objective Justification and Article 82 EC in the Era of Modernisation", Edited by Ehlermann, C. D. and Giuliano Amato (Ed.). EC Competition Law, A Critical Assessment. Hart Publishing, 2007 ("Rousseva, *Objective Justification*"), p. 428-429. However, we cannot share such a conclusion in that under Article 82, abusive conducts are enumerated as illustrative examples and once such arrangements have been committed by the undertakings concerned, their conducts are abusive. However, as to whether such abusive conducts should be prohibited and if prohibited, under which conditions they should be prohibited and finally, if conducts are found to be abusive, as to whether efficiency justifications will be accepted or not are different arguments. For instance, tying or output restrictions may be envisaged in the agreement. However, such clauses may also be justified due to possible efficiency consideration. However, if it would be concluded that there was no abuse as the authors have pointed out, then it should also be concluded that tying or output restrictions have not existed. On the other hand, tying or output restrictions or other conducts envisaged in Article 82 is, without any debate, abusive conducts. We, therefore, have the view that the Community Institutions do not intend to mention that some of the arrangements are not "abusive" but instead and as they did under Article 81 regime, they tend to

i. an arrangement concerned will be capable of creating the alleged efficiency,

ii. such an arrangement is indispensable for the attainment of the alleged efficiency,

iii. consumers will benefit from the alleged efficiency and

iv. competition in respect of a substantial part of the products concerned is not eliminated.

As can be seen that in order for the undertakings to escape from the prohibition under Article 82 of the EC Treaty, the same defense mechanism to that of the one made under Article 81 (3) regime has been brought by the Community Institution which is confirmed in the Discussion Paper on Article 82.

Exclusive dealing arrangement may also be achieved by the undertakings through different types of arrangements which amount to or work as an exclusive dealing structure. For the purpose of this Thesis, we will explain loyalty discounts and other practices as such to the extent it may be useful to highlight some issues with respect to technology transfer agreements.

2.4.2.1. English Clauses

English clauses envisaged in the agreements may work as an exclusive dealing arrangement in that such clauses may require the purchaser to disclose to the supplier all proposals or better arrangements offered by the competitors of the said dominant supplier. Such clauses will also be analysed by the Community Institutions under the same criteria as that of the exclusive dealing arrangements. It should, however, be clarified that English clauses will not be assessed strictly by the Community Institutions as exclusive arrangements. The Commission has permitted English clauses in the cases where such clauses are included at the request of the purchaser and no disclosure of confidential information and the identification of the competitor of which those informations are belong to are required to be disclosed under the agreement concerned.

design a framework for the justification/exemption system also for Article 82 in order to bring the application and outcomes of Article 81 and 82 as far as the agreements including restrictive clauses are concerned, i.e. exclusive dealing. Furthermore, it should be noted that an exclusionary conducts of undertakings may create efficiency, albeit being abusive in nature.

In any case, however, it should be recalled that the actual or likely effects of the English clauses on competition should be assessed.

2.4.2.2. Provision Of Equipment

Suppliers may sometimes offer the purchaser equipments at no or subsidized cost in return for the exclusive stocking commitments[162]. Those types of arrangements or commitments may also work as an exclusive dealing arrangement in which case the Community Institutions will scrutinize the actual or likely effects of those types of clauses or arrangements on competition[163].

2.4.2.3. Loyalty Discounts[164]

Loyalty discounts commitments may be used in the agreements in a way to amount to or work as an exclusive dealing structure. For instance, purchasers may be given discounts when they have achieved to a certain share/thresholds or quantity of sales within a period and since the purchasers would have no or little choice to purchase from the other undertakings which are the competitor(s) of the dominant firm in question[165]. Therefore such type of clauses may work well as an exclusive dealing arrangement. For instance, in the famous Michelin ruling[166], the Court of Justice have declared the practices of Michelin as 'illegal', since, inter alia[167], Michelin's dealer might loose money if they could not succeed in achieving a discount granted by Michelin and such a situation will put the dealers to purchase all or most of its requirements from Michelin and in practice make almost impossible or restricts the dealers of Michelin to purchase the product from the undertakings which are competitors of Michelin or from the undertakings which made more favorable offers

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[162] O'Donoghue and Padilla, p. 371.
[163] Van Den Bergh Case, paras. 75-99.
[164] For the purpose of this Thesis, we are using the term 'loyalty discount' in a way to include rebates and other related practices as such which have the effect or object to achieve or work as an exclusive dealing arrangement.
[165] For further information see Padilla, J. and D. Slater. "Rebates as an Abuse of Dominance under Article 82 EC", GCLC Research Papers on Article 82 EC, Global Competition Law Center, College of Europe, July 2005 ("Padilla and Slater, *Rebates*"), p. 93-100; Kjolbye, Lars. "Rebates Under Article 82 EC: Navigating Uncertain Waters", E.C.L.R., 31(2), 2010, ("Kjolbye, *Rebates*"), p. 66-80; Faella, Gianluca. "The Antitrust Assessment of Loyalty Discounts and Rebates", Journal of Competition Law & Economics, 4(2), 2008, p. 375–410.
[166] Michelin 322/81, paras. 81, 84-85.
[167] It should be noted that there are other terms and practices committed by Michelin against its dealer which are declared illegal by the Court of Justice, i.e. lack of transparency with respect to the sales thresholds and an amount of discount, individualized selective application of thresholds, discounts applied to total sales made in a ong reference period.

than Michelin. Therefore, almost a per se illegality has been applied by the Court of Justice to loyalty discount scheme[168].

Loyalty discount[169] schemes may also be used as an exclusive dealing arrangement and/or as a mean to partition the market concerned. It may be agreed by the parties to the technology transfer agreement that the royalty fee to be paid by the licensee will be calculated by the sales of the contract product produced by the licensed technology and/or a discount from royalty will be granted by the licensor to the licensee if the licensee will achieve to a specified revenue by the sales of the contract product produced by the licensed technology. In such cases, similar approach to that of exclusive dealing arrangement should be adopted in order to determine as to whether such practices are legal or not and defense mechanism under Article 81 (3) regime should be applied by the Community Institutions.

2.4.3. Unfair Non-Price[170] Contractual Terms

In addition to the aforementioned, there may be other non-price contractual terms in the technology transfer agreements which may be imposed by the dominant undertakings concerned. Although Technology Transfer Guidelines sets forth the most common contractual terms which may be imposed by the undertakings, some of the terms in the agreements should be scrutinized more closely by the Community Institutions due to the market power held by one[171] of undertakings to the technology transfer agreement and in which the undertaking concerned take the advantage of its market power. In this regard, the undertakings concerned should pass from the legal test outlined in accordance with the jurisprudence of the Community Institutions.

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[168] The Court of Justice has ruled that "… a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining their supplies from competing manufacturers, amounts to an abuse within the meaning of Article 86 of the Treaty", see Michelin 322/81, para. 71.

[169] For further information, see Elhauge, Einer. "How Loyalty Discounts Can Perversely Discourage Discounting", Journal of Competition Law & Economics, 5(2), March 2009, p. 189-231.

[170] We are of the view that due to the importance and unilateral nature of excessive pricing arrangements and predatory pricing arrangements, such conducts should be dealt with by the Community Institutions under Article 82 of the EC Treaty. Since, the excessive pricing or predatory pricing strategy as unilateral conduct of the dominant undertaking are mostly raised concerns once the other undertakings in the relevant market confront harm and complain to the competition authorities with respect to those arrangements committed by the dominant undertakings.

[171] Although it may be rare, it should be noted that there may be situations where both of the parties to the technology transfer agreement hold a dominant position.

First, the alleged unfair term should be pertained to the purpose of the agreement[172] and necessary in order to create efficiency[173]. Secondly, the alleged unfair term should give harm to the other undertaking[174] and finally, even if the alleged unfair term generates efficiency, the respective term should be reasonable and proportional[175]. For instance in Tetra Pak ruling[176], in addition to the other abusive and unfair contract terms, exclusive right for Tetra Pak to maintain and repair equipment and to supply spare parts, grant-back clauses envisaged in the agreement, long-term duration of the agreement concerned and penalty clause for any infringement by the leaseholder of the agreement are found to be disproportionate and abusive practice.

3. TECHNOLOGY TRANSFER AGREEMENTS

3.1. Introduction

Article 81 of the EC Treaty has prohibited agreements between undertakings which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market. Restrictive clauses in such agreements may be directly or indirectly fixing prices or any other trading conditions, limiting or controlling production, markets, technical developments, or investment, sharing markets or sources of supply, imposing dissimilar conditions to equivalent transactions and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Such agreements shall be automatically null and void, if all conditions have met under Article 81 (1) and unless exempted in accordance with the terms and conditions of Article 81 (3) of the EC Treaty. Agreements caught by Article 81 (1) but which satisfy the conditions of Article 81 (3) are valid and enforceable, no prior decision to that effect being required.

[172] It is found out that an exclusive right of Tetra Pak to control the equipment configuration is not connected with the purpose of the agreement. See Tetra Pak 83/91, paras. 130-131, 140.
[173] O'Donoghue and Padilla, p. 656.
[174] For instance a non-reciprocal obligaton to cross-license IPRs royalty-free to the dominant company, see O'Donoghue and Padilla, p. 656.
[175] In this regard, the proportionality test encompasses that the term concerned (i) has a legitimate aim, (ii) is effective for achieving the said aim, (iii) is necessary and that there is no less restrictive alternative in order to achieve the said aim, (iv) is proportional in that the legitimate aim should not be outweighed by its exploitative effect on the other undertaking. See O'Donoghue and Padilla, p. 656.
[176] Tetra Pak 83/91, paras. 130-131, 140.

Article 81 (3) of the Treaty sets out a defense mechanism for the undertakings against a finding of an infringement of Article 81 (1) of the EC Treaty. In order to be exempted under Article 81 (3) regime, the agreement shall:

i. "contribute to improving the production or distribution of goods or to promoting technical or economic progress and

ii. allow consumers a fair share of the resulting benefit, and

iii. not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and

iv. afford such undertakings the possibility of eliminating compensation in respect of a substantial part of the products in question"[177].

Article 81 (3) can be applied for individual cases and thus an individual assessment is required under Article 81 (3) of the EC Treaty. With effect from May 1st, 2004, Article 81 (3) is directly effective and applicable by the national courts of the Member States. Since, Council Regulation 1/2003 has removed the Commission's monopol competence over the application of Article 81 (3) of the EC Treaty and now the national authorities of the Member States have the power to apply 81 (3) of the EC Treaty[178]. It is now the parties to the agreement and their advisers who will assess the legality of their agreements and to decide as to whether an agreement is legal and enforceable by taking into account the Community Courts' jurisprudence and by observing the Guidelines on Article 81. However, agreements may be covered by way of block exemption regulations and agreements which are in compliance with such block exemption regulations shall deem to be block exempted and thus escaped from the prohibition under Article 81 (1) of the EC Treaty. All agreements covered by such block exemption regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81 (1). Such agreements can only be

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[177] Article 81 (3) of the EC Treaty.

[178] For further information see Schuhmacher, Florian. "Legislative Development: Council Regulation (EC) No 1/2003 of December 16, 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty", Columbia Journal of European Law, 480, Summer 2003, p. 2-5; Greaves, Rosa. "The Impact of Regulation 1/2003 within the EU", Edited by Mateus, M. Abel and Teresa Moreira (Ed.). Competition Law and Economics Advances in Competition Policy and Antitrust Enforcement, Kluwer Law International, 2007, p. 31-41.

prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority[179].

In this part of the Thesis, following the common restrictive provisions, which may be envisaged in the technology transfer agreement, will be put forward, the Technology Transfer Regulation applicable to technology transfer agreements shall be evaluated in detail.

3.2. General Restrictive Provisions In The Technology Transfer Agreements

Licensing agreements help the spread of technology in a globalize world. However, licence agreements may include anticompetitive clauses which may adversely affect competition in the relevant market. The holder of the IPRs, due to its monopoly and exclusive power on the IPRs, may wish to impose clauses upon the licensee such as to the quantity of licensed products, the price of the concerned licensed products, grant-back clauses, tie-in clauses, non-competition clauses, etc. while framing their licence agreements. In order to be clearer, it is better to focus on those restrictive clauses envisaged generally in most of the licence agreements[180] and which has been commonly focused by the Community Institutions. These are, in particular, as follows:

(i) Territorial Restrictions: Such restriction has been envisaged in the licence agreement in order to assign certain part of the market to the licensee either exclusively or on a non-exclusive basis or as a sole licence. However, such restrictive provisions may amount to partition the market in which case may fall within the ambit of Article 81 prohibition[181].

(ii) Payment of Royalties: The licensee is required by the licensor to pay royalties in return for the right to produce and sell the product concerned via the licensed technology. The parties are as a general rule free to determine their royalty fees

[179] Without prejudice to the application of Article 82 of the EC Treaty.
[180] For further information with respect to the restrictive clauses in the license agreement under Turkish competition regime see Özdemir, Saibe Oktay. Sınai Haklara İlişkin Lisans Sözleşmeleri ve Rekabet Hukuku Düzenlemelerinin Lisans Sözleşmelerine Uygulanması. Istanbul: Beta Basım Yayım Dağıtım AŞ, 2002, p. 216-260; Filiz, Erdinç. "Patent Lisans Sözleşmesi", Master Thesis, Gazi Üniversitesi, Sosyal Bilimler Enstitüsü, 2007, p. 61-70.
[181] For further information see Sections '3.3.3.1. Hardcore Restrictions' of the Thesis.

in that sense. It may be that the licensor may envisage an "up-front payment" before the beginning of the production or the parties to the licence agreement may also agree on a profit sharing scheme[182] which the licensee is required to pay a minimum amount of royalties in a particular time period or agree to pay royalties by taking into account the net sales amount[183]. Furthermore, one of the parties may impose a clause which obliges the other to pay royalties even after the concerned agreement has expired. However, in cases where, in particular, the royalty amount will be calculated in accordance with all sales of the licensee, such determination or the calculation of the royalty fee may raise competition concerns and may come within the scope of competition rules due to the restriction on the use of the third party's or the licensee's own technology.

(iii) Exclusive Dealing: Such terms put on the licensee an obligation to solely deal with the licensor in order to make the licensee inevitably dependent on the licensor products and prevent the licensee to sell, distribute or produce the product of the licensor's competitor[184].

(iv) Quotas on the Supply or Production: Those are the restrictions generally put as a condition in order to fix or increase the prices and indirectly partitioning the market in question[185].

(v) Tie-Up Provisions: The licensor may oblige the licensee by a clause to continue to take licenses of newly discovered technology. Such clauses are mostly treated as tying and bundling arrangement and thus may come within the scope of Article 81 prohibition. Therefore, the legal and factual circumstances of the specific case should be taken into account during the assessment of those types of restrictions.

(vi) Field of Use Restriction: In such a clause, the licensee is required to produce goods only for a particular purposes specified by the licensor. These types of

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[182] Özoğuz, Ayşe Selin. "Regulation and Technology Transfer in the European Union and Turkey", PhD Thesis. Marmara Üniversitesi, Avrupa Birliği Enstitüsü, 2004, p. 57-59.
[183] Bakırcı, M. Enes. Teknoloji Transferinde 'Patent ve Know-How Lisansı' Sözleşmeleri, Master Thesis, Istanbul Üniversitesi, Sosyal Bilimler Enstitüsü, Istanbul, 1999, p.71-72.
[184] For further information see Sections '3.3.3.1. Hardcore Restrictions' of the Thesis.
[185] For further information see Sections '3.3.3.1. Hardcore Restrictions' of the Thesis.

clauses are, most of the time, seen as a reasonable exploitation of right owner's position[186].

(vii) Non-Competition Clause: The licensor may wish to prevent the licensee to compete with the licensed product and/or to use competing technology[187]. In such cases, the licensor may impose non-competition clause or 'best effort' clause to achieve the said objective. As long as the aim of such clause is to require the licensee to focus only the production of the licensed product, such restrictive provisions may be allowed under Article 81 regime. However, in the cases where the purpose of the licensor is to limit the production of the licensee produced via the licensee's or the third party's technology, such restriction may amount to an output restriction which is not allowed under Article 81 regime.

(viii) No-Challenge Clause: By no-challenge clause in the agreement**,** the licensee is required not to challenge the validity of the IPR concerned. Since, the licensee is in the best position to show as to whether the licensed technology lacks originality and since it is in the public interest to challenge the invalid technology, such type of clauses may, depending on the legal and factual circumstances, fall within the ambit of Article 81 prohibition[188].

(ix) Restriction on End User: Such restriction prevents the licensee to sell the licensed products to the determined customers. Such restrictions are generally treated as customer allocation or sharing customer which is prohibited under Article 81 regime[189].

(x) Grant-Back Clause: The licensor may wish to envisage a clause which requires the licensee to grant the licensor or a third party determined by the licensor of the newly developed knowledge and/or technology and/or process that the licensee has acquired during the production or research and development experiences[190]. In such cases, the licensor may wish to limit the licensee's ability to grant the newly developed

186 For further information see Sections '3.3.3.1. Hardcore Restrictions' of the Thesis.
187 For further information see Section '3.3.4.7. Non-Compete Obligation' of the Thesis.
188 Windsurfing Case, para. 91; Bayer Case, paras. 16-18.
189 For further information see Section '3.3.3.1. Hardcore Restrictions' of the Thesis.
190 For further information see Section '3.3.3.2. Excluded Restrictions' of the Thesis.

knowledge to the third parties and/or may acquire the newly developed technology in order to produce by itself.

(xi) Sharing Markets and Customers: Those are the restrictions envisaged mostly by the competitors mainly for the purpose of partitioning the market and customers in order to have a market power in the divided market[191].

(xii) Tying and Bundling Clause: The licensor may put a term in the licence agreement that in addition to the licensed product, an additional product will be bought by the licensee[192]. It may be that the licensor may impose a clause obliging the licensee to produce in accordance with the requirements as to quality, marketing, labeling of the concerned product, since the licensor does not wish that his brand-image will be debased. Furthermore, in order to achieve the aforementioned aim, the licensor may impose on the licensee to buy the product from him apart from the licensed product.

(xiii) Fixing Prices: Determination of sale and/or purchase price is one of the most essential restrictions envisaged in the licence agreement either between the competitors or non-competitors[193]. Since such restriction may be used as a tool, inter alia, to prevent the potential competitor to enter into the market or to expel any competitor in the market.

(xiv) Termination Clause: Licence agreements result continuous relations and that terms of the agreements envisaged by the parties in almost all licence agreement are framed for a long period. The importance of termination clause is that, inter alia[194], it may sometime work as a behavioural barriers to entry, i.e. there may be penalty payment due to early termination of the agreement[195] and the licensee may not be in a position to terminate the agreement due to switching costs. In such cases, this clause

[191] For further information see Section '3.3.3.1. Hardcore Restrictions' of the Thesis.
[192] For further information see Section '3.3.4.6. Tying and Bundling' of the Thesis.
[193] For further information see Section '3.3.3.1. Hardcore Restrictions' of the Thesis.
[194] In case where one of the party has the sole right to extend the term of the agreement may sometimes be treated as illegal due to the abuse of the said party of its dominant position.
[195] See Section '4.2.1.2. Entry Barriers' of the Thesis.

becomes very important during the evaluation to determine the market power of the undertaking concerned[196].

(xv) Minimum Quality: An obligation on the licensee to comply with the specification with respect to the minimum quality of the licensed product may also be envisaged in the licence agreement. Such restriction may not mostly be caught by Article 81 prohibition provided that compliance with such specifications is necessary in order for a technically and satisfactorily exploit the licensed technology and/or to ensure that the licensee's products conform to the minimum standards observed by the other licensees and the licensor. By the same token, an obligation on the licensee to enable the licensor to carry out checks and controls with respect to the compliance with minimum quality standards does not as a general rule fall within the scope of Article 81 prohibition. In Windsurfing ruling, the Court of Justice has set forth that "… quality controls … do not come within the specific subject-matter of the patent unless they relate to a product covered by the patent *and there are objective criteria laid down in advance*[197] since their sole justification is that they ensure that the technical instructions as described in the patent and used by the licensee may be carried into effect"[198].

(xvi) Obligation to Use Licensor's Trade Mark or Get-up: Such obligation on the licensee to use the licensor's trade mark or get-up on products will in general fall outside the scope of Article 81 (1) prohibition provided that the obligation will not cover the products which are not produced with the licensed technology[199].

(xvii) Provision of Assistance for Infringers: An obligation to assist the other party in case third party infringes the IPRs will in general fall outside Article 81 prohibition.

(xviii) Confidentiality: An obligation on any or both of the parties to keep the information confidential and not to disclose even after the expiry of the agreement will in general be outside the scope of Article 81 prohibition.

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[196] See i.e. Michelin 322/81, para. 81; Van Den Bergh Case, paras. 79, 105.
[197] Italics are added.
[198] Windsurfing Case, para. 45.
[199] Windsurfing Case, para. 155.

3.3. Technology Transfer Regulation

The Commission adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements ("**Regulation 240/96**")[200]. However, following the publication of an evaluation report[201] on the transfer of technology block exemption regulation and obtaining comments from the public and Member States on Regulation 240/96, the Commission had decided to reform Regulation 240/96.

Finally, the Commission has launched Technology Transfer Regulation and the Technology Transfer Guidelines[202] which shall be applicable to categories of technology transfer agreements and that exempted those agreements from the prohibition under Article 81 (1) if all terms and conditions in these technology transfer agreements will be in compliance with the Technology Transfer Regulation. Technology transfer agreements falling outside the scope of the Technology Transfer Regulation will be subject to an individual assessment under Article 81 (3) of the EC Treaty. However, it should be noted that even if the technology transfer agreements are covered by the Technology Transfer Regulation, the exemption from the application of prohibition under Article 81 of the EC Treaty is without prejudice to the application of Article 82 of the EC Treaty. This is in compliance of the Court of Justice ruling in Compagnie Maritime Belge in which the Court of Justice has pointed out that "… the applicability to an agreement of Article 85 *(now Article 101)*[203] of the Treaty does not prevent Article 86 *(now Article 102)*[204] of the Treaty being applied to the conduct of the parties to the same agreement, provided that the conditions for the application of each provision are fulfilled. More particularly, the grant of an exemption under Article 85(3)

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200 For a comparative study on and differences between the Regulation 240/96 and the Technology Transfer Regulation, see Vollebregt, Erik. "The Changes in the New Technology Transfer Block Exemption Compared to the Draft", E.C.L.R., 25(10), 2004, p. 660-665; Korah, Valentine, "Draft Block Exemption For Technology Transfer", E.C.L.R., 25(5), 2004 ("Korah, *Draft Block Exemption*"), p. 247-262; Hansen, Marc and Omar Shah. "The New EU Technology Transfer Regime - Out Of The Straightjacket Into The Safe Harbour?", E.C.L.R., 25(8), 2004, p. 465-469; see Hansen and Omar, p. 1-4; Korah, *Interface* p. 23-28; Korah, Valentine and Andrej Fatur. "Annotated Version of The Technology Transfer Block Exemption", E.I.P.R., 26(9), 2004, p. 422-423; Bakırcı, M. Enes. Teknoloji Transferinde 'Patent ve Know-How Lisansı' Sözleşmeleri, Master Thesis (not yet published), Istanbul Üniversitesi, Sosyal Bilimler Enstitüsü, Istanbul, 1999, p. 189-199.

201 Evaluation Report on the Transfer of Technology Block Exemption Regulation No 240/96, 19 July 2002.

202 Treacy, Pat and Thomas Heide. "The New EC Technology Transfer Block Exemption", E.I.P.R., 26(9), 2004, p. 414-416.

203 Italics are added.

204 Italics are added.

(now Article 101(3))[205] does not prevent application of Article 86 *(now Article 102)*[206] of the Treaty"[207].

3.3.1 Scope Of The Technology Transfer Regulation

According to Article 2(1) of the Technology Transfer Regulation, only technology transfer[208] agreements[209] between two undertakings[210] will be covered by the Technology Transfer Regulation even if the agreement envisages terms and conditions for more than one level of trade, i.e. a licence agreement concerning not only the production level but also the distribution level may be covered under the Technology Transfer Regulation.

Furthermore, by the technology transfer agreement, it has meant that a patent[211] licensing agreement, a know-how[212] licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement[213].

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[205] Italics are added.
[206] Italics are added.
[207] Compagnie Maritime Belge Case, para. 130.
[208] By the phrase 'transfer', it has been meant that 'that technology must flow from one undertaking to another. Such transfers normally take the form of licensing whereby the licensor grants the licensee the right to use his technology against payment of royalties. It can also take the form of sub-licensing, whereby a licensee, having been authorized to do so by the licensor, grants licenses to third parties (sub-licensees) for the exploitation of the technology.' See Technology Transfer Guidelines, para. 48.
[209] Agreement has been defined as an agreement, a decision of an association of undertakings or a concerted practice. See Article 1 of the Technology Transfer Regulation.
[210] Since, the Commission is only empowered to grant exemption if those agreements will be concluded between two undertakings. See Council Regulation No 1215/1999, OJ L148/1. See also for further information Marquis, Mel, "Patent, Know-How and Software Copyright Licensing: The EU Competition Regime", Antitrust Bulletin, Vol. 52, No. 2/Summer 2007, p. 254.
[211] Patent has been defined as 'patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates'. See Article 1 of the Technology Transfer Regulation.
[212] Know-how has been defined as 'a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified'. See Article 1 of the Technology Transfer Regulation. It has been argued by Vollebregt that "*it is difficult to prove that certain know-how is indispensable. However, know-how is often crucial for improving efficiency of production processes or to achieve certain cost savings. In response to the comments received in the consultation process the Commission has changed "indispensable" to "significant and useful for the production of the contract products". The Guidelines require in this respect that the information must "significantly contribute to or facilitate the production of contract products". This burden of proof seems much easier to meet than "indispensable". By implementing this change to the text the Commission adopts a definition of know-how much like the old TTBE, under which know-how was substantial if it was "useful, i.e. can reasonably be expected at the date of conclusion of the agreement to be capable of improving the competitive position of the licensee.*" See Vollebregt, p. 2.
[213] In accordance with Article 1 of the Technology Transfer Regulation, those agreements also include any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that:
   a. those provisions do not constitute the primary object of the agreement and

Unlike Regulation 240/96, the Technology Transfer Regulation covers software copyright licences, licences of designs and licences of utility models as well as licences dealing, in particular, with patents and/or know-how. Regulation 240/96 has, however, covered only pure patent or mixed patent and know-how licences and other intellectual property rights such as copyright, design rights, trade marks were covered only if ancillary to a patent and/or knowhow licence[214]. Other issue to be considered is that unlike Regulation 240/96 which exempts know-how licenses for a maximum period of 10 years, the Technology Transfer Regulation exempts know-how licences as long as the licensed know-how is kept secret.

In order to be covered under the Technology Transfer Regulation, the technology transfer agreements as defined above shall be pertained to the production of contract products. In other words, the agreement should allow the licensee to exploit the licensed technology for the production of goods or services[215]. Additionally, those products which are to be produced by the licensed technology should be clearly identified in the agreement.

Finally, Technology Transfer Regulation also covers subcontracting agreements where the licensor grants licence to the licensee and the licensee agrees to produce exclusively for the licensor. In this respect, in case the licensor supplies equipment to the licensee, such subcontracting agreements will also be covered by the Technology Transfer Regulation as long as the primary objects of the agreement is to grant licence to the licensee for the production of the contract goods via the licensed technology[216].

3.3.2. Relationship With Other Block Exemption Regulations

As has been explained above the Technology Transfer Regulation exempts technology transfer agreements between two undertakings with respect to the licensing

b. the provisions in the agreement covering such rights must be ancillary and are directly related to the production of the contract products and
c. assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor.

214 Treacy and Heide, p. 2.

215 In this respect, it should be noted that exemption is granted under the Technology Transfer Regulation to the non-assertion and settlement agreement. See Technology Transfer Guidelines, para. 43.

216 See for further information with respect to the subcontract agreements Marquis, p. 257-259.

of technology for the production of contract products. However, the products incorporating the licensed technology may be subject of other types of agreements as well. It is therefore necessary to show the relationships between Technology Transfer Regulation and Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements ("**Specialization Agreements Regulation**"), Commission Regulation 2659/2000 on the application of Article 81(3) to categories of research and development agreements ("**Research and Development Agreements Regulation**") and Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ("**Vertical Agreements Regulation**").

(i) Specialization Agreements Regulation: Specialization Agreements Regulation exempts, inter alia, the joint production agreements concluded between two or more undertakings agree to produce certain products jointly. The Technology Transfer Regulation also covers the terms and conditions in the agreement with regard to the assignment or use of intellectual property rights, provided that they do not constitute the primary object of the agreement, but are directly related to and necessary for its implementation[217]. In case two or more undertakings establish joint venture for the production of goods and services via the licensed technology, such an agreement for the grant of technology to the joint venture will be covered under the Specialization Agreements Regulation.

(ii) Research and Development Agreements Regulation: Research and Development Agreements Regulation covers agreements concluded between two or more undertakings for the purpose of jointly carry out research and development and jointly exploit the results thereof. Research and development and the exploitation of the outcomes thereof are carried out jointly 'where the work involved is carried out by a joint team, organization or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialization in research, development, production and distribution, including licensing'[218].

[217] See Specialisation Agreements Regulation.
[218] Research and Development Agreements Regulation.

(iii) Vertical Agreements Regulation: Vertical Agreements Regulation covers "agreements concluded between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"[219]. Agreements, therefore, solely regarding supply and distribution agreements are covered under the Vertical Agreements Regulation. As explained above, if the agreement imposes on the licensee obligations as to the way in which the licensee may sell the contract products, such an agreement will be covered under the Technology Transfer Regulation. However, any distribution agreements concluded to implement these obligations must comply with Vertical Agreements Regulation[220]. For instance, distributors should, inter alia, be free to make passive sales into the territories of other exclusive distributors[221]. However, if the main purpose of the agreement is not the production of goods and services via the licensed technology, but the establishment of a certain type of distribution system such as exclusive distribution or selective distribution, such an agreement will be covered under the Vertical Agreements Regulation[222].

3.3.3. Application Of The Technology Transfer Regulation

In accordance with the jurisprudence of the Community Courts, agreements between competitors may have more anticompetitive effects on competition than the agreements between non-competitors. Additionally, as experienced by the Community

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[219] Vertical Agreements Regulation.

[220] L'Ecluse, Peter, Catherine Longeval, Gaetane Goddin, Van Bael and Bellis, "The Technology Transfer Block Exemption Regulation: Suited for Life Science?", Cross-Border Handbooks, p. 113, www.practicallaw.com/lifesciencesbook.

[221] Article 4(b) of the Commission Notice, Guidelines on Vertical Restraints (2000/C 291/01), para. 50.

[222] It should be noted that since each licensee will be considered as a separate supplier under Vertical Agreements Regulation, it has been clarified that "the reasons underlying the block exemption contained in that Regulation may also apply where the products incorporating the licensed technology are sold by the licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. In such cases the Commission would be unlikely to challenge restraints where by analogy the requirements of Vertical Agreements Regulation are fulfilled. For a common brand identity to exist the products must be sold and marketed under a common brand, which is predominant in terms of conveying quality and other relevant information to the consumer. It does not suffice that in addition to the licensees' brands the product carries the licensor's brand, which identifies him as the source of the licensed technology". See Technology Transfer Guidelines, para. 64.

Institutions, competition between undertakings using the same technology[223] may have pro-competitive effects on competition more than competition between undertakings using competing technologies[224]. Therefore, the Commission has conditioned that in order for the technology transfer agreements to be covered under the block exemption, market share threshold should not exceed 20 % on the affected relevant technology and product market[225] if agreements have been concluded between competitors and should not exceed 30 % on the affected relevant technology and product market if concluded between non-competitors. Provided that the agreements will be concluded between the undertakings having market share ratios as defined and as long as all other conditions will be satisfied, the technology transfer agreements will be covered by the Technology Transfer Regulation and that will be protected under the safe harbors established by the said Regulation. However, if the market share ratios of the undertakings are above those levels, those technology transfer agreements will not be within the safe harbors and that will not be covered under the Technology Transfer Regulation. In such cases and outside the safe harbors, individual assessment under Article 81 (3) of the EC Treaty will be required. However, it should be borne in mind that the fact that market shares of the undertakings exceed the thresholds will not amount that those agreements will be caught by Article 81 (1) or that the agreement does not fulfill the conditions of Article 81 (3). In such cases, if those agreements will be caught by Article 81 (1) of the EC Treaty, undertakings concerned shall be required to prove that their agreements have pro-competitive effects and that the agreement satisfies the terms and conditions of Article 81 (3) of the EC Treaty.

As set forth above, it would be required to determine as to whether the technology transfer agreement concerned has been concluded between the competitors or the non-competitors. Since, the market share threshold will be applied following the

[223] It is called as ‘intra-technology competition’ between licensees. The Commission has pointed out that such agreements may lead to “… lower prices for the products incorporating the technology in question, which may not only produce direct and immediate benefits for consumers of these products, but also spur further competition between undertakings that use competing technologies”, see Technology Transfer Guidelines, para. 26.
[224] ‘inter-technology competition’, see Technology Transfer Guidelines, para. 11.
[225] In Article 3 of the Technology Transfer Guidelines, it has been clarified that “the market share of a party on the relevant technology market(s) is defined in terms of the presence of the licensed technology on the relevant product market(s). A licensor's market share on the relevant technology market shall be the combined market share on the relevant product market of the contract products produced by the licensor and its licensees”.

determination that the agreement has been concluded between competitors or non-competitors. Under the Technology Transfer Regulation regime:

(i) undertakings will deem to be competitors *on the relevant technology market* in case they license competing technologies and the licensor enters the technology market by granting a licence for a competing technology to the licensee[226]. In other words, in case the undertakings were actually granting competing technology licences on the date the licence was grated, i.e. the licensee was granting licences for a competing technology, the parties are considered to be actual competitors on the relevant technology market. However, potential competition on the technology market will not be taken into consideration for the application of the market share threshold[227]. Since otherwise, different hardcore lists might be applied to equivalent agreements except as regards potentially small differences in the level of the parties' market shares[228].

(ii) undertakings will deem to be competitors *on the relevant product market* if, in the absence of the technology transfer agreement, both undertakings are active on the same product and geographic market(s) on which the products incorporating the licensed technology are sold[229]. To put it differently, in case the licensor and the licensee are both active on the same product market without infringing the other's intellectual property rights of the other party, they will deem to be actual competitors.

(iii) undertakings will deem to be competitors in case 'they would be likely, on realistic grounds, to undertake the necessary additional investments or other necessary switching costs to enter the relevant product and

[226] Technology Transfer Guidelines, para. 66.
[227] Technology Transfer Guidelines, para. 66.
[228] Marquis, p. 266.
[229] Defined as 'actual competitors'. See Technology Transfer Guidelines, para. 28.

geographic market(s) within a reasonably short period of time[230] in response to a small and permanent increase[231] in relative prices'[232]. By the same token, the parties will deem to be potential competitors in case they possess substitutable technologies and if in the specific case the licensee is not licensing his own technology, provided that the licensee would be likely to do so in the event of a small but permanent increase in technology prices[233]. It should be noted that although potential competition and supply-side substitution 'overlap in part'[234], those issues differ from each other[235] in that while supply-side substitution gives reaction to the price increase of the product or service concerned rapidly, a longer period for the commencement to supply the concerned product or service is required for potential competition. The Relevant Market Notice envisages that the supply-side substitution is to be taken into consideration when the suppliers switch to supply the product in question in the 'short term', however, does not specify a time period which can be understood as 'short term'. Instead, it has set forth that a short term may be understood as 'a period that does not entail a significant adjustment of existing tangible and intangible assets'[236]. As can be see, the phrases "short term" are used to define both the supply-side substitution while determining the relevant market and for the determination as to whether the parties are potential competitor. Since the Technology Transfer Guidelines has illustrated one or two years as a short time period, it may be argued that while evaluating the supply-side substitution and

[230] It has been set forth in the Technology Transfer Guidelines, para. 29 that in order to be realistic, entry has to be likely to occur within a short period. A period of one to two years is told to be appropriate. However, all cases should be assessed in accordance with its own facts and merits.
[231] It should be noted that small but permanent increase has not been defined in the Technology Transfer Guidelines. However, we think that the definition envisaged in the Market Definition Notice will be applicable with respect to any issue raised in this respect.
[232] Defined as 'potential competitors'. See Technology Transfer Guidelines, para. 29.
[233] Technology Transfer Guidelines, para. 29.
[234] Atlantic Container Case, para. 834.
[235] Additionally, while significant costs or risks will not be occurred in supply-side substitution, potential competition, on the other hand, refers to the entrance of potential supplier of the concerned product to the relevant product market in the long term and may involve significant sunk costs. Finally 'the competitive constraint imposed by supply-side substitution has clear-cut significant impact on both pre-entry and post-entry prices. Meanwhile, potential entry felt via lower post-entry prices only.' See O'Donoghue and Padilla, p. 72-73.
[236] Relevant Market Notice paras. 16-20. The Court of Justice acknowledges the Commission's finding that due to the time constraint, the tyres concerned have formed different product markets. See Michelin 322/81, paras. 41, 56.

determining the relevant market, shorter than one year period may be taken into account. However, this approach should be applied cautiously since, it may lead to an incorrect outcome in some cases if, by taking into account the specific sector with respect to intellectual property, longer period might be required. In our views, the period required while defining the potential competitor and supply-side substitution should be determined in accordance with the factual circumstances of each specific case.

As can be seen, the undertakings concerned will deem to be competitors in case they are actual or potential competitors in the relevant market affected by the agreement. Otherwise, they are deemed to be non-competitors in case the parties would not have been actual or potential competitors in any relevant market if they would not conclude such agreement.

It has also been envisaged in the Technology Transfer Guidelines that in case the parties own technologies that are in a one-way[237] or two-way blocking position[238], the parties are considered to be non-competitors on the technology market. Such an approach is in line with the Commission's decision in Odin/Metal Box, where the Commission has pointed out that parties having mutually blocking know-how should not be considered as competitors[239]. However, while making such evaluation, the Commission will rely on objective factors, such as court decisions including injunctions and opinions of independent experts, as opposed to the subjective views of the parties. We believe that imposing such a burden on the parties is unnecessarily formalistic approach and such a burden corresponds to an unacceptably high barrier. Furthermore, such requirement will both increase the cost of the undertakings unnecessarily and

[237] A one-way blocking position exists in case a technology cannot be exploited without infringing upon another technology. See Technology Transfer Guidelines, para. 32.
[238] A two-way blocking position exists where neither technology can be exploited without infringing upon the other technology and where the holders thus need to obtain a licence or a waiver from each other. See Technology Transfer Guidelines, para. 32.
[239] See Case IV/32.009 Elopak/Metal Box - Odin, Commission decision of July 13, 1990, paras. 24-25 where the Commission has pointed out that "… at the time of the conclusion of the agreements Elopak and Metal Box were not competitors, actual or potential, in the relevant product market and the development of the product by either party on its own was highly unlikely… Neither party could in the short term enter the market alone as such entry would require knowledge of the other party's technology which could not be developed without significant and time-consuming investment. Both Metal Box's and Elopak's experience and resources are necessary to develop the new product which will be a combination of their respective technical and commercial know-how".

impose burden on the national competition authorities and the courts. Additionally, it should be borne in mind that such a request from the respective court may take time and the court may not be eager to rule in the absence of a genuine dispute between the parties and that a court decision may not be obtained by the parties in most of the cases. Therefore, by taking into account all said issues and keeping in mind that the burden of proof with respect to the violation of Article 81 (1) is on the plaintiff or the authority concerned, if the Commission has the view that the parties do not possess one-way or two-way blocking position, the burden to prove should be on the Commission and/or the plaintiff.

It should be noted that in case the licensed technology represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive, the parties will deem to be non-competitors on the relevant product and technology market[240]. However, if it would not be possible to come to this conclusion at the time the agreement is concluded, the parties will deem to be competitors. On the other hand, if at a later stage, the licensee's technology becomes obsolete or uncompetitive on the market, the competitors will be considered as non-competitors[241]. However, there may be cases where the parties thought that the licensed technology represents such a drastic innovation and that they might draft their agreement as if they were non-competitors. If at a later stage, it was understood that the licensed technology does not represent such a drastic innovation on the signature date of the agreement, what would be the effect on those types of agreements? Technology Transfer Regulation has envisaged, as a general rule, that in case the undertakings were not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, hardcore restrictions applicable to non-competitors shall apply for the full life of the agreement[242]. However, in case the parties thought that the licensed technology represents such a drastic innovation and that they had drafted their agreement as if they were non-competitors, but they were competitors at the time they had concluded the agreement what would be the possible outcome? The block exemption provisions on clauses between non-competitors should be applied or not? We believe that in such

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240 Technology Transfer Guidelines, para. 33.
241 Technology Transfer Guidelines, para. 33.
242 Article 4 (3) of the Technology Transfer Regulation.

cases hardcore restrictions applicable to non-competitors should be applied with retroactive effect to avoid claims for damages during that period. Therefore, such an ambiguity should be removed from the wording of or at least have been crystallized in the Technology Transfer Guidelines.

Following the determination that the agreement has been concluded between competitors or non-competitors, market shares of the undertakings concerned have to be found out. In order to determine the market shares of the parties in the relevant market, calculation will be on the basis of market sales value data, if exists. If those sales value data are not available, then estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned[243]. The market share shall be calculated on the basis of data pertains to the preceding calendar year.

As it can be seen from the aforementioned, while the Commission tries to achieve a safe harbor for the undertakings having small market share thresholds in the relevant market, such a safe harbor based on, inter alia, the market shares of the undertakings concerned may not lead to greater legal certainty and increase the cost of the undertakings. Since taking into account the difficulty of measuring market shares and rapid change of relevant market definitions in dynamic and technology-driven markets, determination by the undertakings of the relevant market and calculation their market shares before the conclusion their agreements will be burdensome and will not most of the time put the undertakings to the safe side with respect to the legality of their agreements. Since Article 81 (2) of the EC Treaty stipulates that as long as the agreements having anticompetitive effects will not fulfill the criteria under Article 81 (3) or block exempted, the agreement concerned shall be automatically void and unenforceable. Consequently such an uncertainty and the difficulty of the determination of the relevant market and of market share thresholds may substantially decrease the utility of the licence agreement and that may not promote the aim of encouraging dissemination of technology and are, in fact, likely to discourage the undertakings concerned in this respect.

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[243] Article 8 of the Technology Transfer Regulation.

3.3.3.1. Hardcore Restrictions

Technology Transfer Regulation has made distinctions between competitors and between non-competitors with regard to the restrictions contained in the technology transfer agreements. Article 4 of the Technology Transfer Regulation contains a list of hardcore restrictions of competition and these hardcore restrictions classification has been made by taking into account the nature of the restrictions[244] and experience of Community Courts with respect to such restrictions.

Technology transfer agreements that comply with the conditions set out in Article 4 of the Technology Transfer Regulation are block exempted from the prohibition rule under Article 81 (1) of the EC Treaty. Block exempted technology transfer agreements are considered that even if those agreements will be caught by Article 81(1) of the EC Treaty, they fulfill the criteria under Article 81(3) regime and thus they are presumed that they give rise to economic efficiencies, are indispensable to the attainment of these efficiencies, consumers within the affected markets receive a fair share of the efficiency gains and finally such agreements do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned[245].

Since hardcore restrictions envisaged in the Technology Transfer Regulation restrict competition “by object”, technology transfer agreement containing hardcore restriction of competition as mentioned in Article 4 of the Technology Transfer Regulation falls automatically outside the scope of the block exemption and an individual assessment is to be made under Article 81 (3) regime. However, such clauses containing hardcore restrictions may hardly and only in exceptional circumstances fulfill the criteria under Article 81 (3) of the EC Treaty. It should be, however, borne in mind that mere labelling of these clauses in the agreements as hardcore restriction may be risky in some cases and will have negative impact on national courts and national competition authorities in that they may not have the incentive to analyse those clauses’

[244] It has been envisaged in the Technology Transfer Guidelines, para. 36 that many licence agreements fall outside Article 81(1), either because they do not restrict competition at all or due to the restriction of competition is not appreciable.
[245] Technology Transfer Guidelines, para. 5.

effects and may neither be required to evaluate as to whether the agreement concerned comes within the scope of Article 81 (1) nor be required to evaluate as to whether the criteria under Article 81 (3) have been fulfilled. The national competition authorities and the courts may, therefore, declare such clauses as per se illegal since they are considered as affecting competition by its object in accordance with the Technology Transfer Regulation. However, it should be noted that even if the hardcore restrictions restrict competition by its object, national authorities concerned should evaluate these clauses carefully and determine as to whether such clauses are capable of fulfilling Article 81 (3) of the EC Treaty. Since, in any case, there is no presumption accepted by the Community Institutions that the technology transfer agreements falling outside the block exemption will be caught by Article 81(1) or fail to fulfill the criteria under Article 81(3) of the EC Treaty. Individual assessment of the possible anticompetitive and procompetitive effects of those agreements must be made under Article 81 (3) regime.

Finally, it should also be borne in mind that in case a technology transfer agreement contains a hardcore restriction, the agreement as a whole falls outside the scope of the block exemption. To put it differently, unlike the excluded restrictions envisaged in the Technology Transfer Regulation, hardcore restrictions cannot be severed from the rest of the agreement.

3.3.3.1.1. Hardcore Restrictions If Between Competitors

Article 4 of the Technology Transfer Regulation set forth hardcore restrictions which are prohibited if concluded between the competitors. Those anticompetitive restrictions have been envisaged under four headings, namely, price fixing, output limitations, market and customer allocation and the restriction on the licensee's ability to exploit its own technology or on any of the party to carry out research and development. Additionally, there are exceptions put forward in those hardcore restrictions which are also allowed under the Technology Transfer Regulation. In other words, in case technology transfer agreements contain such exceptional restrictions, those restrictive provisions will also be block exempted under Technology Transfer Regulation.

(i) Price Fixing: As a general rule, all kinds of restrictive provisions in the technology transfer agreements with respect to the determination of undertaking's ability on prices when selling products to third parties is prohibited and thus not be exempted under the Technology Transfer Regulation. Since, licensor and the licensee should normally be free to determine their own prices and set their prices freely irrespective of the products produced with the licensed technology or another technology. Therefore, agreements between competitors that contain clauses having as their object the fixing of prices for products to be sold to third parties, including the products incorporating the licensed technology will not be exempted under the Technology Transfer Regulation regime. Since, as it is envisaged by the Technology Transfer Guidelines, price fixing[246] between competitors constitutes a restriction of competition by its very object. Price fixing, either vertical or horizontal, has also been treated by the Community Courts as a restriction that by its very object restricts competition[247].

Price fixing may occur or may be designed in the agreement directly or indirecty. In this respect, direct agreement on the exact price to be charged to the third parties or on a price list with certain allowed maximum rebates or indirect application of disincentives to deviate from an agreed price level[248] or as such will not be exempted under the Technology Transfer Regulation[249].

However, determination of the royalty payment amount in the technology transfer agreements are not prohibited under the Technology Transfer Regulation unless such royalties will be calculated by taking into account all product sales whether or not licensed technology is used[250]. In Windsurfing case, the Court of Justice has ruled that

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[246] It would not matter as to whether the agreement concerns fixed minimum, maximum or recommended prices. See Technology Transfer Guidelines, para. 79.

[247] Case 19/77, Miller International Schallplatten GmbH v Commission (1978), ECR 131 ("Miller 19/77"), para. 7.

[248] For instance by envisaging in the agreement that the royalty rate will be increased in case product prices are reduced below a certain level will not be exempted under the Technology Transfer Regulation. See Technology Transfer Guidelines, para. 79.

[249] However, it should be noted that as long as maximum or recommended prices will not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by any of the parties, maximum or recommended prices between the non-competitors may be agreed by the parties. See Faull and Nikway. The EC Law of Competition. 2nd Edition, Oxford University Press, 2007, p. 1259.

[250] Korah, *Intellectual Property*, p. 58. Since the clauses restricting licensee's ability to exploit its own technology is also prohibited in Article 4 (1) (d) of the Technology Transfer Regulation, such agreements will not be exempted under the Technology Transfer Regulation.

"… it must be held that the method of calculating the royalties based on the net selling price of a complete sailboard was of such a nature as to restrict competition with regard to the separate sale of boards…"[251]. Such restrictions may only be exempted if fulfilled the criteria under Article 81 (3) of the EC Treaty and provided that the undertakings under consideration has proved that the restriction is indispensable to duly calculate and monitor the royalty payable by the licensee, i.e. the licensor's technology leaves no visible trace on the final product and practicable alternative monitoring methods are unavailable[252]. Since, it should be noted that in some cases royalty payment calculated in consideration of total sales may be used as a mechanism for allocating payment for the use of technology if it is difficult to monitor the usage of licensed intellectual property. In such cases, the burden to prove that such mechanism is indispensable for monitoring and calculating the royalty will be on the party who claims. However, while evaluating such cases, the competition authorities should take into consideration that unless a total sales royalty would foreclose competition and if there are objective justifications or proved efficiency defense, such restrictions should be considered as procompetitive. Otherwise, it would be likely that licensors would be discouraged from granting licences.

(ii) Output Limitations: All kinds of output limitation but for the limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement[253] is prohibited under the Technology Transfer Regulation. In other words, output limitation on the amount of the licensee's ability to produce and/or sell contract products on a non-reciprocal manner is not prohibited under the Article 4(1)(b) of the Technology Transfer Regulation provided that the output limitation only pertains to the products produced with the licensed technology. Therefore, Technology Transfer Regulation identifies as

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[251] Windsurfing Case, para. 67.
[252] Technology Transfer Guidelines, para. 81.
[253] Reciprocal agreements are defined as "cross-licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products" and non-reciprocal agreement is defined as "an agreement where only one of the parties is licensing its technology to the other party or where in case of cross-licensing the licensed technologies are not competing technologies and cannot be used for the production of competing products." Technology Transfer Guidelines, para. 78. However, it should be noted that an agreement will not be considered as reciprocal solely because the agreement contains a grant back obligation or because the licensee licenses back own improvements of the licensed technology. See Technology Transfer Guidelines, para. 78.

hardcore restrictions the reciprocal output restrictions on the parties and output restrictions on the licensor in respect of his own technology.

In the event that the competitors envisage output limitations on a reciprocal manner, the object and possible anticompetitive effect of the agreement may be to reduce output and to raise the prices in the relevant market. Agreements having such clauses, which lead to reduce the incentive of the parties to expand output and/or reduce its incentive to use its own technology may also have anticompetitive effects and thus not exempted under the Technology Transfer Regulation regime[254]. As said above, Technology Transfer Regulation distinguishes reciprocal and non-reciprocal agreements and envisages a stricter system of prohibition for reciprocal agreements than for non-reciprocal agreements between competitors. Since, clauses envisaged in the technology transfer agreements in a non-reciprocal manner may be required to induce the licensor to grant licence and such clauses may not lead to the reduction in output and may lead to an integration of complementary technologies or an efficiency enhancing integration of the licensor's superior technology with the licensee's productive assets[255]. It is also defended that an output restriction envisaged in a reciprocal technology transfer agreement on one of the licensees may 'reflect the higher value of the technology licensed by one of the parties and may serve to promote pro-competitive licensing'[256].

(iii) Allocation of Markets and Customers: Agreements between the competitors which lead to share the markets and/or customers have anticompetitive effect on competition and thus clauses in a reciprocal agreement envisaging not to produce in certain territories or not to sell actively and/or passively into certain territories or to certain customers reserved for the other party[257] will not be exempted under the Technology Transfer Regulation. As a general rule, the parties should not be restricted by the licence agreement as to where to produce or for whom to produce or to whom to sell.

[254] Technology Transfer Guidelines, para. 82.
[255] Technology Transfer Guidelines, para. 83.
[256] Technology Transfer Guidelines, para. 83.
[257] Technology Transfer Guidelines, para. 84.

Clauses, therefore, framed for or leading to an allocation of markets and customers are prohibited except clauses below mentioned:

a. The obligation on the licensee to produce with the licensed technology only within one or more technical fields of use or one or more product markets[258] which limits the licence to one or more product markets or technical fields of use may be set forth in the agreements. Field of use restrictions may commonly enable the parties to license intellectual property from which they would choose without sacrificing the advantages to use their intellectual property. The holder of the IPRs will continue to maintain its IPRs, but grants licence to third parties to produce only within one or more technical fields of use or one or more product markets which the holder may not be willing to produce.

Such restrictions are exempted up to the market share of 20 % on the affected relevant technology and product market irrespective of whether the agreement is reciprocal or not. However, the field of use restrictions should not go beyond the scope of the licensed technologies and the licensees should not be limited to use their own technology. Since, otherwise, such restrictions may lead to market sharing[259].

b. The obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party[260] is exempted under the Technology Transfer Regulation and the scope of the territory will not matter in that sense. The purpose of such agreements may be to give the licensee an incentive to invest in and develop the licensed technology and may not mostly amount to market sharing[261]. Therefore, in case the licence is world-wide, the exclusivity implies that the licensor

[258] Article 4 of the Technology Transfer Regulation.
[259] Technology Transfer Guidelines, paras. 90-91.
[260] Article 4 of the Technology Transfer Regulation.
[261] Technology Transfer Guidelines, paras. 90-91.

refrains from entering or remaining on the relevant market. However, it should be noted that the exclusive territory for the licensee or the licensor must be reserved for the other party.

Field of use restrictions in reciprocal agreements between competitors are considered as hardcore restriction, however, the parties are free to impose a field of use obligation in a non-reciprocal agreement. In such case, it should be borne in mind that the licensee may only be limited by the licensor to use the licensed technology, but not its own technology[262].

It should, however, be noted that in some cases, field of use restrictions in reciprocal agreements may be necessary to encourage licensing. In cases where the parties are free to use their existing technology and unless the competition is foreclosed or if there is an objective justification or efficiency defenses, such clauses should not be prohibited by the competition authorities. Since the parties may focus different technological markets and one of the party may not be in a position to compensate the other for the technology covering a broad application field. In such cases the mere wording of the field of use clauses in the agreement should not be considered as a per se illegal or be considered as a market or customer allocation.

c. The obligation on the licensor not to license the technology to another licensee in a particular territory[263] will also be covered under the Technology Transfer Regulation. In this respect the licensor will have the right appoint the licensee as its sole licensee in a particular territory and commit not to give licence to third parties in the same territory. To put it differently, the licensor may restrict itself not grant licence to third parties for the production by the licensed technology in the territory concerned, but the licensor will maintain its right to enter the said

[262] Since it is a hardcore restriction under 4 (1)(d) of the Technology Transfer Regulation.
[263] Article 4 of the Technology Transfer Regulation.

territory for his own production. In such cases, as to whether the agreement is reciprocal or not will not affect the exemption provided that the agreement will not affect the parties' ability to fully exploit their own technology in the respective territories[264].

d. The restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party[265] is not prohibited under the Technology Transfer Regulation. By the same token, the undertakings will have the right to envisage clauses, on a non-reciprocal basis, not to sell actively or passively into an exclusive territory or to an exclusive customer group reserved for the other party[266]. Therefore, if the parties are competitors and enter into a reciprocal agreement, due to the possible market-sharing arrangement which is also prohibited under Article 81 (1), such an obligation will not be exempted under the Technology Transfer Regulation. However, in case the exclusive licence is between non-competitors, the Technology Transfer Guidelines regard these licensing arrangements favourably since, exclusive licences between non-competitors are generally seen as necessary in order to encourage the licensee to invest in the licensed technology and to bring the products to market in a timely manner[267].

e. The restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee is block exempted up to the market share threshold of 20 % provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence[268]. In other words, such restrictions may be envisaged in the agreement provided that the protected licensee was not a competitor of

[264] Technology Transfer Guidelines, para. 88.
[265] Article 4 of the Technology Transfer Regulation.
[266] Technology Transfer Guidelines, para. 87.
[267] See Treacy and Heide, p. 7.
[268] Article 4 of the Technology Transfer Regulation.

the licensor when the agreement was signed. Since, if the licensor is permitted to grant a licensee, not operated on the relevant market, protection against active sales by licensees who are competitors of the licensor and which for that reason are already established on the relevant market, such agreements may urge the licensee to exploit the licensed technology more efficiently[269]. However, in the event that the licensees agree between themselves not to sell actively or passively into certain territories or to certain customer groups, the agreement may lead to a cartel amongst the licensees and thus fall outside the scope of the Technology Transfer Regulation.

f. The obligation on the licensee to produce the contract products only for its own use is not prohibited under the Technology Transfer Regulation provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products[270]. Such restrictions are called as 'captive use restrictions' and are designed for the licensee to produce the products by the licensed technology only for his own use. Since such restrictions may encourage the dissemination of technology, without prejudice to the exceptional cases, they may be exempted under the Technology Transfer Regulation. The licensee may merely use the products as an input for incorporation into his own production and does not sale the product produced by the licensed technology for incorporation into the other producers' products. The licensee may be restricted to produce a component only for incorporation into his own products and be obliged not to sell the components to other producers in case the contract product is a component. The licensee, however, should not be restricted to sell the components as spare parts for his own products and should be free to supply third parties that perform after sale services on these products.

[269] Technology Transfer Guidelines, para. 89.
[270] Article 4 of the Technology Transfer Regulation.

If the technology transfer agreement is concluded between competitors, such a restriction will prevent the licensee from being a supplier of components to third party producers[271]. If prior to the conclusion of the agreement, the licensee was not an actual or potential supplier of components to other producers, the captive use restriction will not change the circumstances compared to the pre-existing situation[272]. In such case, the restriction will be evaluated in the same way as if the agreements are concluded between non-competitors. If, on the other hand, the licensee is an actual or potential component supplier, it is necessary to examine the impact of the agreement on this activity[273]. In case the licensee ceases to use his own technology on a stand alone basis by tooling up to use the licensor's technology and thus to be a component supplier, the agreement restricts competition that existed prior to the agreement[274]. It may have anticompetitive effects when the licensor has a significant degree of market power on the component market.

If technology transfer agreements including such captive use restrictions will be concluded between the non-competitors, as to whether there exists restriction on intra-technology competition on the market for the supply of inputs and as to whether an exclusion of arbitrage between licensees enhancing the possibility for the licensor to impose discriminatory royalties on licensees will have to be evaluated[275].

g. The obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer for the purpose of creating an alternative source of supply for that customer[276] is also exempted under the Technology Transfer Regulation. Since, it is thought that in case a licensee is limited, in a non-reciprocal manner, in his

[271] Technolog Transfer Guidelines, para. 187.
[272] Technolog Transfer Guidelines, para. 187.
[273] Technolog Transfer Guidelines, para. 187.
[274] Technology Transfer Guidelines, para. 187.
[275] Technology Transfer Guidelines, para. 188.
[276] Article 4 of the Technology Transfer Regulation.

production for the determined customer, agreement will neither cause the said licensee to stop to exploit his own technology nor amount to a market sharing in the market. Therefore, such restrictions are permitted under the Technology Transfer Regulation. It should be borne in mind that where more than one undertaking will be licensed in order to supply the same particular customer, such clauses in the technology transfer agreements will also be exempted under the Technology Transfer Regulation[277].

(iv) Finally, the restriction on the licensee's ability to exploit its own technology or the restriction on the ability of any of the parties to the agreement to carry out research and development is prohibited under the Technology Transfer Regulation, unless the latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties[278]. In this respect, licensee's ability to exploit its own technology and/or to carry out research and development should neither be restricted in the field which the licence is granted nor in other fields which the licence is not covered. However, the undertakings are free to agree to provide each other with future improvements of their technologies concerned and such restrictive clauses will not take the agreement out of the Technology Transfer Regulation unless the undertakings envisage in their agreement to restrict each other from carrying out research and development with third parties and/or the licensee is restricted in his productions or sales and/or the licensee is restricted to license his own technology to third parties and/or the licensee is obliged to pay royalties on what he produces by his own technology[279]. It should be borne in mind that in any case, such restrictions must be necessary and proportionate for the protection of the licensor's know-how against disclosure[280].

[277] Technology Transfer Guidelines, para. 93.
[278] Article 4 of the Technology Transfer Regulation.
[279] Technology Transfer Guidelines, para. 68.
[280] For instance, if it has been envisaged in the agreement that particular employees of the licensee will be trained in order to use the licensed know-how, it may be appropriate and enough to oblige the licensee not to permit those employees to be engaged in research and development with third parties. See Technology Transfer Guidelines, para 94.

It should be noted that undertakings will deem to be non-competitors on the relevant technology market in case they do not license competing technologies without infringing each other IPRs[281]. In such cases the parties are, in general, free to impose an obligation on the ability of the other to to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development. However, in case the licensee owns a competing technology but does not license it and thus is considered as non-competitors, an obligation on the licensee not to to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development may restrict competition and thus may not fulfill the criteria under Article 81 (3) of the EC Treaty. While evaluating such types of restrictions, the competent authority should closely scrutinize as to whether the licensee owns a competing technology or not.

3.3.3.1.2. Hardcore Restrictions If Between Non-Competitors

Article 4 of the Technology Transfer Regulation set forth hardcore restrictions which are prohibited if concluded between the non-competitors. Those anticompetitive restrictions have envisaged under three headings, namely, price restrictions, territorial restrictions and selective distribution limitations. Additionally, there are some exceptions put forward in those hardcore restrictions. In other words, in case technology transfer agreements contain such exceptional restrictions, those restrictive provisions will also be block exempted under Technology Transfer Regulation.

(i) Price Fixing: The restriction of a party's ability to determine its prices when selling products to third parties is prohibited under the Technology Transfer Regulation. However, the parties are free to determine maximum sale price or recommend a sale price as long as such restrictions will not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties[282].

Restriction of a party’s ability to determine selling prices may be directly incurred by one of the parties in the agreement. In such cases, it would be easy to conclude that a hardcore restriction has been envisaged in the agreement in question.

[281] Technology Transfer Guidelines, para. 95.
[282] Article 4 of the Technology Transfer Regulation.

However, such an aim may be achieved indirectly through different means as well, such as clauses in the agreement with respect to fixing the margin, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties, or contract terminations in relation to observance of a given price level[283]. The Parties to the agreement may also achieve by identifying price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations or by reducing the licensee's incentive to lower his selling price, such as the licensor obliging the licensee to apply a most-favored-customer clause, i.e. an obligation to grant to a customer any more favorable terms granted to any other customer[284]. The same methods may be used in order to make maximum or recommended prices work as fixed or minimum selling prices[285]. In such cases, the effects of such provisions on competition should be carefully assessed.

(ii) Territorial Restrictions: Clauses in the agreement with respect to the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products are prohibited and thus not exempted under the Technology Transfer Regulation except the clauses mentioned below. Therefore, the parties are free to envisage in their licence agreement any sales restrictions on the licensor and such restrictions on the licensor are exempted up to the market share threshold of 30 %, save for the exceptional cases[286]. Additionally, although restrictions on passive selling of the licensee are, in general, considered as hardcore restrictions, obligations on active selling between the licensor and a licensee are allowed in the case of agreements between non-competitors. Such type of restriction is also permitted for active selling between licensees in case the licensor has licensed several licensees[287].

Passive sales restrictions on the licensee may be envisaged in the agreement either as direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees or may indirectly and through different means be achieved by the

[283] Technology Transfer Guidelines, para. 97.
[284] Technology Transfer Guidelines, para. 97.
[285] It should, however, be borne in mind that clauses with respect to a list of recommended prices or a maximum price may not always work as leading to fixed or minimum selling prices. See Technology Transfer Guidelines, para. 97.
[286] As an exception to the general rule see Technology Transfer Guidelines, paras. 105-106.
[287] Treacy and Heide, p. 8.

parties, such as inducing the licensee to refrain from making such sales, such as by financial incentives or through the implementation of a monitoring system aimed at verifying the effective destination of the licensed products[288]. Quantity limitations may not be assumed by the Commission to indirectly mean to restrict passive sales provided that such quantity limitations will not be the means to implement a market partitioning agreement[289]. The parties to the agreement are free to envisage a clause with respect to sales restrictions, either actively or passively, on the licensor and such restrictions are exempted up to the market share threshold of 30 % under the Technology Transfer Regulation. Some of the restrictions may be envisaged in the agreements which are permitted under the Technology Transfer Regulation as set forth below:

a. The restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor is permitted and thus exempted under the Technology Transfer Regulation. Since such restrictions promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee, both the active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor will not constitute hardcore restrictions. In this respect, it would be no need that the licensor is actually producing with the licensed technology in the territory or for the customer group, but solely being reserved by the licensor of the concerned territory or of the customer group for later exploitation would be enough[290].

b. The restriction for a period of two years of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee that this other licensee is selling the contract products in that territory or to that customer group is allowed under the

[288] Technology Transfer Guidelines, para. 98.
[289] Such as the agreement containing 'the adjustment of quantities over time to cover only local demand, the combination of quantity limitations and an obligation to sell minimum quantities in the territory, minimum royalty obligations linked to sales in the territory, differentiated royalty rates depending on the destination of the products and the monitoring of the destination of products sold by individual licensees'. See Technology Transfer Guidelines, para. 98.
[290] Technology Transfer Guidelines, para. 100.

Technology Transfer Regulation[291]. Since, licensees may sometimes make huge amount of investments in production assets and promotional activities in order to start up and develop a new territory and thus they are not willing to enter the market without having protection at least for a certain period of time against sales into their territory by other licensees. In Nungesser case, the Court of Justice has accepted the argument of the parties that the grant of exclusive rights for a limited period is capable of providing an incentive to innovate and concludes that "in fact, in the case of a *(newly* developed*)*[292] licence, … an undertaking … which was not certain that it would not encounter competition from other licensees for the territory granted to it, or from the owner of the right himself, might be deterred from accepting the risk of cultivating and marketing that product; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products" [293].

Two years will be calculated from the date on which the protected licensee first markets the products incorporating the licensed technology inside his exclusive territory or to his exclusive customer group[294]. Following the expiry of this period, restrictions on passive sales between licensees will not be covered under the Technology Transfer Regulation and thus an individual assessment under Article 81(3) of the EC Treaty will be required.

c. Unless the licensee is restricted in selling the contract products actively and passively as spare parts for its own products, the obligation to produce the contract products only for its own use is permitted under the Technology Transfer Regulation. If the contract product is a component, the licensee may be obliged to use that product only for incorporation into his own products and can be obliged not to sell the product to other

[291] Article 4 of the Technology Transfer Regulation.
[292] Italics are added.
[293] Nungesser Case, para. 57.
[294] Technology Transfer Guidelines, para. 101.

producers[295]. However, the licensee should not be restricted to actively and passively sell the products as spare parts for his own products and should not be prevented to supply third parties that perform after sale services on these products.

d. If the licensor grants the licence in order for the creation an alternative source of supply for a particular customer, the obligation on the licensee to produce the contract products only for that particular customer will also be exempted under the Technology Transfer Regulation[296]. Since, there may be cases where the licensor cannot be effectively operate and in such cases it would be acceptable that the licensor grants licence to the licensee to create an alternative source of supply.

e. The restriction of sales to end users by a licensee operating at the wholesale level of trade is permitted under the Technology Transfer Regulation and thus be exempted. This type of restriction lets the licensor to assign the wholesale distribution function to the licensee and thus enables the licensor to restrict the sales to end users.

f. As explained above, the licensor may impose on the licensee obligations as to the way in which the licensee may sell the contract products and that such an agreement will be covered by the Technology Transfer Regulation. In other words, in case the main purpose of the agreement is the production of goods and services via the licensed technology, the agreement will fall within the scope of Technology Transfer Regulation and in such cases, the licensor will be free to impose an obligation on the licensee as to the way in which the licensee should sell the products incorporating the licensed technology. As a general rule, a producer is free to determine the way in which the products will be distributed. However, there may be cases where the producer or the licensor wishes to limit the numbers of the distributors in order to establish or to protect a

[295] Technology Transfer Guidelines, para. 102.
[296] Technology Transfer Guidelines, para. 103.

brand image or to make use of the economies of scale by considering the characteristics or the quality of the products[297] and capacity problem[298]. In cases where the product concerned requires technology, the licensor may wish the products to be sold only in the determined places and via the distributors which fulfill certain criteria. In such cases, the restriction on sales to unauthorized distributors by the members of a selective distribution system is allowed under the Technology Transfer Regulation. Since, such restrictions enable the licensor to impose on the licensees an obligation to form part of a selective distribution system[299].

However, it should be taken into consideration that the licensees should not be restricted to sell actively and passively to end users, without prejudice to the possibility to restrict the licensee to a wholesale function as aforementioned[300]. The permission on the restriction on the wholesalers is in line with the Metro case, where the Court of Justice has ruled that "… apart from the fact that this limitation on the activity of wholesalers is in accordance with the requirements of German legislation, it does not constitute a restriction on competition within the meaning of Article 85 (1) *(now Article 101(1))*[301] of the Treaty because it corresponds to the separation of the functions of wholesaler and retailer and because if such a separation did not obtain the former would enjoy an unjustified competitive advantage over the latter which, since it would not correspond to benefits supplied, would not be protected under Article 85 *(now Article 101)*[302]... It is established that various Member States have enacted legislation entailing obligations and charges, in particular in the field of social security and taxation, which differ as between the retail and wholesale trades, so that competition would be distorted if wholesalers, whose costs are in general proportionally lighter

[297] For instance, the licensor may wish that the sale of a perfume will only be in the determined, luxury shops.
[298] Koç, A. Fuat. AT Rekabet Hukukunda Seçici Dağıtım Anlaşmaları. Ankara: Rekabet Kurumu, 2005, p. 15.
[299] Technology Transfer Guidelines, para. 105.
[300] Technology Transfer Guidelines, para. 105.
[301] Italics are added.
[302] Italics are added.

precisely because of the marketing stage at which they operate, competed with retailers at the retail stage, in particular on supplies to private customers . The Commission did not infringe Article 85 (1) *(now Article 101 (1))*[303] in considering that this separation of functions is in principle in accordance with the requirement that competition shall not be distorted"[304]. Therefore, imposing a restriction at whosaler level is allowed. It should be noted that any restrictions on the sale of the licence to end users is also prohibited under the Vertical Agreement Regulation and the Guidelines on Vertical Restraint[305] except the restriction a wholesaler from selling to end users.

(iii) Selective Distribution Limitations: The parties to the agreement cannot decide to envisage a clause which restricts active or passive sales to end users by a licensee which is a member of a selective distribution system and which operates at the retail level[306]. As mentioned above, there may be cases where the product concerned requires technology and the licensor may wish the products to be sold only in the determined places via the distributors which fulfill certain criteria in order to establish or to protect a brand image or to make use of the economies of scale. In such cases, the licensor may impose on the licensee an obligation to form part of a selective distribution system. However, once the licensee becomes a member of the selective distribution system, such licensee is considered that he fulfills the criteria in order for the licensor to establish or to protect a brand image or to make use of the economies of scale. Therefore, limiting the sale of the licensee is considered to restrict the competition and may amount to a market and customer allocation in case the licensee operates at the retail level. However, the licensee may be limited from operating out of an unauthorized place of establishment in case the licensee is a member of a selective distribution

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[303] Italics are added.
[304] Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v. Commission (1977), ECR 1875 ("Metro 26/76"), para. 28-29.
[305] Commission Notice, Guidelines on Vertical Restraints (2000/C 291/01), para. 52.
[306] In cases where the market shares of the parties exceed 30 % on the relevant market, such restrictions should be assessed by taking into account the concerned sector and the relevant market and since there may be anticompetitive effects on the market, selective distribution limitations should be analysed in detail in the legal and factual circumstances of the specific case. See Koç, p. 18-23 for the anticompetitive effects of the selective distribution system. See also for further information with respect to the selective distribution see Fox, M. Eleanor. Cases and Materials on the Competition Law of the European Union. West Group, American Casebook Series, 2002, p. 924-931.

system[307]. Selective distribution restrictions are similar to that of the ones regarded as customer restrictions. Since in both circumstances, the licensee is limited in its sales. Such restrictions are also in line with the ones under the Guidelines on Vertical Restraint in that in case selective distribution system has been imposed on the licensee, active and passive sales restrictions on the licensee operating at the retail level will most likely to have a negative effect on inter-brand competition and thus are prohibited.

3.3.3.1.3. Once Non-Competitors Become Competitors

There may be cases where the parties were non-competing undertakings, neither an actual nor a potential competitor, when they had signed the technology transfer agreement, but because the licensee have improved and started exploiting a competing technology, they have become competing undertakings during the execution of the agreement. In such case, the hardcore restriction applied to non-competing undertakings will continue to be applied for the full life of the agreement unless the agreement is subsequently amended between the parties in any material respect. In cases where the agreement is substantially amended, the effects of the agreement in the relevant market should be assessed by the competent authority in accordance with the criteria under Article 81 (3) of the EC Treaty[308].

In some cases, two undertakings are not competitors, the licensor is neither an actual nor a potential supplier of products on the relevant market and the licensee, already operates on the product market, is not licensing out a competing technology even if he owns a competing technology and produces on the basis of that technology. However, if the licensee starts to grant licences or the licensor becomes an actual or potential supplier of products on the relevant market, they may become competitors. In such case the hardcore restrictions relevant for agreements between non-competitors

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[307] Technology Transfer Guidelines, para. 105. It should be noted that this clause is also in line with the Guidelines on Vertical Restraint, para. 54. Since, selected dealers may be prevented from running their business from different premises or from opening a new outlet in a different location.

[308] However, it should be noted that the parties have the chance to amend their agreement in a way to comply with the Technology Transfer Regulation in that they may amend their agreement according to the hardcore restrictions applicable for competitors. This would be (or should be) preferable by the parties, since, the hardcore restrictions restrict competition by its object and that it might be very unlikely that the competent authority may not grant individual exemption to the agreement concerned.

will continue to apply to the agreement during the term of the agreement unless the agreement is subsequently amended in any material respect[309].

In both of the aforementioned cases, the parties are protected during the term of the agreement[310]. However, in case the parties have substantially amended their agreement, the parties should amend their agreement in a way to comply with the rules in accordance with their new legal status[311]. Otherwise, such agreement as a whole will fall outside the scope of the block exemption and since those hardcore restrictions restrict competition by its object and cannot be severable from the rest of the agreement, unless exempted, the agreement will be null and void in its entirety from the moment the parties have substantially amend their agreements. We believe that the parties are under the burden to amend their agreements in a way to comply with the Technology Transfer Regulation if and when they have substantially amended their agreement. Since, in case there is no substantial amendment in their agreement, the agreement will be covered by the Technology Transfer Regulation. Therefore, defending that the agreement will be null and void from the moment it has been signed by the parties amount to a risky situation and do not have any legal base. Since the parties have complied with all the requirements under the Technology Transer Regulation on the date they have concluded their agreement. If, due to the changing circumstances, the parties become competitors or non-competitors, the parties are already protected at least during the term of the agreement. Therefore, for the sake of legal certainity, the authorities should intervene on the date the parties have substantially amended the agreement.

One interesting issue to be noted is that in case the undertakings were not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, what would be the market share threshold to be applied to the undertakings? In accordance with the Technology Transfer Regulation, in

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[309] Technology Transfer Guidelines, para. 31.

[310] However, we believe that in case the market share threshold is exceeded during the term of the agreement, the agreement concerned will continue to be protected only for a period of two consecutive calendar years following the year in which the threshold is first exceeded. Following that two year period, the parties are under the burden to amend their agreement in a way to comply with the Technology Transfer Regulation or may apply to the competent authority in order to obtain individual exemption for their agreement.

[311] In case the parties become competitors, they should comply with Article 4 (1) of the Technology Transfer Regulation which is applicable to competitors.

case the parties will not substantially amend their agreements, hardcore restrictions applicable to the non-competitors will be applicable in such cases. However, as to whether the applicable market share thresholds should be 20 % instead of 30 % on the relevant market has not been envisaged explicitly in the Technology Transfer Regulation. We believe that, in such cases, the parties should not be required to amend their agreement and the hardcore restrictions applicable non-competitors will continue to be covered by the Technology Transfer Regulation, however, the parties are required to comply with the threshold applicable to competitors. In other words, for instance, in case the parties have 25 % on the relevant market, such agreement will not be covered by the Technology Transfer Regulation. Since, Article 4 (3) of the Technology Transfer Regulation has set forth that *"paragraph 2 and not paragraph 1 shall apply for the full life of the agreement"*. If the intention of the Commission was to apply the threshold for non-competitors, say 30 %, the Technology Transfer Regulation should have also referred to Article 3 and mentioned that the threshold applicable to non-competitors will also continue to be applied in case the non-competitors become competitors. However, since there is neither an explicit intention nor a reference to Article 3, once the non-competitors become competitors, the threshold to be applied to the parties is 20 % but not 30 % any more. However, we also believe that in such cases, Article 8 of the Technology Transfer Regulation will be applicable, since the market share threshold is exceeded during the term of the agreement and that the agreement concerned will continue to be protected only for a period of two consecutive calendar years following the year in which the threshold is first exceeded. Following this two year period, the parties are under the burden to amend their agreement in a way to comply with the Technology Transfer Regulation.

3.3.3.2. Excluded Restrictions

There are restrictions which are not covered and thus not exempted under the Technology Transfer Regulation. Those types of restrictive clauses, if exist in the technology transfer agreements, need to be assessed individually under Article 81 (3) regime. However, such restrictive clauses will not affect the application of the block exemption to the rest of the agreement. In other words, as long as the agreements containing pro-competitive hardcore restrictions complies with the Technology Transfer Regulation, the agreement, but for those excluded restrictive clauses, will deem to be exempted. Since those types of restrictions may reduce the incentive of licensees to innovate, each of the restrictive clauses will be evaluated by the competent authority severally and in accordance with the factual circumstances of the agreement and the status of the parties to the agreement in the relevant market. Unlike the hardcore restrictions, the rule of severability applies to the excluded restrictions set out in Article 5 of the Technology Transfer Regulation.

Technology Transfer Regulation envisages that the exemption shall not apply to the following obligations:

(i) Exclusive Grant Back or Assign Clause: Such clauses include any direct or indirect obligation on the licensee to grant an exclusive licence or to assign to the licensor or to a third party designated by the licensor in respect of its own severable[312] improvements to or its new applications of the licensed technology[313]. However, non-exclusive grant back or assign obligations in respect of severable improvements will be covered by the Technology Transfer Regulation. For instance, if the grant back obligation is non-reciprocal and where, under the agreement, the licensor is entitled to feed-on the severable improvements to other licensees, grant back clauses will be covered by the Technology Transfer Regulation. A feed-on clause may promote the dissemination of technology since, each licensee knows on the signature date of the agreement that he will be on an equal footing with other licensees in terms of the technology on the basis of which he is producing[314]. Furthermore, it is commonly accepted that such clauses will not prevent competition within the meaning of Article 81(1) since non-severable improvements cannot be exploited by the licensee without the licensor's permission[315]. In this respect, since an amount to be paid to the licensee will be an incentive for the licensee to innovate, paying by the licensor an amount in return

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[312] An improvement is assumed to be severable if it can be exploited without infringing upon the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting his improvements, including by way of licensing to third parties. See Technology Transfer Guidelines, para. 109.
[313] Article 5 of the Technology Transfer Regulation.
[314] Technology Transfer Guidelines, para. 109.
[315] Technology Transfer Guidelines, para. 109.

for acquiring the improvement or for obtaining an exclusive licence will be an important indicator while evaluating the anticompetitive effects of such type of clauses under Article 81(3) regime. While evaluating the clauses under Article 81 (3) regime, impact assessment on competition should also be made in case of parallel networks of licence agreements[316]. When available technologies are controlled by a limited number of licensors, anticompetitive effects on competition may be greater than where there are a number of technologies only some of which are licensed on exclusive grant back terms[317]. The risk of negative effects on innovation is also accepted to be higher in the case of cross licensing between competitors where a grant back obligation on both parties is combined with an obligation on both parties to share with the other party improvements of his own technology[318]. The sharing of all improvements between competitors may restrict each competitor from gaining a competitive lead over the other. However, it is commonly accepted that the parties will not be prevented from gaining a competitive lead over each other if the purpose of the licence is to allow them to improve their technologies and where the licence does not lead them to use the same technological base in the design of their products, i.e. in case the purpose of the licence is the creation of design freedom rather than the improvement of the technological base of the licensee[319].

(ii) No-Challenge Clause: Such restriction includes any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor in the common market[320]. It should be borne in mind that, save for the exceptional cases, the Community Institutions have treated no-challenge clauses compatible with Article 81 (1) of the EC Treaty. The Court of Justice in Bayer case has ruled that "A no-challenge clause included in a patent licensing agreement may, in the light of the legal and economic context, restrict competition within the meaning of Article 85 (1) *(now Article 101 (1))*[321] of the EEC Treaty. In regard to that context, it should be pointed out that there is no restriction on competition when the licence

[316] Technology Transfer Guidelines, para. 110.
[317] Technology Transfer Guidelines, para. 110.
[318] Technology Transfer Guidelines, para. 111.
[319] Technology Transfer Guidelines, para. 111.
[320] Article 5 of the Technology Transfer Regulation.
[321] Italics are added.

granted is a free licence inasmuch as, in those circumstances, the licensee does not suffer from the competitive disadvantage involved in the payment of royalties. Nor does a no-challenge clause contained in a licence granted subject to payment of royalties restrict competition when the licence relates to a technically outdated process which the licensee undertaking did not use"[322].

It is obvious that the licensees are mostly in the best position to determine whether or not IPRs are invalid. Therefore, in order to eliminate invalid IPRs for the purpose of undistorted competition and in conformity with the principles underlying the protection of IPRs, such clause may be not allowed[323]. Since restricting the competition may sometimes be permitted for the sake of innovation and dissemination of technology. If there would be invalid IPRs, the competition should not be restricted due to the lack of higher purpose. However, the Commission has mentioned that since no-challenge clauses with regard to know-how may promote the dissemination of new technology, such clauses may be allowed, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee[324].

In some circumstances, in cases where such clauses may be within the scope of Article 81 (1) prohibition, the licensor should be entitled to terminate the licence agreement in case the licensee challenges the validity of the licensed technology. Leading to this end, Technology Transfer Regulation has envisaged that the licensor is free to set forth in the licence agreement a termination clause in order to keep its interest once the licensee would challenge the validity of the technology licensed[325]. Therefore, solely envisaging such a termination clause in the technology transfer agreement will neither take the agreement nor the clause out of the Technology Transfer Regulation[326].

(iii) Finally, if the undertakings party to the agreement are non-competitors, any direct or indirect obligation to limit the licensee's ability to exploit its own

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[322] Bayer Case, paras. 16-18.
[323] See Korah, Valentine. Cases and Materials on EC Competition Law. 3rd Edition, Hart Publishing, 2006 ("Korah, *Cases and Materials*"), p. 569-570 with respect to non-challenge clause envisaged in trademark license agreement.
[324] Technology Transfer Guidelines, para. 112.
[325] Article 5 (1) (c) of the Technology Transfer Regulation.
[326] It should be noted that same approach was pursued by the Regulation 240/96.

technology or the ability of any of the parties to the agreement to carry out research and development is prohibited under the Technology Transfer Regulation unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties. This hardcore restriction have the similar content as the hardcore restriction between the competitors under Article 4(1)(d) of the Technology Transfer Regulation. However, agreements containing such restrictive clauses have not been envisaged under the hardcore restrictions which are exempted under the Technology Transfer Regulation, but instead, as far as an agreement containing such clauses will be concluded between non-competitor, the Commission is willing that those clauses should be evaluated individually under Article 81 (3) regime[327]. In this respect, if the agreement is concluded between non-competitors, individual assessment will be required under Article 81 (3) of the EC Treaty.

3.3.4. Treatment Of Other Licensing Clauses

The parties may also envisage in their technology transfer agreements restrictive clauses different from the clauses, mentioned under the hardcore restrictions and excluded restrictions. Since they are outside the scope of the Technology Transfer Regulation and an individual assessment is to be made under Article 81 of the EC Treaty, it would be useful to provide here guidance with respect to their assessment and treatment by the Community Institutions.

3.3.4.1 Royalty Obligations

The undertakings are normally free to determine the royalty fee to be paid by the licensee under the licence agreement and such provisions in the agreement may not in general be caught by Article 81 prohibition. In this respect, it does not matter as to whether the licence agreements have been concluded between competitors or non-

[327] However, it should be noted that in some cases even if the licensee possesses a competing technology, the parties are regarded as non-competitors, since the licensee does not grant any license to third parties. In such cases it is important to ensure that the licensee is not restricted in his ability to exploit his own technology and further develop it when it wishes to do so. Otherwise competition will be restricted and the criteria under Article 81 (3) will unlikely be fulfilled. For instance, an obligation on the licensee to pay royalties not only on the basis of products it produces with the licensed technology but also on the basis of products it produces with its own technology will not be exempted under the Technology Transfer Regulation. It is also an important issue when the licensee does not own a competing technology or is not already developing such a technology, but the parties possess the necessary assets and skills to carry out further research and development. In such cases, potential competition should not be disregarded. See Technology Transfer Guidelines, para. 115.

competitors. Royalty obligations may be decided by the parties in the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology[328]. If the final product is produced by an input incorporating the licensed technology, royalties calculated on the basis of the price of the final product will not mostly prevent competition[329] without prejudice to the royalty obligations amounting to price fixing between the competitors and royalties extend to products produced solely with the licensee's own technology, which are hardcore restrictions under the Technology Transfer Regulation. Since, in such case, the agreement may have a foreclosure effect and thus needs to be assessed under Article 81(3) of the EC Treaty.

The parties are also free to envisage in their licence agreement running royalty obligations. Running royalties are preferred in the licence agreement for several reasons in that the value of a licensed technology may depend on the extent to which the licensed technology will be used over the life of the licence. Since it may be highly uncertain and unforeseeable to determine the value of the licensed technology before, running royalties enable the parties to calculate the use of the licensed technology and compensate the licensor based on the use of the licensed technology. Furthermore, in case the parties will be forced to agree on a lump sum royalty in advance, this may serve as a barrier to licensing, since a licensee may not be willing to pay a large lump sum royalty because of uncertainty as to the value of the licensed technology and may not be willing to take the risk in advance which depends on the success of the licensed technology. In addition to the aforementioned, running royalties may work for the licensee as a financing mechanism in that the licensee will have the chance to pay from its earnings during the life of the agreement when and if it earns through the licensed technology.

In case, however, the competitors cross license and impose running royalties that are not proportional compared to the market value of the licence and such royalties have a significant impact on market prices and such royalty obligations should be

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[328] Technology Transfer Guidelines, para. 156.

[329] For instance, if royalties will be calculated on a per machine basis and on the number of users in a software license agreement, such an agreement will mostly compatible with Article 81 of the EC Treaty.

evaluated, on an indvidual basis, under Article 81 regime. Since in such cases, royalty mechanism may be used to support pricing coordination or may work as an output limitation. In this respect, the royalties paid by other licensees on the product market for the same or substitute technologies will be a valuable indicator during the evaluation as to whether the royalties are disproportionate or not[330]. However, it should be noted that since the determination of the market value of the technology may be difficult, it may be unlikely that the Commission will intervene the reciprocal running royalties. Since, it is the Commission, under the Council Regulation 1/2003, who is under the burden to prove that Article 81 (1) of the EC Treaty has been violated.

Additionally, in case the undertakings have a significant market power, royalty obligations on a reciprocal basis increasing per unit when output increases will need to be evaluated under Article 81 of the EC Treaty. Sometimes, royalty fee is decided on the basis of both products produced with the licensed technology and products produced with technologies licensed from third parties. Such types of clauses may work as a non-competition clause and may prevent the use of the third party technology or the use of licensee's own technology. In Windsurfing case, the Court of Justice has ruled that "… in the light of those considerations, it must be held that the method of calculating the royalties based on the net selling price of a complete sailboard was of such a nature as to restrict competition with regard to the separate sale of boards, which were not covered by the German patent, but not the sale of rigs"[331]. In such cases, if royalty obligation of this type leads to foreclosure by increasing the cost of using third party inputs[332], they may have significant foreclosure effects and such agreements may be caught by Article 81(1) of the EC Treaty and the undertakings concerned are required to show that there is no other practical way of calculating and monitoring royalty payments.

[330] Technology Transfer Guidelines, para. 158.
[331] Windsurfing Case, para. 67.
[332] Furhermore, such an obligation may lead to reduce the incentive to use the third party inputs.

3.3.4.2. Exclusive Licensing And Sales Restrictions

A licence is deemed to be exclusive if the licensee is the only one who is permitted to produce on the basis of the licensed technology within a given territory[333]. The licensor thus undertakes not to produce itself or grant another licence to other licensees in the determined territory. In case the licensor undertakes only not to licence third parties to produce within a given territory, the licence is accepted as the sole licence. While the Technology Transfer Guidelines has made distinction between the exclusive licence and the sole licence, it also treats the licence granted to competitor and non-competitors in a different manner in that the Technology Transfer Guidelines pay more attention to the grant of licence between the competitors than between the non-competitors.

In case the parties are competitors and at the same time have significant market power, commitment by the parties not to grant licence of their competing technologies to third parties may facilitate collusion since the parties may be the only sources of output in the market based on the licensed technologies[334]. As mentioned above, reciprocal exclusive licensing between competitors are hardcore restrictions under the Technology Transfer Regulation. On the other hand, reciprocal sole licensing between competitors is block exempted up to the market share threshold of 20 % on the affected product and technology market. Since the licensor may not have the capacity to produce or distribute in an efficient way and thus commit not to produce in the defined territory. In case the undertakings market share threshold has exceeded 20 %, non-reciprocal exclusive licensing between competitors may be caught by Article 81 and in that case an individual assessment is required[335].

On the other hand, if an exclusive licence agreement has been concluded between the non-competitors, those agreements may be immuned from the application of Article 81 (1) prohibition irrespective of the market shares they have in the relevant

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[333] Technology Transfer Guidelines, para. 162.
[334] Technology Transfer Guidelines, para. 163.
[335] During the individual assessment under Article 81 regime, a due regard on the licensor market position on the product market or its capacity to effectively exploit the technology in the licensee's territory should be taken and if it can be concluded that the licensor has a limited market position or do not have enough capacity to effectively exploit the technology in the licensee's territory, the agreement is unlikely to be caught by Article 81(1) or, if caught, may likely to fulfill the criteria under Article 81 (3) regime.

market[336]. As the Court of Justice has pointed out in Nungesser case[337] "… in so far as the exclusive licence granted is in the nature of an open licence, that is to say that it relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory, the grant of an exclusive licence … is not in itself incompatible with Article 85(1) *(now Article 101(1))*[338] of the EEC Treaty, in view of the specific nature of the products in question, if it promotes the dissemination of a new technology and competition in the community between the new product and similar existing products"[339].

In case a dominant licensee obtains an exclusive licence of one or more competing technologies and if the barriers to entry in the technology market are high, such agreements may mostly be caught by Article 81(1) of the EC Treaty due to the fact that an exclusive licence may foreclose third party licensees and allow the licensee to preserve his market power[340]. Agreements, which are concluded between two or more parties and which are having clauses with respect to cross licensing to each other and commitments not to license third parties, may have also anticompetitive effects on the market, in case the package of technologies resulting from the cross licences creates a de facto industry standard to which third parties must have access in order to compete effectively on the market[341]. It should be borne in mind that in such cases, the technologies supporting such a standard should be licensed to third parties on fair, reasonable and non-discriminatory conditions[342].

As forementioned, restrictions on active and passive sales by one or both parties in a reciprocal agreement between competitors are hardcore restrictions under

[336] However, it should be borne in mind that the competition authorities may intervene in case an undertaking having a dominant position will grant license ad obtain an exclusive license of competing technologies in return of its license. In such cases, foreclosure effects of the agreement should be evaluated under Article 81 of the EC Treaty.
[337] For further information see Korah, *Cases and Materials*, p. 528-534.
[338] Italics are added.
[339] Nungesser Case, para. 3 (summary).
[340] Technology Transfer Guidelines, para. 166.
[341] Technology Transfer Guidelines, para. 167.
[342] It should be borne in mind that if the undertakings party to the agreement is competing undertakings with third parties, such agreements may have an exclusionary effects.

Technology Transfer Regulation[343]. Sales restrictions on either party in a reciprocal agreement between competitors will be caught by Article 81(1) and will unlikely to fulfill the criteria under Article 81 (3) if such restrictions prevent one of the undertaking from selling actively and passively into territories or to customer groups which he actually served or could realistically have served in the absence of the agreement. Additionally, although restrictions on active and passive sales by one or both parties in a non-reciprocal agreement between competitors are allowed under the Technology Transfer Regulation, in case the market share threshold has been exceeded 20 %, the non-reciprocal agreement between competitors which includes restrictions on active and passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party are caught by Article 81(1) when one or both of the parties have a significant degree of market power. By the similar reasoning sales restrictions on the licensor may fulfil the conditions of Article 81(3) if there are real alternatives to the licensor's technology on the market or such alternatives are licensed by the licensee from third parties[344].

Finally, in case the market share thresholds provided in the Technology Transfer Regulation have been exceeded and/or any terms envisaged in the hardcore restrictions will not be complied with by the undertakings and/or any deviations from those terms will lead the respective clause(s) in the licence agreement out of the scope of the Technology Transfer Regulation, an individual impact assessment of the agreement is required under Article 81 (3) regime.

3.3.4.3. Output Restrictions

Reciprocal output restrictions in licence agreements between competitors constitute a hardcore restriction under the Technology Transfer Regulation. However, output restrictions imposed on the licensee in a non-reciprocal agreement or on one of the licensees in a reciprocal agreement will be exempted up to the market share threshold of 20 % if concluded between the competitors. Above the said market share

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[343] On the other hand, as aforementioned in Section '3.3.3.1.2. Hardcore Restrictions if Between Non-Competitors' of the Thesis, all active sales restrictions and passive sales into an exclusive territory or customer group reserved for the other party or passive sales restrictions between exclusive territories or customer groups allocated to different licensees for a period of two years is exempted under the Technology Transfer Regulation, Article 4.

[344] Technology Transfer Guidelines, para. 173.

threshold, in case the parties have a significant degree of market power, output restrictions on the licensee may restrict competition. In such case, if the licensor's technology is substantially better than the licensee's technology and the output limitation substantially exceeds the output of the licensee prior to the conclusion of the agreement, this kind of clauses in the licence agreement may fulfill the criteria under Article 81 (3) provided that those restrictions may be necessary in order to induce the licensor to disseminate his technology extensively[345]. In this respect, however, whether one of the parties have substantial market power will be important during the evaluation under Article 81 (3).

If output restriction is agreed between non-competitors having market share over 30 %, as to whether intra-technology competition between licensees have been reduced will be of crucial importance while making assessment under Article 81 (3) of the EC Treaty. If in the licence agreement, clauses restricting the output are combined with the exclusive territories or exclusive customer groups clauses, the negative effects of the agreement on competition will increase[346].

Finally, as said above, in case the market share thresholds provided in the Technology Transfer Regulation have been exceeded and/or any terms envisaged in the hardcore restrictions will not be complied with by the undertakings and/or any deviations from those terms will lead the respective clause(s) in the licence agreement out of the scope of the Technology Transfer Regulation, an individual assessment of the agreement is required under Article 81 (3) regime. During such impact assessment under Article 81 (3) regime, as to whether the clauses in the licence agreements have pro-competitive effects by promoting the dissemination of technology will be one of the most important factors to be taken into account.

3.3.4.4. Field Of Use Restriction

As aforementioned, field of use restrictions are exempted, however, certain customer restrictions are hardcore restrictions under the Technology Transfer Regulation. A licensee is limited to use the licensed technology in one or more

[345] Technology Transfer Guidelines, para. 175.
[346] In such case whether the parties have, by object or effect, partioned the market is important.

particular fields once the licensor restricts the licensee by a field of use obligation. In other words, a field of use restriction limits the exploitation of the licensed technology by the licensee to one or more particular fields of use without limiting the licensor's ability to exploit the licensed technology[347]. In a customer restriction, the licensor limits the licensee's ability to sell to particular customer groups. Therefore, in a case where a field of use restriction corresponds to certain groups of customers within a product market, as to whether a customer restriction or a field of use restriction has been envisaged in the agreement should be clearly identified.

In case fields of use restriction have been envisaged in the agreement with an exclusive or sole licence, the licensor's ability to exploit his own technology, either for him or by way of licensing to third parties, may be restricted. In such case the assessment should be made in accordance with the principles applicable for exclusive and sole licenses as explained above[348].

Field of use restrictions on licensees in the agreements between competitors having the market share threshold less than 20 % is block exempted under the Technology Transfer Regulation. However, if 20 % has been exceeded, such agreements may lead to anticompetitive results when the licensee ceases to be a competitive force outside the licensed field of use or in case of cross license between competitors where the agreement provides for asymmetrical field of use restrictions[349] or if such restriction leads the licensee to reduce output outside the licensed field of use or if without justification terminates or scales back his activities in the area outside the licensed field of use[350].

Field of use restrictions in agreements between non-competitors up to the market share threshold of 30 % are block exempted under the Technology Transfer

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[347] Technology Transfer Guidelines, para. 181.

[348] It should be noted that in case the agreement has been concluded between competitors, this means that there is a reciprocal exclusive license agreement which is hardcore under Article 4(1)(c) of the Technology Transfer Regulation. Technology Transfer Guidelines, para. 181.

[349] A field of use restriction is deemed to be asymmetrical in case one party is permitted to use the licensed technology within one product market or technical field of use and the other party is permitted to use the other licensed technology within another product market or technical field of use. See Technology Transfer Guidelines, para. 183.

[350] In such cases, as to whether there is a market sharing arrangement exists or not have to be taken into consideration. Technology Transfer Guidelines, para. 183.

Regulation. Since, such restrictions are considered either non-restrictive of competition or efficiency enhancing. Even if this threshold is exceeded, field of use restrictions between non-competitors are likely to benefit from exemption under Article 81(3) of the EC Treaty[351]. Since, the Community Institutions have experienced that field of use restrictions between non-competitors may mostly promote dissemination of new technology by giving the licensor an incentive to license in the fields which he would not be willing to exploit. In case of field of use restrictions in agreements between non-competitors, the licensor has the right to grant sole or exclusive licences to different licensees limited to one or more fields of use. In such cases, account should be taken on whether there is a restriction on intra-technology competition between licensees.

3.3.4.5. Captive Use Restrictions

A clause with respect to the captive use restriction deals with an obligation on the licensee to limit his production of the licensed product to the quantities required for the production of his own products and for the maintenance and repair of his own products and it does not cover the sale of the licensed product for incorporation into the products of other producers[352]. In case a licence agreements including such type of restriction has been concluded between competitors having a market share above 20% and if, for instance the licensee is an actual or likely component supplier, a restriction on the licensee to produce under the licence only for incorporation into his own products prevents him from being a supplier of components to third party producers[353] and in such case, the effect of this clause on competition should be assessed carefully. Since due to the existing agreement, the licensee may cease to use his own technology on a stand alone basis and to be a component supplier, in particular when the licensor has a significant market power on the component market[354].

If licence agreements have been concluded between non-competitors, a captive use restriction may limit intra-technology competition on the market for inputs[355]. However, if the licensor is a supplier of components, captive use restriction may be

[351] Technology Transfer Guidelines, para. 184.
[352] Technology Transfer Guidelines, para. 186.
[353] Technology Transfer Guidelines, para. 187.
[354] Technology Transfer Guidelines, para. 187.
[355] Technology Transfer Guidelines, para. 188.

necessary to disseminate the technology between non-competitors. In any case, however, in case the licensor is a supplier of components, the licensee should not be restricted in selling the licensed product as replacement parts for his own products and be able to serve the after market for his own products, including independent service organizations that service and repair the products produced by him[356].

3.3.4.6. Tying And Bundling

Tying in the technology transfer agreements may exist in case the licensor imposes on the licensee to buy another technology in addition to the technology licensed to the licensee and/or to buy product from the licensor in addition to the technology licensed. Bundling in the technology transfer agreements may exist in case two technologies or a technology in addition to a product are sold together as a bundle[357]. It should be borne in mind that there should be distinct demands for each of the technologies and products due to the product differentiation[358].

If the market shares exceed the threshold envisaged in the Technology Transfer Regulation, it is necessary to balance the anti-competitive and pro-competitive effects of tying and bundling. Tying and bundling may sometimes have anticompetitive effects on the market if the licensor have a significant degree of market power in the tying product[359] so as to restrict competition in the tied product, for instance, when it foreclosures[360] competing suppliers of the tied product and/or allowes the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time and/or allowes the licensor to increase royalties, in particular when the tying product and the tied product are partly substitutable and the two products are not used in fixed proportion and/or prevents the licensee from switching to substitute inputs in the face of increased

[356] Technology Transfer Guidelines, para. 189.
[357] For further information with respect to tying and bundling cases, see Section '2.4.1. Tying And Bundling' of the Thesis.
[358] Faull and Nikway, p. 1277.
[359] If, however, the licensor has market power on the tied product market, the restraint is analysed as non- compete or quantity forcing, reflecting the fact that any competition problem has its origin on the market for the 'tied' product and not on the market for the tying product.
[360] For instance in case tie covers a certain proportion of the market for the tied product

royalties for the tying product[361]. In those cases, as to whether the agreement is concluded between the competitors or non-competitors will not matter and individual assessment under Article 81 (3) regime is required. However, it should be noted that in case the licensor has a market power, anticompetitive effects of the agreement is more likely to occur and it would be unlikely that the agreement will fulfill the criteria under Article 81 (3) of the EC Treaty[362].

3.3.4.7. Non-Compete Obligation

Non-compete obligations require the licensee not to use third party technologies which compete with the licensed technology[363]. If the market shares exceed the thresholds envisaged under the Technology Transfer Regulation, non-compete obligations may foreclose third party technologies in a way to reduce competitive pressure on royalties charged by the licensor and reduces competition between the incumbent technologies by limiting the possibilities for licensees to substitute between competing technologies[364] and thus need to be individually examined under Article 81 (3) regime. However, if the relevant market shares, either for competitors or non-competitors, do not exceed the thresholds envisaged in the Technology Transfer Regulation, the parties are free to envisage in their technology transfer agreements non-compete obligations in order not to exploit third-party technology. However, non-compete obligations were not allowed under the Regulation 240/96 and were considered as hardcore restrictions[365]. This is a welcoming approach introduced by the new regime.

Finally, if the competitors agree to cross license and commit not to use third party technologies, such agreement may facilitate collusion. It should be also noted that a non-compete obligation may work as an entry barrier and foreclose third party's technology. Foreclosure effect may arise, in particular, in case a substantial part of potential licensees are already tied to one or, in the case of cumulative effects, more

[361] Technology Transfer Guidelines, para. 193.
[362] See Section '2.4.1. Tying and Bundling' for the cases with respect to tying and bundling under Article 82 of the EC Treaty.
[363] To the extent that a non-compete obligation covers a product or additional technology supplied by the licensor, the obligation works similar to that of the one under the tying obligation.
[364] Technology Transfer Guidelines, para. 198.
[365] See Article 3 (2) of Regulation 240/96.

sources of technology and are prevented from exploiting competing technologies[366] or in case the agreement concluded by a licensor having a significant degree of market power or by a cumulative effect[367] of agreements concluded by several licensors, even if each individual agreement or network of agreements is covered under the Technology Transfer Regulation.

3.3.5. Settlement And Non-Assertion Agreements

Settlement and non-assertion agreements have been mostly agreed by the parties with the aim to settle the existing disputes and/or to avoid future disputes[368]. Therefore, settlement agreements and non-assertion agreements are treated like other technology transfer agreements in that as long as they do not contain any hardcore restrictions, the agreements concerned will be within the scope of the Technology Transfer Regulation and thus exempted from the application of prohibition under Article 81 (1) of the EC Treaty. In Bayer case[369], the Court of Justice has ruled that " In its prohibition of certain agreements between undertakings, Article 85 (1) *(now Article 101(1))*[370] makes no distinction between agreements whose purpose is to put an end to litigation and those concluded with other aims in mind. It should also be noted that this assessment of such a settlement is without prejudice to the question whether, and to what extent, a judicial settlement reached before a national court which constitutes a judicial act may be invalid for breach of Community competition rules. A no-challenge clause included in a patent licensing agreement may, in the light of the legal and economic context, restrict competition within the meaning of Article 85 (1) *(now Article 101(1))*[371] of the EEC Treaty"[372]. Therefore, it would be no distinction if the technology transfer agreements have been concluded in order to settle the existing disputes and that

[366] Technology Transfer Guidelines, para. 199.
[367] In case the tied market is above 50 % and there are high barriers to entry, cumulative effects may likely to occur. However, if the barriers are low, before concluding that there is no cumulative effect, the position of the distributors who are tied to the licensee by non-compete obligation should also be taken into consideration. In this respect, as to whether the new licensees have the access to distribution channel is of great importance to assess the barriers to entry. See Technology Transfer Guidelines, para. 199.
[368] Technology Transfer Guidelines, para. 209.
[369] Although the conflict was with respect to the non-challenge clause, the Court of Justice's view with respect to the settlement agreement is important.
[370] Italics are added.
[371] Italics are added.
[372] Bayer Case, paras. 15-16.

the same terms and conditions under the Technology Transfer Regulation will be applied to such settlement agreements.

3.3.6. Technology Pools

Technology pools are defined in the Technology Transfer Guidelines as 'arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties'[373]. Pooling arrangements are important and enficiency enhancing in that different technologies may be combined in the pool in order to produce a product and in such cases the licensee will pay for the combined technologies and thus the transaction costs will be reduced. Additionally, it will be more profitable to set a price for a bundle lower than the sum of prices at which each technology would be offered by the independent operators[374]. Secondly, it is defended that pooling arrangement 'ensure that a single overall royalty can be fixed, thereby avoding a stacking of royalties with resulting double marginalisation'[375].

On the other hand, pooling arrangements may give rise to a number of particular concerns with respect to the selection of the technologies which will be included in the pools or issues regarding the operation[376] of the pool[377], i.e. the way of choosing a standard, the way of choosing the technology in the pool, the way of choosing the royalties on various IPRs are established or the way of determining the price of the package licensed[378]. Therefore, pooling arrangements may prevent entry to

[373] Technology Transfer Guidelines, para. 210.
[374] Encaoua, David and Abraham Hollander. "Competition Policy and Innovation", Oxford Review of Economic Policy, Vol:18, No:1, 2002, p. 75.
[375] Faull and Nikway, p. 1280.
[376] One important issue to be considered while evaluating the operation of the pool is as to whether the arrangements for exchanging sensitive information, such as pricing and output data, among the parties may facilitate collusion or not. Technology Transfer Guidelines, para. 234. For instance the Court of Justice has ruled that "… the effect of the information exchange system was to reduce, or even remove, the degree of uncertainty as to the foreseeable nature of competitors' conduct and that that consequence was likely to impair substantially the competition which existed between traders." See Case C-7/95 P, John Deere, [1998] ECR I-3111 ("John Deere Case"), para. 80.
[377] It should be noted that an individual licence granted by the pool to third party licensees will be treated like other licence agreements and as long as they fulfilled the criteria set out in the Technology Transfer Regulation, they will be exemted from the application of the prohibition under Article 81 (1) of the EC Treaty. Technology Transfer Guidelines, para. 212.
[378] Lind, C. Robert, Any V. Kleymenova, Marie Miauton and Paul Muysert. "Report on Multiparty Licensing", Charles River Associates Ltd., 2003, p. 80-81.

the market and/or artificially raise prices above the competitive level[379]. While making the evaluation, the Commission has focused, in particular, on market strength of the technology pools concerned, as to whether the technology pools concerned is open to all interested parties and as to whether the terms and conditions of the pools will be applied in a non-discriminatory manner[380] and as to whether the technology pools foreclose third party technologies and/or limit the creation of alternative pools[381]. For instance, undertakings in the technology pools should be free to negotiate and fix royalties for the technology package and the licensees remain free to determine the price of products produced under the licence[382]. By the same token, licensors and licensees should be free to develop competing products and standards and should be free to grant and obtain licences outside the pool[383]. Otherwise, it would be likely that the competition is restricted and thus will be caught by Article 81 (1) of the EC Treaty.

It should also be noted that a technology pool composed solely or predominantly of substitute technologies may amount to a price fixing cartel or a technology pool establishing a *de facto* industry standard[384] may result in a reduction of innovation by foreclosing alternative technologies[385]. Therefore, in such cases attention should be given to the relationship between the pooled technologies and their relationship with technologies outside the pool. In this respect, in case the technologies in a pool are substitutes[386], royalties may be likely to be higher than they would otherwise be, since licensees do not benefit from competition between the technologies

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[379] Anderman, Steven. "EC Competition Law and Intellectual Property Rights in the New Economy", Antitrust Bulletin, June 22, 2002 ("Anderman, *EC Competition Law*"), p. 306.

[380] For instance, in case the technology pool concerned has a dominant position on the market, royalties and other licensing terms should be fair and non-discriminatory and licences should be non-exclusive. Technology Transfer Guidelines, para. 225.

[381] Technology Transfer Guidelines, para. 224.

[382] Technology Transfer Guidelines, para. 225.

[383] Technology Transfer Guidelines, para. 225.

[384] It has been defended for standard setting of patent pools that "The development of a successful industry standard eliminates possible dynamic competition among proprietary standards for the market. Since standard setting associated with patent pools today takes place in industries where there are strong network effects, it is likely that the end result of dynamic competition for the market will either be one monopolist supplying the market or perhaps a very dominant firm supplying the market with the winning technology, although probably still operating along with several marginal competitors. Therefore, after the initial period of intense competition for the market when price competition is likely to be fierce, and a winner has emerged, prices are likely to be higher than with competition under an industry standard. The competitive standard race will also potentially leave consumers stranded with technology that is of little value, either because it is no longer produced or, more importantly, because it is not interoperable with the winning technology." See Lind and Others, p. 83.

[385] Technology Transfer Guidelines, para. 213.

[386] Two technologies are considered as substitutes in case 'either technology allows the holder to produce the product or carry out the process to which the technologies relate'. Technology Transfer Guidelines, para. 216.

in question[387] and such an arrangement may also restrict inter-technology competition and amount to collective bundling[388]. In such cases, it would be very likely that an arrangement will be caught by Article 81 (1) prohibition. There may be cases where there are substitute technologies outside the technology pools. In such cases the licensee may be likely to purchase a technology which is a part of a package including other tehnologies instead of purchasing the substitute technology outside the technology pool. In case the technology pool is in a dominant position, such arrangement may foreclose competition and likely be caught by Article 81 prohibition.

On the other hand, in case the technologies in the pool are complements[389], the arrangement reduces transaction costs and may lead to lower overall royalties since the parties are in a position to fix a common royalty for the package as opposed to each fixing a royalty which does not take account of the royalty fixed by others[390] and thereby will be unlikely caught by Article 81 (1) prohibition[391].

Finally, while evaluating the anticompetitive and pro-competitive effects of the technology pools[392], the focus should be on the issues such as the IPRs in the pool are complements or not, there are any pro-competitive reasons for including the non-essential technologies in the pool or not, the pooled technologies are available only as a single package or the licensee is free to purchase some part of the pooled technologies by reducing the royalty fee amount[393], intellectual property for which a royalty is

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387 Technology Transfer Guidelines, para. 217.
388 Technology Transfer Guidelines, para. 218.
389 Two technologies are considered as complements in case 'they are both required to produce the product or carry out the process to which the technologies relate'. Technology Transfer Guidelines, para. 216. However, it should be noted that in case licensees demand both technologies due to efficiencies stemming from the integration of two technologies, the technologies are treated as complements even if they are partly substitutable. Technology Transfer Guidelines, para. 218.
390 Technology Transfer Guidelines, para. 217.
391 However, in each case as to whether the technologies are essential or not should be evaluated. Since non-essential Technologies may foreclose competition. In such cases, evaluation will be made by considering, inter alia, 'whether there are any pro-competitive reasons for including the non-essential technologies in the pool, whether the licensors remain free to license their respective technologies independently, whether, in cases where the pooled technologies have different applications some of which do not require use of all of the pooled technologies, the pool offers the technologies only as a single package or whether it offers separate packages for distinct applications and whether the pooled technologies are available only as a single package or whether licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties'. See Technology Transfer Guidelines, para. 222.
392 It should be recalled that patent pools may also be formed by way of a joint ventures. In such cases, the same criteria to that of the ones for technology pools will be applied to the formation and the operation of the joint ventures. See for furher information Lind and Others, p. 94-96.
393 Technology Transfer Guidelines, para. 222.

charged is essential to the standard or not, licensees are free to develop competing products and standards or not, licensors are free to participate in development of competing products and standards or not, licences to the pool are non-exclusive or not, licences are issued on a non-discriminatory basis or not, royalties paid to the pool are reasonably related to the level of use of the licensed technologies or not, grantback restrictions are non-exclusive and essential to the pool, and have the same field-of-use as the licence from the pool or not[394]. It should finally borne in mind that since complementary or substitute technologies may be developed following the creation of the pool, the assessment of the anticompetitive effects of the pooling arrangement and the operation of the pools are required to be assessed from time to time.

3.3.7. Withdrawal Of Exemption

The Commission and the competition authorities and courts of the Member States[395] may be entitled to withdraw the exemption granted to the agreement which does not satisfy the criteria under Article 81(3) of the EC Treaty. Therefore, if any of the criteria will not be fulfilled, exemption may be withdrawn. In this respect, the competent authority concerned will be under the responsibility to prove that the agreement and/or the respective anticompetitive clauses fall within the scope of Article 81 (1) and that do not satisfy any of the criteria under Article 81 (3) regime.

It has been envisaged that the exemption may be withdrawn in the following circumstances:

(i) In case the access of third parties' technologies to the market is restricted, i.e. by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology[396], the competition authorities concerned will have the right to withdraw the exemption granted to the agreement. Such a restriction of other licensors may arise from the cumulative effect of networks of licence agreements restricting the licensees from exploiting competing technologies and

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[394] Lind and Others, p. 84.

[395] Competition authorities of the Member States are only empowered to withdraw the exemption where the relevant geographic market is no wider than the territory of the Member State concerned. See Technology Transfer Guidelines, para. 117.

[396] Article 6 of the Technology Transfer Regulation.

thus leads to the exclusion of other (potential) licensors. Foreclosure of licensors may also arise in case the undertakings on the market which could take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees confront high barriers to entry[397].

(ii) In case the access of potential licensees to the market is prevented, i.e. by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees[398], the competition authorities concerned will have the right to withdraw the exemption granted to the agreement. Foreclosure of other licensees may arise from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and thereby preventing potential licensees from gaining access to the necessary technology[399]. Furthermore, the competition authorities concerned may withdraw the benefit of the exemption if a significant number of licensors of competing technologies in individual agreements impose on their licensees to extend to them more favorable conditions agreed with other licensors[400].

(iii) In case, without any objectively valid reason, the parties refrain from exploiting[401] the licensed technology[402], the competition authorities concerned will have the right to withdraw the exemption granted to the agreement.

If the parties do not exploit the licensed technology without any objective valid reason, unless there is objective justification, it may be reasonable that the competition authorities will withdraw the exemption[403], since there would be no efficiency enhancing activity and that the competition would be prevented without any economic grounds whatsoever.

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[397] Technology Transfer Guidelines, para. 121.
[398] Article 6 of the Technology Transfer Regulation.
[399] Technology Transfer Guidelines, para. 121.
[400] Technology Transfer Guidelines, para. 121.
[401] Exploitation needs not to take the form of an integration of assets, but where the licence creates design freedom for the licensee by allowing him to exploit his own technology without facing the risk of infringement claims by the licensor would also be observed. See Technology Transfer Guidelines, para. 122.
[402] Article 6 of the Technology Transfer Regulation.
[403] If the agreement has been concluded between the competitors or the non-competitor undertakings become competitor, such a non-exploitation arrangement should be strictly taken into consideration, since it may be a result of disguised cartel arrangement. See Technology Transfer Guidelines.

Even if the Technology Transfer Regulation has put forward hardcore restrictions for the purpose of ensuring that the exempted agreements do not reduce the incentive to innovate, or not delay the dissemination of technology or not unduly restrict competition between the licensor and licensee or between licensees, all the possible impacts of licence agreements should be evaluated in accordance with the factual circumstances of each cases, in particular, the cumulative effect of similar restrictions contained in networks of licence agreements. Therefore during the execution of the agreement concerned, it may be required by the competition authorities to withdraw the granted exemption for the grounds as mentioned above.

(iv) It should, finally, be borne in mind that, in accordance with Article 29 of the Council Regulation 1/2003, the Commission, acting on its own initiative, is empowered to withdraw the exemption granted to the technology transfer agreements under the Technology Transfer Regulation at any time in case the effects of the agreement concerned will be incompatible with Article 81(3) of the EC Treaty. Therefore, it should be noted that even if the aforementioned three grounds which enable the competent authority to withdraw the exemption would not have been envisaged in the Technology Transfer Regulation, the Commission has the competence to withdraw the exemption granted under the Technology Transfer Regulation[404] in accordance with the Council Regulation 1/2003.

3.4. Evaluations

As aforementioned, the Commission tries to achieve a safe harbor for the undertakings having small market shares in the relevant market. However, a safe harbor brought by the Technology Transfer Regulation is based on, inter alia, the market shares of the undertakings concerned. In order to find the market shares of the parties, the relevant market, say the relevant product and geographic market has to be defined by

[404] It may be argued that in addition to the Commission the Technology Transfer Regulation has empowered the Member States to withdraw the exemption, therefore, it would be required to envisage such withdrawal mechanism in the Technology Transfer Regulation. However, such an argument will not be correct in that Council Regulation 1/2003 has empowered the national competent authorities of the Member States to apply Article 81 (3). Therefore, we believe that the competent authorities of the Member States are empowered both to grant exemption to the agreements if they fulfill the criteria under Article 81(3) of the EC Treaty and to withdraw the exemption granted previously if the agreements concerned will not, at all, fulfill the criteria under Article 81(3) of the EC Treaty. Since Article 81, in whole, is directly applicable and have direct effect.

the parties to the agreement in order for the undertakings to be on the safe side. However, even if the parties and their advisors pay great attention and do their best to determine the relevant market, such a determination may not be acceptable for the respective authorities having the last say on this issue. Therefore, even if the undertakings increase their costs in order to find out the market shares they have possessed, such determination may not bring legal certainty thereto. Therefore, taking into account the difficulty of measuring market shares[405] and rapid change of relevant markets in dynamic and technology-driven markets, determination by the undertakings of the relevant market and calculation their market shares before the conclusion of their agreements will be burdensome and will not most of the time put the undertakings to the safe side with respect to the legality of their agreements.

Another issue to be focused on is that it will not be sufficient for the parties simply to satisfy that they benefit from the Technology Transfer Regulation on the date the agreement has been signed. In case the circumstances between the parties will change in the future, i.e. the market share thresholds are exceeded[406] or the parties become competitors[407] or an agreement will be prohibited in whole or in part due to the changing circumstances at some future point in time, the parties may find themselves in an unprotected legal environment. Since, Article 81 (2) of the EC Treaty stipulates that the agreement concerned shall be automatically void and unenforceable as long as the agreements having anticompetitive effects will not be exempted either by the block exemption or individual exemption. Consequently, such an uncertainty and the difficulty in the determination of the relevant market and of market share thresholds will substantially decrease the utility of the licence agreement and that will not promote the aim of encouraging dissemination of technology and are, in fact, likely to discourage the undertakings concerned in this respect. All those issues aforementioned will certainly have a chilling effect upon the willingness of IPPs holder to license, upon the value of

[405] See L'Ecluse and Others, p. 110-111 for different market share definitions.
[406] It should be noted that in case the market share threshold is exceeded during the term of the agreement, the Technology Transfer Regulation will continue to cover the agreement concerned only for a period of two consecutive calendar year following the year in which the threshold is first exceeded. See Article 8 of the Technology Transfer Regulation.
[407] There is an exception to this rule in that in case the undertakings are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, block exemption will continue to apply for the full life of the agreement ***unless the agreement is substantially amended***. See Article 4 (3) of the Technology Transfer Regulation.

licences to both IPRs owners and the initial licensees, and upon the incentive to the creation of intellectual property for licensing[408].

Final issue to be considered is that whether the parties to an agreement are competitors and whether the agreement is "reciprocal" or not. Such an examination will also increase cost of the undertakings and reduce legal certainty[409]. The need to assess whether the parties are potential competitors on the product market or actual competitors on the technology market, the need to keep market shares under review throughout the life of the agreement and the relevant market-share thresholds depend on whether the parties are competitors or not, the need to monitor whether a transition from non-competitor to competitor has taken place for the purposes of applying the market-share thresholds will create an annual monitoring burden on the undertakings[410]. Furthermore, taking into account the new decentralized enforcement system, due to such complexity in calculation, there may be inconsistencies in the approaches of national courts to the licence agreements. Taking into account that the status of the Technology Transfer Guidelines is unclear and notification of an agreement to the Commission for an individual exemption under Article 81 (3) or a negative clearance decision is no longer possible under the new Commission approach, there may be more inconsistencies in the approaches of national courts to the licence agreements.

4. TECHNOLOGY TRANSFER AGREEMENTS OUTSIDE THE SCOPE OF TECHNOLOGY TRANSFER REGULATION

4.1. Introduction

As aforementioned, Article 81 of the EC Treaty has prohibited agreements between undertakings which may affect trade between Member States and which have

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[408] Lind, C. Robert and Paul Muysert. "The European Commission's Draft Technology Transfer Block Exemption Regulation And Guidelines: A Significant Departure From Accepted Competition Policy Principles", E.C.L.R., 25(4), 2004, p. 181-189.

[409] Another issue to recall is that in case at a later stage, a non-reciprocal agreement becomes a reciprocal agreement due to the conclusion of a second licence agreement between the same parties, the parties concerned may have to amend the first licence agreement in order to avoid that the first agreement contains a hardcore restriction. See Technology Transfer Guidelines, para. 78.

[410] Toutoungi, Adrian and Benedict Bird. "The New EC Technology Transfer Regulation: One Year On", E.I.P.R., 28(5), 2006, p. 292-293.

as their object or effect the restriction of competition within the common market[411]. Article 81 (3) can be applied in individual cases and thus an individual assessment is required under Article 81 (3) of the EC Treaty. Such agreements shall be automatically void, if caught by Article 81 (1) of the EC Treaty and unless exempted in accordance with the terms and conditions of Article 81 (3) regime[412]. Agreements caught by Article 81(1) but which satisfy the conditions of Article 81(3) are valid and enforceable, no prior decision to that effect being required. However, agreements may be covered by way of block exemption regulations and in such case those agreements may be exempted and thus escaped from the prohibition under Article 81 (1) of the EC Treaty. All agreements covered by such block exemption regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81(1)[413].

In order for the application of Article 81 (3) criteria, an agreement must be caught by Article 81 (1) of the EC Treaty. To put it differently, Article 81 (3) is a defense mechanism for those of who conclude technology transfer agreements containing restrictive clauses. If an agreement will not an anticompetitive agreement within the meaning of Article 81 (1) of the EC Treaty, there would be no reason for the undertakings to defend themselves and thus apply Article 81 (3) criteria. Therefore, the assessment under Article 81 includes two essential parts. As a first step, evaluation on whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or anti-competitive effects has to be determined. If it can be concluded that an agreement is restrictive of competition, a second step is to be taken which deals with the pro-competitive benefits produced by

[411] Article 81 (1) of the EC Treaty.

[412] Those conditions in Article 81 (3) are cumulative in that all criteria shall be fulfilled in order to be exempted from the application of Article 81 (1) of the EC Treaty.

[413] However, as set forth above, the exemptions granted to such agreements may be withdrawn for the future only upon formal withdrawal of the block exemption by the Commission or a national competition authority. Additionally, some restrictive clauses may not be exempted, i.e. excluded restrictions under the Technology Transfer Regulation, under the block exemption regulations and in such cases individual assessment is required under Article 81 (3) regime even if the rest of the agreement is exempted by the respective block exemption regulations.

that agreement and the assessment on whether these pro-competitive effects outweigh the anti-competitive effects[414].

In this part of the Thesis, before setting forth the terms and conditions of Article 81 (3) of the EC Treaty, the regime brought by Article 81 (1) of the EC Treaty which is the precondition for the application of Article 81 (3) regime will be analysed in detail. Following this assessment, the evaluation and the statute of the technology transfer agreements under the general regime of Article 81 (3) of the EC Treaty will be analysed in detail in the event that those agreements or some of the restrictive provisions therein will not be exempted under the Technology Transfer Regulation. It should be borne in mind that since most of the licence agreements may not be covered by the Technology Transfer Regulation due to the low market shares thresholds, which leads such agreements out of the scope of the Technology Transfer Regulation, evaluation under Article 81 (3) regime and the Guidelines on Article 81 become more important for those of who conclude such agreements containing restrictive clauses. Therefore, not only the Technology Transfer Guidelines but also the Guidelines on Article 81 will be applicable for those technology transfer agreements outside the scope of the Technology Transfer Regulation[415].

4.2. Restrictive Agreements Under Article 81 (1) Of The EC Treaty

Undertakings make substantial investment for the research and development of intellectual property. This is often a risky endeavor since undertakings may confront sunk cost in case of any failure. In order not to restrict competition more than necessary and to maintain for the undertakings the incentive to innovate, the innovator should not be unduly restricted in the exploitation of intellectual property rights and should normally be free to seek compensation for his successful projects that is sufficient to maintain investment incentives. Article 81 of the EC Treaty should be applied by considering such ex ante investments made by the parties and the risks faced by the

[414] Such assessment is also followed in some recent Article 82 cases as well in that first it has to be concluded that a conduct of the dominant undertaking(s) is the abusive conduct and secondly the Community Courts have dealt as to whether such abusive conducts have pro-competitive effect which outweighs the anticompetitive effects arising out of this abusive conduct. Therefore we believe that the Community Institutions have mostly followed an efficiency defense similar to rule of reason approach both in the recent Article 81 and Article 82 cases.
[415] Treacy and Heide, p. 9.

undertakings pertaining thereto[416]. Those risks incurred by the IPRs owner may most of the time lead to the agreement falling outside Article 81(1) or satisfying the criteria under Article 81(3) regime.

In 2004, the Commission has launched the Guidelines on Article 81 and sets forth in this Guideline its intention on the interpretation and application of Article 81 of the EC Treaty. Despite the fact that this Guideline on Article 81 is not binding[417] for the the respective national authorities, in order for the duly application of Article 81 and for the sake of the principle of legal certainity and the principle of uniformity of law in all Member States[418], such guidance is very essential to understand the Commission's views on cases relating to the application of Article 81[419]. Furthermore, since the Guidelines on Article 81 have been framed by considering the Community Court's jurisprudences[420], we believe that the Community Institutions will not take decisions which deviate from the Guidelines on Article 81 but for the exceptional cases having differing specific features.

As applied by the Community Institutions in the recent Article 82 cases, the Commission has resorted to an economic base approach[421] for Article 81 cases and thus framed the Guidelines on Article 81 in consideration thereof.

It should be noted that before the Council Regulation 1/2003, a restriction of competition was enough for the application of Article 81 (1) of the EC Treaty and the

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[416] Technology Transfer Guidelines.

[417] Although not binding in nature, it has been envisaged that "the application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments. When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission. Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC and in the annual report on competition policy." See Commission Notice on the Co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004) OJ C 101/54 (the "**Commission Notice**"), para 8.

[418] Even if not binding in nature, the Guidelines on Article 81 is an important factor while deciding on Article 81 cases for national authorities. See for a similar approach Ezrachi, Ariel. "The European Commission Guidance on Article 82 EC – The Way in which Institutional Realities Limit the Potential for Reform", University of Oxford Legal Research Paper Series, 2009, located at: http://www.ssrn.com/link/oxford-legal-studies.html, p. 26.

[419] See for further information and for a similar approach Stefan, Oana Andreea. "European Competition Soft Law in European Courts: A matter of Hard Principles?", European Law Journal 14(6), November 2008, p. 753-772.

[420] Guidelines on Article 81, para. 7.

[421] It has been argued that the Community Institutions have followed the rule of reason approach in the recent cases.

Community Institutions did not require a finding of market power for the application of Article 81. In most cases, where the undertakings did not have a market power, it would be enough for the Community Institutions to conclude that the concerned agreement was exempted from the prohibition under Article 81 (1) of the EC Treaty. However, the role of market power has become an essential element once Council Regulation 1/2003 has come into force and the new attitude of the Community Institutions enables the market power analysis for Article 81 cases[422] as it does for Article 82 cases.

In this respect, agreements having a restriction of competition as their object and those having a restriction of competition as their effect are to be distinguished while making the impact assessment. Restrictions of competition by object are those which by their very nature restrict competition and since they have a high potential for negative effects on competition, actual effects on the market and on competition is not required to be demonstrated in order for the application of Article 81 (1) of the EC Treaty. In Anic Partecipazioni case, the Court of Justice has ruled that "for the purposes of applying Article 85(1) *(now Article 101(1))* [423]of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition"[424]. The same ruling has been launched in Consten and Grunding where the Court of Justice has stressed that "besides, for the purpose of applying Article 85(1) *(nowArticle 101(1))*[425], there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition"[426]. Therefore, in case the agreement restricts competition by its object, then there would be no need to assess as to whether the agreement restricts competition to an appreciable extent[427].

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[422] Market power analysis is important for two reasons in that, first, market power is used for jurisdictional purposes and secondly for the determination of the anticompetitive effects of the agreement. For further information see Monti, p. 156-157.
[423] Italics are added.
[424] Case C-49/92 P, Anic Partecipazioni v. Commission, (1999), ECR I-4125 ("Anic Partecipazioni Case"), para. 99.
[425] Italics are added.
[426] Consten & Grundig Case, p. 342; See also, to the same effect, Sandoz Case, paras. 14-15.
[427] However, in case the agreement does not restrict competition by its object, the effects of the agreement on the relevant market should be evaluated.

Such an assessment may be made by taking into consideration of several indicators[428], in particular, the content and the context of the agreement, the way in which an agreement is actually implemented, the actual conduct and behaviors of the parties on the market, the facts underlying the agreement and the specific circumstances in which it operates and the objective aims pursued by the agreement[429]. For instance in CRAM and Rheinzink ruling the Court of Justice has pointed out that "In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied"[430]. Similar ruling has been launched in Anseau-Navewa where the Court of Justice has crystallised that "… it must be stated that the agreement, regard being had to its content, its origin and the circumstances in which it was implemented, clearly expresses the intention of treating parallel imports less favourably than official imports with a view to hindering the former... therefore, the purpose of the agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties, is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks. That finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the agreement to restrict competition"[431].

Guidelines on Article 81 has envisaged that in order to determine the anticompetitive effect of the agreement, it is necessary in each case to take into account of the way in which competition operates on the market. In this respect, the Commission has followed "foreclosure assessment" in that in order to determine the

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[428] The Commission considers that the restrictions covered by the list of hardcore restrictions of competition contained in the Technology Transfer Regulation are restrictive by their very object. See Technology Transfer Guidelines, para. 14; Guidelines on Article 81, paras. 21, 23.

[429] Evidence of the parties' intention with respect to the restriction of competition is also an important indicator, but not a precondition to be established. See Guidelines on Article 81, para. 22.

[430] Joined Cases 29/83 and 30/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission, (1984), ECR 1679 ("Compagnie Royale Case"), para. 26.

[431] Joined Cases 96-102, 104, 105, 108 and 110/82, NV IAZ International Belgium and others v. Commission, (1983), ECR 3369 ("International Belgium Case"), paras 23-25.

negative effects of the agreement concerned in the relevant market, the Commission assesses as to whether the agreement contributes to the creation, maintenance or strengthening of market power or allows the parties to exploit their market power[432]. Therefore, the new approach followed by the Commission has underlined the importance of market position of the parties and the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time[433]. In this respect, the Commission makes assessment with respect to the nature of the agreement, the market position of the parties, the market position of competitors, the market position of buyers of the licensed products, entry barriers, maturity of the market and other factors[434] for each case closely. As can be seen, those factors are the identical to the ones made under Article 82 analysis in order to determine as to whether the undertaking concerned has a dominant position. To put it differently, all those factors are also assessed for Article 82 cases in order to determine as to whether the undertaking concerned has a market power and has a dominant position in the relevant market. Therefore, the new attitude of the Community Institutions towards a market power analysis under Article 81 cases has brought the application of Article 81 closer and identical to that of the ones carried out under Article 82 cases. Therefore, those factors for the determination of market power will be analysed below in detail and explaination on market power in Article 81 and 82 cases will be given profoundly.

The assessment of whether a licence agreement[435] prevents competition should be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions[436]. As the Court of Justice has ruled "… the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute"[437]. The Court of Justice has also

[432] Rousseva, *Modernizing by Eradicating*, p. 611.
[433] Guidelines on Article 81, para. 15.
[434] Guidelines on Article 81, para. 27.
[435] In order to conclude that there is an agreement between the undertakings concerned, there should exist an explicit or an implicit agreement concluded between the undertakings. Implicit agreement may be formed by an explicit or implicit invitation from an undertaking to another undertaking for the purpose of reaching an aim jointly. An ongoing commercial relationship between the parties in some circumstances may lead to conclude that there is an implicit agreement between the undertakings concerned. In order to reach such an outcome, each case should be evaluated in accordance with its own facts and merits. See Guidelines on Article 81, para.15.
[436] Technology Transfer Guidelines, para. 11; Guidelines on Article 81, para. 17.
[437] Case 56/65, Societe Technique Miniere v. Commission, (1966), ECR 337 ("Societe Technique Case"), p. 250.

pointed out the same ruling in John Dere case that "… in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute"[438]. Impacts of the agreement on inter-technology competition[439] and on intra-technology[440] competition should be individually taken into consideration. To put it differently, such impact assessment should be focused on as to whether the agreement concerned restricts actual or potential competition that would have existed in the absence of the contractual restraint(s). The assessment on as to whether the actual or potential competition is restricted to an appreciable extent has been firstly launched in Metro case where the Court of Justice has ruled that "… the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market"[441]. In this ruling the Court of Justice has underlined that the agreement should not affect competition to an appreciable extent and that certain degree of competition may be restricted as long as the market still stays competitive. If, for instance[442], two undertakings established in different Member States cross license competing technologies and undertake in their agreement not to sell products in each other's home markets, potential competition that have existed prior to the agreement may be restricted[443]. If a licensor restricts its licensees from competing with each other, potential competition that could have existed between the licensees in the absence of restraints is restricted. While making the impact assessment, as to whether the parties to

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438 John Deere Case, para. 76.
439 In other words, competition between undertakings using competing technologies should be taken into account.
440 In other words, competition between undertakings using the same technology should be taken into account.
441 Metro 26/76, para. 21.
442 By the same reasoning if a licensor imposes obligations on his licensees not to use competing technologies and these obligations restricts third party' technologies, actual or potential competition that would have existed in the absence of the agreement is prevented. See Technology Transfer Guidelines, para. 12.
443 Technology Transfer Guidelines, para. 12; Guidelines on Article 81, para. 18.

the agreement have objective justifications[444], say objective factors external to the parties[445] themselves, have exist or not should also be taken into account.

As aforementioned, if an agreement is not restrictive of competition by its object, it is then necessary to evaluate as to whether it has restrictive effects on competition. In this respect, both actual and potential effects on the competition should be evaluated. The Court of Justice in John Dere case has ruled that "Article 85(1) *(now Article 101(1))*[446] does not restrict such an assessment to actual effects alone; it must also take account of the agreement's potential effects on competition within the common market"[447]. The possible negative effects of the agreement on competition should also be significant in that at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power[448] or allows the parties to exploit such market power[449].

In some cases, the main transaction covered by the agreement does not restrict competition. In such cases individual restraints ancillary to the main non-restrictive transaction which are directly related and necessary for the implementation of the main non-restrictive transaction[450] will be considered to be compatible with Article 81 (1) of the EC Treaty. In other words, if an agreement does not have as its object or effect the restriction of competition, then restrictions, which are directly related[451] to and necessary[452] for the implementation of that transaction, also fall outside Article 81 (1) of

[444] In this respect, as to whether the parties would have accepted to conclude a less restrictive agreement will not be important but as to whether, given the nature of the agreement and the characteristics of the market, a less restrictive agreement would have been concluded or not by undertakings will be evaluated. See Technology Transfer Guidelines, para. 12; Guidelines on Article 81, para. 18.

[445] For instance, entering into a new market, restrictions required for safety and health reasons, etc.

[446] Italics are added.

[447] John Deere Case, para. 77; See also Case 31/85 ETA v. DK Investment (1985), ECR 3933 ("ETA Case"), para. 12.

[448] The mere fact market shares of the parties have exceeded the safe harbors envisaged in a block exemption will not be enough to conclude that the agreement will be caught by Article 81(1) or will not satisfy the criteria under Article 81(3) of the EC Treaty.

[449] Technology Transfer Guidelines, para. 15.

[450] See Korah, *Cases and Materials*, p. 53-72 with respect to the case law on ancillary restraints.

[451] A restriction is considered to be directly related to the main transaction in case it is subordinate to the implementation of that transaction and is inseparably linked to it. See Guidelines on Article 81, para. 29.

[452] A restriction is considered to be necessary when it is objectively necessary for the implementation of the main transaction and be proportionate to it. See Case T-112/99 Metropole Television and others v. Commission (2002), ECR II-2459 ("Metropole Television Case"), para. 106; Guidelines on Article 81, para. 29.

the EC Treaty[453]. In Metropole Television case, the Court of First Instance has ruled that "… a number of restrictions were objectively necessary to implementing certain operations. Failing such restrictions, the operations in question could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerablyless probability of success"[454]. In parallel with this ruling, the Court of Justice in Gottrup-Klim case has pointed out that "… a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organized cooperation which are in direct competition with it, is not caught by the prohibition in Article 85 (1) *(now Article 101 (1))*[455] of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers"[456]. However, in any case it is required to ascertain as to whether such restrictions are proportional or not to implement the operations concerned[457].

However, an application of the ancillary restraint concept, in particular the objective necessity of a restriction, should be distinguished from the application of the defenses under Article 81(3) which relates to certain economic benefits produced by restrictive agreements and which should be balanced against the restrictive effects of the agreements[458]. Ancillary restraint doctrine does not involve any weighing of pro-

[453] In one of its rulings, the Court of Justice has underlined that "… the franchisor must be able to communicate his know-how to the franchisees and provide them with the necessary assistance in order to enable them to apply his methods, without running the risk that that know-how and assistance might benefit competitors, even indirectly. It follows that provisions which are essential in order to avoid that risk do not constitute restrictions on competition for the purposes of article 85 (1). That is also true of a clause prohibiting the franchisee, during the period of validity of the contract and for a reasonable period after its expiry, from opening a shop of the same or a similar nature in an area where he may compete with a member of the network. The same may be said of the franchisee's obligation not to transfer his shop to another party without the prior approval of the franchisor; that provision is intended to prevent competitors from indirectly benefiting from the know-how and assistance provided … the franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol. It follows that provisions which establish the means of control necessary for that purpose do not constitute restrictions on competition for the purposes of Article 85 (1)". See Pronuptia de Paris Case, paras. 16-17.
[454] Metropole Television Case, para. 111.
[455] Italics are added.
[456] Gottrup-Klim Case, para. 45.
[457] We believe that excluded restrictions under the Technology Transfer Regulation may also be assessed by using the ancillary restraint doctrine in accordance with the factual and legal circumstances of the cases and in case such clauses are proportional and are directly related and necessary for the implementation of the main non-restrictive transaction, they should fall outside the scope of Article 81 (1) of the EC Treaty.
[458] See Guidelines on Article 81, para. 30.

competitive and anticompetitive effects[459] and the assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive transaction or activity, a particular restriction is necessary for the implementation of that transaction or activity and proportionate to it[460].

Finally, it should be borne in mind that in case the main operation in the agreement will not fall within the scope of Article 81 (1) prohibition, ancillary restrains will not fall within the scope of Article 81 (1) prohibition. On the other hand, in case the main operation in the agreement will be caught by Article 81 (1) prohibition, but be exempted by Article 81 (3) of the EC Treaty, then such exemption will also cover the restraints which are directly related and necessary for the operation[461].

4.2.1. Impact Assessment Of Technology Transfer Agreements

As aforementioned, Guidelines on Article 81 has envisaged that in order to determine the anticompetitive effect of the agreement, it is necessary in each case to take into account of the way in which competition operates on the market. In this respect, the nature of the agreement, the market position of the parties, the market position of competitors, the market position of buyers of the licensed products, entry barriers, maturity of the market[462] and other factors[463] should be scrutinized for each case closely. In this part of the Thesis, those indicators will be closely examined for the sake of the cases both under Article 81 and Article 82. Since those indicators have been mostly used for and evaluated under Article 82, the main rulings of the Community Courts for Article 82 cases will also be demonstrated in order to highlight the

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[459] However, it should be noted that some has argued that "the view the ancillary restraint doctrine does not require any weighing is not a convincing one and difficult to accept. This view relies on an alleged distinction between proportionate restraints objectively necessary to the implementation of the main non-restrictive operation (which are ancillary and fall outside Article 81(1)) and restraints that are indispensable to achieve efficiencies which offset anticompetitive effects of the transaction (which can be assessed only under Article 81 (3)). See Jones, Allison. "Analysis of Agreements under US and EC Antitrust Law-Convergence or Divergence?", The Antitrust Bulletin, Vol. 51, No. 4/Winter 2006, p. 779.

[460] See Metropole Television Case, paras. 106-107; Guidelines on Article 81, para. 30.

[461] Metropole Television Case, para. 116.

[462] In case the licensed technology is a well known and widespread technology and not changing very much and in which demand is relatively stable or declining, it is accepted that there is a mature market and in such market, restrictions of competition are more likely to have negative effects than in more dynamic markets. Guidelines on Article 81, para. 139.

[463] Those factors may be, inter alia, cumulative effects of the license agreements, 'the duration of the agreements, the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour'. Guidelines on Article 81, para. 140.

application of those indicators for Article 81 cases in accordance with the new modernized approach of the Community Institutions.

4.2.1.1. Determination Of Market Shares Held By The Parties

In order to correctly evaluate the impact of the technology transfer agreements on competion, all aforementioned factors should be carefully and on an individual basis examined. For the examination of the market position of the parties, market shares of the respective undertakings are used as an indicator[464]. In this respect, it should be noted that one of the most important factors to understand the effects of the agreement is also the market shares of the parties to the agreement and their competitors. Even it is a common view that the higher their market share possessed by the undertakings, the greater their market power is likely to be, in cases where there are low barriers to entry, market shares will not be enough to conclude that the effect of the agreement on competition is very high.

As aforementioned, market shares of the parties are valuable indicators to determine the anticompetitive effects of the agreement. The relevant market has two dimensions: the product or service market and the geographic market. Since the determination of the relevant market is important in order to find out the market shares of the undertakings both for the application of Technology Transfer Regulation and for the impact assessment of the technology transfer agreement in accordance with the Guidelines on Article 81, indicators established by the Community Institutions will be given profoundly below.

4.2.1.1.1. Product Market

The Market Definition Notice[465] has defined the relevant product market as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[466] The crucial issues to be focused in this definition are the

[464] Guidelines on Article 81, para. 136.
[465] Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, OJ 1997 C 372/5, (the "**Market Definition Notice**").
[466] Market Definition Notice, para. 7

products regarded as interchangeable or substitutable by the consumers (demand-side substitution) and the competing undertakings having the ability to switch their production in the short term and without incurring large sunk costs[467] (supply-side substitution). In Tierce Ladbroke, the Court of First Instance has clarified that the relevant product or service market "includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question"[468]. Therefore, as it is pointed above, in order to define the relevant market, demand-side substitution and the supply-side substitution has to be determined.

i. Demand-Side Substitution

Demand-side substitution comprises purchasers' reactions[469] to switch to the other products or services in case of an increase in price of the product or services under consideration[470]. The Market Definition Notice has pointed that "demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions"[471]. The determinative factor in demand-side substitution is the consumers' willingness and appreciation to regard the product or the services as the substitutes to the product being under consideration. Since, in case the purchasers will switch easily to available substitute products or to suppliers, undertakings cannot have a significant impact on the prevailing conditions of sale[472]. In this regard, purchasers' preferences and views[473] plays an important role to show the relevant product market. For instance, luxury and standard

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[467] O'Donoghue and Padilla, p. 69.
[468] Case T-504/93 Tierce Ladbroke v. Commission (1997) ECR II-923 ("Tierce Ladbroke Case"), para. 81.
[469] Since reactions and perceptions of the consumers are of importance for the determination of the relevant product interchangeability, it is referred to as the "subjective interchangeability" by some authors, see Aşçıoğlu, Öz Gamze. Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması. Ankara: Rekabet Kurumu, 2000, p. 92-97.
[470] Bellamy and Child, p. 259.
[471] The Market Definition Notice, para. 13.
[472] Case T-177/04 EasyJet v. Commission (2006) ECR II-1931 ("EasyJet Case"), paras. 104, 108.
[473] The customers' view may also be obtained by asking them directly which may also be taken into account as evidence.

type of product[474] may constitute different product market in that purchasers' preferences for the luxury products depend less on the functionality and more on its quality and/or its image[475] and/or the idea behind the purchasing of the concerned product[476] and/or other grounds as such[477].

The Commission has followed the 'small but significant non-transitory increase in price'[478] test (the "**SSNIP**") in order to find out as to whether the product under consideration and the product switched by the purchasers are real substitute products[479]. In the Relevant Market Notice, it has been clarified that "The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by consumers. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase…The question to be answered is whether the supplier's customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographic areas is such that small, permanent increases in relative prices would be profitable"[480].

Demand-side substitution can be clarified through the examination of product's characteristics and functional[481] interchangeability in that product having materially different characteristics and/or product not functionally being interchangeable may not constitute the same product market. It should be kept in mind that not all parts of the

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[474] Bellamy and Child, p. 261.
[475] Bellamy and Child, p. 261-262.
[476] Airtours, OJ 2000 L93/1 (2000).
[477] Case M.938 Guinness/Grand Metropolitan, OJ 1998 L288/24 ("Guinness Decision"), para 14.
[478] For further information, see Korah, Valentine. An Introductory Guide to EC Competition Law and Practice. 9th Edition, Hart Publishing, 2007 ("Korah, *Introductory Guide*"), p. 107-111; Øystein Daljord, Sørgard Lars and Thomassen Øyvind. "The SSNIP Test And Market Definition with the Aggregate Diversion Ratio: A Reply to Katz and Shapiro", Journal of Competition Law & Economics, 5(2), November 2007, p. 263–270.
[479] In order for the correct application of SSNIP test, price concentration studies, the studies on the behavior of the alleged dominant firm and traditional characteristics approach have been used. See Geradin and Others, p. 14.
[480] Relevant Market Notice, paras. 39 - 41.
[481] Since the functions of the product have been determined in accordance with the characteristics of the said product, functional interchangeability is referred to as the "objective interchangeability", see Aşçıoğlu, p. 94-96.

product but solely some part of the product concerned may serve for the same functionality and/or have similar technical features with another product. In such cases not the products concerned but the substitutable parts of the products may form the relevant product market[482]. The Court of Justice in Hoffman La Roche has stressed that "the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such product is concerned"[483]. However, it should also be borne in mind that product having similar characteristics and/or product interchangeable functionally[484] may not always result that the product under consideration will constitute the same product market[485] and other indicators should be dealt with in order to clearly define the relevant product market[486].

Evaluating the previous instances of switching by the consumers to substitute product and the assessment as to whether demand for the respective product has been stable over a long period of time are also important evidences in determining that the product forms a distinct product market[487]. The Court of Justice in Tetra Pak case has pointed out that a 15-year period was evidence that non-carton packaging was not a viable substitute for carton[488].

Attention on the cost incurred by the purchasers when switching to other product and any other barriers as such are also required to be taken in order to crystallize the relevant product market. Additionally purchasers' orders and bidding data or the products under consideration which have absolute different levels of prices which, at the end, form different relevant product market[489] may be helpful to clarify the

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[482] Aşçıoğlu, p. 94-96.
[483] Hoffmann-La Roche Case, para. 28.
[484] The Commission has put forward its views in Case M. 430 Procter & Gamble/Schickendanz, OJ 1994 L354/32 ("Procter & Gamble 430") that the tampons and sanitary towels has constituted different product market even if it serves in general for the same function, since as a result in price increase in tampons would lead to an unprofitable situation due to consumers' switch to sanitary towels.
[485] Korah, *Introductory Guide,* p. 107-111; Bellamy and Child, p. 259-262; O'Donoghue and Padilla, p. 76-88.
[486] Case M.190 Nestle/Perrier, OJ 1992 L/356/1, para. 9; Case T-395/94 Atlantic Container Line v. Commission (2002) ECR II-875 ("Atlantic Container 395/94"), paras. 798-799, 828; Case 66/86 Ahmed Saeed Flugreisen v. Zentrale zur Bekampfung unlauteren Wettbewerbs (1989) ECR 803, paras. 39.
[487] Bellamy and Child, p. 263-264.
[488] Tetra Pak 333/94, paras. 7-19.
[489] Microsoft Decision, paras. 469, 523.

relevant product market[490] as well. It should be noted that when a new product is supplied to the market, 'it may be possible to identify the products from which it won shares'[491] or it may be useful to examine the sales ratio of other product once the supply of a product under examination has reduced as a result of financial difficulty[492] or as such the supplier of the product under consideration has been confronted.

In addition to the SSNIP test, the Commission has applied the "price elasticity" test in order to determine the relevant product market. Price elasticity test has two dimensions: own-price elasticity and cross-price elasticity. By the application of own-price elasticity test, the Commission has found out the effect of the price increase or decrease of the product concerned on the demand for that product in question when all other products' prices are kept stable. To illustrate, if the own-price elasticity is less than one, it may be concluded that the price changes do not have a material effect on purchasing pattern[493], but if not[494], then the demand is said to be elastic[495].

By the application of cross-elasticity test, the Commission has determined the effect of the price increase or decrease of the product concerned on the demand for another prospective substitute product provided that all other products' prices are kept stable. In case the demand for another product will increase due to the price increase in the product concerned, then it may be concluded that there is a competitive relations between those products and thus the products concerned may constitute the same relevant product market.

Close price correlations of two products within a period of time may also show as to whether those two products under consideration are substitute products and thus form the same product market[496]. It should, however, be taken into account that a

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[490] For more information please see the Commission's view in Case M. 3178 Bertelsmann/Springer/JV (2005) paras. 41 and 44 that the order patterns are good indicators to show the relevant product market; the Commision's view in Case M.3216 Oracle/Peoplesoft, OJ 2005 L218/6 ("Oracle Decision"), paras 98, 129, 136, 142 and 144 that the tender documents may be helpful to clarify the relevant product market by identifying the suppliers of the product concerned.
[491] Bellamy and Child, p. 262-263.
[492] Bellamy and Child, p. 262-263.
[493] Bellamy and Child, p. 264-265.
[494] Hilti Case, paras. 18, 75.
[495] Bellamy and Child, p. 264-265.
[496] Case M.1939 Rexam/American National Can (2000), para.12; Case M.2972 DSM/Roche Vitamins, OJ 2004 L82/73, para. 43.

common inflationary rates, exchange rates, raw materials or as such which may have impacts on the said two products under consideration even if they are not substitute products at all. In such cases, it would not be correct to construe that the positive and high price correlations between those products will lead to result that those two products are within the same product market.

It is also to be recorded that if the supplier produces the similar products for different categories of purchasers or sells those products through different distribution means, it may be correct to construe that those products pertain to the same product market[497].

Finally it should be noted that internal company documents[498] issued by or for the undertakings concerned with respect to the demands of the purchasers or anticipations regarding the rival products or the competitors or as such may also be useful evidences in addition to the indicators as set forth above.

ii. Supply-Side Substitution

In compare to the demand-side substitution, supply-side substitution is of secondary status due to its difficulty in its application[499]. It should be, however, taken into consideration that the Court of Justice has emphasized in its ruling the importance of its application[500].

Supply-side substitution focuses on the suppliers of the products other than the supplier of the ones under consideration and takes into account as to whether those suppliers would, *rapidly and without incurring any considerable cost*[501] *or risks*[502], switch their production facilities to supply prospective substitute product or to the product under consideration instead of or in addition to the products they previously

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[497] Bellamy and Child, p. 268. See i.e. Case T-221/95 Endemol Entertainment v. Commission (1999) ECR II-1299, paras. 109-112; Case M.2097 SCA/Metsa Tissue, OJ 2002 L/57/1 ("Metsa Decision"), para. 17; Case M.3436 Continental/Phoenix (2004) ("Continental/Phoenix Decision"), paras. 12-17; Case M.3658 Orkla/Chips (2005) ("Orkla/Chips Decision"), paras. 9-15.

[498] Case C-62/86 Akzo Chemie v. Commission (1991) ECR I- 3359 ("Akzo Case"), paras. 53, 59.

[499] Bellamy and Child, p. 270.

[500] The Court of Justice has annulled the Commission's finding due to the lack of application of supply-side substitution. See Continental Can Case, para. 36.

[501] O'Donoghue and Padilla, p. 71-75.

[502] Relevant Market Notice.

produce. The Court of Justice has ruled in Kish Glass case that due to the identical nature of the glasses produced by the undertakings concerned, glass manufacturers can convert their production quickly and without incurring excessive cost[503]. As aforementioned, the Relevant Market Notice envisages that the supply-side substitution is to be taken into consideration when the suppliers switch to supply the product in question in the 'short term', however, does not specify a time period which can be understood as 'short term'. Instead, it has set forth that a short term may be understood as 'a period that does not entail a significant adjustment of existing tangible and intangible assets'[504].

Switching costs are of crucial while evaluating the supply-side substitution in that 'manufacturing equipment, training of staff, marketing costs and any distribution costs associated with the product'[505] have to be taken into consideration in order to find out the correct supply-side substitution and thus the relevant product market. In Microsoft case, the Commission has added the importance of purchaser's views with respect to the familiarity with the look and feel of a product[506].

The rulings of the Community Courts have also showed that other than or in addition to the ones as aforementioned, there may be also other barriers[507] such as regulatory and/or or technological hindrances[508] which may prevent the suppliers to switch to produce the prospective substitute product or the product under examination[509]. As mentioned in the demand-side substitution, the past events with respect to the switch by the suppliers to produce the prospective substitute product or

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[503] Case T-65/96 Kish Glass v. Commission (2000) ECR II-1885 ("Kish Glass Case"), para. 61, 68.

[504] Relevant Market Notice paras 16-20. The Court of Justice acknowledges the Commission's finding that due to the time constraint, the tyres concerned have formed different product markets. See Michelin 322/81, paras. 41, 56.

[505] Bellamy and Child, p. 272.

[506] Microsoft Decision, para. 505.

[507] See the Court of Justice's ruling that an issuance of a license by General Motors in order to enable the customers to commence a commercial activity constitute a barrier. See i.e. Case 26/75 General Motors Continental v. Commission (1975) ECR 1367 ("General Motors Case"), para. 9; Case C-82/01P Aeroports de Paris v. Commission (2002) ECR I-9297 ("Aeroports de Paris Case"), paras. 96, 106; Case 226/84 British Leyland v. Commission (1986) ECR 3263 ("British Leyland Case"), para. 9.

[508] See i.e. Case T-229/94 Deutsche Bahn v. Commission (1997) ECR II-189 ("Deutsche Bahn Case"), para. 10; Case M.269 Shell/Montecatini, OJ 1994 L332/48, paras. 31-32; Case M.2396 Industri Kapital/Perstop (II) (11 May, 2001), paras. 77-80.

[509] In Microsoft Decision, the Commission has stressed the importance of intellectual property rights as a barrier to enter into the concerned product market.

the product under consideration may play an essential and an evidencing role to determine the relevant product market.

It has been highly debated[510] as to whether 'connected product markets'[511], due to the functionality and the usage of the said product, may constitute distinct markets[512] or are regarded as in the same product market. The Court of Justice in Hilti case has ruled that there are separate product markets for nail guns, Hilti-compatible cartridge strips and Hilti-compatible nails since those are not consumed together and produced for a single brand of gun[513].

Finally, it should be recorded that even if potential competition and supply-side substitution 'overlap in part'[514], those issues differ from each other. The Relevant Market Notice envisages that "potential competition is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry"[515]. Therefore, those issues may be distinguished in that while supply-side substitution gives reaction rapidly to the price increase of the product or service concerned, on the other hand, a longer period for the commencement of supply for the concerned product or service should be required for potential competition. Additionally, while significant costs or risks will not be occurred in supply-side substitution, potential competition, on the other hand, refers to the entrance of potential supplier of the concerned product to the relevant product market in the long term and may involve significant sunk costs[516]. Finally 'the competitive constraint imposed by supply-side substitution has clear-cut significant impact on both

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510 See i.e. Case 22/78 Hugin v. Commission (1979) ECR 1869 ("Hugin Case"), paras. 6-8; Tetra Pak 83/91, para. 63.
511 Bellamy and Child, p. 274-275.
512 It has been discussed as to whether branded and own label products may constitute a separate market or not. See i.e. Metsa Decision, para. 28; See Case 6/73 & 7/73 Istituto Chemioterapico Italiano S.p.A and Commercial Solvents (1974) ECR 223, ("Commercial Solvents Case"), para. 22; Case T-139/98 AAMS v. Commission (2001) ECR II-3413 ("AAMS Case"), para. 8 for a discussion as to whether products have formed separate markets due to its different stages in production or distribution channels. See Bellamy and Child, p. 277 – 280 for other discussions and indicators in order to find the relevant product market.
513 Bellamy and Child, p. 275; See also Hilti Case, para. 66.
514 Atlantic Container Case, para. 834.
515 Relevant Market Notice, para. 24.
516 O'Donoghue and Padilla, p. 72-73.

pre-entry and post-entry prices. Meanwhile, potential entry felt via lower post-entry prices only.'[517]

4.2.1.1.2. Geographic Market

Following the determination of relevant product market, relevant geographic area is to be found out. SSNIP test is also applicable in order for the determination of the relevant geographic area[518]. In other words, in case of purchasers' switch due to price increase of 5-10%, then it may be correct to draw a broader geographic area. The geographic market[519] has been defined in the Relevant Market Notice as the area, in which the undertakings concerned are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous[520] and which can be distinguished from the neighboring areas due to the appreciably different conditions of competition[521].

There are some indicators helpful to determine the relevant geographic area. The Court of Justice has determined the geographic area as Italy in AAMS case since, inter alia, '(a) AAMS provide cigarette distribution services only in Italy, but not in other Member States, (b) it had a de facto monopoly over the whole distribution of cigarettes in Italy for a long period of time[522] (c) there exists a special legislation governing all operations with respect to cigarettes in Italy, (d) there exists significant differences in retail sale prices between Italy and other Member States, (e) there exists distinctive preferences of Italian consumers and (f) there exists a large market share held by AAMS in Italy but not in other Member States'[523].

While evaluating the demand-side substitution, the essential issue to be found out is that the purchasers' willingness to buy the product or the services concerned from

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[517] O'Donoghue and Padilla, p. 72-73.
[518] Korah, *Introductory Guide,* p. 114.
[519] The Court of Justice has defined the relevant geographic area as the "area in which the product is marketed and where conditions of competition are sufficiently homogenous for the effect of the economic power of the undertaking concerned to be able to be evaluated" in United Brands Case, para. 11; See also Societe Alsacienne Case, para. 15.
[520] It has been ruled in Deutsche Bahn Case, para. 11 that the competition needs to be similar or sufficiently homogenous. Therefore perfect homogenous competition is not required.
[521] The Market Definition Notice, para. 8.
[522] Bellamy and Child, p. 282-283.
[523] AAMS Case, paras. 38-42.

the areas[524] other than the prospective relevant geographic area. On the other hand, consideration is to be given as to whether the suppliers may commence to produce the product or provide the service concerned in the area under consideration and/or may supply the product or the services concerned to those area. During the assessment, customs duties, regulations, taxation, national preferences, transport costs, territory particularities, characteristic of the product, conditions of trade, habits of consumers or other barriers as such[525] having an impact on the suppliers' and the purchasers' wills should be taken into account for the correct determination of the relevant geographic area. It should be borne in mind that the relevant geographic should circulate all such areas where demand-side substitution and the supply-side substitution have met[526].

As aforementioned, transportation costs[527] may have an impact on demand-side substitution and/or the supply-side substitution in that either the purchasers may be willing to buy the product or the services from the areas other than the area which they incur additional cost and/or the suppliers may be willing to commence to supply in or to the areas other than the area which they incur any additional costs. In Irish Sugar case, it was decided that the freight cost have a significant impact on the trade and be deemed as a barrier and thus the relevant geographic area is determined as Ireland for to the retail and industrial white granulated sugar supply[528].

Significant differences in the price of the products supplied in different areas may lead to conclude that those products have been supplied in the same geographic markets[529], since it may be possible that the purchasers do have the intention to order the same product from or travel to the area which they may buy the same product at a

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524 Bellamy and Child, p. 283.

525 Some authors have divided and classified the impacts under the heading "demand-side substitution" and "supply-side substitution". However, it would not always be correct to examine the impacts under those headings. For instance transport cost, national preferences, pricing data, customs duties and/or taxation, etc may have impacts on the demand-side substitution and/or the supply-side substitution. See Bellamy and Child, p. 284-292 for the said classification.

526 For more information please see O'Donoghue and Padilla, p. 92.

527 United Brands Case, paras. 37-38; Hilti Decision, para. 81; Case M.3625 Blackstone/Acetex (13 July, 2005) ("Blackstone Decision"), para. 26.

528 Case C-497/99 P Irish Sugar plc v. Commission (2001) ECR I-5333 ("Irish Sugar 497/99"), paras. 87, 104.

529 It should be noted that some authors have the views that as a general rule in case there would be significant price correlation between the same product in different regions, since the purchasers have the ability to travel to or order from the location outside their regions and suppliers do not confront obstacles to shipping their products into the area concerned, it may be concluded that the geographic area includes all such area the purchasers have located in and the area the purchasers have bought the product concerned, see O'Donoghue and Padilla, p. 93-94.

cheaper price. It should be, however, borne in mind that in case the purchaser will confront barriers such as taxation, customs duties, transportation costs[530] or as such which may result in the cheaper product's prices to increase or lead them to incur any additional costs and/or expenses which may lead the price of the product similar to that of one with a higher price, then it may be concluded that those areas may not pertain to the same geographic area. Therefore, all facts should be evaluated in accordance with the factual evidences of the respective incidents[531].

As mentioned above, national preferences and cultural peculiarities[532] such as 'linguistic requirements[533], consumer-led standards, and requirements specific to a local area'[534] may lead to the formation of different geographic areas. Geographic purchasing patterns and trade flows[535] may also clarify the relevant geographic area. In Michelin case, the Court of Justice has concluded that the relevant geographic area is Netherlands[536] due to (a) the attitude of the dealers to purchase their tyres solely from the suppliers in Netherlands (b) the activities of the undertaking concerned were concentrated in the Netherlands[537] (c) discounts given to the dealers leading to abuse takes place in the Netherlands. The Relevant Market Notice stressed the importance of national and purchasers' preferences and that in each case such differences should be taken into consideration. Additionally, it may happen that local distribution or an after sales network may lead to a narrow definition of geographic market. Since, in such cases it may be difficult for the suppliers outside the respective regions to supply their products into the area concerned.

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530 The Commission has concluded that "persistent price differences that are not due to transport costs are a strong indicator that hair products in one Member State do not exercise a competitive constraint on hair products in other Member States" in Case M.3149 Procter & Gamble/Wella (30 July, 2003) ("Procter & Gamble 3149"), para. 27.

531 In Soda Ash – Solvay, OJ 2003 L10/10, para. 43, the Commission has concluded that due to the objective differences in the purchase conditions of the respective products between the UK and the other Member States, the geographic area is the UK. However, the Court of First Instance in Hilti Case ruled that even if the existence of the artificial barriers, the geographic area is the Community as a whole. The similar reasoning has been launched in Tetra Pak 83/91, para. 94.

532 Case T-310/01 Schneider Electric v. Commission (2002) ECR II-4071, para. 159; Case T-119/02 Royal Philips Electronics v. Commission (2003) ECR II-1433, para. 89; Case T-69/89 Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission (1991) ECR II-485 ("Radio Telefis 69/89"), para. 62.

533 The Court of Justice have ruled in Case T-346 & 47/02 Cableuropa v. Commission (2003) ECR II-4251, paras. 18, 106 that Spain forms a separate geographic area due to the linguistic requirement and the cultural grounds.

534 Bellamy and Child, p. 286; Aşçıoğlu, p. 99-102.

535 O'Donoghue and Padilla, p. 93-95; Bellamy and Child, 287; See Oracle Decision, para. 29.

536 Michelin 322/81, para. 28.

537 Korah, *Introductory Guide* p. 112.

In case the suppliers hold high and constant market shares for a long period of time and unless there is other grounds for the determination of a broader or separate[538] geographic market, it may be concluded that the geographic area is narrow due to non-existence of considerable competition that the suppliers concerned have confronted[539].

As aforementioned, past evidences with respect to the purchasers' reactions to a price change may serve to find out the demand-side substitution and may also guide to determine the relevant geographic areas[540]. However, it should be borne in mind that it would not be correct to apply the market definitions from the earlier decisions[541]. Since the concerned market may change in the meanwhile and that the examination should be updated. Additionally, the structure of the market such as the commercial policies 'generally adapted to the specific conditions existing on each market'[542] or the existence of production sites in different locations with different marketing teams in different Member States[543] may lead to determine a narrower geographic market.

Finally, it should be kept in mind that internal company documents issued by or for the undertakings concerned and the purchasers'[544] and competitors' perceptions are essential indicators to draw the relevant geographic area.

4.2.1.1.3. Market Shares As A Proxy For Market Power

Market shares are used as a proxy in order for the assessment of the market power held by the undertakings concerned in the relevant market provided that the calculation made during such an assessment has been correctly applied. Sales generated by the undertaking under inspection in the relevant market have been taken into consideration during such evaluation[545]. During such an assessment, ready-made information, i.e. estimates made by the undertaking, studies produced by the consultants

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538 Continental/Phoenix Decision, paras. 41, 56.
539 Bellamy and Child, p. 288; See Case M.3099 Areva/Urenco/ETC JV (06 October, 2004) ("Areva Decision"), para. 76.
540 Bellamy and Child, p. 288; Blackstone Decision, paras. 102, 133.
541 Korah, *Introductory Guide,* p. 114. See also Case T-125 & 127/97, Coca Cola Company and Coca Cola Enterprises Inc. v. Commission (2000) ECR II-1733, para. 82.
542 Michelin 322/81, para. 26.
543 Procter & Gamble 3149, para. 24; See also for narrow definition of market Continental/Phoenix Decision, paras. 44; Orkla/Chips Decision, para. 17.
544 Tierce Ladbroke Case paras. 104, 106.
545 Relevant Market Notice, para. 53.

and/or trade associations, volume and/or value information have been taken into account.

It should be borne in mind that market shares are not, save in exceptional cases, the sole determinative indicator of dominance and that other factors should be assessed accordingly. In Hoffmann-La Roche ruling, the Court of Justice has stressed that "The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative … A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned …The relationship between the market shares of the undertakings involved in the concentration and of its competitors, especially those of the next largest… significant evidence of the existence of a dominant position"[546]. Following this judgment, a conclusion may be drawn that not only the market shares of the undertaking but also the next largest competitor(s) of the said undertaking should be taken into consideration even if the market shares of the undertaking under consideration would be very high in the relevant market. Since as to whether a competitive condition[547] exists or not should be determined before the conclusion of dominance.

Save in exceptional cases, high market shares may be presumed of market power. In AAMS ruling, the Court of First Instance has concluded that 100% share held by the undertaking in wholesale distribution of cigarettes leads to a de facto monopoly in the relevant market[548].

It has been accepted that a share exceeding 70 % in the relevant market is, in general, supposed to be a determinative that the undertaking concerned holds a dominant position in the relevant market. In Hoffmann-La Roche case, the Court of

[546] Hoffmann-La Roche Case, para. 48.
[547] It should be pointed out that there are also indicators, such as the existence of barriers to entry and the countervailing market power, taken into account during the assessment of dominance.
[548] AAMS Case paras. 40, 48.

Justice ruled that having 70-90% shares in the several vitamin markets was "… so large that they prove the existence of a dominant position"[549].

Analysis of the competitive conditions in the relevant market plays a crucial role in case an undertaking holds market shares between 50% - 70% in the determined relevant market. In Akzo ruling, it has been concluded that "Market share, while important, is only one of the indicators from which the existence of a dominant position may be inferred. Its significance in a particular case may vary from market to market according to the structure and characteristics of the market in question"[550]. The Court has continued to point out that the Commission is under obligation to take into account also the relevant economic evidences in order to assess market power of the undertaking concerned. To put it differently, in addition to the market shares of the undertaking in the relevant market, existence of entry barriers have played an essential role in concluding the existence of dominance.

In case of holding market shares exceeding 40% up to 50%, the assessment of other factors[551] also make sense for the evaluation of market power of the undertaking. Since the Court does not see conclusive in case of holding such share ratios.

Furthermore, other upholding is required during the assessment of market power in case of market shares below 40% in the relevant market, since it is commonly admitted that such a share ratio is, save in exceptional cases, very unlikely for a finding of market power[552].

Finally, it should be noted that the importance of market shares while evaluating the market power arises from the connection with the "burden of proof" in the competition cases[553]. Since if high market shares are assumed as the evidence of market power, the burden of proof will be on the undertaking in question and that the

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[549] Hoffmann-La Roche Case, para. 60. See also Hilti Case, paras. 89, 92; Tetra Pak 83/91, para. 109 for a similar approach with respect to the determination of dominance.

[550] It should be pointed here that the Court, *unfortunately*, stressed in the same ruling that the very large market shares (in this case the shares around 50%) are, save in exceptional cases, the evidence of dominant position. Since such a conclusion may condemn the undertaking solely by having 50% market shares in the relevant market by disregarding the importance of evaluation of other factors in the factual case. See Akzo Case, paras. 59-60.

[551] See i.e. Hoffmann-La Roche Case, para. 42.

[552] O'Donoghue and Padilla, p. 114-115; Bellamy and Child, p. 925-926.

[553] Geradin, and Others, p. 17-18 for a further discussion.

undertaking concerned should refute that it does not possess the market power even if it holds a high market shares. If otherwise, the Commission or the public authorities will bear the burden of proof and has to prove that the undertaking concerned has both the high market shares and other indicators relevant in the concerned market has shown that there exists no contrary circumstances evidencing that the undertaking concerned holds market power.

4.2.1.2. Entry Barriers

Entry barriers are said to be measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry[554]. Save in exceptional cases, the Community Courts urges the Commission to make analysis with respect to the indicators, other than and in addition to the market shares of the undertaking, as evidences which pertains to the relevant market before the conclusion that the concerned undertaking has a market power. It should be noted that, save in exceptional cases, there is no certainty on the value of market shares as an indicator of market power in proportion to that of other indicators[555] or as to whether some indicators have a priority over the others and/or the market shares.

In this respect, definition or constituents[556] of entry barriers[557] have a very crucial role in that, inter alia, first, if entry barriers would be defined narrowly, the undertaking under consideration may escape from the inspection under competition rules in the EC Treaty, since lack of entry barriers may lead to the conclusion that the relevant market is open to competition and potential competitors may easily enter to the relevant market. Since in case of narrow definition and thus low entry barriers, even if the undertaking concerned have high market shares in the relevant market, it would be unlikely that the undertaking will act independently of its competitors and its

[554] Guidelines on Article 81, para. 138.
[555] Geradin and Others, p. 19-20.
[556] See O'Donoghue and Padilla, p. 117-119 for different definition of entry barriers.
[557] It has been envisaged in the Guidelines on Article 81 that entry barriers may result 'such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage or brand loyalty of consumers created by strong advertising over a period of time'. Guidelines on Article 81, para. 138.

purchasers. If otherwise, the same undertaking would be assumed to have market power due to the existence of entry barriers in the concerned market.

Entry barriers have been defined as "factors which prevent or hinder companies from entering a specific market"[558]. As can be seen, broad approach has been taken into consideration by the Community Institutions while defining the entry barriers. It is not that surprising that the entry barriers have been defined broadly as any conduct having the effect of prevention of undertaking to enter a relevant market, since both in Article 81 and Article 82 of the EC Treaty have envisaged, inter alia, a precondition that competition must be affected in order for the application of those two Articles. To put it differently, as long as competition will not be affected, those Articles will not be applicable. By the same token, as long as competitors and/or the potential competitors will have the ability to easily penetrate the relevant market and/or expand in the relevant market, it may be correct to conclude that the market is open to competition. In other words, if entry barriers are low-defined and does not include each important factors having the ability to prevent the entry to and/or expansion in the relevant market by the competitors and/or the potential competitors, then it may be likely to conclude that there exists no or low barriers to entry by competitors and/or the potential competitors even if the concerned market is not open to competition.

In our views, entry barriers should be defined broadly in a way to include any factors that prevents entry to and/or expansion in the market concerned by competitors and/or the potential competitors. Even if restrictive agreements entered into by undertakings may also amount to an entry barrier by making the access of entrants more difficult and foreclosing competitors[559]. However, while making assessment of dominance, those factors should be carefully analyzed in accordance with the factual distinctive features of the cases and the relevant market concerned. In this respect, some important instances will generally be analyzed below non-exhaustively.

i. **Legal or Administrative Barriers to Entry:** Regulations or other governmental measures, i.e. licensing, authorization requirements,

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[558] European Communities, Glossary of Competition Terms, 2003.
[559] Guidelines on Article 81, para. 138.

exclusive or monopoly rights[560] or intellectual property protection regulations, may have effects on the competitors and/or the potential competitors to enter the relevant market. Since the undertaking holding a de facto monopoly right(s) or other regulatory rights granting such undertaking the power to exclude others to dispose those rights or act in the capacity arising out of such rights may lead for those competitors or the potential competitors to enter to or expand in the relevant market. Similarly, intellectual property rights, even if they do not automatically conclude that the undertaking concerned have a dominant position, may be a strong indicator of entry barriers. It should, however, be borne in mind that, even if intellectual property rights grant a legal monopoly to the undertaking concerned, careful assessment is to be made as to whether solely possessing by the said undertaking of the intellectual property rights will have a negative effect on the competitors or the potential competitors to enter or expand in the relevant market and thus enable the right-holder to prevent competition[561] since there may be alternative technologies allowing the other undertakings to produce the product with such alternative technology. Therefore, if the entry or the expansion by the competitors or the potential competitors is not restricted due to such rights, legal monopoly held by intellectual property rights may not automatically lead to an economic monopoly[562] in the relevant market.

ii. **Sunk Cost of Entry:** Sunk costs are defined as those costs which have to be incurred to enter or be active on a market but which are lost when the market is exited[563]. Sunk costs are the costs such as investment in facilities or machines, other expenses made to enter the market, expenditures for research and development, human resources, advertising

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560 See i.e. Case 41/83, Italy v. Commission (1985), ECR 873, para. 2 (summary); Case C-320/91, Paul Corbeau, (1993), ECR I-2533, paras. 9, 11; AAMS Case, paras. 40-41.

561 Bellamy and Child, p. 933-934; See i.e. Hilti Case, paras. 19, 93; Radio Telefis Case, paras. 46-47; Case 238/87 AB Volvo v. Veng, (1988), ECR 6211, para. 2 (summary).

562 Jones and Sufrin, p. 356.

563 Guidelines on Article 81, para. 138.

and quality improvements that an undertaking incurs in order to enter a market and which are not recoverable in case of exit[564] or of failure by the new entrant. In case sunk cost of entry is high, potential entrants may have to weigh the risks of entering the market. However, even if such costs are one of the main important factors as an entry barrier, careful assessment, however, is to be made, since sunk cost may not automatically prevent the entry to the relevant market[565].

iii. **Economies of Scale:** An undertaking is assumed to enjoy 'economies of scale in the production and/or distribution of product when its average costs fall as output increases'[566]. To put it differently it is defended that an undertaking will have a substantial advantage over the other firms who do not reach the same production or distribution level when significant positive returns to scale have appeared in the market[567]. It is commonly accepted that the economies of scales are the advantages which the new entrant to the market cannot obtain immediate benefit[568]. An undertaking enjoying economies of scale may not need promotional pricing to increase its sales due to its well established situation in the market[569] such as switching costs and/or network effects or its brand royalty. It should be pointed out that careful assessment is to be made as to whether economies of scale enjoyed by the said undertaking will have a negative effect on the competitors or the potential competitors to enter or expand in the relevant market and thus prevent competition before concluding that economies of scale in the factual case concerned have emerged as a barrier to entry.

iv. **Network Effects:** It has been pointed that the network effects has emerged when the benefit of product or service increases by joining of

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[564] O'Donoghue and Padilla, p. 121.
[565] For further discussions see Geradin and Others, p. 21-23; Motta, p. 115-134.
[566] O'Donoghue and Padilla, p. 122; Jones and Sufrin, p. 357-358.
[567] O'Donoghue and Padilla, p. 122.
[568] See i.e. United Brands Case, paras. 82, 84.
[569] Motta, p. 115-134.

other users of the product or service concerned[570]. Network effects are important barriers mostly in telecommunication sectors, network industry and telephone or fax machine users due to their value arising out of interaction of other users thereof[571].

v. Switching Cost: In case the purchasers may incur high costs while switching to another supplier, this situation may lead to a barrier to entry. Since in such case, purchasers may not be willing to switch due to such costs, i.e. transaction costs, information costs, learning costs, i.e. customer may not be willing to switch to new software program once he learns how to run the old one, and the competitor or the potential competitor may not be willing to enter to or expand in the relevant market. Switching costs are so important that even the purchasers may not switch to the similar product or service by giving up the old one. Therefore, the effects of switching cost should carefully be examined during the evaluation of competition hindrances.

However, it should be noted that switching costs may sometimes be created by inserting clauses in the agreements as well. For instance there may be penalty payment due to early termination of the agreement. In such cases, if a potential competitor is willing to enter the market, they have to offer 'not just more attractive prices but also terms which, in addition to the price benefits, compensate customers for the incurred switching costs'[572]. Therefore, following the new approach under Guidelines on Article 81, switching costs should be taken into account while evaluating the market power and thus the anticompetitive effects of the agreement concerned.

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[570] O'Donoghue and Padilla, p. 122-123; Motta, p. 115-134.
[571] Microsoft Decision, paras. 31, 33.
[572] Rousseva, *Modernizing by Eradicating*, p. 614.

vi. **Features of the Undertaking:** Access to material inputs or raw materials[573] and/or special knowledge and/or superior technology[574] and/or having advanced research and development activities[575] and/or excess capacity[576] and/or profits[577] and/or well-known brand, reputation and/or economic strength[578] and/or portfolio and/or product/service diversity rendered by the undertaking and/or vertical integration[579] held by the allegedly dominant undertaking and/or having property ownership or rights over land[580] plays an important role on competition between the undertakings in the relevant market. For instance in Commercial Solvents[581] and United Brands[582] rulings, the Court have highlighted the importance of distribution and sales network and thus the vertical integration of the undertaking in the relevant market in a way so as to deter other competitors or potential competitors to enter to or expand in the relevant market. However, those indicators should be assessed very carefully, otherwise, the undertaking gaining those skills and abilities in the course of time by working very hard and effectively may be condemned due to its success.

vii. **Advertising[583]:** Requirement of high level of advertising costs may also play an essential role during the assessment of dominance[584] which may

[573] Commercial Solvents Case, para. 18.
[574] United Brands Case, paras. 78, 82-84.
[575] United Brands Case, paras. 82, 84.
[576] Hoffmann-La Roche Case, paras, 33, 48.
[577] It should be clarified that all undertakings enter the market in order to obtain profits. However, as to whether the undertaking concerned have earned monopoly profit is sometimes taken into account by the Courts. See further discussion in Jones and Sufrin, p. 361-362.
[578] United Brands Case, paras. 65, 121; Hoffmann-La Roche Case, para. 38, 41,
[579] It is also defended that vertical integration is not an indicator of dominance but solely a matter which accompany monopoly. See Jones and Sufrin, p. 357. We, however, believe that once all relevant indicators gathered in the concerned case will show the existence of entry barriers, this will lead to a conclusion of dominance. In other words, if one of the indicators, such as vertical integration, will exist in addition to the existence of other factors, it may be concluded that the undertaking concerned has the market power. However, this does not mean that vertical integration exist only for the dominant undertaking. Since it may be that an undertaking may be assumed to be dominant with or without the existence of vertical integration. Therefore, vertical integration should be assessed as an indicator in accordance with the factual merits of each case. Of course, such a debate will bring the same query regarding the extent and the content of the definition of entry barrier.
[580] Aeroports de Paris Case, para. 106.
[581] Commercial Solvents Case, para. 18.
[582] United Brands Case, paras. 122-123.
[583] It is also defended that advertising and advertising expenses are in general sunk costs. See Jones and Sufrin, p. 359-360.
[584] For further information see Bellamy and Child, p. 934-935.

deter the competitors or the potential competitors to enter to or expand in the relevant market.

viii. **Undertaking's Own Evaluation:** Assessment made by or for the undertaking concerned may give some important clues with respect to its market power[585]. It should however be borne in mind that such internal documentation or the ones prepared for the undertaking concerned should carefully be analyzed while making such a market power assessment.

4.2.1.3. Countervailing Buying Power

In each case it may be required to analyse the nature of the agreement in terms of the competitive relationship between the parties and the restraints that it contains[586]. In this respect, the way in which the parties have implemented the agreement concerned is crucial. It may be probable that due to the strength of the purchasers' position, the undertaking under consideration may not hold market power, since the concerned undertaking's conduct may be restricted due to such purchasers' strength. In order for the correct assessment of market power, such strength of the purchasers' should be evaluated[587].

The market position of buyers provides an indication of whether or not one or more buyers possess countervailing buying power[588]. In this respect one of the most important indicators to show the countervailing buying power is the market shares of the buyers concerned. Since, the strength of the purchasers' position may arise from the quantity of the products or the services they purchase from the supplier. Once the market shares of the buyers will be higher, the demand of the buyers from the supplier will be higher. The quantity of the product or the services purchased may be such amount that the undertaking under consideration will not have the opportunity or willingness to disregard the requests of the purchaser concerned and/or to cease to

[585] Akzo Case, para. 59.
[586] Guidelines on Article 81, para. 134.
[587] Same is true in order to find out as to whether the undertaking concerned hold a dominant position or not. Since dominant position has defined as "the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers". See United Brands Case, para. 65; Hoffmann-La Roche Case, para. 38.
[588] Guidelines on Article 81, para. 137.

continue commercial activity with the purchaser in question. In this respect, terms and conditions of both the negotiations inter-se and the contracts and even the prices of the product or the service concerned will be framed in accordance with the request and/or motives of the purchasers. In such circumstances and save for the exceptional cases, it will not be correct to conclude that the undertaking under consideration has the market power. Since, the undertaking concerned should comply with the requests forwarded by the purchasers concerned and that the buyer power may prevent the licensor and/or the licensee from exercising market power on the market and thereby solve a competition problem that would otherwise have existed[589].

Therefore, in order to achieve the correct impact assessment of the agreement concerned, such purchasers' strength[590] and the degree of such strength in the relevant market should be evaluated carefully. Finally, as to whether there exists more than one purchaser having such buying power in the relevant market should also be assessed before giving the final judgment with respect to the anticompetitive effect of the agreement in the relevant market.

4.2.2. Application Of Article 81 (3) To The Restrictive Agreements: Defense Mechanism

As aforementioned, Article 81(3) regime may be applied either to individual agreements or to categories of agreements by way of a block exemption regulation. When an agreement is covered by one of the block exemption, the undertakings concerned will not under the responsibility to prove that their agreement satisfies each of the conditions of Article 81(3). They only have to prove that the restrictive agreement benefits from a block exemption[591]. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope fulfil each of the four conditions laid down in Article 81(3). However, if otherwise, once it has been concluded that the

[589] Guidelines on Article 81, para. 137.

[590] The assessment of buying power has been made by the European Communities in accordance with some indicators. See O'Donoghue and Padilla, p. 129-133 for those indicators and further information.

[591] By the same reasoning in the case of withdrawal of the exemption, it is for the competition authorities concerned to show the evidences that the agreement infringes Article 81(1) and that it does not fulfil the conditions of Article 81(3).

agreement and/or any of the clauses therein prevents competition by its object and effect and is thus caught by Article 81(1), the undertakings to the agreement have to prove the positive economic effects of restrictive agreements which outweigh the negative effects on competition.

Agreements having pro-competitive effects by way of efficiency gains[592] and enhancing consumer welfare and of ensuring an efficient allocation of resources may outweigh the anticompetitive effects of the agreements concerned. The application of the defense mechanism under Article 81(3) is subject to four cumulative[593] and exhaustive conditions, namely, the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress, consumers must receive a fair share of the resulting benefits[594], the restrictions must be indispensable to the attainment of these objectives, and the agreement concerned must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. Once each of these four criteria will be satisfied, the agreement is said to enhance competition within the relevant market by granting cheaper or better products for consumers[595].

The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case. When applying Article 81(3) criteria, the risk confronted by the parties and the sunk cost incurred by the parties for the execution of the agreement should aso be taken into consideration.

For the purpose of this Thesis, we prefer to open a broader heading with respect to defences that may be used by the undertakings in case their technology transfer agreements which fall outside the scope of Technology Transfer Regulation and

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[592] Such as lowering the cost of output, improving the quality of the product or manufactering new products.
[593] Sufrin, Brenda, "The Evolution of Article 81 (3) of the EC Treaty", The Antitrust Bulletin, Vol. 51, No. 4/Winter 2006, p. 933.
[594] In other words, efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market.
[595] Guidelines on Article 81, para. 34.

be evaluated by the respective authorities either in accordance with Article 81 or Article 82 of the EC Treaty. Therefore, immunity regime with respect to the efficiency grounds under Article 81 (3) will be explained in more detail under the following section[596].

4.2.3. Defenses Under Competition Cases[597]

As aforementioned, the Community Courts have the view that Article 81 and 82 of the EC Treaty follow common aims at different level[598]. Additionally, in accordance with the jurisprudence of the Community Courts, Article 81 (3) is also applicable for the agreements[599] concluded by the dominant undertakings[600]. Therefore such an approach leads to an outcome that as long as the agreements are concerned, Article 81 and/or 82 of the EC Treaty will be applicable for the undertakings in question. However, this attitude held by the Community Institutions amount to another outcome in that if there would be no immunity mechanism accepted under Article 82 regime as did by Article 81 (3) of the EC Treaty, the application of those Articles may result in different outcomes since Article 82 does not provide any justification mechanism. Since once the agreements -even if concluded by the dominant undertaking(s)- will be evaluated under Article 81 of the EC Treaty, the undertaking concerned may defend itself by Article 81 (3) mechanism, say efficiency grounds, on the other hand it could not provide any defense during the evaluation under Article 82 regime. Therefore, the same anticompetitive agreement having the same object and effect might be immuned from Article 81 but not from Article 82 even if both of the Articles have the same purpose, the protection of competition in the market[601].

Although Article 82 of the EC Treaty does not provide any defense mechanism as the EC Treaty provides for under Article 81, in accordance with the evolving jurisprudence of the Community Courts[602] and the new approach pursued by the

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[596] See Section '4.2.3.3. Efficiency Defenses' of the Thesis.
[597] For the purpose of the Thesis, we will only deal with the cases brought under Article 81 and 82 of the EC Treaty.
[598] Continental Can Case, para. 25.
[599] In particular for the terms regarding single branding, rebates or tying. See examples given in Guidelines on Article 81, para. 82.
[600] Tetra Pak 51/89, paras. 21-22; Hoffmann-La Roche Case, para 116; Atlantic Container Case, para. 610.
[601] The Council Regulation 1/2003.
[602] Case T-228/97 Irish Sugar v. Commission (1999) ECR II-2969 ("Irish Sugar 228/97"), paras. 112, 173, 189, 190, 218, ; Deutsche Grammophon Case, para. 19; United Brands Case paras. 168, 189, 208; Sirena Case, para. 17; Case C-163/99 Portugal v. Commission (2001), ECR I-2613 ("Portugal Case"), paras. 11, 44, 49, 54; Case 77/77, Benzine

Commission, it has been argued that an immunity mechanism may be used by the undertakings under consideration and that unless it is objectively justified, the anticompetitive conducts of the undertakings will be prohibited. Therefore, by showing its intention to bring the application of Article 81 and 82 closer, the Commission has launched the Discussion Paper on Article 82 and has showed its willingness to establish a new immunity regime for exclusionary abuse cases under Article 82 of the EC Treaty. The new immunity regime has been modeled upon Article 81 (3) of the EC Treaty which will be explained below.

There may be three types of defense mechanism which may be used by the undertakings in the competition cases, either under 81 or 82 of the EC Treaty.

4.2.3.1. Objective Justifications

The concept of objective justifications, say exceptions to or derogations from the EC Treaty, has been provided in the EC Treaty provisions with respect to the free movement of goods. The exceptions to the free movement of goods set forth in the EC Treaty are exhaustive list and are to be distinguished from the mandatory requirements in that the exceptions will always exist since they are provided for in the Treaty itself[603]. Article 30 of the EC Treaty has enumerated the objective justifications as 'public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, the protection of industrial and commercial property' and envisages a condition that such restrictions shall not constitute a means of arbitrary discrimination or disguised restriction on trade between Member States.

On the other hand, the Community Courts have launched the doctrine of mandatory requirements and they are not exhaustively listed. They may only be relied upon in the absence of the common rules[604] and as long as they are non-economic

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en Petroleum Handelsmaatschappij BV and Others v. Commission (1978), ECR 1513 ("BPB 77/77"), para. 19; Tetra Pak 83/91, paras. 115, 165, 207, 221.

[603] For further information with respect to mandatory requirements, see Mathijsen, P.S.R.F. A Guide to the European Union Law, 7th Edition, London: Sweet and Maxwell, 2001, p. 198-206.

[604] Mathijsen, p. 200.

nature[605]. They are not exceptions to free movement provisions and they only justify a temporary suspension of the applicability of a basic rule[606]. Therefore, in order to be accepted as the mandatory requirements, it should be:

- **a.** temporarily accepted,
- **b.** accepted in so far as they are necessary,
- **c.** reasonable[607]
- **d.** applied without discrimination.

The Community Courts, in various cases with respect to free movement of goods, have accepted, inter alia, the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, the defence of the consumer[608], the legitimate elements of economic and social policy[609], the fight against inflation[610], the protection of the environment[611], the promotion of the culture[612], and the safeguard of press diversity[613] as mandatory requirements.

The question may emerge as to whether and to what extent the exceptions in the EC Treaty and/or mandatory requirements created by the Community Courts will be applied under the EC Competition regime[614]. Since, there exists no Treaty provision which sets forth objective justification to justify the abusive conducts of the dominant undertakings. Would it be possible to defend that the objective justifications which may be used in Article 82 (and in some cases for Article 81 cases) cases are the outcomes of the evolving jurisprudence of the Community Courts as done for mandatory

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[605] Rousseva, *Objective Justification*, p. 383-390.
[606] Mathijsen, p. 200.
[607] Case 8/74 Procureur du Roi v. Dassonville (1974), ECR-837, para. 6.
[608] Case 120/78 Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (1979), ECR-649, para. 8.
[609] Case 155/80 Sergius Oebel (1981), ECR- 1993, paras. 12, 16.
[610] Case 181/82 Roussel Laboratoria v. Netherland (1983), ECR-3849, paras. 24-25.
[611] Case 302/86 Commission v. Denmark (1988), ECR-04607, paras 8-9.
[612] Joint Cases 60, 61/84 Cinetheque (1985) ECR-2605, paras. 23-24.
[613] Case C–368/95 Vereinigte Familiapress v. Bauer Verlag (1997) ECR I–3689, para. 34.
[614] It is not surprising that there are several cases which the undertakings have attributed their refusal to supply to objective justifications. See i.e. Case 311/84 CBEM v. CLT & IPB (1985) ECR 3261, para. 27; Microsoft Decision, paras. 668, 688, 690; Case C-418/01 IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG (2004), ECR I-50309, paras. 32, 52.

requirements by the interpretation of Article 28 of the EC Treaty?[615] We believe that the answer to be given to this question is positive[616].

In one of its earliest ruling, Sirena[617], the Court of Justice has pointed out that unless it is objectively justified, very high level of prices may lead to a conclusion that the dominant undertaking abuses its dominant position. Although Article 82 of the EC Treaty prohibits "unfair prices" as abusive conducts, the Court of Justice has put forward implicitly that even if the undertakings has exercised unfair prices, the unfair prices may still be objectively justified. Following Sirena ruling, in United Brands[618] case, the Court of Justice has accepted[619] the justifications such as differences in transport cost, taxation, customs duties, wages of labours, marketing conditions, differences in currencies parity, densitiy of competition which may amount to a price differentiation between the Member States. It also accepted that "… the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests …"[620], however, what the Court of Justice has objected is that "such behaviour *(of the undertaking)*[621] cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it"[622]. Finally, what the Court of Justice objects is not the submission of objective justification but the intent of the undertaking to strengthen its dominant position[623]. The Court of Justice further continues that "the sanction consisting of a refusal to supply by an undertaking in a dominant position was in excess of what might, if such a situation were to arise, reasonably be contemplated as

[615] Llorens, A. Albors. "The Role of Objective Justification and Efficiencies in the Application of Article 82 EC", C.M.L.R. 44, Kluwer Law International, 2007, p. 1733.
[616] In any case, even if the answer would be negative, the Community Courts tend to accept objective justification in competition cases.
[617] Sirena Case, para. 17
[618] United Brands Case paras. 168, 189, 208.
[619] However, since it is not the undertaking itself who bears those risk, the Court of Justice rejects the defenses submitted by the undertakings.
[620] United Brands Case, para. 189.
[621] Italics are added.
[622] United Brands Case, para. 189.
[623] This reasoning of the Court of Justice is similar to that of the ones under Article 30 of the EC Treaty in that Member States should not apply derogations from the Treaty as a means to constitute disguised restrictions to trade. See Llorens, p. 1737.

a sanction for conduct similar to that for which UBC blamed Olesen"[624]. Finally, what the Court of Justice has rejected is that the undertaking's conduct is not proportional.

In Ministere Public v. Tournier[625] ruling, the Court of Justice has also stressed the importace of objective justifications mechanism in order for the dominant undertaking to escape from the application of Article 82 prohibition. However, in this ruling, while the undertaking have submitted, inter alia, different climate, social habits and historical traditions as objective justifications, the Court of Justice has indicated that objective justifications for the price differences submitted by the dominant undertaking concerned should pertain to the undertaking itself. Put it differently, the dominant undertaking concerned should establish objective grounds for the differing royalty fee amount between other collecting societies and itself. Therefore, the Court of Justice does not reject that the dominant undertaking may submit objective justifications but solely mention that if the dominant undertaking applies different royalty fee from the other collecting societies, objective justifications which difrentiates the royalty fee amount should pertain to and be justified by the dominant undertaking by considering the different features of those undertakings concerned.

Finally, in Wouters ruling, the Court of Justice have concluded that although a regulation prohibiting the lawyers from engaging multidisciplinary partnership with accountants restricts competition, provided that the principle of proportionality will be respected, Article 81 of the EC Treaty will not be applied to the case, since the regulation was justified for the maintenance of a sound administration of justice and the proper practice of profession[626]. As it can be seen, although sound administration of justice and the proper practice of profession are not envisaged in Article 81 (3) of the EC Treaty, the Court of Justice has applied objective justifications mechanism without hesitation[627].

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[624] United Brands Case, para. 191.

[625] Case 395/87 Ministere Public v. Tournier (1989), ECR 2521 ("Ministere Public Case"), para. 46.

[626] Case C-309/99 JCJ Wouters v. Algemene Raad van de Netherlandsche Orde van Advocaten (2002) ECR I-1577, paras. 97, 110.

[627] See Komninos, P. Assimakis. "Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC", The University of Oxford Centre for Competition Law and Policy, Working Paper (L) 08/05, p. 8. The author has mentioned that "… the wording of Article 81(3) EC does not appear to accommodate such non-economic aims. The advantages of a restrictive agreement that nevertheless deserves an exemption must benefit the actual consumers

To sum up, it should be noted that as long as there are other justifications accepted by the Community Courts in addition to derogations to or exceptions from the EC Treaty and provided that the principle of proportionality will be respected by the undertakings concerned, the Community Courts will (or should) allow the undertakings to bring their objectively justified claims during the cases[628]. However, it should be highlighted that in any case whether the justifications submitted by the undertakings are objective and reasonable or not and as to whether the principle of proportionality will be respected or not will be evaluated by the Community Courts by considering the special features and factual circumstances[629] of each case brought under Article 81 and/or Article 82 of the EC Treaty.

4.2.3.2. 'Meeting Competition' Defense[630]

Although dominant undertakings are under a special responsibility to take into account their market power while they frame their market strategies, conducts of the dominant undertakings may also be justified if they take reasonable defensive and/or protective measures to protect their commercial interests and provided that the measure concerned is proportional. Although it is defended that such a defense mechanism will lead the dominant undertaking to act flexible, the dominant undertakings should be

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of the specific product and not society at large. Thus, employment or industrial policy considerations, by themselves, cannot lead to the legality of an otherwise anti-competitive agreement. On the other hand, it is not excluded that such concerns may be taken into account as a further positive element among other economic efficiency elements of a restrictive agreement, especially if such concerns have an economic facet".

[628] For different and opposite views see Rousseva, *Objective Justification*, p. 383-390.

[629] Public policy arguments put forward by the dominant undertakings was also rejected by the Community Courts. See i.e. Hilti Case, paras. 115-119, where the Court of First Instance has rejected Hilti's safety argument by pointing out that "… at no time during the period in question did Hilti approach the competent United Kingdom authorities for a ruling that the use of the interveners' nails in Hilti tools was dangerous …If Hilti had made use of the possibilities available to it under the relevant United Kingdom legislation, the legitimate rights of the interveners would in no way have been impaired had the United Kingdom authorities acceded to Hilti' s request for a ban on the use in its tools of nails produced by the interveners and, where appropriate, on all misleading advertisements issued by them. If on the other hand the authorities had dismissed those requests, Hilti would have had great difficulty in persisting in its allegations against Profix and Bauco … there are laws in the United Kingdom attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of any product. There are also authorities vested with powers to enforce those laws. In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products. It must further be held in this connection that the effectiveness of the Community rules on competition would be jeopardized if the interpretation by an undertaking of the laws of the various Member States regarding product liability were to take precedence over those rules. Hilti's argument based on its alleged duty of care cannot therefore be upheld".

[630] It should be noted that meeting competition defense is applicable for individual behaviour but not to collective behaviour. See the Discussion Paper on Article 82, para. 81. Since the subject-matter of our Thesis is technology transfer agreement, we will not very much deal with this type of defense mechanism. For a further discussion see Rousseva, *Objective Justification,* p. 392-403; O'Donoghue and Padilla, 284-290; Monti, p. 205-208.

enabled to act in accordance with the changing competitive conditions in the market and adapt its new strategies by taking into consideration the behaviour and conducts of their competitors.

In United Brands ruling, the Court of Justice has pointed out that provided that the measures taken by the dominant undertaking is proportional, the same may take reasonable steps to protect its commercial interest and added that "the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interest if they were attacked"[631]. However, in this ruling the Court of Justice objects the termination by the dominant undertaking to supply to a distributor who participates in advertising campaign for a competitor of the dominant undertaking due to its being a disproportionate measure.

In Akzo ruling, the dominant undertaking was accused due to its, inter alia, unreasonable low prices and selective quotations strategy[632] in pricing. The Court of Justice has ruled that the measures with respect to low price strategy taken by Akzo are reasonable in that the low prices applied by the dominant undertaking is not below the competitor's prices and the dominant undertaking does not act to exclude its competitor from the market but acts solely to give reaction to its competitor's price cut.

In this ruling it is defended that since the intention of Akzo is not to eliminate its competitor, the conduct is not abusive in nature and that meeting competition defense is not a defense to abusive practices but only an indication that the conditions of 'abuse' are not fulfilled[633]. We are of the firm view that such an argument will amount to risky outcomes and incorrect evaluation of the meeting competition defense. Since we believe that if such an argument will be appreciated, this may lead to a conclusion that assuming the proportionality principle will be taken into account, as long as the

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[631] United Brands Case, para. 18.

[632] The Court of Justice objects the arguments brought by Akzo with respect to selective price cuts below the average total cost and concludes that such an anticompetitive intent leads to a conclusion that the conduct in question is abusive. The Court of Justice, however, does not argue as to whether the meeting competition defense is available or not. See Akzo Case, paras. 71-72

[633] Rousseva, *Objective Justification,* p. 428-429. There is also view which go too far by defending that all defences provided by the Community Institutions, say the objective justifications, meeting competition defense and efficiency, are not 'defenses', but they are measures for the dominant undertakings to show that their acts are not abusive. See Monti, p. 203-213. He argues that there is a space within the context of the definition of abuse and the dominant undertaking may bring its evidences to show that its acts do not constitute an abuse.

intention of the dominant undertaking is not to eliminate its competitors[634] and provided that the low prices applied by the dominant undertaking is not below the competitor's prices, this will automatically amount to the conclusion that the measure taken by or the conduct of the dominant undertaking is not abusive. However, we believe that meeting competition is a defense mechanism for the dominant undertakings to escape from the application of Article 82 regime even if the dominant undertaking's conduct is abusive. If otherwise, this will also bring another conflict to the application of Article 81 and 82 of the EC Treaty. Furthermore, there may be, at least theoratically, cases which the intention of the dominant undertaking cannot be established and that the low prices applied by the dominant undertaking is below the competitor's prices. In such cases, the competition authorities should evaluate as to whether the competition is restricted or not, since harm to competitor does not always amount to harm to competition and additionally the competition authorities are under the burden to evaluate as to whether the defenses submitted by the dominant undertakings are reasonable and proportional[635].

4.2.3.3. Efficiency Defenses

The Discussion Paper on Article 82 envisages that there may be efficiency defense mechanism in Article 82, modeled upon or identical to Article 81 (3) of the EC Treaty[636]. The Commission has the attitude to apply for Article 82 cases the same four criteria under Article 81 (3) regime. This means that the undertaking concerned must demonstrate that four criteria under Article 81 (3) have been fulfilled in order to escape from the prohibition under Article 82 of the EC Treaty. In this respect, as to whether the case has been brought before the Community Institutions under Article 81 or Article 82 and that as to whether the undertaking under consideration is a dominant one or not will not make sense. Since, the Community Institutions' new approach has brought the

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[634] Cases T-24, 25, 26, 28/93 Compagnie Maritime Belge Transports SA v. Commission (1996), ECR II-1201 ("Compagnie Maritime Belge 93"), para. 146.

[635] Unfortunately, it should be noted that meeting competition defense for a pricing abuse cases is only applicable in relation to behaviour which otherwise would constitute abuse in that the Community Courts have considered that an objective justification is not possible if the dominant company is not able to show that its conduct is only a response to low pricing by others or if the objective aim of the conduct is to directly foreclose competitors. See the Discussion Paper on Article 82, para. 81.

[636] Criticisim with respect to the Discussion Paper on Article 82, see Niels, Gunnar. "The Article 82 Discussion Paper: A Comment on the Economic Principles", April 2006, available at www.oxera.com/cmsDocuments/Agenda_April%2006/The%20Article%2082%20discussion%20paper.pdf, ("Niels, Discussion Paper") p. 1-4.

immunity regime for the anticompetitive agreements identical to each other made under Article 81 and Article 82 of the EC Treaty. In this sense, it should be noted that both the evolving jurisprudence of the Community Courts and the approach of the Commission framed under the Guidelines on Article 81 will be applicable if and when efficiency defense mechanism will be applied even if the case has been brought before the Community Institutions under Article 82 of the EC Treaty.

The Discussion Paper on Article 82 has envisaged that the dominant undertaking under consideration has to demonstrate that:

i. "the alleged efficiencies are realised or likely to be realised as a result of the conduct of the undertaking concerned,
ii. the undertaking's conduct concerned is indispensable to realise these efficiencies,
iii. the efficiencies benefit consumers,
iv. competition in respect of a substantial part of the products concerned is not eliminated"[637].

Therefore, the dominant undertaking is under an obligation to prove that all four conditions are fulfilled. Due to its importance and close relation with Article 81 (3) regime, it should be better to scrutinize in detail the immunity regime brought by the Discussion Paper on Article 82. Although the new immunity regime has been accepted for exclusionary abuses under Article 82 cases, the criteria and as to whether the defenses brought by the dominant undertaking in question will be enough to fulfill those criteria cannot be evaluated apart from the jurisprudence and matured attitude of the Community Institutions towards Article 81 (3) regime.

Therefore even if the case has been brought under Article 82 of the EC Treaty, the approach and the guidance set forth by the Guidelines on Article 81 will be applicable. It should be noted that four criteria to be fulfilled by the undertakings are

[637] The Discussion Paper on Article 82, para. 84.

exhaustive in that once the undertakings will prove that the four criteria has been fulfilled, there would be no other criteria left to be fulfilled[638].

4.2.3.3.1. Efficiency Gains

According to the first condition of Article 81(3) regime and the Discussion Paper on Article 82 regime, the conduct or the restrictive agreement must contribute to improving the production or distribution of goods[639] or to promoting technical or economic progress, i.e. by 'improving the quality of its product or by obtaining specific cost reductions or other efficiencies'[640]. In this respect it should be noted that the efficiency gains should be the direct consequence of the anticompetitive conduct of the undertaking in question. In accordance with the jurisprudence of the Court of Justice, only objective benefits[641] and verified efficiencies may be taken into consideration in that efficiencies are not assessed from the subjective point of view of the undertakings party to the restrictive agreements. In case the undertakings agree to fix prices or share markets, such an agreement may lead to the reduction in output and production costs and thereby lowering the sales and marketing expenditures. Such cost reductions are accepted as a direct consequence of a reduction in output and value. However, the cost

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[638] Kjolbye, Lars. "The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81", E.C.L.R. 25 (9), 2004, ("Kjolbye, *Economic Approach*"), p. 571. The author has also defended that "It is not possible to use Article 81(3) as a basis for pursuing aims that cannot be subsumed under these conditions. For instance, it is not possible to exempt a restrictive agreement on grounds that it promotes employment in a particular part of the Community. It is not the role of the competition authorities and courts enforcing Article 81 to allow undertakings to restrict competition to the detriment of consumers in order to pursue non-competition aims". The same argument has been stressed by another author who mentions that "… the wording of Article 81(3) EC does not appear to accommodate such non-economic aims. The advantages of a restrictive agreement that nevertheless deserves an exemption must benefit the actual consumers of the specific product and not society at large. Thus, employment or industrial policy considerations, by themselves, cannot lead to the legality of an otherwise anti-competitive agreement. On the other hand, it is not excluded that such concerns may be taken into account as a further positive element among other economic efficiency elements of a restrictive agreement, especially if such concerns have an economic facet". See also Komninos, p. 8.

[639] It also applies by analogy to services. See Guidelines on Article 81, para. 48.

[640] The Discussion Paper on Article 82, para. 85.

[641] In this respect it should be noted that some authors have mentioned that efficiency justification and objective justification differs from each other in that the efficiency justification lacks the element of 'objectivity' inherent in the concept of objective justification. It is also defended that the objective justification is related to the circumstances applicable to all undertakings in the market. See Rousseva, *Objective Justification*, p. 421-427. However, we do not believe that the Community Courts accept subjective efficiency justification submitted by the undertakings. If that would be the case the Court of Justice would accept the objective justification, say health and security defence, argued by the undertaking in Hilti ruling. See Hilti Case, paras. 20, 135. By the same token, in Ministere Public Case, para. 46, the Court of Justice does not reject that the dominant undertaking may submit objective justifications but solely mention that if the dominant undertaking applies different royalty fee from the other collecting societies, objective justifications which differentiates the royalty fee amount from other undertaking's should be pertain to and be justified by the dominant undertaking by considering the different features of the undertakings concerned from that of the other ones.

reductions[642] mostly do not produce any pro-competitive effects on the market and cannot be taken into consideration as efficiency gains[643].

It should be borne in mind that the undertakings are under responsibility to demonstrate the link[644] between the restrictive agreement or the restrictive provision(s)[645] in the agreement and the alleged efficiencies gains through this agreement, the possibility of alleged efficiencies, the period required for the achievement of those alleged efficiency. However, it should be noted that efficiency gains need not to be occurred in the relevant market which is restricted[646]. In other words, advantages or efficiency gains arising out of the agreement concerned may be eventuated in the market related to the relevant market which is restricted. Therefore, link between the efficiency gains and the relevant market is not required to be established in order for the application of this condition[647] and that provided that efficiency gains will be established in any market in relation with the relevant market will be taken into account[648].

An anticompetitive agreement or a conduct of an undertaking may produce cost efficiencies and/or qualitative efficiencies[649]. Cost efficiencies may be created by the development of new production technologies and methods and such an aim may be

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642 In case the undertaking alleges the cost efficiency, they should demonstrate or estimate the value of the efficiencies, describe in detail how the amount has been computed, the method(s) by which the efficiencies have been or will be achieved and finally the data submitted by the undertakings should be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise. See Guidelines on Article 81, para. 56.

643 Guidelines on Article 81, para. 49.

644 Such causal link should mostly be accepted by the Community Institutions when it is direct, i.e. a technology transfer agreement allows the licensees to produce new or improved products. See Guidelines on Article 81, para. 54.

645 It should be noted that in case the efficiency is not resulted due to the restrictive provision(s) in the agreement, but is resuted directly from the agreement, the Community Courts does not accept that the link between the restrictive provision and the efficiency gains have been established. Therefore, the mere fact that the agreement concerned has caused some efficiency does not mean that the link has been established. In other words, the link between the restrictive provision in the agreement and the efficiency gains through the said restrictive provision(s) should be established. See i.e. Van Den Bergh Case, paras. 142-143.

646 Bellamy and Child, p. 201.

647 However, it should be borne in mind that Guidelines on Article 81 envisages another condition that in case there are two related markets, efficiencies achieved on these two markets can only be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same. Guidelineson Article 81, para. 43.

648 See i.e. Case T-86/95 Compagnie Generale Maritime v. Commission (2002), ECR II-1011, para. 343; Case T-168/01 GlaxoSmithKline v. Commission (2006), ECR II-2969, para. 248.

649 For instance, the undertaking concerned may create value in the form of new or improved products, greater product variety etc.

the subject-matter of agreements between undertakings or from synergies[650] resulting from integration of existing assets[651] or from economies of scale[652] or learning by doing or economies of scope[653] or from cost reductions.

On the other hand, qualitative types of efficiencies may arise from the quality improvements, technical and technological advances generating significant benefits in the form of new or improved products[654] and other efficiencies of a qualitative nature and such type of efficiencies may therefore be of equal or greater importance than cost efficiencies[655]. The combination of complementary assets may also give rise to cost savings and/or may lead to the production of higher quality products[656] or products with novel features and/or at the same time may create synergies that create efficiencies of a qualitative nature[657]. It should be borne in mind that, in any case, either cost efficiencies or qualitative efficiencies arising from the agreement concerned should be greater than the disadvantages arising out of the existence of the agreement[658].

Finally, in such cases, an anticompetitive agreement may be concluded between the undertakings in order to create efficiencies by allowing the undertakings in question to perform a particular task at lower cost or with higher added value for consumers. In this regard careful assessment should be made by the Community Institutions under Article 81 (3) regime and the new identical regime launched in the Discussion Paper on Article 82.

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[650] For instance, it may be that an undertaking may optimize one part of the value chain and another undertaking may optimise another part of the value chain, and as a result the combination of their operations may lead to lower costs. See Guidelines on Article 81, para. 65.
[651] For instance, the undertakings may combine their existing technologies that have complementary strengths and that may reduce production costs or lead to the production of a higher quality product.
[652] The undertakings may achieve economies of scale in respect of all parts of the value chain, including research and development, production, distribution and marketing. See Guidelines on Article 81, para. 66.
[653] The undertakings may achieve cost savings by producing different products on the basis of the same input. See Guidelines on Article 81, para. 67.
[654] For instance in Matra Hachette Case, the Court of First Instance has ruled that "the technical improvements made to the vehicle fall within the scope of Article 85(3), since they bring together in single product techniques which, where they exist, are at present used in isolation, on different models". Matra Hachette Case, para. 110.
[655] See Guidelines on Article 81, para. 69.
[656] For instance, licence agreements may ensure more rapid dissemination of new technology in the market and enable the licensee(s) to make available new products or to employ new production techniques that lead to quality improvements. See Guidelines on Article 81, para. 71.
[657] See Guidelines on Article 81, para. 71.
[658] Bellamy and Child, p. 203.

4.2.3.3.2. Fair Share For Consumers

Both Article 81 and 82 of the EC Treaty protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Therefore, consumers[659] should receive a fair share[660] of the efficiencies generated by the restrictive agreement and that the consumers should be compensated for any actual or likely negative impact caused to them by the conduct concerned. In this respect it should be noted that consumers are the buyers of the product covered by the agreement and that the term is thus not synonymous with final consumers[661]. Therefore in case the buyers of the products receive a fair share of the efficiencies generated by the agreement, this criteria is satisfied even if for some reason these benefits are not passed on to final consumers[662].

The undertaking concerned is under the obligation to prove that the efficiencies brought about by the restrictive conduct outweigh the likely negative effects on competition and therewith the likely harm to consumers that the conduct might otherwise have[663]. It is not required that consumers receive a share of each and every efficiency gain, but it will be enough if sufficient benefits are passed on to compensate the negative effects of the restrictive agreement[664]. However, it should be noted that consumers should receive direct and explicit economic benefits of a particular product as measured by its price and quality[665]. If, for instance, a restrictive agreement leads to higher prices, consumers must be fully compensated through increased quality or other benefits[666].

While making the assessment with respect to the extent to which cost efficiencies are likely to be passed on to consumers, the characteristics and structure of

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[659] Consumers covers all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers. See Guidelines on Article 81, para. 84.

[660] Fair share is meant that the "pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1)". See Guidelines on Article 81, para. 85.

[661] Kjolbye, *Economic Approach*, p. 576.

[662] Kjolbye, *Economic Approach*, p. 576.

[663] The Discussion Paper on Article 82, para. 84.

[664] If cost efficiencies will lead to increased output and lower prices for the affected consumers and that due to cost efficiencies the undertakings in question can increase profits by expanding output, consumer pass-on may occur. See Guidelines on Article 81, para. 96.

[665] Rousseva, *Modernizing by Eradicating*, p. 609.

[666] Guidelines on Article 81, para. 86.

the market, the nature and magnitude of the efficiency gains[667], the elasticity of demand, and the magnitude of the restriction of competition should be carefully taken into account[668].

In case a certain period of time[669] is required before the efficiencies materialize, the compensation obtained by the consumers should be greater. In this respect, the value of a gain for consumers in the future is not the same as a present gain for consumers and that the value of a gain for consumers both in the future and in the present time must comparatively be taken into consideration. Additionally, the greater the restriction of competition, the greater must be the efficiencies and the pass-on to consumers. Since, if otherwise, it would be very unlikely that this condition will be fulfilled and the exemption will be granted under Article 81 (3) regime[670]. If the agreement has both substantial anti-competitive effects and substantial pro-competitive effects, an assessment is to be made very carefully[671].

Finally, it should be noted that the benefits gained by the undertakings concerned should be passed on to the consumers. Pass-on cost efficiencies to consumers is related to the existence of competitive pressure from the other competitors and if the actual or potential negative effects on competition is higher and/or demand is very inelastic, it may be more unlikely that efficiency gains would be sufficient to outweigh its actual or likely anti-competitive effects and that consumers will benefit from those benefits[672]. Therefore, the undertakings concerned should prove that the alleged efficiencies for consumers are not outweighed by the disadvantages arising out of the restrictive agreement.

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667 For instance, pass-on may also be in the form of qualitative efficiencies such as new and improved products or technologies, creating sufficient value for consumers to compensate for the anticompetitive effects of the agreement, including a price ncrease. In such case, value judgment is to be made in that the overall impact of the agreement on the consumers within the relevant market and the extent of the countervailing benefits obtained by the consumers should be closely scrutinized. See Guidelines on Article 81, para. 102.
668 Guidelines on Article 81, para. 96.
669 For instance, it is accepted that in case the undertakings compete mainly on price and are not subject to significant capacity constraints, pass-on may occur quicker on the other hand, if competition is mainly on capacity and capacity adaptations occur with a certain time lag or when the market structure is conducive to tacit collusion, pass-on will occur slower.
670 Bellamy and Child, p. 217.
671 Guidelines on Article 81, para. 92.
672 The Discussion Paper on Article 82, para. 90.

4.2.3.3.3. Indispensability

The restrictions envisaged in the agreement should be indispensable to the attainment of the efficiencies created by the agreement[673]. In other words, the restrictive agreement should be reasonably necessary in order to achieve the efficiencies and the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies[674]. In this respect, if it would be possible to perform the activity in a more efficient way than would likely have been the case in the absence of the agreement or the restriction concerned, then it may be concluded that the restrictions imposed by the agreement is not indispensable to the attainment of the efficiencies created by the agreement. The parties' intention to the agreement is not valuable in this sense and a defense by the undertakings that the agreement would not have been concluded in the absence of the restriction will not make sense for the competition authorities. However, as to whether more efficiency is produced with the agreement or restriction than in the absence of the agreement or restriction will be taken into consideration while evaluating these criteria[675].

The undertakings in question must also prove that there are no other economically practicable and less restrictive means of achieving the efficiencies under the relevant the market conditions and business realities faced the parties and if less restrictive ways exist, the undertakings should demonstrate why less restrictive alternatives would be significantly less efficient[676]. In this regard, the undertaking in question is not required to consider hypothetical or theoretical alternatives and that the claim where it is reasonably clear that there are realistic and attainable alternatives, the undertaking under consideration should be required to explain and demonstrate why

[673] For instance, see Ministere Public Case, para. 31.
[674] In Nungesser Case, para. 77, the Court of Justice has decided that "As it is a question of seeds intended to be used by a large number of farmers for the production of maize, which is an important product for human and animal foodstuffs, absolute territorial protection manifestly goes beyond what is indispensable for the improvement of production or distribution or the promotion of technical progress, as is demonstrated in particular in the present case by the prohibition, agreed to by both parties to the agreement, of any parallel imports of inra maize seeds into Germany even if those seeds were bred by inra itself and marketed in France".
[675] Guidelines on Article 81, para. 74.
[676] Guidelines on Article 81, para. 75.

seemingly realistic and less restrictive alternatives would be significantly less efficient[677].

Once it is concluded that the agreement concerned is required to produce the efficiencies, the indispensability of each restriction of competition should be assessed[678]. In this respect, it will be necessary to evaluate as to whether the individual restrictions are reasonably necessary in order to produce the alleged efficiencies gains. The undertakings concerned must prove that in the absence of such restrictions, the efficiencies that follow from the agreement would be eliminated or significantly reduced or may not be materialized.

4.2.3.3.4. No Elimination Of Competition

Finally, the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned[679]. Since if competition is eliminated, the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming, inter alia, from expenditures incurred by the dominant undertaking to maintain its position, misallocation of resources, reduced innovation and higher prices[680]. In this respect, the protection of competition[681] and the competitive process is more essential than the potentially pro-competitive efficiency gains arising out of the restrictive agreements.

Elimination of competition in respect of a substantial part of the products concerned depends on the degree of competition existing prior to the agreement and the impact of the restrictive agreement on competition. It should be noted that, in the past, the Commission considered that the elimination of competition criteria is considered to be fulfilled in case the undertaking in question holds a dominant position. However, this tendency has been put aside in accordance with the jurisprudence of the Community

[677] The Discussion Paper on Article 82, para. 86.
[678] As to whether the restriction is indispensable to align the incentives of the parties and to ensure that they concentrate their efforts on the implementation of the agreement are also taken into consideration. For a further clarification and examples, see Guidelines on Article 81, para. 80.
[679] See for further information Kjolbye, *Economic Approach*, p. 566-577.
[680] The Discussion Paper on Article 82, para. 91.
[681] The Council Regulation 1/2003.

Courts where it is established that elimination of competition is not the same as dominance[682]. In Atlantic Container case, the Court of First Instance has ruled that "Although eliminating competition may preclude the application of the block exemption … the mere holding of a dominant position has no effect in that regard. As the concept of eliminating competition is narrower than that of the existence or acquisition of a dominant position, an undertaking holding such a position is capable of benefiting from an exemption. Thus, … it is only where *an undertaking*[683] abuses its dominant position that the Commission may withdraw the benefit of the block exemption provided for in that regulation. Furthermore, unlike the possibility of eliminating competition, the mere holding of a dominant position is not in itself prohibited by the competition rules laid down in the Treaty, since only the abuse of that position is prohibited"[684]. From this ruling it can be concluded that one cannot decide that the competition has been eliminated due to the high market shares held by the undertaking[685]. The application of these criteria require a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on this competitive constraint. Secondly, competition is deemed to be eliminated when and if the restrictive agreement concerned amounts to an abuse of dominant position[686]. Additionally, actual and potential competition, the actual market conduct of the parties, previous competitive interaction, barriers to entry[687] and the degree of substitutability between the products[688] offered by the parties should be taken into account during this evaluation.

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682 Kjolbye, *Economic Approach*, p. 578.
683 Italics are added.
684 Atlantic Container Case, para. 939.
685 However, it should be borne in mind that it is accepted in the Discussion Paper on Article 82 that a dominant undertaking with a market share exceeding 75% could be unlikely to justify that efficiency gains would be sufficient to counteract its actual or likely anti-competitive effects.
686 Sufrin, p. 951.
687 While evaluating the entry barriers, it would be necessay to assess, inter alia, the regulatory framework with a view to determining its impact on new entry, the cost of entry including sunk costs, the minimum efficient scale within the industry, the rate of output where average costs are minimized, the competitive strengths of potential entrants, the position of buyers, the likely response of incumbents to attempted new entry, the economic outlook for the industry, past entry on a significant scale or the absence thereof. See Guidelines on Article 81, para. 115.
688 If the parties to the agreement offer close substitutes products, it would be more likely that the agreement restricts the competition.

4.3. Evaluations

As aforementioned, efficiency defense mechanism identical to Article 81 (3) of the EC Treaty has been launched for Article 82 cases, especially for the exclusionary abusive conducts of the undertakings, in the Discussion Paper on Article 82 and that in accordance with the Discussion Paper on Article 82, the four criteria under Article 81 (3) regime will be applicable for Article 82 cases. Therefore, as to whether the case has been brought before the Community Institutions under Article 81 or Article 82 and as to whether the undertaking under consideration is a dominant one or not will not make sense in this respect. This is a welcoming approach in order for the parallel and consistent application of Article 81 and 82 of the EC Treaty, which protects the common aim, say the protection of competition in the market. However, it should be noted that even before the new immunity regime framed by the Commission, the ***existency*** of efficiency defenses have also been accepted and underlined by the Community Courts for Article 82 cases[689].

It should be recalled here that it was enough for the establishment of 'abuse' by the Community Institutions if and when the undertaking's conduct is not ***competition on the merits***[690]. In other words, it was enough to conclude that the dominant undertaking abuses its position in case the competition is affected due to the conducts of the undertaking which are not competing on the merits. However, the newly launched immunity regime under the Discussion Paper on Article 82 has brought a closer regime and methodology to that of one followed by Article 81 (3) regime in that in case the conduct of the dominant undertaking forecloses or restricts competition, such conduct is prohibited under Article 82 of the EC Treaty unless such conduct will be justified by efficiency grounds.

Some commentator has argued that creating an 'Article 82 (3)' rule in the absence of a Treaty provision is troublesome[691] for the lawyers and that the efficiency defense actually protects the undertakings having relatively a weaker dominant position

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[689] See, for instances, British Airways 219/99, para. 280; Hoffmann-La Roche Case, para. 90; Michelin 322/81, paras. 73, 85; Portugal Case, para. 114; Michelin 203/01, paras. 140-141; Irish Sugar 228/97, paras. 114, 189.
[690] Hoffmann-La Roche Case, paras. 90-91.
[691] Rousseva, *Objective Justification,* p. 424.

which can also be saved under Article 81[692]. It is also defended that instead of incorporating efficiency justification into Article 82 of the EC Treaty as a defense mechanism, efficiency considerations should be elements in order to refute foreclosure effect in the market and thus re-defining the meaning of abuse is proposed by the same commentator[693]. Rousseva mentions that abuse should consist of two following indicators:

i. 'competitive structure should be affected by excluding the competitors (foreclosure effect) and
ii. effect must be caused through means not based on normal competition'[694].

We, however, cannot share such an argument, since, this argument will amount to a conclusion that if there is efficiency gain, foreclosure effects will not exist and as long as the undertaking's conduct will be proportionate, the conduct of the undertaking will not declared as an abusive conduct. Such a conclusion cannot be acceptable since, first, such an argument does not take into account 'the fair share for consumers and consumers' pass-on' and 'no elimination of competition' criteria. Secondly, efficiency gains may exist even there is a foreclosure effect or the exclusion of competitors. The aim of competition law is not solely to protect the competitors, but to protect competition in the market. Additionally, if such an argument would be appreciated, this will bring us an almost inapplicable formula. Since, any restrictive conduct of the undertaking having already in a dominant position may mostly lead to a foreclosure effect[695]. Furthermore, such a formula will amount to an inconsistent methodology with Article 81 (3) regime. Thirdly, another point to be remembered is that abusive conducts have been enumerated as examples in Article 82 of the EC Treaty. Those examples are factual things. For instance, if an undertaking will make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such

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[692] Rousseva, *Objective Justification,* p. 425.
[693] Rousseva, *Objective Justification,* p. 428-429.
[694] This means that "*the pursuit of the legitimate aim of profit maximization through disproportinate means*".
[695] Rousseva's argument is not acceptable under the case law of the Community Courts, neither. Since, for instance, a loyalty discount is not prohibited even if they have a foreclosure effects as long it is based on an economically justified considerations. See Michelin 203/01, paras. 140-141; British Airways 219/99, para. 280.

contracts, such conduct is declared as ‘abusive’. Due to the explicit wording of Article 82 of the EC Treaty, one cannot say that such conduct is ***not*** abusive. Since, Article 82 has given this arrangement as an illustration to the abusive conduct. However, in case the four criteria under Article 81 (3) will be fulfilled, such conduct may be declared as immuned, albeit abusive. But if Rousseva’s argument will be accepted, once it would be found out that there is a foreclosure effect in the market, it will be concluded that the conduct is abusive. Such approach will not bring any developments from the previous practices which the Community Courts have mentioned that as long as there is a foreclosure effect, Article 82 will be applicable. However, we believe that if a dominant undertaking will commit in such conduct, this should be declared in any case as abusive. Since, tying is a factual thing and as to whether there is efficiency gains or not should be scrutinized in this respect.

We, therefore, believe that rejecting the new defense approach brought by the Community Institutions modeled upon 81 (3) regime and incorporating new, but almost inapplicable formula by re-defining the term ‘abuse’ is not consistent with Article 81 (3) regime and may amount to undesirable outcomes. In this respect, the new immunity regime drawn by the Community Institutions should be fully respected for the sake of the principle of legal certainity and the principle of uniformity of law.

In this respect, it is true that unlike Article 81 (3) of the EC Treaty, Article 82 does not envisage any immunity regime in its text. However, right to defence is a fundemantal right both protected under ECHR and observed by the EC Treaty[696]. In this respect, it should be noted that in order to determine as to whether the right to defence is effectively enforced and observed by the respective competition authorities, there are three proxies to be respected:

i. “the respective authorities should work effectively with respect to the determination of competition violations, burden of proof processes and the penalties,

[696] Hüls AG Case, paras. 148-149; Sumitomo Case, paras. 69, 104.

ii. the respective authorities should minimize any limitation on the right to defence of the parties,

iii. the respective authorities should respect and carefully analysed the evidences submitted by the defendants"[697]. In case the respective competition authorities will not carefully assessed the efficiency defenses raised by the undertakings, one cannot claim that the right to defense is fully observed by the competition authorities concerned.

Additionally, it should be noted that there exists no Treaty provision with respect to the application of mandatory requirements as *derogation* from the free movement provisions, neither[698]. However, mandatory requirements have been created by the Community Courts and now been applied as a derogation from the free movement provisions. Therefore, objection on the ground that the text of Article 82 does not envisage any efficiency grounds will not make sense in this respect. Since, the Commission is capable to determine its priorities and has been entrusted with an extensive and general supervisory and regulatory task in the field of competition law. As the Court of First Instance has ruled in Automec Srl. that "...in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law where those priorities have not been determined by the legislature is an inherent feature of administrative activity. This must be the case, in particular, where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law"[699]. Therefore, by envisaging efficiency defense for Article 82 cases, the Commission has showed its intention that only the non-

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[697] Türkkan, Erdal. "Rekabet Politikalarının Gelişmesinde Savunmanın Rolü", Rekabet Günlüğü, Rekabet Kurumu 2009, http://www.rekabet.gov.tr.
[698] See for further information with respect to the mandatory requirements Section '4.2.3.1. Objective Justifications' of the Thesis.
[699] Case T-24/90, Automec Srl v. Commission, (1992) ECR II-2223, para. 77.

efficient and unjustified conducts of the undertaking will be scrutinized under Article 82 cases[700].

Finally, due to the jurisprudence of the Community Courts, Article 81 and 82 of the EC Treaty will be applicable to the same cases and obtaining immunity from the prohibition under Article 81 will not immunize the same undertaking from the prohibition under Article 82 of the EC Treaty. We believe that such an efficiency approach identical to that of the one under Article 81 (3) of the EC Treaty will give confidence to the dominant undertaking concerned. Additionally, since both Article 81 and 82 of the EC Treaty will be applicable to contractual practices, the dominant undertaking may act freely to the extent its agreement will obtain immunity from the application of Article 81 (2) of the EC Treaty. Such an interpration is also consistent with the aim protected by those Articles, say the protection of competition. If the common aim is protected through different means and in case the different methodology in these two Articles become identical to each other, this will amount to the same conclusion when one assesses the same case both under Article 81 and Article 82 of the EC Treaty[701].

4.4. Simultaneous Application Of Article 82 And Article 81 Of The EC Treaty To The Restrictive Technology Transfer Agreements

Article 81 of the EC Treaty stipulates, inter alia, that conduct of the undertakings which leads "…directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical developments, or investment, share markets or sources of supply, apply dissimilar conditions to equivalent transactions with other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts …" are void. Article 82 of the EC Treaty puts forward that conduct of the undertakings which leads "directly or indirectly imposing unfair purchase or selling

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[700] Similar approach has been upheld in British Airways 219/99 where the Court of Justice has ruled that "… the Commission is entitled, in order effectively to ensure the application of the Community competition rules … to give differing degrees of priority to the complaints brought before it by reference to their Community interest, measured in relation to the circumstances of each case and, in particular, to the elements of fact and law which are presented to it". British Airways 219/99, para. 68.

[701] This subject will be scrutinized in more detail in Section 4.4. Simultaneous Application of Article 82 and Article 81 of the EC Treaty to the Restrictive Technology Transfer Agreements.

prices or other unfair trading condition; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts" are prohibited. As it can be seen, the main prohibitions in both Articles are almost identical to each other. It should be noted that until the issuance of Guidelines on Article 81, one of the most important distinctive feature of Article 82 from Article 81 is that the said conducts shall be eventuated solely by the dominant firm, an undertaking having the market power individually or collectively. On the other hand, before Guidelines on Article 81, market power of the undertakings was not taken into account in order to apply Article 81 (1) and only the anticompetitive conducts of the undertakings have been taken into consideration for the purpose of Article 81 (1) of the EC Treaty[702]. Therefore, it was thought that Article 82 would be applicable only in cases where one (or both) of the party to the agreement is in a dominant position in which case Article 81 will not be applicable. However, in accordance with the jurisprudence of the Community Courts, it was ruled that Article 81 (3) is also applicable for the agreements concluded by the dominant undertakings[703]. Additionally, the Community Courts also have ruled that Article 81 and 82 of the EC Treaty follow common aims at different level[704]. Therefore, confusion with respect to the application of Article 81 and Article 82 has emerged, in particular for the cases where there would be restrictive agreements concluded by the undertakings having, either individually or collectively, market power.

The Community Courts and the Commission had been affected by ordoliberal in that they had continued to resist to changes in the market structure and did not, in practice, take into account the effects of the agreements concerned in the relevant market[705]. This attitude held by the Community Institutions amount to an outcome in

[702] On the other hand, the Community Institutions have taken into account the market power of the undertakings while granting exemption to the undertakings under Article 81 (3) of the EC Treaty.
[703] See i.e. United Brands Case, para. 141; Tetra Pak 51/89, paras. 28-29; Hoffmann-La Roche Case, paras. 90, 116; Atlantic Container Case, paras. 610, 1441-1443.
[704] Continental Can Case, para. 25.
[705] Rousseva, *Modernizing by Eradicating*, p. 589.

that since there would be no immunity mechanism accepted under Article 82 regime as did by Article 81 (3) of the EC Treaty, the application of those Articles may result in different outcomes, in particular where an agreement has been concluded by one (or two) dominant undertakings. Since, once the agreements -even if concluded by the dominant undertaking(s)- will be evaluated under Article 81 of the EC Treaty, the undertaking concerned may defend itself by Article 81 (3) mechanism, say efficiency grounds, on the other hand it could not provide any defense during the evaluation under Article 82 regime. Therefore, the same anticompetitive agreement having the same object and effect might be immuned from Article 81 but not from Article 82 even if both of the Articles have the same purpose, the protection of competition in the market[706]. Therefore, since Article 82 of the EC Treaty does not provide any defense mechanism as the EC Treaty provides for Article 81, in accordance with the evolving jurisprudence of the Community Courts[707] and the new approach pursued by the Commission, it has been argued that an immunity mechanism may be used by the undertakings under consideration and that unless it is objectively justified, the anticompetitive conducts of the undertakings will be prohibited. By showing its intention to bring the application of Article 81 and 82 closer in that regard, the Commission has launched the Discussion Paper on Article 82 in order to bring an immunity regime for exclusionary abuse cases under Article 82 of the EC Treaty[708].

In addition to the new approach brought by the Discussion Paper on Article 82, the Commission has launched the Guidelines on Article 81 and sets forth in this Guideline its intention on the interpretation and application of Article 81 of the EC Treaty on an economic based approach as applied by the Community Institutions in the recent Article 82 cases. Before the Council Regulation 1/2003 and the Guidelines on Article 81, a restriction of competition was enough for the application of Article 81 (1)

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[706] The Council Regulation 1/2003.

[707] Irish Sugar 228/97, paras. 112, 173, 189, 190, 218; Deutsche Grammophon Case, para. 19; United Brands Case paras. 168, 189, 208; Sirena Case, para. 17; Portugal Case, paras. 11, 44, 49, 54, 114; BPB 77/77, paras. 19; Tetra Pak 83/91, paras. 115, 165, 207, 221; British Airways 219/99, para. 280; Hoffmann-La Roche Case, para. 90; Michelin 322/81, paras. 73, 85; Michelin 203/01, paras. 140-141.

[708] Although the Discussion Paper on Article 82 is not effective as of today, we believe that a new guideline on the application of immunity regime to Article 82 cases, in particular for exclusionary abuses, will be launched by the Commission in the near future. Since, the revision of the immunity regime and thus enforcement regime for Article 82 cases is inevitable if the uniform application of and thus coherent outcomes in Article 81 and 82 cases are requested as far as the agreements, concluded between the parties having dominant position either individually or collectively, are concerned.

of the EC Treaty and the Community Institutions did not require a finding of market power for the application of Article 81 (1) of the EC Treaty. This amounts to an expansive interpretation of the notion of restrictive of competition and a wide scope of application[709] for Article 81 (1) of the EC Treaty[710]. In most cases, however, where the undertakings do not have a market power, it would be enough for the Community Institutions to conclude that the agreement concerned was exempted from the prohibition under Article 81 (2) of the EC Treaty[711] or if the undertaking concerned had a high market share, it was enough for the Community Institutions to come to the conclusion that the agreement concerned was not fulfilled the criteria under Article 81(3) of the EC Treaty. Since, the idea behind this approach was that as long as the undertaking concerned does not possess market power, it would be unlikely that it would affect the structure of the market and thus affect the competition. However, this approach by the Community Institutions has brought unmanageable workload for the Commission under Article 81 (3) of the EC Treaty. Since, once it is concluded that the restrictive agreements affect the competition under Article 81 (1), the Commission has to evaluate those agreements under Article 81 (3). In order to resolve the procedural problems arising due to the expansive approach in Article 81 (1) and escape from the workload it had confronted, the Commission tries to reduce the scope of Article 81 (1) and therefore the Commission, by considering its experiences under Article 81 cases, gives importance to the role of market power. Therefore, market power has also become an essential element once Council Regulation 1/2003 and the Guidelines on Article 81 have come into force and that the new attitude of the Community Institutions enables the market power analysis for Article 81 cases as it does for Article 82 cases. By these evolving approaches of the Community Institutions, market power of the undertaking concerned becomes almost a decisive factor while evaluating the impact of the agreement in the relevant market while applying Article 81 (1) of the EC Treaty.

Furthermore, Guidelines on Article 81 has envisaged that in order to determine the anticompetitive effect of the agreement, it is necessary, in each case, to take into

[709] It should be noted that within the first stage which the ordoliberal thinking was effective in framing the application of Article 81, this effect was also felt in Article 82 cases in which an expansive approach was maintained to finding an abuse. See Section '2.4. Abusive Conducts' of the Thesis.
[710] Rousseva, *Modernizing by Eradicating*, p. 607.
[711] Monti, p. 156.

account of the way in which competition operates on the market. In this respect the nature of the agreement, the market position of the parties, the market position of competitors, the market position of buyers of the licensed products, entry barriers, maturity of the market and other factors should be scrutinized for each case closely. Those proxies are the same to that of the ones under Article 82 analysis and that all those factors are also assessed for Article 82 cases in order to determine as to whether the undertaking concerned has a dominant position and thus a market power in the relevant market. Therefore, the new attitude of the Community Institutions towards a market power analysis for the application of Article 81 (1) of the EC Treaty has brought the application of Article 81 closer and almost identical to that of the one made under Article 82 of the EC Treaty.

As defined above[712], in order to find out market power of the undertaking under consideration, the Community Institutions should first define the relevant market and determine the market shares of the undertaking and following this assessment, barriers to entry and the countervailing market power have to be analysed under Article 82 cases which the Community Institutions have applied for years. The new approach under the Guidelines on Article 81 is the same to that of the methodology followed under Article 82 cases. As also defined above[713], under the Discussion Paper on Article 82, the Commission has showed its intention to apply efficiency defenses for Article 82 cases which is modeled upon Article 81 (3) of the EC Treaty. This is interesting in that the Community Institutions has become familiar in applying market power analysis under Article 82 cases and also has become familiar in applying defense mechanism under Article 81 (3) and now the Community Institutions, in particular the Commission, try to achieve coherent approach in the application of Article 81 and Article 82 by applying the immunity mechanism to Article 82 cases which it gains experience on Article 81 (3) and by applying market power analysis to Article 81 cases which it gains experience on Article 82 cases. Such an approach, although not a creative one, is an effort to work as a filter in order to reduce the scope of Article 81 (1) cases and to bring efficiency justification for undertakings which are caught by Article 82 of the EC

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[712] See Section '2. Abuse of Dominant Position' of the Thesis.
[713] See Section '4.2.3.3. Efficiency Defenses' of the Thesis.

Treaty. In this way, the Commission tries to achieve both a coherent application of Article 81 and Article 82 and also tries to avoid possible conflicts which may arise following Council Regulation 1/2003. Since, while Council Regulation 1/2003 enables the national competition authorities of Member States to apply Article 81 (3) to the agreements concerned, it also abolished the individual exemption system which was the monopol competence held by the Commission. By considering that there are hundreds of cases either dealt with under Article 81 or Article 82 cases, the guiding principles for the national competition authorities of the Member States will be those cases and practices while assessing the restrictive agreements.

From the foregoings, one question may emerge as to whether it would still be required for the respective competition authorities to apply Article 82 for the technology transfer agreements concluded between the undertakings, individually or collectively, holding dominant position. Since as underlined in detail, there is no distinctive feature left between the application of Article 81 and Article 82 to the technology transfer agreements following the issuance of Guidelines on Article 81.

In Hoffman La Roche[714] case, the Court of Justice has ruled that "… the fact that agreements of this kind might fall within Article 85 *(now Article 101)*[715] and in particular within paragraph (3) thereof does not preclude the application of Article 86 *(now Article 102)*[716], since this latter Article is expressly aimed in fact at situations which clearly originate in contractual relations so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and to the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of Article 85 *(now Article 101)*[717] or Article 86 *(now Article 102)*[718]. In this respect, the Court of Justice might mean that in case the agreement is concluded between the parties voluntarily[719] and is in the interest or to the benefits[720] of both the parties to the agreement, Article 81 will be applied, but if

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[714] Hoffmann-La Roche Case, para. 116.
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[716] Italics are added.
[717] Italics are added.
[718] Italics are added.
[719] For the same view see Rousseva, *Modernizing by Eradicating*, p. 620.
[720] Hoffmann-La Roche Case, para. 115.

otherwise, Article 82 will be applicable for the case in question. However, it should be noted that there may be cases where both of the parties may be willing to enter into a restrictive agreement voluntarily. The intentions of the parties will not preclude the application of either Article 81 or Article 82 of the EC Treaty. In Crehan ruling, the Court of Justice has mentioned that "… a party to a contract liable to restrict or distort competition within the meaning of Article 85 *(now Article 101)*[721] of the Treaty can rely on the breach of that Article to obtain relief from the other contracting party and Article 85 *(now Article 101)*[722] of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract"[723]. In other words, the Court of Justice has meant that an agreement may be to the benefit of one of the party and such party may confront harm even if the parties enter into agreement voluntarily. Therefore, in case the parties enter into agreement where only one of the parties will benefit, this will neither be construed so as to preclude one of the parties to claim its losses due to the agreement nor will preculude the application of Article 81 prohibition to the agreement.

Second outcome which may arise from this ruling may be refuted in that, as the Court of Justice has mentioned, while Article 82 may be applicable for the cases where one of the parties to the agreement holds dominant position and thus exercise this power on the other party, on the other hand, Article 81 will be applicable for the cases where none of the parties hold a dominant position[724]. However, it should be borne in mind that following the new approach of the Commission and the evolving jurisprudence of the Community Courts, Article 81 will be applicable for the cases where one of the parties holds a dominant position. Therefore, it should be noted that Article 81 will neither be applicable only when the parties have voluntarily concluded the agreement nor there will be no market power of the parties[725]. The outcomes from the explanations with respect to the ruling is that neither the nature of the reciprocal undertakings of the

[721] Italics are added.
[722] Italics are added.
[723] Case C-453/99 Crehan v. Courage (2001) ECR I-6297 ("Crehan Case"), para. 36.
[724] For the same view see Rousseva, *Modernizing by Eradicating*, p. 620.
[725] For the same view see Rousseva, *Modernizing by Eradicating*, p. 622.

parties nor the competitive positions of the parties will be a decisive factor in order to determine the application of either Article 81 or Article 82 to the case[726].

In Compagnie Maritime Belge case, the Court of Justice has ruled that "It is clear from the very wording of Articles 85 *(Article 81)*[727] (1) (a), (b), (d) and (e) and 86 *(Article 82)*[728] (a) to (d) of the Treaty that the same practice may give rise to an infringement of both provisions. Simultaneous application of Articles 85 and 86 of the Treaty cannot therefore be ruled out a priori. However, the objectives pursued by each of those two provisions must be distinguished. Article 85 *(Article 81)*[729] of the Treaty applies to agreements, decisions and concerted practices which may appreciably affect trade between Member States, regardless of the position on the market of the undertakings concerned. Article 86 *(Article 82)*[730] of the Treaty, on the other hand, deals with the conduct of one or more economic operators consisting in the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers"[731]. From this ruling one may conclude that Article 82 will be applicable as long as one of the parties holds a dominant position and the said dominant party affects competition in the relevant market to an appreciable extent with its economic strenght[732]. However, as noted above, Article 81 will be applicable to the cases in which one of the parties holds dominant position[733]. For instance in Van den Bergh case[734] although the undertaking holds a dominant position in the relevant market, the Commission does not apply Article 82 at first. Secondly, as also aforementioned[735], the assessment as to whether the competition is appreciably affected or not or the assessment on as to whether the actual or potential competition is restricted or not is

[726] However, in this respect it should be borne in mind that economic pressure and the absence of interest may be important during the evaluation and determination of the fines to be imposed on the undertakings concerned. See Rousseva, *Modernizing by Eradicating*, p. 621.
[727] Italics are added.
[728] Italics are added.
[729] Italics are added.
[730] Italics are added.
[731] Compagnie Maritime Belge Case, paras. 33-34.
[732] Similar view has been held by Rousseva, *Modernizing by Eradicating*, p. 623.
[733] See i.e. United Brands Case, para. 141; Tetra Pak 51/89, paras. 28-29; Hoffmann-La Roche Case, paras. 90, 116; Atlantic Container Case, paras. 610, 1441-1443.
[734] Van Den Bergh Case, paras. 83-84, 91.
[735] See Section '4.2. Restrictive Agreements under Article 81 (1) of the EC Treaty' of the Thesis.

also evaluated under Article 81 as well. This assessment has been firstly launched in Metro case where the Court of Justice has ruled that "… the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market"[736]. In this ruling the Court of Justice has underlined that the agreement should affect competition to an appreciable extent and that certain degree of competition may be restricted as long as the market still stays competitive. From the foregoings, it may be concluded that being in a dominant position or affecting the market to an appreciable extent will not be a decisive factor in order to determine the application of Article 82 to the case, neither[737].

As there is no distinctive feature left between the application of Article 81 and Article 82 to the technology transfer agreements following the issuance of Guidelines on Article 81 and the methodology is the same pursued by Article 82 of the EC Treaty, we firmly believe and defend that as long as the technology agreements are concerned, if and provided that the technology agreement will be block exempted or complies with and fulfills the criteria under Article 81 (3) of the EC Treaty, there is no legal ground to apply Article 82[738] to the same technology transfer agreement and we believe that reference to Article 82 should be omitted from the text of the Technology Transfer Regulation[739]. One can defend that this is contrary to the ruling of the Court of First Instance in Tetra Pak[740] where the Court of First Instance has underlined that "… in the scheme for the protection of competition established by the Treaty the grant of exemption, whether individual or block exemption, under Article 85 *(now Article*

[736] Metro 26/76, para. 21.
[737] Being in a dominant position is only the precondition for the application of Article 82 of the EC Treaty.
[738] It should be noted that as long as the 'collective dominance' under Article 82 is concerned, some authors have the same view that Article 82 should be applicable in case where Article 81 is not applicable. The said authors have mentioned that "Finally, Article 82 should not deal at all with collusive conduct that falls under Article 81 EC (e.g., concerted practices and agreements). To hold otherwise risks blurring the important distinction between unilateral conduct and collusion and the corresponding provisions of the EC Treaty dealing with these types of anticompetitive conducts". O'Donoghue and Padilla, p. 163.
[739] It has been mentioned that "This Regulation is without prejudice to the application of Article 82 of the Treaty". See Technology Transfer Regulation, para. 20.
[740] Tetra Pak 51/89, para. 25.

101)[741] (3) cannot be such as to render inapplicable the prohibition set out in Article 86 *(now Article 102)*[742]". However, in the same ruling, the Court of First Instance also has pointed out that "The grant of individual exemption presupposes that the Commission has found that the agreement in question complies with the conditions set out in Article 85 (3) *(now Article 101(3))*[743]. So, where an individual exemption decision has been taken, characteristics of the agreement which would also be relevant in applying Article 86 *(now Article 102)*[744] may be taken to have been established. Consequently, in applying Article 86 *(now Article 102)*[745], the Commission must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under Article 85 *(now Article 101)*[746] (3)"[747]. This is important in that while the Court of First Instance has underlined that the exemption granted to the undertakings under Article 81 will not prejudice the application of Article 82, on the other hand, it also emphasizes that the Commission is bound by its earlier decisions and findings unless the factual and legal circumstances have changed. It should be noted that in case the factual and legal circumstances have altered, this will be a ground for the competition authorities to withdraw the exemption[748] granted to undertakings and in order for the sake of legal certainity, instead of application of Article 82 of the EC Treaty, the respective authorities should apply the withdrawal mechanism. Since, this will also bring more legal certainity in that once the factual and legal circumstances have changed, the undertakings will know that the authorities concerned will have the competence to withdraw the exemption from the moment factual and legal circumstances have changed. If, however, Article 82 would be applied instead of withdrawal mechanism, the undertaking will be punished as if its conduct were abusive from the beginning and will confront fines due to the application of Article 82 instead of withdrawal mechanism.

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[741] Italics are added.
[742] Italics are added.
[743] Italics are added.
[744] Italics are added.
[745] Italics are added.
[746] Italics are added.
[747] Tetra Pak 51/89, para. 28.
[748] See Section '3.3.7. Withdrawal of Exemption' of the Thesis.

In addition to the above mentioned, it should be noted that in case a technology transfer agreement satisfies the criteria under Aricle 81 (3) of the EC Treaty, it would be almost impossible that the said agreement may be caught by Article 82 prohibition. Since as explained in detail above, the agreements of the undertakings are evaluated identical to the assessment to that of the one made under Article 82 of the EC Treaty. However, where the evaluation is made under Article 81, it would be more likely that the agreement concerned would be caught by prohibition. Since, for the application of Article 81 (1) prohibition, being in a dominant position, albeit important, not a decisive factor. An agreement may be caught by Article 81 (1) even if the undertaking concerned does not possess a market power, i.e. in case of cumulative effects of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology and that it would be likely that the agreements under consideration may be prohibited under Article 81 regime. As the Commission has pointed out in its Guidelines on Article 81 "***Market power is a question of degree***. The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for finding of dominance under Article 82"[749]. Therefore, it would be rational to conclude that if Article 81 catches the agreement which is not even concluded by the dominant undertaking, Article 81 would be most appropriate mechanism to catch the agreements concluded by the dominant undertakings. Since, we believe that Article 81 has a stricter methodology than the methodology under Article 82 in order to catch the anticompetitive technology transfer agreements. Therefore, it may be concluded that there is no issue left which is not scrutinized under Article 81 when compared to Article 82 criteria. For instance in Van den Bergh case[750] although the undertaking holds a dominant position in the relevant market, the Commission does not apply Article 82 at first and the Court of First Instance have applied the foreclosure effects of the agreement concerned. Once the Court of First Instance have applied the foreclosure effects principle under Article 81 and concluded that the agreement has a foreclosure effect, it has then mentioned that the agreement is also abusive. However, while deciding as to whether the conduct is abusive or not, the Court of First Instance does not

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[749] Guidelines on Article 81, para. 26.
[750] Van Den Bergh Case, paras. 83-84, 91.

give any reasoning departing from or in addition to the assessment made under Article 81 of the EC Treaty. Since this case is one of the most recent judgements issued in 2003, it would not be incorrect to conclude that the Community Institutions are also willing to apply Article 81 instead of Article 82 as long as the case before them is with respect to restrictive agreements.

Application of Article 81 instead of Article 82 to the technology transfer agreement will bring another advantage in addition to the aforementioned in that under Article 81, the degree of market power is evaluated with a view to ascertaining the degree of foreclosure irrespective of the undertaking holds dominance or superdominance in the relevant market and thus the agreement is caught by the authorities not due to the undertaking concerned has a superdominance but due to the agreement concerned has a strong foreclosure effect in the relevant market[751]. Therefore, the Community Courts will not be required to lauch obscure and invent undefined phrases such as ‘special responsibility’ or ‘competition on merits’ or at least apply those phrases for the unilateral conducts of the undertakings which raise real competition concerns.

Finally, we believe and defend that as long as the technology agreements are concerned, if and provided that the technology agreement complies with and fulfills the criteria under Article 81 (3) of the EC Treaty, there is no legal ground to apply Article 82 to the same technology transfer agreement and we believe that reference to Article 82 should be omitted from the text of the Technology Transfer Regulation[752]. Therefore, we are of the firm view that as long as technology transfer agreements and the restrictive provisions therein are concerned, following order should be pursued by the respective competition authorities:

- **i.** In case the technology transfer agreement is covered by the Technology Transfer Regulation, the same agreement should be immuned from the prohibition under Article 82 of the EC Treaty,

[751] Rousseva, *Modernizing by Eradicating*, p. 630.
[752] It has been mentioned that “This Regulation is without prejudice to the application of Article 82 of the Treaty”. See Technology Transfer Regulation, para. 20.

ii. In case the technology transfer agreement or any terms thereof is not covered by the Technology Transfer Regulation and in case the same technology transfer agreement or any terms thereof has been assessed under Article 81 (3) regime and thus declared immuned from the prohibition under Article 81 (1) of the EC Treaty, the same technology transfer agreement or any terms thereof should be immuned from the prohibition under Article 82 of the EC Treaty,

iii. If there are other restrictive terms[753] in the technology transfer agreement which are not dealth with either under the Technology Transfer Regulation or Technology Transfer Guidelines, but which have been assessed under Article 81 (3) and finally immuned from the application of 81 (1) prohibition, the same terms should be immuned from the prohibition under Article 82 of the EC Treaty.

It should be noted that since the cumulative effects of the agreements or the restrictive provisions therein are dealt with by the respective authorities during Article 81 (3) immunity regime, the aforementioned guadiance will not prevent neither the Commission nor the national courts from the assessment in the future of cumulative effects of the technology transfer agreements. Since, it should be recalled that the Commission or the competition authorities of the Member States are, at any time, entitled to withdraw, in the future, the exemption granted to the agreement which does not satisfy the criteria under Article 81(3) of the EC Treaty. Therefore if any of the criteria will not be fulfilled, exemption may be withdrawn in the future[754].

4.5. Legal Status Of Anticompetitive Agreements And The Restrictive Provisions

Technology transfer agreements which satisfy the conditions envisaged in the Technology Transfer Regulation are block exempted from the prohibition rule envisaged in Article 81(1) in that those agreements are legally valid and enforceable by

[753] For instance ancillary restraints. For further information see Section '4.2. Restrictive Agreements Under Article 81 (1) Of The EC Treaty' of the Thesis.
[754] See Section '3.3.7. Withdrawal of Exemption' of the Thesis.

the parties to the agreement. Such agreements falling within the scope of the Technology Transfer Regulation can only be prohibited for the future upon the withdrawal of the block exemption by the Commission or a Member State competition authority. If an agreement is covered by the Technology Transfer Regulation, national courts of the Member States will not be competent to prohibit those agreements in the context of private litigation[755].

It should be recalled that there is no presumption of illegality for the agreements falling outside the Technology Transfer Regulation. In case an agreement is not covered by the Technology Transfer Regulation and falls outside the block exemption, i.e. the market share thresholds are exceeded on the signature date of the agreement or the agreement involves more than two parties, such agreement will be subject to an individual assessment. In such case, if an agreement does not restrict competition within the meaning of Article 81(1) or if restricts, does fulfil the conditions of Article 81(3), the said agreement will also be valid and enforceable[756] by the parties to the agreement.

In this respect, we believe that the agreements restricting competition by its object or by its effects are to be distinguished from each other. In case an agreement restricts competition by its very object, i.e. price cartel, unless exempted, those types of agreement should be null and void from the moment it has been concluded[757] and the plaintiff is neither required to assess the effect of the agreement on the relevant market nor to prove that the agreement affects competition in the market. In the European Night Services, the Court of First Instance has ruled that "… it must be borne in mind that in

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[755] Technology Transfer Guidelines, para. 34.

[756] It should be noted that there is no presumption that the agreement will be prohibited under or caught by Article 81(1) applies in case the market share thresholds are exceeded.

[757] Restrictions of competition by object have been defined in the Guidelines on Article 81, para. 21 as "… are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is ***unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market***. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question".

assessing an agreement under Article 85(1) *(now Article 101(1))*[758] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned … unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets"[759]. Therefore, in cases where an agreement includes hardcore restrictions, such agreement as a whole will fall outside the scope of the block exemption. Since those hardcore restrictions restrict competition by its object and cannot be severable from the rest of the agreement[760], the agreement will be null and void in its entirety from the moment it has been concluded by the parties and provided that it will not fulfil the four criteria under Article 81 (3) of the EC Treaty, it will be unenforceable, null and void from the date of its signature[761].

As we have noted above restriction by object and effect has to be distinguished from each other in that in case the agreement restricts competition by its object, i.e. price cartel or agreements containing hardcore restrictions, such agreement should not be required to assess by the competent authorities by its effects on the market. In other words, the respective authorities will not be required to analyse that such agreement restricts competition on the relevant market by its effects and will not be under the burden to prove that the agreement concerned has the effect of restricting competition in order to apply Article 81 (1) of the EC Treaty[762].

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[758] Italics are added.
[759] European Night Services, para. 136.
[760] See Technology Transfer Guidelines, para. 14.
[761] It is even defended that "Licenses which may restrict competition in the EU can be caught by the EU prohibition on anti-competitive agreements regardless of the location of the licensor and licensee. For example, a license between two US companies which grants the US licensee worldwide rights to exploit a particular technology, including the EU rights, and which contains provisions which are considered restrictive of competition under EU law, will expose the parties to sanctions and damages for breach of EU law. It will also render the restrictive provisions and potentially the license as a whole unenforceable in the EU". See Coumes, Jean-Michel. "IP Rights and EU Competition Law: Can Your IP Licensing Agreement Benefit From Safe Harbour?", E.C.L.R., 28(1), 2007, p. 24; See for a similar approach Yengin, Halisan. "Ulusal Rekabet Hukuku Kurallarının Ülke Dışı Uygulanmasının Türkiye ve Avrupa Birliği İlişkisi Üzerinde Etkisi", İstanbul Barosu Dergisi, 2006, p. 14-15; Erol, Kemal. Milli Hukuk Kurallarının Ülke Dışında (Extraterritorial) Uygulanmasına İlişkin Devletler Hukuku Kuralları. Ankara: Rekabet Kurumu, 1999, p. 129.
[762] The burden to prove is set forth in Article 2 of the Council Regulation 1/2003 as "In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled".

However, in case the agreement does not have its object to restrict competition or it cannot be inferred from the agreement that the agreement restricts competition by its object, then the effect of the agreement in the relevant market should be evaluated. In Delimitis case, the Court of Justice has put forward that "If such agreements do not have the object of restricting competition within the meaning of Article 85(1) *(now 101(1))*[763], it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition" [764]. In our views, one of the most important differences between the restriction by "object" or by "effect" is the ***burden of proof*** on the parties. In case the agreement restricts competition by its object, the burden to prove will shift on the undertakings claiming that its agreement fulfills the criteria under Article 81 (3) of the EC Treaty. On the other hand, in case the agreement does not have its object to restrict competition or it cannot be inferred from the agreement that the agreement restricts competition by its object, the burden to prove is on the plaintiff and the plaintiff must show and prove with its analysis that the agreement in question restricts competition by *its very effect*. Since, in order for the application of Article 81, there should be, inter alia, anticompetitive agreement which restricts competition either by its object or its effect on the market. If any party claims that there is an agreement which restricts competition, the burden to prove is on the party claiming such restriction. Therefore, we believe that the most important issue to be focused is the one who will bear the burden of proof.

It should be noted that, although an agreement may restrict competition by its very object, such agreement may still, however, be exempted in case the parties will prove that their agreement fulfills the criteria under Article 81 (3) of the EC Treaty. In both Reims II[765] and CECED[766] cases, the Commission declares that the parties have committed price fixing which restricts competition by its object. However, the Commission has accepted the parties' claims that their agreements have fulfilled the criteria under Article 81 (3) and thus granted exemptions to the price fixing arrangements. In European Night Services[767], the Court of First Instance has ruled that

[763] Italics are added.
[764] Case C-234/89, Delimitis v. Henninger Brau AG, (1991), ECR I-935, para. 13.
[765] Reims II, OJ (L56) 76, (2004), para. 65.
[766] Case IV.F.1/36.718. CECED, OJ (L187) 47, 5 C.M.L.R. 635 (2000), para. 67.
[767] European Night Services, para. 136.

if "… an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets, … such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85 (3) *(now Article 101(3))*[768] of the Treaty, with a view to granting an exemption from the prohibition in Article 85 (1) *(now Article 101(1))*"[769]. These cases show that although the Commission declares that price fixing restricts competition by its object, price fixing arrangement can still be exempted in case the parties will prove that their agreements fulfill the conditions under Article 81 (3). The important issue in that regard is that the Commission is neither under the burden to prove that price fixing arrangement restricts competition by its effect on the market nor must base its findings to analysis which shows the anticompetitive effect of the agreement on the relevant market, since it is already set forth in Article 81 (1) that price fixing is prohibited.

In both of the cases, if and until the exemption is granted in accordance with Article 81 (3) of the EC Treaty, the agreement will have no effect between the parties[770] and the parties to the agreement cannot set up as a defense to a claim by third parties[771]. In case the parties will not raise any questions with respect to the legality of the agreement, the national courts of the Member States or the arbitrator[772] will also have the competence to bring this illegality issue and may declare all or some part of the agreement null and void. Since, Article 81 (2) has a direct application and those authorities are under the obligation to apply Article 81 by their own inititave[773].

There may be cases where the agreement concerned is within the scope of the Technology Transfer Regulation and on the date the agreement was concluded, the parties were considered as non-competitors (or vice versa) and thus the hardcore restrictions applicable for non-competitors had been fulfilled by the parties, however, in

[768] Italics are added.
[769] Italics are added.
[770] Goyder, p. 138.
[771] Crehan Case, para. 22.
[772] It should be noted that even an arbitration award may be annulled due to the non-observance of Article 81 (2) of the EC Treaty in case such an annulment is based on the failure by the arbitrator to apply national rules of public policy and/or national procedural law.
[773] Case C-430/93 Van Schijndel (1995), ECR I-4705, para. 15; Case C-126/97 Eco Swiss v. Benetton (1999), ECR I-3055, para. 37. See for further information with respect to the application of Article 81and 82 by national courts, Gerber, J. David and Paolo Cassinis. "The 'Modernization' of European Community Competition Law: Achieving Consistency in Enforcement: Part 1", E.C.L.R., 27(1), 10-18, 2006, p. 11-12.

accordance with the changing circumstances, the parties become competitors in the relevant market. In such cases, the parties are protected during the term of the agreement[774]. However, in case the parties have substantially amended their agreement in the meantime, the parties should also amend their agreement in a way to comply with the hardcore restrictions in accordance with their new legal status. Otherwise, such agreement as a whole will fall outside the scope of the block exemption and since those hardcore restrictions restrict competition by its object and cannot be severable from the rest of the agreement, the agreement will be null and void in its entirety from the moment the parties have substantially amended their agreements, unless individually exempted. We believe that, in such cases, the parties are under the burden to amend their agreements in a way to comply with the Technology Transfer Regulation if and when they have substantially amended their agreement. Since, in case there is no substantial amendment in the agreement, the agreement will be covered by the Technology Transfer Regulation. Therefore, defending that the agreement will be null and void from the moment it was signed by the parties leads to a risky situation and do not have any legal base. Since, the parties have complied with all the requirements under the Technology Transer Regulation on the date they have concluded their agreement. If, due to the changing circumstances, the parties become competitors or non-competitors, the parties are already protected at least during the term of the agreement. Therefore, for the sake of legal certainity, the agreement concerned should be scrutinized by the authorities on the date the parties have substantially amended the agreement.

As aforementioned, there are excluded restrictions[775] which are not block exempted in the Technology Transfer Regulation. Those restrictions require individual assessment in that their anti-competitive and pro-competitive effects will be analysed under Article 81 (3) regime. In case an agreement contains such types of restrictions and if all the provisions in the rest of the agreement satisfy the conditions under the Technology Transfer Regulation, except those excluded restrictions in the agreement

[774] However, we believe that in case the market share threshold is exceeded during the term of the agreement, the agreement concerned will continue to be protected only for a period of two consecutive calendar years following the year in which the threshold is first exceeded. In such case, the parties are under the burden to amend their agreement in a way to comply with the Communiqué.

[775] See Section '3.3.3.2. Excluded Restrictions' of the Thesis.

concerned, the rest of the agreement will be exempted under the Technology Transfer Regulation. In other words, only the excluded restrictions in the said agrement will not be block exempted and individual assessment will be required[776]. If the conditions of Article 81(3) will not be fulfilled, the excluded provisions which could not fulfill the criteria under Article 81 (3) of the EC Treaty will be null and void provided that the concerned restrictive provisions will be severable from the rest of the agreement. In Societe Technique case, the Court of Justice has ruled that "the automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition and which therefore do not involve the application of the Treaty, fall outside Community law" [777]. If, therefore, part of the agreement will be null and void, it is for the competent national authority to determine[778] the consequences thereof for the remaining part of the agreement[779]. However, it should be noted that the Community Courts do not yet envisage a ***principle of severance*** which may be applicable in all over the Community. Therefore, the determination of the applicable national law may affect the outcome of both the litigation and the status of the agreement in question[780]. In Kerpen case, the Court of Justice has ruled that "… an agreement falling under the prohibition imposed by Article 85 (1) *(now Article 101 (1))*[781] of the Treaty is void and that, since the nullity is absolute, the agreement has no effect as between the contracting parties. It also follows from previous judgments of the Court … that the automatic nullity decreed by Article 85 (2) *(now Article 101 (2))*[782] applies only to those contractual provisions which are incompatible with Article 85 (1) *(now Article 101*

[776] Unlike the hardcore restrictions, which the rule of severability will not be applicable, the rule of severability will be applicable for the excluded restrictions. See Technology Transfer Guidelines, para. 107.
[777] Societe Technique Case, p. 250.
[778] Case 319/82, Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG., (1983), ECR 4 173 ("Kerpen Case"), para. 12.
[779] Guidelines on Article 81, para. 41; Goyder, p. 138.
[780] Since Council Regulation 44/2001 Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters OJ (2001) (the "**Brussels Regulation**") determines where litigation will take place in civil and commercial cases and Rome Convention on the Law Applicable to Contractual Obligations (1980) (the "**Rome Convention**") will determine which law will be applicable in the concerned dispute. In accordance with Article 10 of the Rome Convention, the applicable law of the contract governs the interpretation; performance; the consequences of breach and the assessment of damages; the extinction of obligations and the consequences of nullity of the contract. See for further information with respect to the application of the Rome Convention Wadlow, M. Christopher, "Intellectual Property and the Rome Contracts Convention", E.I.P.R., 19(1), 11-15, 1997, p. 13.
[781] Italics are added.
[782] Italics are added.

(1))[783]. The consequences of such nullity for other parts of the agreement are not a matter for Community law ... that … those consequences are to be determined by the national court according to its own law"[784]. We believe that while appliying the principle of severance, the competent authority should scrutinize, in particular, as to whether the removed part of the agreement will change the character of the agreement in a way that the parties would not enter into any such agreement in case of such change[785].

Another issue to be noted is that as to whether the money paid under the agreement will be recoverable[786] or not and/or the parties to an illegal agreement may have the right to bring an action in tort[787] since they are the cause of the restriction of competition as they are acting in pari delicto[788]. We believe that, as a common principle, nobody can set up a legal consequence from his own illegal acts[789]. However, in Courage Ltd. v. Crehan ruling[790], the Court of Justice has taken into account the importance and full effectiveness of Article 81 of the EC Treaty and mentioned that in case the party to an illegal agreement would not be free to claim damages for his loss due to an illegal agreement, competition rules in the EC Treaty will be put in a risk and that claiming by the parties of their damages strengthen the working of competition

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783 Italics are added.
784 Kerpen Case, paras. 11-12.
785 We believe and propose that it would be in the best interest of the parties to envisage a severability clause in their agreement in order to enable the parties, at least, to escape from the burden of proof and submitting evidence with respect to the parties' intentions if they would be willing that their agreement would continue to be enforceable.
786 In this respect it should be noted that even if the agreement has been voluntarily concluded by the parties and one of the parties has paid money to the other in exhange of the other party's commitment, in case the latter do not fulfill his obligations under the agreement, it would not be just to claim that the money paid will not be recoverable by claiming the principle of "*in pari delicto potior est condition defendentis*". In any case, it should be borne in mind that it is the national law itself which determines the legal consequences, in particular, as to whether the money paid is recoverable or not. Under Turkish law, the parties have the right claim the money paid under Article 61-64 of the Turkish Code of Obligation.
787 By applying the principles of "*in pari delicto potior est condition defendentis*" or "*ex dolo malo non oritur actio*" (meaning that no court will give its aid to a party who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault).
See Wikipedia, located at: http://en.wikipedia.org/wiki/Ex_turpi_causa_non_oritur_actio.
788 For further information, see Whish, p. 291.
789 Case 39/72 Commission v. Italy (1973) ECR 101, para. 10. It should also be pointed out that save as exceptional cases, a party to an agreement should sue the dominant undertaking for damages and in such cases the principle of "*in pari delicto potior est condition defendentis*" should not be respected by the courts provided that the special circumstances of the case firmly shows that the party concerned is the victim of abusive conducts of the dominant undertaking. See Whish, p. 296-297 for further information and the same reasoning.
790 Crehan Case, paras. 26-27.

provisions and make an important contribution to the maintenance of competition in the market. In such circumstances, the Court of Justice added that the *economic and legal context of the parties, the bargaining powers and the conducts* thereof should be taken into account. Therefore, the Court of Justice has underlined that the parties to an agreement which is prohibited under Article 81(1) may claim damages due to such agreement even if such party is the party of the agreement concerned.

However, the Court of Justice also has ruled in the same judgement that "… provided that the principles of equivalence and effectiveness are respected ... Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past … a litigant should not profit from his own unlawful conduct, where this is proven … In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him… Article 85 *(now Article 101)*[791] of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract *however*[792] Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition"[793].

[791] Italics are added.
[792] Italics are added.
[793] Crehan Case, paras. 31, 33, 36.

This ruling is very interesting and at the same time shows how the Court of Justice has put forward its creative and rational efforts with respect to compensation claims. Since, first, the Court of Justice has underlined that everybody, who claims that he is the victim of an agreement covered by Article 81 of the EC Treaty, has the right to claim compensation from the other side. The reason behind this view is that the Court of Justice has taken into account that there are lots of anticompetitive agreements which are not disclosed by the parties and that in case the party to an illegal agreement would not be free to claim damages for his loss due to an illegal agreement, competition rules in the EC Treaty will be put in a risk due to such undisclosed agreements. Secondly, the Court of Justice does not prejudice the principle of *in pari delicto potior est condition defendentis* by urging the national competent authorities to refuse such compensation claims by taking into account the *economic and legal context of the parties, the bargaining powers and the conducts* thereof. Therefore, while the Court of Justice has showed that even if everybody has the right to apply to the national authorities for compensation claims for the sake of competition, the national authorities still have the right to refuse such compensation claims or at least derogate from the principle of *in pari delicto potior est condition defendentis* only in a very specific cases. We, also, believe that right to bring an action for compensation[794] by one of the parties to the agreement should be applied very cautiously and in limited instances where it is explicitly foreseen that such party is the victim of the agreement by taking into account the *economic and legal context of the parties, the bargaining powers and the conducts* thereof.

One further issue to underline is that the question with respect to the status of the agreement in case an agreement did not restrict competition at the time it was concluded, but, due to the changing circumstances, restricts competition thereafter. We think that if an agreement did not restrict competition and fell outside Article 81 (1) at the time the parties had concluded the agreement, but, due to the changing circumstances, the agreement becomes within the scope of Article 81 (1), the agreement should be null and void from the moment the changing circumstances bring the

[794] For a comparative study with respect to compensation claims see Kortunay, Ayhan. "AB Rekabet Hukukunda Tazminat Davalarına Yönelik Reform Çalışmaları ve Türk Hukuku Bakımından Değerlendirilmesi", Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-IV, Rekabet Kurumu, 2008, p. 89-98.

agreement under the scope of Article 81 (1)[795]. Since, first, restriction of competition is prohibited under Article 81 (1) of the EC Treaty. Therefore, once the agreement restricts competition, it will fall within the scope of Article 81 (1). By the same token, even if an agreement was exempted previously, the agreement might, in the future and due to the changing circumstances, restrict competition and thus become within the scope of Article 81 (1) of the EC Treaty. In Passmore v. Morland case, English Court of Appeal has put forward that an agreement which was not within the scope of Article 81 (1) at the time it was concluded, but due to the changing circumstances, it restricts competition, it will come within the scope of Article 81 (1) of the EC Treaty and by the same token an agreement which was within the scope of Article 81 (1) at the time it was concluded, but due to the changing circumstances, it does not restrict competition at all will come within the scope of Article 81 (1) of the EC Treaty since the prohibition in Article 81 (1) is *temporary and transient rather than being absolute*[796].

Secondly, agreements are assessed within the actual context in which they occur, meaning "that as a general rule, the assessment cannot be made exclusively on the basis of the fact pertaining at the time when the agreement was concluded. If subsequently the circumstances change, the assessment may change. It would neither be legally possible nor economically justified to base the assessment exclusively on the situation ex ante. The mere fact that at the time of conclusion an agreement is not caught by Article 81(1) or satisfies the conditions of Article 81(3) does not imply that the agreement is immune to subsequent intervention. Undertakings are obliged to re-assess their agreements when the circumstances change materially"[797]. By the same token, if an agreement had restricted competition and fell within the scope of Article 81 (1) at the time the parties had concluded the agreement, but, due to the changing circumstance, the agreement becomes outside the scope of Article 81 (1), the agreement should be legal and enforceable from the moment[798] the changing circumstances bring

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[795] Kjolbye, *Economic Approach*, p. 566-577.
[796] Passmore v. Morland and Others (2000), ECR-261, paras. 26-28.
[797] Kjolbye, *Economic Approach*, p. 574.
[798] See Section '5.4.4. Types of Nullity Under The Act On Competition' of the Thesis for our views with respect to whether any of the parties to the agreement may claim the money paid or the committments performed by the other under Turkish law regime.

the agreement outside the scope of Article 81 (1)[799]. Guidelines on Article 81 has also put forward that the exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when there is no longer the case. Therefore, the agreements may 'move in and out of the exception'[800] at any time the circumstances have changed.

In this respect, we believe that by the changing attitude of the Community Institutions towards the application of Article 81 cases, it would be very rare that the agreement will fall within the scope of Article 81 (1) of the EC Treaty. If an agreement will fall within the scope of Article 81 (1) and cannot fulfill the criteria under Article 81 (3) of the EC Treaty, it would be likely to conclude that the agreement concerned will foreclose competition and restrict the competition in the market. We, therefore, believe that since the maintenance and protection of competition is one of the unique principles and objectives brought by the EC Treaty, the parties to the agreement should be under the burden to scrutinize their agreement from time to time.

5. TECHNOLOGY TRANSFER AGREEMENTS UNDER TURKISH COMPETITION REGIME

5.1. Introduction

Article 4 of the Act on Competition has prohibited agreements between undertakings which have as their object or effect or likely effect the restriction of competition directly or indirectly in a particular market for goods or services. Restrictive practices in such agreements may be directly or indirectly fixing prices or any other trading conditions, partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements, controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,

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799 In this respect, it should be borne in mind that as to whether the parties have applied to the competent authority or not for an exemption will not be decisive with respect to the legal status of the agreement. As the Court of Justice in Societe Technique Case, p. 248 has ruled that "the fact that an agreement is not notified to the Commission … cannot make an agreement automatically void. It can only have an effect as regards exemption under Article 85 (3) if it is later established that this agreement is one which falls within the prohibition laid down in article 85(1). The prohibition of such an agreement depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in Article 85(1)".

800 Sufrin, p. 969, Whish, p. 292-293, Passmore Case, para. 28.

complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behavior, or preventing potential new entrants to the market, except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts, contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the re-supply of a good or service supplied[801]. Such agreements shall be automatically illegal and prohibited, if all conditions have met under Article 4 and unless exempted in accordance with the terms and conditions of Article 5 of the Act on Competition. Agreements caught by Article 4 but which satisfy the conditions of Article 5 are valid and enforceable. Article 5 of the Act on Competition envisages an immunity regime for the undertakings from the prohibition in Article 4 of the Act on Competition. In order to be immunized from the application of the provisions of Article 4, the agreement shall:

i. "ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
ii. benefit the consumer from the above-mentioned,
iii. not eliminate competition in a significant part of the relevant market,
iv. not limit competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b)"[802].

Article 5 can be applied for individual cases and in such case an individual exemption is required under Article 5 of the Act on Competition. Agreements may also be covered by way of block exemption communiqués and thus such agreements which are in compliance with such block exemption communiqués shall deem to be block exempted and thus escaped from the prohibition under Article 4 of the Act on Competition. All agreements covered by such block exemption communiqués are legally valid and enforceable even if they are restrictive of competition within the

[801] Article 4 of the Act on Competition.
[802] Article 5 f the Act on Competition.

meaning of Article 4. Such agreements can only be prohibited and exemption may be revoked in accordance with Article 13 of the Act on Competition. It should be borne in mind that the exemption may also be withdrawn in case an agreement or networks of agreements which qualified for exemption under the communiqués do not satisfy the requirements under Article 5 of the Act on Competition.

In this part of the Thesis, while the Communiqué applicable to technology transfer agreements shall be evaluated in detail, the evaluation and the statute of the technology transfer agreements under the general regime of Article 5 of the Act on Competition will also be analyzed for those agreements or restrictive provisions which are outside the scope of the Communiqué.

5.2. Regime Under The Communiqué

The Turkish Competition Authority has launched the Communiqué which shall be applicable to categories of technology transfer agreements. Those agreements are exempted from the prohibition under Article 4 of the Act on Competition provided that all terms and conditions in these technology transfer agreements are in compliance with the Communiqué. Technology transfer agreements falling outside the scope of the Communiqué will be subject to an individual assessment under Article 5 of the Act on Competition. In this respect, the Communiqué aims to protect competition within the market and to provide legal certainty to undertakings.

5.2.1. Scope Of The Communiqué

According to the Communiqué, only technology transfer agreements which have been concluded between two undertakings will be covered. By the technology transfer agreement, it has meant that an agreement in which the relevant intellectual property rights[803] and/or know how[804] are licensed individually or mixed. Agreements containing provisions which relate to the sale and purchase of products or which relate to the licensing or assignment of other intellectual property rights shall be regarded to

[803] It includes a patent, utility model, industrial design, integrated circuit topography, plant breeder's right and related applications and software rights. See the Communiqué.
[804] Know-how means a confidential, substantial and identified package of knowledge resulting from experience and testing. See the Communiqué.

fall under technology transfer agreement, provided that those conditions do not constitute the primary object of the agreement and are directly related to the production of the contract products[805]. In this respect, even if the agreement envisages terms and conditions for more than one level of trade, i.e. a licence agreement concerning not only the production level but also the distribution level or sublicense agreement which sublicensing is not the primary object of the agreement will be covered under the Communiqué. However, in such a case, such obligations need to be in compliance with the relevant Competition Authority's communiqués[806]. In order to be covered under the Communiqué, the technology transfer agreements as defined above shall be pertained to the production of contract products, say, the agreement should allow the licensee to exploit the licensed technology for production of goods or services[807].

5.2.2. Relationship With Other Block Exemption Regulations

As has been explained above, the Communiqué exempts technology transfer agreements between two undertakings with respect to the licensing of technology for the production of contract products. However, the products incorporating the licensed technology may be subject of other types of agreements as well. It is therefore necessary to show the relationships between the Communiqué and the Communiqué on Research and Development Agreements (the "**Research and Development Communiqué**"), numbered 2003/2 and the Communiqué on Vertical Agreements, numbered 2002/2 (the "**Vertical Agreements Communiqué").**

(i) Research and Development Comminuque: Research and Development Communiqué covers agreements concluded between two or more undertakings for the purpose of jointly carry out research and development and jointly exploit the results thereof. Research and development and the exploitation of the outcomes thereof are carried out jointly where the work involved is carried out by a joint team, organization

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[805] See the Communiqué.

[806] However, this Communiqué shall not apply to supply and distribution agreements between licensee and their buyers or the license agreements made through pooling of technologies in order to grant license to third parties as a package or license agreements drawn up for the purpose of having an undertaking carry out research and development activities. See the Communiqué.

[807] In this respect, exemption is granted under the Communiqué to the non-assertion and settlement agreement. See the Guidelines on the Application of Article 4 and 5 of the Act on Competition to the Technology Transfer Agreements (the "**Guidelines**").

or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialization in research, development, production and distribution, including licensing, the assignment of IPRs or the transfer of know-how[808]. In this respect, Research and Development Communiqué will be applicable to agreements when the undertakings concerned have jointly licensed IPRs to any third party for the purpose of research and development[809]. However, in case the terms and conditions with respect to the licenses resulted from such research and development will be determined in the agreement, such licence granted to any third party will not be within the scope of Research and Development Communiqué, but if fulfilled, will be covered by the Communiqué[810].

(ii) Vertical Agreements Communiqué: Vertical Agreements Communiqué 'covers agreements concluded between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'[811]. Agreements concerning solely supply and distribution agreements are covered under the Vertical Agreements Communiqué. As explained above, if the agreement imposes on the licensee obligations as to the way in which the licensee must sell the contract products, such an agreement will be covered under the Communiqué[812]. However, if the main purpose of the agreement is not the production of goods and services via the licensed technology, but the establishment of a certain type of distribution system such as exclusive distribution or selective distribution, such an agreement needs to be drafted in conformity with the Vertical Agreements Communiqué if it is requested that the agreements will be covered and exempted by the Communiqué[813]. To put it differently, since the licensee is not only a supplier within the meaning of the Vertical Agreements Communiqué, but also a licensee within the meaning of the Communiqué -since it sells the products produced with the licensed technology-, both the Vertical Agreements Communiqué and the Communiqué will be

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[808] See the Guidelines.
[809] See the Guidelines.
[810] See the Guidelines.
[811] See the Guidelines.
[812] See the Guidelines.
[813] See the Guidelines.

applicable simultaneously. In this respect, the Communiqué will be applicable for the licence agreement between the licensee and the licensor and the Vertical Agreements Communiqué will be applicable for the agreement between the licensee and its purchasers[814].

5.2.3. Application Of The Communiqué

Agreements between competitors may have anticompetitive effects on competition more than the agreements between non-competitors. Additionally, as experienced, competition between undertakings using the same technology may have pro-competitive effects on competition more than competition between undertakings using competing technologies. Therefore, rules to be applied to technology transfer agreements between competitors and between non-competitors, and in particular market share thresholds and hardcore limitations which would exclude the agreement from the scope of block exemption are differentiated.

In that regard, the Communiqué has envisaged that in order for the technology transfer agreements to be covered under the block exemption regime, market share threshold should not exceed 30 % on the affected relevant technology and product market if agreements have been concluded between competitors and should not exceed 40 % on the affected relevant technology and product market if concluded between non-competitors. Provided that the agreements will be concluded between the undertakings within those market share ratios and as long as all other conditions will be satisfied, the technology transfer agreements will be covered by the Communiqué and that such agreements will be protected under the safe harbors established by the said Communiqué.

On the other hand, if the market share ratios of the undertakings are above those levels on the signature date of the agreement, those technology transfer agreements will not be within the safe harbors and that will not be covered under the

[814] It should be noted that since each licensee is considered as a separate supplier under Vertical Agreements Communiqué, where the products incorporating the licensed technology are sold by the licensees under a common brand belonging to the licensor, the same types of restraints permitted under the Vertical Agreements Communiqué will be applied between licensees' distribution systems as within a single vertical distribution system. See the Guidelines.

Communiqué. In such cases and outside the safe harbors, individual assessment under Article 5 of the Act on Competition will be required. However, it should be borne in mind that the fact that market shares of the undertakings exceed the thresholds will not amount that those agreements will be caught by Article 4 or that the agreement does not fulfill the conditions of Article 5. In such cases, if those agreements will be caught by Article 4, undertakings concerned shall be required to prove that their agreements have pro-competitive effects and that the agreement satisfies the terms and conditions of Article 5 of the Act on Competition. In such individual assessment, all the legal and economic factors pertaining to the agreements, in particular the structure of the relevant technology and product market, will be taken into account[815].

As above set forth, it would be required to determine as to whether the technology transfer agreement concerned has been concluded between the competitors or the non-competitors on the date the agreement has been concluded. Since, the market share threshold will be applied following the determination that the agreement has been concluded between competitors or non-competitors. Under the Communiqué regime:

(i) undertakings will deem to be competitors *on the relevant technology market* in case they grant licences related to competing technologies (actual competitors on the technology market). The relevant technology market covers technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, in respect of the technologies' characteristics, their licence fees and their intended use[816].

(ii) undertakings will deem to be competitors *on the relevant product market* if, at the time of the conclusion of the technology transfer agreement, both undertakings are active on both the relevant product market and the relevant geographic market without violating the other's IPRs (actual competitors on the relevant market) or

[815] See the Communiqué.
[816] In case the technologies are dependent to each other or the licensed technology leads the licensee not to use its own technology due to the new application, the undertakings concerned will deem to be non-competitors in the relevant technology market. See the Guidelines.

(iii) undertakings will deem to be competitors in case, at the time they conclude the agreement, 'they would be likely, on realistic grounds, to undertake the necessary additional investments or other necessary switching costs in order to timely enter the relevant product and geographic market(s) without violating the other's IPRs in response to a small but continuous increase in relative prices (potential competitors on the relevant market). In this respect, entering the market should be within a reasonably short period of time, i.e. one or two years will deem to be short period in some instances[817]. By the same token the parties will deem to be potential competitors in case they possess substitutable technologies and if, in the specific case, the licensee is not licensing his own technology, but the licensee would be likely to do so in the event of a small but continuous increase in technology prices[818].

As can be seen, the undertakings concerned will deem to be competitors in case they are actual or potential competitors in the relevant market affected by the agreement. Otherwise, they are deemed to be non-competitors in case the parties would not have been actual or potential competitors in any relevant market *if they would not conclude* such agreement. By the same token, in case the undertakings are not actual or potential competitors in the affected market *on the conclusion date* of the agreement, the undertakings concerned will deem to be non-competitors.

Following the determination that the agreement has been concluded between competitors or non-competitors, market shares of the undertakings concerned have to be found out. In order to determine the market shares of the parties, calculation will be on the basis of market sales value data, if exists. If those sales value data are not available, then estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned[819]. The market share shall be calculated on the basis of data pertains to the preceding calendar year.

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[817] See the Guidelines, para. 26.
[818] See the Guidelines, para. 27.
[819] See the Communiqué.

While the Communiqué tries to achieve a safe harbor for the undertakings having small market share thresholds in the relevant market, such a safe harbor based on, inter alia, the determination of market shares of the undertakings concerned may not lead to greater legal certainty. Since taking into account the difficulty of measuring market shares and rapid change of relevant market definitions in dynamic and technology-driven markets, determination by the undertakings of the relevant market and calculation their market shares before the conclusion their agreements will be burdensome and will not most of the time put the undertakings to the safe side with respect to the legality of their agreements. Since Article 4 of the Act on Competition stipulates that as long as the agreements having anticompetitive effects will not be exempted either by the block exemption or individual exemption, the agreement concerned shall be automatically illegal and prohibited. Consequently such an uncertainty and the difficulty of the determination of the relevant market and of market share thresholds will substantially decrease the utility of the licence agreement as it did in the European Union and that will not promote the aim of encouraging dissemination of technology and are, in fact, likely to discourage the undertakings concerned in this respect.

5.2.3.1. Hardcore Restrictions

The restrictions contained in the technology transfer agreements are differed according to the status of the parties to the agreement, say competitors or non-competitors. Article 6 of the Communiqué contains a list of hardcore restrictions of competition and this hardcore restriction classification has been made by taking into account the nature of the restrictions and experience of the Board with respect to such restrictions having mostly anticompetitive effects and the approach followed by the Community Institutions.

Technology transfer agreements that fulfill the conditions set out in Article 6 the Communiqué are block exempted from the prohibition rule under Article 4 of the Act on Competition. When the technology transfer agreements will be exempted by the Communiqué, unless and until withdrawn by the Board, those agreements are legally valid and enforceable until the protection granted to the intellectual property right regarding the licensed technology is valid and in case of know-how, as long as the know-how remains secret[820]. In case the know-how becomes publicly known because of the licensee, it shall continue to apply for during the term of the agreement[821].

Block exempted technology transfer agreements is considered that even if those agreements are caught by Article 4 of the Act on Competition, to put it differently, even if such agreements restrict competition in the relevant market, they fulfill the criteria under Article 5 regime and thus they are presumed that they give rise to economic efficiencies, are indispensable to the attainment of these efficiencies, consumers within the affected markets receive a fair share of the efficiency gains and finally such agreements do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned.

Technology transfer agreement containing hardcore restriction of competition as mentioned in Article 6 of the Communiqué amount the technology transfer agreement as a whole to fall outside the scope of the block exemption and an individual assessment of hardcore restrictions is to be made under Article 5 of the Act on Competition. Since, hardcore restrictions are not considered to be severable from the rest of the agreement[822]. However, such clauses containing hardcore restrictions may hardly and only in exceptional circumstances fulfill the criteria under Article 5.

It should be borne in mind that there is no presumption accepted that technology transfer agreements falling outside the block exemption will be caught by Article 4 or fail to fulfill the criteria under Article 5 of the Act on Competition. Individual assessment of the possible anticompetitive effects of those agreements must be made under Article 5.

5.2.3.1.1. Hardcore Restrictions If Between Competitors

Article 6 of the Communiqué sets forth hardcore restrictions which are prohibited if concluded between the competitors. Those anticompetitive restrictions have envisaged under four headings, namely, price fixing, restriction on output and

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[820] See the Communiqué.
[821] See the Communiqué.
[822] See the Guidelines, para. 61.

sales volume, market and customer allocation and the restriction of a licensee's right to use its own technology or the restriction of a party's right to carry out research and development activities. Additionally, there are some exceptions put forward in those hardcore restrictions. In other words, in case technology transfer agreements contain such exceptional restrictions, those restrictive provisions will also be block exempted under the Communiqué.

(i) Price Fixing: Article 4 of the Act on Competition prohibits fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale[823]. In parallel with the Act on Competition, all kinds of restrictive provisions in the technology transfer agreements with respect to the determination of undertaking's ability on prices when selling products to third parties are prohibited and that will not be exempted under the Communiqué[824]. Determination of the prices of the products when selling to third parties are mostly imposed by the licensor in order to maximize its profits and to protect its interest on its technology[825]. However, as a general rule, the price of the products should be determined in accordance with the needs of the market without any intervention from the parties. Therefore, since such agreements containing such restrictive provisions are considered to have as their object the restriction of competition, determination of the prices or fixing the prices of the product is one of the most important violations and thus is per se prohibited under the Act on Competition and the Communiqué.

In Aygaz decision[826], the Board has underlined that such restrictions are per se prohibited under the Act on Competition due to their foreclosure effects. In Anadolu Efes decision, the Board has clarified that it will not grant individual exemption in case the parties will limit the ability of the other party to determine the price or components of price or discounts for licensed products[827]. In Beck's decision, the Board also underlined that the price estimates envisaged in the agreement and the preparation of and agreement on the Plan on Business and Marketing should not be applied as

[823] Article 4 (a) of the Act on Competition.
[824] This approach in the Communiqué is in line with the Technology Transfer Regulation.
[825] Gözlükaya, Fatma, Teknoloji Transferi Sözleşmeleri. Ankara: Rekabet Kurumu, 2008, p. 50.
[826] Aygaz Decision, numbered 93-750-159, dated 26.11.1998, www.rekabet.gov.tr.
[827] Anadolu Efes Biracılık ve Malt Sanayi A.Ş., numbered 02-70/843-347, dated 14.11.2002, p. 8, www.rekabet.gov.tr.

amounting to price fixing and limiting the parties' ability on prices[828]. Therefore, any restrictive provisions which directly have its object or indirectly have its effect to fix the price of the contract products will amount the agreement to fall outside the scope of the Communiqué.

In this respect, it should be noted that the term 'price' has been construed very broadly in parallel with the European Union practices and that direct agreement on the exact price to be charged to the third parties, including the products incorporating the licensed technology or on a price list with certain allowed maximum rebates[829] or indirect application of disincentives to deviate from an agreed price level or increase in royalty fees when output decreases or maturity terms and conditions with respect to the payment of licence fees, interest rates determined by the parties or as such will not be exempted under the Communiqué. Since, price fixing between competitors constitutes a restriction of competition by its very object. It should be noted that whether the agreement concerned has been enforced by the parties or the intention of the parties or as to whether the price of the products are reasonable or not will not matter[830] in this respect.

However, determination of the minimum licence fee in the technology transfer agreement will not automatically be construed as price fixing[831] and that, as a general rule, determination of the royalty payment amount under the technology transfer agreements are not prohibited under the Communiqué unless such royalties will be calculated by taking into account all product sales whether or not licensed technology is used[832]. Since, such restrictions may also limit the ability of the licensee to use its own technology and/or third party's technology[833] and that is also prohibited both under the

[828] Anadolu Efes Biracılık ve Malt Sanayi A.S., numbered 03-42/463-202, dated 12.6.2003 ("Anadolu Efes 03-42"), p. 2, 9, www.rekabet.gov.tr.
[829] See the Guidelines, para. 63.
[830] Sanlı, K. Cem. Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği, Ankara: Rekabet Kurumu, 2000, p. 107.
[831] See the Guidelines, para. 63.
[832] See the Guidelines, para. 65.
[833] In such cases, determination of royalty amount by taking into account all product sales will work as a non-compete obligation and thus the licensee will loose its incentive to produce the products by using third party's technology. See Section '3.3.4.7. Non-Compete Obligation' of the Thesis with respect to the approach of the Commission to the non-compete obligation. The same approach has been pursued by the Guidelines. See the Guidelines, paras. 158-162. See also for further information Gözlükaya, p. 48-51; Odman, N. Ayşe, "Rekabet Hukukunun Teknolojik Yeniliklerin Teşvikinde Rolü", Perşembe Konferansları, p. 182; Can, Ozan. "Rekabet Yasağı

Communiqué and the Technology Transfer Regulation. Indeed, determination of the royalty fee by taking into account all product sales -whether or not licensed technology is used- is not considered to pertain to the subject-matter of the IPRs and thus such restrictions are also mostly prohibited under the European Union practices. In such cases, if royalty obligation of this type increases the cost of using third party inputs, they may have significant foreclosure effects and such agreements may be caught by Article 4 of the Act on Competition and the undertakings concerned are required to show that there is no other practical way of calculating and monitoring royalty payments. Such restrictions may only be exempted if fulfilled the criteria under 5 of the Act on Competition and provided that the undertakings under consideration has proved that the restriction is obectively indispensable to achieve a competitive results, i.e. to duly calculate and monitor the royalty payable by the licensee[834], or practicable alternative monitoring methods are unavailable or unnecessariliy difficult, or the licensor's technology leaves no visible trace on the final product.

As mentioned, the undertakings are, as a general rule, free to determine the royalty to be paid by the licensee under the licence agreement. In this respect, as to whether the licence agreements have been concluded between competitors or non-competitors will not matter. In this respect, royalty obligations may be decided by the parties in the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology. In case the competitors cross license and impose running royalties that are not proportional compared to the market value of the licence and such royalties may have a significant impact on market prices, such royalty obligations will be evaluated on an indvidual basis under Article 5 of the Act on Competition. In this respect, the royalties paid by other licensees on the product market for the same or substitute technologies will be a valuable indicator during the evaluation and to decide as to whether the royalties are disproportionate or not.

ve Rekabet Sınırlandırmaları Hukuku İlişkisi", Rekabet Dergisi, Sayı 32, Rekabet Kurumu, p. 35-36 where the author has mentioned that the subject-matter, geographic area covered by and the term of a non-compete obligation should be reasonable and proportional.

[834] See the Guidelines, para. 65.

(ii) Output Limitations: Controlling the amount of supply or demand in relation to goods or services is prohibited under the Act on Competition. Since such restrictions are not pertained to the subject-matter of the IPRs, all kinds of restriction of production and sales volumes of contract products imposed on the licensee are prohibited under the Communiqué in parallel with the Act on Competition. Output limitations may be resulted by the agreement through restricting the amount of the products or quotas on the production or increasing the licence fee in case the production amount has reached a certain level[835]. Indeed, it is common in some technology transfer agreements that the licensors impose an obligation on the licensee with respect to the maximum or minimum production and sales volumes of the licensed product. Such restrictions are mostly seen in the agreements in order, inter alia, to limit the production of luxury products for the purpose of, inter alia, affecting the price of those products[836]. Parties may achieve this aim by maintaining excess capacity or by maintaining their production without increasing their production or by stocking their products[837] or by limiting their investments or by concluding agreements containing such restrictive clauses.

In the event that the competitors[838] envisage output limitations on a reciprocal manner, the object and possible anticompetitive effect of the agreement may be to reduce output in the relevant market[839]. Agreements having the clauses, which leads to reduce the incentive of the parties to expand output may also have anticompetitive effects and thus may not be exempted under the Communiqué. For instance, an obligation on a party to pay extra charges to the other in case the output has reached to a certain level may also lead such end and reduce output in the relevant market and thus not exempted under the Communiqué. It should be noted that most of the agreements which include output restriction will mostly bring a market sharing arrangement since,

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835 Gözlükaya, p. 44.
836 Özdemir, p. 251; Aslan, Yılmaz. Rekabet Hukuku. Bursa: Ekin Kitabevi, 2001, p. 128; Gözlükaya, p. 44.
837 Aslan, p. 127.
838 If output restriction is agreed between non-competitors having market share over 40 %, as to whether intra-technology competition between licensees have been reduced will be of crucial importance deciding under Article 5 of the Act on Competition. If, in the license agreement, clauses restricting the output are combined with the exclusive territories or exclusive customer group clauses, the restrictive effects on competition will increase. See the Guidelines, para. 150.
839 See the Guidelines, para. 66.

the parties may mostly restrict the output for the purpose of determining the market shares of the parties concerned in the relevant market[840].

Finally, it should be noted that while evaluating the obligation in the agreement with respect to the output restriction, the market power held by the parties and as to whether such an obligation on the licensee is required in order to expand the usage of the licensors technology are very important.

(iii) Allocation of Markets and Customers: The Act on Competition has prohibited all kinds of conducts amounting to partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements. In accordance with the Act on Competition, agreements between the competitors which leads to share the markets and/or customers are considered to have anticompetitive effect on competition and thus clauses envisaging not to produce in certain territories or not to sell actively and/or passively into certain territories or to certain customers reserved for the other party will not be exempted under the Communiqué, save for some restrictive provisions below-sided. Allocation of market may be agreed by the undertakings through the allocation of region or cities and in this respect as to whether the parties share all the regions in the country or not will not matter[841].

Clauses in the technology transfer agreements, therefore, framed for or leading to an allocation of markets and customers are prohibited except the clauses below mentioned:

a. The obligation on the licensor and/or the licensee to produce or not to produce with the licensed technology on one or more technical fields of use or product markets or territories[842] may be set forth in the agreements, which limits the licensee to one or more product markets or technical fields of use[843]. Such types of restrictions are accepted that are mostly arising from the subject-matter of the IPRs and are common in

[840] Badur, Emel. Türk Rekabet Hukukunda Rekabeti Sınırlayıcı Anlaşmalar (Uyumlu Eylem ve Kararlar). Post Graduate Thesis Series, No: 6, Ankara: Rekabet Kurumu, 2001, p. 98.
[841] Badur, p. 95.
[842] See the Communiqué, Article 6.
[843] For further information with respect to those restrictive provisions see Section '3.3.3.1.1. Hardcore Restrictions if Between Competitors' of the Thesis.

most of the technology transfer agreements. In Paşabahçe decision[844], the Board has mentioned that field of use restrictions is mainly the feature of the licence agreement and the licensor should be free to limit the scope of the licensed technology on one or more technical fields of use and decide where the licensee can use the licensed technology. By taking these issues into considerations, the Board, finally, had granted an individual exemption to the agreement.

Such restrictions are exempted up to the market share of 30 % on the affected relevant technology and product market. However, the field of use restrictions should not go beyond the scope of the licensed technologies and the licensees should not be limited to use their own technology. Since, otherwise, such restrictions may lead to market sharing[845].

It should be noted that an obligation as a customer restriction to limits the licensee's ability to sell to particular customer groups is a hardcore restriction under Article 6 of the Communiqué. There may be cases where fields of use restriction may correspond to certain groups of customers in a product market. In such cases, it would not be correct to automatically conclude that the restraint is deemed to be a customer restriction. An individual assessment is to be made under Article 5 of Act on Competition by taking into account the defined scope of the the field of use and the technical characteristics of the licensed product.

Finally, in case a particular territory will be allocated to the licensee under an exclusive or sole licence, in addition to the field of use restrictions, the assessment will be made in accordance with the

[844] Türkiye Sise ve Cam Fabrikaları A.Ş., numbered 99-44/466-295, dated 28.09.1999, ("Sisecam Case"), p. 6, www.rekabet.gov.tr.
[845] See the Guidelines, para. 69.

principles applicable for exclusive and sole licenses as explained above[846].

b. The obligation on the licensor not to give a licence to a third party and not to use the subject of the licence on a particular territory are exempted under the Communiqué and the scope of the territory will not matter in that sense[847]. The purpose of such agreements may be to give the licensee an incentive to invest in and develop the licensed technology and not necessarily to share markets. In some cases, the parties may envisage in their agreements clauses to enable one of the parties to apply to the court in case of any infringement by other licensees and such types of clauses strengthens the effectiveness of those exclusivity clauses.

The obligation on the licensor not to license the technology to another licensee in a particular territory will also be covered under the Communiqué. In this respect the licensor will have the right appoint the licensee as its sole licensee in a particular territory. To put it differently, the licensor may restrict itself not grant licence to third parties for the production by the licensed technology in the territory concerned. In such cases, as to whether the agreement is reciprocal or not will not affect the exemption provided that the agreement will not affect the parties' ability to fully exploit their own technology in the respective territories.

In Paşabahçe decision[848], the Board has clarified that since the licensor commits not to grant any licence to third parties and not to operate itself in Turkish Republic which leads Şişecam to have a monopol for the duration of the agreement, the agreement concerned have violated Article 4 of the Act on Competition. However, the Board decided to give an individual exemption to the said agreement for a

[846] See Section '3.3.4.4. Field of Use Restriction' of the Thesis.
[847] In case the license is world-wide, the exclusivity means that the licensor refrains from entering in or remaining on the relevant market.
[848] Sisecam Case, p. 7.

period of 5 years since the agreement has fulfilled the criteria under Article 5 of the said Act.

Finally, it should be borne in mind that, in case a dominant licensee obtains an exclusive licence of one or more competing technologies and if the barriers to entry in the technology market are high, such agreements may mostly be caught by Article 4 of the Act on Competition due to the fact that an exclusive licence may foreclose third party licensees and allow the licensee to preserve his market power. Agreements concluded between two or more parties having clauses with respect to cross licencing to each other and commit not to licence third parties may have also anticompetitive effects on the market, in case the package of technologies resulting from the cross licences creates a de facto industry standard to which third parties must have access in order to compete effectively on the market. It should be borne in mind that in such cases, the rules applicable to the technology pools will be applicable for those arrangements[849].

c. As mentioned, allocation of markets is prohibited under Article 4 of the Act on Competition. However, as an exception to this rule, the restriction of the active sales by the licensor and/or the licensee into the territory or the customer group reserved for the other party is not prohibited and thus exempted under the Communiqué. There may be cases where the licensor is willing to grant licence to third party in order to disseminate the usage of its technology. However, in case the licensor will not be allowed to limit the licensee from making sales into its territory the licensor is willing to keep for itself, the licensor may not grant licence. Therefore, the Communiqué allows such restrictive terms if concluded between the competitors. However, it should be borne in mind that the parties cannot be restricted directly or indirectly from making sales to third parties which are present in their territories and which make sales

[849] See Section '3.3.6. Technology Pools' of the Thesis.

into the other territories or customer groups within the country[850]. This clause is also in line with the paragraphs (b) above and (d) below. It should be borne in mind that in case the agreement is concluded between non-competitors, restricting the licensee's ability to actively sell its products into a territory reserved for the licensor is also allowed under the Communiqué.

d. The restriction of active sales by the licensee into a territory or a customer group reserved by the licensor for another licensee is not prohibited under the Communiqué[851]. The same argument made under the paragraph (c) is also valid for such kind of restrictions as well. Therefore, if the licensor is free to keep a territory for himself, there would be no difference to allocate a territory for his other licensees. However, the parties cannot be limited, directly or indirectly, from making sales to third parties which are present in their territories and which make sales into the other territories or customer groups within the country.

e. The obligation on the licensee to produce the contract products only for its own use is not prohibited under the Communiqué provided that the licensee shall not be restricted in selling the contract products actively and passively as spare parts for its own products or supply to third parties who provides after sales services[852]. Such restrictions are designed for the licensee to produce the products by the licensed technology only for his own use and for the maintenance and repair of his own products and that the licensee may merely use the products as an input for incorporation into his own production and does not sale the product produced by the licensed technology for incorporation into the other producers' products. Since such restrictions may encourage the

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[850] See the Communiqué, Article 6.

[851] However, if the licensees agree not to sell actively or passively into a territory or a customer group, such agreement may lead to a cartel agreement and thus is not covered by the Communiqué. See the Guidelines.

[852] Since the same restriction is considered as hardcore, see for further explanation Section '3.3.3.1.1. Hardcore Restrictions if Between Competitors' of the Thesis.

dissemination of technology, without prejudice to the exceptional cases, they are exempted under the Communiqué. The licensee may be restricted to produce a component only for incorporation into his own products and be obliged not to sell the components to other producers in case the contract product is a component. The licensee should not, however, be restricted to sell the components as spare parts for his own products and should be free to supply third parties that perform after sale services on these products[853].

In case a licence agreement including such type of restriction has been concluded between competitors and if, for instance the licensee is an actual or likely component supplier, a restriction on the licensee to produce under the licence only for incorporation into his own products prevents him from being a supplier of components to third party producers. In such cases, this clause should be assessed carefully by taking into account the effect of such restriction on the operation of the supplier. Since, due to the existing agreement, the licensee may cease to use his own technology and to be a component supplier and thus such agreement may have anticompetitive effects on the market, in particular, where the licensor has a significant market power on the component market[854].

f. The obligation on the licensee to produce the contract products only for a particular customer for the purpose of creating an alternative source of supply for that customer[855] is also exempted under the Communiqué. Restriction on the ability of the licensee to determine to whom the licensee must sell the licensed product is, as a general rule, prohibited under Article 4 of the Act on Competition. Since, such restrictions will not only deprive the licensee to effectively use the licensed technology but also create a discriminatory practice between the customers to whom

[853] For further information see the Guidelines.
[854] The Guidelines, para. 159.
[855] See the Communiqué, Article 6.

the licensee may sell and the customers to whom he cannot sell. However, there may be cases where the licensor cannot be effectively operate and in such cases it would be more appropriate that the licensor grants licence to the licensee to create an alternative source of supply. Such restrictions will be exempted under the Communiqué. It should be borne in mind that where more than one undertaking is licensed in order to supply the same particular customer, such clauses in the technology transfer agreements will also be exempted under the Communiqué[856].

(iv) Finally, the restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development is prohibited under the Communiqué, unless the latter restriction is necessary to prevent the disclosure of the licensed know-how to third parties[857]. In this respect, licensee's ability to exploit its own technology and/or to carry out research and development should neither be restricted in the field which the licence is granted nor in other fields which the licence is not covered[858]. It should be noted that in case the parties will be obliged by the agreement to provide each other any improvements arising out of the research and development activities, such a restrictive provision in the agreement shall not be construed that the research and development activities are restricted. In such cases, individual assessment should be made under Article 5 of the Act on Competition.

Additionally, the undertakings are free to agree to provide each other with future improvements of their technologies concerned and that such restrictive clauses will not take the agreement out of the Communiqué unless the undertakings envisage in their agreement to restrict each other from carrying out research and development with third parties and/or the licensee is restricted in his productions or sales and/or the licensee is restricted to license his own technology to third parties and/or obliging the licensee to pay royalties on what he produces by his own technology. It should be borne

[856] See the Guidelines, para. 74.
[857] See the Communiqué.
[858] See the Guidelines, para. 75.

in mind that such restrictions must be necessary and proportionate for the protection of the licensor's know-how against disclosure[859].

The restriction on the ability of any of the parties to the agreement to carry out research and development with a third party may only be envisaged in the agreement as long as the latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties and provided that such restriction will be proportional and necessary to achieve such purpose[860].

Finally, it should be borne in mind that licensee should not be restricted to use the competing technologies. The licensee should also be able to freely use its own licensee and that the licensee should not be under obligation to pay an amount for the products produced by his own technology[861].

5.2.3.1.2. Hardcore Restrictions If Between Non-Competitors

Article 4 of the Communiqué sets forth hardcore restrictions which are prohibited if concluded between the non-competitors. Those anticompetitive restrictions have been envisaged under three headings, namely, price restrictions, territorial restrictions and selective distribution limitations. Additionally, there are some exceptions put forward in those hardcore restrictions. In other words, in case technology transfer agreements contain such exceptional restrictions, those restrictive provisions will also be block exempted under Communiqué.

(i) Price Restrictions: The restriction of a party's ability to determine its prices when selling products to third parties is prohibited under the Communiqué. This restriction is also prohibited if the agreement envisaging such type of restriction is concluded between the competitors[862]. However, unlike the agreement concluded between the competitors, the parties are free to determine maximum sale price or

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[859] See the Guidelines para. 75.
[860] For instance, if it has been envisaged in the agreement that particular employees of the licensee will be trained in order to use the licensed know-how, it may be appropriate and enough to oblige the licensee not to permit those employees to be engaged in research and development with third parties. See the Guidelines para.75.
[861] See the Guidelines para. 76.
[862] Since price fixing decided in the license agreement is also prohibited if such agreements are concluded between the competitors, our aforementioned views with respect to the price fixing between the competitors are also applicable for those agreements concluded between the non-competitors except the freedom to determine maximum sale price or recommend a sale price between the non-competitors.

recommend a sale price as long as such restrictions will not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties[863].

Restriction of a party's ability to determine selling prices may be directly incurred by one of the parties in the agreement. In such cases, it would be easy to conclude that a hardcore restriction has been envisaged in the agreement in question. However, such an aim may be achieved indirectly through different means as well, such as clauses in the agreement with respect to fixing the margin, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties, or contract terminations in relation to observance of a given price level[864].

The Parties to the agreement may also achieve by identifying price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations or by reducing the licensee's incentive to lower his selling price, such as the licensor obliging the licensee to apply a most-favored-customer clause, i.e. an obligation to grant to a customer any more favorable terms granted to any other customer[865]. The same means may be used in order to make maximum or recommended prices work as fixed or minimum selling prices[866].

(ii) Territorial Restrictions: Clauses in the agreement with respect to the restriction of the territory into which, or of the customers to whom, the *licensee* may *passively* sell the contract products are prohibited and thus not exempted under the Communiqué except the clauses mentioned below. Therefore, *active* sales restrictions between non-competitors and also sales restrictions on the *licensor*, either actively or passively may be envisaged in the technology transfer agreements and such restrictions are exempted up to the market share threshold of 40 % under the Communiqué.

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[863] See the Communiqué, Article 6.
[864] See the Guidelines para. 78.
[865] See the Guidelines para. 78.
[866] It should, however, be borne in mind that clauses with respect to a list of recommended prices or a maximum price may not always work as leading to fixed or minimum selling prices. See Technology Transfer Guidelines, para. 97.

Passive sales restrictions on the licensee may be envisaged in the agreement either as direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees or may indirectly and through different means to be achieved by the parties, such as inducing the licensee to refrain from making such sales, financial incentives and the implementation of a monitoring system aimed at verifying the effective destination of the licensed products[867]. Quantity limitations, however, may not be assumed to indirectly mean to restrict passive sales provided that such quantity limitations will not be the means to implement an underlying market partitioning agreement.

As mentioned, the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products are prohibited and thus not exempted under the Communiqué. However, there are exceptions to this rule which are allowed as set forth in the Communiqué. These clauses mentioned below:

a. The restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor is permitted and thus exempted under the Communiqué. Since, such restrictions are pro-competitive for the dissemination of technology and integration of such technology into the production assets of the licensee, both the active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor will not constitute hardcore restrictions. In this respect it would be no need that the licensor is actually producing with the licensed technology in the territory or for the customer group, but solely being reserved by the licensor of the concerned territory or for the customer group for later exploitation would be enough[868].

b. The restriction for a period of two years of passive sales into an exclusive territory or to an exclusive customer group allocated by the

[867] See the Guidelines para. 79.
[868] See the Guidelines para. 81.

licensor to another licensee that this other licensee is selling the contract products in that territory or to that customer group is allowed under the Communiqué[869]. Since, licensees may mostly make huge amount of investments in production assets and promotional activities in order to start up and develop a new territory and thus they are not willing to enter the market without having protection at least for a certain period of time against sales into their territory by other licensees[870]. Two years will be calculated from the date on which the protected licensee first markets the products incorporating the licensed technology inside his exclusive territory or to his exclusive customer group[871]. Following the expiry of this period, restrictions on passive sales between licensees will not be covered under the Communiqué and thus an individual assessment under Article 5 of the Act on Competition will be required.

c. Unless the licensee is restricted in selling the contract products actively and passively as spare parts for its own products, the obligation to produce the contract products only for its own use is permitted under the Communiqué. If the contract product is a component, the licensee may be obliged to use that product only for incorporation into his own products and can be obliged not to sell the product to other producers[872]. However, the licensee should not be restricted to actively and passively sell the products as spare parts for his own products and should not be prevented to supply third parties that perform after sale services on these products[873].

d. If the licensor grants the licence in order for the creation an alternative source of supply for a particular customer, the obligation on the licensee to produce the contract products only for that particular customer will be

[869] See the Communiqué, Article 6.
[870] See the Guidelines para. 82.
[871] See the Guidelines para. 82.
[872] See the Guidelines para. 83.
[873] Same approach has been pursued for the agreements concluded between the competitors.

exempted under the Communiqué[874]. As aforementioned, restriction on the ability of the licensee to determine to whom the licensee must sell the licensed product is, as a general rule, prohibited under Article 4 of the Act on Competition. Since, such restrictions will not only deprive the licensee to effectively use the licensed technology but also create a discriminatory practice between the customers to whom the licensee may sell and the customers to whom he cannot sell. However, in case the main purpose of the licence agreement is to provide an alternative source of supply for a particular customer, such restrictive provisions are allowed under the Communiqué. Therefore, the parties are free to envisage in their agreements such obligation.

e. The restriction of sales to end users by a licensee operating at the wholesale level of trade is permitted under the Communiqué and thus be exempted. This type of restriction allows the licensor to assign the wholesale distribution function to the licensee and thus enables the licensor to restrict the sales to end users[875].

f. As also explained above[876], the producer or the licensor may wish to limit the numbers of the distributors in order to establish or to protect a brand image or to make use of the economies of scale by considering the characteristics or the quality of the products and capacity problem[877]. In cases where the product concerned requires technology, the licensor may wish the products to be sold only in the determined places via the distributors which fulfill certain criteria. Therefore, restriction of sales to unauthorized distributors by the members of a selective distribution system is allowed under the Communiqué in order to enable the licensor to impose on the licensees an obligation to form part of a selective distribution system.

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874 See the Communiqué, Article 6.
875 See the Guidelines para. 85.
876 See Section '3.3.3.1.2. Hardcore Restrictions if Between Non-Competitors' of the Thesis.
877 Koç, p. 15.

However, it should be taken into consideration that the licensees should not be restricted to sell actively and passively to end users, without prejudice to the possibility to restrict the licensee to a wholesale function as aforementioned[878]. The permission on the restriction on the wholesalers is in line with the Metro case, where the Court of Justice has ruled that "… apart from the fact that this limitation on the activity of wholesalers is in accordance with the requirements of German legislation, it does not constitute a restriction on competition within the meaning of Article 85 (1) *(now Article 101(1))*[879] of the Treaty because it corresponds to the separation of the functions of wholesaler and retailer and because if such a separation did not obtain the former would enjoy an unjustified competitive advantage over the latter which, since it would not correspond to benefits supplied, would not be protected under Article 85 *(now Article 101)*[880]... It is established that various Member States have enacted legislation entailing obligations and charges, in particular in the field of social security and taxation, which differ as between the retail and wholesale trades, so that competition would be distorted if wholesalers, whose costs are in general proportionally lighter precisely because of the marketing stage at which they operate, competed with retailers at the retail stage, in particular on supplies to private customers . The Commission did not infringe article 85 (1) *(now Article 101 (1))*[881] in considering that this separation of functions is in principle in accordance with the requirement that competition shall not be distorted"[882]. Therefore, imposing restriction of sales to unauthorized distributors by the members of a selective distribution system is allowed under the Communiqué.

(iii) Selective Distribution Limitations: As mentioned above, there may be cases where the product concerned requires technology and the licensor may wish the

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878 See the Guidelines para. 86.
879 Italics are added.
880 Italics are added.
881 Italics are added.
882 Metro 26/76, para. 28-29.

products to be sold only in the determined places by the distributors which fulfill certain criteria in order to establish or to protect a brand image or to make use of the economies of scale. In such cases, the licensor may impose on the licensee an obligation to form part of a selective distribution system. However, once the licensee becomes the form of the selective distribution system, it is considered that he fulfills the criteria in order for the licensor to establish or to protect a brand image or to make use of the economies of scale. Therefore, limiting the sales of the licensee is considered to restrict the competition and may amount to a market and customer allocation in case the licensee operates at the retail level. The parties to the agreement are, therefore, not allowed to decide a clause which restricts active or passive sales to end users by a licensee whom operates at the retail level. However, the licensee may be limited from operating out of an unauthorized place of establishment[883] in case the licensee is a member of a selective distribution system.

5.2.3.1.3. Once Non-Competitors Become Competitors

In some cases, the parties were non-competing undertakings, neither an actual nor a potential competitor, when they had signed the technology transfer agreement, but because the licensee has improved and started exploiting a competing technology, they may become competing undertakings during the execution of the agreement. In such case, the hardcore restriction applied to non-competing undertakings will continue to be applied for the full life of the agreement in accordance with the Communiqué unless the agreement is subsequently amended between the parties in any material respect[884]. In cases where the agreement is subsequently amended, the effects of the agreement in the relevant market should be assessed[885].

In some cases, two undertakings are not competitors, the licensor is neither an actual nor a potential supplier of products on the relevant market and the licensee, already operates on the product market, is not licensing out a competing technology

[883] See the Communiqué, Article 6.
[884] However, we believe that, even if the agreement is not substantially amended by the parties, in case the market share threshold is exceeded during the term of the agreement, the agreement concerned will continue to be protected only for a period of two consecutive calendar years following the year in which the threshold is first exceeded. Following that two year period, the parties are under the burden to amend their agreement in a way to comply with the Communiqué.
[885] See the Guidelines para. 28.

even if he owns a competing technology and produces on the basis of that technology. However, if the licensee starts to grant licence or the licensor becomes an actual or potential supplier of products on the relevant market, they may become competitors. In such case the hardcore restrictions relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect[886].

As put forward above[887], in case the undertakings are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, what would be the market share threshold to be applied to the undertakings? In accordance with the Communiqué, in case the parties will not substantially amend their agreements, hardcore restrictions applicable to the non-competitors will continue to be applicable in such cases. However, as to whether the market share thresholds should be 30 % instead of 40 % on the relevant market has not been envisaged explicitly. We believe that, in such cases, the parties should not be required to amend their agreement and the hardcore restrictions applicable non-competitors will continue to be covered by the Technology Transfer Regulation, however, the parties are required to comply with the threshold applicable to competitors. In other words, for instance, in case the parties have 35 % on the relevant market, such agreement wil not be covered by the Communiqué. Since, Article 6 (4) of the Communiqué has set forth that *"paragraph 2 and not paragraph 1 shall apply for the full life of the agreement"*. If the intention is to apply the threshold for non-competitors, say 40 %, the Communiqué should have also referred to Article 5 and mentioned that the threshold applicable to non-competitors will also continue to be applied in case the non-competitors become competitors. However, since there is neither an explicit intention nor a reference to Article 5, once the non-competitors become competitors, the threshold to be applied to the parties is 30 % but not 40 % any more. However, we also believe that in such cases, Article 9 (4) of the Communiqué will be applicable, since the market share threshold is exceeded during the term of the agreement and that the agreement concerned will continue to be protected only for a

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[886] See the Communiqué.
[887] See Section '3.3.3.1.3. Once Non-Competitors Become Competitors' of the Thesis.

period of two consecutive calendar years following the year in which the threshold is first exceeded. Following this two year period, the parties are under the burden to amend their agreement in a way to comply with the Communiqué.

5.2.3.2. Excluded Restrictions

There are restrictions which are not covered and thus not exempted under the Communiqué. However, if such restrictive clauses can be severable from the rest of the agreement, such excluded restrictions will not affect the application of the block exemption to the rest of the agreement. In other words, as long as the agreements comply with the Communiqué, the agreement, but for those excluded restrictive clauses, will deem to be exempted under the Communiqué and the excluded restrictions will be evaluated individually under Article 5 of the Act on Competition[888]. Since those types of restrictions may reduce the incentive of licensees to innovate, each of the restrictive clauses will be evaluated severally and in accordance with the factual circumstances of the agreement and the status of the parties to the agreement in the relevant market. However, if those excluded restrictions cannot be severable from the rest of the agreement, then the agreement will be out of the scope of the Communiqué and the agreement, *in whole*, will be individually assessed under Article 5 of the Act on Competition.

Technology Transfer Regulation envisages that the exemption shall not apply to the following obligations:

(i) Exclusive Grant Back or Assign Clause: Any direct or indirect obligation on the licensee to grant an *exclusive* licence or to assign, partly or wholly, to the licensor or to a third party designated by the licensor in respect of its own severable[889] improvements on or its new applications of the licensed technology[890] is not block exempted under the Communiqué. Since, such restrictive clauses may prevent the licensee to use its own improvements or new applications and decrease the incentive of

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[888] See the Guidelines para. 87.

[889] In Pınar Süt decision, the Board has clarified that the assignment of non-severable improvements of know-how will not affect the licensee to deal with the competitive production technics and thus will not restrict the competition in the relevant market. See Pınar Süt Mamulleri Sanayii A.Ş., numbered 04-46/597-145, dated 8.7.2004, p. 10-11, www.rekabet.gov.tr.

[890] See the Communiqué, Article 7.

the licensee to innovate as such. However, at the same time, such restrictive clauses decrease the risk of technology to loose its value as the newly developed technologies or applications may not be licensed in case there would be no grant back or assign clause[891].

However, *non-exclusive* grant back or assign obligations, either on the licensee or the licensor, in respect of severable improvements on and/or applications of the licensed technology will be covered by the Communiqué. For instance, if the licensor is entitled to feed-on the severable improvements to other licensees, grant back clauses will be covered by the Communiqué. Since, a feed-on clause may promote the dissemination of technology and that each licensee knows at the time of contracting that he will be on an equal footing with other licensees in terms of the technology on the basis of which he is producing[892]. Furthermore, it is commonly accepted that such clauses will not prevent competition within the meaning of Article 4 since non-severable improvements cannot be exploited by the licensee without the licensor's permission[893]. In Beck's decision[894], the Board has decided that such restrictive clauses will not affect the competition on condition that the parties have decided to assign, on a non-exclusive basis and in a reciprocal manner, all such improvements with respect to, inter alia, the use of know-how, production process, packaging of the products, marketing of and the sale the products.

In this respect, paying by the licensor an amount in return for acquiring the improvement or for obtaining an exclusive licence will not be an important factor for the non-application of Article 7 (a) and (b). However, since an amount to be paid to the licensee will be an incentive for the licensee to innovate, paying by the licensor an amount in return for acquiring the improvement or for obtaining an exclusive licence will be an important indicator while evaluating the anticompetitive effects of such type of clauses under Article 5 regime. In this respect, the market power of the licensor in the relevant technology market is to be taken into consideration while evaluating such

891 Gözlükaya, p. 58.
892 See the Guidelines para. 89.
893 See the Guidelines para. 89.
894 Anadolu Efes 03-42, p. 8.

restrictive clauses, since it would be very likely that the competition is restricted in case the licensor has a significant market power[895].

While evaluating the clauses under Article 5 regime, impact assessment on competition should be made in case of parallel networks of licence agreements[896]. When available technologies are controlled by a limited number of licensors, anticompetitive effects on competition may be greater than where there are a number of technologies only some of which are licensed on exclusive grant back terms[897].

The risk of negative effects on innovation is also accepted to be higher in the case of cross licensing between competitors where a grant back obligation on both parties is combined with an obligation on both parties to share with the other party improvements of his own technology[898]. The sharing of all improvements between competitors may restrict each competitor from gaining a competitive lead over the other. However, it is commonly accepted that the parties will not be prevented from gaining a competitive lead over each other if the purpose of the licence is to allow them to improve their technologies and where the licence does not lead them to use the same technological base in the design of their products, i.e. in case the purpose of the licence is the creation of design freedom rather than the improvement of the technological base of the licensee[899].

(ii) No-Challenge Clause: Any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor[900] in Turkey is not covered by the Communiqué. However, the licensor shall have the right to terminate the licence agreement in case the licensee challenges the validity of the licensed technology. Therefore, solely envisaging such a termination clause in the technology transfer agreement will neither take the agreement nor the clause out of the scope of the Communiqué.

[895] See the Guidelines para. 90.
[896] See the Guidelines para. 90.
[897] See the Guidelines para. 90; Technology Transfer Guidelines, para. 110.
[898] See the Guidelines para. 91; Technology Transfer Guidelines, para. 111.
[899] See the Communiqué, Article 7; Article 5 of the Technology Transfer Regulation.
[900] Article 5 of the Technology Transfer Regulation.

The licensees are mostly in the best position to determine whether or not IPRs are invalid[901]. Since restricting the competition is permitted for the sake of innovation and dissemination of technology, invalid IPRs are to be eliminated for the purpose of undistorted competition and in conformity with the principles underlying the protection of IPRs. If there would be invalid IPRs, the competition should not be restricted due to the lack of higher purpose. However, it has mentioned that since non-challenge clauses with regard to know-how may promote the dissemination of new technology, such clauses may be allowed, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee[902].

(iii) Finally, if the undertakings party to the agreement are non-competitors, any direct or indirect obligation to limit the licensee's ability to exploit its own technology or the ability of any of the parties to the agreement to carry out research and development is prohibited under the Communiqué unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties. This hardcore restriction have the similar content as the hardcore restriction between the competitors under Article 6(2)(c) of the Communiqué. However, agreements containing such restrictive clauses have not been envisaged under the hardcore restrictions which are exempted under the Communiqué, but instead, as far as an agreement containing such clauses will be concluded between non-competitor, the Board is willing to consider and evaluate under Article 5 of the Act on Competition. In this respect, if the agreement is concluded between non-competitors, individual assessment will be required under Article 5 of the Act on Competition.

As recalled, in case the licensee has a technology but does not license it and the licensor is not an actual or potential supplier on the product market, the agreement is deemed to be concluded between non-competitors. In such cases, since the licensee's use of his own technology or on research and development are normally considered to be anticompetitive, it is important to ensure that the licensee is not restricted in his

[901] See the Guidelines para. 92; Technology Transfer Guidelines, para. 112.
[902] See the Guidelines para. 92; Technology Transfer Guidelines, para. 112.

ability to exploit his own technology and further develop it[903]. For instance, if an obligation is envisaged on the licensee to pay royalties both on the products it produces with the licensed technology and on the products it produces with its own technology, such an obligation may prevent licensee to exploit its own technology[904]. In such cases such a restriction will not be covered by the Communiqué.

By the same token, if the licensee does not own a competing technology or is not already developing such a technology, an obligation on the parties not to carry out independent research and development may be anticompetitive in case only a few technologies are available in the relevant market and the parties possess the necessary assets and skills to carry out research and development [905]. In any of those cases, it should be borne in mind that the agreement should not reduce the licensee's incentive to improve and exploit his own technology.

5.2.4. Withdrawal Of Exemption

The Board is entitled to withdraw the exemption granted to the agreement which does not satisfy the criteria under Article 5 of the Act on Competition. Therefore if any of the criteria will not be fulfilled, exemption may be withdrawn. In this respect, the Board is under the responsibility to prove that the agreement and/or the respective anticompetitive clauses fall within the scope of Article 4 and that do not satisfy the criteria under Article 5 of the Act on Competition[906].

In case the access of third parties' technologies to the market is restricted, i.e. by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology[907] the competition authorities concerned will have the right to withdraw the exemption granted to the agreement. Such a restriction of other licensors may arise from the cumulative effect of networks of licence agreements restricting the licensees from exploiting competing technologies and thus leading to the exclusion of other (potential) licensors. Foreclosure of licensors may

[903] See the Guidelines para. 95; Technology Transfer Guidelines, para. 115.
[904] See the Guidelines para. 95; Technology Transfer Guidelines, para. 115.
[905] See the Guidelines para. 96; Technology Transfer Guidelines, para. 116.
[906] See the Guidelines para. 99.
[907] See the Guidelines para. 100.

also arise in case the undertakings who wish to take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees confront high barriers to entry.

In case the access of potential licensees to the market is prevented, i.e. by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees, the Board will have the right to withdraw the exemption granted to the agreement. Foreclosure of other licensees may arise from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and thereby preventing potential licensees from gaining access to the necessary technology. Furthermore, the Board may withdraw the benefit of the exemption if a significant number of licensors of competing technologies in individual agreements impose on their licensees to extend to them more favorable conditions agreed with other licensors.

In accordance with the Technology Transfer Regulation, the competition authorities concerned will have the right to withdraw the exemption granted to the agreement in case, without any objectively valid reason, the parties refrain from exploiting the licensed technology[908]. It would be reasonable if the competition authorities will withdraw the exemption, since if the parties do not exploit the licensed technology without any objective valid reason or delay in the dissemination of technology[909], there would be no efficiency enhancing activity and that the competition would be prevented without any economic ground whatsoever. Such a provision is not envisaged in the Communiqué. However, it should be important that the Board will take into account such circumstances while evaluating the anticompetitive effects of such conducts of the undertaking party to the agreement.

Finally, it should be noted that in case parallel networks created by similar technology transfer agreements cover more than 50 % of the relevant market, the Board may, by a communiqué which it shall further issue, render agreements containing such

[908] Article 6 of the Technology Transfer Regulation.

[909] If the agreement has been concluded between the competitors or the non-competitor undertakings become competitor, such a non-exploitation arrangement should be strictly taken into consideration, since it may be a result of disguised cartel arrangement.

restrictions out of the scope the exemption provided for in this Communiqué[910]. However, it will not be correct to conclude for each case that the Board will withdraw the block exemption, where parallel networks created by similar technology transfer agreements cover more than 50 % of the relevant market[911]. In such cases, careful assessment is to be made under Article 5 of the Act on Competition in accordance with the legal and factual circumstances of each case.

5.3. Evaluations

As mentioned above, Article 4 of the Act on Competition prohibits agreements between undertakings which have as their object or effect or likely effect the restriction of competition directly or indirectly in a particular market for goods or services. In order to escape from Article 4 prohibition, anticompetitive agreements should either be individually exempted or be covered by communiqués. The Turkish Competition Authority has launched the Communiqué for technology transfer agreements in order to ensure a safe harbor for the undertakings having small market share thresholds in the relevant market. The Communiqué has been framed by taking into account the Technology Transfer Regulation applicable in the European Union. Even the text of the Guidelines, the way how the Communiqué will be applied, is drafted identical to and in parallel with the Technology Transfer Guidelines. Therefore, it should be noted that the Communiqué will most probably bring the same negative and positive impacts of the Technology Transfer Regulation to the Turkish competition law practice.

As aforementioned, a safe harbor brought by the Communiqué is based on, inter alia, the market shares of the undertakings concerned. However, in order to find the market shares of the parties, the relevant market has to be defined by the parties to the agreement. Therefore, the transaction costs of the undertakings will certainly increase while making the assessment. Additionally, taking into account the difficulty of measuring market shares and rapid change of relevant market definitions in dynamic and technology-driven markets, determination by the undertakings of the relevant market and calculation their market shares before the conclusion their agreements will

[910] See the Comminuque, Article 8 (2).
[911] See the Guidelines, para. 104.

be burdensome and will not most of the time put the undertakings to the safe side with respect to the legality of their agreements.

Another issue to be focused on is that it will not be sufficient for the parties simply to satisfy that they benefit from the Communiqué on the date the agreement has been signed. In case the circumstances will change in the future, their agreement may be prohibited in whole or in part at some future point in time and the parties may find themselves in an unprotected legal environment. Such an uncertainty and the difficulty of the determination of the relevant market and of market share thresholds may substantially decrease the utility of the licence agreement and that will not promote the aim of encouraging dissemination of technology in this respect. Those all issues aforementioned will certainly have a chilling effect upon the willingness of IPPs holder to licence, upon the value of licences to both IPRs owners and the initial licensees, and upon the incentive to the creation of intellectual property for licensing.

One of the most important departing features from the European Union perspective is that in accordance with the Technology Transfer Regulation, in some cases where the parties to an agreement are competitors and the agreement is "reciprocal", the agreement is considered as per se illegal and thus falls outside the scope of the Technology Transfer Regulation. By the same token, in case at a later stage, a non-reciprocal agreement becomes a reciprocal agreement due to the conclusion of a second licence agreement between the same parties, the parties concerned may have to amend the first licence agreement in order to avoid that the first agreement contains a hardcore restriction. Such an examination will also increase cost of the undertakings and reduce legal certainty[912]. On the other hand, such a strict approach has not been pursued by the Communiqué which is a welcoming approach.

In accordance with the European Union perspective and the new modernized economic approach to technology transfer agreements, the Guidelines has put forward that in case the technology transfer agreements will fall outside the safe harbor and thus not covered by the Communiqué, the Board, while making its assessment on the impact of the agreement on competition, will evaluate the nature of the agreement, the market

[912] See Technology Transfer Guidelines, para. 78.

position of the parties, the market position of competitors, the market position of buyers of the licensed products, entry barriers, maturity of the market and other factors[913] for each case closely. This is also a welcoming approach for the technology transfer agreements. It should be noted that those proxies are the identical to the ones followed under Article 6 analysis and that all those factors are also assessed in order to determine as to whether the undertaking concerned has a market power and a dominant position in the relevant market. Therefore, the new attitude pursued by the Guidelines towards a market power analysis for anticompetitive technology transfer agreements has brought the application of Article 4 closer and identical to that of the ones under Article 6 of the Act on Competition. In order to find out market power of the undertaking under consideration, it would be first required to define the relevant market and determine the market shares of the undertaking and following this assessment, inter alia, barriers to entry and the countervailing buying power will be analysed. Therefore, the new approach under the Guidelines is the same to that of the one made for Article 6 cases.

As there is no distinctive feature left[914] between the application of Article 4 and Article 6 to the technology transfer agreements following the issuance of Guidelines and that the methodology is the same pursued for Article 6 cases, we firmly believe and defend that as long as the technology agreements are concerned, if and provided that the technology agreement complies with and fulfills the criteria under Article 5 of the Act on Competition, there is no legal ground to apply Article 6 to the same technology transfer agreement. Since, the Board has the competence to withdraw the exemption granted to the concerned agreement in case the technology transfer agreement will have anticompetitive effects on competition in the future, we believe that reference to Article 6 should be omitted from the text of the Communiqué[915].

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[913] The Guidelines, para. 110.

[914] One question may emerge as to whether it would be still required for the respective competition authorities to apply Article 6 for the technology transfer agreements concluded between the parties, individually or collectively, holding dominant position. For further information see our discussions and view in Section '4.4. Simultaneous Application of Article 82 and Article 81 of the EC Treaty to the Restrictive Technology Transfer Agreements' of the Thesis.

[915] Article 11 of the Communiqué.

As the Court of First Instance in Tetra Pak[916] has underlined that "… in the scheme for the protection of competition established by the Treaty the grant of exemption, whether individual or block exemption, under Article 85 *(now Article 101)*[917] (3) cannot be such as to render inapplicable the prohibition set out in Article 86 *(now Article 102)*[918]". However, in the same ruling the Court of First Instance also have pointed out that "The grant of individual exemption presupposes that the Commission has found that the agreement in question complies with the conditions set out in Article 85 *(now Article 101)*[919] (3). So, where an individual exemption decision has been taken, characteristics of the agreement which would also be relevant in applying Article 86 *(now Article 102)*[920] may be taken to have been established. Consequently, in applying Article 86 *(now Article 102)*[921], the Commission must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under Article 85 *(now Article 101)*[922] (3)"[923]. This is important in that while the Court of First Instance has underlined that the exemption granted to the undertakings under Article 81 will not prejudice the application of Article 82, on the other hand it also emphasizes that the Commission is bound by its earlier decisions and findings unless the factual and legal circumstances have changed. It should be noted that in case the factual and legal circumstances have altered, this will be a ground for the Board to withdraw the exemption granted to undertakings instead of application of Article 6 of the Act on Competition[924]. This will also bring legal certainity in that once the factual and legal circumstances have changed, the undertakings will know that the authorities concerned will have the competence to withdraw the exemption from the moment factual and legal circumstances have changed. If, however, Article 6 would be applied instead of withdrawal mechanism, the undertaking will be punished as if its conduct were abusive from the beginning.

[916] Tetra Pak 51/89, para. 25.
[917] Italics are added.
[918] Italics are added.
[919] Italics are added.
[920] Italics are added.
[921] Italics are added.
[922] Italics are added.
[923] Tetra Pak 51/89, para. 28.
[924] See Section '5.2.4. Withdrawal of Exemption' of the Thesis.

In addition to the above mentioned, it should be noted that in case a technology transfer agreement satisfies the criteria under Aricle 5 of the Act on Competition, it would be almost impossible that the said agreement may be caught by Article 6 prohibition. Since, the licence agreements are evaluated identical to the assessment to that of the one made under Article 6 of the Act on Competition. However, where the evaluation is made under Article 4, it would be more likely that the agreement concerned would be caught by prohibition. Since, for the application of Article 4 prohibition, being in a dominant position, albeit important, not a decisive factor[925]. An agreement may be caught by Article 4 prohibition even if the undertaking concerned does not possess a market power, i.e. in case of cumulative effects of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology, it would be likely that the agreements under consideration may be prohibited under Article 4 regime. Therefore, it would be rational to conclude that if Article 4 catches the agreement which is not even concluded by the dominant undertaking, Article 4 would be most appropriate mechanism to catch the agreements concluded by the dominant undertakings. Therefore we propose that:

a. In case the technology transfer agreement is covered by the Communiqué, the same agreement should be immuned from the prohibition under Article 6 of the Act on Competition,

b. In case the technology transfer agreement or any terms thereof is not covered by the Communiqué and in case the same technology transfer agreement or any terms thereof has been assessed under Article 5 regime and thus declared immuned from the prohibition of Article 4 of the Act on Competition, the same technology transfer agreement or any terms thereof should be immuned from the prohibition under Article 6 of the Act on Competition,

c. If there are other restrictive terms in the technology transfer agreement which are not dealth with either under the Communiqué or the

[925] In accordance with the jurisprudence of the Community Courts, it was ruled that Article 81 (3) is also applicable for the agreements concluded by the dominant undertakings. See i.e. United Brands Case, para. 141; Tetra Pak 51/89, paras. 28-29; Hoffmann-La Roche Case, paras. 90, 116; Atlantic Container Case, paras. 610, 1441-1443.

Guidelines, but which have been assessed under Article 5 of the Act on Competition and thus immuned from the application of the prohibition under Article 5 of the Act on Competition, the same terms should be immuned from the prohibition under Article 6 of the Act on Competition.

It should be noted that since the cumulative effects of the agreements or the restrictive provisions therein should also be assessed by the Board during Article 5 assessment, the aforementioned guadiance will not prevent the Board from the assessment of cumulative effects of the technology transfer agreements and does not allow the agreements due to its cumulative effects of parallel networks of similar restrictive agreements even if the agreement is within the scope of the Communiqué. Furthermore, it should be noted that the Board[926] is also entitled to withdraw the exemption granted to the agreement in the future in case the cumulative effects of parallel networks of similar restrictive agreements will exist or for other grounds which it thinks that competition is restricted. Finally, in any case, the Board is empowered to withdraw the exemption which it had granted earlier in accordance with Article 13 of the Act on Competition.

Application of Article 4 instead of Article 6 to the technology transfer agreement will bring another advantage in that under Article 4, the degree of market power is evaluated with a view to ascertaining the degree of foreclosure effect irrespective of the undertaking holds dominance or superdominance in the relevant market and thus the agreement is caught by the authorities not due to the undertaking concerned has a superdominance but due to the agreement concerned has a strong foreclosure effect in the relevant market.

Secondly, since once the agreements -even if concluded by the dominant undertaking(s)- will be evaluated under Article 4 of the EC Treaty, the undertaking concerned may defend itself by Article 5 mechanism, say efficiency grounds, on the other hand it could not provide any defense during the evaluation under Article 6

[926] See Section '5.2.4. Withdrawal of Exemption' of the Thesis.

regime[927]. Therefore, the same anticompetitive agreement having the same object and effect might be immuned from Article 4 prohibition, but not from Article 6 even if both of the Articles have the same purpose: the protection of competition in the market. However, in case the technology transfer agreements will only be evaluated under Article 4 and 5 of the Act on Competition, such unjustified outcome will be removed.

Finally, we firmly believe that as long as the technology agreements are concerned, if and provided that the technology agreement complies with and fulfills the criteria under Article 5 of the Act on Competition[928], there is no legal ground to apply Article 6 to the same technology transfer agreement and we believe that reference to Article 6 should be omitted from the text of the Communiqué[929].

5.4. Legal Status Of Anticompetitive Provisions In The Technology Transfer Agreements

Save as exceptional circumstances, as a common rule and pursuant to the freedom to contract principle, the parties are free, inter alia, to set up their relations, to conclude an agreement, to terminate or amend their relations and contracts, conclude their contracts with a party they choose and decide the form and the content of their contracts[930]. Article 48 of the Turkish Constitution Law has underlined the existence of freedom to contract principle and Article 13 has set forth that freedoms can only be restricted by laws provided that such restrictions should respect to the principle of proportionality. Therefore, it should be noted that the freedoms of the parties may only

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[927] It should be noted that the Commission has showed its intention to apply efficiency defenses for Article 82 cases which is modeled upon Article 81 (3) of the EC Treaty. This is interesting development in that the Community Institutions become familiar in applying market power analysis under Article 82 cases and also become familiar in applying defense mechanism under Article 81 (3) and now the Community Institutions, in particular the Commission, try to achievea coherent approach in the application of Article 81 and Article 82 by applying the immunity mechanism to Article 82 cases which it gains experience on Article 81 (3) and by applying market power analysis to Article 81 cases which it gains experience through the years on Article 82 cases. In this way, the Commission tries to achieve both a coherent application of Article 81 and Article 82 and also tries to avoid possible conflicts which may arise following Council Regulation 1/2003. We believe that a similar approach should be followed by the Board in order to have a parallel application of Article 4 and Article 6 of the Act on Competition.

[928] Either by way of a block exemption or an individual exemption.

[929] Article 11 of the Communiqué.

[930] Yavuz, Cevdet, Faruk Acar and Burak Özen. Türk Borçlar Hukuku Özel Hükümler. 7. Bası, Istanbul: Beta Yayımevi, 2009, p. 12-14; Eren, Fikret. Borçlar Hukuku Genel Hükümler. 11. Baskı, Istanbul: Beta Yayınevi, 2009, p. 270.

be restricted by laws, i.e. Turkish Code of Obligations, the Act on the Protection of Competition[931], Turkish Labor Laws, Turkish Consumer Law, etc.

In this respect, Article 4 of the Act on Competition has set forth that agreements which have directly or indirectly, actually or potentially as their object or effect the restriction of competition within the relevant market are illegal and prohibited and Article 56 of the Act on Competition has clarified that those agreements will be null and void[932]. In other words, since restricting competition is declared to be illegal under the Act on Competition, agreement which is used as a mean to restrict competition is accepted as null and void. It should be borne in mind that even if Article 56 of the Act on Competition would not envisage that agreement restricting competition will be null and void, such an outcome will also be easily reached by the application of Article 19 and 20 of the Turkish Code of Obligation[933]. Since Article 19 and 20 of the Turkish Code of Obligation has sets forth that the agreements between the parties will be valid as long as, inter alia[934], the subject-matter of the agreements are not contrary to the existing Turkish laws. To put it differently, as long as the subject-matter of the agreement concerned will not be against the existing Turkish laws and provided that all other conditions will be fulfilled, such agreement will be valid and enforceable.

Article 19 and 20 of the Turkish Code of Obligation envisage that the subject-matter of the agreement shall not be contrarty to the Turkish laws. In this respect, it should be borne in mind that the *"subject-matter"* of the agreement encompasses not only the subject of the agreement, but also the purpose of the agreement and the commitments of the parties therein[935]. Therefore, the agreement will be null and void in

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[931] The Act on the Protection of Competition Act, No: 4054 Date of Adoption: 7/12/1994 Official Gazette of Its Publication: Date:13/12/1994 Number: 22140 **(the "Act on Competition").**
[932] For the purpose of the Thesis, we will use the phrases null and void as having the same meaning.
[933] By the same token, it should be noted that the same outcome will be reached in case the dominant undertakings abuse their dominant position. Since abuse of dominant position is also prohibited under Article 6 of the Act on Competition.
[934] It should be noted that not only the agreements having the subject-matter contrary to the existing laws, but also the agreements having a subject-matter which is impossible to materialize or agreements contrary to moral rules also amount to nullity.
[935] Eren, p. 289-290.

case the subject-matter of the agreement and/or the purpose of the agreement and/or the commitments[936] therein will be contrary to the Turkish laws.

This issue is very essential in that the Act on Competition has envisaged that the agreements which have as their *object or effect* the restriction of competition within the relevant market are illegal and prohibited. If it would be concluded that the object or the purpose of the agreement and/or the subject-matter of the agreement is contrary to the Act on Competition, it may be easier to conclude that the agreement is null and void in its entirety[937] from the moment it has been concluded unless exempted in accordance with the criteria under Article 5 of the Act on Competition. However, since restricting competition is illegal under the Act on Competition and in case the object or the purpose of the agreement and/or the subject-matter of the agreement is not contrary to the Act on Competition, but the commitments therein and/or the effect of the agreement or some restrictive provisions therein restricts competition, such agreement or any restrictive provisions therein having *such effect* should be carefully evaluated in accordance with the criteria under Article 5 of the Act on Competition before concluding that the agreement concerned is null and void in its entirety.

The Act on Competition does not give clarification with respect to the status of the restrictive agreements, types of the nullity thereof and possible outcomes in case the parties conclude such restrictive agreements. Since there is an ongoing debate[938] both on the types of nullity and possible outcomes in case the parties conclude such restrictive agreements and due to the importance of these issues for the technology transfer agreements, clarification is required to be made herein. For the purpose of this Thesis, we will only deal with the absolute nullity *(mutlak geçersizlik)*, partial nullity *(kısmi*

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[936] For instance the sale of drugs, women, etc.

[937] It may be that the agreement itself may be illegal, in that the laws may solely prohibit the conclusion of such type of agreement or the commitments in the agreement may be illegal or the objects of the parties and the agreement may be contrary to laws. In those circumstances, it may be concluded that there is an "illegality". See Aksoy, M. Nazlı. Rekabetin Korunması Hakkında Kanuna Aykırılığın Özel Hukuk Alanındaki Sonuçları. Ankara: Rekabet Kurumu, 2004, p. 10.

[938] See i.e. Akıncı, Ateş. Rekabetin Yatay Kısıtlanması. Ankara: Rekabet Kurumu, 2001, p. 341; Aslan, p. 378-386; Topçuoğlu, Metin. Rekabeti Kısıtlayan Teşebbüsler Arası İşbirliği Davranışları ve Hukuki Sonuçları. Ankara: Rekabet Kurumu, 1999, p. 287-294; Sanlı, p. 396-439; Arı, Zekeriyya. Rekabet Hukukunda Danışıklılık Kavramı ve Hukuki Sonuçları. 1. Bası, Ankara: Seçkin Yayıncılık, 2004 , p. 173-185; Ortaç, O. Nurdan. "4054 Sayılı Rekabetin Korunması Hakkında Kanun'a Aykırı Anlaşma ve Kararların Geçersizliğinin Hukuki Niteliği", Master Thesis, Kırıkkale Üniversitesi, Sosyal Bilimler Enstitüsü, 2006, p. 71; Badur, p. 159-160.

geçersizlik) and suspended nullity *(askıda geçersizlik)* which the ongoing debate has encompassed[939].

5.4.1. Absolute Nullity

In case the agreement concerned does not fulfill or include all validity elements and conditions in order to duly enforce the agreement, as a general rule, such types of agreement may not be validly enforceable and does not create any legal consequences[940]. In such cases, provided that another sanction is not envisaged in the laws concerned[941], as a general rule, the agreement is exposed to absolute nullity in that such types of agreement can never gain validity and create legal consequences. In other words, if an agreement is contrary to any existing laws and unless other sanction is provided in the said laws[942], as a general rule, Article 20 of Turkish Code of Obligation will be applicable. In this respect, even if the reason amounting to an absolute nullity will be removed[943] and/or even if the parties to the agreement has fulfilled their obligations under the agreement concerned and/or even if the parties have obtained any approval required for validity of the agreement, such agreement will never gain validity and never create any legal consequences[944].

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[939] As mentioned there is an ongoing debate with respect to the headings of the types of nullity and their possible outcomes under the Code of Obligation, as well. See for further information with respect to the types of nullity either for private law concerns or competition law concerns, Tekinay, S., S. Akman, H. Burcuoğlu and A. Altop. Tekinay Borçlar Hukuku. 7. Bası, Istanbul, 1993, p. 375-381, 885; Akıncı, p. 341; Aslan, p. 378-386; Topçuoğlu, p. 287-294; Sanlı, 396-439; Arı, p. 173-185; Ortaç, 59-75; Arbek, Ömer. Fikir ve Sanat Eserlerine İlişkin Lisans Sözleşmesi. Yetkin Yayınları, 2005, p. 170-171.

[940] Some of the authors tend to separate absolute nullity into two by taking into account the interest of which the provision concerned has protected. In case the provision, which has been violated, protects public interest (*mutlak emredici hükümlere aykırılık*), violation of such provision will amount to absolute nullity. On the other hand, in case the provision, which has been violated, protects the weak party against the powerful party (*nispi emredici hükümlere aykırılık*), violation of such provision should not amount to absolute nullity, since the weak party should have the right to renounce from the right to claim the nullity following the appearance of his right. Moroğlu, Erdoğan. Anonim Ortaklıklarda Genel Kurul Kararlarının Hükümsüzlüğü. 5. Bası, Istanbul: Vedat Kitapçılık, 2009, p. 57.

[941] Reisoğlu, S. Borçlar Hukuku Genel Hükümler. 21. Bası, Beta Yayımevi, 2009, p. 134; Tunçomağ, Kenan. Borçlar Hukuku Dersleri Genel Hükümler. C.1, İstanbul, 1965, p. 173; Hatemi, Hüseyin. Hukuka ve Ahlaka Aykırılık Kavramı ve Sonuçları. İstanbul, 1976, p. 144.

[942] For instance, Article 360, 373, 381 of the Turkish Commercial Code, gives the opportunity to the concerned parties to cancell the decision taken. See Poroy, R., Ü. Tekinalp and E. Çamoğlu. Ortaklıklar ve Kooperatif Hukuku. 11. Baskı, Istanbul: Vedat Kitabevi, 2009, section: 712-749.

[943] Tekinay and Others, p. 377; Eren, p. 301-302.

[944] Eren, p. 301-302; Tekinay and Others, p. 377; Oğuzman, K. and T. Öz. Borçlar Hukuku Genel Hükümler, 6. Bası, Istanbul: Vedat Kitapçılık, 2009, p. 137-139; Gürzumar, B. Osman. "4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 4. maddesine Aykırı Sözleşmelerin Tabi Olduğu Geçersizlik Rejimi", Rekabet Dergisi, S. 12, Ekim-Kasım-Aralık 2002 ("Gürzumar, *Geçersizlik Rejimi*"), p. 26-27; Moroğlu, p. 21-22.

The Parties are not required to file a case with respect to the nullity of the agreement, since absolute nullity has automatically create its outcomes without the need for a further declaration or court order, etc. Furthermore, the parties to the agreement may not be forced by the other to fulfill their commitments envisaged in the agreement and in case one of the parties request from the other to satisfy his obligations under the agreement concerned, the other party may object such request by declaring the absolute nullity of the agreement[945]. In case a party fulfills any of its obligations, the said party may request from the other either in accordance with Article 61-64 of the Turkish Code of Obligation[946] or Article 683, 1025 of Turkish Civil Code and request from the other its damages in accordance with the principle of 'culpa in contrehendo'[947].

5.4.2. Partial Nullity[948]

In accordance with Article 20/II of Turkish Code of Obligation, in case some parts of the agreement will be contrary to Turkish laws, those parts of the agreement may be declared null and void[949] provided that:

- **i.** only some parts of the agreement is contrary to Turkish Laws[950],
- **ii.** those parts of the agreement can be severable from the agreement concerned[951],
- **iii.** the parties should not conclude any nullity agreement,
- **iv.** it must be concluded that the parties' intentions[952] were to maintain the agreement concerned, in case the severable parts of the agreement would

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945 Oğuzman and Öz, p. 137; Eren, p. 301-302; Tekinay and Others, p. 377; Reisoğlu, p. 141.
946 It should be noted that Article 56 of the Act on Competition has set forth that Article 65 of the Turkish Code of Obligation will not be applicable in case an anticompetitive agreement within the meaning of Article 4 of the Act on Competition is concerned.
947 Tunçomağ, p. 175.
948 For further information with respect to partial nullity see Aksoy, p. 11-16; Sanlı, p. 392-393.
949 As explained above in case a party fulfills any of its obligations, the said party may request from the other either in accordance with Article 61-64 of the Turkish Code of Obligaion or Article 683, 1025 of Turkish Civil Code and request from the other its damages in accordance with the principle of "culpa in contrehendo".
950 Oğuzman and Öz, p. 141.
951 Eren, p. 304-305; Arı, p. 174.
952 See also Ünal, Akın. "Rekabet Hukukunun Sozlesme İçeriğini Belirleme Özgürlüğüne Müdahalesi", Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-VII, Rekabet Kurumu, 17-18 Nisan 2009, p. 412.

not have existed in the agreement[953]. In this respect, the competent authority should evaluate the parties' hypothetical intentions existed on the date they had concluded the agreement[954]. In case the competent authority would not be in a position to evaluate the parties' hypothethical intentions on the signature date of the agreement, it should also evaluate the circumstances and decide in accordance with the best interest of the parties[955].

In Consten and Grunding ruling, the Court of Justice has underlined that in case the restrictive provisions can be severable from the agreement, severable parts should be null and void, but if not, all the agreements should be null and void[956]. The Court of Justice has concluded in Societe Technique ruling that "the automatic nullity of an agreement within the meaning of article 85 (2) *(now 101(2))*[957] of the EEC Treaty only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Any other contractual provisions which are not affected by the prohibition fall outside Community law. The absolute nullity imposed by article 85 (2) *(now 101(2))*[958] applies to all provisions of the contract which are incompatible with Article 85(1) *(now Article 101(1))*[959]. The consequences of this nullity for all other aspects of the agreement are not the concern of Community law"[960].

[953] Some authors have argued that the intention of the party who will be exposed to damage should be taken into account. See Aksoy, p. 15. However, such application may lead to unjust outcomes in some circumstances. For instance, there may be situations where a dominant undertaking may accept restrictive provisions in order to induce the weak party or to protect its commercial interest for some reasons. In such events, it may be the dominant undertaking that pushes for those restrictive provisions in the agreement but at the same time, it may be the dominant undertaking that may be exposed to damages in accordance with the changing circumstances of the market or of the circumstances between the parties. Therefore, we do not think that only the party's intention that may be exposed to damage should be taken into account in every case.

[954] For further information see Eren, p. 307-308; Tekinay and Others, p. 379.

[955] Kocayusufpaşaoğlu, Necip, "Değişik Kısmi Hükümsüzlük ve Genişletilmiş Kısmi Hükümsüzlük Kavramı ile İlgili Düşünceler" Selim Kaneti'ye Armağan, Istanbul, 1996, p. 27.

[956] Consten & Grundig Case 56, p. 344.

[957] Italics are added.

[958] Italics are added.

[959] Italics are added.

[960] Societe Technique Case, para. 9 (summary).

5.4.3. Suspended Nullity

In case of suspended nullity, even if the agreement concerned has been concluded and established by the parties, the said agreement cannot create any legal consequences due to the lack of elements required for the duly enforceability of the agreement. The courts shall take into account independently even if nobody raises this issue and the parties have the right to put forward the nullity of the agreement at any moment and irrespective of any time limitation[961]. The said agreement may commence to create legal consequences once the parties have completed or fulfilled the incomplete[962], lack elements required for the agreement[963]. The validity date of the agreement or the date on which the agreement will commence to create legal consequences will be determined by considering the incomplete elements[964]. In other words, it is the absent element itself which will be decisive factor on the enforceability date of the agreement. In case the incomplete element will not be fulfilled, then the agreement concerned will be null and void from the moment it has been concluded by the parties[965].

5.4.4. Types Of Nullity Under The Act On Competition

As aforementioned, Article 4 of the Act on Competition has set forth that agreements which have directly or indirectly, actually or potentially as their object or effect the restriction of competition within the relevant market are illegal and prohibited and Article 56 of the Act on Competition has clarified that those agreements will be null and void. However, the Act on Competition does not envisage the type of nullity for those restrictive agreements.

Once the European Union practice has been analysed, it will be seen that the Community Courts has left the determination of the type of nullity and the legal

[961] Moroğlu, p. 21.
[962] It should be noted that in some cases the decision given by the official authorities may be required for the validity of the agreement. See Oğuzman and Öz, p. 139-140.
[963] For further information see Sanlı, p. 393; Eren, p. 300.
[964] Oğuzman, K. and Ö. Seliçi. Borçlar Hukuku, Istanbul, 1998, p. 132.
[965] Eren, p. 300.

consequences thereof to the competent national authority[966] in case part of the agreement will be null and void[967]. Therefore, the type of nullity for such restrictive agreements was not yet determined by the Communtity Courts. However, in Courage Ltd. v. Crehan ruling[968], the Court of Justice has taken into account the importance and full effectiveness of Article 81 of the EC Treaty and mentioned that in case a party to an illegal agreement would not be free to claim damages for his loss incurred due to an illegal agreement, competition rules will be put in a risk and that claiming by the parties of their damages strengthen the working of competition provisions and make an important contribution to the maintenance of competition in the market. The Court of Justice further added that the *economic and legal context of the parties*, *the bargaining powers and the conducts thereof* should be taken into account in such circumstances. This ruling is very important for compensation claims for those of who feels themselves as a victim of the restrictive agreements, but at the same time may be construed as an important guidance for several reasons in that the economic and legal context and circumstances of the parties may be taken into account while determining the outcome of the compensation claims. One further important issue stemming from that the ruling is that competition concern has been given priority over the other policy concerns when compared and that while the competition authorities evaluates the legal outcomes of invalid agreement, competition concerns should be taken into consideration. Thirdly, the Court of Justice has put forward "… the importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) (*now 101(2)*)[969] of the Treaty, that any agreements … prohibited pursuant to that Article are to be automatically void … automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) (*now Article 101(3)*)[970]of the Treaty"[971]. Therefore, the Court of Justice has further put forward that an absolute nullity system can only be established if the

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[966] Kerpen Case, para. 12. See also Consten & Grundig Case 56, where the Court of Justice has concluded that "… the consequences of this nullity for all other aspects of the agreement are not the concern of Community law". Therefore, it leaves this issue to the national competent authorities. See Consten & Grundig Case 56, p. 344.
[967] Guidelines on Article 81, para. 41; Goyder, p. 138; Akıncı, p. 330.
[968] Crehan Case, paras. 26-27.
[969] Italics are added.
[970] Italics are added.
[971] Crehan Case, paras. 21-22.

agreement concerned will fall within the scope of Article 81 (1) of the EC Treaty and provided that the criteria under Article 81 (3) of the EC Treaty will not be satisfied.

It should be noted that there is still an ongoing debate between the Turkish scholars with respect to the types of nullity and the legal consequences thereof[972]. In our opinions, nullity and validity of the agreements should depend on, first of all, as to whether the competition is restricted or not and types of nullity for competition concerns should be determined by taking into account, inter alia, the degree and the type of incomplete and absent elements in the concerned agreement[973]. In this respect, we believe that sole application of absolute nullity to all types of agreements in every circumstance will not amount to just and equal outcomes[974]. We think that competition concerns should take precedence over other concerns and the objectives of the Act on Competition should be taken into account to determine the legal consequences of nullity. We, therefore, cannot share the opinions of authors which have pointed out that the Act on Competition has envisaged for those restrictive agreements solely the "absolute nullity" regime[975]. But for some exceptional grounds, we share the opinions

[972] See i.e. Sanlı, p. 390, footnote 26, 27; Özdemir, p. 176-177; Odman, N. Ayşe. Fikri Mülkiyet Hukuku ile Rekabet Hukukunun Teknolojik Yeniliklerin Teşvikinde Rolü. 1. Bası, Ankara: Seçkin Yayınevi, 2002, p. 286-289; Aşçıoğlu, p. 179-180; Arı, 173-185; Topçuoğlu, 287-294; Tekinalp, Ü. and G. Tekinalp. Avrupa Birliği Hukuku. İstanbul, 2000, p. 423-431; Gürzumar, Osman. "Franchise Anlaşmaları ve Rekabet Hukuku", Perşembe Konferansları – 1, Ankara, Ekim, 1999 ("Gürzumar, *Franchise Anlaşmaları*"), p. 123; Gürzumar, *Geçersizlik Rejimi*, p. 47-58; Akıncı, p. 341; Aslan, p. 143; Ortaç, p. 59-75; Aksoy, p. 28-33.; Sayhan, İsmet. "Rekabet Hukukunda Rekabet Düzeninin Korunmasına Yönelik Düzenleme Bakımından Hukuka Aykırılık", Rekabet Dergisi, S. 17, p. 34; Eğerci, Ahmet. Rekabet Kurulu Kararlarının Hukuki Niteliği ve Yargısal Denetimi. Ankara: Rekabet Kurumu Yayınları, 2005, p. 204; Badur, p. 159-160.

[973] Arı, p. 172-173.

[974] In fact, some authors have underlined that the types of nullity should be determined by considering which competition law provision is violated and the objectives of the said competition law provision of which it protects and depends upon. See Sanlı, p. 394, 395.

[975] See i.e. Akıncı, p. 341; Aşçıoğlu, p. 179-180; Odman, p. 286-289; Ortaç, p. 60, 71; Aksoy, p. 28-33; Sayhan, p. 34; Eğerci, p. 204; Badur, p. 159-160. See also for different arguments Topçuoğlu, p. 287-294, where the author has mentioned that since the decision of the Board is not a precondition for the validity of an agreement, until an exemption is granted, the agreements are 'lamed' (topal hukuki muamele). However, the author cannot explain how an agreement becomes valid following the exemption decision is granted by the Board; See also Öz, Turgut. Yönetim (Management) Sözleşmesi, Istanbul, 1997, p. 62 where the author has mentioned that since it is the Board who will assess the agreement, such agreements are exposed to appraised nullity regime (takdiri butlan) and the author has mentioned that such agreements are similar to the ones assessed by the courts under Article 99/II of the Code of Obligation. However, it should be noted that in case an agreement restricts competition either by its object or its effects, the Board does not have any discretion, at all, to decide that such agreement does not restrict competition. See Gürzumar, *Geçersizlik Rejimi,* p. 38. Our argument cannot be invalidated by claiming that the Board has discretion while giving its decision on the exemption criteria under Article 5 of the Act on Competition, neither. Since the criteria under Article 5 is cumulative and at the same time exhaustive and in case and provided that those criteria will be fulfilled, the Board is under the responsibility to grant an exemption to the agreement concerned. In this respect, it should be noted that as to whether the Board, while giving its decision and making its assessment under Article 5, has correctly evaluated the factual and legal circumstances of the parties and duly take into account all necessary information or not are different issues and without prejudice to the responsibility of the Board to grant an exemption once all conditions have been fulfilled under Article 5 of the Act on Competition. To think otherwise

of authors which have pointed out that the Act on Competition has envisaged for those restrictive agreements the "suspended nullity" regime[976] for the following grounds mentioned below:

i. First of all, it should be noted that the Turkish Code of Conduct has brought a general rule and unless other sanction is provided in the laws, as a general rule, Article 20 of Turkish Code of Obligation will be applicable. It should be noted that by showing its objectives while framing the Act on Competition[977], the law maker has showed its intention that all such restrictive agreements should not be subject to the same nullity regime[978]. In this respect, it should be noted that the Act on Competition has brought a special regime for restrictive agreements[979].

ii. In order to duly determine the type of nullity regime under the Act on Competition and the legal consequences thereof, legal consequences of individual and block exemption system should also be assessed. As aforementioned, exemption system under the Act on Competition is designed to protect the agreement from the prohibition under Article 4 of the Act on Competition. In case an agreement is caught by Article 4[980],

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will grant an excessive discretionary power to the Board under Article 5 of the Act on Competition which we think that neither the objectives nor the text of the current Act on Competition intends to achieve. Secondly, we think that there is a conflict in the arguments of the author. Since, Öz has mentioned that the decision given by the Board is declaratory in nature. In case an agreement is exposed to appraised nullity regime (takdiri butlan) as the author has underlined, the decision given by the Board should not have been declaratory, since with its decision, the Board has formed a new legal status to the agreement via its decision.

[976] See i.e. Özdemir, p. 176-177; Sanlı, p. 433-436; Arı, p. 173-185; Gürzumar, *Franchise Anlaşmaları,* p. 123; Gürzumar, *Geçersizlik Rejimi*, p. 50.

[977] For instance the law maker has used the phrases "suspended" and "has obtained its legal validity" in Article 10 of the Act on Competition or "to come to an end" in Article 11 of the Act on Competition.

[978] Sanlı, p. 394.

[979] Ünal, p. 401; Aslan, p. 379; Arı, p. 175.

[980] It should be underlined that it is an important precondition for the application of the criteria under Article 5 that an agreement should be caught by Article 4 of the Act on Competition. In other words, if an agreement is not caught by Article 4 (or Article 6 as the case may be), this would lead the agreement outside the scope of the Act on Competition. In this respect, one of the issues to be clarified is under which conditions the agreement is caught by Article 4 of the Act on Competition. Indeed, we think that efforts have been made by the authors to save most of the agreements from the strict application and legal outcomes of nullity regime when they do not raise real competition concern. Since, in practice, due to the existing text of Article 4 of the Act on Competition, almost all restrictive provisions comes within the scope of Article 4 of the Act on Competition (even if most of them may be exempted thereafter in accordance with Article 5 of the said Act). Therefore, it is felt that in case all anticompetitive agreements will be exposed to absolute nullity regime, this would not bring just and fair outcomes. In this respect, it should be noted that due to the jurisprudence of the Community Courts and the new approach pursued by the Community Institutions, agreements that are really important for competition concerns are caught by Article 81(1). See Guidelines on Article 81. In case such guidance similar to Guidelines on Article 81 will be adopted by the Turkish

this agreement is evaluated under Article 5 unless the said agreement is within the scope of a block exemption issued by the Turkish Competition Authority[981]. If, following the evaluation, all criteria under Article 5 are fulfilled, the Board should grant an individual exemption to the agreement[982]. Both the individual and the block exemption protect the agreement in question from the application of the prohibition under Article 4 and sanctions under the Act on Competition[983].

In this respect, while some authors have pointed out that the decision by the Board on individual exemption leads the null agreement into valid and enforceable agreement[984], while some has argued that since the individual exemption decision given by the Board is declaratory in nature[985] and not precondition for the validity[986] of the agreement, null and void agreement never becomes a valid one[987]. In that regard, it should be noted that we do not share the latter opinions above mentioned since, if null and void agreement never becomes a valid and enforceable one due to an individual exemption granted by the Board, the same Authority should not have a competence to withdraw its previous decision by the application of Article 13 of the Act on Competition. Since only an exemption granted to the valid and enforceable agreements may be withdrawn. There is no reason and legal justification to withdraw an exemption if the agreement is null and void from the moment it has been concluded.

Furthermore, if the agreement is absolutely valid or absolutely null, the Board should not have the authority to prohibit the exempted

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Competition Authority, only the restrictive agreements which raise real competition concerns might come within the scope of Article 4 of the Act on Competition and be exposed to nullity.

[981] Since, in case the agreement is covered by any of the communiqués issued by the Turkish Competition Authority, the agreement is considered that it fulfills the conditions under Article 5 of the Act on Competition.

[982] Since, we believe that Article 5 of the Act on Competition is a legal exception provided by the said Act.

[983] Aslan, Yılmaz, "Türk Rekabet Hukuku Çerçevesinde Rekabeti Bozucu Anlaşma Uyumlu Eylem ve Kararlar ve Muafiyet", Rekabet Hukuku ve Yargı Sempozyumu-2, Rekabet Kurumu, Ankara 1999, p. 19.

[984] Sanlı, p. 400; Arı, p. 176.

[985] Eğerci, p. 203.

[986] It should be noted that in some cases the decision given by the official authorities may be required for the validity of the agreement. See Oğuzman and Öz, p. 140.

[987] Ortaç, p. 71; Aksoy, p. 28-31.

agreement by the application of Article 6 of the Act on Competition. It is undebatable that restrictive agreements under the umbrealla of Article 4 are null and cannot be validly enforceable until a decision is granted by the Board. Therefore, once a decision on individual exemption is taken[988], this leads the agreement to a validly enforceable one for the period which the individual exemption is granted[989]. It should also be borne in mind that if the law maker's intention is the "absolute nullity"[990], or the "absolute validity", the individual exemption decisions taken by the Board should not have been applied ex tunc[991] or the individual exemption should not be granted for a limited period of time.

iii. Another issue to be recalled is that it is not important for the enforceability and validity of the agreement as to whether the agreement has been concluded before the block exemption regulation. In other words, the agreement in question will be covered by the block exemption communiqués, even if the agreement has been concluded before the communiqué concerned[992]. Once the agreement is covered thereby, the nullity will not be a matter for the agreement concerned within a time period envisaged in the respective communiqué and the agreement can be enforceable without a need for declaration or any acts of the Board whatsoever[993]. Such an outcome also shows that "absolute nullity" regime has not been envisaged for all types of restrictive agreements and that competition concerns takes precedence over the other concerns. Since, in the absolute nullity regime, even if the reason amounting to an

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[988] In this respect, it should be noted that in case an individual exemption decision is refused by the Board, this will lead the agreement absolute nullity in that such agreement will be null and void from the moment it has concluded, but for the exceptional cases as the case may be.

[989] It has been defended that following the period granted for an individual exemption has been expired, the agreements becomes "suspended validity" (askıda geçerlilik). See Aslan, p. 381. However, since we believe that suspended validity can be used for the agreements which can be cancelled by one of the parties, these phrases should not be used for the agreements of which the period of their individual exemption has expired. See Aksoy, p. 45-46.

[990] With the exception that the agreements having by its vey object the restriction of competition, i.e. price cartel agreement.

[991] Sanlı, p. 400.

[992] Sanlı, p. 405, footnote 105; Gürzumar, *Franchise Anlaşmaları,* p. 129; Gürzumar, *Geçersizlik Rejimi*, p. 6.

[993] For information with respect to the relation between the Turkish Competition Authority and the Turkish courts, see Gül, İbrahim. "Rekabet Kurulu'nun Muafiyet Kararının Adli Mahkemelerin Kararına Etkileri", Rekabet Hukuku ve Yargı Sempozyumu–2, Rekabet Kurumu, Ankara 1999, p. 26-29; Sanlı, p. 406.

absolute nullity will be removed[994] and/or even if the parties to the agreement has fulfilled their obligations under the agreement concerned and/or even if the parties have obtained any approval required for validity of the agreement, such agreement will never gain validity and never create any legal consequences[995]. Absolute nullity has a strict application and legal outcomes in that, for insance, in case the parties have decided to import a good which the importation is prohibited by laws, even if the said laws would be abolished, the said agreement will never obtain validity and the parties must re-phrase and conclude the agreement if they would like to have a valid and enforceable agreement[996].

iv. It should be noted that agreements concerned may be contrary to Turkish laws and thus be prohibited for several reasons mentioned below:

a. Solely conclusion of such an agreement may be prohibited by the Turkish laws, i.e. Article 613 of the Turkish Civil Code or Article 100 (3) of the Code of Obligation[997]. In such cases, it does not really matter as to whether the commitments of the parties or the subject-matter of the agreement is contrary to Turkish laws, however, it would be enough to assume that the agreement as illegal since, the conclusion of such agreement is already prohibited by and contrary to the existing Turkish laws.

b. There may be cases where the Turkish laws have prohibited the commitments envisaged in the agreement. In such cases the parties are not allowed to assume such obligations in their agreements, i.e. in case the parties have committed to do an act which is contrary to the Turkish Penal Code[998].

[994] Tekinay and Others, p. 377; Eren, p. 301.
[995] Eren, p. 302; Tekinay and Others, p. 377; Oğuzman and Öz, p. 137-138.
[996] Oğuzman and Öz, p. 137-139.
[997] Eren, p. 289.
[998] Eren p. 290.

c. There may be also cases where the Turkish laws have prohibited the objective/purpose of the agreement[999]. In such cases without evaluating the rest of the agreement, it would be concluded that the agreement is contrary to Turkish laws and thus are illegal due to its subject-mater and its objective. Since the sole intention of the parties is to achieve an illegal outcomes by concluding an agreement[1000].

As can be seen, the agreement concerned may be contrary to the existing Turkish laws and thus is prohibited due to the agreement itself is prohibited by the existing Turkish laws or the commitment in the agreement or the objectives of the agreement is prohibited by the existing Turkish laws. As we have noted above, we believe that the Act on Competition has brought a special regime and special rules for restrictive agreements. In this respect, we defend that the agreements restricting competition by its object or by its effects are to be distinguished from each other[1001]. In case an agreement restricts competition by its very object, i.e. price cartel agreements, those types of agreements should be

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[999] Eren, p. 290.
[1000] Eren, p. 290-291.
[1001] Apart from our arguments with respect to the legal status of the agreement, restriction by object and effect has to be distinguished from each other in that in case the agreement restricts competition by its object, i.e. price cartel agreements or agreements containing hardcore restrictions, such agreement should not be required to assess by the competent authorities **by its effects** on the market. In other words, the respective authorities will not be required to prove that such agreement restricts competition on the relevant market by its effect. However, in case the agreement does not have its object to restrict competition or it cannot be inferred from the agreement that the agreement restricts competition by its object, then the effect of the agreement in the relevant market should be evaluated and the Board will be under the burden to prove that the agreement concerned restricts competition by its effect and thus is within the scope of Article 4 of the Act on Competition. In our views, one of the most important differences between the restriction by "object" or by "effect" is the burden of proof on the parties. In case the agreement restricts competition by its object, the burden to prove will shift on the undertakings claiming that their agreement fulfills the criteria under Article 5 of the Act on Competition. On the other hand, in case the agreement does not have its object to restrict competition or it cannot be inferred from the agreement that the agreement restricts competition by its object, the burden to prove is on the plaintiff and the plaintiff should prove that the agreement concerned restricts competition by its effect on the relevant market. Since, in order for the application of Article 5 of the Act on Competition, there should be, inter alia, anticompetitive agreement which restricts competition within the meaning of Article 4 of the Act on Competition. If any party (or the Board) claims that there is an agreement which restricts competition by its effect, the burden to prove is on the party claiming such anticompetitive effects. Therefore, we believe that one of the most important issues to be taken into consideration with respect to the restriction by object and restriction by effect is the one who will bear the burden of proof. In both Reims II and CECED cases, the Commission declares that the parties have committed price fixing which restricts competition by its object. However, the Commission has accepted the parties' claims that their agreements have fulfilled the criteria under Article 81 (3) and thus granted exemptions to the price fixing arrangements. These cases also show that although the Commission declares that price fixing restricts competition by its object, price fixing arrangement can still be exempted in case the parties will prove that their agreements fulfill the conditions under Article 81 (3). However, it should be noted that this argument is, certainly, without prejudice to our views with respect to the agreements which are exposed to absolute nullity or suspended nullity regime.

null and void from the moment it has been concluded[1002] and the determination of the effects thereof on the market and on competition is not required[1003] to be demonstrated by the Board. In Anic Partecipazioni case, the Court of Justice has ruled that "for the purposes of applying Article 85(1) *(now Article 101(1))* [1004]of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition"[1005]. The same approach has been pursued in Consten and Grunding where the Court of Justice has stressed that "… for the purpose of applying Article 85(1) *(nowArticle 101(1))*[1006], there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition"[1007]. Therefore, in case the agreement restricts competition by its object, then there would be no need to assess as to whether the agreement restricts competition to an appreciable extent and the respective competition authorities are not required to demonstrate that the agreement restricts competition by its very effects on the market. In such cases, the agreements concerned should be exposed to an absolute nullity[1008]

[1002] And, albeit it would be very unlikely, unless individually exempted.

[1003] Robertson, Aidan, "AT 81. Madde: Haklı Sebep Kuralı ve Muafiyet", Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-V, Rekabet Kurumu, 6-7 Nisan 2007, p. 29-30; Sanlı, p. 423; Gürzumar, *Geçersizlik Rejimi*, p. 35; Waelbroeck, D. "Michelin II: A Per Se Rule Against Rebates By Dominant Companies?", Journal of Competition Law and Economics 1(1), p. 160.

[1004] Italics are added.

[1005] Case C-49/92 P, Anic Partecipazioni v. Commission, (1999), ECR I-4125 ("Anic Partecipazioni Case"), para. 99.

[1006] Italics are added.

[1007] Consten & Grundig Case, p. 342; See also, to the same effect, Sandoz Case, paras. 14-15.

[1008] It should be noted that even if an agreement restricts competition ***by its object***, albeit it would be very unlikely, it would still be possible for the undertakings concerned to prove that their agreements have fulfilled the criteria under Article 5 of the Act on Competition. In accordance with the European Union approach, the Commission declares that the parties have committed price fixing which restricts competition by its object. However, the Commission has accepted the parties' claims that their agreements have fulfilled the criteria under Article 81 (3) and thus granted exemptions to the price fixing arrangements. See Reims II, para. 65 and CECED Case, para. 67. In European Night Services, the Court of First Instance has ruled that if "… an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets, … such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article Article 81(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 81(1)". See European Night Services, para. 136. These cases show that although the Commission declares that price fixing restricts competition by its object, price fixing arrangement can still be exempted in case the parties will prove that their agreements fulfill the conditions under Article 81 (3). The important issue in that regard is that the Commission is **not** under the burden to demonstrate that price fixing arrangement restricts competition by its effect and thus is caught by Article 81 (1) of the EC Treaty nor to show the negative effects of the agreement on competition, since it is already set forth in Article 81 (1) that price fixing is prohibited.

system in case the parties cannot demonstrate that their anticompetitive agreement fulfills the criteria under Article 5 of the Act on Competition. In addition to this, it should be noted that both in the EC Competition regime[1009] and the Turkish competition regime as long as an agreement includes hardcore restrictions and since it is accepted that those hardcore restrictions restrict competition by *its object*, the agreement will be null and void in its entirety from the moment it has been concluded by the parties and provided that the parties cannot prove that their anticompetitive agreement fulfills the criteria under Article 5 of the Act on Competition. Therefore, we believe that in case the agreements restrict competition by their very object and provided that the parties cannot demonstrate that their anticompetitive agreements fulfill the criteria under Article 5 of the Act on Competition, those agreements should be exposed to an "absolute nullity" system.

However, if the agreement does not restrict competition by its object, the effects of the agreement on competition should be evaluated in this respect and that as to whether competition is restricted in the relevant market should be demonstrated by the plaintiff during the individual assessment of the agreement. In such cases, suspended nullity should be adopted for such types of agreements. Following this individual assessment, in case the agreement will not obtain individual exemption, this should amount to an absolute nullity of the agreement from the moment it has been concluded.

One question may emerge with respect to the legal status of the agreement in case the market share thresholds envisaged in the Communiqué is exceeded on the conclusion date of the agreement. In such cases, it should be noted that solely exceeding the market share thresholds should not amount that the agreement concerned to an automatic nullity. In this circumstance, it is the Board who will decide on

[1009] See i.e. Case 19/77, Miller International Schallplatten GmbH v Commission (1978), ECR 131 ("Miller 19/77"), para. 7.

the possible effects on competition and thus the validity of the agreement. The agreement concerned should be exposed to "suspended nullity" system and in case the Board will grant exemption, save for exceptional cases, the agreement concerned should be valid and enforceable from the moment it has been concluded.

By the same token, there may be cases where the parties were considered as non-competitors and thus the hardcore restrictions applicable for non-competitors had been observed by the parties, however, in accordance with the changing circumstances, the parties might become competitors thereafter in the relevant market. In such cases, the parties are protected during the term of the agreement unless the parties have amended their agreement substantially[1010]. However, in case the parties have amended their agreement substantially, the agreement concerned will not be covered by the Communiqué. In such cases, the agreement will be exposed to suspended nullity regime on the substantial amendment date of the agreement and such agreement should be evaluated in accordance with the criteria under Article 5 of the Act on Competition. In case the Board will refuse to grant an exemption, the agreement concerned will be exposed to absolute nullity regime.

As far as the excluded restrictions[1011] are concerned, such restrictions in the agreement should be evaluated by the authorities individually. Following this assessment, if it is concluded that the restrictions concerned has anticompetitive effects on the market and that they cannot be severable from the rest of the agreement[1012], the agreement in whole will be out of the scope of the Communiqué. On the other hand, if such anticompetitive restrictions can be severable from the rest of the agreement, the restrictive clauses should be omitted from the

[1010] Article 6 (4) of the Communiqué.
[1011] See Article 7 of the Communiqué.
[1012] We believe and propose that it would be in the best interest of the parties to envisage a severability clause in their agreement in order to enable the parties to escape from the burden of proof and submitting evidences with respect to the parties intention if they would be willing that their agreement would continue to be enforceable.

agreement and the rest of the agreement will not be affected and thereby dully enforceable and legally valid from the moment it has been concluded by the parties.

v. Another important issue to be noted is that the nature of the decision taken by the Board should not be a decisive indicator, but the legal outcome of the decision should be evaluated while making the debate on the type and legal outcome of the nullity regime under the Act on Competition. To put it differently, once an individual exemption is granted, until a withdrawal decision or the expiry date of the exemption, such agreement will be validly enforceable even if they are within the scope of Article 4 of the Act on Competition. In fact, the issue to be focused with respect to the individual exemption decision or the withdrawal decision is as to whether competition is restricted in the relevant market. In this respect, the unique objectives of competition provisions should be respected and it should be borne in mind that the sole application of absolute nullity system framed by the Turkish Code of Obligation will amount to unfair outcomes. In that regard, it should be borne in mind that agreements are not prohibited since they are contrary to Turkish laws. They are, however, prohibited since restriction of competition is prohibited under the Act on Competition[1013]. Therefore, while an agreement is prohibited or an individual exemption is granted or a withdrawal decision is issued, the main issue to be focused is as to whether competition in the relevant market is restricted within the meaning of Article 4 of the Act on Competition. Furthermore, solely not respecting the procedural issues framed under the Act on Competition

[1013] It should be borne in mind that both the individual and block exemption decisions may be withdrawn pursuant to the changing circumstances in accordance with Article 13 (a) of the Act on Competition. This is also an evidencing indicator to show the importance and priority of competition concerns over the other concerns. If it would not be the case and if an absolute nullity regime were adopted by the Act on Competition, such an outcome through withdrawal may not be reached by the Turkish Competition Authority. For other grounds for withdrawal see Sanlı, p. 419-420.

should not amount to an automatic nullity of the agreement if there is no restriction of competition at all[1014].

In this respect, it should be borne in mind that as to whether the parties have applied to the competent authority or not for an exemption should not be decisive with respect to the legal status of the agreement. As the Court of Justice, in Societe Technique[1015] case, has ruled that "the fact that an agreement is not notified to the Commission … cannot make an agreement automatically void. It can only have an effect as regards exemption under Article 85(3) *(now Article 101(3))*[1016] if it is later established that this agreement is one which falls within the prohibition laid down in article 85(1) *(now Article 101(1))*[1017]. The prohibition of such an agreement depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in Article 85 (1) *(now Article 101(1))*[1018]". Therefore, we think that procedural issues and rules should be separated from the issues with regard to the founding principles of the formation of the agreement and the sanctions in order to protect the objectives of competition provisions in the Act on Competition.

Final issue to be clarified is that since restriction of competition is prohibited under the Act on Competition, if an agreement did not restrict competition when it was concluded, but due to the changing circumstances, it restricts competition in the relevant market, such agreement becomes illegal from the moment the circumstances has

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[1014] Before the annulment of the first paragraph of Article 10 of the Act on Competition, in case the parties would not apply to the Board in order to obtain exemption, the Board had the competence not to grant an exemption to the agreement and apply penalties to the undertakings concerned. However, in 02.07.2005, the said competence of the Board was removed. We believe that the Turkish Competition Authority has the view that solely the lack of application to the Board should not amount the agreement to be exposed to absolute nullity regime nor should deprive the parties from obtaining an exemption if their agreement has fulfilled the criteria under Article 5 of the Act on Competition.

[1015] Societe Technique Case, p. 248.

[1016] Italics are added.

[1017] Italics are added.

[1018] Italics are added.

changed[1019]. Since, we believe that the prohibition in 4 of the Act on Competition is ***temporary and transient rather than being absolute***[1020] and restriction of competition may, from time to time, change once the economical circumstances has changed. Therefore, since the restriction of competition is ***inconsistent***, an agreement may, from time to time, come within or outside the scope of Article 4 due to such economical changes.

Secondly, agreements are assessed within the actual context in which they occur and mere fact that an agreement is not caught by Article 4 or satisfies the conditions of Article 5 does not imply that the agreement is immune to subsequent intervention and that mere labeling the agreement as valid and enforceable one will not mean that the Board cannot intervene once the agreement restricts competition and thus comes within the scope of Article 4 of the Act on Competition. Therefore, in cases where the agreement did not restrict competition when it was concluded, but due to the changing circumstances, it restricts competition in the relevant market, until an exemption decision will be granted by the Board, those agreements will be exposed to suspended nullity regime. However, in case the Board will refuse to grant an individual exemption to the agreement, such agreement will be exposed to absolute nullity regime.

In cases, however, where the agreement had restricted competition at the time it was concluded, but due to the changing circumstances, it does not restrict competition, at all, in the relevant market, the parties should not claim the money paid or any other commitments performed by any of the parties until such time should be returned due to absolute nullity of the agreement. In such cases, if there is a continuous relation between the parties, it may be assumed as if the agreement had been -implicitly-validly re-drafted and concluded between the parties and that such claims may be abolished by the application of Article 2 of the Turkish Civil Code[1021].

[1019] The similar approach has been taken by Gürzumar, Geçersizlik Rejimi, p. 56.

[1020] Sufrin, p. 969; Whish, p. 292-293; Passmore Case, paras. 26-28.

[1021] Gürzumar, Geçersizlik Rejimi, p. 57. Under the current theory and practice of the nullity system in Turkish law, such approach is the best solution, at least, to abolish the unjust outcomes arising out of the strict application of absolute nullity regime. It should, however, be noted that ***restriction of competition is prohibited*** under Article 4 of the Act on Competition and in case agreement restricts competition and unless exempted, such agreement will be exposed to absolute nullity regime under the current theory and practice of the Turkish competition law system. However, since we believe that restriction of competition is ***transient and inconsistent*** and is ***dependent on***

It has argued that in such cases, exemption decision is required in order to duly enforceability of the agreement[1022]. However, we cannot share this opinion since, in such case, the agreement should become validly enforceable due to the agreement does not come within the scope of Article 4 of the Act on Competition[1023]. Since, as aforementioned, agreements are prohibited since they restrict competition. In case there is no restriction of competition at all and the agreement concerned will not be within the scope of Article 4 of the Act on Competition, the parties should not be obliged to apply the Board in order to obtain an exemption. Since, in order to apply Aricle 5 of the Act on Competition, it is a precondition for an agreement to be caught by Article 4. If the agreement is not caught by Article 4, there is no reason to apply Article 5 of the Act on Competition.

On the other hand, there may be cases where the Board has refused to grant an exemption to the agreement which is within the scope of Article 4 of the Act on Competition because the agreement does not fulfill the criteria under Article 5. In such cases, if the parties have the view that, due to the changing circumstances, their agreement, albeit still an anticompetitive one under Article 4, fulfills the criteria under Article 5, the parties should apply the Board to obtain an individual exemption to duly

economical variables, we believe that nullity and validity regime is required to be envisaged under the Act on Competition by taking into account its ***sui generis*** nature. In this respect, in addition to the solution which Gürzumar has proposed, as long as the exempted agreements are concerned, it would be appropriate to design a mechanism under the Act on Competition with respect to the validity of the agreement, as well. Since, in case the agreement has obtained validity by an exemption decision, this validity is granted for a limited period of time (i.e. for 5 years) or such exemption may be withdrawn before such exemption period has expired. See Sanlı, p. 401 where the author has mentioned that validity is granted for a limited period (***sınırlı süreli geçerlilik***). Such mechanism, if envisaged under the Act on Competition, would best fit to the soul and the objectives of the Act on Competition and be an appropriate mechanism to crystallize the legal uncertainities which exist in the application of Article 4 and 5 of the Act on Competition. It should also be noted that Moroğlu has mentioned with respect to the invalidity of the decision taken by the general assembly that the circumstances in which the agreements might be exposed to the absolute nullity regime would be enumerated and/or limitation period to claim such nullity would envisaged and/or the exceptional situations in which the absolute nullity might gain validity might be enumerated. See Moroğlu, p. 64. However, even if such approach would be acceptable under the current Turkish Commercial Code, such guidance would not solve the existing legal uncertainities, neither. Since, first, if such approach would be observed under the Act on Competition and in case the absolute nullity would be enumerated under the Act on Competition, it would be without debate that Article 4 and Article 6 of the Act on Competition would be considered firstly under the said heading. Secondly, if a time limitation period would be assumed, such approach would not protect the agreement from the intervention by the Board even after the limitation period has expired in case the agreement would restrict competition at a later stage. Since, restriction of competition is prohibited under the current text of Article 4 and the Board, without any time limitation, has the right to withdraw its exemption under Article 13 of the Act on Competiton. In case exceptional situations in which the absolute nullity might gain validity would be enumerated, this also does not prevent the Board to withdraw its previous exemption or to prohibit the agreement at a later stage in case the agreement concerned would restrict competition at future point in time.

[1022] Sanlı, p. 424.

[1023] Our argument is also in line with the decision given in Passmore Case, paras. 26-28, where the English Court of Appeal has mentioned that the restriction of competition is temporal and transient.

enforce their agreement. In such cases, however, it should be noted that the agreement concerned still restricts competition and is within the scope of Article 4 of the Act on Competition. However, in such cases, the parties have the view that due to the changing circumstances their agreement currently fulfills the criteria under Article 5 of the Act on Competition. This debate is an important one to demonstrate that the application to the Board to obtain an exemption is only required if and when the agreement concerned is within the scope of Article 4 of the Act on Competition. In case the agreement does not restrict competition and thus does not fall within the ambit of Article 4, there would be no reason to obtain any relief under Article 5 of the Act on Competition.

Indeed, the efforts made by the authors with respect to the clarification on the nullity system should be appreciated and both of the opinions of the authors are plausible. We think that most of the efforts have been made to save most of the agreements from the strict application and legal outcomes of nullity regime when the agreements do not raise real competition concern or cease to have competition concern. Since, in practice, due to the existing text of Article 4 of the Act on Competition, almost all restrictive provisions comes within the scope of Article 4 of the Act on Competition even if most of them might be exempted thereafter in accordance with Article 5 of the said Act. Therefore, it is felt that in case all anticompetitive agreements will be exposed to absolute nullity regime, this would not bring just and fair outcomes.

Finally, one of the most important issues to be focused is that in order to come within the scope of Act on Competition, it is a precondition that an agreement should be caught by Article 4 of the Act on Competition. In other words, one should recall that if an agreement is not caught by Article 4, this would lead the agreement outside the scope of the Act on Competition[1024]. Therefore, under which conditions the agreement is caught by Article 4 of the Act on Competition is very essential to be determined. In this respect, it should be noted that due to the jurisprudence of the Community Courts and the new approach pursued by the Community Institutions, agreements that are really important for competition concerns are caught by Article 81 (1) of the EC Treaty. The new system and approach followed by the Community Institutions are differing from

[1024] Robertson, p. 28.

the Turkish competition system[1025]. In case such guidance similar to Guidelines on Article 81 will be adopted by the Turkish Competition Authority, only the restrictive agreements which raise real competition concerns might be caught by Article 4 of the Act on Competition and be exposed to nullity.

[1025] However, it should be noted that even if there is no general guidelines with respect to the application of Article 4 and 5 of the Act on Competition, in accordance with the European Union perspective and the new modernized economic approach to technology transfer agreements, the Guidelines has put forward that in case the technology transfer agreements will fall outside the safe harbor and thus the Communiqué, the Board, while making its assessment on the impact of the agreement on competition, will evaluate the nature of the agreement, the market position of the parties, the market position of competitors, the market position of buyers of the licensed products, entry barriers, maturity of the market and other factors for each case closely. See the Guidelines, para. 110.

6. FINAL REMARKS

Technology transfer agreements have substantial procompetitive effects on the market by promoting innovation by allowing innovators to earn returns and leading to a dissemination of technologies. However, even if the technology transfer agreements may have procompetitive effects on the market, this will not automatically mean that IPRs are immuned from competition law. Intellectual property laws confer exclusive rights on the holders of IPRs and the owner of intellectual property is entitled, inter alia, to prevent unauthorised use of his intellectual property and to exploit it, i.e. by way of a granting licence to third parties. Once the holders of those IPRs may exercise their exclusive rights by way of technology transfer agreements, such agreements are also scrutinized by the competent competition authorities. Since, there may be cases where the undertakings envisage in their technology transfer agreements restrictive provisions which are not allowed by competition rules. In such cases, exercise of the IPRs by the holder of those rights will be evaluated by the respective competition authorities.

In accordance with the jurisprudence of the Community Courts and the newly modernized economic approach pursued by the Commission, Technology Transfer Regulation has been launched in 2004 in order to maintain a safe harbor for the undertakings which conclude technology transfer agreements. In accordance with the Technology Transfer Regulation, being a competitor or a non-competitor on the relevant market is essential for the application of hardcore restrictions. Therefore, the parties are under the burden to determine, at first, as to whether they are competitors or not and this outcome will be followed by the determination of the relevant market and the market shares of the parties concerned. However, even if the parties and their advisors pay great attention and do their best to determine the relevant market, such a determination may not be acceptable for the respective authorities having the last say on this issue. Therefore, taking into account the difficulty of measuring market shares and rapid change of relevant market definitions in dynamic and technology-driven markets, determination by the undertakings of the relevant market and calculation their market shares before the conclusion their agreements will be burdensome on the business and will not most of the time put the undertakings to the safe side with respect to the legality of their agreements. Another issue to be focused on is that it will not be sufficient for the parties simply to satisfy that they benefit from the Technology Transfer Regulation on the date the agreement has been signed. In case the circumstances will change in the future, the parties might find themselves in an unprotected legal environment.

Consequently, such an uncertainty and the difficulty in the determination of the relevant market and of market shares of the parties, the need to assess whether the parties are potential competitors on the product market or actual competitors on the technology market, the need to keep market shares under review throughout the life of the agreement and the relevant market-share thresholds depend on whether the parties are competitors or not, the need to monitor whether a transition from non-competitor to competitor has taken place for the purposes of applying the market-share thresholds will create an annual monitoring burden on the undertakings and thus will substantially decrease the utility of the licence agreement and that will not promote the aim of encouraging dissemination of technology and are, in fact, likely to discourage the undertakings concerned in this respect. Furthermore, taking into account the new decentralized enforcement system, due to such complexity in calculation, there may be inconsistencies in the approaches of national courts to the licence agreements. Taking into account that the notification of an agreement to the Commission for an individual exemption under Article 81(3) or a negative clearance decision is no longer possible under the new Commission approach, there may be more inconsistencies in the approaches of national courts to the licence agreements.

In cases where, inter alia, the market share thresholds are exceeded on the conclusion date of the agreement, the agreement concerned will be evaluated under Article 81 (3) regime. In this respect, the Commission has launched the Guidelines on Article 81 in order to clarify when an agreement might be anticompetitive and thus restrict competition within the meaning of Article 81 (1) of the EC Treaty and also to provide guidance with respect to the application of Article 81 (3) criteria. In this respect, the Commission has followed an effect base approach and showed its intention that the foreclosure effect of the agreement will be important while deciding as to whether the agreement concerned is within the scope of Article 81 (1) of the EC Treaty or not. While making the assessment of the technology transfer agreements under Article 81 of the EC Treaty and evaluating the anticompetitive effects of the technology transfer agreements on the relevant market, determination of the relevant market in order to find out the market shares of the parties is required. Following this assessment, the nature of the products and technologies concerned, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers should be scrutinised in detail. Even if such an impact assessment is burdensome, such approach is familiar to those of who specialize in Article 82 cases. Since, the same proxies have been followed under Article 82 cases and this brings Article 81 closer to Article 82. The new approach under the Guidelines on Article 81 is the same to that of the methodology for Article 82 cases. As also aformentioned[1026], under the Discussion Paper on Article 82, the Commission has showed its intention to apply efficiency defenses for Article 82 cases which is modeled upon Article 81 (3) of the EC Treaty.

This is interesting in that the Community Institutions has become familiar in applying market power analysis under Article 82 cases and also has become familiar in applying defense mechanism under Article 81 (3) and now the Community Institutions, in particular the Commission, try to achieve coherent approach in the application of Article 81 and Article 82 by applying the immunity mechanism to Article 82 cases which it gains experience on Article 81 (3) and by applying market power analysis to Article 81 cases which it gains experience under Article 82 cases. Such an approach, although not a creative one, is an effort to work as a filter in order to reduce the scope of Article 81 (1) cases and to bring efficiency justification for undertakings which are caught by Article 82 of the EC Treaty. In this way, the Commission tries to achieve both a coherent application of Article 81 and Article 82 and also tries to avoid possible conflicts which may arise following Council Regulation 1/2003. By considering that there are hundreds of cases either dealt with under Article 81 or Article 82 cases, the guiding principles for the national competition authorities of the Member States will be those cases and practices while assessing the effects of the agreements.

[1026] See Section 4.2.3.3. Efficiency Defenses of the Thesis.

We, therefore, have proposed that the application of Article 81 to technology transfer agreements instead of Article 82 should be maintained and we also have proposed in the respective parts the Thesis that as long as the technology transfer agreements are concerned, the respective authorities should pursue the below guidance[1027]:

i. In case the technology transfer agreement is covered by the Technology Transfer Regulation, the same agreement should be immuned from the prohibition under Article 82 of the EC Treaty,

ii. In case the technology transfer agreement or any terms thereof is not covered by the Technology Transfer Regulation and in case the same technology transfer agreement or any terms thereof has been assessed under Article 81 (3) regime and thus declared immuned from the prohibition under Article 81 (1) of the EC Treaty, the same technology transfer agreement or any terms thereof should be immuned from the prohibition under Article 82 of the EC Treaty,

iii. If there are other restrictive terms in the technology transfer agreement which are not dealth with either under the Technology Transfer Regulation or Technology Transfer Guidelines, but which have been assessed under Article 81 (3) of the EC Treaty and immuned from the application of Article 81 (1) prohibition, the same terms should be immuned from the prohibition under Article 82 of the EC Treaty.

It should be noted that the aforementioned guadiance will prevent neither the Commission nor the national courts from the assessment of cumulative effects of the technology transfer agreements and withdraw the exemption granted previously. Since, it should be recalled that the Commission and the competition authorities of the Member States are entitled to withdraw, in the future, the exemption granted to the agreement which does not satisfy the criteria under Article 81(3) of the EC Treaty. It

[1027] Since the legal grounds for these proposals have been set forth in the respective parts of the Thesis in detail, in order to avoid duplication, we will not deal with these grounds herein.

should, also, be borne in mind that, in accordance with Article 29 of the Council Regulation 1/2003, the Commission, acting on its own initiative, is empowered to withdraw the exemption granted to the technology transfer agreements under the Technology Transfer Regulation at any time in case the effects of the agreement concerned will be incompatible with Article 81(3) of the EC Treaty. Therefore if any of the criteria will not be fulfilled, exemption should be withdrawn for the future instead of application of the prohibition under Article 82 of the EC Treaty.

In accordance with the European Union perspective and the new modernized economic approach to technology transfer agreements, the Communiqué and the Guidelines have been launched in Turkey. Both the Communiqué and the Guidelines have been framed identical to the Technology Transfer Regulation and the Technology Transfer Guidelines in that in case the technology transfer agreements will fall outside the safe harbor and thus the Communiqué, the Board, while making its assessment on the impact of the agreement on competition, will evaluate the nature of the agreement, the market position of the parties, the market position of competitors, the market position of buyers of the licensed products, entry barriers, maturity of the market and other factors for each case closely. This is also a welcoming approach for the technology transfer agreements. We, finally, have the same views and proposals for the application of Article 4 and 6 of the Act on Competition to technology transfer agreements and we believe that as long as the technology agreements are concerned, if and provided that the technology agreement complies with and fulfills the criteria under Article 5 of the Act on Competition, there is no legal ground to apply Article 6 to the same technology transfer agreement provided that the legal and factual circumstances are the same and we propose that reference to Article 6 should be omitted from the text of the Technology Transfer Regulation in order for the sake of legal certainity.

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(Located at rekabet.gov.tr)

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