

行政院及所屬各機關出國報告

(出國類別：研習)

知識經濟時代公平交易法對競爭者間合作聯盟之規範

服務機關：行政院公平交易委員會

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內容摘要: 依現行公平交易法第七條與第十四條規定,競爭者合作聯盟,係屬聯合行為,因此,競爭廠商間欲為合作聯盟時,不論其合作目的為何,都必須事前依公平交易法向公平會申請許可,否則,將面臨行政處分的懲罰;又如合作聯盟的內容,無法歸屬公平交易法第十四條但書的七種類型,企業間的合作聯盟,除有其他法令規定,均不得為之。如此的嚴密的聯合行為管制,在知識經濟發展的潮流下,確實不合時宜。反觀美國實務上對競爭者合作關係之判斷,已有相當規則可循,因此,我們可以借鏡美國休曼法第一條規定與競爭者合作聯盟之指導原則來釐清問題核心。美國休曼法第一條之規範範圍與我國公平交易法聯合行為之規範不同,美國法院判例所發展出來的當然違法原則與合理原則,亦與我國對聯合行為採「原則禁止,例外許可」制度不同,此亦為問題之癥結所在。而解決之道,本研究報告提出四項建議:(1)釐清或修正公平交易法第七條對聯合行為實質要件的規定;(2)檢討聯合行為許可制之利弊與存廢;(3)如維持許可制,得增訂例外許可的概括條款;(4)如維持許可制,若干美國法令或判例,不得直接引入我國公平交易法內。

知識經濟時代公平交易法對競爭者間合作聯盟之規範

【 摘 要 】

依現行公平交易法第七條與第十四條規定，競爭者合作聯盟，係屬聯合行為，因此，競爭廠商間欲為合作聯盟時，不論其合作目的為何，都必須事前依公平交易法向公平會申請許可，否則，將面臨行政處分的懲罰；又如合作聯盟的內容，無法歸屬公平交易法第十四條但書的七種類型，企業間的合作聯盟，除有其他法令規定，均不得為之。如此的嚴密的聯合行為管制，在知識經濟發展的潮流下，確實不合時宜。反觀美國實務上對競爭者合作關係之判斷，已有相當規則可循，因此，我們可以借鏡美國休曼法第一條規定與競爭者合作聯盟之指導原則來釐清問題核心。

美國休曼法第一條之規範範圍與我國公平交易法聯合行為之規範不同，美國法院判例所發展出來的當然違法原則與合理原則，亦與我國對聯合行為採「原則禁止，例外許可」制度不同，此亦為問題之癥結所在。而解決之道，本研究報告提出四項建議：（1）釐清或修正公平交易法第七條對聯合行為實質要件的規定；（2）檢討聯合行為許可制之利弊與存廢；（3）如維持許可制，得增訂例外許可的概括條款；（4）如維持許可制，若干美國法令或判例，不得直接引入我國公平交易法內。

知識經濟時代公平交易法對競爭者間合作聯盟之規範

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一、 目的

在經濟全球化的趨勢下，企業面對比以前更形競爭的經營環境，而在知識經濟的趨勢下，企業則對於研發創新的需求大幅提昇。面對這兩種趨勢，國內企業莫不尋求各種方式提升自己的競爭力，而競爭者間的「合作聯盟 (collaboration)」將是最常為企業所選擇的方式之一，因為合作聯盟不但常帶來規模經濟的效益，而且對於研發創新也常帶來相當的綜效。所以，「合作聯盟」的出現愈來愈頻繁，而其合作行為一方面可能使合作之企業因資源互補或分工合作而增進整體之競爭力，進而影響市場競爭、國際貿易及國際分工等，然而另一方面則面臨公平交易法基於維護市場競爭秩序，而為經濟行政管制時，其法律之規範為何，主管機關應如何介入，值得研究。

美國是世界上第一個對反托拉斯立法的國家，有豐富的執法經驗，學術論述亦相當成熟，主管機關更於 2000 年訂「Antitrust Guidelines for Collaboration Among Competitors」競爭者合作聯盟指導原則。故赴美國進行「知識經濟時代公平交易法對競爭者間合作聯盟之規範」研究計畫。

二、 過程

出國進修期間，我就讀美國華盛頓特區的美利堅大學法學院 (American University Washington College of Law) 的國際法律課程 (The International Legal Studies Program)，從九十二年一月二日開學，一直到九十二年十二月二十日期末考為止，整整一年，三個學期，共修了二十四個學分，僥倖獲得一個 LL. M. 法學碩士學位。

在 AU (American University) 的學習過程中，我選修了國際反托拉斯法比較、國際貿易法、國際政府採購法、智慧財產權法、國際直接投資法、國際法、美國商法、美國法律制度及法學研究方法等課程，另外，我在第三學期，在獲得 Baker 教授允許下，我旁聽 JD 課程的反托拉斯法 (Antitrust Law)，因此，第三學期，又多了四個學分的旁聽課。

其中，我個人最有興趣者，莫過於反托拉斯法，而 International Comparative Antitrust Law 的老師 Miller 教授，以及 JD 課程 Antitrust Law 的老師 Jonathan Baker 教授，他們教學內容非常有體系，且以蘇格拉底式的教學方式上課，學生必須課前預習，準備老師指定的案例，上課時，老師就不停的發問問題，然後再歸納整理出重點，教授循循善誘，給我很多的啟發，解決了我心中很多的疑惑，更巧的是，Baker 教授正是美國 FTC 修訂 Merger Guideline 及

Antitrust Guidelines for collaborations among competitors 這兩項指導原則的幕後功臣，我何其有幸，得以在 AU 聆聽老師的課！

AU 三個學期的時間表如下：

Spring 2003---01/02/2003~/5/15/2003

New LLM student orientation/registration	January 2
First day of classes	January 6
Last day of classes	April 24
Examinations begin	April 27
Examinations end	May 15

Summer 2003---05/26/2003~/08/10/2003

First day of classes	May 26
Last day of classes	July 30
Examinations begin	July 28
Examinations end	August 10

Fall 2003 ---08/25/2003~/12/20/2003

New LLM student orientation and registration	August 20
First day of classes	August 25
Last day of classes (including make-ups for holidays)	December 4
Examinations begin	December 8
Examinations end	December 20

AU 三個學期的選修課程表如下：

2003 Spring

課程代號	課程名稱	學分數	教授
LAW-580-001	American Legal Institutions 美國法律制度	2	Berenson
LAW-580-002	Legal Research 法學研究方法	1	Feris
LAW-699-001	International Comparative Antitrust Law 國際反托拉斯法比較	3	Miller
LAW-581-001	U. S. Business Law		Eule

	美國商法	3	
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2003 Summer

LAW-670-001	Intellectual Property Law 智慧財產權法	3	Bouganim
LAW-795-004	International Procurement Law 國際政府採購法	3	De Laurentiis

2003 Fall

LAW-657-001	International Trade Law 國際貿易法	3	Brower
LAW-660-002	International Law 國際法	3	Goldman
LAW-634-001	Legal Aspects Foreign Direct Investment 直接投資法律研究	3	Levinson
LAW-692-001	Antitrust Law 反托拉斯法	Audit 4	Baker

三、心得

由於美國反托拉斯法的立法架構，與我國公平交易法的立法架構不同，加上大陸法系與英美法系本質上的差異，以及美國老師的教學方式與思考模式，與國內多數競爭法（或公平交易法）老師不一樣，因此，有一些問題在國內實務上很難解決的問題，但以美國反托拉斯法的老師而言，他們的回答可能是一「這依反托拉斯法的原理就可以解決了」。

美國競爭者合作聯盟指導原則（以下稱指導原則）— Antitrust Guidelines for collaborations among competitors，乃反托拉斯法主管機關 Federal Trade Commission 與 US Department of Justice 會銜發布，為一行政機關所訂定之行政規則(regulation)。其所有分析架構，均來自於美國法院在個案中對休曼法第一條之闡釋，因此，要了解指導原則的精髓，必須從休曼法第一條之規範內容及法院判決著手。

（一） 美國休曼法第一條

美國反托拉斯法主要是由休曼法（Sherman Act）、克萊頓法（Clayton Act）、the Federal Trade Commission Act 及 the Robinson-Patman Act 所構成。而休曼法，於一八九〇年立法，是規範經濟自由之完整法案，也是美國國會

最早制定之聯邦反托拉斯法，其目的在維持商業行為之自由與維護市場競爭，不受不合理限制。

休曼法第一條是美國反托拉斯法的核心之一，其原文為：

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court”

本條規定禁止任何以契約、合併或共謀行為，對美國之國內或國際商業行為，予以不合理之限制。本條所規範之行為即稱卡特爾行為，而有關競爭者間之合作關係，即為本條所規範。

休曼法第一條所規範之行為，以上下游關係而言，包括垂直卡特爾與水平卡特爾兩類；而以合意之種類來分，有協商或聯合行為（concerted action）、合作行為（collaboration）及密謀勾結行為（conspiracy; tacit collusion）等行為。

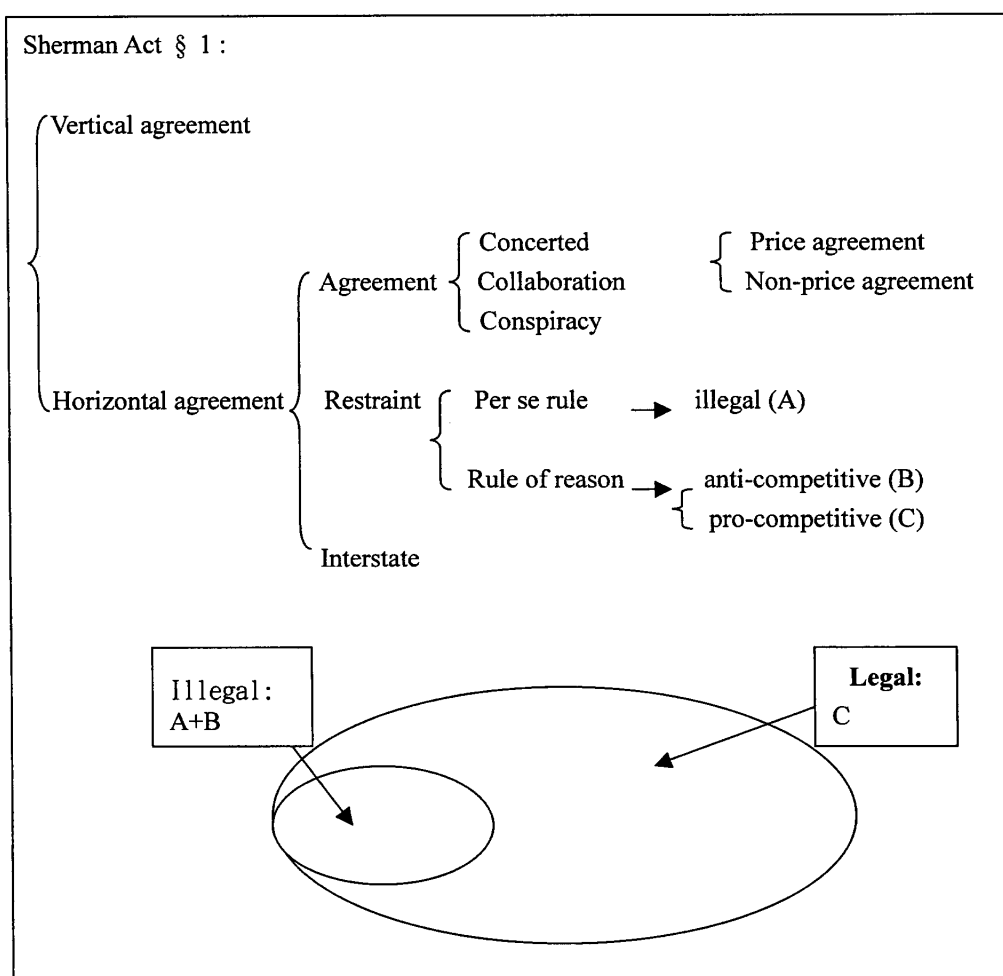
原則上，在休曼法第一條之訴訟案件中，原告主張被告為違法卡特爾行為者，必須證明系爭卡特爾行為符合三個要件：

- (1) 競爭者間有合意（契約、聯合或共謀）存在；the existence of a contract, combination, or conspiracy among two or more separate entities that；
- (2) 行為對貿易有不合理之限制，即不合理的限制競爭；unreasonably restrains trade and；
- (3) 其限制已影響或將影響州際（或國際）之商業；affects interstate or foreign commerce。

而其中第二個要件「不合理的限制競爭」，美國法院傳統上依兩大原則來判斷行為是否有限制競爭之情形—即「當然違法原則」（per se illegal）與「合理原則」（rule of

reason)，後來，又發展出另一折衷理論，即 quick look 原則，此均為美國案例中發展而來的判斷標準，並非休曼法之立法條文。以下即分別介紹這三大原則及其發展。

休曼法第一條：



(二) 休曼法第一條之當然違法原則 (per se illegal)、合理原則 (rule of reason) 與快速審查原則 (quick look test)

1、合理原則 (rule of reason)

「合理原則」係美國法院為判斷休曼法第一條第二個構成要件「不合理限制競爭」而發展出來的理論。其主要內涵，係認為法院於審酌事業行為是否違法時，須綜合考量多種相關因素，評價被指控事業之行為目的與所造成之結果，俾據以決定其行為是否違法，而非僅因該禁止行為之發生，即認定其違法性。亦即，法院於適用此原則時，須決定被告行為對於市場競爭之影響，而此種影響係依據「相關市場」(relevant market) 之概念予以評估，包括分析雙方或被告之市場占有率、市場影響力與市場結構等。在本原則下，法院必須評估案件中所有相關之因素，以便決定其中是否有對商業行為之不合理限制。

實務上，在「合理原則」之下，美國法院對於限制競爭行為之認定必須同時考量諸多因素，例如：受影響之產業本身之特殊狀況、在相關行為發生前與發生後，相關產業所產生之目標、效果、被告之所以採行此項做法，所希望達成之目標、效果、是否有其他限制較少之行為，亦可產生相同之效果。

由此可知，美國法院在適用合理原則時，必須對於受影響產業有相當程度之了解，俾進一步評估系爭行為對於競爭所造成之影響。如評估結果，被告行為對於競爭不具有重大影響，或僅有些微影響，且被告有正當商業理由支持其採取此項行為時，在合理原則之下，該行為便不致被認定為違法行為。

再者，法院不但判斷限制競爭之情形，亦同時斟酌「正當性」(justifications)。法院同時評估限制競爭及促進競爭之影響，是否已無其他限制競爭更小的方式可以達到。綜上，在合理原則案件中，法院必須對行為，在本質上和效率上，是否明顯、不合理的反競爭，加以判斷。

依據合理原則，原告就「對貿易不合理的限制競爭」負舉證責任，如果，原告已經舉證證明確實「對貿易不合理的限制競爭」存在，則舉證責任移轉至被告，被告則必須證明系爭卡特爾行為「能夠促進競爭」(sufficiently pro-competitive)。如果，被告亦能舉證證明系爭卡特爾行為確實能夠促進競爭，則舉證責任又移轉至原告，由原告證明該限制競爭之行為，沒有合理之理由去達成所謂的促進競爭此一目標。

2、當然違法原則 (per se illegal)

「當然違法原則」，法院在認定有卡特爾合意存在後，即不再須要證明對競爭造成實質的損害，亦不須審酌正當性 (justification defense) 之有無，因為當然違法原則，意指合意之存在本身，即推定會直接且立即 (direct and immediate) 對國內之貿易造成限制競爭。美國最高法院第一次於價格固定協議 (price-fixing) 案中，宣示當然違法原則時，其理由述及：其反競爭的負面效果是相當明顯的，不容許任何有促進競爭之正當性抗辯。而當然違法原則所適用之類型，則為最高法院判例形成的違法推定類型。此一當然違法原則，乃是基於訴訟經濟及企業對法律預期可能性之考量，所做的程序上的合理原則之例外原則。換言之，合理原則乃是法院分析反競爭之主要原則，而當然違法原則是法院判斷反競爭之例外原則。

以聯邦最高法院判例過去案例而言，如行為本身涉及競爭者間之價格固定 (price-fixing) 協議或分割市場 (divide market) 協議，因明顯減損競爭效能，一旦經調查認定該行為確實存在，則被歸屬當然違法之類型，原告即毋庸再舉證證明被告之行為有反競爭效果，且不必再認定相關市場、認定市場力量有無或是促進競爭之正當性 (pro-competitive justification)。

值得注意的是，法院於適用「當然違法原則」時，首先須先確定系爭行為確實存在，其次再檢視該行為是否屬於法院過去所認定之「當然違法」類型，如是，即可認其違法，而不須再考量該行為在實際上所造成之損害，或被告採行該項行為之理由為何，因此，當然違法原則，因為行為本質上明顯反競爭，所以在判斷休曼法第一條第個二要件「不合理之限制」時，實為一「簡化之合理原則」。

再者，美國判例中形成之當然違法原則類型，並不是美國立法（反托拉斯法）上的排除類型，最高法院仍得於個案中加以斟酌，甚至於後案中推翻前例。

3、快速審查原則（quick look test）

在當然違法原則與合理原則之外，法院引更發展了所謂的「快速審查原則」，此原則源自於 *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) 案中，Burger 法官之不同意見書，他暗指水平的卡特爾，通常被認為當然違法，但也可能有促進競爭之情形。他相信全然以當然違法原則評價所有之水平限制競爭行為，有違休曼法之立法意旨，而且建議法院應放寬當然違法原則。

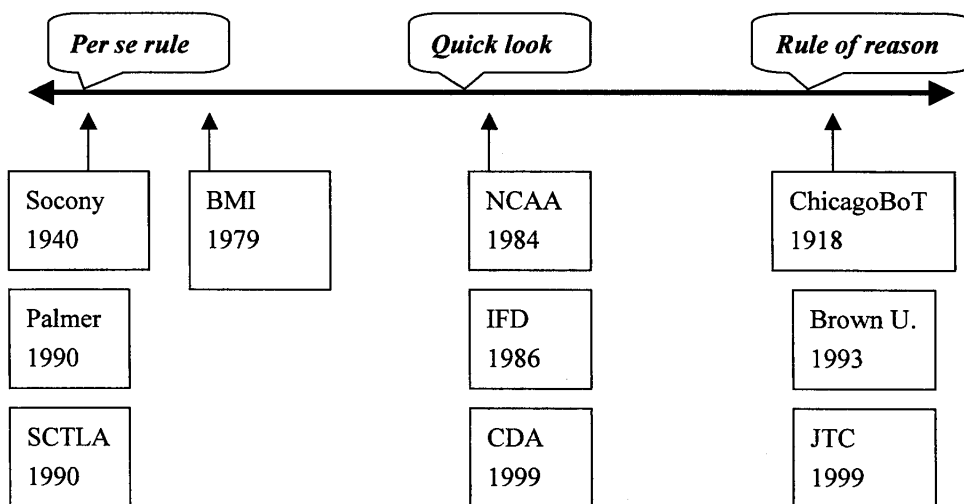
最高法院於 *Brown University*, 5 F.3d 658 (1993) 一案中深入討論「快速審查原則」，也稱「quick look approach」

亦為「“truncated” rule of reason」或「“limited” rule of reason」。「快速審查原則」，是當法院對該系爭相關產業不甚瞭解，無法判斷是否該行為有必要去限制競爭（necessarily suppress competition），但是，一旦行為本身有高度反競爭懷疑時，即不再進一步分析。因此，「快速審查原則」，乃是介於當然違法原則與合理原則之間之判斷「不合理限制競爭」標準。

不過，「快速審查原則」與「當然違法原則」較為接近。因為，一方面，通常它是用來檢驗「高度懷疑」或者「表面反競爭」之行為，例如，直接影響價格或產量之行為等。另一方面，原告只要舉證證明限制行為（restraint）之存在，即推定反競爭或對競爭有損害（competitive harm is presumed）。

然而，「快速審查原則」與「當然違法原則」不同之處。在「當然違法原則」中，法院不審酌限制競爭是否有「正當性」，而「快速審查原則」，被告仍可舉證推翻原告所證明之限制行為有「正當性」，如果被告無法提出任何合法之正當性理由，則反競爭效果之推定成立，法院不再進一步分析。如果，被告一旦舉證證明了限制行為有其正當性，則分析過程將回歸完整之合理原則，也就是，此時，原告必須舉證證明休曼法第一條之三個要件，法院必須審酌促進競爭有無大於限制競爭。

美國法院運作了這三個原則來判斷水平卡特爾違法與否，但學術上仍有很多爭論，以下為案例代表：



Socony:	Socony-Vacuum Oil Co., 310 U.S. 150
Palmer:	Plamer v. BRG of Georgia, 498 U.S. 46
SCTLA:	Superior Court Trial Lawyers Association, 493 U.S. 411
BMI:	Broadcast Music, Inc., 441 U.S. 1
NCAA:	National Collegiate Athletic Association, 468 U.S. at 109
IFD:	Indiana Federation of Dentists, 476 U.S. 447
CDA:	California Dental Association, 526 U.S. 756
Chicago BoT:	Chicago Board of Trade v. United States, 246 U.S. 231
Brown U.:	Brown University, 5 F.3d 658
JTC:	JTC Petroleum Co., 190 F.3d 775

(三) “Antitrust Guidelines for collaborations among competitors” 指導原則

1、 訂定背景

競爭者合作聯盟指導原則乃美國 FTC 的 Joint Venture 計畫的成果，而該計畫從 1995 年開始舉辦一系列「Hearings on Global and Innovation-Based Competition」公聽會。主管機關在 Joint Venture 計畫中廣邀競爭法與經濟學領域之學者，以及企業家與反托拉斯法的執業律師與會，他們就競爭者之合作行為對市場競爭究竟會造成損害，抑或有促進競爭之可能，充分討論，並於 1999 年十月完成 “Antitrust Guidelines for collaborations among competitors” 草案，進而於 2000 年四月與 DOJ 會銜發布。

2、 適用範圍

本指導原則係美國競爭法主管機關第一次對競爭者合作行為訂定行政規則，且值得注意者，雖然指導原則為 Joint Venture 計畫的成果，但其對「競爭者合作聯盟」之定義，卻不以限於狹義的 Joint Venture（合資）行為，而採廣義的定義，包括其他所有 strategic alliances, minority equity investment, joint research, R&D 等行為。而且，指導原則所著重者為「相關合意行為」（relevant

agreement)，可以是完整的一個合作計畫（overall collaboration），亦可以是個別的合意（individual agreement）或一系列之合作行為（a set of agreement）。

指導原則，乃行政機關以美國法院判決形成之案例法（case law），來訂定競爭者間之合作關係之執法方向，並不拘束法院。

3、 指導原則中的當然違法原則與合理原則

(1). 當然違法原則

指導原則中的當然違法原則，係採取一種所謂二階段分析法（two-step per se rule），第一步驟，判斷是否為「in box」當然違法類型，其合意本身即潛在地反競爭，屬當然違法類型，第二步驟是「out box」，在特定條件下可以逃脫當然違法之判斷。

依美國聯邦法院長期的 case law，確立了一些類型屬於當然違法類型。從 IBM 案，最高聯邦法院即表示在考量當然違法類型時可以考量 "justification" 正當性，因此，主管機關的立場是，指導原則於醫療產業及 IP 授權，均遵循類似此二階段判斷法。

第一步驟，只要是系爭行為被指導原則歸類為當然違法類型，認定該合意本身即潛在的當然違法，指導原則規定「提高價格或限制產量之合意，幾乎一概被認定為當然違法類型，主管機關一旦認定是本類型之合意，即視為當然違法」。而「一旦」二字，也隱含著在認定當然違法之前有二階段之判斷，指導原則進一步闡釋當然違法類型之合意，通常是對價格與產量不為競爭。在指導原則附錄案例四，即是價格不為競爭。

第二步驟，係指表面上可能是當然違法之類型，但可能逃脫當然違法之判斷，而改由合理原則之分析。換言之，「out box」類型，主管機關可以就正當性加以考量。指導原則規定，經濟活動與提昇效率有合理之關係，且對促進競爭之達成有合理之必要性時，則可逃脫當然違法之直接認定。而「out box」有其要件規定。

「out box」類型的要件之一是「提高效率的整合行為」(efficiency-enhancing integration of economic activity)，雖然這個要件在傳統上是用來區別當然違法原則與合理原則最大不同之要件，然而，這個要件已經漸漸的模糊了當然違法原則與合理原則之間的差別。第二個要件是相關合作(或合意)行為對於促進競爭是「合理必要的」(reasonably necessary)，如果合作行為所提高的促進競爭的利益，小於該合作行為的限制競爭效果，則認為該合作

行為對促進競爭行為是合理必要的。而是否「合理必要」的判斷時間點，是合作行為當時來判斷，不是嗣後實際有無達成其促進競爭之結果來判斷。

(2). 合理原則

只要不屬於當然違法原則之類型者，均以合理原則來判斷是否有反競爭之情形。承上，合理原則乃是一種對合意之本質與市場情況作相當有彈性之分析方法。有些案例，在某些特定條件下，分析過程很快地就排除違法的可能性，例如，在合意的本質與合意後缺乏市場力量，即沒有市場競爭損害，主管機關將不會追訴該行為，例如附錄案例八。

另外，有些案例中，合意本身一經執行，即會造成競爭之損害，例 *FTC v Indiana Federation of Dentists* 案，美國聯邦最高法院認為醫師拒絕對病人提供 X 光照攝，已經實際上對產量造成限制，因此，主管機關認為不須要再進一步對市場結構作分析。又在某些案例中，從合意的本質即可認定對競爭之損害相當明顯，如 *California Dental Association* 案，或是合意造成之實質上損害大於促進競爭帶來之經濟利益，則主管機關會加以追訴，而不須進一步的市場分析。競爭者間之合作聯盟指導原則雖表面上採二階段分析法，並沒有第三類「快速審查原則」，惟指導原則此部分 (section 3) 之 3.3 節的第三段中，即為快速審查原則

之引用，此即多數學者憑以認為指導原則已承襲所謂之三大判斷標準—當然違法原則(per se illegal)、合理原則(rule of reason)與快速審查原則(quick look test)所在。

(四) 我國公平交易法之立法架構與休曼法之不同

1. 我國公平交易法所規範之聯合行為只限於水平聯合

我國公平交易法的立法體系，原則上將反競爭行為分為「限制競爭」與「不公平競爭」兩部分—即第二章「獨占、結合、聯合」與第三章「不公平競爭」行為。雖多數學者，對公平交易法之體系多所批評，認為公平交易法第十八條及第十九條應屬限制競爭部分，不應置於第三章以下，惟實務上與學術上之通說，均認為公平交易法所規範之聯合行為只限水平競爭關係的聯合行為¹，在我國公平交易法上，沒有所謂「垂直的聯合行為」概念。此為我國聯合行為規範與美國休曼法第一條之規定重大差異所在。

2. 我國公平交易法第十四條有關聯合行為之規範採「原則禁止例外許可原則」；美國不採許可制

¹ 「按所謂聯合，在學理上可分為『水平聯合』與『垂直聯合』兩種，目前各國趨勢，對於垂直聯合係採放寬之立法，本法初創，亦不宜過於嚴苛，除第十八條就垂直聯合為規範外，本條則僅就『水平聯合』加以規定」立法院公報法律案專輯 132 輯，公平交易法案，頁 11。

我國公平交易法第十四條對聯合行為之禁止規定，實務上及多數學者認為公平交易法對聯合行為之規範係採「原則禁止例外許可原則」²，亦為美國反托拉斯法所謂的「當然違法原則」(illegal per se)，除非事業能證明符合公平交易法施行細則第二條第一項規定，認該水平聯合，無足以影響生產、產品交易或服務供需者始能免於違法之認定。或者，依公平交易法第十四條但書規定，且事先申請公平會許可，否則，一旦符合公平交易法第七條「事業以契約、協議或其他方式之合意，與有競爭關係之他事業共同決定商品或服務之價格，或限制數量、技術、產品、設備、交易對象、交易地區等，相互約束事業活動之行為」，即受公平交易法評價為違法行為。

而美國休曼法第一條規範之卡特爾，包括水平卡特爾及垂直卡特爾。有關水平卡特爾，並非全部適用當然違法原則。只有最高法院判決維持的特定類型，始適用當然違法原則；其餘適用合理原則。休曼法對卡特爾之規範，除有其他法律明文排除適用者，不採事前許可制或事後異議制，企業所為之卡特爾行為，不論是公開之合作行為，還是私下之勾結行為，主管機關如認為有違法情事者，則進行調查，事證充足時，即對卡特爾廠商起訴。又如果，不論主管機關起訴與否，因卡特爾行為受損之廠商，仍得向法院提起休曼法第

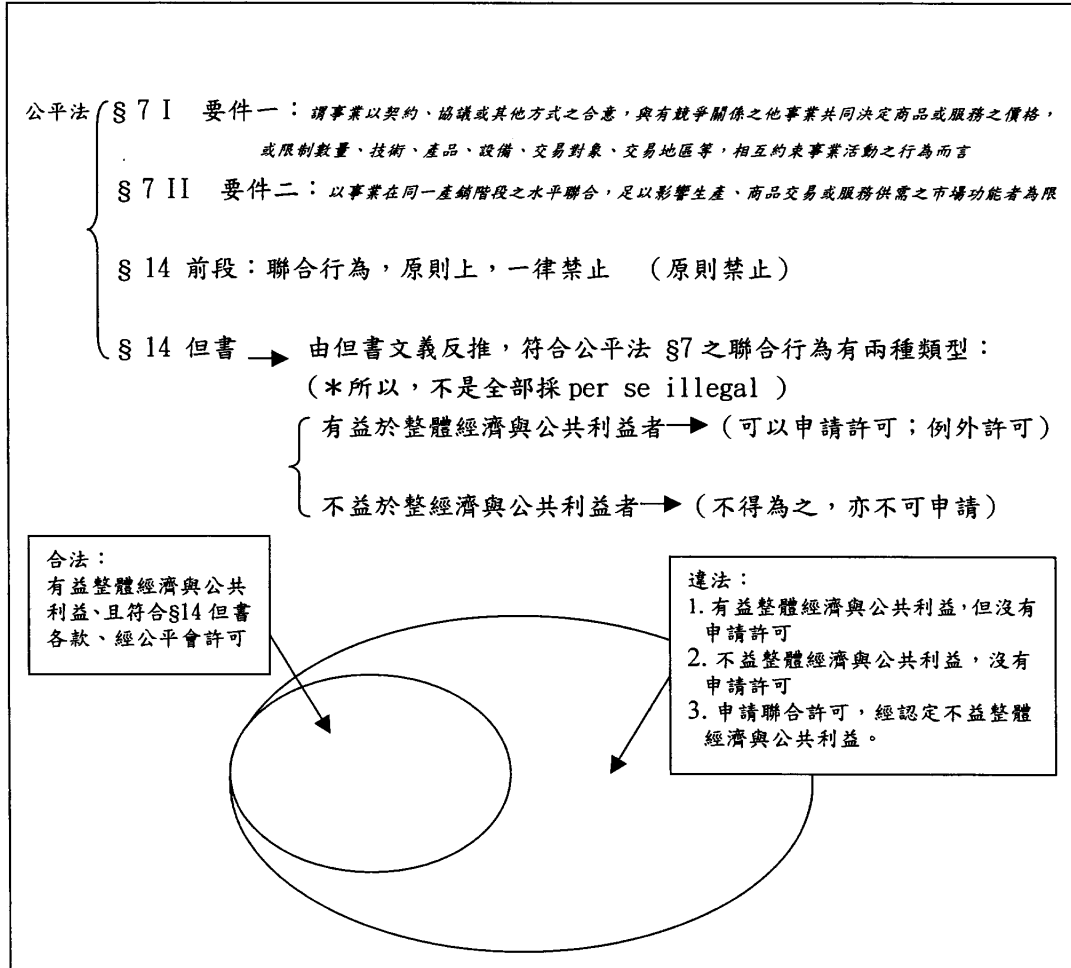
² 禁止原則乃相對於「濫用原則」，立法上前者採禁止態度，後者採允許態度，僅其合法地位濫用時，才加以制裁。參閱吳秀明，「論卡特爾之法律規範」，政大法研所碩士論文，1986年，頁143以下。

一條之訴訟。所有訴訟均由法院作合法與否的判斷。

3. 我國之「原則禁止例外許可原則」與美國之「當然違法原則」不同

我們公平交易法有關聯合行為之規定，是否即是美國休曼法第一條案中之「當然違法原則」？按公平交易法第十四條但書規定之反面解釋，符合公平交易法第七條構成要件之聯合行為，也有本質上為「有益於整體經濟與公共利益」者，因此，有益整體經濟與公共利益之聯合行為，會因為許可制度之立法，沒有申請主管機關許可，而構成違法，而不是因為其本質反競爭而違法，此與美國「當然違法原則」不同，故德國立法例之「原則禁止」與美國判例法發展出來的「當然違法原則」，不能等同視之。

我國公平交易法聯合行為之規定以圖表說明如下：



四、建議

依據公平交易法第七條規定，競爭廠商之間欲為合作聯盟時，不論其合作目的為何，都必須事前向公平會申請許可，始得為之，否則，將面臨行政處分的懲罰；又合作聯盟的內容，如無法歸屬公平交易法第十四條但書的七種類型，企業間的合作聯盟，縱使有促進競爭之情形，仍不得為之。如此的管制，確實不合時宜，應如何借鏡美國休曼法與競爭者合作聯盟之指導原則之立法與其執法經驗，以下為本報告之建議：

(一) 澄清或修改公平交易法第七條之規定

依美國休曼法第一條規定禁止之卡特爾須符合三個構成要件，如不符合，即不構成休曼法第一條卡特爾行為，主管機關將不會對其起訴，如果主管機關認為有反競爭情形而起訴，法院仍必須依 *per se rule* 或 *rule of reason* 二原則，對系爭行為是否有反競爭效果，來判斷是否符合第一條規定，如不符合者，判決原告敗訴。

而我國公平交易法第七條之規定，聯合行為之構成要件為何？聯合行為之本質為何？常有爭議，必須加以澄清，因為，在實務上出現所謂的聯合行為人「縱形式上符合第七條之定義型態，惟倘其聯合行為之市場力量極微，對市場並無

實質影響者，即無管制必要」之情形，而必須在「原則禁止，例外許可制」之上，再加上排除許可制之適用規定？換言之，何以一方面將公平交易法第七條之聯合行為作最廣義的解釋，廣泛地包含了所有競爭事業之合意行為，不論其市場力量，對市場之影響均不論，另一方面，又採取聯合行為以許可制度加以管制，產生所謂主管機關對「微不足道的聯合行為」管制沒有實益之情形。如以美國休曼法第一條之構成要件而言，縱使主管機關加以起訴，法院仍會認為不符合第二個要件，而判決原告敗訴。

又縱使如論者所謂有「市場力量極微，對市場並無實質影響者，無管制必要」之聯合行為存在，則在採行「原則禁止，例外許可制」之前題下，應修改公平交易法第七條之實質要件，限縮聯合行為成立範圍。

（二）檢討聯合行為「原則禁止，例外許可制」（公平交易法第十四條）之利弊與存廢

如改採一般取締規定，如美國休曼法第一條之立法，即違法之聯合行為不得為之，其餘不屬於法律所禁止之聯合行為，則為企業自由；又如不採許可制，即不會有主管機關行政資源的考量問題。而合法的聯合行為可以加上「有益於整體經濟與公共利益」一構成要件，以及舉證責任之規定。則主管機關在判斷聯合行為適法與否時，得借鏡美國之執法經

驗。

(三) 如維持「原則禁止，例外許可制」，可於第十四條
聯合行為許可類型增訂概括條款

如維持許可制，另一種解決之道是在公平交易法第十四條聯合行為許可類型增訂概括條款，主管機關可以彈性運作，企業將有更好的發揮空間。惟如此仍無法解釋，何以如此多的例外類型，再加以概括條款的聯合行為，均可以促進競爭，而在法律上仍被評價為「原則禁止」之行為，且未經申請仍受行政處分。

(四) 如維持「原則禁止，例外許可制」之前題下，不
應將美國若干原則，直接引入我國公平交易法之條文
內

承上，我國法與美國休曼法之立法不同，如我國聯合行為修法欲維持「原則禁止，例外許可制」之前提下，不應將美國若干原則，翻譯成中文後直接植入我國公平交易法之條文內。例如，指導原則所謂之反托拉斯安全區 (antitrust safety zones)，乃在判斷是否有限制競爭此一要件時，主管機關試圖列出一些屬於促進競爭之類型，不會被起訴，或是不被歸類為 per se 類型者，使企業對其合法性之預期有所幫助。因此，仍在 rule of reason 與 per se rule 之判

斷範疇，並非是該當休曼法第一條禁止之卡特爾要件後，再以行政規則加以豁免不處罰，與德國之集體豁免立法不同，不可不查。

以上是以美國反托拉斯法的思考模式，就國內實務上對競爭者合作關係之問題，提出法解釋上與修法上的建議。

五、感言

研究計畫終於結束了，記得研究計畫的開始，也就是出國前幾個月，上班之餘，必須考托福，申請學校，辦理相關手續，千頭萬緒，後來竟也如期出國，這是我一個人所無法單獨完成的，在此，我要感謝經濟部國際合作處與會計室的幫忙，更由衷地感謝黃主任委員惠賜推薦信函，以及幾位師長、委員、處長、副處長和主任們出國前的建言與鼓勵，更要感謝法務處王科長及幾位好友的鼎力相助。另外，我也要感謝出國期間二科同仁，因為人力不足而付出的辛勞。

一趟美國之旅終於結束了，現在回想是短短一年，當時卻是無比的漫長，雖然學校生活非常充實，然而，過程中所遭遇的挫折，卻無法言喻。去年三月中一位 AU 的台灣同學，她是我到美國時開車來接機的同學，在一場車禍中失去雙腿，年僅二十八歲，後來看見她坐輪椅，穿義肢，學走路，內心總是一陣陣酸楚。七月間得知母親罹患癌症第四期，讓我一度想就此結束研究計畫立刻回台灣。八月底再得知，曾

經室友多年的大學同學，因為腦癌，也過世台中。當時的悲痛與感傷，久久無法忘懷，也改變了我的人生觀，感謝一年來，好友們遙遠的祝福，以及先生的陪伴。

六、附錄：Antitrust Guidelines for collaborations among competitors

Antitrust Guidelines for Collaborations Among Competitors



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and the
U.S. Department of Justice

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**ANTITRUST GUIDELINES FOR
COLLABORATIONS AMONG COMPETITORS**

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**ANTITRUST GUIDELINES FOR
COLLABORATIONS AMONG COMPETITORS**

PREAMBLE

In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.

Such collaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations. Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.¹

To provide guidance to business people, the Federal Trade Commission (“FTC”) and the U.S. Department of Justice (“DOJ”) (collectively, “the Agencies”) previously issued guidelines addressing several special circumstances in which antitrust issues related to competitor collaborations may arise.² But none of these Guidelines represents a general statement of the Agencies’ analytical approach to competitor collaborations. The increasing varieties and use of competitor collaborations have yielded requests for improved clarity regarding their treatment under the antitrust laws.

The new *Antitrust Guidelines for Collaborations among Competitors* (“*Competitor Collaboration Guidelines*”) are intended to explain how the Agencies analyze certain antitrust issues raised by collaborations among competitors. Competitor collaborations and the market circumstances in which they operate vary widely. No set of guidelines can provide specific

¹ Congress has protected certain collaborations from full antitrust liability by passing the National Cooperative Research Act of 1984 (“NCRA”) and the National Cooperative Research and Production Act of 1993 (“NCRPA”) (codified together at 15 U.S.C. § § 4301-06).

² The *Statements of Antitrust Enforcement Policy in Health Care* (“*Health Care Statements*”) outline the Agencies’ approach to certain health care collaborations, among other things. The *Antitrust Guidelines for the Licensing of Intellectual Property* (“*Intellectual Property Guidelines*”) outline the Agencies’ enforcement policy with respect to intellectual property licensing agreements among competitors, among other things. The 1992 DOJ/FTC *Horizontal Merger Guidelines*, as amended in 1997 (“*Horizontal Merger Guidelines*”), outline the Agencies’ approach to horizontal mergers and acquisitions, and certain competitor collaborations.

answers to every antitrust question that might arise from a competitor collaboration. These Guidelines describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors. They should enable businesses to evaluate proposed transactions with greater understanding of possible antitrust implications, thus encouraging procompetitive collaborations, deterring collaborations likely to harm competition and consumers, and facilitating the Agencies' investigations of collaborations.

SECTION 1: PURPOSE, DEFINITIONS, AND OVERVIEW

1.1 Purpose and Definitions

These Guidelines state the antitrust enforcement policy of the Agencies with respect to competitor collaborations. By stating their general policy, the Agencies hope to assist businesses in assessing whether the Agencies will challenge a competitor collaboration or any of the agreements of which it is comprised.³ However, these Guidelines cannot remove judgment and discretion in antitrust law enforcement. The Agencies evaluate each case in light of its own facts and apply the analytical framework set forth in these Guidelines reasonably and flexibly.⁴

A "competitor collaboration" comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom.⁵ "Competitors" encompasses both actual and potential competitors.⁶ Competitor collaborations involve one or more business activities, such as research and development ("R&D"), production, marketing, distribution, sales or purchasing. Information sharing and various trade association activities also may take place through competitor

³ These Guidelines neither describe how the Agencies litigate cases nor assign burdens of proof or production.

⁴ The analytical framework set forth in these Guidelines is consistent with the analytical frameworks in the *Health Care Statements* and the *Intellectual Property Guidelines*, which remain in effect to address issues in their special contexts.

⁵ These Guidelines take into account neither the possible effects of competitor collaborations in foreclosing or limiting competition by rivals not participating in a collaboration nor the possible anticompetitive effects of standard setting in the context of competitor collaborations. Nevertheless, these effects may be of concern to the Agencies and may prompt enforcement actions.

⁶ Firms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present. A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter.

collaborations.

These Guidelines use the terms “anticompetitive harm,” “procompetitive benefit,” and “overall competitive effect” in analyzing the competitive effects of agreements among competitors. All of these terms include actual and likely competitive effects. The Guidelines use the term “anticompetitive harm” to refer to an agreement’s adverse competitive consequences, without taking account of offsetting procompetitive benefits. Conversely, the term “procompetitive benefit” refers to an agreement’s favorable competitive consequences, without taking account of its anticompetitive harm. The terms “overall competitive effect” or “competitive effect” are used in discussing the combination of an agreement’s anticompetitive harm and procompetitive benefit.

1.2 Overview of Analytical Framework

Two types of analysis are used by the Supreme Court to determine the lawfulness of an agreement among competitors: *per se* and rule of reason.⁷ Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as *per se* unlawful.⁸ All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement’s overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.⁹

This overview briefly sets forth questions and factors that the Agencies assess in analyzing an agreement among competitors. The rest of the Guidelines should be consulted for the detailed definitions and discussion that underlie this analysis.

Agreements Challenged as Per Se Illegal. Agreements of a type that always or almost always tends to raise price or to reduce output are *per se* illegal. The Agencies challenge such agreements, once identified, as *per se* illegal. Types of agreements that have been held *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

⁷ See *National Soc’y of Prof’l. Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

⁸ See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 432-36 (1990).

⁹ See *California Dental Ass’n v. FTC*, 119 S. Ct. 1604, 1617-18 (1999); *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459-61 (1986); *National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104-13 (1984).

Agreements Analyzed under the Rule of Reason. Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.

The Agencies' analysis begins with an examination of the nature of the relevant agreement. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm. In some cases, the nature of the agreement and the absence of market power together may demonstrate the absence of anticompetitive harm. In such cases, the Agencies do not challenge the agreement. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.

If the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis, the Agencies analyze the agreement in greater depth. The Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power or facilitate its exercise. The Agencies examine the extent to which the participants and the collaboration have the ability and incentive to compete independently. The Agencies also evaluate other market circumstances, e.g. entry, that may foster or prevent anticompetitive harms.

If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.

1.3 Competitor Collaborations Distinguished from Mergers

The competitive effects from competitor collaborations may differ from those of mergers due to a number of factors. Most mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants. This remaining competition may reduce competitive concerns, but also may raise questions about whether participants have agreed to anticompetitive restraints on the remaining competition.

Mergers are designed to be permanent, while competitor collaborations are more typically of limited duration. Thus, participants in a collaboration typically remain potential competitors, even if they are not actual competitors for certain purposes (*e.g.*, R&D) during the collaboration. The potential for future competition between participants in a collaboration requires antitrust scrutiny different from that required for mergers.

Nonetheless, in some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period¹⁰ by its own specific and express terms.¹¹ Effects of the collaboration on competition in other markets are analyzed as appropriate under these Guidelines or other applicable precedent. *See* Example 1.¹²

SECTION 2: GENERAL PRINCIPLES FOR EVALUATING AGREEMENTS AMONG COMPETITORS

2.1 Potential Procompetitive Benefits

¹⁰ In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger. The length of this term may vary, however, depending on industry-specific circumstances, such as technology life cycles.

¹¹ This definition, however, does not determine obligations arising under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

¹² Examples illustrating this and other points set forth in these Guidelines are included in the Appendix.

The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures, trade or professional associations, licensing arrangements, or strategic alliances.

Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. For example, one participant may have special technical expertise that usefully complements another participant's manufacturing process, allowing the latter participant to lower its production cost or improve the quality of its product. In other instances, a collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant. For example, two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products. Consumers may benefit from these collaborations as the participants are able to lower prices, improve quality, or bring new products to market faster.

2.2 Potential Anticompetitive Harms

Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants' ability or incentive to compete independently.

Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.

2.3 Analysis of the Overall Collaboration and the Agreements of Which It Consists

A competitor collaboration comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom. In general, the Agencies assess the competitive effects of the overall

collaboration and any individual agreement or set of agreements within the collaboration that may harm competition. For purposes of these Guidelines, the phrase “relevant agreement” refers to whichever of these three – the overall collaboration, an individual agreement, or a set of agreements – the evaluating Agency is assessing. Two or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement. *See* Example 2.

2.4 Competitive Effects Are Assessed as of the Time of Possible Harm to Competition

The competitive effects of a relevant agreement may change over time, depending on changes in circumstances such as internal reorganization, adoption of new agreements as part of the collaboration, addition or departure of participants, new market conditions, or changes in market share. The Agencies assess the competitive effects of a relevant agreement as of the time of possible harm to competition, whether at formation of the collaboration or at a later time, as appropriate. *See* Example 3. However, an assessment after a collaboration has been formed is sensitive to the reasonable expectations of participants whose significant sunk cost investments in reliance on the relevant agreement were made before it became anticompetitive.

SECTION 3: ANALYTICAL FRAMEWORK FOR EVALUATING AGREEMENTS AMONG COMPETITORS

3.1 Introduction

Section 3 sets forth the analytical framework that the Agencies use to evaluate the competitive effects of a competitor collaboration and the agreements of which it consists. Certain types of agreements are so likely to be harmful to competition and to have no significant benefits that they do not warrant the time and expense required for particularized inquiry into their effects.¹³ Once identified, such agreements are challenged as per se illegal.¹⁴

Agreements not challenged as per se illegal are analyzed under the rule of reason. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. Under the rule of reason, the central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Given the great variety of competitor collaborations, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. Rule of reason analysis focuses on only those factors, and undertakes only the degree of factual inquiry, necessary to assess accurately the overall competitive effect of the

¹³ *See* *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

¹⁴ *See* *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 432-36.

relevant agreement.¹⁵

3.2 Agreements Challenged as Per Se Illegal

Agreements of a type that always or almost always tends to raise price or reduce output are per se illegal.¹⁶ The Agencies challenge such agreements, once identified, as per se illegal. Typically these are agreements not to compete on price or output. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.¹⁷ The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal.¹⁸ See Example 4. In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entity created by the collaboration or by one or more participants or by a third party acting on behalf of other participants) one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits cognizable under the efficiencies analysis set forth in Section 3.36 below. Such procompetitive benefits may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies. See Examples 5 through 7.

¹⁵ See *California Dental Ass'n*, 119 S. Ct. at 1617-18; *Indiana Fed'n of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 104-13.

¹⁶ See *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19-20 (1979).

¹⁷ See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market allocation); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (price fixing).

¹⁸ See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 339 n.7, 356-57 (1982) (finding no integration).

An agreement may be “reasonably necessary” without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary.¹⁹ In making this assessment, except in unusual circumstances, the Agencies consider whether practical, significantly less restrictive means were reasonably available when the agreement was entered into, but do not search for a theoretically less restrictive alternative that was not practical given the business realities.

Before accepting a claim that an agreement is reasonably necessary to achieve procompetitive benefits from an integration of economic activity, the Agencies undertake a limited factual inquiry to evaluate the claim.²⁰ Such an inquiry may reveal that efficiencies from an agreement that are possible in theory are not plausible in the context of the particular collaboration. Some claims – such as those premised on the notion that competition itself is unreasonable – are insufficient as a matter of law,²¹ and others may be implausible on their face. In any case, labeling an arrangement a “joint venture” will not protect what is merely a device to raise price or restrict output;²² the nature of the conduct, not its designation, is determinative.

¹⁹ See *id.* at 352-53 (observing that even if a maximum fee schedule for physicians’ services were desirable, it was not necessary that the schedule be established by physicians rather than by insurers); *Broadcast Music*, 441 U.S. at 20-21 (setting of price “necessary” for the blanket license).

²⁰ See *Maricopa*, 457 U.S. at 352-53, 356-57 (scrutinizing the defendant medical foundations for indicia of integration and evaluating the record evidence regarding less restrictive alternatives).

²¹ See *Indiana Fed’n of Dentists*, 476 U.S. at 463-64; *NCAA*, 468 U.S. at 116-17; *Prof’l. Eng’rs*, 435 U.S. at 693-96. Other claims, such as an absence of market power, are no defense to per se illegality. See *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 434-36; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 & n.59 (1940).

²² See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

3.3 Agreements Analyzed under the Rule of Reason

Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.²³

Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.²⁴ The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.

Under the rule of reason, the Agencies' analysis begins with an examination of the nature of the relevant agreement, since the nature of the agreement determines the types of anticompetitive harms that may be of concern. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm.²⁵ If the nature of the agreement and the absence of market power²⁶ together demonstrate the absence of anticompetitive harm, the Agencies do not challenge the agreement. See Example 8. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement,²⁷ or anticompetitive harm has resulted from an agreement

²³ In addition, concerns may arise where an agreement increases the ability or incentive of buyers to exercise monopsony power. See *infra* Section 3.31(a).

²⁴ See *California Dental Ass'n*, 119 S. Ct. at 1612-13, 1617 (“What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”); *NCAA*, 468 U.S. 109 n.39 (“the rule of reason can sometimes be applied in the twinkling of an eye”) (quoting Phillip E. Areeda, *The “Rule of Reason” in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)).

²⁵ See *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

²⁶ That market power is absent may be determined without defining a relevant market. For example, if no market power is likely under any plausible market definition, it does not matter which one is correct. Alternatively, easy entry may indicate an absence of market power.

²⁷ See *California Dental Ass'n*, 119 S. Ct. at 1612-13, 1617 (an “obvious anticompetitive effect” would warrant quick condemnation); *Indiana Fed'n of Dentists*, 476 U.S. at 459; *NCAA*, 468 U.S. at 104, 106-10.

already in operation,²⁸ then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.²⁹

If the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis, the Agencies analyze the agreement in greater depth. The Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power³⁰ or facilitate its exercise and thus poses risks to competition.³¹ The Agencies examine factors relevant to the extent to which the participants and the collaboration have the ability and incentive to compete independently, such as whether an agreement is exclusive or non-exclusive and its duration.³² The Agencies also evaluate whether entry would be timely, likely, and sufficient to deter or counteract any anticompetitive harms. In addition, the Agencies assess any other market circumstances that may foster or impede anticompetitive harms.

If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably

²⁸ See *Indiana Fed'n of Dentists*, 476 U.S. at 460-61 (“Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”) (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 424 (1986)); *NCAA*, 468 U.S. at 104-08, 110 n.42.

²⁹ See *Indiana Fed'n of Dentists*, 476 U.S. at 459-60 (condemning without “detailed market analysis” an agreement to limit competition by withholding x-rays from patients’ insurers after finding no competitive justification).

³⁰ Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. Sellers also may exercise market power with respect to significant competitive dimensions other than price, such as quality, service, or innovation. Market power to a buyer is the ability profitably to depress the price paid for a product below the competitive level for a significant period of time and thereby depress output.

³¹ See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464 (1992).

³² Compare *NCAA*, 468 U.S. at 113-15, 119-20 (noting that colleges were not permitted to televise their own games without restraint), with *Broadcast Music*, 441 U.S. at 23-24 (finding no legal or practical impediment to individual licenses).

necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.³³

3.31 Nature of the Relevant Agreement: Business Purpose, Operation in the Marketplace and Possible Competitive Concerns

The nature of the agreement is relevant to whether it may cause anticompetitive harm. For example, by limiting independent decision making or combining control over or financial interests in production, key assets, or decisions on price, output, or other competitively sensitive variables, an agreement may create or increase market power or facilitate its exercise by the collaboration, its participants, or both. An agreement to limit independent decision making or to combine control or financial interests may reduce the ability or incentive to compete independently. An agreement also may increase the likelihood of an exercise of market power by facilitating explicit or tacit collusion,³⁴ either through facilitating practices such as an exchange of competitively sensitive information or through increased market concentration.

In examining the nature of the relevant agreement, the Agencies take into account inferences about business purposes for the agreement that can be drawn from objective facts. The Agencies also consider evidence of the subjective intent of the participants to the extent that it sheds light on competitive effects.³⁵ The Agencies do not undertake a full analysis of procompetitive benefits pursuant to Section 3.36 below, however, unless an anticompetitive harm appears likely. The Agencies also examine whether an agreement already in operation has caused anticompetitive harm.³⁶ Anticompetitive harm may be observed, for example, if a competitor collaboration successfully mandates new, anticompetitive conduct or successfully eliminates procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market. If anticompetitive harm is found, examination of market power ordinarily is not required. In some cases, however, a determination of anticompetitive harm may be informed by consideration of market power.

³³ See *NCAA*, 468 U.S. at 113-15 (rejecting efficiency claims when production was limited, not enhanced); *Prof'l. Eng'rs*, 435 U.S. at 696 (dictum) (distinguishing restraints that promote competition from those that eliminate competition); *Chicago Bd. of Trade*, 246 U.S. at 238 (same).

³⁴ As used in these Guidelines, "collusion" is not limited to conduct that involves an agreement under the antitrust laws.

³⁵ Anticompetitive intent alone does not establish an antitrust violation, and procompetitive intent does not preclude a violation. See, e.g., *Chicago Bd. of Trade*, 246 U.S. at 238. But extrinsic evidence of intent may aid in evaluating market power, the likelihood of anticompetitive harm, and claimed procompetitive justifications where an agreement's effects are otherwise ambiguous.

³⁶ See *id.*

The following sections illustrate competitive concerns that may arise from the nature of particular types of competitor collaborations. This list is not exhaustive. In addition, where these sections address agreements of a type that otherwise might be considered per se illegal, such as agreements on price, the discussion assumes that the agreements already have been determined to be subject to rule of reason analysis because they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. *See supra* Section 3.2.

3.31(a) Relevant Agreements that Limit Independent Decision Making or Combine Control or Financial Interests

The following is intended to illustrate but not exhaust the types of agreements that might harm competition by eliminating independent decision making or combining control or financial interests.

Production Collaborations. Competitor collaborations may involve agreements jointly to produce a product sold to others or used by the participants as an input. Such agreements are often procompetitive.³⁷ Participants may combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce. However, production collaborations may involve agreements on the level of output or the use of key assets, or on the price at which the product will be marketed by the collaboration, or on other competitively significant variables, such as quality, service, or promotional strategies, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, the control over some or all production or key assets or decisions about key competitive variables that otherwise would be controlled independently.³⁸ Such agreements could reduce individual participants' control over assets necessary to compete and thereby reduce their ability to compete independently, combine financial interests in ways that undermine incentives to compete

³⁷ The *NCRPA* accords rule of reason treatment to certain production collaborations. However, the statute permits per se challenges, in appropriate circumstances, to a variety of activities, including agreements to jointly market the goods or services produced or to limit the participants' independent sale of goods or services produced outside the collaboration. *NCRPA*, 15 U.S.C. §§ 4301-02.

³⁸ For example, where output resulting from a collaboration is transferred to participants for independent marketing, anticompetitive harm could result if that output is restricted or if the transfer takes place at a supracompetitive price. Such conduct could raise participants' marginal costs through inflated per-unit charges on the transfer of the collaboration's output. Anticompetitive harm could occur even if there is vigorous competition among collaboration participants in the output market, since all the participants would have paid the same inflated transfer price.

independently, or both.

Marketing Collaborations. Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

Buying Collaborations. Competitor collaborations may involve agreements jointly to purchase necessary inputs. Many such agreements do not raise antitrust concerns and indeed may be procompetitive. Purchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies. However, such agreements can create or increase market power (which, in the case of buyers, is called “monopsony power”) or facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement. Buying collaborations also may facilitate collusion by standardizing participants’ costs or by enhancing the ability to project or monitor a participant’s output level through knowledge of its input purchases.

Research & Development Collaborations. Competitor collaborations may involve agreements to engage in joint research and development (“R&D”). Most such agreements are procompetitive, and they typically are analyzed under the rule of reason.³⁹ Through the combination of complementary assets, technology, or know-how, an R&D collaboration may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes. Joint R&D agreements, however, can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants’ individual competitive R&D efforts. Although R&D collaborations also may facilitate tacit collusion on R&D efforts, achieving, monitoring, and punishing departures from collusion is sometimes difficult in the R&D context.

³⁹ Aspects of the antitrust analysis of competitor collaborations involving R&D are governed by provisions of the *NCRPA*, 15 U.S.C. §§ 4301-02.

An exercise of market power may injure consumers by reducing innovation below the level that otherwise would prevail, leading to fewer or no products for consumers to choose from, lower quality products, or products that reach consumers more slowly than they otherwise would. An exercise of market power also may injure consumers by reducing the number of independent competitors in the market for the goods, services, or production processes derived from the R&D collaboration, leading to higher prices or reduced output, quality, or service. A central question is whether the agreement increases the ability or incentive anticompetitively to reduce R&D efforts pursued independently or through the collaboration, for example, by slowing the pace at which R&D efforts are pursued. Other considerations being equal, R&D agreements are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their supracompetitive earnings. In addition, anticompetitive harm generally is more likely when R&D competition is confined to firms with specialized characteristics or assets, such as intellectual property, or when a regulatory approval process limits the ability of late-comers to catch up with competitors already engaged in the R&D.

3.31(b) Relevant Agreements that May Facilitate Collusion

Each of the types of competitor collaborations outlined above can facilitate collusion. Competitor collaborations may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anticompetitively, as well as a greater ability to detect and punish deviations that would undermine the collusion. Certain marketing, production, and buying collaborations, for example, may provide opportunities for their participants to collude on price, output, customers, territories, or other competitively sensitive variables. R&D collaborations, however, may be less likely to facilitate collusion regarding R&D activities since R&D often is conducted in secret, and it thus may be difficult to monitor an agreement to coordinate R&D. In addition, collaborations can increase concentration in a relevant market and thus increase the likelihood of collusion among all firms, including the collaboration and its participants.

Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. The Agencies recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration. Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.

Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.

3.32 Relevant Markets Affected by the Collaboration

The Agencies typically identify and assess competitive effects in all of the relevant product and geographic markets in which competition may be affected by a competitor collaboration, although in some cases it may be possible to assess competitive effects directly without defining a particular relevant market(s). Markets affected by a competitor collaboration include all markets in which the economic integration of the participants' operations occurs or in which the collaboration operates or will operate,⁴⁰ and may also include additional markets in which any participant is an actual or potential competitor.⁴¹

3.32(a) Goods Markets

In general, for goods⁴² markets affected by a competitor collaboration, the Agencies approach relevant market definition as described in Section 1 of the *Horizontal Merger Guidelines*. To determine the relevant market, the Agencies generally consider the likely reaction of buyers to a price increase and typically ask, among other things, how buyers would respond to increases over prevailing price levels. However, when circumstances strongly suggest that the prevailing price exceeds what likely would have prevailed absent the relevant agreement, the Agencies use a price more reflective of the price that likely would have prevailed. Once a market has been defined, market shares are assigned both to firms currently in the relevant market and to firms that are able to make "uncommitted" supply responses. See Sections 1.31 and 1.32 of the *Horizontal Merger Guidelines*.

3.32(b) Technology Markets

When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may define technology markets in assessing the competitive effects of a competitor collaboration that includes an agreement to license intellectual property. Technology markets consist of the intellectual property that is licensed and its close substitutes;

⁴⁰ For example, where a production joint venture buys inputs from an upstream market to incorporate in products to be sold in a downstream market, both upstream and downstream markets may be "markets affected by a competitor collaboration."

⁴¹ Participation in the collaboration may change the participants' behavior in this third category of markets, for example, by altering incentives and available information, or by providing an opportunity to form additional agreements among participants.

⁴² The term "goods" also includes services.

that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed. The Agencies approach the definition of a relevant technology market and the measurement of market share as described in Section 3.2.2 of the *Intellectual Property Guidelines*.

3.32(c) Research and Development: Innovation Markets

In many cases, an agreement's competitive effects on innovation are analyzed as a separate competitive effect in a relevant goods market. However, if a competitor collaboration may have competitive effects on innovation that cannot be adequately addressed through the analysis of goods or technology markets, the Agencies may define and analyze an innovation market as described in Section 3.2.3 of the *Intellectual Property Guidelines*. An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

3.33 Market Shares and Market Concentration

Market share and market concentration affect the likelihood that the relevant agreement will create or increase market power or facilitate its exercise. The creation, increase, or facilitation of market power will likely increase the ability and incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Other things being equal, market share affects the extent to which participants or the collaboration must restrict their own output in order to achieve anticompetitive effects in a relevant market. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. In assessing whether an agreement may cause anticompetitive harm, the Agencies typically calculate the market shares of the participants and of the collaboration.⁴³ The Agencies assign a range of market shares to the collaboration. The high end of that range is the sum of the market shares of the collaboration and its participants. The low end is the share of the collaboration in isolation. In general, the Agencies approach the calculation of market share as set forth in Section 1.4 of the *Horizontal Merger Guidelines*.

Other things being equal, market concentration affects the difficulties and costs of achieving and

⁴³ When the competitive concern is that a limitation on independent decision making or a combination of control or financial interests may yield an anticompetitive reduction of research and development, the Agencies typically frame their inquiries more generally, looking to the strength, scope, and number of competing R&D efforts and their close substitutes. *See supra* Sections 3.31(a) and 3.32(c).

enforcing collusion in a relevant market. Accordingly, in assessing whether an agreement may increase the likelihood of collusion, the Agencies calculate market concentration. In general, the Agencies approach the calculation of market concentration as set forth in Section 1.5 of the *Horizontal Merger Guidelines*, ascribing to the competitor collaboration the same range of market shares described above.

Market share and market concentration provide only a starting point for evaluating the competitive effect of the relevant agreement. The Agencies also examine other factors outlined in the *Horizontal Merger Guidelines* as set forth below:

The Agencies consider whether factors such as those discussed in Section 1.52 of the *Horizontal Merger Guidelines* indicate that market share and concentration data overstate or understate the likely competitive significance of participants and their collaboration.

In assessing whether anticompetitive harm may arise from an agreement that combines control over or financial interests in assets or otherwise limits independent decision making, the Agencies consider whether factors such as those discussed in Section 2.2 of the *Horizontal Merger Guidelines* suggest that anticompetitive harm is more or less likely.

In assessing whether anticompetitive harms may arise from an agreement that may increase the likelihood of collusion, the Agencies consider whether factors such as those discussed in Section 2.1 of the *Horizontal Merger Guidelines* suggest that anticompetitive harm is more or less likely.

In evaluating the significance of market share and market concentration data and interpreting the range of market shares ascribed to the collaboration, the Agencies also examine factors beyond those set forth in the *Horizontal Merger Guidelines*. The following section describes which factors are relevant and the issues that the Agencies examine in evaluating those factors.

3.34 Factors Relevant to the Ability and Incentive of the Participants and the Collaboration to Compete

Competitor collaborations sometimes do not end competition among the participants and the collaboration. Participants may continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. Collaborations may be managed by decision makers independent of the individual participants. Control over key competitive variables may remain outside the collaboration, such as where participants independently market and set prices for the collaboration's output.

Sometimes, however, competition among the participants and the collaboration may be restrained through explicit contractual terms or through financial or other provisions that reduce or eliminate the incentive to compete. The Agencies look to the competitive benefits and harms of the relevant agreement, not merely the formal terms of agreements among the participants.

Where the nature of the agreement and market share and market concentration data reveal a likelihood of anticompetitive harm, the Agencies more closely examine the extent to which the participants and the collaboration have the ability and incentive to compete independent of each other. The Agencies are likely to focus on six factors: (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (b) the extent to which participants retain independent control of assets necessary to compete; (c) the nature and extent of participants' financial interests in the collaboration or in each other; (d) the control of the collaboration's competitively significant decision making; (e) the likelihood of anticompetitive information sharing; and (f) the duration of the collaboration.

Each of these factors is discussed in further detail below. Consideration of these factors may reduce or increase competitive concern. The analysis necessarily is flexible: the relevance and significance of each factor depends upon the facts and circumstances of each case, and any additional factors pertinent under the circumstances are considered. For example, when an agreement is examined subsequent to formation of the collaboration, the Agencies also examine factual evidence concerning participants' actual conduct.

3.34(a) Exclusivity

The Agencies consider whether, to what extent, and in what manner the relevant agreement permits participants to continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. The Agencies inquire whether a collaboration is non-exclusive in fact as well as in name and consider any costs or other impediments to competing with the collaboration. In assessing exclusivity when an agreement already is in operation, the Agencies examine whether, to what extent, and in what manner participants actually have continued to compete against each other and the collaboration. In general, competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.

3.34(b) Control over Assets

The Agencies ask whether the relevant agreement requires participants to contribute to the collaboration significant assets that previously have enabled or likely would enable participants to be effective independent competitors in markets affected by the collaboration. If such resources must be contributed to the collaboration and are specialized in that they cannot readily be replaced, the participants may have lost all or some of their ability to compete against each other and their collaboration, even if they retain the contractual right to do so.⁴⁴ In general, the greater

⁴⁴ For example, if participants in a production collaboration must contribute most of their productive capacity to the collaboration, the collaboration may impair the ability of its participants to remain effective independent competitors regardless of the terms of the agreement.

the contribution of specialized assets to the collaboration that is required, the less the participants may be relied upon to provide independent competition.

3.34(c) Financial Interests in the Collaboration or in Other Participants

The Agencies assess each participant's financial interest in the collaboration and its potential impact on the participant's incentive to compete independently with the collaboration. The potential impact may vary depending on the size and nature of the financial interest (e.g., whether the financial interest is debt or equity). In general, the greater the financial interest in the collaboration, the less likely is the participant to compete with the collaboration.⁴⁵ The Agencies also assess direct equity investments between or among the participants. Such investments may reduce the incentives of the participants to compete with each other. In either case, the analysis is sensitive to the level of financial interest in the collaboration or in another participant relative to the level of the participant's investment in its independent business operations in the markets affected by the collaboration.

3.34(d) Control of the Collaboration's Competitively Significant Decision Making

The Agencies consider the manner in which a collaboration is organized and governed in assessing the extent to which participants and their collaboration have the ability and incentive to compete independently. Thus, the Agencies consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker. For example, the Agencies ask whether participants are allowed to appoint members of a board of directors for the collaboration, if incorporated, or otherwise to exercise significant control over the operations of the collaboration. In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions.⁴⁶

To the extent that the collaboration's decision making is subject to the participants' control, the Agencies consider whether that control could be exercised jointly. Joint control over the collaboration's price and output levels could create or increase market power and raise competitive concerns. Depending on the nature of the collaboration, competitive concern also may arise due to joint control over other competitively significant decisions, such as the level and

⁴⁵ Similarly, a collaboration's financial interest in a participant may diminish the collaboration's incentive to compete with that participant.

⁴⁶ Control may diverge from financial interests. For example, a small equity investment may be coupled with a right to veto large capital expenditures and, thereby, to effectively limit output. The Agencies examine a collaboration's actual governance structure in assessing issues of control.

scope of R&D efforts and investment. In contrast, to the extent that participants independently set the price and quantity⁴⁷ of their share of a collaboration's output and independently control other competitively significant decisions, an agreement's likely anticompetitive harm is reduced.⁴⁸

3.34(e) Likelihood of Anticompetitive Information Sharing

The Agencies evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party. Similarly, a buying collaboration might use an independent third party to handle negotiations in which its participants' input requirements or other competitively sensitive information could be revealed. In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.

3.34(f) Duration of the Collaboration

The Agencies consider the duration of the collaboration in assessing whether participants retain the ability and incentive to compete against each other and their collaboration. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.

3.35 Entry

Easy entry may deter or prevent profitably maintaining price above, or output, quality, service or innovation below, what likely would prevail in the absence of the relevant agreement. Where the nature of the agreement and market share and concentration data suggest a likelihood of anticompetitive harm that is not sufficiently mitigated by any continuing competition identified

⁴⁷ Even if prices to consumers are set independently, anticompetitive harms may still occur if participants jointly set the collaboration's level of output. For example, participants may effectively coordinate price increases by reducing the collaboration's level of output and collecting their profits through high transfer prices, *i.e.*, through the amounts that participants contribute to the collaboration in exchange for each unit of the collaboration's output. Where a transfer price is determined by reference to an objective measure not under the control of the participants, (*e.g.*, average price in a different unconcentrated geographic market), competitive concern may be less likely.

⁴⁸ Anticompetitive harm also is less likely if individual participants may independently increase the overall output of the collaboration.

through the analysis in Section 3.34, the Agencies inquire whether entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the anticompetitive harm of concern. If so, the relevant agreement ordinarily requires no further analysis.

As a general matter, the Agencies assess timeliness, likelihood, and sufficiency of committed entry under principles set forth in Section 3 of the *Horizontal Merger Guidelines*.⁴⁹ However, unlike mergers, competitor collaborations often restrict only certain business activities, while preserving competition among participants in other respects, and they may be designed to terminate after a limited duration. Consequently, the extent to which an agreement creates and enables identification of opportunities that would induce entry and the conditions under which ease of entry may deter or counteract anticompetitive harms may be more complex and less direct than for mergers and will vary somewhat according to the nature of the relevant agreement. For example, the likelihood of entry may be affected by what potential entrants believe about the probable duration of an anticompetitive agreement. Other things being equal, the shorter the anticipated duration of an anticompetitive agreement, the smaller the profit opportunities for potential entrants, and the lower the likelihood that it will induce committed entry. Examples of other differences are set forth below.

For certain collaborations, sufficiency of entry may be affected by the possibility that entrants will participate in the anticompetitive agreement. To the extent that such participation raises the amount of entry needed to deter or counteract anticompetitive harms, and assets required for entry are not adequately available for entrants to respond fully to their sales opportunities, or otherwise renders entry inadequate in magnitude, character or scope, sufficient entry may be more difficult to achieve.⁵⁰

⁴⁹ Committed entry is defined as new competition that requires expenditure of significant sunk costs of entry and exit. See Section 3.0 of the *Horizontal Merger Guidelines*.

⁵⁰ Under the same principles applied to production and marketing collaborations, the exercise of monopsony power by a buying collaboration may be deterred or counteracted by the entry of new purchasers. To the extent that collaborators reduce their purchases, they may create an opportunity for new buyers to make purchases without forcing the price of the input above pre-relevant agreement levels. Committed purchasing entry, defined as new purchasing competition that requires expenditure of significant sunk costs of entry and exit — such as a new steel factory built in response to a reduction in the price of iron ore — is analyzed under principles analogous to those articulated in Section 3 of the *Horizontal Merger Guidelines*. Under that analysis, the Agencies assess whether a monopsonistic price reduction is likely to attract committed purchasing entry, profitable at pre-relevant agreement prices, that would not have occurred before the relevant agreement at those same prices. (Uncommitted new buyers are identified as participants in the relevant market if their demand responses to a price decrease are likely to occur within one year and without the expenditure of significant sunk costs of entry and exit. See *id.* at Sections 1.32 and 1.41.)

In the context of research and development collaborations, widespread availability of R&D capabilities and the large gains that may accrue to successful innovators often suggest a high likelihood that entry will deter or counteract anticompetitive reductions of R&D efforts. Nonetheless, such conditions do not always pertain, and the Agencies ask whether entry may deter or counteract anticompetitive R&D reductions, taking into account the likelihood, timeliness, and sufficiency of entry.

To be timely, entry must be sufficiently prompt to deter or counteract such harms. The Agencies evaluate the likelihood of entry based on the extent to which potential entrants have (1) core competencies (and the ability to acquire any necessary specialized assets) that give them the ability to enter into competing R&D and (2) incentives to enter into competing R&D. The sufficiency of entry depends on whether the character and scope of the entrants' R&D efforts are close enough to the reduced R&D efforts to be likely to achieve similar innovations in the same time frame or otherwise to render a collaborative reduction of R&D unprofitable.

3.36 Identifying Procompetitive Benefits of the Collaboration

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, as explained above, competitor collaborations have the potential to generate significant efficiencies that benefit consumers in a variety of ways. For example, a competitor collaboration may enable firms to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would otherwise be possible. Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. *See supra* Section 2.1. Indeed, the primary benefit of competitor collaborations to the economy is their potential to generate such efficiencies.

Efficiencies generated through a competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, through collaboration, competitors may be able to produce an input more efficiently than any one participant could individually; such collaboration-generated efficiencies may enhance competition by permitting two or more ineffective (*e.g.*, high cost) participants to become more effective, lower cost competitors. Even when efficiencies generated through a competitor collaboration enhance the collaboration's or the participants' ability to compete, however, a competitor collaboration may have other effects that may lessen competition and ultimately may make the relevant agreement anticompetitive.

If the Agencies conclude that the relevant agreement has caused, or is likely to cause, anticompetitive harm, they consider whether the agreement is reasonably necessary to achieve "cognizable efficiencies." "Cognizable efficiencies" are efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means. *See infra* Sections 3.36(a) and 3.36(b). Cognizable efficiencies are assessed net of costs produced by the competitor collaboration or incurred in achieving those efficiencies.

3.36(a) Cognizable Efficiencies Must Be Verifiable and Potentially Procompetitive

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the collaboration's participants. The participants must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each would enhance the collaboration's or its participants' ability and incentive to compete; and why the relevant agreement is reasonably necessary to achieve the claimed efficiencies (*see* Section 3.36 (b)). Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

Moreover, cognizable efficiencies must be potentially procompetitive. Some asserted efficiencies, such as those premised on the notion that competition itself is unreasonable, are insufficient as a matter of law. Similarly, cost savings that arise from anticompetitive output or service reductions are not treated as cognizable efficiencies. *See* Example 9.

3.36(b) Reasonable Necessity and Less Restrictive Alternatives

The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be "reasonably necessary" without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.

The reasonable necessity of an agreement may depend upon the market context and upon the duration of the agreement. An agreement that may be justified by the needs of a new entrant, for example, may not be reasonably necessary to achieve cognizable efficiencies in different market circumstances. The reasonable necessity of an agreement also may depend on whether it deters individual participants from undertaking free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies. Collaborations sometimes include agreements to discourage any one participant from appropriating an undue share of the fruits of the collaboration or to align participants' incentives to encourage cooperation in achieving the efficiency goals of the collaboration. The Agencies assess whether such agreements are reasonably necessary to deter opportunistic conduct that otherwise would likely prevent the achievement of cognizable efficiencies. *See* Example 10.

3.37 Overall Competitive Effect

If the relevant agreement is reasonably necessary to achieve cognizable efficiencies, the Agencies

assess the likelihood and magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market, for example, by preventing price increases.⁵¹

The Agencies' comparison of cognizable efficiencies and anticompetitive harms is necessarily an approximate judgment. In assessing the overall competitive effect of an agreement, the Agencies consider the magnitude and likelihood of both the anticompetitive harms and cognizable efficiencies from the relevant agreement. The likelihood and magnitude of anticompetitive harms in a particular case may be insignificant compared to the expected cognizable efficiencies, or vice versa. As the expected anticompetitive harm of the agreement increases, the Agencies require evidence establishing a greater level of expected cognizable efficiencies in order to avoid the conclusion that the agreement will have an anticompetitive effect overall. When the anticompetitive harm of the agreement is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the agreement from having an anticompetitive effect overall.

SECTION 4: ANTITRUST SAFETY ZONES

4.1 Overview

Because competitor collaborations are often procompetitive, the Agencies believe that "safety zones" are useful in order to encourage such activity. The safety zones set out below are designed to provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the Agencies presume the arrangements to be lawful without inquiring into particular circumstances. They are not intended to discourage competitor collaborations that fall outside the safety zones.

The Agencies emphasize that competitor collaborations are not anticompetitive merely because they fall outside the safety zones. Indeed, many competitor collaborations falling outside the safety zones are procompetitive or competitively neutral. The Agencies analyze arrangements outside the safety zones based on the principles outlined in Section 3 above.

The following sections articulate two safety zones. Section 4.2 sets out a general safety zone

⁵¹ In most cases, the Agencies' enforcement decisions depend on their analysis of the overall effect of the relevant agreement over the short term. The Agencies also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from the efficiencies (due to delay in the achievement of, or the realization of consumer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.

applicable to any competitor collaboration.⁵² Section 4.3 establishes a safety zone applicable to research and development collaborations whose competitive effects are analyzed within an innovation market. These safety zones are intended to supplement safety zone provisions in the Agencies' other guidelines and statements of enforcement policy.⁵³

4.2 Safety Zone for Competitor Collaborations in General

Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected.⁵⁴ The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,⁵⁵ or to competitor collaborations to which a merger analysis is applied.⁵⁶

4.3 Safety Zone for Research and Development Competition Analyzed in Terms of Innovation Markets

Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required

⁵² See Sections 1.1 and 1.3 above.

⁵³ The Agencies have articulated antitrust safety zones in *Health Care Statements 7 & 8* and the *Intellectual Property Guidelines*, as well as in the *Horizontal Merger Guidelines*. The antitrust safety zones in these other guidelines relate to particular facts in a specific industry or to particular types of transactions.

⁵⁴ For purposes of the safety zone, the Agencies consider the combined market shares of the participants and the collaboration. For example, with a collaboration among two competitors where each participant individually holds a 6 percent market share in the relevant market and the collaboration separately holds a 3 percent market share in the relevant market, the combined market share in the relevant market for purposes of the safety zone would be 15 percent. This collaboration, therefore, would fall within the safety zone. However, if the collaboration involved three competitors, each with a 6 percent market share in the relevant market, the combined market share in the relevant market for purposes of the safety zone would be 21 percent, and the collaboration would fall outside the safety zone. Including market shares of the participants takes into account possible spillover effects on competition within the relevant market among the participants and their collaboration.

⁵⁵ See *supra* notes 27-29 and accompanying text in Section 3.3.

⁵⁶ See Section 1.3 above.

specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. In determining whether independently controlled R&D efforts are close substitutes, the Agencies consider, among other things, the nature, scope, and magnitude of the R&D efforts; their access to financial support; their access to intellectual property, skilled personnel, or other specialized assets; their timing; and their ability, either acting alone or through others, to successfully commercialize innovations. The antitrust safety zone does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis,⁵⁷ or to competitor collaborations to which a merger analysis is applied.⁵⁸

⁵⁷ See *supra* notes 27-29 and accompanying text in Section 3.3.

⁵⁸ See Section 1.3 above.

Appendix

Section 1.3

Example 1 (Competitor Collaboration/Merger)

Facts

Two oil companies agree to integrate all of their refining and refined product marketing operations. Under terms of the agreement, the collaboration will expire after twelve years; prior to that expiration date, it may be terminated by either participant on six months' prior notice. The two oil companies maintain separate crude oil production operations.

Analysis

The formation of the collaboration involves an efficiency-enhancing integration of operations in the refining and refined product markets, and the integration eliminates all competition between the participants in those markets. The evaluating Agency likely would conclude that expiration after twelve years does not constitute termination "within a sufficiently limited period." The participants' entitlement to terminate the collaboration at any time after giving prior notice is not termination by the collaboration's "own specific and express terms." Based on the facts presented, the evaluating Agency likely would analyze the collaboration under the *Horizontal Merger Guidelines*, rather than as a competitor collaboration under these Guidelines. Any agreements restricting competition on crude oil production would be analyzed under these Guidelines.

Section 2.3

Example 2 (Analysis of Individual Agreements/Set of Agreements)

Facts

Two firms enter a joint venture to develop and produce a new software product to be sold independently by the participants. The product will be useful in two areas, biotechnology research and pharmaceuticals research, but doing business with each of the two classes of purchasers would require a different distribution network and a separate marketing campaign. Successful penetration of one market is likely to stimulate sales in the other by enhancing the reputation of the software and by facilitating the ability of biotechnology and pharmaceutical researchers to use the fruits of each other's efforts. Although the software is to be marketed independently by the participants rather than by the joint venture, the participants agree that one will sell only to biotechnology researchers and the other will sell only to pharmaceutical researchers. The

participants also agree to fix the maximum price that either firm may charge. The parties assert that the combination of these two requirements is necessary for the successful marketing of the new product. They argue that the market allocation provides each participant with adequate incentives to commercialize the product in its sector without fear that the other participant will free-ride on its efforts and that the maximum price prevents either participant from unduly exploiting its sector of the market to the detriment of sales efforts in the other sector.

Analysis

The evaluating Agency would assess overall competitive effects associated with the collaboration in its entirety and with individual agreements, such as the agreement to allocate markets, the agreement to fix maximum prices, and any of the sundry other agreements associated with joint development and production and independent marketing of the software. From the facts presented, it appears that the agreements to allocate markets and to fix maximum prices may be so intertwined that their benefits and harms “cannot meaningfully be isolated.” The two agreements arguably operate together to ensure a particular blend of incentives to achieve the potential procompetitive benefits of successful commercialization of the new product. Moreover, the effects of the agreement to fix maximum prices may mitigate the price effects of the agreement to allocate markets. Based on the facts presented, the evaluating Agency likely would conclude that the agreements to allocate markets and to fix maximum prices should be analyzed as a whole.

Section 2.4

Example 3 (Time of Possible Harm to Competition)

Facts

A group of 25 small-to-mid-size banks formed a joint venture to establish an automatic teller machine network. To ensure sufficient business to justify launching the venture, the joint venture agreement specified that participants would not participate in any other ATM networks. Numerous other ATM networks were forming in roughly the same time period.

Over time, the joint venture expanded by adding more and more banks, and the number of its competitors fell. Now, ten years after formation, the joint venture has 900 member banks and controls 60% of the ATM outlets in a relevant geographic market. Following complaints from consumers that ATM fees have rapidly escalated, the evaluating Agency assesses the rule barring participation in other ATM networks, which now binds 900 banks.

Analysis

The circumstances in which the venture operates have changed over time, and the evaluating Agency would determine whether the exclusivity rule now harms competition. In assessing the exclusivity rule’s competitive effect, the evaluating Agency would take account of the

collaboration's substantial current market share and any procompetitive benefits of exclusivity under present circumstances, along with other factors discussed in Section 3. The Agencies would consider whether significant sunk investments were made in reliance on the exclusivity rule.

Section 3.2

Example 4 (Agreement Not to Compete on Price)

Facts

Net-Business and Net-Company are two start-up companies. They independently developed, and have begun selling in competition with one another, software for the networks that link users within a particular business to each other and, in some cases, to entities outside the business. Both Net-Business and Net-Company were formed by computer specialists with no prior business expertise, and they are having trouble implementing marketing strategies, distributing their inventory, and managing their sales forces. The two companies decide to form a partnership joint venture, NET-FIRM, whose sole function will be to market and distribute the network software products of Net-Business and Net-Company. NET-FIRM will be the exclusive marketer of network software produced by Net-Business and Net-Company. Net-Business and Net-Company will each have 50% control of NET-FIRM, but each will derive profits from NET-FIRM in proportion to the revenues from sales of that partner's products. The documents setting up NET-FIRM specify that Net-Business and Net-Company will agree on the prices for the products that NET-FIRM will sell.

Analysis

Net-Business and Net-Company will agree on the prices at which NET-FIRM will sell their individually-produced software. The agreement is one "not to compete on price," and it is of a type that always or almost always tends to raise price or reduce output. The agreement to jointly set price may be challenged as per se illegal, unless it is reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

Example 5 (Specialization without Integration)

Facts

Firm A and Firm B are two of only three producers of automobile carburetors. Minor engine variations from year to year, even within given models of a particular automobile manufacturer, require re-design of each year's carburetor and re-tooling for carburetor production. Firms A and B meet and agree that henceforth Firm A will design and produce carburetors only for automobile models of even-numbered years and Firm B will design and produce carburetors only for automobile models of odd-numbered years. Some design and re-tooling costs would be saved,

but automobile manufacturers would face only two suppliers each year, rather than three.

Analysis

The agreement allocates sales by automobile model year and constitutes an agreement “not to compete on . . . output.” The participants do not combine production; rather, the collaboration consists solely of an agreement *not* to produce certain carburetors. The mere coordination of decisions on output is not integration, and cost-savings without integration, such as the costs saved by refraining from design and production for any given model year, are not a basis for avoiding per se condemnation. The agreement is of a type so likely to harm competition and to have no significant benefits that particularized inquiry into its competitive effect is deemed by the antitrust laws not to be worth the time and expense that would be required. Consequently, the evaluating Agency likely would conclude that the agreement is per se illegal.

Example 6 (Efficiency-Enhancing Integration Present)

Facts

Compu-Max and Compu-Pro are two major producers of a variety of computer software. Each has a large, world-wide sales department. Each firm has developed and sold its own word-processing software. However, despite all efforts to develop a strong market presence in word processing, each firm has achieved only slightly more than a 10% market share, and neither is a major competitor to the two firms that dominate the word-processing software market.

Compu-Max and Compu-Pro determine that in light of their complementary areas of design expertise they could develop a markedly better word-processing program together than either can produce on its own. Compu-Max and Compu-Pro form a joint venture, WORD-FIRM, to jointly develop and market a new word-processing program, with expenses and profits to be split equally. Compu-Max and Compu-Pro both contribute to WORD-FIRM software developers experienced with word processing.

Analysis

Compu-Max and Compu-Pro have combined their word-processing design efforts, reflecting complementary areas of design expertise, in a common endeavor to develop new word-processing software that they could not have developed separately. Each participant has contributed significant assets – the time and know-how of its word-processing software developers – to the joint effort. Consequently, the evaluating Agency likely would conclude that the joint word-processing software development project is an efficiency-enhancing integration of economic activity that promotes procompetitive benefits.

Example 7 (Efficiency-Enhancing Integration Absent)

Facts

Each of the three major producers of flashlight batteries has a patent on a process for manufacturing a revolutionary new flashlight battery -- the Century Battery -- that would last 100 years without requiring recharging or replacement. There is little chance that another firm could produce such a battery without infringing one of the patents. Based on consumer surveys, each firm believes that aggregate profits will be less if all three sold the Century Battery than if all three sold only conventional batteries, but that any one firm could maximize profits by being the first to introduce a Century Battery. All three are capable of introducing the Century Battery within two years, although it is uncertain who would be first to market.

One component in all conventional batteries is a copper widget. An essential element in each producers' Century Battery would be a zinc, rather than a copper widget. Instead of introducing the Century Battery, the three producers agree that their batteries will use only copper widgets. Adherence to the agreement precludes any of the producers from introducing a Century Battery.

Analysis

The agreement to use only copper widgets is merely an agreement not to produce any zinc-based batteries, in particular, the Century Battery. It is "an agreement not to compete on . . . output" and is "of a type that always or almost always tends to raise price or reduce output." The participants do not collaborate to perform any business functions, and there are no procompetitive benefits from an efficiency-enhancing integration of economic activity. The evaluating Agency likely would challenge the agreement to use only copper widgets as per se illegal.

Section 3.3

Example 8 (Rule-of-Reason: Agreement Quickly Exculpated)

Facts

Under the facts of Example 4, Net-Business and Net-Company jointly market their independently-produced network software products through NET-FIRM. Those facts are changed in one respect: rather than jointly setting the prices of their products, Net-Business and Net-Company will each independently specify the prices at which its products are to be sold by NET-FIRM. The participants explicitly agree that each company will decide on the prices for its own software independently of the other company. The collaboration also includes a requirement that NET-FIRM compile and transmit to each participant quarterly reports summarizing any comments received from customers in the course of NET-FIRM's marketing efforts regarding the desirable/undesirable features of and desirable improvements to (1) that participant's product and (2) network software in general. Sufficient provisions are included to prevent the company-specific information reported to one participant from being disclosed to the other, and those provisions are followed. The information pertaining to network software in general is to be

reported simultaneously to both participants.

Analysis

Under these revised facts, there is no agreement “not to compete on price or output.” Absent any agreement of a type that always or almost always tends to raise price or reduce output, and absent any subsequent conduct suggesting that the firms did not follow their explicit agreement to set prices independently, no aspect of the partnership arrangement might be subjected to per se analysis. Analysis would continue under the rule of reason.

The information disclosure arrangements provide for the sharing of a very limited category of information: customer-response data pertaining to network software in general. Collection and sharing of information of this nature is unlikely to increase the ability or incentive of Net-Business or Net-Company to raise price or reduce output, quality, service, or innovation. There is no evidence that the disclosure arrangements have caused anticompetitive harm and no evidence that the prohibitions against disclosure of firm-specific information have been violated. Under any plausible relevant market definition, Net-Business and Net-Company have small market shares, and there is no other evidence to suggest that they have market power. In light of these facts, the evaluating Agency would refrain from further investigation.

Section 3.36(a)

Example 9 (Cost Savings from Anticompetitive Output or Service Reductions)

Facts

Two widget manufacturers enter a marketing collaboration. Each will continue to manufacture and set the price for its own widget, but the widgets will be promoted by a joint sales force. The two manufacturers conclude that through this collaboration they can increase their profits using only half of their aggregate pre-collaboration sales forces by (1) taking advantage of economies of scale -- presenting both widgets during the same customer call -- and (2) refraining from time-consuming demonstrations highlighting the relative advantages of one manufacturer’s widgets over the other manufacturer’s widgets. Prior to their collaboration, both manufacturers had engaged in the demonstrations.

Analysis

The savings attributable to economies of scale would be cognizable efficiencies. In contrast, eliminating demonstrations that highlight the relative advantages of one manufacturer’s widgets over the other manufacturer’s widgets deprives customers of information useful to their decision making. Cost savings from this source arise from an anticompetitive output or service reduction and would not be cognizable efficiencies.

Section 3.36(b)

Example 10 (Efficiencies from Restrictions on Competitive Independence)

Facts

Under the facts of Example 6, Compu-Max and Compu-Pro decide to collaborate on developing and marketing word-processing software. The firms agree that neither one will engage in R&D for designing word-processing software outside of their WORD-FIRM joint venture. Compu-Max papers drafted during the negotiations cite the concern that absent a restriction on outside word-processing R&D, Compu-Pro might withhold its best ideas, use the joint venture to learn Compu-Max's approaches to design problems, and then use that information to design an improved word-processing software product on its own. Compu-Pro's files contain similar documents regarding Compu-Max.

Compu-Max and Compu-Pro further agree that neither will sell its previously designed word-processing program once their jointly developed product is ready to be introduced. Papers in both firms' files, dating from the time of the negotiations, state that this latter restraint was designed to foster greater trust between the participants and thereby enable the collaboration to function more smoothly. As further support, the parties point to a recent failed collaboration involving other firms who sought to collaborate on developing and selling a new spread-sheet program while independently marketing their older spread-sheet software.

Analysis

The restraints on outside R&D efforts and on outside sales both restrict the competitive independence of the participants and could cause competitive harm. The evaluating Agency would inquire whether each restraint is reasonably necessary to achieve cognizable efficiencies. In the given context, that inquiry would entail an assessment of whether, by aligning the participants' incentives, the restraints in fact are reasonably necessary to deter opportunistic conduct that otherwise would likely prevent achieving cognizable efficiency goals of the collaboration.

With respect to the limitation on independent R&D efforts, possible alternatives might include agreements specifying the level and quality of each participant's R&D contributions to WORD-FIRM or requiring the sharing of all relevant R&D. The evaluating Agency would assess whether any alternatives would permit each participant to adequately monitor the scope and quality of the other's R&D contributions and whether they would effectively prevent the misappropriation of the other participant's know-how. In some circumstances, there may be no "practical, significantly less restrictive" alternative.

Although the agreement prohibiting outside sales might be challenged as per se illegal if not reasonably necessary for achieving the procompetitive benefits of the integration discussed in Example 6, the evaluating Agency likely would analyze the agreement under the rule of reason if

it could not adequately assess the claim of reasonable necessity through limited factual inquiry. As a general matter, participants' contributions of marketing assets to the collaboration could more readily be monitored than their contributions of know-how, and neither participant may be capable of misappropriating the other's marketing contributions as readily as it could misappropriate know-how. Consequently, the specification and monitoring of each participant's marketing contributions could be a "practical, significantly less restrictive" alternative to prohibiting outside sales of pre-existing products. The evaluating Agency, however, would examine the experiences of the failed spread-sheet collaboration and any other facts presented by the parties to better assess whether such specification and monitoring would likely enable the achievement of cognizable efficiencies.