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Competition Law I



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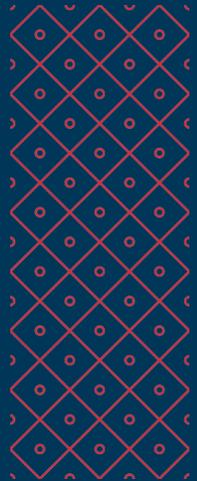


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Content

1. Introduction
2. Cartel agreements
3. Relevant market
4. Application
5. Abuse of dominance
6. Enforcement



Chapter 1

Introduction



PROTOCOL (No 27)

ON THE INTERNAL MARKET AND COMPETITION

THE HIGH CONTRACTING PARTIES, CONSIDERING that **the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,**

HAVE AGREED that: To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.



Competition protection as an integration measure

To create the Internal market, the EU Treaties pursue a dual strategy: **negative** and **positive** integration.

Negative integration = Treaties' provisions prohibiting the existing or emerging barriers.

Positive integration = EU Regulations and Directives carrying out harmonization (even unification) of standards.

Competition protection dismantles barriers erected by undertakings = measures of negative integration.

Digital Markets Act = ex-ante stipulation of big online platforms' obligations = a measure of positive integration.

What is “Harm to Competition“?



Which company's practice has such an effect that it seriously endangers the goal(s) pursued by competition law as a part of public law i.e. in service of important public interest?

- *Economic loss for consumers?*
- *Unfair treatment of other market actors?*
- *Oppression of start-ups and SMEs?*
- *Lessening of the total efficiency?*
- *De-fragmentation of the market structure?*
- *No room for efficient rivals on the market?*
- *Closure of the market to new entrants?*
- *Weaker impulses for innovations?*
- *Hurdle to EU's internal market unification?*



EU Glossary of Competition Terms

A situation in a market in which **sellers of** a product or service **independently** strive for the patronage of buyers in order to achieve a particular **business objective**, e.g., profits, sales and/or market share. **Competitive rivalry** between firms may take place in terms of price, quality, service or combinations of these and other factors which customers may value. **Fair and undistorted** competition is a **cornerstone of** a market economy, and the **European Commission has been vested** with the powers necessary to oversee and enforce EU competition law to ensure **effective competition in the internal market**.



Article 3 TFEU

1. The Union shall have **exclusive competence** in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.



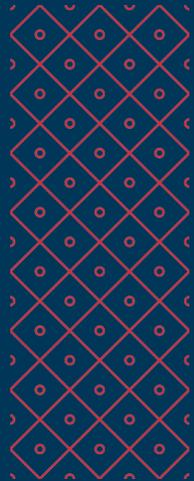
Harm to competition?

TFEU in Article 101 specifies the harm as:

... the prevention, restriction or distortion of competition within the internal market.

CJEU C-52/09 TeliaSonera (2011):

The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.



Chapter 2

Cartel Agreements



Article 101(1) TFEU

1. The following shall be prohibited as incompatible with the internal market:

- all agreements between undertakings,
- decisions by associations of undertakings and
- concerted practices
- which may affect trade between Member States and
- which have as their ***object or effect the prevention, restriction or distortion of competition within the internal market***, and in particular those which: ...



“Effect on trade“ / “by object or effect“

Agreements **fall outside Article 101(1) TFEU** if they are not capable of appreciably affecting trade between Member States.

Commission’s Notice on effect on trade sets the thresholds:

- **5 % market share and a EUR 40 million turnover.**

Restriction BY OBJECT = when the action of the undertakings is by its very nature harmful to the functioning of competition in the common market (usually intention or full awareness of what is committed).

Restriction BY EFFECT = object of harming competition, therefore effects analysis and deep factual investigation of the market, the economic consequences of the action, and the effect of partitioning the market is required.



Undertaking

ECJ in Höfner and Elser vs. Macrotron GmbH C-41/90 (1991):

- *“A public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules since, in the context of competition law, that classification applies to **every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.**”*



Subjects of competition law

Undertaking/Competitor/Economic operator

- Is an “entity” (regardless of legal status) which is engaged in independent “***economic activity***”, i.e. in offering and selling goods and services in a market.
 - Work agencies, funeral services, football players agents, emergency transport services, health-care service providers, legal services providers, airport handling services, management of private pension schemes, performing artists... ***in the EU case law recognized as economic activities.***
 - National air space control, state-funded education, public systems of solidarity-based social security and health insurance... ***were recognised by ECJ as non-economic activities in public interest.***
 - Human labour is not a commodity in competition law, i.e. employees and employers as “social partners” ***are not competitors and their bargaining do not lead to cartel(s).***



Important takeaways

Undertaking / Competitor / Economic operator

- Irrelevant whether an entrepreneur from the legal point of view,
- Irrelevant whether profit making entity, non-profit or publicly funded,
- Irrelevant whether privately or publicly owned,
- Irrelevant whether natural or legal person, or even non-subject from the legal point of view,
- Irrelevant whether located in the EU or outside...

It must offer/sell goods/services in an EU market that can, at least potentially, be served by independent undertakings!



Who is not an undertaking?

C-264/01AOK Bundesverband (2004)

*“In the field of social security, the Court has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes **pursue an exclusively social objective and do not engage in economic activity.** The Court has found that to be so in the case of sickness funds which **merely apply the law and cannot influence** the amount of the contributions, the use of assets and the fixing of the level of benefits.”*

Social welfare/peace objective pursued within strict legal framework and usually achieved on solidarity principles = not a market activity conducted by undertakings.



State as competitor

If a state acts as a commercial entity, e.g. as a private-law subject through state-owned enterprises, state agencies..., **it is also subjected to competition rules as any other undertaking.**

BUT

If a state pursues its national or public interest and acts for these purposes as a public power (sovereign) then **it enjoys a “state action exemption“ (“sovereign immunity exemption“).**



State as strict regulator – “State compulsion defence”

Case C-359/95 P Ladbroke (1997):

*“Articles 81 and 82 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 and 82 do not apply. In such a situation, **the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.** Articles 81 and 82 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition”*



“Single Economic Unit“ doctrine

If competition takes place only between INDEPENDENT competitors, then it cannot by definition take place between the mutually dependent ones.

If one company controls another company hardly their market strategies would be aggressively opposed one to another... i.e.:

- **Group of interlinked companies supervised from one centre forms a “single economic unit“ which is considered as one single undertaking/competitor.**
- **Its internal decision making, division of tasks between its parts (although legally separated ones) and their mutual relationships remain outside the scope of application of competition law.**



Single economic unit as a non-subject from legal point of view

Group of companies could not have legal personality of its own... (like businesses owned by different family members), nevertheless will be constituting an undertaking under EU competition law. **But can a non-subject be party to legal proceedings, can it be imposed a sanction.....!?**

Case C-407/08 P Knauf Gips KG v Commission (2010)

„...“the legal structure particular to a group of companies, which is characterized by the absence of a single legal person at the apex of that group, is not decisive where that structure does not reflect the effective functioning and actual organization of the group... The fact that there is no single legal person at the apex of the Knauf Group is no obstacle to Knauf Gips KG being held liable for the actions of that group.“



Important takeaways

Reversed side of the “single economic unit“ doctrine is the **parental “liability“ doctrine.**

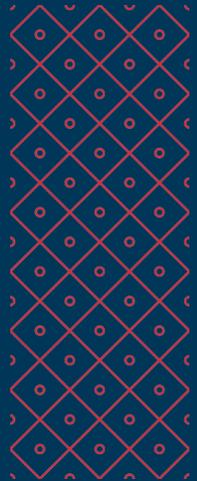
- If an economic holding (group of interlinked companies supervised from one centre) is impermeable for competition law, i.e. relations within the group remain out of its scope...
- ...this group shall **be accountable as one whole** for infringements of its members, i.e. mother company liable together with its daughter for infringements that it was not involved in itself.
- **The fine to sanction it can be calculated up to a limit of 10 % of the total group turnover in the preceding financial year!**



Case C-97/08 Akzo Nobel (2009)

ECJ: *(If) parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules..,*

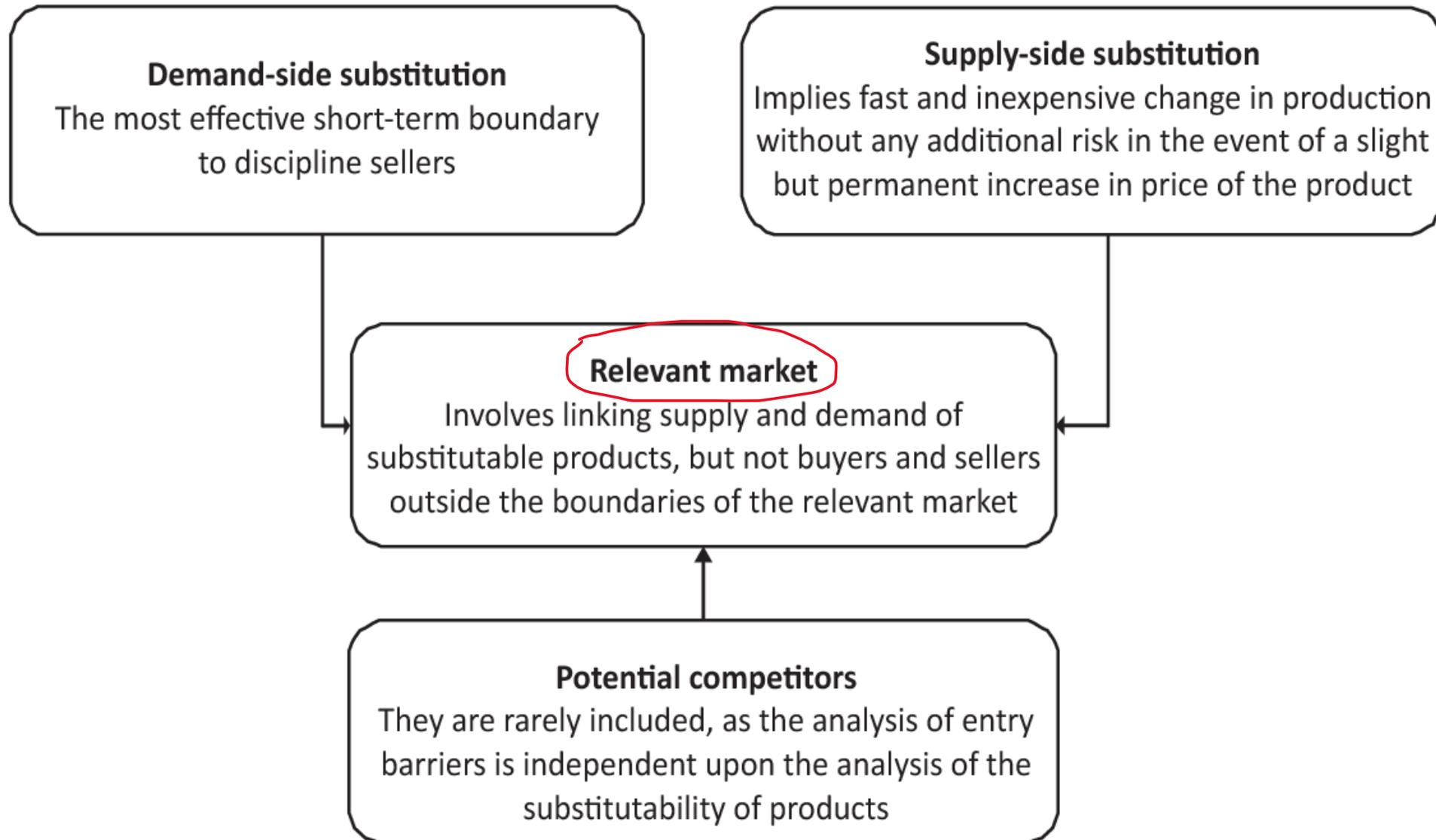
- *first, the parent company can **exercise a decisive influence** over the conduct of the subsidiary and,*
- *second, there is a **rebuttable presumption** that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.*
- *In those circumstances, it is **sufficient for the Commission to prove that the subsidiary is wholly owned** by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary.*



Chapter 3

Relevant Market

Distortion of competition in which market?



Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)



*Market definition is a tool to identify and define the **boundaries of competition between firms**. It serves to establish the framework within which competition policy is applied by the Commission.*

*The main purpose of market definition is **to identify** in a systematic way **the competitive constraints that the undertakings involved face**.*

*The objective of defining a market in both **its product and geographic dimension** is **to identify those actual competitors** of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.*



Definition of relevant market

Defining the relevant market means determining the scope of the competition rules in respect of restrictive practices and abuses of a dominant position:

- **a relevant product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
- **a relevant geographic market** comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

SSNIP = small but significant and non-transitory increase in price



The size of RM of a hypothetical dominant / monopolist is established through a test of whether it could raise the price of its product 5 to 10 % for a period of 1 year without inducing a sufficient number of customers to **switch to another product or another area of supply**.

It is the response of the *marginal consumer*, not the *average consumer* which is important.

- Small but significant number of consumers (generally 5 to 10 percent) switching to another product when there is a price increase is considered a sufficient condition for both goods to be defined as forming part of the same relevant market.
- Existence of a group of consumers who would never switch in response to a relative price increase is not by itself sufficient to conclude that the relevant market should be defined narrowly.



SSNIP or SSNDQ test?

SSNIP test cannot work if nothing is charged to consumers, i.e. on markets where the product is given for free (in money terms).

Google, Facebook, Amazon... collect users' data but not users' money. They charge only the other side of the market: advertisers, sellers, market researchers etc.

Small but Significant Non-transitory Decrease in Quality (of their service) is proposed to test the willingness and capacity of their users to switch to another provider.

Do *Google, Facebook, Twitter, Amazon...* serve one or several relevant markets, each measured using different methodology? How closely these multi-sided markets communicate?

Market shares and EU definition of exemptions/presumption of dominance



Up to 10 % of RM

- De minimis “exemption” for horizontal restraints

Up to 15 % of RM

- De minimis “exemptions” for vertical restraints and purchase alliances

Up to 20% of RM

- Exemption for competitors-parties to a specialization agreement

Up to 25 % of RM

- Exemptions for competitors-parties to a joint research and development agreement

Up to 30 % of RM

- Maximum market share for a supplier/distributor to meet vertical BER requirements

Over 40 % of RM

- Dominant position likely, over 50 % *de facto* proved



EC's new RM Notice

The European Commission has prepared changes to its 25-year-old **RM Definition Notice**, launched (in 2020) a public consultation on its potential amendment/replacement and finally issued its new Notice in February 2024)

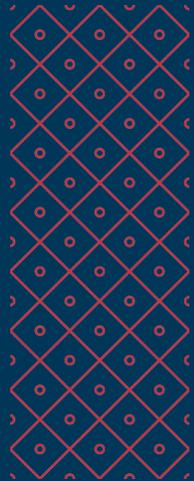
- **Impact of digital economy:** markets are frequently multi-sided and on some of them products are not paid for in money... so how many markets does Google or Facebook have? What a platform integrating many functions/ applications means for the RM definition?
- Does the market definition method, as currently applied, sufficiently **takes into account the globalised nature of today's world**? What if a quick entry of a Chinese SOE unpredictably changes EU market circumstances?

New RM EC Notice – changes



1. Explanations on the **principles of market definition** and the way market definition is used for the purpose of application of competition rules.
2. Greater **emphasis on non-price elements** such as innovation and quality of products and services.
3. Clarifications regarding the forward-looking application of market definition, especially in **markets that are expected to undergo structural transitions**, such as technological or regulatory changes.
4. New guidance in relation to market definition in **digital markets**, for example multi-sided markets and “digital eco-systems” (e.g. products built around a mobile operating system).
5. New principles on **innovation-intensive markets**, clarifying how markets should be assessed where companies compete on innovation, including through pipeline products.
6. More guidance on **geographic market definition**, including the conditions to define global markets, the approach to assessing imports as well as the Commission's approach to local markets defined by catchment areas (e.g. in the retail sale of consumer goods).
7. Clarifications as regards the **quantitative techniques**, such as the small but significant and non-transitory increase in price/SSNIP test, that the Commission may use when defining a market.
8. Expanded guidance on possible **sources of evidence and their probative value**, based on the Commission's material experience and fact-based approach to market definition.

Check the latest news on: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528



Chapter 4

Application



Article 101(1) TFEU

in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development, or investment;
- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Agreement (between undertakings)?



Case C-277/87 Sandoz (1990)

Sandoz, a Swiss-based drug manufacturer, had been repeatedly sending invoices to its European distributors, carrying a stamp with express words “*export prohibited*”. Distributors had been continuing its commercial relationship with Sandoz without protests nor remarks, i.e. had tacitly accepted the requirement of Sandoz’s export policy.



Agreement (between undertakings)

ECJ: Bayer/Adalat C-2/01P and C-3/01P (2004)

Bayer disliked re-exports of its Adalat pharmaceutical to the UK by French and Spanish wholesalers.

Bayer did not try to agree with wholesalers, did not even explain them its price strategy but unilaterally assessed the absorption capacity of French and Spanish markets and cut down its supplies to them accordingly. Wholesalers had lost opportunity to re-export Adalat if they wanted to satisfy their local customers.

*“The mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers **is not sufficient for a finding that such an agreement exists.**”*

“Agreements” - EU competition law typology



Horizontal – between direct competitors

Vertical – between companies operating at different levels of the production or distribution chain

Hard core cartels – restrictions **by object**, presumed to be evident to anyone (“naked restrictions”) and not exemptible

- Agreements directly or indirectly **fixing purchase or selling prices** or any **other trading conditions**,
- Agreements **limiting or controlling production**, markets, technical development or investment,
- Agreements **sharing markets** or sources of supply.
- **Bid-rigging** conspiracy

Case C-8/08 T-Mobile Netherlands BV and others (2009)



1. **A concerted practice** pursues an anti-competitive object... where, according to its content and objectives and having regard to its legal and economic context, it is capable... of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. **An exchange of information** between competitors is tainted with an anti-competitive object if the exchange **is capable of removing uncertainties** concerning the intended conduct of the participating undertakings.
3. In so far as **the undertaking participating in the concerted action remains active on the market** in question, there is a **presumption of a causal connection between the concerted practice and the conduct of the undertaking** on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

Decision of association of undertakings?



“**Association**“ = another entity subjected to EU competition law - **not necessarily an undertaking!**

- with or without legal personality
- also associations of associations
- undertakings/competitors must be members/participants

“Decision“ (as breach of 101 x not 102 TFEU)

- Act of (attributable to) an association (i.e. no agreement between some members reached at a meeting of an association!)
 - Formally voted, endorsed, announced, published...
 - Understood as made on behalf of association

Associations OR undertakings?



Professional chambers, industry associations, European con-federations of national industry associations, regional business clubs, etc.

If not involved in any economic activity = no undertakings, but still governed by Art 101 TFEU if they...

- Adopt single policy of their member companies to face the economic crisis, to deal with bad debtors, to regulate “unfair“ business practices of members (low prices, aggressive marketing etc.)...

May be involved in an economic activity = then they are **undertakings themselves**

- If they publish textbooks for company managers, organize trainings, lease office space, certify product quality on commercial basis etc.



Article 101(2) TFEU

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

EU: General exemption of Art. 101(3) TFEU



The provisions of Art 101(1) may, however, be **declared inapplicable** in the case of:

- any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which:
 1. contributes to **improving the production or distribution** of goods or to **promoting technical or economic progress**, while
 2. **allowing consumers a fair share** of the resulting benefit, and which
 3. does not impose on the undertakings concerned **restrictions which are not indispensable to the attainment** of these objectives;
 4. does not afford such undertakings the possibility of **eliminating competition in respect of a substantial part of the products in question**.

EU: General exemption of Art. 101(3) TFEU



Specified for the most frequent types of agreements by the European Commission in the so-called “**Block exemption**“ regulations

- Regulation(s) issued by the Commission or by the Council pursuant to Article 101(3) of the TFEU, specifying the conditions under which certain types of agreements are exempted from the prohibition on restrictive agreements laid down in Article 101(1) of TFEU.
- **When an agreement fulfils the conditions set out in a block exemption regulation, then such an agreement is not prohibited, i.e. valid and enforceable.**
- Agreement that does not fulfil conditions of a block exemption could still satisfy directly conditions of Art 101(3) TFEU, i.e. it is not automatically prohibited and void.



EU Block exemptions

Regulations of the European Commission on the applicability of Art. 81(3) TEC/**now 101(3) TFEU** to:

- Vertical agreements (N. **2022/720**)
- Specialization agreements (N. **2023/1067**)
- Research + Development agreements (N. **2023/1066**)
- Transfer of technology agreements (N. **316/2014**)
- Distribution of cars (N. **461/2010** amended by Regulation (EU) 2023/822)

... agreements in railway, road, inland water, high sea and air transports, in insurance business.

See for updates: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/block-exemption-regulations_en

Presumption of legality = exemption conferred *ex lege* on anybody who meets the conditions.

Structure of a block exemption



Scope of applicability

- Types of agreements between undertakings
- Sizes of market shares

“Black clauses” (hard core cartels)

- Agreement as a whole not exempted – nullity

“Gray clauses”

- If severable then invalid while agreement remains in force

Possibility of withdrawal

- Notwithstanding of its formal compliance with the Regulation, the agreement that restricts competition by effect, can be non-exempted by the decision of the European Commission

C-439/09 Pierre Fabre (2011)



French manufacturer of luxury cosmetics *Pierre Fabre* forbade its distributors to sell its products outside “brick ’n’ mortar” premises, arguing that their sophisticated nature requires direct contact with an expert.

CJEU rejected such requirement as a general ban on internet sales constituting a hard-core vertical cartel restricting cross-border consumer choice. CJEU did not admit the justification by good-will but allowed for in specific cases (if more pharma than cosmetic product). Then each case must be assessed on factual base by a national court.

C-230/16 Coty Germany (2017)



Does *Pierre Fabre* precedent apply absolutely, i.e. ***is it always against free competition to limit online sales of non-pharma products by independent distributors?***

Coty (cosmetics supplier) prevented its retailers, members of the selective distribution network, to sell via general third party's internet platforms (*Amazon, eBay* etc.), allowed only direct online sales operated by selected distributors themselves.

CJEU agreed with *Coty* under the following conditions:

- Retailers are selected on the basis of non-discriminatory, objective, qualitative criteria, that are proportionate...
- To preservation of the goods' luxury image.



De minimis notice

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union OJ C 291, 30.8.2014

Agreements between undertakings which **may affect trade between MSs** and which may have as their effect the **prevention, restriction or distortion of competition** within the internal market, **do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:**

- if the aggregate market share held by the parties to the agreement **does not exceed 10 %** on any of the relevant markets affected by the agreement, where the agreement is made between undertakings **which are actual or potential competitors** on any of those markets;
- if the market share held by each of the parties to the agreement **does not exceed 15 %** on any of the relevant markets affected by the agreement, where the agreement is made between undertakings **which are not actual or potential competitors** on any of those markets.

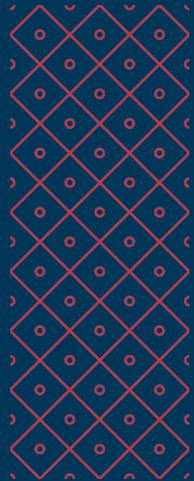


Specific sectors

Agriculture

The competition rules for agricultural products (other than fisheries products) are set out in **Regulation 1308/2013** known as the "Common Market Organisation (CMO) Regulation".

Applying competition rules while *taking into account the five objectives of the Common Agricultural Policy*: increasing productivity of agricultural production, ensuring a fair standard of living for agricultural communities, stabilising markets, assuring supplies and ensuring reasonable prices for the consumer.



Chapter 5

Abuse of Dominance

EU – abuse of a dominant position



Art 102 of TFEU:

- Any **abuse** by **one or more** undertakings of a **dominant position** within the common market or in a substantial part
- of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse **may, in particular**, consist in:

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

Dominant position – EU definition



*“A dominant position is a position of economic strength enjoyed by an undertaking which **enables it to hinder the maintenance of effective competition** on the relevant market by allowing it to **behave to an appreciable extent independently** of its competitors and customers and ultimately of consumers.”*

CJEU, Michelin C-322/81(1983)



Establishing the dominant position / monopoly power

1. Defining the relevant market

- Looking for substitutes (fungible products) on both demand (transfer of consumer's demand) and supply (entry of new suppliers) side
- Identifying the geographical scope of the market
 - *Must be “within the Common market or a substantial part of it“ to be caught by the EU Competition law*
- Assessing the stability of the market (always more than 1-2 years... difficult in ICT cases!)

2. Analysing market shares

3. Assessing other competitive factors and constraints

Establishing dominance / monopoly **is not** a question of the competitor's turnover, balance sheet, volume of sales, investment, number of employees, branches etc.

Important takeaways: dominant position



Capacity to hinder the maintenance of effective competition

Capacity to behave independently of competitors, customers, consumers

Capacity to maintain prices significantly above the average level of competitors' prices during at least 2 years and remain profitable.

Significant market power based on:

- Market share exceeding 40 % of the relevant market (**over 50 % for 3 years to be a proof of the dominant position**)
- Outstanding production or/and financial capacity
- Outstanding vertical integration (production-distribution-retail)
- Considerable lead over other competitors (market shares, technologies etc.)
- Better access to/Control over distribution networks
- Control over IPR / infrastructure /facility of outstanding business importance

EU doctrine on abuse (of dominance)



CJEU 85/76 Hoffmann-La Roche (1979): “The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market, where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition... has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”



EU doctrine on abuse “step by step”

1. Abuse is an **objective concept**...
 - *Strict liability of a dominant undertaking?*
2. Related to the **behaviour of an undertaking in a dominant position**...
 - *YES or NO causal nexus between dominant behaviour and distortion of competition?*
3. Which **influences the structure of a market**...
 - *Only long-standing practices or also one-off events?*
4. Through recourse to **methods different from those of normal competition**...
 - *Really only practices that another, weaker competitor would not allow?*
5. With **the effect of restricting** the existing competition in the market or **the growth of that competition**.
 - *Can the dominant still defend its market share?*



Examples of exploitative practices

Long lasting policy of excessively high prices

Forcing of unfair trading conditions

Tying to the detriment of consumers (making of contract for one product conditioned by acceptance of another unrelated product)

Discrimination against comparable customers placing some of them at a competitive disadvantage

Refusal to deal/supply with an aim to influence commercial behaviour of a potential partner

Wilful limitation of production, development, supplies – “quiet life“



Examples of exclusionary practices

Long lasting artificially low (predatory) prices

Market closing

Non-competing clause in agreements

Bans on export, import

(Threats of) retaliation in case of a deal with competing firm

Tying to the detriment of market competitive structure and openness

Business/Marketing strategy oriented against entry of new competitors

Hindering of access to “essential facility“



Usual tests of “abusiveness”

It is very essential to draw borderline between “normal” and “abusive” behaviour of a dominant competitor.

Anti-monopoly offices use the following tests:

- **Sacrifice test (also “but for” test)**
 - Behaviour of a dominant company is definitely not-profitable (has no business sense) unless the annihilation of competition is its sought-after benefit.
- **As-efficient competitor test**
 - Behaviour of a dominant company leads to an exclusion not of any competitor but of an equally efficient competitor out of the market.
- **Consumer harm test**
 - Behaviour of a dominant company is detrimental not to specific competitors but to the competition as such with an adverse effect on consumers’ welfare.

Draft antitrust Guidelines on exclusionary abuses (European Commission 2024)



In its **2008 Guidance on the Commission's enforcement priorities**, the Commission set out its enforcement priorities with regard to exclusionary abuses of dominance.

In **2023** Commission issued **Amendments** to the **Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2023/C 116/01)**:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.116.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A116%3ATOC

(currently applicable EC's approach)

In **2024** Commission launched a public consultation about the new wording - **draft antitrust Guidelines on exclusionary abuses**

https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623

- Commission clarifies two main concepts of “**competition on the merits**” and “**exclusionary effects**” that are decisive for the establishment of an abuse / infringement of art 102 TFEU
- For the first time Commission identifies: (i) categories of conduct for which it is **necessary to demonstrate** the capability of producing exclusionary effects (must be proved by the Commission); (ii) categories of conduct that have a **high potential** to lead to exclusionary effects (rebuttable presumption), and (iii) **naked restrictions**, which by their very nature lead to exclusionary effects (always prohibited).
- Commission proposes an analytical framework applicable to **certain types of conduct** by dominant companies. The draft distinguishes between: (i) **conduct subject to a specific legal test** set out in EU case law (i.e. exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze); and ii) **conduct not subject to a specific legal test** (i.e. conditional rebates, multi-product rebates, self-preferencing and access restrictions).

EC on “Naked restrictions”



Naked restrictions: certain types of conduct by a dominant undertaking that have no economic interest for that undertaking, other than that of restricting competition.

These types of conduct are by their very nature capable of restricting competition. Only in very exceptional cases will a dominant undertaking be able to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects.

Examples:

- (i) payments by the dominant undertaking to customers that are conditional on the customers postponing or cancelling the launch of products that are based on products offered by the dominant undertaking’s competitors;
- (ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors; or
- (iii) the dominant undertaking actively dismantling an infrastructure used by a competitor.



Collective dominance

General Court T-342/99 Airtours

Court identified 3 conditions that must be met before a finding of collective dominance may be met:

1. Given the characteristics of the relevant market, each member of the oligopoly must know how other members are behaving in order to be able to adopt the same policy.
2. Members of the oligopoly must be deterred over time from departing from the policy thus adopted (including by the threat of likely retaliatory measures etc.).
3. That policy must be able to withstand challenge by other competitors, potential competitors or customers.

“Famous Microsoft case“

T-201/04 (2007)



In 2004, Commission fined Microsoft EUR 497 million for abusing its dominant position in the market for operating systems for personal computers (PCs) in 1998-2004.

Microsoft who's Windows operating system holds a 95 % share of the relevant market was found to have:

- ***(i) withheld information which rival server software would have needed to 'talk' properly with Windows-based PCs. This meant that rivals could not compete fairly in the market; and***
- ***(ii) made the purchase of Windows conditional on the simultaneous acquisition of Microsoft's separate Windows media player product. This had the effect of populating virtually all PCs with Windows media player, and hence distorting competition by artificially driving content providers and applications developers to the Windows media platform.***

“Famous Microsoft case” T-201/04 (2007)



GC: *The Court recalls that, ... although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position.*

*Before a refusal by the holder of an **intellectual property right** to license a third party to use a product can be characterised as an abuse of a dominant position, three conditions must be satisfied: (i) the refusal must relate to a product or service indispensable to the exercise of an activity on a neighbouring market; (ii) the refusal must be of such a kind as to exclude any effective competition on that market; and (iii) the refusal must prevent the appearance of a new product for which there is potential consumer demand. Provided that such circumstances are satisfied, the refusal to grant a licence may constitute an abuse of a dominant position unless it is objectively justified.*

*In the present case, **the Court finds that the Commission did not err in considering that those conditions were indeed satisfied.***

“Famous Microsoft case” T-201/04 (2007)



GC: *The Court considers that the factors on which the Commission based its conclusion that there was abusive tying are correct and consistent with Community law.*

It observes that those factors are as follows: (i) the undertaking concerned must have a dominant position on the market for the tying product; (ii) the tying product and the tied product must be two separate products; (iii) consumers must not have a choice to obtain the tying product without the tied product; and, (iv) the practice must foreclose competition.

*In respect of each of those factors, **the Court considers that the Commission’s decision is well founded.***



Digital Markets Act – EU regulation 2022/1925

The Digital Markets Act (DMA) establishes a set of narrowly defined objective criteria for **qualifying a large online platform as a so-called “gatekeeper”**. This allows the DMA to tackle “ex-ante“ the problems caused to competition by **large, systemic online platforms** – without establishing their dominance and proving their abuses.

These criteria will be met if a company (art 3(1) DMA):

1. has a strong economic position, significant impact on the internal market and is active in multiple EU countries
2. has a strong intermediation position, meaning that it links a large user base to a large number of businesses
3. has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time

... can be proved through quantitative thresholds attainment (turnover, number of users etc.) specified in art 3(2) DMA but also disputed by the company concerned.



Digital Markets Act – new proposal of EU regulation

Example of the “don’ts” - Gatekeeper platforms may no longer:

- treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform
- prevent consumers from linking up to businesses outside their platforms
- prevent users from un-installing any pre-installed software or app if they wish
so

Penalties for non-compliance: **fin**es of up to 10% of the company’s total worldwide annual turnover, **periodic penalty payments** of up to 5% of the average daily turnover



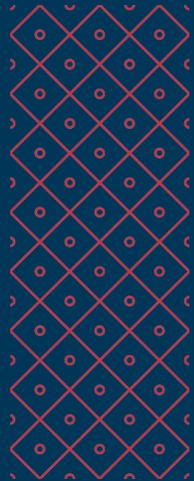
Can an “abusing“ dominant be not-guilty?

EU competition law has **no** statutory exemptions from the abuse of dominance violation.

- **Art 102 TFEU** has nothing similar to **Art 101(3) TFEU**, i.e. **no easy equivalent of the US “rule of reason“**.
- **Art 106(2)** allows to **except certain “SGEI“ providers**.

Responsibility of a dominant player for not impairing the free competition is a “special“ one, very close to the “strict liability“.

Nonetheless a dominant can escape prohibition and sanction if he can provide **an objective justification** for its actions or show that the actions are **proportionate** and generate **efficiencies which outweigh the anticompetitive effects**.



Chapter 6

Enforcement

Council Regulation 1/2003/EC

on application of *Art. 81, 82 TEC*



1. “Modernization“ of competition law enforcement since May 1, 2004
 1. Replaced the “historical“ Reg. 17/1962/EEC
2. Abolition of “preliminary clearance“ and “individual exemptions“ procedures.
3. Shift of the burden of proof on the subject who actively refer him/herself to an EU law provision.
4. Decentralization of competition policy application
 - European competition network (mutual co-operation)
 - NCAs to apply also EU competition law
 - Direct applicability of Art. 101, 102 by national courts/NCAs
5. Enhancement of Commission's competencies
6. Opportunity for competitors to “offer commitments“
7. Fines and penalties, principles, prescription etc.

Commission proceedings (based on Regulation 773/2004/EC)



1 Phase: initial assessment

- Whether the case merits further investigation
- Case may be abandoned or reallocated to NAC
- Commission is allowed to carry on local inspections even before the official proceedings are opened
- Undertakings are informed that they are subject to a preliminary investigation as well as about the subject –matter and purpose of such investigation

2 Phase: opening of proceedings – investigation

- The case merits further attention
- Commission may make it public and publish the opening on its website, issue a press release
- It does not prejudice in any way the existence of an infringement!

Commission proceedings (based on Regulation 773/2004/EC)



Hearings and Hearing Officers

- Fundamental principle of EU law: right to be heard before a final decision affecting interests of parties (if breached – decision quashed by the General court!)
- On the points contained in Statement of Objections (as Commission cannot based its decision on any different points of accusation)
- Hearing Officer – an official in a specific position – act independently from DG Competition staff, resolve disputes between undertakings and the DG, reports directly to the Commissioner
 - **Guarantor of fair and impartial treatment of the parties' submissions, i.e. of a fair trial!**

“Dawn raid“ – local inspection



The officials and other accompanying persons are empowered, pursuant to Art 20(2) of Regulation 1/2003:

- a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- c) to take or obtain in any form copies of or extracts from such books or records;
- d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.



Judicial review of Commission's decisions

General court/CJEU's review focuses on 4 basic conditions

1. Respect of procedural rules and rules of reasoning
2. Correct establishment of the facts of the case
3. No errors of assessment
4. Correct and proportional use of discretionary power

Cassation principle applies: EU Courts can uphold or quash the Commission's decision on breach of TFEU articles

EU courts have **unrestricted capacity to fully review** the fine(s) imposed

Standards of criminal proceedings de facto applied to the rights of parties... although it is sometimes doubtful as the Commission can rely on many rebuttable presumptions, sometimes *nulla poena* principle is treated quite casually etc.



Application in/by NCAs of MSs

Under Reg. 1/2003/EC, Arts. 101 and 102 TFEU are **in full directly applicable**, i.e. enforceable by national courts and competition authorities.

Commission applies only the EU law.

National Competition Authority (NCA) applies **both EU law and their national law**

- If the restrictive practice has an effect on trade between EU member states (i.e. the case with EU element), **NCA must apply EU law** (i.e. Arts 101 and 102 TFEU) and **can simultaneously apply national competition law**.

To avoid diverging evaluation and chaotic decision-making the Regulation establishes “**convergence rules**” (Arts 3, 11 of Reg. 1/2003/EC)

Application in/by NCAs of MSs



NCA applies **simultaneously EU and national law to agreements**: Decisions must be in full accordance, i.e. decision based on national law cannot be stricter or more lenient than under EU law.

NCA applies **simultaneously EU and national law to unilateral practices** (dominance): Decision based on national law may not be milder, but it may be more stringent than under EU law (i.e. MSs can penalize abuses of economic dependence / excessive but not dominant market power).

If the Commission initiates proceedings itself: the NCA proceedings under EU law will not start or must be stopped if already initiated.

If an NCA deals with the case: it must inform the Commission before opening the proceedings and before taking the decision.

Application by courts of MSs



When national courts rule according to Arts 101, 102 TFEU on the cases already decided by the Commission, they **can not decide contrary to the decision of the Commission.**

National courts must avoid taking decisions which would conflict with the decision **which the Commission intends to take** in the proceedings it has initiated. For this purpose, the national court may consider whether it is necessary to stay its proceedings.

The courts may, in proceedings under Arts 101, 102 TFEU, ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition rules (*amicus curiae*).



Alternative solutions to infringement

Commitments (commitment decision under Article 9 of Regulation 1/2003)

- Under commitment decisions, the Commission does not have to conclude on the existence of an infringement of the antitrust rules and imposes no fines, only takes a decision to make them legally binding.

Leniency (Commission Notice on Immunity from fines from 2006)

- Companies that whistle blow over the anti-competition policies of cartels are treated leniently and may obtain either total immunity or a reduction in fines.

Settlement (Commission Regulation 622/2008)

- The parties acknowledge upfront their participation in the cartel, resulting in a speedier procedure and an up to 10% reduction in the fines.

Directive 2014/104/EU on antitrust damages actions



Easier access to evidence the victims need to action for damages (national courts can order companies to disclose evidence when victims claim compensation).

A final infringement decision of a national competition authority constitutes full proof before civil courts in the same MS that the infringement occurred. Before courts of other MSs, it will constitute **at least prima facie evidence of the infringement**.

Victims have at least **5 years to bring damages claims**, starting from the moment when they had the possibility to discover that they suffered harm from an infringement. This period is suspended or interrupted if a competition authority starts infringement proceedings, once a competition authority's infringement decision becomes final, victims have at least 1 year to bring damages actions.

Directive 2014/104/EU on antitrust damages actions



Legal consequences of passing on, when direct customers of an infringer offset the increased price they paid by raising the prices they charge to their own customers (indirect customers) - a rebuttable presumption that they suffered some level of overcharge harm, to be estimated by the judge.

victims are entitled to **full compensation** for the harm suffered, which covers compensation for **actual loss** and for **loss of profit**, plus payment of **interest** from the time the harm occurred until compensation is paid (i.e. no triple or punitive damages)

Rebuttable presumption that cartels cause harm (i.e. reversed burden of proof - infringers themselves must prove that their cartel did not cause harm).

Any participant in an infringement will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability).



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