



# UiO : Department of Private Law

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EU Competition Law –

Cartels / horizontal agreements (Article 101 TFEU)

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# Cartels and other horizontal agreements

- 1. Introduction**
2. Cartels
3. Information exchange
4. Horizontal cooperation agreements

# Introduction – cartels and horizontal cooperation agreements

- Horizontal agreements – cooperation between actual or potential competitors
- Primary competitive concern: coordinated effects
- Three broad categories (no clear divisions and numerous subcategories)
  - Cartels
  - Information exchange
  - Other horizontal cooperation agreements
- Substantive legal analysis
  - Article 101 (1): undertakings, cooperation, “object or effect”, appreciability, effect on trade
  - Article 101 (3): individual assessment, (Block exemptions)

1. Introduction

**2. Cartels**

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# Cartels – starting points

- Enforcement priority in most jurisdictions
- Horizontal cooperation – between competitors
  - “Naked restraints” vs integration of resources
- Cartels - restrictions by “object” under Article 101 (1) TFEU
  - Not necessary to investigate “effects”
- In practice – cartels will generally not satisfy the conditions in Article 101 (3) TFEU
- Severe sanctions, e.g.
  - Substantial fines
    - EU highest individual cartel fine: Saint Gobain EUR 715 mill
  - Criminal sanctions in many jurisdictions
  - Damages actions
- Leniency

# EU: top 10 fines for cartels (per case)

Year	Undertaking	Amount in €
2012	TV and computer monitor tubes	1.470.515.000
2008	Car glass	1.189.896.000
2013	Euro interest rate derivatives	1.042.749.000
2014	Automotive bearings	953.306.000
2007	Elevators and escalators	832.422.250
2010	Airfreight	799.445.000
2001	Vitamins	790.515.000
2007/2012	Gas insulated switchgear	675.445.000
2013	Yen interest rate derivatives	669.719.000
2009	Gas	640.000.000

# “Classic cartels”

- Price fixing (between competitors)
  - Agreements regarding the selling price (incl. rebates, discounts, margins, etc.)
- Market sharing (between competitors)
  - Geographical market sharing, customer sharing, product sharing
- Quantity agreements (between competitors)
  - Agreements regarding the offered/supplied quantity
- Bid rigging / collusive tendering (between competitors)
  - Bid sharing, bid rotations, cover bids
- Information exchange (between competitors)
  - Facilitating cartel activity – monitoring devices



# Cartels: Restrictions by «object»

- Cartels: generally “naked restraints” whose objective is merely/predominantly to restrict competition
  - No/limited integration of resources
- Case law on “object”
- Commission guidelines Article 101(3) TFEU
  - Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced

# Some potential substantive legal issues regarding cartels

- «Undertakings»
  - Single economic entity?
- Cooperation – often mostly an evidential issue
- Effect on trade between Member States
- «object or effect» – borderline/mixed cases
- Appreciability
  - Case C-226/11, Expedia (13 December 2012)
- Article 101 (3) TFEU
  - In principle applicable also to infringements by “object”, ref. Case T-168/01, GlaxoSmithKline v Commission, Case T-17/93, Matra Hachette v Commission
  - True cartels will rarely have an efficiency rationale, let alone be “indispensable”
- Sanctions – leniency, calculation of fines, parent liability etc.

## Third party "information central"

- Organic peroxides: AC Treuhand (Switzerland) as "secretariat"
  - € 1000 fine (first time offence)
- Commission press release
  - "the message is clear: organisers or facilitators of cartels, not just the cartel members, must fear that they will be found and heavy sanctions imposed from now on."
- Upheld by General Court in Case T-99/04
  - The notion of «agreement» «implies that an undertaking may infringe [Article 101] where the purpose of its conduct (...) is to restrict competition on a specific relevant market (...) and that does not mean that the undertaking may be active on the relevant market itself.» (para 122)

# Crisis cartels

- Crisis cartels / industrial restructuring agreements
  - Typically agreements between undertakings in an industry facing common difficulties to reduce “overcapacity” or to reduce competition e.g. to avoid bankruptcy
- Case C-209/07, Beef Industry Development Society (BIDS)
  - Agreements between the ten principal Irish beef and veal producers e.g. to reduce production capacity by 25 %
  - «even supposing it to be established that the parties (...) acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying [Article 101(1)]. Indeed an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives». (para 21)
  - Article 101 (3) TFEU – potentially applicable, but strict conditions

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# Introduction

- Information exchange between actual or potential competitors
- Primary competitive concern: coordinated effects
- Forms and contexts
  - Part of a cartel
  - Part of a broader cooperation agreement
  - By/through a trade association or a third party
  - Single occasion/meeting
- Types of information
  - Most problematic: commercially sensitive, strategic market information
  - Future/historic information
  - Individualized/aggregated information
  - Public/non-public information

# Economic and legal issues

- Information exchange can have mixed economic effects
  - Reduced competition
    - Coordinated effects: removal of uncertainties regarding competitors conduct, increase stability of cartel activity
  - Efficiencies
    - Benchmarking to achieve cost reductions: comparison with more efficient undertakings
    - Dissemination of know-how and technology
    - Consumer information: public information
- Common legal questions regarding information exchange
  - «concerted practice» vs unilateral conduct
  - «object» vs «effect»
  - Article 101(3) TFEU

# «Concerted practice»

- Basic principle: competitors must operate independently
  - “each economic operator must determine independently the policy which he intends to adopt on the common market” Joined Cases 40/73 etc, Suiker Unie, para 174
  - “the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted” Case C-8/08, T-Mobile, para 35
- Contact, conduct and causation
  - “a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.” Case C-49/92, Anic, para 118
  - Contact establishes a (rebuttable) presumption for conduct and causation, ref. Hüls (C-199/92), para 162



# Unilateral/reciprocal contact

- Unilateral disclosure
  - "[...] the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it". Joined Cases T-25/95 and others, *Cimenteries*, para 1849
- Participation in meetings
  - Case C-199/92, *Hüls*
    - «since the Commission was able to establish that Hüls had participated in meetings between undertakings of a manifestly anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.» (para 155)
  - Joined cases C-204 etc./00, *Aalborg Portland and others v Commission*
    - «The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.» (para 82)

# Public announcements

- Commission guidelines Horizontal cooperation agreements (para 63)
  - “Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1).”
  - “However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other’s public announcements (...) could prove to be a strategy for reaching a common understanding about the terms of coordination.”

# Single meeting

- Case C-8/08, T-Mobile
  - “what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition.” (para 61)
  - “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.” (para 62)

# «Concerted practice» vs «tacit collusion»

- Tacit collusion: coordination, and reduced competition, without explicit contact/communication
  - Stable duopoly/oligopoly (few competitors, homogenous products, transparency – monitoring of competitors' behaviour and informed consumers, entry barriers)
  - Prisoner's dilemma - repeated game

# «Concerted practice» vs «tacit collusion» (cont.)

- The decisive legal criterion under Article 101(1): “contact” (Joined Cases 40/73 etc, Suiker Unie, para 174)
  - “[the] requirement of independence does not deprive economic operators of the right to adopt themselves intelligently to the existing and anticipated conduct of their competitors”
  - “its does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”
- Other legal instruments
  - Merger control: coordinated effects
  - Article 102 TFEU: collective dominance

# Proof – parallel conduct

- Problem
  - Parallel conduct may (depending on the circumstances) be consistent with both «concerted practice» and «tacit collusion»
- Case C-89/85, Woodpulp
  - «parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct (...) [Article 101] does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.» (para 71)
  - «[T]he parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market (...). Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.» (para 126)

# Restriction by «object»

- Case C-8/08, T-Mobile
  - “object” - “certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition” (para 29)
  - “apparent from Article [101 (1)(a)] that concerted practices may have an anti-competitive object if they ‘directly or indirectly fix purchase or selling prices’ (para 37)
  - “exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object, and that extends to situations (...) in which the modification relates to the reduction in the standard commission paid to dealers. (para 41)
- Commission guidelines horizontal cooperation agreements
  - “Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object .” (para 74)

# Restriction by «effect»

- Type of information
  - Capable of removing uncertainties (inter-partes)?
    - prices (actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, R&D
    - Historic/future, individualized/aggregated, public/non-public
- Market structure/characteristics
  - Collusion plausible? Tight oligopoly vs perfect competition
- Market power
  - The involved parties' market coverage



# Article 101(3)

- Individualised future prices («object»)
  - “private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities.”
  - “Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3).”
    - Commission guidelines horizontal cooperation agreements, para 74
- Cost and demand information may lead to productive and allocative efficiencies
- Public information: consumers’ informed choice

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**4. Horizontal cooperation agreements**

# Introduction

- A broad variety of horizontal cooperation agreements
- Mixed economic effects
  - Restriction of competition: Competitive concerns: coordinated and/or exclusionary effects
  - Efficiencies: allocative, productive, dynamic efficiencies
- Common legal questions regarding horizontal cooperation agreements
  - Cooperation – rarely problematic
  - «object or effect»
    - Are the parties' actual or potential competitors?
    - Disguised cartel?
    - How does the agreement affect competition between the parties?
    - Market power/market definition/appreciability
  - Article 101(3) TFEU

# Research & Development agreements

- Improvements existing products / development of new products
- Joint ventures / cooperation agreements
- Competitive concerns
  - Reduction in R&D
  - Coordination / information exchange
- Efficiencies
  - Development of new/better products, services, processes
  - Dissemination of technology

# Production agreements

- Subcontracting/outsourcing of production
- Specialization agreements – unilateral/reciprocal
  - Seize production – purchase from other party
- Competitive concerns
  - Reduced variety, quality, differentiation
  - Coordination / information exchange
- Efficiencies
  - Cost savings – reduction of duplication costs
  - Economies of scale

# Purchasing agreements

- Ad hoc / alliances
- Bi-lateral / multi-lateral
- Competitive concerns
  - Foreclosure of inputs / exclusion of competitors
  - Coordination
    - Commonality of costs
    - Information exchange
- Efficiencies
  - Lower purchase prices
  - Reduced transaction costs
  - Reduced distribution/transport costs

# Standardisation agreements

- Agreements on technical or quality standards
- Competitive concerns
  - Reduction of product variety
  - Limitation of R&D
  - Foreclosure – access to the standard
- Efficiencies
  - Ensure interoperability/compatibility
  - Reduce transaction costs
  - Product safety and quality

# Commercialisation agreements

- Joint selling, distribution, promotion or marketing
- Competitive concerns
  - Coordination of prices, output, markets
  - Information exchange
- Efficiencies
  - Cost savings
  - Economies of scale and scope



# Application of Article 101 (1) TFEU

- Does the agreement have an anti-competitive «object»?
  - Is it a disguised cartel?
- Does the agreement have anti-competitive effects?
  - Does the agreement restrict competition?
    - Inter partes / foreclosure
    - Relevant parameters of competition
  - Does the agreement restrict competition on the relevant market?
    - Sufficient market power?

# Application of Article 101 (3) TFEU

- Individual assessment
  - Burden of proof
  - Four cumulative conditions
    - Efficiencies
    - Consumers must receive a «fair share»
    - Indispensability
    - No elimination of competition
- Block exemptions
  - R&D Block Exemption Regulation
  - Specialisation Block Exemption Regulation