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EU Competition Law –

Cartels / horizontal agreements (Article 101 TFEU)

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Outline

- Tuesday 16 September
 - Introduction to Article 101 TFEU
- Tuesday 23 September
 - Cartels and other horizontal cooperation agreements
 - Cartels
 - Information exchange
 - Horizontal cooperation agreements

Introduction to Article 101

1. Introduction

2. Cooperation

3. Restriction of competition

4. Article 101 (3)

Article 101 (1) TFEU

(ex Article 81 EC, ex Article 85 EC)

“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:

- (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.”

Article 101 (3) TFEU

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

[cooperation] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

Overview of Article 101 TFEU

- Prohibits anticompetitive cooperation
- Applies only to «undertakings»
- Applies only in so far as the cooperation affects trade between Member States
- Applies to cooperation
 - Agreements, decisions by associations of undertakings, concerted practices
 - Horizontal vs vertical cooperation
- Anticompetitive «object» / «effect»
- *De minimis*
- Article 101 (3) – efficiency defense
- Block Exemptions

Recap «undertaking»

- ECJ definition
 - “the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”
 - Case 41/90, Höfner and Elser v Macrotron, para 21
- Single economic entity doctrine
 - Entities within the same legal group form a single economic entity = one undertaking
 - Article 101 not applicable
 - «[t]he wording of Article [101] causes the prohibition to apply (...) to an agreement between several undertakings.» Joined cases 56 & 58/64, Consten & Grundig
 - Article 101 TFEU is «not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.» Case 30/87, Bodson

Single economic entity

- Requirement: control – the ability to exercise decisive influence of an undertaking (e.g. majority of voting rights)
- Is the entity autonomous or subject to control e.g. by a parent company?
- Case C-73/95, *Viho Europe v Commission*
 - «Parker and its *fully own subsidiaries* form a single economic unit within which the subsidiaries do not enjoy *real autonomy* in determining their course of action in the market, but *carry out the instructions* issued to them by the parent company *controlling them.*» (para 16)
- Sole/joint control
 - Joint control under the EUMR and attribution of liability
 - AG Kokott case C-440/11, *Gosselin*, para 32: «the concept of an undertaking and the imputation of responsibility under competition law are two sides of the same coin.»

Recap «effect on trade between Member States»

- Trade between Member States must be affected for Article 101 (and 102) to apply
- The jurisdictional limit to the prohibitions
 - Decides the borderline between TFEU and national competition rules
 - If trade is not affected, an agreement will be regulated by national competition law exclusively
- Case 56/65, STM
 - “It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it *may* have an influence, *direct or indirect, actual or potential*, on the pattern of trade between Member States”
- Commission Notice – Guidelines on the effect on trade concept in Articles 101 and 102

1. Introduction

2. Cooperation

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Cooperation

- Cooperation between independent undertakings
- The distinction between unilateral conduct (beyond the limits of Article 101 TFEU) and cooperation (potentially contrary to Article 101 TFEU)
- Three alternative forms
 - Decisions by associations of undertakings
 - Agreements
 - Concerted practices

Decisions by associations of undertakings

- Objective
 - The concept of decisions by associations of undertakings “seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article 85(1) [also] covers (...) institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.” AG Léger, Case C-109/99, Wouters, para 62
- “Association” –broad concept
 - “The concept of association of undertakings is not defined by the Treaty. As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general.” AG Léger, Case C-109/99, Wouters, para 61
 - E.g. trade associations, collecting societies, agricultural cooperatives, professional associations
 - E.g. Joined cases 209/78 etc, van Landewyck v Commission: Article 101 applicable to non-profit making associations

Decisions by associations of undertakings (cont.)

- Decisions
 - “[A] recommendation, even it has no binding effect, cannot escape Article [101 (1)] where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition (...)”
 - Joined cases 96-102, 104, 105, 108 and 110/82, IAZ v Commission, para 20
 - “[I]t is settled case-law that a measure may be categorised as a decision of an association of undertakings for the purposes of Article [101](1) EC even if it is not binding on the members concerned, at least to the extent that the members to whom the decision applies comply with its terms”.
 - Case T-325/01, Daimler Chrysler v Commission, para 210
- Medium for cartel activity or exchange of information

«Agreements»

- Broad concept: «joint intention»
 - “in order for there to be an agreement within the meaning of Article [101](1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way” Case T-41/96, Bayer v Commission, para 67
- Form irrelevant (oral, written, signed, unsigned, enforceable, “gentlemen’s agreements”)
 - “As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (...), without its having to constitute a valid and binding contract under national law (...).” Case T-41/96, Bayer v Commission, para 68

Agreements no longer in force

- Covered by Article 101 where the agreement continues to produce effects
 - “For Article 101 to apply to cases of agreements which are no longer in force it is sufficient that such agreements continue to produce effects after they have formally ceased to be in force.”
 - “An agreement is only regarded as continuing to produce its effects if from the behaviour of the persons concerned there may be inferred the existence of elements or concerted practice and of coordination producing the same result as that envisaged by the agreement.”
 - Case 51/75, EMI vs CBS
- Agreement=joint intention

The distinction between «agreement» and unilateral conduct

- Example: Case T-41/96, Bayer v Commission
 - Bayer France and Bayer Spain had adopted a new supply policy to make it more difficult for its wholesalers to engage in exports to the UK
- The Commission found that Bayer France and Bayer Spain had entered into agreements contrary to Article 101
- Annulled by the General Court (subsequently upheld by ECJ)
 - «A distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent.» para 71
 - “the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer (...) in reality forms the basis of an agreement between undertakings within the meaning of Article [101](1) of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer”. (para 72)

The distinction between «agreement» and unilateral conduct (cont.)

- Example: Case C-277/87, Sandoz v Commission
 - The systematic dispatching by a supplier to his customers of invoices bearing the words "Export prohibited" constitutes an agreement prohibited by Article [101] (1) of the Treaty, and not unilateral conduct, when it forms part of a set of continuous business relations governed by a general agreement drawn up in advance, based on the consent of the supplier to the establishment of business relations with each customer prior to any delivery and the tacit acceptance by the customers of the conduct adopted by the supplier in their regard, which is attested by renewed orders placed without protest on the same conditions .

The relationship between “agreement” and “concerted practice”

- Objective: broaden the scope of Article 101 beyond “agreements”
 - “The object with the alternative “concerted practice” is “to bring within the prohibition (...) a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.” Case 48/69, ICI v Commission, para 64
- No need for clear distinction
 - Not necessary to “require the Commission to categorise either as an agreement or as a concerted practice each form of conduct found but was right to hold that the Commission had been entitled to characterise some of those forms of conduct as principally ‘agreements’ and others as ‘concerted practices’. Case C-49/92, Anic, para 132
 - “in the case of an infringement involving different forms of conduct, these may meet different definitions whilst being caught by the same provision and being all equally prohibited. “Case C-49/92, Anic, para 133

«Concerted practice»

- Undertakings 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 173
- A form of «mental consensus»?
 - «[A] form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, *knowingly substitutes practical cooperation between them for the risks of competition.*» Case 48/69, ICI, para 64

Concerted practice (cont.)

- Contact, conduct and causation
 - Contact: “[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, it 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.” Joined Cases 40/73 etc, Suiker Unie, para 174
- 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

Concerted practice (cont.)

- Contact which reduces uncertainty about competitor's strategy creates a (rebuttable) presumption of conduct and causation
 - “subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market.” Case C-199/92, Hüls, para 162
- Also in case of only a single meeting
 - “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.” Case C-8/08, T-Mobile, 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
- 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.”

	B (high price)	B (low price)
A (high price)	3,3	0,4
A (low price)	4,0	1,1

- Article 101
 - «concerted practice» = contact
- Article 102
 - «collective dominance»
- EUMR
 - SIEC – incl. «collective dominance»
 - “A merger in a concentrated market may significantly impede effective competition, through the creation or the strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behaviour in this way and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article [101].”
(Horizontal merger guidelines)

Collective dominance: three elements

- The entities must be independent economic entities
 - If they constitute a single economic unit they are regarded as one undertaking
- The undertakings must be united through “economic links”
 - The links should unite the undertakings in such a way that they adopt the same conduct on the market
 - The Commission: The undertakings in question must have the same position vis-à-vis their customers and competitors as a single company with a dominant position would have
 - There must be no effective competition between the companies
- By virtue of the economic links the undertakings must together hold a dominant position

Economic/structural «links»

- Tacit collusion in a tight oligopoly
- Case T-342/99, Airtours (EUMR decision, but the same applies to Article 102)
 - A collective dominant position may arise where “each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling above prices, without having to enter into an agreement or resort to a concerted practice within the meaning of [Article 101]” (para 61)
- Factors
 - Market structure/characteristics
 - Transparency
 - Retaliation

1. Introduction

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Starting points

- “the prevention, restriction or distortion of competition”
 - Used and applied interchangeably
- Objectives
 - The requirement that “competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.” Case 26/76, Metro v Commission, para 20
 - Workable/effective competition vs market integration?
- European Commission
 - “Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.” Guidelines Article 101 (3), para 25

«object or effect»

- Alternative conditions
 - “the anti-competitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article [101](1) EC.” Case C-501/06, GlaxoSmithKline v Commission, para 55
- Analytical structure
 - First: does the agreement have an anti-competitive “object”? If no;
 - Second: does the agreement have anti-competitive “effects”?
- “It is (...) apparent from the case-law that it is not necessary to examine the effects of an agreement once its anti-competitive object has been established.”
 - Case C-501/06, GlaxoSmithKline v Commission, para 55

Restrictions by «object»

- By “nature”/ “experience” restrictive of competition
 - “certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”. Case C-8/08, T-Mobile Netherlands, para 29
 - “the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition ‘by object’ is the finding that such coordination reveals in itself a sufficient degree of harm to competition.” Case C-67/13, CB v Commission, para 57
 - “restrictions which (...) have such a high potential of negative effects on competition that it is unnecessary (...) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market”. Commission guidelines Article 101(3), para 21

Restrictions by «object» (cont.)

- Factors/methodology
 - ”in order to assess the anti-competitive nature of an agreement, regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part”. Case C-501/06, GlaxoSmithKline v Commission, para 58
 - “economic and legal context” – rebut a prima facie finding of “object”?
- Intent not required
 - “although the parties’ intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking that aspect into account”. Case C-501/06, GlaxoSmithKline v Commission, para 58
- “obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets”
 - Joined cases T-374/94 etc, European Night Services and others v Commission, para 136

Restrictions by «effect»

- The competitive consequences of the cooperation
 - “the consequences of the agreement should (...) be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been [restricted] to an appreciable extent.” Case 56/65, STM, p. 249
- Factors/methodology
 - “account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned” Joined cases T-374/94 etc, European Night Services and others v Commission, para 136

Restrictions by «effect» (cont.)

- Horizontal effects: Inter partes & on the relevant market
- Case 23/67, Brasserie de Haecht, p. 415
 - “It would be pointless to consider an [agreement] by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate (...). (...) an agreement cannot be examined in isolation from the above context, that is from the factual or legal circumstances causing it to prevent, restrict or distort competition.”
- Commission’s Horizontal guidelines
 - For an agreement to have restrictive effects on competition (...) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation.
 - Restrictive effects on competition within the relevant market are likely to occur where it can be expected (...) that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power.

Restrictions by «effect» (cont.)

- Actual & potential competitors
 - Two companies are treated as actual competitors if they are active on the same relevant market.
 - A company is treated as a potential competitor if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the company, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.
- Causation between the agreement and the anti-competitive effects - counterfactual
 - “The competition must be understood within the actual context in which it would occur in the absence of the agreement.” Case 56/65, STM, p. 250
 - “The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.” Case T-328/03, O2 v Commission, para 68

Appreciability – *de minimis*

- «[A]n agreement falls outside the prohibition in [Article 101(1)] when it only has an insignificant effect on the market of the products in question.» Case 5/69, *Völk v Vervaecke*, para 7
- «Traditional» view: applicable to both restrictions by «object» and «effect»
 - “an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article [101](1).” Case 5/69, *Völk v Vervaecke*, para 7
- Case C-226/11, *Expedia* (13 December 2012)
 - “an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.” (para 37)

Appreciability – *de minimis* (cont.)

- Commission's *de minimis* notice
 - Agreements between competitors: below 10 % market share
 - Agreements between non-competitors: below 15 % market share
 - Does not apply to “object” restrictions

Ancillary restraints

- Ancillary restrictions fall outside Article 101 (1) TFEU
- “[T]he concept of an ‘ancillary restriction’ covers any restriction which is directly related and necessary to the implementation of a main operation”. Case T-112/99, para 104
 - Subordinate to the main pro-competitive operation
 - Necessity/proportionality
- Example
 - Non-compete clauses imposed on the seller of an undertaking
 - “such clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose.” Case 42/84, Remia v Commission, para 20
- Commission Notice on restrictions directly related and necessary to concentrations

1. Introduction
2. Cooperation
3. Restriction of competition
4. **Article 101 (3)**

Article 101 (3) TFEU

- Allows efficiency gains to be weighed against the negative effects of reduced competition
- Four cumulative criteria
- Article 101 (1) and 101(3)
 - Article 101(1) - negative effects
 - Article 101(3) - positive effects + balancing
- Burden of proof, Article 2, Regulation 1/2003
 - “In any national or Community proceedings for the application of Articles [101] and [102] of the Treaty, the burden of proving an infringement of Article [101](1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement.
 - The undertaking or association of undertakings claiming the benefit of Article [101](3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”

Relationship between Article 101 (1) and 101(3) TFEU

- Two-step analysis
 - “The first step is to assess whether an agreement between undertakings (...) has an anti-competitive object or actual or potential anti-competitive effects.
 - The second step, which only becomes relevant when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects. The balancing (...) is conducted exclusively within the framework laid down by Article [101](3).” Commission guidelines Article 101(3), para 11
- Article 101 (3) applicable to both restrictions by “object” and by “effect”
 - «Any agreement which restricts competition, whether by its effects or by its object, may in principle benefit from an exemption» Case T-168/01, GlaxoSmithKline v Commission, see also Case T-17/93, Matra Hachette v Commission
- Commission’s policy
 - Restrictions by “object” unlikely to fulfil the conditions of Article 101(3)
 - Factually correct, provided the notion of “object” is not interpreted and applied too broadly

The two positive conditions

- The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress
 - Efficiencies - all objective economic efficiencies
 - Cost efficiencies: economies of scale and scope
 - Qualitative efficiencies: quality improvements, technical improvements
- Consumers must receive a fair share of the resulting benefits
 - "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers
 - "fair share" implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition
 - the net effect of the agreement must at least be neutral

The two negative conditions

- The restrictions must be indispensable to the attainment of these objectives
 - efficiencies must be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving them
 - a restriction may be indispensable only for a certain period of time, in which case the exception of Article 101 (3) only applies during that period
- The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question
 - Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements
 - Market power threshold: eliminating competition vs dominance?