

# EU Competition Law

*Introduction to Article 101*

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# ARTICLE 101(1) – THE ELEMENTS

- The concept of an “undertaking”
- Forms of co-operation caught
  - The meaning of agreement
  - Decisions by associations of undertakings
  - Concerted practices
- “Object or effect the prevention, restriction or distortion of competition”
- Effect on trade between member states
- De minimis

# THE CONCEPT OF AN “UNDERTAKING” – SOME BASIC POINTS

- Article 101 (and 102) applies only to “undertakings”
- ECJs definition of an undertaking:
  - “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
  - It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity
    - Case C-180/98 etc para 75
  - Procurement ancillary to a non-economic activity is not economic
    - Case T-319/99 FENIN
  - Exercise of the powers of a public authority not economic activity

# SINGLE ECONOMIC UNIT DOCTRINE

- Two or more separate legal undertakings can be treated as one undertaking
  - 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
  - “Parker and its subsidiaries thus 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”.
    - Case C-73/95P Viho v Commission
- Agreements between two undertakings within a single economic unit not regarded as an agreement “between” undertakings
  - Escapes the prohibition in article 101(1)

- **The rationale:**

- No freedom to take decisions regarding the market conduct
  - Regarded as unilateral conduct
  - May be caught by article 102 if the undertaking has a dominant market position
- Internal allocation of functions

- **The other side of the coin:**

- If a subsidiary engages in anti competitive agreements the mother company will also be regarded as part of the agreement
- Parent company may be held liable for an infringement of the competition rules by a subsidiary, see for example C-97/08P Akzo Nobel NV v Commission
  - Presumption that the parent company has exercised control
  - May be rebutted if sufficient evidence is adduced that the subsidiary act independently on the market

## • The test of control

- If a parent company owns more than 50% of the shares in a subsidiary interdependency is presumed
- Minority share holdings may also give control if combined with specific rights attached to them
- One large shareholder and many small
- Joint control (50/50)
  - Jointly controlled companies must belong to a single group of companies to be regarded as part of one economic unit

## • Agents

## • The State regarded as one economic unit?

# THE CONCEPT OF AN “AGREEMENT”

- “Agreement” → widely construed

- It is sufficient if the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way
  - Alignment of the competition parameters available to them

- “joint intention” → a legally binding agreement not necessary

- The form of no importance (oral, signed, unsigned)
- “gentlemen’s agreements”
- The agreement does not have to be exhaustive
  - It is enough just to set the broad framework for the undertakings market conduct

- The engagement of the parties in the agreement
  - It is enough to be partly engaged in the collaboration
    - Breach of contract regarding parts of the agreement
  - Passive “members”
  - An excuse if an undertaking has been “forced” into a cartel?
- Collaboration through the establishment of a company (joint ventures)
- The distinction between “agreement” and unilateral conduct
  - Joined Cases C-2/01 P and C-3/01 P, *BAI v Bayer and Commission*
    - Consensus requires and intention from the supplier to impose a contract obligation (an export ban), and an intention from the distributors to adhere to the contract obligation



## • The situation when the agreement is terminated

- ECJ: It is sufficient if such agreements continue to produce their effects after they have formally ceased to be in force
  - Case 51/75, EMI Records Limited v CBS United Kingdom Limited
- It is the effects of the agreement on the parties conduct that is decisive for the application of art 101(1)

# “DECISIONS OF UNDERTAKINGS”

- Collusion can take place through the medium of an association: Directly covered by art 101(1)
  - Makes it possible to hold associations directly liable
- Association
  - widely defined
- Decision
  - every statement made with the object or effect of influencing the commercial behaviour of the association’s members
  - Does not have to be binding (e g recommendations)

# “CONCERTED PRACTICES”

- A form of co-ordination where undertakings, without concluding any sort of agreement or establishing a plan of action, knowingly substitute practical co-operation between them for the risks of competition
  - This criteria avoids that situations where companies collaborate without any kind of agreement but only on the basis of a common understanding falls outside article 101(1)
- It is contrary to the rules on competition for a producer to co-operate with his competitors, in any way whatsoever, in order to determine a co-operated way of action or to ensure its success by prior elimination of all uncertainty as to each others conduct regarding the essential elements of that action
  - ECJ, case 48/69, ICI v Commission

# PROVING CONCERTED PRACTICES

- Direct or indirect contact
- Meeting of minds or some kind of consensus
  - Exchange of information
  - Unilateral disclosure
  - Public announcements
- Competition is knowingly substituted with cooperation
  - Uncertainty eliminated
  - Subsequent behaviour in the market
- Causality

## CAN A CONCERTED PRACTICE BE INFERRED FROM CIRCUMSTANTIAL EVIDENCE ALONE?

- A question of the use of economic evidence in competition cases
- Parallel market behaviour alone in itself not a concerted practice
- BUT: It may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market having regard to the nature of the products, the size and numbers of undertakings, and the volume of the said market power
  - ECJ, case 48/69, ICI v Commission
- Oligopoly markets and economic evidence
  - Joint dominance

# THE DISTINCTION BETWEEN “AGREEMENT” AND “CONCERTED PRACTICES”

- Overlapping concepts
  - Complex cartels → and/or
- No precise distinction
  - And no use for a precise distinction
- “Concerted practice” important mainly where the Commission or the Courts is forced to rely upon circumstantial evidence alone

## “OBJECT OR EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION”

- The term “prevention, restriction and distortion”
  - Used interchangeably
- Economic analysis and not a strict interpretation of the words that is decisive
- Integration and competition
- Three cumulative requirements:
  - An agreement must have as its object or effect
  - to restrict competition
  - to an appreciable extent

# ECJS CONCEPT OF COMPETITION

- ECJ has not relied upon any particular competition "ideology"
  - But economic arguments/theories/models decisive for the application of the competition rules in individual cases
    - Article 101
    - An economic approach to Article 102
- Definition in *Metro* (case 26/76)
  - The requirements contained in Articles 3 and [81] of the EEC Treaty 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 the domestic market. In accordance with this requirement the nature and the intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.



- The ECJs concept of "workable competition" related to what competition is intended to achieve in the Community context

- Not one of the concepts of "workable competition" found in economic theory
  - But influenced by the theory

- Concept of competition in the Merger Regulation compared:

- Prohibits concentrations creating or strengthening a dominant position "significantly impede effective competition"
  - Article 2(2) and (3)

# RESTRICTION BY OBJECT

- Restrictions which “by their very nature” or “of themselves” constitute a restriction of competition
- To decide whether an agreement restricts competition by object
  - “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 part”
    - C-501/06P GSK Services v Commission
- Must be analysed on the background of:
  - The terms of the agreement
  - The legal and economic context in which it was concluded and
  - The conduct of the parties

- Sufficient that the natural tendency of an agreement is to restrict competition

- Agreements which by experience restrict competition

- Typically agreements which are entered into solely to restrict competition that have no beneficial effects

- Not dependent upon the subjective intent of the parties

- Their aim not decisive

- An anti-competitive aim not enough if the agreement is not anti-competitive in itself
    - But may be taken into account. Case C8/07 T-Mobile

- Laudable aims irrelevant

- The means decisive

## • Horizontal agreements and “restriction by object”

- Price fixing
- Market sharing
- Information exchange
- To limit output, including the removal of excess capacity
  - Crisis cartels, C-209/07 Competition Authority v BIDS
- To limit sales
- Joint selling
- Collective exclusive dealing

- Vertical agreements and “restriction by object”

- Agreements which have as their obvious consequence

- Impeding parallel trade

- Integration

- Enforcing resale price maintenance

- Other cases: ECJ unlikely to find vertical agreements restrictive by object

- Exclusive rights

- Will in most circumstances have an effect on competition

- An assumption for anti-competitiveness and thus restrictive by object?

- ECJ: Not considered as being “of its nature” restrictive of competition (STM v Maschinenbau Ulm Case 56/65)

- When anti-competitive object is shown is there no need to take account of the concrete effect of an agreement
  - Sufficient that the agreement has the potential to have a negative impact on competition
    - Case C8/07 T-Mobile
- No analysis regarding the effect in the market needed
  - Negative effects
  - Positive effects may be examined under art 101(3)

## RESTRICTION BY OBJECT AND APPRECIABILITY

- Is absolutely no investigation regarding “effects” necessary when an agreement has an anti-competitive object?
- Or: Are agreements that have anti-competitive objects caught by art 101(1) even if their effect on competition is not “appreciable”?

- ECJ: Must analyse the actual or potential effect of the agreement involved so as to rule out the possibility that it may only have an “insignificant effect” on the market or trade (Völk Vervaecke, case 5/69)
- Another view: Once an agreement is caught by object, appreciability only applies to the effect on trade
- ECJ has later reaffirmed its position
  - “Even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 85 if it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question”
    - case C-306-/96, Javico International v Yves Saint Laurent Parfums



# RESTRICTION BY EFFECT

- If an agreement does not have the object of restricting competition:
  - The consequence of the agreement should then 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 prevented or restricted or distorted to an appreciable extent.
  - The competition in question must be understood within the actual context in which it would occur in the absence of the agreement.
    - ECJ, STM v Maschinenbau Ulm, case 56/65

# ”EFFECT”

- ”restriction of competition”
  - No definition
- The need to establish a countefactual
  - What would be the situation in absence of the agreement?
- Actual and potential competition
- Restriction of competition inter partes vs restriction of competition in the market
- The Court of Justice interprets Article 101(1) in a flexible manner
  - Rejects a formal interpretation (Consten/Grundig v Commission)
  - Agreements or concerted practices must be assessed in their market context

## THE EXAMPLES IN ARTICLE 81(1) LITRA A-E

- (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.

## THE ANALYSIS – THE VIEW OF THE ECJ

- It would be pointless to consider an agreement, decision or practice by reason of its effect if those effects were to be taken distinct from the market in which they are seen and operate... Thus in order to examine whether it is caught by Article [101(1)] an agreement cannot be examined in isolation from ... the factual and legal circumstances causing it to prevent, restrict or distort competition

– Brasserie de Haecht v Wilkin

- Limiting the commercial freedom of the parties neither a necessary nor a sufficient condition for article 101(1) to apply
  - The analysis can in other words not limit itself to the consequences of an agreement on the freedom inter partes
- But a suitable starting point for the analysis

# CFI VIEW ON THE ANALYSIS

- In assessing an agreement under Article [101(1)] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned ... unless it is an agreement containing obvious restrictions of competition such as price fixing, market sharing or the control of outlets ... In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article [101(3)]

– joined cases s T-374, 384,388/94, European Night Services

- If the agreement restricts competition by object, pro-competitive effects can be taken into account only under article 101(3)
- In other cases, both pro- and anti-competitive effects can be taken into account under Article 101(1)
  - But which pro-competitive effects?
  - Is the division between Article 101(1) and (3) eliminated?
  - Only effects on the competitive process relevant under Article 101(1)
    - Not gains mentioned in Article 101(3)

## BROAD ECONOMIC ASSESSMENT UNDER ARTICLE 101(1)

- Only the effects on competition or integration that is relevant under Article 101(1)
  - Other economic effects relevant under article 101(3)
  - Other non-economic effects
- Focus on allocative efficiency
  - Efficiency gains in production or distribution not relevant
    - Taken into account under Article 101(3)
  - Dynamic efficiency
    - Taken into account under Article 101(3)



## • Competition assessment: Rule of reason?

- According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article 85(1) of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that article. It should, however, be observed, first of all, that contrary to the applicants' assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful
- Article 85 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed
  - T-112/99 Metropole Television v Commission

# A TWO STEP ANALYSIS

- Is the freedom of the parties restricted?
  - The restriction defined
    - Which competition parameters are restricted
- Is the freedom of third parties restricted?
  - The restriction viewed in its market context
    - Economic assessment
    - New economic approach

## ANCILLARY RESTRAINTS OR OBJECTIVE NECESSITY

- Restrictions on rivalry falling outside Article 101(1) if “ancillary restraints”
- Restrictions on the conduct of the parties essential or ancillary to the operation of a pro-competitive agreement found not to restrict competition
  - Remia v Commission, non-compete clauses
  - Pronuptia, franchising
    - Provisions which are strictly necessary to ensure that the know-how and assistance provided by the franchisor do not benefit competitors do not constitute restrictions of competition for the purpose of Article [101(1)]

# ANCILLARY RESTRAINTS - DEFINITION

- Directly related to the agreement
- Objectively necessary for its existence
  - For the attainment of the objectives of the agreement
- Must remain subordinate in importance to the main object of the agreement
  
- The ancillary restraints doctrine must be used with caution
  - Depending upon the facts in the individual case
  - Will not automatically apply to all restraints

# APPRECIABLE EFFECT

- If an agreement does not affect competition “to an appreciable extent” it will not be caught by Article 101(1)
  - Will fall outside the prohibition (legal exception)
- The Commissions notice on agreements of minor importance
  - Horizontal agreements: Where the aggregate market share of the parties to an agreement does not exceed 10%
  - Vertical agreements: Where the aggregate market share of the parties to an agreement does not exceed 15%
  - Does not apply to “hard core restrictions”

## EFFECT ON TRADE BETWEEN MEMBER STATES

- Trade between Member States must be affected for Article 101 and 102 to apply
- Sets out the jurisdictional limit to the prohibitions in Article 101 and 102
  - Decides the borderline between EC-treaty and national competition rules
  - If trade is not affected an agreement will be regulated by national competition law exclusively
    - Parallel application above the limit

- “may affect trade” must be interpreted on the background of the objectives in the EC-Treaty
- The starting point
  - 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

# “TRADE BETWEEN MEMBER STATES”

- Flow of trade
- Between Member states
  - Undertakings from different Member States involved
  - Export and import between Member States
  - Agreements covering the whole territory of a Member State
  - Agreement covering EU
    - “Per se rule”
  - Trade with third countries
    - Import to EU
    - Export from EU
  - Changes in Market Structure



# “MAY AFFECT”

- Direct or indirect effect
- Actual or potential
- Negative effects necessary?
  - “The case that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may “affect” such trade”
    - Case 56 & 58/64, Consten & Grundig v Commission
- Appreciable effect on trade

# A MORE FUNCTIONAL APPROACH?

- Time for a new jurisdictional test?
  - A unified multinational market may require a new interpretation that could match the new situation
    - Advocate General Trabucchi in *Papiers Peints*, case 73/74
- Focus on the functioning of the internal market rather on cross border effects
- Only restrictions with community dimension to fall under Article 101 and 102?

## ARTICLE 101(3)

- Allows efficiency gains to be weighed against allocative efficiency losses
- All of the four criteria must be satisfied
  - Economic and non economic criteria
- Article 101(3) and economics
  - New Commission guidelines on the application of Article 101(3)

## ARTICLE 101 – AN ECONOMIC INTERPRETATION

- Negative effects – allocative efficiency
  - The prohibition rule of article 101(1)
- Weighed against positive effects – economies of scale etc.
  - The exception rule of article 101(3)
- When positive effects outweigh negative effects article 101 will not apply

# THE TWO POSITIVE CONDITIONS

- Improvement in production or distribution
  - Efficiency gains, or
- Promotion of technical or economic progress
  - Dynamic efficiency
- Allowing consumers a fair share of the resulting benefit
  - Consumer welfare standard
    - Not total welfare standard as in the US

# THE TWO NEGATIVE CONDITIONS

- Indispensable restriction
  - Must be essential to achieve the benefits of an agreement
  - Proportionality
- Competition must not be substantially eliminated
  - The losses will then normally outweigh the gains