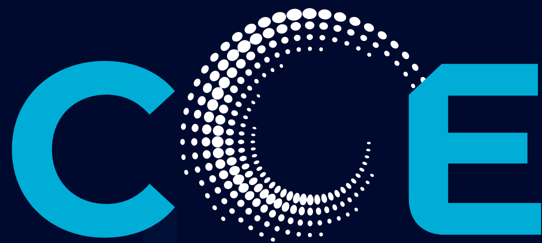

EU competition law in a nutshell

Dubravka Akšamović
Lidija Šimunović
Aleksandar Erceg, Eds.

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EU COMPETITION LAW IN A NUTSHELL

Editors:
Dubravka Akšamović
Lidija Šimunović
Aleksandar Erceg

Osijek, 2025.

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LIST OF ABBREVIATIONS

e.g.	Example
ECMR	EC Merger Regulation
ECN	European Competition Network
ECtHR	European Court on Human Rights
EU Commission	European Commission
EU Court	Court of Justice of the European Union
EU	European Union
GDP	Gross Domestic Product
HHI	Herfindahl-Hirschman Index
Ibid.	Ibidem
IPRs	Intellectual Property Rights
JVs	Joint Ventures
Loc. cit.	locus citatum
NCA	National competition authorities
OJ	Official Journal
R&D agreements	Research and Development
SBER	Specialization Block Exemption Regulation
SGEI	Service of general economic interest
SIEC test	Substantial impede effective competition test
TEU	Treaty on European Union
TTA	Technology Transfer Agreements
TTBER	Technology Transfer Block Exemption Regulation
VBER	Vertical Block Exemption Regulation

EDITORIAL

Welcome to this teaching book on EU Competition Law. This book is designed to be your essential guide as you navigate the complexities of this dynamic legal domain.

Competition Law plays a pivotal role in regulating market behaviour, preventing anti-competitive practices, and promoting a level playing field for businesses. As future practitioners, policymakers, or scholars, your understanding of these principles will contribute to creating equitable and competitive marketplaces that benefit consumers and the economy alike.

This book provides a structured approach to mastering the core concepts of Competition Law, including foundational theories, legal frameworks, key cases, and enforcement mechanisms. It also integrates real-world examples and practical exercises to bridge the gap between theory and application.

We encourage you to explore this subject with curiosity and a critical mindset. As you delve into the intricacies of market structures, monopolies, cartels, and regulatory frameworks, remember the broader objective: fostering healthy competition that drives innovation and protects consumer welfare.

We hope this book serves as a reliable companion on your academic journey and inspires you to contribute meaningfully to this vital area of law.

Editors

1. EU COMPETITION LAW[1]

1.1. Introduction

1.1.1. Goals of the EU competition law

The rules of competition law seek to prevent and sanction the behaviour of undertakings that prevent, restrict, or distort free market competition. The rules serve to ensure that all competitors have equal conditions in their efforts to achieve the best possible results and overcome their competitors. If there were no such rules, there would be a danger that some undertakings would use means and methods that would not be fair in relation to their competitors and would prevent equal conditions of competition for all.

Free market competition is a competition of undertakings on the market in which entrepreneurial freedoms, freedom of contract, and autonomy of will are respected, and the limits of these freedoms and autonomy are set so that freedoms are not abused.

However, it would be wrong to conclude that thus these rules are determined primarily for the benefit of undertakings against those undertakings which attempt to prevent, restrict, or distort competition. The ultimate goal of competition law is the protection of consumers.

In the European Union, the additional purpose of the rules of competition law is to maintain and functioning of the internal market. The internal market is achieved primarily by the free movement rules (free movement of workers, goods, capital, and right of establishment and freedom to provide services). However, these rules would be obsolete without the rules that can prevent the undertakings from jeopardizing the maintenance of the internal market. That is the reason why Article 3 TEU gives the Union an exclusive competence in the area of establishing competition rules necessary for the functioning of the internal market.

To put into the wider context, achieving and maintaining an internal market, and functioning of the internal market also serves the consumers. Thus, this special role of competition law in the EU does not change its ultimate goal, which is the protection of consumers. Namely, the Union aims to promote peace, its values, and the well-being of its peoples, and for that purpose, the Union shall

[1] **Sinisa Petrović**, Full professor, Faculty of Law, University of Zagreb; **Vlatka Butorac Malnar**, Full professor, Faculty of Law, University of Rijeka.

establish an internal market (Article 3 paras 1 and 3 of the TEU). Consequently, it is logical to give the Union exclusive competence in the area of competition rules necessary for the functioning of the internal market which eventually serve the consumers. To emphasize the importance of competition for the internal market, Protocol 27 states that the internal market as set out in Article 3 of the TEU includes a system ensuring that competition is not distorted, and to this end, empowers the Union and its institutions that are involved in the legislative procedures (Council, Commission and European Parliament) to take action under the provisions of the Treaties.

Seeing competition law as crucial for the achievement and maintenance of the internal market is the reason why rules of competition law are so important for the EU and its Member States. That is the motive for the EU's insistence on early implementation of national competition law which is consistent and harmonized with the European competition law even before a state acceded to the EU. That requirement from the EU to the prospective Member States includes not only harmonization of the substantive law but also the need to ensure its effective enforcement by the competent national authorities.

1.1.2. Competition law and competition policy

Competition law is a set of rules governing competition. On the other hand, competition policy consists of all measures and rules of conduct aimed at free competition. The centre of the competition policy is competition law. In addition to the rules of competition law, the competition policy also embraces the institutional framework in the form of the creation of bodies capable of implementing the competition rules, as well as all the measures that should ensure adequate implementation of competition law. Competition rules would be vague and just black-letter laws if they are not properly implemented and enforced. That is why the implementation measures include not only the rules of competition law as substantive law (dedicated to the merits) but also all other rules of the legal system necessary for the proper application of substantive law. Such rules are, for example, the rules of procedure before the special bodies entrusted with the task of implementing competition law, as well as the rules of procedure before the courts that exercise control over the decisions of these competition authorities. In addition, extremely important are rules that ensure the effective implementation of sanctions for non-compliance with the rules of competition law. Finally, part of the competition policy is also all rules, methods, procedures, and functioning of the relevant competition authorities. The aim is to ensure their full institutional independence and financial viability. They have to be equipped with sufficient

personal and financial resources, since it is considered crucial that competition authorities have all the necessary means to investigate cases, collect evidence, and issue sanctions, without external influence, notably political influence.

The European Commission is an institution entrusted with the implementation and enforcement of competition law on the EU level. Within the Commission, the Directorate General for Competition plays a crucial role, even though decisions in competition cases are made by the College of Commissioners. Decisions of the Commission may be scrutinized by the European Court of Justice, the General Court in the first instance, and subsequently by the Court of Justice as the court of second instance in appeals procedures. Besides that, the Court of Justice may hear cases in connection with European competition law based on the general rules on references for preliminary rulings. Hence, The Court of Justice has a role in the uniform application and prevention of divergent interpretations of European competition law.

At the same time, every EU member state is required by EU law to have its national competition authority (NCA). Each national competition authority has to be an independent body fully empowered with the, inter alia, application and enforcement of the European competition law. The enforcement powers of the NCAs have been notably developed by Regulation 1/2003[2] as one of the cornerstone sources of European competition law and its application by the NCAs. However, NCAs apply also their respective national competition laws. In principle, it may be stated that these national competition laws apply to situations that do not have a cross-border effect and effect on trade between Member States. In such cases, European competition law preserves the internal market.

The European Commission and national competition authorities of the Member States cooperate with each other through the European Competition Network (ECN). It was established at the time when NCA was entrusted with the application of Articles 101 and 102 in their respective states. Before that, the Commission had a monopoly in the application thereof, and over enforcement of the European competition law.[3] Its creation aimed to ensure consistent and harmonized application of the EU competition law in the Member States, since every NCA is authorized and required to implement European competition rules. Through

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ L 1, 4.1.2003, p. 1–25.

[3] The original enforcement structure was regulated by the EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty OJ 13, 21/02/1962, p. 204–211. For a more detailed account on the Regulation 17 see Barry J. Rodger and Angus Macculloch, Competition Law and Policy in the EU and UK. 6th ed. (Routledge, 2021) Reprint, 41.

the ECN, NCAs inform each other on the cases they deal with, on the proposed decisions they would make, and make comments on these decisions. In addition, they assist each other in investigations and exchanging evidence, notably in cases against undertakings that are involved in cross-border transactions. Without this kind of cooperation, there would be a threat of non-consistent application of EU competition law, which would eventually lead to legal insecurity for the addressees of the competition rules and might jeopardize the maintenance of the internal market. Thus, all NCA, along with the Commission, jointly create and apply the best practices in dealing with competition cases, implementation of the EU competition law, and enforcement of the competition policy.

1.1.3. What makes the European competition law

Even though there are valid arguments that would speak against such an unconditional division, it could be said that the competition law (in the broadest sense) is comprised of three main areas:

- competition law stricto sensu;
- liberalization of services of general economic interest (often network industries)
- state aids.

The rules on state aid have unique features and in their current form exist only in the EU and the Member States. One could even say that they form a special part of competition law.

In addition, due to the recent development of the EU rules, a new area that in the broadest sense does make part of competition law is foreign subsidies. Their addresses are foreign (non-EU) undertakings that are not subject to state aid rules, and their aim is thus to prevent unequal treatment (unfavourable treatment) of the EU undertakings vis-à-vis their non-EU counterparts. Namely, while EU companies are subject to state aid rules, non-EU companies are not. Thus, the latter might receive state aids from other countries, unlike EU companies. To overcome this problem from the point of view of competition law, the EU has adopted Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market[4] and the Implementing Regulation (EU) 2023/1441.[5]

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[4] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market OJ L 330, 23.12.2022, p. 1–45.

[5] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU)

Liberalization is especially important for the services of general economic interest. Traditionally, in each state, there was only one undertaking, owned by the state, which was responsible for services of general economic interest, such as energy services, telecommunications, transport, etc. There was no competition in performing these activities, and these public undertakings had a legal monopoly. The political justification for this anti-competitive approach was the view that keeping the legal monopolies of public undertakings was essential to ensure the provision of these services, which is in the interest of all citizens.

The situation regarding these activities is changing drastically with the general liberalization of the market, especially in the EU, and the development of the internal market, being at the forefront of the economic integration within the EU. The internal market may not be achieved if there are legal obstacles that enable closing the market for certain services within the national political borders of the Member States. Consequently, it was indispensable to gradually establish the internal market also for the provision of these services. In this respect, let us be reminded that competition law is necessary for the functioning of the internal market, or, in other words, that the internal market may be preserved only through the application of the EU competition rules.

Often, liberalization goes parallelly with privatization, although not necessarily. However, it is a fact that many areas of business activities that have been reserved to the state, have become open to private investments. This occurs especially due to technological development, and the reduction of the cost price of providing certain services of general economic interest. The cheaper performance of activities immediately becomes more attractive to private investors who perceive the previously exclusive domain of the state as an area where they too can achieve positive economic effects.

The liberalization of the market required additional regulation of the services of general economic interest, to ensure that they would continue to be of a certain quality in the interest of consumers, and performed permanently and without interruptions, even if not highly profitable. This ex-ante regulation precedes the application of competition rules, and it is considered essential to the provision of services of general economic interest. Regulatory rules provide for conditions that have to be fulfilled by undertakings engaged in services of general economic interest, as well as conditions and procedures for how they are performed.

This is one of the reasons for the establishment of independent regulators, as autonomous and independent bodies with public powers established to regulate

2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, C/2023/4622, OJ L 177, 12.7.2023, p. 1–44.

and supervise the performance of services of general economic interest. This is particularly important under the presumption that some of the services of general economic interest are natural monopolies.

Article 106 (2) of the TFEU states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. At the same time, the development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

In essence, this provision requires the application of competition rules also to services of general economic interest if this application does not prevent the undertakings from the provision of these services.

From the institutional point of view, this also means there for services of general economic interest there might be a parallel existence of two independent bodies, one competent for the application of competition rules (a national competition authority), and the other which is responsible for the ex-ante regulation. Their respective areas of competence are not in conflict, and they should work in cooperation to ensure the provision of these services and simultaneously the application of competition rules.

1.1.4. Competition law stricto sensu

Competition law (in the narrower sense) regulates three forms of prevention, distortion, or restriction of competition in the internal market. These are:

- agreements
- abuse of a dominant position
- mergers (concentrations).

Prohibited are agreements between undertakings, decisions by associations of undertakings, and any concerted practices by undertakings which may affect trade between the Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market (Article 101 (1)). Agreements that are prohibited can have negative effects on competition with other undertakings and on consumers.

In the case of abuse of a dominant position, one undertaking has such market power that it can behave to a significant extent in the relevant market independently of its competitors, consumers, customers, or suppliers, and that it uses this market power in such a way that its behaviour distorts competition.

Market power is primarily determined by the market share of the undertaking concerned in the relevant market. However, in determining the market power of an undertaking, and subsequently its dominant position, other factors should be considered as well. As a rule, a dominant position is held and abused by one undertaking, but it is also possible for several undertakings together to have such a dominant position and abuse it.

Mergers are various forms of how two or more legally independent undertakings concentrate their economic powers and create a single economic unit. Thereby, the undertakings concerned do not necessarily lose their legal independence.

Competition law does not prevent the concentration of undertakings as such, but only if the concentration significantly distorts market competition, especially by creating a new or strengthening an existing dominant position on the market. Concentrations can be vertical, horizontal, or conglomerate. Horizontal concentrations are those that arise between undertakings that sell the same or substitute products or provide the same services in the same market, i.e. undertakings that are competitors. Vertical concentrations occur between undertakings operating at different levels of production or distribution in the same chain (for example, a coffee producer and a coffee distributor or a fabric producer and a clothing manufacturer that uses that fabric to produce clothing). Conglomerate concentrations arise between undertakings operating in different, completely unrelated markets (e.g. a cement producer and a travel agency).

In the case of prohibited agreements and the case of concentrations, market competition is necessarily distorted by the actions of at least two undertakings (who are parties to the agreement or are participants in the concentration), while in the case of abuse of a dominant position, it is usually one undertaking who acts contrary to the rules of competition law.

The difference between agreements and abuse of a dominant position on the one hand and concentrations on the other is that in the case of the former, the behaviour of entrepreneurs on the market is sanctioned, while in the case of concentrations, it is attempted to prevent market distortions, by requiring undertakings to notify the concentration before it has occurred.

From this difference arises another difference. The rules on concentrations, which, as stated, mean preventive control, represent a form of ex-ante action by the competition authority. It intervenes in advance by prohibiting those concentrations that are evaluated to be capable of significantly distorting market competition. The competition authority conducts a hypothetical analysis of what would happen to competition if the undertakings concerned were to form a single economic entity. It is assessed how a new market structure could affect competition.

In the case of agreements and abuse of a dominant position, the intervention is ex-post, that is, as a reaction to some behaviour of the undertakings that are analysed and evaluated by the competition authority. This evaluation aims to determine whether there has already been a violation of the rules of competition law.

The rules of competition law are in principle not aimed at preventing any action by undertakings, but rather only those that may significantly prevent, restrict, or distort competition. An exception to this occurs if undertakings violate hardcore restrictions, such as if they collude on prices or share the market. Likewise, not sufficiently large undertakings are not even addresses of rules on concentrations, since for a concentration to be subject to notification, the undertakings concerned must have a significant turnover jointly, and each of them individually.

1.2. Sources of the EU competition law

Besides the general principles of European law (proportionality, subsidiarity, fundamental rights, equality before the law, legal certainty), the sources of European competition law are contained in primary and secondary legislation. The primary legislation is the provisions of Articles 101 - 109 of the TFEU. Article 101 is dedicated to prohibited agreements, and Article 102 to the abuse of the dominant position. Articles 103 - 105 govern the powers of the Council and the Commission to issue regulations and directives and give the Commission the power to investigate cases of possible infringements of competition rules. Article 106 is dedicated to public undertakings and undertakings to which Member States grant special or exclusive rights, as well as to the issue of liberalization and services of general economic interest. Articles 107 to 109 are devoted to state aids. It is also worth mentioning that Protocol 26 of the TFEU[6] refers to the services of general economic interest and accentuates their importance, and Protocol 27[7] to the relationship between the internal market and competition rules.

Thus, only two forms of distortion of competition stricto sensu (agreements and abuse of a dominant position), as well as state aids are regulated in the primary legislation, while mergers are not. Mergers are regulated in the secondary legislation.

By Article 288 TFEU, the secondary legislation comprises regulations, directives, decisions, recommendations, and opinions.

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6 Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 26) on services of general interest, OJ C 115, 9.5.2008, p. 308-308.

7 Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition, OJ C 115, 9.5.2008, p. 309–309.

The key legal sources for mergers are the Council Regulation (EC) No 139/2004 (the EC Merger Regulation)[8] and the Implementing Regulation 2023/914.[9]

Another important regulation is the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003) which brought about a radical change in the implementation of Articles 101 and 102. A previously highly centralized system in which the Commission was supposed to authorize in advance agreement falling under the exception from prohibition (Article 101 (3) TFEU) was replaced by the ex-post appraisal and enforcement. In addition, the importance of Regulation 1/2003 is notably in the competence of the national competition authorities of the Member States to enforce articles 101 and 102, thus enabling the Commission to focus on the most serious infringements of the competition rules contained in the Treaties.

Regulation 773/2004[10] sets out the procedural framework for the application of Regulation 1/2003.

Other regulations in the field of competition law have been adopted by the Commission in accordance with its authority granted by the Council to provide for the legal framework for exemption from the general rule of prohibition of agreements falling under Article 101 (3) TFEU. They are so-called Block exemption regulations. They notably include block exemption regulations of horizontal agreements, vertical agreements, transfer of technology agreements, as well as block exemption regulations in some special sectors, such as insurance and transport.

Unlike is the case in other fields of European law, directives in competition law are not numerous. These are Directive 2014/104/EU (Damages directive)[11] and

[8] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L 24, 29/01/2004, p. 1–22.

[9] Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No 802/2004 (Text with EEA relevance), C/2023/2400, OJ L 119, 5.5.2023, p. 22–102.

[10] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance) OJ L 123, 27.4.2004, p. 18–24.

[11] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, p. 1–19.

Directive (EU) 2019/1 (ECN+ directive).[12] The Damages Directive requires the Member States to enable the right of any individual, citizen, or business, to claim full compensation for the harm caused to them by an infringement of EU antitrust rules. The ECN+ directive empowers the national competition authorities with additional enforcement tools with a view of achieving a more effective overall enforcement mechanism, and thus a genuine implementation of the European competition policy in the Member States.

In addition to the regulations and directives, which the TFEU already foresees as sources of European law, an important part of competition law in the EU is also those sources that are contained in formally non-binding forms (soft law), such as notices, communications, and guidelines, as well as best practices, neither of which are mentioned in the TFEU as parts of secondary legislation. Formally, they are not binding on the EU courts, even though they are in essence an important tool to detect the actual state of law. For example, crucial issues for the definition of the relevant market are contained in the Commission Notice on the definition of the relevant market for the purposes of Union competition law (Notice on the relevant market)[13]. Worth mentioning are also, for example, the Commission Notice on Immunity from fines and reduction of fines in cartel cases,[14] Notice on agreements of minor importance (De Minimis Notice),[15] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.[16]

They were adopted by the EC to clarify some issues that are part of secondary legislation. These documents have great interpretative power, which they derive from the authority of the Commission. In terms of content, they are an extremely important part of the sources of EU competition law, as they regulate some of the key issues for the proper application of the competition rules.

[12] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance.) OJ L 11, 14.1.2019, p. 3–33.

[13] Communications from the Commission, Commission Notice on the definition of the relevant market for the purposes on Union competition law, OJ C, C/2024/1645, 22.2.2024.

[14] Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance), OJ C 298, 8.12.2006, p. 17–22.

[15] Communication from the 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 (De Minimis Notice) OJ C 291, 30/08/2014, p. 1–4.

[16] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1–48.

1.3. The relationship between European and national competition law

In accordance with the general rules and principles of European law, national law must be harmonized with European law, and European competition law has priority in application when it comes to issues that are relevant for the proper functioning of the internal market. This is a consequence of the EU's exclusive competence in "determining the rules on competition necessary for the functioning of the internal market". This at the same time sets the limit of the EU's exclusive competence for competition rules. In other words, Member States are free to adopt their own competition rules which apply to situations where anticompetitive behaviour of undertakings does not affect trade between Member States and does not jeopardize the internal market.

The fact is that all Member States have national competition rules that are largely following the model of Articles 101 and 102 TFEU. Nevertheless, there is a possibility that European and national laws differ and that one is stricter than the other.

Article 4 (3) TFEU requires the Member States to take "any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union", as well as to „facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

In the Walt Wilhelm case,[17] the EU Court clearly said that the then EEC Treaty constitutes an independent legal system that must be integrated into the legal systems of Member States and that it would be contrary to its nature for states to maintain or introduce measures that would call into question the practical effectiveness of the Treaty. In other words, the Court clearly determined that European law has priority in application. If there is a conflict between European and national law, it must be resolved by applying the principle that Community law takes precedence, from which it follows that the authorities of the Member State responsible for the application of competition law would have to consider the European law. If, specifically, the law of the member state would prohibit an agreement that is permitted by European law or it is an agreement that is permitted by a decision of the Commission, the national competition authority should apply European and not national law. On the other hand, if the agreement or procedure is not regulated by European legislation, and the Commission has not decided

[17] *Walt Wilhelm and others v Bundeskartellamt*, Judgment of the Court of 13 February 1969, Case 14-68, EU:C:1969:4.

thereon, the competent authorities of the Member States can initiate the proceedings by applying the competition law of the member state. Hence, European and national competition law can coexist, and national law can be applied if it does not infringe the European law and thus jeopardizes the harmonized application of the European law and implementation of the European competition policy.

Article 3. (convergence rule) of Regulation 1/2003 essentially corresponds to the principles adopted in the aforementioned Walt Wilhelm case, with the explicit acceptance of the principle of parallel application of the law of the member state and the law of the EU in the same case, when the prerequisites of both legislations for their application are met. However, these solutions seek to ensure that the application of the law of the Member States does not lead to the prohibition of agreements between undertakings which would be permitted by European law, as this would mean unequal treatment of the same issue, depending on which competition authority of the member state or which court decides on the validity of the agreement. Thus, in cases where national competition authorities or national courts of Member States apply national competition law to agreements, they must also apply Article 101 TFEU. Member States cannot adopt or apply stricter laws than European laws when it comes to agreements, decisions of business associations, or concerted practices that may affect trade between Member States. This confirms the principle of supremacy of European law.

Regulation no. 1/2003 does not prohibit the application of provisions of national law that protect goals that are essentially different from those protected by the application of Article 101 and 102 of the TFEU. Namely, the value that is protected by the application of those provisions of the Agreement is exclusively the protection of competition on the internal market of the EU. The legislation of the Member States can, however, protect some other values as well, if they are in line with the general principles of EU law. When it comes to the application of national law to abuses of a dominant position, Member States can provide in their national laws for stricter rules than those in Article 102 TFEU. Regulation no. 1/2003, therefore, does not prevent the adoption and application of the legislation of Member States that prohibit and sanction unfair business practices.

1.3.1. Application of European competition law in Member States

The provisions of Article 101 and 102 of the TFEU are an integral part of the legal order of the Member States, so the subjective rights and obligations that they regulate enjoy the protection provided by the national competition authorities and courts of the Member States, in addition to protection by the EU institutions (the Commission and the EU Court).

This solution is, therefore, different from the one adopted in merger cases, because for the application of the Merger Regulation, there is an exclusive competence of the EU Commission. That does not affect, however, the possibility that the Member States have their own merger rules.

In the case of BRT v. SABAM,[18] the EU Court removed the dilemma regarding the jurisdiction of the courts of the Member States regarding the application of EC competition law. Prohibitions from Articles 101 and 102 by their nature have a direct effect on relations between persons and give interested persons immediate rights for which national courts must provide legal protection.

The principle of parallel jurisdiction of the Commission, national competition authorities, and courts was confirmed in the case of Stergios Delimitis v. Henninger Bräu.[19] In that case, the European Court confirmed the competence of the courts of the Member States to resolve questions governing the conditions for the exemption of certain types of agreements (application of Article 101 (3)). An important aspect of the Delimitis judgment is the consideration of the issue of avoiding the adoption of different decisions by the Commission and the courts of the member state when it comes to parallel proceedings based on the same factual situation. With its judgment, the European Court recommended that the court of a member state issue a judgment if it is obvious that there is no violation of Article 101/1 or Article 102 or if the violation of those provisions is beyond doubt. On the other hand, if the court of a member state assesses that there is a danger that the Commission will later make a different decision, it should stop the proceedings, adopt temporary measures if necessary, and ask the Commission for an opinion on questions of application of law or economic analysis of the case or refer it to the European Court with the request for a preliminary ruling (now Article 267 TFEU).

Today, that issue is resolved by the provision of Article 16 of Regulation 1/2003 which prohibits the courts of the Member States from making decisions that are contrary to those already adopted by the Commission. When it comes to a case in which the Commission has started proceedings but has not yet decided, the Regulation recommends the courts to consider the possibility of suspending the proceedings until the Commission's decision is made.

The last step in the effort to achieve a uniform and effective application of Articles 101 and 102 by all competent authorities throughout the Union is the

[18] *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*, Judgment of the Court of 30 January 1974., Case 127-73., EU:C:1974:6.

[19] *Stergios Delimitis v Henninger Bräu AG.,* Judgment of the Court of 28 February 1991, Case C-234/89, EU:C:1991:91.

adoption of Directive 2019/1 (ECN+ Directive), which strengthens the existing system of the European Competition Network.

1.4. The relevant market

It is the task of competition law to make sure that competitive process on the market is not distorted. Because competition exists only between undertakings active on the same market, it is of outmost importance to define competitive restraints between them. This is done by delineating and analysing the relevant market.

The rationale is comparable to sports. We can all agree that both basketball and football are sports, and yet they are not in competition with each other. Even within the same sport not all teams are in competition with each other. This may be because the teams are active only at the local level in different geographic areas, or because they do not fit the same competitive category. Therefore, a Croatian basketball team will not participate in the German national basketball tournament. Similarly, a Croatian children's basketball team will not compete against a Croatian adult team, as they do not belong to the same competitive category. Consequently, the teams that compete are only those participating in the same tournament or league. Similarly, the undertakings that compete are only those participating in the same relevant market.

The relevant market has two key dimensions: product and geographic dimension. In fact, competition takes place between undertakings offering competing products or services on the same geographic area. When products are substitutable in the eyes of consumers, they are considered to belong to the same product market. For example, if consumers think that apples and pears to be interchangeable goods, then these two products are competing products encompassed by the same product market. On the other hand, the geographic dimension of the relevant market depicts the location where undertaking sell competing good or services. In our example it is a location where the undertaking under consideration and all of its competitors sells apples and pears. The area of competition may be local, national, regional, or world-wide, provided that the conditions of competition within that area are sufficiently homogeneous and distinguishable from those prevailing in other areas.[20]

In addition to the geographic and product dimension of the relevant market, sometimes there is a need to assess a third dimension - the temporal market. In most cases, this will be necessary when time is of relevance to consumers in

20 Notice on the relevant market para 12 (b).

making their choices, such as seasonality or peak/off-peak times.[21] For instance, consumers may not necessarily consider interchangeable the live broadcasting of a sport event with its deferred broadcasting. It may be that these two broadcastings form two separate relevant markets.[22]

Delineating the relevant market is not an automatic exercise because specific facts of the case may influence its outcome. This is why it is important to do it on a case-by-case basis. The outcome can differ depending on the undertakings involved, the time period considered and the competitive concerns under consideration.[23] Because the relevant markets are often the same across the same economic activity, the Commission may start the analysis from its prior findings on specific market.[24] Yet, this is only a possibility and the Commission in not bound by its prior findings.[25]

Defining the relevant market is not an end in itself but rather, it is an intermediate tool used by the Commission enabling the identification of competitors of the undertaking involved and calculation of their market shares.[26] This, in turn, facilitates the full competitive assessment that follows. In other words, when we define the relevant market, we do not get the answer as to whether competition law has been infringed, we only establish a framework for the anticompetitive analysis. The definition of the relevant market is very important in the investigation of a potential abuse of a dominant position under Article 102 TFEU,[27] as it helps to determine whether an undertaking under investigation holds a dominant position on that market. This is because the dominant position is a position of power that exists only on a specific relevant market.[28] In fact, one undertaking may be active in many relevant markets and be dominant in only one of those markets. Market shares are the first indicator of possible dominance. In general, where there are many competitors on the relevant market with relatively evenly distributed market shares, less likely that an undertaking under investigation is in a dominant

21 Notice on the relevant market, para 13.

22 G. Niels, H. Jenkins, J. Kvanagh, *Economics for Competition Lawyers*, 2nd ed., (Oxford: Oxford University Press, 2016), 28.

23 Notice on the relevant market, para 18. On a purposive approach to market definition see Magali Eben, "The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process", Journal of Competition Law & Economics, Volume 17, Issue 3, (September 2021): 586–619.

24 For instance, the air transport sector, or online advertising services. See Notice on the relevant market, para 18, and the case law listed in related fn 31.

25 Notice on the relevant market, para 14.

26 Notice on the relevant market, para 6.

27 Notice on the relevant market, para 9 (a).

28 V. Butorac Malnar, J. Pecotić Kaufman, S. Petrović, D. Akšamović, M. Liszt, *Pravo tržišnog natjecanja i državnih potpora* (Zagreb: Sveučilište u Zagrebu, 2021), 159.

position on that market. Conversely, when undertaking under investigation holds very high shares compared to its rivals, this may be an indication of dominance. It is important to note, however, that the calculation of market shares is only one aspect of the process of determining the market power of an undertaking.[29]

The definition of the relevant market is not limited to cases of abuse of dominance. Usually, it is used by the Commission in the assessment of agreements under article 101 (1) TFEU, in particular, to determine whether an agreement has an appreciable effect on competition. In the majority of cases, the Commission delineates the relevant market when assessing agreements restrictive by effect, whereas when agreements are restrictive by object, such as cartels, the Commission is not obligated to define the relevant market.[30] This is because agreements restrictive by object, by their very nature appreciably restrict competition irrespective of the concrete effect they may have on the relevant market.[31] We have seen that market definition is a necessary prerequisite of calculating market shares. For that reason it is an important tool for the application of the block exemption regulations as it helps to identify whether undertakings can benefit from the safe harbour of the applicable block exemption.[32] Likewise, relevant market definition helps the assessment of the exemption criteria of article 101 (3), in particular when determining whether an agreement would substantially eliminate competition.[33] Finally, the relevant market definition is necessary for the competitive assessment concentrations under the Merger Regulation.[34]

It transpires that in the majority of instances, competition law analysis begins with defining the relevant market which, without prejudicing the outcome of the case, structures the comprehensive competitive assessment of the case. That being said, the Commission is under no obligation to define the scope of the relevant market with precision in situations where it would come to the same conclusion following the competitive assessment under all plausible market definitions.[35]

The role and methodology used to define the relevant market are set out in the Commission notice on the relevant market, updated in 2024. It is a soft law act of the EU which, although non-binding, represents an important source of infor-

[29] Whish, p. 28.
[30] Notice on the relevant market, para 9 (c). *Mannesmannröhren-Werke v Commission*, Judgement of 8 July 2004T-44/00, EU:T:2004:218, para 132.
[31] *Expedia*, Judgment of 13 December 2012, C-226/11, EU:C:2012:795, para 37.
[32] Notice on the relevant market, para 10.
[33] *CMA CGM and Others v Commission*, Judgment of 19 March 2003. T-213/00, EU:T:2003:76, para 226.
[34] Notice on the relevant market, para 9.
[35] Notice on the relevant market, para 20.

mation meant to provide guidance to undertaking and increase transparency and predictability of the Commission's assessments under EU competition law. The new Notice reflects the enforcement developments since the enactment of the original Notice in 1997,[36] particularly regarding sustainability, digital markets, and innovation, all of which display very specific considerations and characteristics.

1.4.1. The relevant product market

The relevant product market includes "all those products that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their prices and their intended use, taking into consideration the conditions of competition and the structure of supply and demand on the market."[37] The relevant product market is analysed with reference to the main sources of competitive constraints: the demand side substitution and supply side substitution, while the third important source of competitive constraint - the potential competition, is not analysed at the stage of defining the relevant market but rather during the competitive assessment.[38]

Demand-side substitution is the most important consideration in defining the relevant market because it is the "most effective and immediate disciplinary force on the suppliers on a given product".[39] It shows how easily would the customers of the product of the undertaking concerned, switch to readily available products they consider to be effective and immediate substitutes for the product in question.[40] Products characteristics and their functionality are the important factors for product substitutability. However, these factors alone are not always sufficient to determine if products are good substitutes[41] mostly because of their subjective nature.[42] The most famous case decided on these criteria is the United Brands, in which the Court decided that bananas are in a separate market from other fruits

[36] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

[37] Notice on the relevant market, para 12 (a). *Tiercé Ladbroke SA v Commission of the European Communities*, Judgment of 12 June 1997, T-504/93, EU:T:1997:84, para 81. Here, the term product should be understood in a broad sense, as referring to services and technologies as well. So, two competing services would be in the same "product" market.

[38] Notice on the relevant market, para 23 (c).

[39] Notice on the relevant market, para 23 (a). *easyJet v Commission,* Judgment of 4 July 2006, T-177/04, EU:T:2006:187, para 99.

[40] Notice on the relevant market, para 26.

[41] Jonathan Faull, Ali Nikpay, *The EC Law of Competition*, 2nd ed. (Oxford: Oxford University Press, 2007), para 1.139.

[42] Robert O'Donoghue and Jorge Padilla (edn), *Law and Economics of Article 102 TFEU,* (Hart Publishing, 2020), 152.

due to their specific features such as "[…] appearance, taste, softness, seed lessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick."[43] The judgement has been criticized, as there will always be a group of customers to whom products under consideration are not interchangeable with other products (such as the very young, the old and the sick) and the decision should not be based primarily on such customers.

Today, the main analytical tool used by the Commission is the small but significant non –transitory increase in price (SSNIP) test. The test is sometimes referred to as the hypothetical monopolist test as it aims to determine whether a hypothetical monopolist could profitably increase the price of its products by a small amount.[44] The test asks what would happen if the price of a product under consideration (in our example apples) was permanently increased by 5 to 10%. Would the customers switch to readily available substitute products in response to such a hypothetically small but non-transitory increase in the product price (would they as a reaction start buying pears)? If the substitution would lead to a loss of sales and thus would not be profitable, additional substitute products would be included in the relevant market (if the price increase of apples would not be profitable because customers would turn to pears, the relevant market would comprise of both apples and pears). This analysis is repeated until the set of products becomes such that permanently increasing prices would become profitable[45] (the price increase of apples would become profitable in relation to, for instance, mangos, if consumers would not start buying more mangos as a reaction to a small but permanent price increase of apples. In this case, mangos would not be included in the same relevant market as apples and pears).

The SSNIP test is usually applied at the prevailing market price, but in some situations, this may lead to misleading results. In particular, such misleading results may arise where the undertaking under investigation already exercises very strong market power and already charges the product under consideration at a supra-competitive level. In such a scenario, there is the risk that the prevailing price is already profit-maximising, therefore any hypothetical price increase will most likely show that consumers will start buying other products. However, this substitution happens only because consumers are unwilling to pay an even higher price for the product in question and not because they consider other products to be genuine substitutes of the product in question. In other words, they start

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43 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Judgment of 14 February 1978, Case 27/76., EU:C:1978:22, para 31.

44 Notice on market definition, para 29.

45 Notice on market definition, para 28.

switching to inferior substitutes they would not consider at all in a competitive setting. If products that are not really interchangeable are considered to be genuine substitutes, the relevant market will appear to be wider than it actually is. Consequently, the market shares of the undertaking under investigation will be smaller and will thus fail to reflect undertaking's true market power. This mistake is referred to as the "cellophane fallacy", termed after the US Supreme Court monopolization case against Du Pont from 1956.[46] The case involved a question whether the relevant market constitutes of only cellophane (Du Pont holding 75 % of its shares) or cellophane and other wrapping material, such as foil, paper film (Du Pont holding only 20% of its shares). Because cellophane was already set at the near monopoly price, the customers were switching to other wrapping material even though they did not consider them to be true substitutes to cellophane. However, this conclusion did not immediately transpire. Instead, the switching to other wrapping materials led the Supreme Court to conclude incorrectly that they fall in the same product market as cellophane, exercising competitive pressure and preventing further price increase of cellophane.[47] In cases such as this one, where the prevailing price might already be supra-competitive, the Commission may apply the SSNIP test on the basis of a price that would have prevailed under more competitive circumstances or it may rely on evidence other than price.[48]

While the SSNIP test focuses on price increase as the main indicator of substitution, to decide on the substitutability between products, the Commission considers other criteria as well such as the products characteristics and their intended use.[49] In addition, the Commission will also consider other competitive parameters whenever they are considered relevant by consumers. These include the degree of innovation, sustainability, durability, availability, resource efficiency, security, and privacy offered, the image conveyed, and many others.[50]

The price-based analysis is particularly unsuitable for digital markets in relation to products and services that are free of charge. A good example is the relevant market delineation in the Google Android case, which concerned a product with zero monetary price. Due to this fact, it was impossible to perform the SSNIP test. The Commission recognized that competition is based on innovation and quality rather than price, and thus it asked whether customers would switch from Android app stores to other app stores in case of a small but non-transitory de-

46 *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

47 Niels et al, *Economics for Competition Lawyers*, 54.

48 Notice on the relevant market, para 30 and the related fn 55.

49 Notice on the relevant market, para 48.

50 Notice on the relevant market, para 15.

crease in quality. In doing so, it formulated the SSNDQ test.[51] While the approach of the Commission has been upheld by the EU Court of First Instance, the appeal before the EUCJ is still pending.[52] If upheld, this test might become a benchmark for most products free of charge who compete on the ground of innovation and quality, often the case on digital markets.

Because sometimes the application of the SSNIP test is difficult or inappropriate, the Commission is not under the obligation to do so. As we have seen, the other types of gathered evidence are equally valid for delineating the relevant market.[53] Which of the consumer preferences is more relevant may vary, so the Commission has to approach the analysis on a case-by-case basis.[54] As it does so, the Commission is free to gather different categories of evidence. Collecting readily available information, information provided by the companies on the market or contained in their previous findings in the same sectors, is likely to be the initial step of the analysis.[55] Commission makes a preliminary market definition which it then modifies in consideration of additional evidence it gathers. Particularly useful is the examination of past evidence of demand substitution. These are data informing the Commission on how the customers reacted in the past to unexpected cost shocks, the entry of new products, the temporary unavailability of certain products or other situations.[56]

In the absence of evidence of past substitution, the Commission may rely on hypothetical substitution. This is the information on the likely behaviour of customers in response to a hypothetical change in supply conditions.[57] The Commission gathers evidence from customers and other market participants through surveys or by collecting already available data on industry views on competition.[58]

Finally, the Commission will also consider evidence on costs endured by customers when switching to substitute products as well as other barriers to switching. These barriers may arise from contractual obligations, learning costs, uncertainty about quality and reputation, regulatory barriers, cost of data portability, degree of interoperability and many others.[59]

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[51] Notice on the relevant market, fn 54.

[52] *Google and Alphabet v Commission*, Judgment of 14 September 2022, T-604/18, EU:T:2022:541, paras 177 and 180.

[53] Notice on the relevant market, para 31.

[54] Notice on the relevant market para 50.

[55] Notice on the relevant market, para 51-53.

[56] Notice on the relevant market, para 51.

[57] Notice on the relevant market para 54-55.

[58] Notice on the relevant market para 56.

[59] Notice on the relevant market para 57-58.

So far, we have focused on demand side substitution as a factor in reference to which we define the relevant market. However, when suppliers are willing to switch to the production of substitute products (usually a range of quality of the product concerned),[60] and they have both the incentive and ability to do so in the short term, without facing significant sunk costs or risks, then it might be important to consider the supply side substitution in the delineation of the relevant market.[61] This means that the potential range of substitute products will be included in the same relevant market. The Notice on market definition specifies that supply side substitution is relevant mostly in situations when the competitive constraints it creates are as effective and immediate as the demand side substitution and lead to similar competitive conditions on the market.[62] In order to widen the market to include supply substitution it is necessary that most suppliers on the market can switch production under those conditions.[63]

An illustrative example often used to describe the importance of supply substitution relates to paper production. Paper quality can vary from standard writing paper to high-quality paper, such as that used in art books. However, from a demand perspective, different paper qualities are not interchangeable. For instance, an art book or a premium publication cannot use poor quality paper. However, paper plants are equipped to produce paper of different quality and can swiftly adjust their production at minimal cost. If in addition paper plants have sufficient lead time to modify production plans and no distribution issues, they can compete for orders across different quality of papers. In such cases, considering the described supply substitution, the Commission might establish only one relevant market for all quality papers.[64] In the practice of the Commission, this supply-side substitution was a relevant factor in defining the relevant product market in the merger case Outokumpu/INOXUM[65] related to the production of various grades of stainless steel.

1.4.2. The relevant geographic market

To delineate the relevant market, it is not sufficient to consider only the product dimension of the market. To be competitors, undertaking need to offer substitute products in the same geographic area. This aspect is referred to as the

60 Notice on the relevant market, para 34.
61 Notice on the relevant market para 33.
62 Notice on the relevant market para 23 (b).
63 Notice on the relevant market para 33.
64 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, para 22.
65 *Outokumpu/INOXUM*, M.6471, OJ 2012, C 116, paras 120 and 121.

geographic dimension of the relevant market. As already mentioned, geographic markets can be local, national, regional or even worldwide. The revised Notice on market definition extends the guidance on the geographic market, particularly in relation to worldwide markets.

The relevant geographic market is defined as an area where "competing goods are being supplied or demanded, that is sufficiently homogenous and distinguishable from other geographic areas, in particular, because conditions of competition are appreciably different in those areas".[66] The delineation of the relevant geographic market is similar to the delineation of the relevant product market. From the perspective of demand side substitution, it answers the question if consumers from one area would start buying substitute products from other areas as a reaction to a price increase, and if so, under which conditions. From the perspective of suppliers, it answers a question under which conditions would suppliers of competing goods from one area start offering their products goods in other areas.[67] The geographic market thus covers "all those regions where consumers can find demand-side substitutes for the products of the firm under scrutiny (demand-side substitution) and there are suppliers who can readily shift production to the markets where the firms whose commercial practices are investigated operate (supply-side substitution)".[68]

The Commission starts the delineation of the geographic market by identifying the location of the undertakings concerned and their customers.[69] Based on the preliminary information about their preferences and purchasing behaviour, the Commission makes an initial view of a possible geographic market which it then analyses to see if the conditions of competition are sufficiently homogeneous and distinguishable from other geographic areas.[70] In doing so, the Commission takes into account different categories of evidence.

A strong indication of homogeneity is the access of customers to the same suppliers in different geographic areas, and the similarity of suppliers' market shares in these areas.[71] Likewise, if prices for the same product are similar in different geographic areas, this may be a strong indication that these areas are sufficiently homogeneous to be part of the same geographic market.[72]

66 Notice on the relevant market para 12 (b); With regard to concentrations see Article 9(7) of the Merger Regulation.
67 Butorac et al, *Pravo tržišnog natjecanja*, 172.
68 O'Donoghue and Padilla, *Law and Economics of Article 102 TFEU*, 159.
69 Notice on the relevant market para 38.
70 Notice on the relevant market para 62.
71 Notice on the relevant market para 64.
72 Notice on the relevant market para 65.

As the differences in market shares and prices may be influenced by the purchasing behaviour of customers, the Commission looks into cultural differences, language, lifestyle, and other elements that can lead to the geographic preferences of consumers. For instance, in the case Google shopping,[73] market for general search was found to be national in scope due to the language preferences of consumers. Although the service was accessible worldwide, the geographic market was limited nationally.[74]

High barriers to entry and other costs that suppliers face when offering goods in other areas are very important factors to consider, because they may discourage suppliers from entering the market in those areas. In fact, suppliers will be able and willing to offer goods and services only on competitive markets. The barriers to entry may be many, from the availability of distribution channels and other barriers to entry to regulatory and administrative barriers. The latter relate particularly to public procurement rules, technical standards, legal monopolies, sector-specific regulations, quotas and tariffs and other.[75] On the other hand, the harmonization of rules reduces barriers to trade and therefore where legal rules and regulations and harmonized, this may indicate that the relevant territories belong to the same geographic market, such as EU or EEA countries.[76]

The distance between suppliers and customers is another factor that influences suppliers' competitive position. More distant suppliers are likely to be at a competitive disadvantage compared to closer suppliers whenever transport costs are too high in relation to the price of the product in question. In such situations distant suppliers may be discouraged from entering the market. Likewise, suppliers may be put in a competitive disadvantage due to product perishability, sustainability or accessibility.[77] In such situations, the Commission defines the market around catchment areas, by "creating circles around production facilities or population centres".[78] These are areas measured either in terms of customers' travel distance or time to the supplier, or in terms of delivery distance or time around a given location where most of the sales occur.[79] Finally, the analysis of trade flows and patterns of shipments may as well indicate the existence or absence of barriers relevant for delineating the geographic market.[80]

73 *Google search (Shopping)*, of 27.6.2017, C (2017) 4444 final, AT.39740.
74 Ibid. 253-254.
75 Notice on the relevant market, para 70.
76 Notice on the relevant market, para 71.
77 Notice on the relevant market, para 73.
78 Niels et al., *Economics for Competition Lawyers*, 68.
79 Notice on the relevant market, para 74.
80 Notice on the relevant market, para 75.

1.4.3. Market definition in digital markets

Notice on the relevant market offers an insight into criteria for relevant market definition in specific industries or types of markets. These include market definition in differentiated markets, markets where the discrimination between customers is present, markets with substantial R&D, after-markets, bundles, and digital ecosystems. For the purpose of this chapter, we will look closer into, multi-sided platform markets and digital ecosystems as they play an essential role in the digital economy.

1.4.3.1. Multi-sided platform markets

Digital markets are often characterized by the presence of multi-sided platforms. These platforms "are business models that facilitate interactions between two or more distinct customer groups".[81] Examples of digital multi-sided platforms are many such as app stores or social networks.

Multi-sided platform markets exhibit specific features relevant for market definition, in particular strong network effects. Network effects occur when the value of a network for a given user is dependent on the total number of users on that network.[82] In other words, more people use a network, greater is the value of this network to each individual user. This is a typical feature of social media platforms. In addition to direct effects, multi-sided digital platform markets display indirect network effects. Indirect network effects occur when the growth in the number of users of a particular platform leads to increased investment in the development of products compatible with that platform. This, in turn, strengthens the popularity of the platform among users.[83] Thus, different sides of the platform, even though distinct, influence each other.[84]

In such situation there are two possible approaches to delineation of the relevant market. Under first approach we may delineate a single product market for all sides, that is, for all products offered by that platform. Alternatively, we

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81 Bart de Rijke, Helen Gornall, Georgiana Mîrza, EU revises Market Definition Notice: shaping and re-shaping digital markets, https://www.debrauw.com/articles/eu-revises-market-definition-notice-shaping-and-re-shaping-digital-markets (30.08.2024.).

82 Niels et al., *Economics for Competition Lawyers*, 113.

83 *Microsoft protiv Komisije*, Judgement of 17 September 2007, T-201/04, EU:T:2007:289, para 1061. In this case content providers and software developers were inclined to choose technology based on the widespread installation and use of media players. Specifically, they preferred Windows Media Player because it allowed them to reach most PC users globally. This preference further boosted the popularity of the media player and reinforced the use of related technologies, such as codecs, formats, and server software.

84 Notice on the relevant market, para 94.

may define separate product markets for each product offered by the platform, i.e. for each side of the platform.[85] The Notice on market definition for the first time gives explicit guidance on this issue, summarizing the recent practice of the Commission and the EU courts in this regard. According to the Notice, the delineation of separate markets may be more appropriate "where there are significant differences in the substitution possibilities on the different sides of the platform."[86] Whether that is the case, may be assessed on the ground of a number of factors such as differences in substitution possibilities, the degree of product differentiation on each side of the platform, user behaviour, and the nature of the platform. Where relevant, the Commission will consider indirect network effects between user groups.[87]

Another reoccurring feature of multi-sided platforms are zero-price products. This is a situation where "the platform operator charges only one customer group while the service is offered for free to another customer group".[88] This is a regular business model of the multi-sided platforms. The fact that a product is free of charge makes the application of the SSNIP test impossible. In such cases, parameters other than prices such as "product functionalities, intended use, evidence of past or hypothetical substitution, barriers or costs of switching, such as interoperability with other products, data portability and licensing features"[89] should be considered. As already explained, instead of the SSNIP test it is possible to apply the SSNDQ (small but non-transitory decrease of quality) test as done in the Google Android case.[90]

1.4.3.2. Digital ecosystems

Another feature of digital markets is the existence of digital ecosystems. Digital ecosystems are comparable to aftermarkets, the latter occurring when a primary product (for instance a watch) leads to the consumption of secondary products (watch spare parts). Obviously these two markets are connected so the question is how to define the relevant market: as a system market including both primary and secondary products (watch and spare parts); dual markets, one for the primary and one for secondary products (one for watch and one for spare parts) or multiple markets, one for the primary product, and separate for each brand of the

85 Notice on the relevant market, para 95.
86 Loc.cit.
87 Loc.cit.
88 Sebastian Wismer, Arno Rasek, "Market definition in multi-sided markets", OECD, 15 November 2017, DAF/COMP/WD(2017)33/FINAL, 8.
89 Notice on the relevant market, para 98.
90 Loc. cit.; *Google Android*, 18 July 2018, AT.40099, para 284-205.

secondary product (one for watch and a separate market for spare parts of different watch brands).[91]

Very comparable situation exists in digital ecosystems, as they consist of a primary core product and a number of secondary digital products, whose consumption is linked to the core product either by technological links or interoperability.[92] An example of a digital ecosystem would be products built around a mobile operating system (a primary core product), mobile devices powered by that operating system, application store, and software applications (secondary digital products).[93] To decide what is the appropriate product market, the Commission may apply similar principles it applies to aftermarkets.[94]

A system market is more likely to exist where customers take the lifespan costs into account when buying the primary product; where the cost or the value of secondary products is higher than the primary product; there is a degree of substitutability and low switching costs between primary products; there are few or no suppliers specializing only in the secondary product.[95]

Identification of a dual market is more appropriate where secondary products of different suppliers are compatible with the primary product.[96] Finally, a multi-sided market should be defined where the customers of the primary product are restricted from using only a defined set of secondary products.[97]

When the secondary digital products come in a bundle (together), that bundle of products might be a separate relevant market.[98] Finally, because not all digital ecosystems fit an aftermarket or bundle market approach, it is appropriate to consider other factors, such as network effects, switching costs, and homing decisions of customers.[99]

[91] *Watch Repair*, 13. May 2015, AT 39097.
[92] Notice on the relevant market, para 104.
[93] Notice on the relevant market, fn 142.
[94] Notice on the relevant market, para 104.
[95] Notice on the relevant market, para 101.
[96] Notice on the relevant market, para 102.
[97] Loc. cit.
[98] Notice on the relevant market, para 103.
[99] Notice on the relevant market, para 104.

2. ANTI-COMPETITIVE AGREEMENTS AND COLLUSION. ARTICLE 101 TFEU[100]

Anti-competitive agreements and collusion represent fundamental concerns in EU competition law due to their potential to undermine the internal market. In this respect, Article 101 of the TFEU prohibits 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[101].

As an exemplification of prohibited agreements, Article 101 (1) lists 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.

It ought to be noted that the list in Article 101 (1) TFUE is merely exemplificative and not exhaustive, so that any anti-competitive conduct falling within the prohibition must be considered illicit, even if non specifically provided for by the said rule. E.g., one may refer to the so-called “pay-for-delay” agreements occurring in the pharmaceutical sector when a patent holder pays a generic manufacturer to delay the market entry of a generic version of a drug. These agreements can be considered anti-competitive because they prevent lower-cost alternatives from reaching the market and maintain artificially high prices for consumers, as stated in the *Lundbeck* case[102].

As it will be specified below, Article 101 TFEU is applicable where such practices may affect trade between Member States, a jurisdictional element designed to distinguish purely domestic practices from those of an EU-wide significance[103].

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101 The problem of defining what a “restriction of competition” is was handled since Case 56/65, Societe Technique Miniere.

102 Lundbeck, Commission Decision of 19 June 2013, Case COMP/AT.39226, OJ C 405, 14.11.2013, p. 7.

103 Craig, P and de Búrca, G, EU Law: Text, Cases, and Materials (Oxford: Oxford University Press, 2020), 1034-1038.

2.1. The prohibition of agreements, concerted practices and decisions of associations of undertakings.

An agreement under Article 101 (1) TFEU encompasses a wide range of arrangements between two or more undertakings, either operating at the same (horizontal) or different (vertical) level of the production and distribution chain, that may have a detrimental impact on competition. The Court of Justice of the European Union (CJEU) has adopted a broad interpretation of what constitutes an agreement, stressing that it can include both formal and informal arrangements, whether written or oral[104]. Even an arrangement which it not legally binding[105] or is null[106] can be considered prohibited insofar as it can promote coordination between competitors. The essential element is that there is a "meeting of the minds" between the parties, whether that be in the form of a contract or less formal coordination.

In contrast to formal agreements, concerted practices refer to forms of coordination that do not reach the level of an agreement, yet still involve some form of collaboration between undertakings. This concept was first defined by the CJEU in the *ICI v Commission* case[107], where the Court highlighted that a concerted practice implies a form of "less formalized" form of coordination[108] that, even if not culminating in a formal agreement, knowingly substitutes practical cooperation for the risks of competition. The different forms of infringement (agreements and concerted practices), however, must not be understood as ontologically different from each other. Rather, they are all intended to detect and punish collusion regardless of the intensity and the form in which collusion manifests itself in the specific case[109]. In this sense, Article 101 (1) TFEU need to be understood, as a whole, as a prohibition of any form of coordination between independent undertakings that have as an object or effect the restriction of competition.

More specifically, the notion of "concerted practice" is a conceptual tool that allows one to find an infringement of Article 101 TFEU not only when enterprises *expressly or implicitly* agree an anticompetitive path of conduct but also when they do follow such a path without any express agreement, insofar as such parallelism is further characterised by "collusion" between the enterprises themselves

[104] ACF Chemiefarma NV v. Commission, Case C-41/69, Judgment of 15 July 1970, EU:C:1970:71.
[105] Case 96/82 NV IAZ International Belgium and Others v. Commission.
[106] Hercules Chemicals NV v. Commission, Case T-7/89, Judgment of 17 December 1991, EU:T:1991:75.
[107] Case 48/69 Imperial Chemical Industries Ltd v Commission.
[108] Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission.
[109] Case C-49/92 P Commission v Anic Partecipazioni.

(i.e., when the enterprises concerned knowingly substitute for the risks of competition practical cooperation between them).[110] The case law of the EU courts has established that even a single instance of contact between competitors, if it results in market behaviour being influenced, can constitute a concerted practice[111]. Even if this is statistically less relevant, a concerted practice may be found even in a vertical relationship between undertakings operating at different levels of the same production/distribution chain[112].

Associations of undertakings, such as trade associations or professional bodies, can significantly influence the competitive conditions in a given market. Decisions by these bodies can take various forms, including formal resolutions, recommendations, or even informal guidelines issued to their members. The CJEU has consistently held that decisions by associations of undertakings are subject to the same scrutiny as agreements and concerted practices. For instance, in *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*[113], the Court found that even non-binding decisions by professional bodies could be caught by Article 101 TFEU if they have the potential to restrict competition. The reason behind this approach is that decisions by associations of undertakings, particularly where they are applied uniformly by members, can have a significant impact on market behaviour, leading to a distortion of competition.

Importantly, the CJEU has also clarified that decisions by associations of undertakings may be anti-competitive even if they appear to pursue a legitimate aim, such as the protection of professional standards. In *Wouters*[114], the Court acknowledged that while certain professional regulations might serve a legitimate public interest, they must be balanced against their restrictive effects on competition. Where a decision goes beyond what is necessary to achieve the purported objective, it may still fall foul of Article 101 (1) TFEU.

2.1.1. The anticompetitive object and effect

Agreements, concerted practice, and decision by an association of undertakings are prohibited it they have the "object" or "effect" of preventing, restricting,

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110 Emiliano Marchisio, "From concerted practices to "invitations to collude"". European Competition Law Review (2017): 555-566.

111 Case C-89/85 Ahlström Osakeyhtiö and others v Commission.

112 Musique Diffusion Française and Others v. Commission, Joined Cases 100 to 103/80, Judgment of 11 July 1983, EU:C:1983:158.

113 Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten.*

114 J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99, Judgment of 19 February 2002, EU:C:2002:98.

or distorting competition. This distinction determines, among others, the legal and evidentiary burden.

Restrictions by object refer to those types of agreements or practices that expressly provide an anticompetitive behaviour. Once an agreement's anti-competitive object is established, it is automatically prohibited under Article 101 (1) without the need for further inquiry[115]. The *Expedia* case[116] clarified that an agreement may be deemed restrictive by object even if its scope and market power are limited. This reinforces the presumption that certain types of agreements are so harmful to competition that they can be condemned without a detailed effects-based analysis. However, even where an agreement is considered to restrict competition by object, parties may still argue that it satisfies the conditions for exemption under Article 101 (3), provided they can demonstrate pro-competitive benefits.

In cases where an agreement, decision, or concerted practice does not constitute a restriction by object, it must be evaluated to determine whether it produces restrictive effects on competition[117]. Unlike object-based restrictions, where the anti-competitive nature of the conduct is presumed, restrictions by effect require a more detailed analysis of the market context and the actual or potential consequences of the conduct in question. To establish a restriction by effect, competition authorities or courts must demonstrate that the agreement or practice leads to negative consequences for competition. This includes showing that the arrangement reduces market competition in terms of price, output, innovation, or quality, as established by the CJEU in *Delimitis*[118].

In particular, the analysis of effects requires examining both the counterfactual scenario (what would have occurred in the absence of the agreement)[119] and the actual or foreseeable impact of the conduct on competition. This is a fact-specific inquiry that looks at factors such as market power, market shares, and the competitive conditions in the relevant market[120]. Additionally, the effects of the agreement must be appreciable, meaning they must be significant enough to in-

[115] Beef Industry Development Society and Barry Brothers v. Competition Authority, Case C-209/07, Judgment of 20 November 2008, EU:C:2008:643; Dole Food Company Inc. and Dole Fresh Fruit Europe v. Commission, Case C-286/13 P, Judgment of 19 March 2015, EU:C:2015:184.

[116] Case C-226/11, Expedia Inc. v Autorité de la concurrence.

[117] Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission, Joined Cases 56 and 58/64, Judgment of 13 July 1966, EU:C:1966:41.

[118] Delimitis v. Henninger Bräu AG, Case C-234/89, Judgment of 28 February 1991, EU:C:1991:91.

[119] O2 (Germany) GmbH & Co. OHG v. Commission, Case T-328/03, Judgment of 12 December 2006, EU:T:2006:116.

[120] Whish, R and Bailey, D, Competition Law (Oxford: Oxford University Press, 2021), 121-146.

fluence market conditions. In fact, insignificant or trivial agreements fall outside the scope of Article 101 (1), as reiterated by the CJEU in *Volk*[121].

2.1.2. Cartels

A cartel is traditionally understood as a formal and explicit agreement between competitors to coordinate their market behaviour to restrict competition. The qualification as a "cartel" under competition law may be attributed to any such agreements whatever their civil law qualification, e.g.: consortia.

Cartels are regarded as the most relevant violation of Article 101 (1) TFEU and are typically classified as anti-competitive "by object", so that they are presumed to be harmful without the need for a detailed analysis of their effects on the market. They are also considered "hard-core" infringements of competition law, as they almost invariably involve **price-fixing, market sharing, output limitations or manipulation of the outcome of public tenders (bid-rigging)**. **In fact**, such forms of agreements are so harmful that they are rarely, if ever, capable of being exempted under Article 101 (3) TFEU. The CJEU has consistently held that such agreements constitute serious infringements that directly harm market competition and, by extension, consumer welfare[122].

Even during the COVID-19 pandemic, competition law was understood as an irreplaceable tool to protect undertakings and consumers so that substantial competition rules were nor changed nor relaxed. At the same time, the EU Commission showed awareness of the exceptional challenges that undertakings were facing due to the COVID-19 outbreak and of their crucial role in overcoming the effects of such a crisis. In this respect, the Commission reputed that strict application of art. 101(1) and (3) TFEU could possibly hinder a prompt and effective reaction against the COVID-19 pandemic. Therefore, in order to encourage pro-competitive cooperation aimed at addressing urgent situations related to the current COVID-19 outbreak, it declared available to relax application of substantive EU competition law with respect to exchange commercially sensitive information among firms and agreements provided for by public powers, within the limits set forth in its Firms Cooperation Temporary Framework. Moreover, without prejudice to the persistent application of other EU competition rules with respect to agreements, the EU Commission committed itself to consider the COVID-19 pandemic as a relevant factor within application and enforcement of

[121] Case 5/69, Volk v Vervaecke.

[122] T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, Case C-8/08, Judgment of 4 June 2009, EU:C:2009:343.

EU competition law and to provide guidance and support to facilitate the proper and swift implementation of cooperation agreements needed to overcome the crisis to the ultimate benefit of citizens[123].

Detecting cartels can be difficult because they are typically conducted in secret, with no formal documentation. Undertakings that participate in cartels often engage in covert behaviour, such as secret meetings, coded communications, and the destruction of evidence. As a result, cartel detection relies heavily on whistleblowers, leniency programs, and advanced investigative techniques.

2.1.3. Elements of proof

The standard of proof required to find an anticompetitive agreement is an issue of great relevance. On the one hand, the easiest proof is that of the existence of an express agreement. In this case, the EU Commission can limit itself to provide evidence of the "concurrence of the wills" of the undertakings concerned[124]. In case such proof does not exist, it is necessary to desume the existence of an anti-competitive collusion by way of elements of proof. Here the problem is that of drawing a line between what constitutes a violation of Article 101 (1) TFEU and what is legitimate market behaviour, instead.

In this respect, in *Suiker Unie v Commission*[125], the CJEU elaborated on the distinction between a concerted practice and an independent business strategy, stating that a concerted practice must demonstrate some element of collaboration between undertakings aimed at reducing the uncertainty inherent in the competitive process. In this context, parallel behaviour, where undertakings behave similarly, does not, in itself, indicate concerted practice unless there is additional evidence of communication or coordination between the parties. In fact, EU competition law recognises the "*right ... to react intelligently to the known or foreseeable behaviour of competitors*"[126].

The very core of the prohibition, instead, consist in "*any direct or indirect contact between economic operators of such a kind as either to influence the conduct*

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[123] Emiliano Marchisio, "EU Competition Law Response to the Coronavirus Crisis". ECLR (2020): 373-383; Emiliano Marchisio, "EU competition law and the "just price" in times of crisis". European Competition Law Review (2021): 186-199.

[124] Bundesverband der Arzneimittel-Importeure eV and Commission v. Bayer AG, Joined Cases C-2/01 P and C-3/01 P, Judgment of 6 January 2004, EU:C:2004:2.

[125] Cases 40-48, 50, 54-56, 111, 113, and 114/73, Coöperatieve Vereniging Suiker Unie UA and Others v Commission.

[126] Case 40-48, 50, 54-56, 111, 113, and 114/73, Coöperatieve Vereniging Suiker Unie UA and Others v Commission.

on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question"[127].

It follows that parallel conduct can be considered anti-competitive only insofar as it is accompanied by such elements that allow them to *presume* that parallelism flows from collusion based on several coincidences and indicia that, taken together and in the absence of another plausible explanation, constitute evidence of an infringement of competition rules[128]. Parallelism, in other words, is a mere *fact*, that can be considered relevant to a finding of concerted practice only insofar as such parallelism is further connoted by "collusion" and, therefore, in a reduction of decision-making autonomy of the competing undertakings.

In this respect, the elements of proof of collusion are currently classified into two groups: endogenous and exogenous indicia. The concept of endogenous indicia refers to indicia that relates to the contested conduct itself and their function is to ascertain if parallelism within the relevant market can be explained otherwise[129] or if coordination can be justified by the pursuit of other lawful objectives, e.g. if competing undertakings raise their prices symmetrically and at the same time because of a previous raise in price of a raw material. It must be stressed, in this respect, that no concerted practice can be found if an alternative explanation for the parallel behaviour is produced by the undertakings concerned[130].

Exogenous indicia, on the other hand, do not refer to the contested conduct itself but on other, external, events showing "concertation" between competing undertakings. These are elements showing contact between undertakings, either direct or indirect, such as meetings, mailing or e-mailing, reunions or any other means to exchange information on one another's commercial behaviour. In particular, if the EU Commission submits evidence that competing undertakings participated even in a sole meeting where sensitive commercial information (e.g.: future pricing or production strategies) were discussed, this would amount to a sufficient proof

[127] Case 40-48, 50, 54-56, 111, 113, and 114/73, Coöperatieve Vereniging Suiker Unie UA and Others v Commission.

[128] Eturas and Others v. Lietuvos Respublikos konkurencijos taryba, Case C-74/14, Judgment of 21 January 2016, EU:C:2016:42.

[129] Joined cases C-89, 104, 114, 116-117, 125-129/85, Ahlström et all v Commission (Wood Pulp II).

[130] Joined cases C-89, 104, 114, 116-117, 125-129/85, Ahlström et all v Commission (Wood Pulp II).

of a a concerted practice[131], since under EU law this would be sufficient to believe that the undertakings concerned would then coordinate on the relevant market[132].

These elements have become more and more relevant in the last decades, also because of the strong incentives provided by legislation to "whistle-blowers"[133] (insofar as this induce undertakings to reveal collusion even if not vested in perceivable collusion).

I ought to be noted that the relevance of exogenous indicia is much higher in horizontal cooperation rather than in vertical one. In the latter case, the CJEU is likely to require acquiescence, either express or tacit, of the partners to an agreement, which most of the case will be downstream partners[134]. Of course, the burden to proof acquiescence would lie on the EU Commission[135]. As regards horizontal agreements, instead, even the proof of a single meeting could be sufficient for the EU Commission to prove an agreement between the undertakings attending the meeting[136].

In fact, if exogenous indicia are found, the antitrust authority may presume that such "contacts" were considered by the relevant undertakings in determining their commercial behaviour within the relevant market. This determines a shift in the *onus probandi*, so that it is for the undertakings to prove that the contested contracts are not in breach of competition law[137].

2.1.4. The problem of oligopoly and a special exogenous element of proof: exchange of sensitive commercial information

Oligopolistic markets present unique challenges in the application of Article 101 (1) TFEU. In such markets, in fact, undertakings may engage in parallel conduct without any explicit agreement or concerted practice, because of the limited number of competitors and their interdependency also due to the transparency that such markets show, especially when products and production processes on the relevant

131 Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit.

132 Hüls v. Commission (Polypropylene), Case C-199/92 P, Judgment of 8 July 1999, EU:C:1999:358.

133 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), OJ C 298, 8.12.2006, p. 17–22.

134 Joined cases C-2/01 P and C-3/01 P, Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG.

135 Case T-208/01, Volkswagen v Commission.

136 Tate & Lyle plc, British Sugar plc, and Napier Brown & Co. Ltd v. Commission, Joined Case T-202/98 and others, Judgment of 12 July 2001, EU:T:2001:185; Thyssen Stahl AG v. Commission, Case T-141/94, Judgment of 13 April 1999, EU:T:1999:48.

137 Joined cases C-238/99 P, Limburgse Vinyl Maatschappij NV v Commission.

market are homogeneous. This can lead to anti-competitive outcomes similar to those caused by cartels. The central question is whether such parallel behaviour constitutes a breach of Article 101 (1), given that it may occur without explicit collusion.

Oligopolistic markets are characterized by high market concentration, that is measured through the Herfindahl-Hirschman Index (HHI) by summing the squares of individual firms' market shares. It ranges from 0 (perfect competition) to 10,000 (monopoly). Even if HHI has limitations, as it does not account for dynamic market factors like entry barriers or innovation, it is considered a reliable metric for market concentration. An HHI below 1,000 indicates an unconcentrated, competitive market, while 1,000-2,000 suggests moderate concentration. Markets with an HHI above 2,000 are considered highly concentrated, often indicating oligopolistic conditions, where a few firms dominate, and competition is limited. In oligopolistic markets, HHI values typically range from 2,000 to 5,000, where firms may engage in tacit coordination without explicit agreements.

The main problem in oligopolistic markets is that, as noted in Suiker Unie v Commission[138], oligopolistic firms naturally observe and react to each other's behaviour due to market interdependence but this cannot automatically imply anti-competitive collusion[139]. Parallel behaviour, in this sense, does not constitute an infringement *per se* unless it constitutes a concerted practice, i.e.: a form of coordination that "knowingly substitutes practical cooperation between them for the risks of competition"[140].

In oligopolistic markets, therefore, it is difficult to distinguish between legitimate competitive behaviour and unlawful concertation. E.g.: it cannot be considered falling within the prohibition of Article 101 (1) TFEU the so-called "barometric price leadership", where there is a market leader setting a price and the other few participants following that price, even if this leads to supracompetitive prices on the relevant market[141].

EU Courts and Commission, to establish the existence of a concerted practice, often look for facilitating practices, which are mechanisms that make collusion in oligopolistic markets easier or more stable. These practices can include price signalling and the use of market transparency tools that allow firms to monitor each other's behaviour[142]. It ought to be noted that, even if Article 101 (1) TFEU does

[138] Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73, Suiker Unie v Commission.

[139] Airtours v. Commission, Case T-342/99, Judgment of 6 June 2002, EU:T:2002:146.

[140] Case 48/69, ICI v. Commission (Dyestuffs).

[141] Zinc Producers Group, Commission Decision 84/405/EEC of 23 July 1984, OJ L 220, 17.8.1984, p. 27–42.

[142] Compagnie Maritime Belge Transports SA v. Commission, Joined Cases C-395/96 P and C-396/96 P, Judgment of 16 March 2000, EU:C:2000:132.

not cover unilateral conduct, in oligopolistic markets undertakings may engage in unilateral actions that have anti-competitive effects similar to those of concerted practices, e.g.: adopting pricing policies that signal their intentions to competitors, leading to parallel behaviour without the need for direct communication[143].

EU Courts and Commission, in detecting collusion within oligopolistic markets, also rely on "plus factors", which are additional elements beyond parallel conduct that suggest coordination among firms such as simultaneous or near-simultaneous price increases[144], unusual market behaviour that cannot be explained by market conditions, and the existence of communication between firms that reduces strategic uncertainty in the relevant market[145]. It ought to be noted that parallelism is considered a relevant item for the finding of a concerted practice, but it is not certainly evidence in itself[146].

Information exchange between firms, therefore, is a key issue in oligopolistic markets, where transparency can facilitate collusion by reducing strategic uncertainty[147]. Undertakings may exchange sensitive information such as pricing strategies, production levels, or market forecasts, allowing them to align their behaviour without entering into a formal agreement. In oligopolistic markets, even informal exchanges of information can have significant anti-competitive effects by reducing competitive rivalry and stabilizing collusion.

In this respect, the exchange of non-strategic information (e.g.: industry statistics or aggregated market data), in principle, does not raise competition concerns, since such an exchange does not affect competitors' market behaviour. However, even non-strategic information can raise concerns if it is exchanged in a manner that facilitates anti-competitive coordination. The issue, in fact, is that information exchange can fall within the prohibition under Article 101 (1) TFEU if it leads to or facilitates anti-competitive conduct, particularly collusion because it reduces strategic uncertainty in the market in a way that restricts competition.[148] The distinction between pro-competitive and anti-competitive information exchange is based on several factors, including the type of information exchanged, e.g. whether it is already public or not. The exchange of historical information is generally less prob-

143 Case T-65/89, BPB Industries and British Gypsum v. Commission.

144 Joined cases C-89, 104, 114, 116-117, 125-129/85, Ahlström et all v Commission (Wood Pulp II).

145 Case C-8/08, T-Mobile Netherlands.

146 Imperial Chemical Industries Ltd. (Dyestuffs) v. Commission, Case 48/69, Judgment of 14 July 1972, EU:C:1972:70.

147 Case C-238/05, Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios (AUSB).

148 Emiliano Marchisio, "From concerted practices to "invitations to collude"". European Competition Law Review (2017): 555-566.

lematic from a competition law perspective, as it relates to past market behaviour and is unlikely to influence future competition. The exchange of future pricing intentions, instead, has a high anti-competitive potential as it was held in the *Airfreight* case[149].

The competitive effects of information exchange also depend on the structure of the market in which the exchange takes place. In highly concentrated markets the exchange of information is more likely to restrict competition, as firms can more easily monitor and coordinate their behaviour and put in place retaliation strategies. By contrast, in more competitive markets with many players and low barriers to entry, the exchange of information is less likely to facilitate collusion. Also, the frequency and method of exchange are variables to be considered.

In particular, information exchange can constitute a concerted practice under Article 101 (1) TFEU, when competitors exchange information with the aim of coordinating their market behaviour, reducing uncertainty, and restricting competition. The CJEU, in *ICI v Commission*[150], confirmed that the mere exchange of information between competitors can amount to a concerted practice if it leads to a reduction in competitive rivalry between them. In the *Belgian Brewers* case[151], the Commission found that the exchange of detailed, confidential sales data between brewers had the effect of limiting price competition, as it allowed the companies to monitor each other's market behaviour and adjust their own pricing strategies accordingly. In the *UK Tractors* case[152] the EU Commission found that the exchange of data on sales volumes and market shares between manufacturers of agricultural tractors allowed them to monitor each other's market positions and adjust their strategies accordingly.

The *T-Mobile Netherlands* case[153] further clarified that even a single instance of information exchange between competitors can be sufficient to establish a concerted practice, provided that it leads to a reduction in competitive uncertainty. The Court held that the exchange of information does not need to be frequent or systematic to constitute an infringement of Article 101 (1).

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[149] Airfreight, Commission Decision of 9 November 2010, Case COMP/39462, OJ C 369, 17.12.2010, p. 19.

[150] Case 48/69, Imperial Chemical Industries Ltd v Commission.

[151] Belgian Brewers, Commission Decision of 5 December 2001, Case COMP/3796, OJ L 200, 7.8.2003, p. 1–35.

[152] UK Agricultural Tractor Registration Exchange, Commission Decision of 17 December 1992, Case IV/31.370, OJ L 68, 17.3.1993, p. 19–33.

[153] Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit.*

It ought to be noted that unilateral transmission or dissemination of sensitive commercial information is also prohibited under Article 101 (1) TFEU and may lead to find a concerted practices even by the mere recipients of this information, unless they have formally "distanced" from such transmission or dissemination. This attitude moves from the so-called "Anic Presumption"[154], under which the *reciprocal* exchange of commercially sensitive information become a conduct capable of being classified as concerted practice irrespective of any further parallel conduct on the relevant market, given that the exchange of information itself can be considered as a prohibited "parallel conduct".

The concept of "reciprocity" of conduct necessary for a finding of a concerted practice was then expanded to cases where only one undertaking disseminated relevant information and the others merely received it, as under the Anic presumption it must be assumed that, once the information was acquired, the undertakings would take it into account when determining their future commercial behaviour. In all these cases, the EU courts would recognise a rebuttable presumption of "acceptance" of that piece of information by other undertakings. This allowed the EU courts to include within the prohibition of concerted practices also unilateral communication of strategic information[155], at least in horizontal cases[156], diffusion of strategic information by a third party and "hub and spoke" cases[157].

In the last step, the EU courts have strongly narrowed the possibility to prove that the information disseminated was not even "accepted". Under consolidated case-law, in fact, "acceptation" may be excluded only insofar as the undertaking concerned, within a reasonably short span of time after receipt of the piece of sensitive information, publicly distances itself from the information provided, either through reporting the fact to competition authorities or public distancing[158], "*by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs*"[159] (clearly stating that

[154] Commission v. Anic Partecipazioni, Case C-49/92 P, Judgment of 8 July 1999, EU:C:1999:356.

[155] Cimenteries CBR and Others v. Commission, Joined Cases T-25/95 and others, Judgment of 15 March 2000, EU:T:2000:77.

[156] Joined cases C-2/01 P and 3/01 P, Bundesverband.

[157] AG Szpunar Opinion in case C-74/14, Eturas; AG Wahl Opinion in case C-194/14 P, AC-Treuhand.

[158] Archer Daniels Midland Co. and Others v. Commission, Case C-511/06 P, Judgment of 19 March 2009, EU:C:2009:166; Lafarge v. Commission, Case T-54/03, Judgment of 8 October 2008, EU:T:2008:402.

[159] Aalborg Portland and Others v. Commission, Joined Cases C-204/00 P and others, Judgment of 7 January 2004, EU:C:2004:6.

it does not want such kind of information to be communicated[160] or it does not intend to participate to anticompetitive meetings anymore[161]).

"Acceptation" cannot be contrasted by mere silence, abandonment of the meeting or dissent[162], instead, instead, and "*the fact that an undertaking does not act on the outcome of those meetings*" and "*the role played by an undertaking in an anti-competitive scheme*" are "*not relevant in establishing its liability, and must only be taken into consideration when the gravity of the infringement is assessed, when it comes to determining the fine*"[163].

Such an attitude has been adopted by the CJEU because of the difficulty in providing full proof of the existence of a cartel[164] and the need to fight collusion[165] notwithstanding the absence, in EU competition law, of a specific prohibition of unilateral "invitations to collude" which is provided, instead, under sect. 5 of the US Federal Trade Commission Act.[166]

2.1.5. Cartel facilitators, "hub and spoke" and conduit agreements

It ought to be noted that Article 101 (1) TFEU does not limit its application only to the parties of an agreement or concerted practice but expand its reach also to "cartel facilitators", i.e.: to third parties that not necessarily compete in the relevant market but still assist, enable, or encourage competitors to engage in anti-competitive practices. This reach does not limit to associations of undertakings, which are facilitators expressly included in Article 101 (1) TFEU, but extends to all external entities like consultants, intermediaries, or suppliers insofar as they may provide logistical support, a platform for meetings, or even advise on how to avoid detection by competition authorities.

Among the most relevant precedents one may quote *AC Treuhand AG v Commission*, where the European Court of Justice ruled that even undertakings not operating in the same market as the cartel participants can be held liable if they contribute to the cartel's functioning[167]. In that case, AC Treuhand, a Swiss con-

160 Case C-199/92 P, Hüls (Polypropylene); Case C-49/92 P, Anic.
161 AC-Treuhand AG v. Commission, Case C-194/14 P, Judgment of 22 October 2015, EU:C:2015:717.
162 Case T-303/02, Westfalen Gassen; Case C-511/06 P, Archer Daniels; Joined cases T-25/95 et. All., Cimenteries CBR; Joined case T-202/98 et all., Tate & Lyle; Case T-1/89, Rhône-Poulenc.
163 Joined cases C-204/00 P et all., Aalborg Portland.
164 Case C-74/14, Eturas; Case T-303/02, Westfalen Gassen.
165 Joined cases C-204/00 P et all., Aalborg Portland; Case C-511/06 P, Archer Daniels.
166 Emiliano Marchisio, "From concerted practices to "invitations to collude"". European Competition Law Review (2017): 555-566.
167 AC Treuhand AG v. Commission, Case T-99/04, Judgment of 8 October 2008, EU:T:2008:256.

sultancy firm, played a facilitating role by organizing meetings between competitors and providing logistical support for price-fixing in the chemical industry.

Similarly, Article 101 (1) TFEU prohibits also hub-and-spoke agreements, which are a form of indirect horizontal coordination that occurs when a central player (the "hub"), which may be a supplier, distributor, or intermediary, facilitates collusion between multiple players at a different level of the supply chain (the "spokes"), by acting as the common point of contact between competing undertakings and enabling the exchange of information between them, thereby allowing the coordination of their competitive behaviour. It ought to be noted that in hub-and-spoke arrangements competitors do not directly communicate with each other but align their behaviour through their interactions with the hub, that passes on sensitive commercial information, such as future pricing or production levels, facilitating collusion without the competitors.

The concept of hub-and-spoke agreements may be found, in EU competition law, in the *Eturas* case[168], where it resulted that several travel agencies were using an online booking platform (Eturas, the hub) which sent a message to the agencies (the spokes), recommending a uniform cap on discounts. The CJEU ruled that a concerted practice may be presumed if there is a centralized system facilitating price coordination, even if there is no direct communication between the participants.

A similar scenario is found with respect to conduit agreements, where an intermediary acts as a "go-between" for competitors to exchange sensitive information or coordinate anti-competitive behaviour. In such cases, the intermediary may be a consultant, auditor, or other party with access to key commercial data from competing undertakings, as it appeared to be the case in *Compagnie Maritime Belge*[169].

2.1.6. The intra-enterprise conspiracy doctrine

As noted elsewhere in this book, an undertaking refers to any entity engaged in an economic activity, regardless of its legal form or the way in which it is financed[170]. This definition extends to corporate groups that function as a single economic entity, meaning that parent companies and their wholly owned subsidiaries are generally considered a single undertaking for the purposes of Article 101 TFEU.

The CJEU has clarified that agreements between entities within the same economic unit do not fall within the scope of Article 101 TFEU because they are not

168 Case C-74/14, Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba.
169 Cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge.
170 Case C-41/90, Höfner and Elser v Macrotron GmbH.

agreements between independent "undertakings" but rather decisions within a single economic entity. In the landmark *Viho* case[171], the Court held that a parent company and its subsidiaries, if they form part of the same economic unit, cannot be said to compete or conspire with each other. Therefore, agreements or arrangements between them do not infringe Article 101 TFEU[172].

However, the single economic entity doctrine applies only where the subsidiary has no real autonomy in determining its conduct on the market. If the subsidiary acts independently or in its own commercial interest, it may be considered a separate undertaking, and intra-enterprise agreements could potentially be scrutinized under Article 101 TFEU.

2.1.7. Effect on trade between Member States

Article 101 (1) TFEU only applies if the agreement, decision, or practice has the potential to affect trade between Member States. This requirement ensures that it applies only to practices that have a cross-border dimension and are relevant to the internal market. If an agreement solely affects competition within a single Member State, it may fall under national competition law rather than EU law.

The concept of "affecting trade" has been interpreted broadly by the European Court of Justice. In the landmark case *Consten and Grundig v Commission*[173], the Court ruled that the effect referred to by Article 101 (1) TFEU is any effect and not only a negative one, so that the prohibition applies also when the parties claim that the agreement is capable of increasing trade among Member States. Moreover, even indirect, potential, or minimal effects on trade between Member States are sufficient to meet this criterion. The agreement need not even have an immediate or substantial impact; it is enough that the arrangement may influence cross-border trade in some way.

The European Commission's guidelines on the effect on trade concept[174] further clarify that this criterion is met when the conduct influences the pattern of trade within the EU, including factors such as the geographical scope of the agreement, the market position of the parties, and the nature of the conduct. In this respect, also agreements between enterprises in third countries may fall within

[171] Viho Europe BV v. Commission, Case C-73/95 P, Judgment of 24 October 1996, EU:C:1996:405.
[172] Case C279/06, CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL.
[173] Joined Cases 56 and 58/64 Consten and Grundig v Commission. See also Societe Technique Miniere.
[174] European Commission's guidelines on the effect on trade concept.

the prohibition laid down in Article 101 (1) TFEU insofar as they have an effect on competition and trade in the EU internal market[175].

2.1.8. Sanctions (civil and administrative law), leniency program and settlement procedures

Violation of Article 101 (1) TFEU without meeting the conditions set out in Article 101 (3) TFEU determines two main consequences. On the one hand, under civil law, the agreement is automatically void under Article 101(2) TFEU. This nullity is absolute and applies *ex tunc*, meaning that the agreement is considered never to have had a legal effect. The further specific civil law effects (e.g.: whether certain clauses can be considered severable from the whole agreement) are a matter for the national civil law of the Member States[176], as far as national law complies with the principles of equivalence and effectiveness[177].

The rationale behind the automatic nullity is to ensure that anti-competitive practices do not produce any legal or economic effects within the internal market. As the European Court of Justice emphasised in *T-Mobile Netherlands*[178], the objective of Article 101 (1) TFEU is to protect not just competitors but the entire competitive process.

However, the practical consequences of nullity can vary depending on the nature of the agreement. In some cases, the nullity of the agreement may lead to claims for damages from parties who have been adversely affected by the anti-competitive conduct. This was clarified by the European Court of Justice in *Courage v Crehan*[179], where the Court held that individuals have the right to claim compensation for harm caused by infringements of Article 101 TFEU[180]. The issue is also disciplined, with reference to actions for damages under national law, by Directive 2014/104/EU[181].

[175] Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 A. Ahlström Osakeyhtiö and others v Commission (Woodpulp).

[176] Société de vente de ciments et bétons de l'Est SA v. Kerpen & Kerpen GmbH und Co. KG, Case 319/82, Judgment of 15 September 1983, EU:C:1983:374.

[177] Courage Ltd v. Bernard Crehan, Case C-453/99, Judgment of 20 September 2001, EU:C:2001:465.

[178] Case C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit.

[179] Case C-453/99, Courage Ltd v Bernard Crehan and Courage Ltd.

[180] An issue further clarified in Joined Cases C-295/04, C-296/04, C-297/04, and C-298/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA.

[181] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

On the other hand, under administrative law, undertakings infringing Article 101 TFEU may be imposed a fine by the EU Commission under Article 23(2) a of Regulation 1/2003[182]. Fines, which are often significant as is shown by the statistics published by the EU Commission[183], aim to penalize undertakings for violating competition rules and to discourage both the offending undertakings and others from engaging in or continuing anti-competitive behaviour. In setting the fine amount, the Commission must consider the severity and length of the infringement under Article 23(3) of Regulation 1/2003 and the fine must not surpass 10% of the undertaking's total turnover in the business year prior to the decision [Article 23(2) of Regulation 1/2003].

Application of the fines under EU competition law is analytically defined by the EU Commission's Guidelines on the method of setting fines[184].

It ought to be noted that cooperation with the EU Commission to fight cartels is encouraged by the Commission's leniency program, under which the first enterprise providing sufficient evidence of a cartel can receive full immunity from fines and subsequent enterprises can receive reductions of up to 50% on the fine that would otherwise be imposed, depending on the timing of their application and the added value they provide[185]. A reduction of 10% of the fine can be granted also if the undertaking reaches a settlement with the EU Commission[186].

2.2. Appreciability and the de minimis doctrine

Only appreciable restrictions of competition require application of antitrust law. Appreciability, in this sense, may be appreciated from two different perspectives: quantitative and qualitative.

Quantitative appreciability refers to market shares. EU competition law is mainly aimed at eliminating, or at least limiting, the consequences of the distortions caused by market power. In this perspective, Article 101 (1) TFEU should not apply to agreements that have only an insignificant effect on competition, as

[182] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

[183] Statistics are published on the website of DG Comp at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

[184] EU Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003 (2006/C 210/02), OJ C 210, 1.9.2006, p. 2–5.

[185] EU Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).

[186] EU Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (2008/C 167/01), OJ C 167, 2.7.2008, p. 1–6.

such agreements do not pose a threat to the internal market or consumer welfare. Consequently, under the *de minimis* doctrine, agreements that have only a minimal impact on competition are assumed not to violate Article 101 (1) TFEU.

The *de minimis* doctrine was first articulated in the *Volk* case[187], where the Court emphasized that for an agreement to fall within the scope of Article 101 (1), it must have an "appreciable" effect on competition. In more recent cases, the CJEU has continued to apply the *de minimis* doctrine, reinforcing the view that competition law enforcement should focus on agreements with a significant competitive impact[188].

The EU Commission has further developed this principle through its *De minimis notice*[189], which provides guidance on when an agreement can be considered to have an insignificant impact on competition. The most recent version of the notice, published in 2014, outlines specific market share thresholds below which agreements are presumed not to appreciably restrict competition. According to para 8, agreements between competitors are considered *de minimis* if the combined market share of the parties does not exceed 10%, while agreements between non-competitors are exempt if the individual market share of each party does not exceed 15%.

The thresholds provided by the Commission's *De Minimis* Notice are intended as safe harbours, so that an agreement falling below these thresholds and not containing hard-core restrictions (e.g.: price-fixing, market-sharing, and output limitations[190]) is presumed to have no appreciable effect on competition under Article 101 (1) TFEU. However, the notice also clarifies that these thresholds are not absolute; in exceptional circumstances, agreements with low market shares may still have a significant impact on competition, depending on the structure of the market and the nature of the conduct involved.

The *de minimis* doctrine interacts with other exemption mechanisms under Article 101 (3), such as individual exemptions and block exemptions. In some cases, an agreement that exceeds the *de minimis* thresholds may still benefit from an individual or block exemption if it meets the criteria set out in Article 101 (3) TFEU.

Qualitative appreciability refers to the effects on competition of a given agreement, concerted practice or decision of an association of undertakings by reference

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187 Case 5/69, Volk v Vervaecke.

188 Shell v. Commission, Case T-11/89, Judgment of 18 September 1991, EU:T:1991:55.

189 EU 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 (De Minimis Notice) (2014/C 291/01), OJ C 291, 30.8.2014, p. 1–4.

190 Expedia Inc. v. Autorité de la concurrence, Case C-226/11, Judgment of 13 December 2012, EU:C:2012:795.

to all factors influencing competition on the relevant market[191]. In *Asnef-Equifax*[192] the European Court of Justice addressed an information exchange system in the Spanish banking sector. The Court ruled that while information exchanges are not automatically anti-competitive, they can be appreciable if they reduce uncertainty among competitors and lead to a restriction of competition. The Asnef-Equifax decision highlights that qualitative appreciability depends, particularly, on whether the agreement facilitates coordination or reduces competitive pressure.

The market structure in which an agreement operates is a key determinant in assessing its competitive effects. The degree of market concentration, entry barriers, and the degree of differentiation between products or services all influence how an agreement impacts competition. In *Société Technique Minière*[193] the European Court of Justice established that the competitive effects of an agreement cannot be assessed in the abstract but must be understood within the specific characteristics of the market in which it operates. Therefore, to assess the effect of an agreement, it is necessary to analyse the economic and legal context, particularly the structure of the market, the position of the parties, and the competitive environment.

The position of the parties involved in an agreement is another critical factor in assessing its potential anti-competitive effects. The market power of the parties, their ability to influence prices, output, or innovation—plays a central role in determining whether an agreement will have a significant effect on competition. In *Hoffmann-La Roche*[194] the European Court of Justice held that the dominant position of Hoffmann-La Roche was critical in determining whether the agreements had anti-competitive effects.

The competitive environment in which an agreement operates must also be considered. The level of competition in the market, the dynamics of innovation, and the potential for new entry all impact whether an agreement will restrict competition. Markets characterized by rapid technological change or low entry barriers may be less vulnerable to anti-competitive agreements, as new entrants or innovations can mitigate any restrictive effects. In contrast, in highly concentrated markets with significant entry barriers, the same agreements can have more serious anti-competitive effects. Also, the regulatory framework may play

[191] Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten, Joined Cases C-180/98 to C-184/98, Judgment of 12 September 2000, EU:C:2000:428.

[192] Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios, Case C-238/05, Judgment of 23 November 2006, EU:C:2006:734.

[193] Société minière et technique v. Maschinenbau Ulm, Case 56/65, Judgment of 30 June 1966, EU:C:1966:38.

[194] Hoffmann-La Roche v. Commission, Case 85/76, Judgment of 13 February 1979, EU:C:1979:36.

an important role, as it happened with respect to the pharmaceutical industry in the GlaxoSmithKline case[195].

Assessing the impact of an agreement requires not only an evaluation of current market conditions but also a forward-looking analysis of how the agreement might influence future market dynamics. For instance, agreements that limit innovation or exclude potential entrants may not have an immediate impact but could harm competition in the long term by reducing the competitive pressures that drive market evolution. In *Microsoft v Commission*[196] Microsoft's refusal to supply interoperability information to competitors was found to restrict competition in the market for workgroup server operating systems in view of its long-term effects on innovation and competition in the market. It was held that, by denying competitors the information necessary to develop interoperable products, Microsoft was able to reinforce its dominant position.

2.3. The so-called "State action defence", when cooperation is facilitated or imposed by national law

The application of Article 101 (1) TFEU prescinds from the is independent of the undertakings' awareness of violating EU competition law[197]. However, the problem arises whether the anti-competitive conduct is required by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity by the undertakings concerned. In this hypothesis, in fact, the undertakings concerned would find themselves in an unacceptable contradiction, where they would violate competition law if they complied with the legal provision and could possibly violate the legal provision if they instead complied with competition law.

This contradictory situation is solved moving from the principles that the primacy of EU law "requires any provision of national law which contravenes a Community rule to be misapplied, regardless of whether it was adopted before or after that rule"[198] and that EU law requires "the Member States not to introduce or

195 Case T-168/01, GlaxoSmithKline.

196 Microsoft v. Commission, Case T-201/04, Judgment of 17 September 2007, EU:T:2007:289.

197 Case T-7/89, Hercules Chemicals NV v. Commission; Case C-8/08, T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit.

198 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, Case C-198/01, Judgment of 9 September 2003, EU:C:2003:430.

maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings"[199].

In this respect, undertakings can be held accountable for infringement of Article 101 (1) TFEU even if their anti-competitive conduct is required by national legislation[200]. The classification of such a conduct as unlawful under Article 101 (1) TFEU determines the duty to disapply national legislation which contravenes EU law by national courts and all other organs of the State, including administrative authorities[201].

As regards, by contrast, the application of penalties, EU law distinguishes between two different scenarios[202]. In the first one, national legislation precludes undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition. In this case, the violation of EU competition law cannot expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned. In this scenario, in fact, "the law thus continues to constitute, for the period prior to the decision to disapply it, a justification which shields the undertakings concerned from all the consequences of an infringement" of Article 101 (1) TFEU.

However, after the national competition authority decides that a national law violates Article 101 (1) TFEU and disapplies it, such a decision becomes binding on the undertakings concerned so that from that time moment undertakings can no longer claim that they are obliged by that law to act in breach of the EU competition rules. Their future conduct is therefore liable to be penalised.

In the second scenario, national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct. In this case, the undertakings concerned remain subject to Article 101 (1) TFEU and may incur penalties, including in respect of conduct prior to the decision to disapply that national law. However, the level of the penalty must be set, in these cases, assessing the conduct of the undertakings concerned in the light of the national legal framework, which must be considered a mitigating factor[203].

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[199] Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo Srl, Case C-96/94, Judgment of 10 November 1995, EU:C:1995:308; GB-Inno-BM, Case 13/77, Judgment of 16 November 1977, EU:C:1977:185; Van Eycke v. ASPA NV, Case 267/86, Judgment of 21 September 1988, EU:C:1988:427.

[200] Joined Cases C-359/95 P and C-379/95 P, Commission and France v Ladbroke Racing.

[201] Fratelli Costanzo SpA v. Comune di Milano, Case 103/88, Judgment of 22 June 1989, EU:C:1989:256.

[202] Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato.

[203] Suiker Unie and Others v. Commission, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73, and 114/73, Judgment of 16 December 1975, EU:C:1975:174.

2.4. Individual and block exemptions under Article 101 (3) TFEU

Article 101 (3) TFEU provides for the possibility of exempting agreements that, despite being restrictive of competition, generate sufficient pro-competitive benefits to outweigh their negative effects[204]. The exemption mechanism under Article 101 (3) allows for a balanced approach in EU competition law. It recognizes that not all restrictions on competition are harmful *per se* and that some may enhance competition if the four following criteria are cumulatively satisfied. The burden of proof lies in the undertaking seeking the exemption to demonstrate how the agreement satisfies such criteria[205].

First of all, agreements must contribute to improving the production or distribution of goods or promoting technical or economic progress. Compliance with this criterion requires that efficiency gains effectively arise from the cooperation and are objectively appreciable[206]. Of course, this criterion may raise concerns to undertakings since the anticompetitive effects of an agreement appear easier to assess *ex ante* than the "technical and economic progress" following the execution of an agreement[207].

Secondly, consumers must receive a fair share of the benefits. This criterion ensures that efficiency gains are not simply retained by the undertakings but result in tangible improvements for consumers, such as lower prices, better quality, or increased innovation, as stated in cases like *MasterCard*[208]. In this respect, the problem arises of what is the consequence if some consumers receive positive effects but other are damaged by the agreement. The approach under EU law appears to be that the global outcome need be taken into consideration, so that this condition can be considered complied with if positive effects for several consumers outweigh the negative effects for others[209].

Thirdly, the restrictions must be indispensable to achieving the pro-competitive objectives (the so-called proportionality test), so that if the same pro-competitive outcomes can be achieved through less restrictive means, the agreement will

[204] Matra Hachette SA v. Commission, Case T-17/93, Judgment of 15 July 1994, EU:T:1994:89.

[205] Case C-238/05, Asnef-Equifax v Ausbanc.

[206] Joined cases 56 and 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission.

[207] GlaxoSmithKline Services Unlimited v. Commission, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, Judgment of 6 October 2009, EU:C:2009:610.

[208] MasterCard Inc. and Others v. Commission, Case C-382/12 P, Judgment of 11 September 2014, EU:C:2014:2201.

[209] Case C-238/05, Asnef-Equifax v Ausbanc.

not satisfy this condition. As clarified in *Metropole Télévision*[210], also the burden of proof lies on enterprises to prove that less restrictive alternatives are not feasible.

Fourthly, the agreement must not eliminate competition in respect of a substantial part of the products or services in question. This condition ensures that competition, which is the driving force behind innovation and efficiency, remains effective even in markets where restrictive agreements are allowed[211]. It ought to be noted that this evaluation refers to a different standard than that used to assess dominance in the relevant market[212].

The eligibility for an agreement to be exempted takes into consideration not only the elements relating to the agreement itself but also the wider context, including the objective conditions of competition in the relevant market. By way of example, in relevant markets where small undertakings are present along with a few bigger market players, agreements among small firms may benefit from exemptions if they allow them to compete effectively with larger competitors[213].

The current system under EU competition law, introduced by Regulation 1/2003, requires undertakings to self-assess whether their agreements meet the conditions of Article 101 (3) TFEU. No prior notification to the EU Commission is required and undertakings must ensure their agreements comply with Article 101 (3) on their own. The Eu Commission retains the power to investigate agreements, assess whether they meet the conditions of Article 101 (3) TFEU, and impose fines if they do not. To facilitate self-assessment, the EU Commission has issued guidelines regarding both the application of Article 101 (3) in general[214] and its appli-

[210] Métropole Télévision (M6) and Others v. Commission, Case T-112/99, Judgment of 11 July 2001, EU:T:2001:215.

[211] Groupement des cartes bancaires v. Commission, Case C-67/13 P, Judgment of 11 September 2014, EU:C:2014:2204.

[212] Atlantic Container Line and Others v. Commission, Case T-395/94, Judgment of 22 November 2002, EU:T:2002:49.

[213] Transocean Marine Paint Association, Case 17/74, Judgment of 16 July 1974, EU:C:1974:82.

[214] EU Commission Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), OJ C 101, 27.4.2004, p. 97–118.

cation with respect to vertical restraints[215], horizontal cooperation agreements[216], technology transfer agreements[217], R&D and specialisation agreements[218].

It ought to be noted that also the exemption decisions adopted by the EU Commission pursuant to Regulation 17/1962 (the predecessor of Regulation 1/2003) may be considered to have precedential value. However, the evolution of EU competition law in the last decades and the issuance of the abovesaid guidelines have limited such a precedential value.

In addition to individual exemptions, Article 101 (3) TFEU provides for the use of block exemptions. Block exemptions are instruments that automatically exempt entire categories of agreements from the prohibition in Article 101 (1), provided certain conditions are met. These regulations are adopted by the EU Commission and are designed to offer legal certainty to businesses by providing a safe harbour for common types of agreements that are deemed to generate pro-competitive benefits. The application of Block Exemption Regulations mainly depends on two main conditions: that the parties to the agreement do not exceed a given market share cap and that it does not contain black-listed clauses that would prevent block exemption from applying to the specific clause or even to the entire agreement.

Block exemptions are typically issued for types of agreements that are likely to generate efficiency gains and consumer benefits, but which may involve some degree of competition restriction. The EU Commission periodically reviews and updates block exemptions to reflect changes in market conditions and economic analysis. It is clear that Block Exemption Regulations need to be considered as exceptions to the general prohibition of anticompetitive agreements under Article 101 (1) TFEU; therefore, they must be interpreted narrowly[219].

[215] EU Commission Guidelines on Vertical Restraints (2010/C 130/01), OJ C 130, 19.5.2010, p. 1–46.

[216] EU Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), OJ C 11, 14.1.2011, p. 1–72; EU Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), OJ C 11, 14.1.2011, p. 1–72.

[217] EU Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/C 89/03), OJ C 89, 28.3.2014, p. 3–50.

[218] EU Commission Guidelines on research and development agreements (2021/C 372/01), OJ C 372, 1.12.2021, p. 1–52.

[219] Bayerische Motorenwerke v. ALD Auto-Leasing D GmbH, Case C-70/93, Judgment of 5 October 1995, EU:C:1995:344.

2.4.1. The Vertical Block Exemption Regulation

The Vertical Block Exemption Regulation (VBER)[220] applies to vertical agreements between undertakings operating at different levels of the supply chain, such as agreements between manufacturers and distributors or wholesalers and retailers.

Many types of vertical restraints can benefit from an exemption under Article 101 (3) TFEU, particularly if they generate efficiencies or other pro-competitive benefits. The European Commission has adopted specific guidelines on vertical agreements, known as the *Vertical Guidelines*[221], as well as the *Vertical Block Exemption Regulation* (VBER)[222], which provide a framework for assessing the legality of various types of vertical agreements. Vertical agreements are generally less likely to restrict competition than horizontal agreements between competitors, and the VBER recognizes that such agreements can often lead to efficiency gains, such as better coordination between production and distribution.

The VBER exempts vertical agreements from the scope of Article 101 (1) TFEU, provided that the market share of both the supplier and the buyer does not exceed 30%, and the agreement does not contain certain hard-core restrictions, such as resale price maintenance or territorial restrictions. These hard-core restrictions are considered so harmful to competition that they cannot benefit from the block exemption, regardless of the market share of the parties involved.

The VBER sometimes conditions exemptions for vertical agreements to compliance with time limitations, e.g.: the exemption applies if the non-compete obligation is limited to 5 years or less. After this period, the non-compete clause loses its automatic exemption, unless it is renewable by the buyer beyond five years and does not de facto impose indefinite exclusivity. Post-term non-compete obligations are exempt if they are limited to 1 year and necessary to protect the know-how of the supplier.

2.4.1.1. Single branding (non-compete obligations)

Single branding, also known as a non-compete obligation, refers to an agreement between a supplier and a buyer that obliges the buyer to purchase products exclusively from the supplier or to refrain from purchasing competing products from other suppliers. These agreements are commonly used in supply chains

[220] Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1–7.

[221] In OJ C 130, 19.5.2010.

[222] Regulation (EU) No 330/2010.

where suppliers seek to secure long-term relationships with distributors or retailers and avoid competition from other brands.

Single branding agreements can deliver significant pro-competitive benefits by fostering a stable and efficient supply chain. Suppliers may be more willing to invest in research, development, and marketing if they are assured of a loyal customer base. Similarly, exclusive arrangements can provide retailers or distributors with incentives to invest in promoting the supplier's products, leading to greater market penetration and improved consumer awareness.

Such agreements can also reduce transaction costs and improve coordination along the supply chain. However, single branding agreements can also pose competition risks, particularly when the supplier holds a dominant position in the market. By restricting the buyer's ability to purchase products from other suppliers, non-compete obligations can lead to market foreclosure, reducing competition by preventing rival suppliers from accessing key distributors or retailers. This can limit consumer choice and potentially lead to higher prices. Furthermore, these agreements can reinforce market dominance and restrict new entrants from gaining a foothold in the market.

The key issue in assessing non-compete obligations is the potential for market foreclosure, particularly in markets where the supplier holds significant market power. The Commission emphasizes that long-term non-compete obligations in markets with high entry barriers are particularly problematic, as they can lead to significant foreclosure effects and reduce competition[223].

2.4.1.2. Exclusive distribution

Exclusive distribution agreements involve a supplier granting exclusive rights to a distributor to sell its products in a specific geographic area or market. In exchange, the supplier agrees not to appoint other distributors in the same territory, and the distributor may agree not to sell competing products from other suppliers. Exclusive distribution agreements are common in sectors where manufacturers seek to control the distribution network to ensure consistent product quality, branding, and customer service.

Exclusive distribution agreements can promote efficiency by allowing suppliers to optimize distribution networks and ensure that their products are sold by qualified and dedicated distributors. Such agreements provide incentives for distributors to invest in marketing, sales, and customer service, as they are guaran-

[223] Vertical Guidelines, para. 134.

teed exclusive access to the supplier's products within the given territory. This can lead to better service for consumers and more efficient distribution.

The main competition concern associated with exclusive distribution agreements is the potential for market foreclosure, an issue that is linked to the objective of the Single European Market[224].

Such agreements are less likely to raise competition concerns if they lead to efficiencies in distribution and do not result in significant market foreclosure[225]. However, the Commission emphasizes that in markets with high barriers to entry or limited competition exclusive distribution agreements may lead to anti-competitive foreclosure[226]. In particular, if a large share of the market is covered by exclusive distribution arrangements, it may prevent new entrants from establishing a presence in the market.

Moreover, the guidelines note that exclusive distribution agreements that include territorial restrictions preventing passive sales (i.e., sales in response to unsolicited customer requests) are particularly problematic. The Commission views such restrictions as limiting competition by preventing cross-border trade and limiting consumer access to alternative suppliers. While active sales restrictions (i.e., restrictions on targeted marketing to customers outside the assigned territory) may be justified in certain cases, passive sales restrictions are generally prohibited under Article 101 (1) TFEU, except in specific circumstances such as protecting selective distribution systems[227].

2.4.1.3. Exclusive customer allocation

Exclusive customer allocation agreements are a type of vertical restriction where a supplier assigns specific customers or customer groups to a distributor or retailer, granting them exclusive rights to sell products to those customers. The supplier agrees not to appoint other distributors or retailers to sell to the same customers, and the distributor may agree not to sell to customers outside its allocated group.

Exclusive customer allocation agreements can lead to efficiencies by allowing suppliers and distributors to tailor their sales strategies to specific customer groups. These agreements can help suppliers establish closer relationships with key customers, such as large institutional buyers or specialized industries, leading

[224] Emiliano Marchisio, "EU Enlargement and EU Competition Law: the Case of Exclusive Distribution Agreements". Albanian Law Journal (2024): 1-20.
[225] Vertical Guidelines, para. 150.
[226] Vertical Guidelines, para. 153.
[227] Vertical Guidelines, para. 151.

to improved service and product offerings. Customer allocation can also prevent over-saturation of distributors in the same market, reducing competition among the supplier's own distributors.

The primary competition concern with exclusive customer allocation agreements is that they may lead to customer foreclosure. By assigning specific customers or customer groups exclusively to certain distributors, the supplier may limit other distributors' or retailers' access to the same customers, reducing competition. These agreements can also create price rigidity and prevent customers from accessing alternative suppliers, particularly if customer allocation agreements cover a large share of the market.

The Commission's Vertical Guidelines address exclusive customer allocation agreements in a similar manner to exclusive distribution agreements. The competitive impact of such agreements depends on the market context, particularly the level of market concentration and the availability of alternative suppliers. The Commission notes that exclusive customer allocation agreements are more likely to raise competition concerns in markets where a small number of large customers represent a significant portion of total demand. In such markets, customer allocation agreements could lead to customer foreclosure, as competitors may be unable to access key customers. Additionally, if the supplier or distributor holds significant market power, exclusive customer allocation agreements could reinforce dominance and reduce competition[228].

The guidelines emphasize that restrictions on passive sales to allocated customers are generally prohibited, as they prevent customers from seeking alternative suppliers and reduce competition. However, active sales restrictions (i.e., restrictions on targeted marketing to customers outside the allocated group) may be permitted under certain circumstances, particularly if they are necessary to protect investments in promoting or developing the customer relationship. The Commission's guidelines stress the need to carefully evaluate whether customer allocation agreements are indispensable to achieving pro-competitive benefits, such as efficiency gains or better service to customers, and whether less restrictive alternatives could achieve the same objectives[229].

2.4.1.4. Selective distribution

Selective distribution is a system where a supplier agrees to sell its products only to distributors or retailers that meet specific criteria or standards, such as

[228] Vertical Guidelines, para. 182.
[229] Vertical Guidelines, para. 183.

qualifications, quality of service, or brand image. In turn, these approved distributors or retailers agree not to sell the supplier's products to unauthorized or non-approved resellers. Selective distribution is commonly used in industries that require high-quality distribution networks or specialized customer service, such as luxury goods, electronics, and cosmetics.[230]

Selective distribution agreements can promote competition by ensuring that products are distributed through high-quality or specialized networks that maintain the brand's image and ensure consistent service standards. These agreements can also incentivize distributors to invest in training, facilities, and marketing, leading to improved customer experiences and better product representation. In some cases, selective distribution can enhance inter-brand competition by increasing consumer trust in a brand and ensuring that products are sold in environments that match their quality.

The main competition concern associated with selective distribution is the risk of restricting intra-brand competition, particularly if the criteria for selecting distributors are overly restrictive or discriminatory. By limiting the number of authorized distributors, selective distribution systems may prevent smaller or non-traditional retailers from accessing the market, thereby reducing competition between distributors. Selective distribution systems can also raise concerns if they are used to shield inefficient distributors from competition or if they involve restrictions on cross-border trade, limiting consumer choice.

The Commission's Vertical Guidelines provide a detailed framework for assessing selective distribution systems, focusing on whether the criteria for selecting distributors are proportionate, objective, and applied in a non-discriminatory manner[231]. In this respect, the Commission distinguishes between qualitative and quantitative selective distribution systems. The first ones involve selecting distributors based on objective criteria, such as technical skills, sales facilities, or customer service quality. Qualitative selective distribution is generally less problematic from a competition law perspective and may fall outside the scope of Article 101 (1) TFEU if it meets certain conditions, such as ensuring that the restrictions are necessary and proportionate to the objectives of maintaining product quality and enhancing consumer welfare[232]. **Quantitative selective distribution**, by contrast, imposes numerical restrictions on the number of authorized distributors or sets limits on where distributors may operate. Quantitative selective distribution

[230] Emiliano Marchisio, "Internet sales of luxury (and maybe also other) products within selective distribution systems after Coty". European Competition Law Review (2018): 345-353.

[231] Vertical Guidelines, para. 174.

[232] Case C-26/76, Metro SB-Großmärkte GmbH & Co. KG v Commission.

is more likely to raise competition concerns, as it can reduce intra-brand competition and limit consumer access to alternative retailers[233].

One of the key issues in selective distribution systems is the treatment of restrictions on passive sales. The Commission's guidelines make clear that selective distribution agreements may not impose restrictions on passive sales by authorized distributors, particularly when such restrictions prevent cross-border trade within the internal market. Restrictions on active sales, however, may be permissible under certain circumstances, particularly if they are necessary to protect the supplier's selective distribution system and ensure that authorized distributors adhere to the agreed-upon criteria[234].

2.4.1.6. Franchising

Franchising is a type of vertical agreement where a franchisor grants a franchisee the right to operate a business under the franchisor's brand and system, in exchange for a fee or royalty. The franchisor typically provides the franchisee with a complete business model, including marketing support, training, operational guidelines, and intellectual property (such as trademarks and logos). In return, the franchisee agrees to follow the franchisor's established business practices and adhere to specific operational standards.

Franchising can deliver significant pro-competitive benefits by enabling the rapid expansion of brands across different geographic markets while maintaining consistent quality and service standards. Franchisees benefit from access to an established business model and brand, reducing the risks and costs associated with starting a new business. Consumers benefit from standardized products and services, as franchising ensures that customers receive a similar experience across all franchise locations. Franchising can also promote inter-brand competition, as franchise networks often compete with other brands in the same industry.

The competition risks associated with franchising agreements primarily arise from the restrictions imposed on franchisees, particularly regarding pricing, territory, and customer allocation. Franchise agreements often include vertical restraints that limit the franchisee's ability to sell outside its assigned territory or to source products from suppliers other than the franchisor. These restrictions can reduce intra-brand competition and limit consumer choice. Moreover, if the fran-

233 Vertical Guidelines, para. 179.
234 Vertical Guidelines, para. 175.

chisor holds significant market power, franchising agreements could be used to reinforce dominance and prevent new entrants from competing in the market[235].

The Commission's Vertical Guidelines provide specific guidance on franchising, emphasizing that these agreements typically involve a combination of vertical restraints, including non-compete obligations, exclusive territories, and quality control standards[236]. The guidelines acknowledge that many of these restrictions may be necessary to protect the franchisor's brand and ensure the consistent application of the franchising model across different locations. For example, non-compete obligations that prevent franchisees from selling competing products may be justified if they are essential to protecting the franchisor's brand and ensuring that franchisees remain loyal to the franchisor's business model. However, non-compete obligations that extend beyond five years or cover a substantial portion of the franchisee's business may raise concerns about market foreclosure and anti-competitive effects[237].

Similarly, exclusive territory restrictions that prevent franchisees from selling outside their assigned region may be permissible if they are necessary to protect the franchisor's investment in developing the franchise network. However, the Commission emphasizes that restrictions on passive sales to consumers outside the assigned territory are generally prohibited, as they limit consumer access to alternative suppliers and restrict cross-border trade within the internal market[238].

2.4.1.7. Exclusive supply

Exclusive supply agreements involve a buyer agreeing to purchase products exclusively from a particular supplier for a specified period. The supplier, in turn, may agree not to sell the same products to other buyers or distributors, thereby securing an exclusive supply relationship. Exclusive supply agreements are commonly used in industries where buyers require a stable and reliable source of input or where suppliers seek to lock in long-term contracts with key customers.

Exclusive supply agreements can generate significant efficiencies by ensuring that buyers have a stable and reliable source of inputs, reducing the risk of supply disruptions and enabling better planning and investment. Such agreements also provide suppliers with a secure customer base, encouraging them to invest in production capacity, quality improvements, and innovation. By securing long-term

[235] Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis, Case 161/84, Judgment of 28 January 1986, EU:C:1986:41.

[236] Vertical Guidelines, para. 189.

[237] Vertical Guidelines, para. 191.

[238] Vertical Guidelines, para. 192.

supply contracts, buyers can often negotiate more favourable terms, such as lower prices or higher quality standards.

The main competition concern associated with exclusive supply agreements is the potential for market foreclosure. By purchasing exclusively from a single supplier, buyers may prevent other suppliers from accessing a significant portion of the market, thereby reducing competition. This is particularly problematic if the supplier holds a dominant position or if the exclusive supply agreement covers a large share of the market. Exclusive supply agreements can also limit the buyer's ability to switch suppliers, potentially leading to higher prices or reduced product quality over time.

The Commission's Vertical Guidelines note that exclusive supply agreements are less likely to raise competition concerns if they lead to efficiencies in the supply chain, such as improved production planning or lower transaction costs[239]. However, exclusive supply agreements may raise concerns if they lead to significant market foreclosure, particularly in markets with high entry barriers or limited competition. The Commission stresses the importance of assessing the market context, including the duration of the exclusive supply obligation and the proportion of the market covered by exclusive supply agreements. Long-term exclusive supply agreements that prevent rival suppliers from accessing a substantial portion of the market are more likely to raise competition concerns[240].

The Commission also notes that exclusive supply agreements involving dominant firms are subject to stricter scrutiny, as such agreements can reinforce dominance and prevent competitors from gaining access to critical input. In cases where the supplier holds significant market power, exclusive supply agreements may be considered an abuse of dominance under Article 102 TFEU if they lead to market foreclosure or significantly restrict competition.

The assessment of exclusive supply agreements focuses on whether they foreclose access to the market for competing suppliers or limit buyers' freedom to choose alternative suppliers. The Commission highlights that shorter-term exclusive supply agreements or those that involve a small share of the market are less likely to lead to significant anti-competitive effects, whereas long-term or widespread exclusive supply obligations may restrict competition by preventing other suppliers from competing effectively in the market[241].

Furthermore, exclusive supply agreements that are coupled with additional restrictions, such as non-compete clauses or resale restrictions, may amplify the

[239] Vertical Guidelines, para. 204.
[240] Vertical Guidelines, para. 206.
[241] Vertical Guidelines, para. 206.

risk of market foreclosure. In such cases, these combined vertical restraints will be analysed together to assess their cumulative impact on competition.

2.4.2. Horizontal co-operation agreements

Horizontal cooperation agreements involve collaboration between undertakings operating at the same level of the supply chain, typically between competitors. Such agreements can deliver significant economic benefits, such as improved efficiencies, innovation, and cost reductions. However, they can also raise competition concerns by potentially reducing competition between the parties involved, leading to price-fixing, market sharing, or other anti-competitive practices. Horizontal cooperation agreements may qualify for an exemption under Article 101 (3) TFEU, provided they deliver pro-competitive benefits and do not unduly restrict competition.

2.4.2.1. Research and Development Agreements

R&D agreements are governed by the Research and Development Block Exemption Regulation (R&D BER)[242], which provides a safe harbour for certain types of R&D cooperation. The R&D BER exempts agreements from Article 101 (1) TFEU if the parties' combined market share does not exceed 25% in the relevant product or technology market, and if the agreement does not contain any hardcore restrictions, such as price-fixing or output limitations. All parties involved in the R&D Agreement, moreover, must have full access to the results of the collaboration, including intellectual property rights and know-how, for the purposes of further R&D or commercialization.

The exemption lasts for the duration of the R&D agreement and for joint exploitation of the results, up to 7 years after the products or technologies are first put on the market. After this period, the agreement must meet the general competition law rules, or it will no longer benefit from the block exemption.

R&D agreements can deliver significant pro-competitive benefits, particularly when they involve the pooling of complementary resources and expertise. Such cooperation can lead to the development of new products or technologies that would not have been possible individually. Additionally, R&D cooperation can reduce costs and shorten the time to market for new products, benefiting consumers through lower prices and increased product choice.

[242] Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements, OJ L 335, 18.12.2010, p. 36–42.

However, R&D agreements can also raise competition concerns, particularly if they reduce incentives for independent innovation or restrict access to the results of the collaboration. The European Commission's Horizontal Guidelines emphasize that R&D agreements should not foreclose competitors or restrict access to essential inputs or technologies. For example, an agreement that grants exclusive rights to the results of joint R&D to one party could limit competition by preventing other undertakings from benefiting from the innovation.

The competitive assessment of R&D agreements focuses on whether the collaboration leads to a significant reduction in competition in the relevant market. Factors such as market concentration, the scope of the agreement, and the nature of the technology involved are crucial in determining whether the agreement is likely to have anti-competitive effects.

2.4.2.2. Specialisation Agreements

Specialization agreements involve cooperation between undertakings to specialize in the production of certain products or services and are governed by the Specialization Block Exemption Regulation (SBER)[243], which provides a safe harbour for certain types of specialization agreements. The SBER applies to three types of specialization agreements: **Unilateral Specialization Agreements**, where one party agrees to stop producing certain products or services and instead purchases them from the other party; **Reciprocal Specialization Agreements**, where two or more parties agree to specialize in different products or services and purchase the products they do not produce from each other; Joint Production Agreements, where parties collaborate to produce certain products or services jointly.

The Specialization Block Exemption Regulation (SBER) provides that these agreements are exempt from the prohibition in Article 101 (1) TFEU if the combined market share of the parties does not exceed 20% in the relevant market. Like other block exemptions, the SBER includes a list of hard-core restrictions that automatically disqualify agreements from the exemption. These restrictions include price-fixing, output limitations, and market-sharing, which are considered inherently anti-competitive and cannot benefit from a block exemption, regardless of market share.

The rationale behind the SBER is that specialization agreements often lead to efficiency gains that benefit consumers by reducing production costs, increasing

[243] Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialization agreements, OJ L 335, 18.12.2010, p. 43–47.

economies of scale, and improving product quality. By allowing firms to specialize in the production of certain products or services, these agreements can reduce duplication of effort, improve resource allocation, and increase the competitiveness of the firms involved. Additionally, specialization agreements can foster innovation by allowing firms to focus on developing new products or improving existing ones. By freeing up resources that would otherwise be spent on producing a wide range of products, firms can invest more in research and development, leading to better products and services for consumers.

However, specialization agreements can also raise competition concerns, particularly if they reduce competition between the parties involved or result in market foreclosure. If two or more firms agree to specialize in different products or services and purchase exclusively from each other, the agreement could limit the ability of third parties to compete in the market, leading to higher prices or reduced consumer choice. The European Commission's Horizontal Guidelines emphasize that specialization agreements should not eliminate competition in the relevant market or result in the creation of monopolistic or dominant positions.

The competitive assessment of specialization agreements focuses on whether the agreement leads to significant efficiency gains that outweigh any potential restrictions on competition. The EU Commission has indicated that specialization agreements are more likely to qualify for an exemption under Article 101 (3) TFEU if they result in tangible benefits for consumers, such as lower prices, improved product quality, or increased innovation. However, the EU Commission is particularly vigilant about agreements that could result in market-sharing or output limitations, which are considered serious restrictions of competition.

2.4.2.3. Technology Transfer Agreements

The Technology Transfer Block Exemption Regulation (TTBER)[244] covers agreements for the licensing of patents, know-how, and software copyrights, which are essential for fostering innovation and technological progress. Technology Transfer Agreements (TTAs) typically involve the licensing of intellectual property (IP) rights, such as patents, know-how, or software, from one party (the licensor) to another (the licensee) to produce goods or services based on the licensed technology and under specific terms and conditions.

[244] Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17–23.

The TTBER introduces market share thresholds to ensure that only agreements with a limited potential to restrict competition qualify for the exemption. For competing undertakings, the combined market share of the parties in the relevant market must not exceed 20%. For non-competing undertakings, the market share of each party must not exceed 30% in their respective relevant markets.

The TTBER applies for the duration of the technology transfer agreement, provided that the other conditions are met (e.g., market share thresholds). Non-compete obligations in the technology transfer agreement are exempt for the entire term of the agreement, including any post-term non-compete obligations if they are directly related to the protection of know-how.

If an agreement contains hardcore restrictions (such as price-fixing, output limitations, territorial or customer restrictions), it does not qualify for the safe harbour of the TTBER and is likely to infringe Article 101 (1) TFEU. In addition to hard-core restrictions, the TTBER identifies certain types of clauses, known as excluded restrictions, that are not automatically exempt under the regulation. If a TTA includes any of these excluded restrictions, only the specific clause is excluded from the exemption, while the rest of the agreement may still benefit from the safe harbour. Key excluded restrictions include **Exclusive Grant-back Obligations**, **No-Challenge Clauses** and **Post-Termination Non-Compete Clauses**.

On the one hand, TTAs encourage the diffusion of new technologies, particularly in sectors that require significant investment in R&D. By allowing firms to share and license cutting-edge technologies, TTAs promote innovation and accelerate the development of new products and services. This can lead to increased consumer welfare through improved product quality, lower prices, and greater choice. They can enable smaller firms or new entrants to access key technologies that they would not be able to develop on their own. By licensing technology from more established players, these firms can enter new markets and compete more effectively, thereby enhancing market competition. TTAs allow firms to focus on their core competencies, leading to more efficient allocation of resources. For instance, a firm with strong R&D capabilities can focus on developing new technologies, while another firm with manufacturing expertise can license and commercialize the technology. This division of labour can lead to greater efficiency and lower production costs.

One of the primary concerns with TTAs is the risk of market foreclosure, particularly in cases where a licensor grants exclusive rights to a licensee and restricts access to the technology for other competitors. This can limit competition by preventing rivals from entering or expanding in the market, especially if technology is essential for competing effectively. Certain restrictions in TTAs, such as non-compete obligations or exclusive grant-back clauses, can stifle innovation by limiting the licensee's ability to conduct independent R&D or improve the li-

censed technology. These restrictions can reduce the incentives for licensees to innovate, leading to less technological advancement and diminished competition in the long term. TTAs between competitors can facilitate collusion or anti-competitive coordination, particularly if they include price-fixing clauses or territorial restrictions. Such agreements can harm competition by reducing rivalry between competitors and leading to higher prices or reduced output.

2.5. Agreements and abuse of dominant position

In EU competition law, Article 101 TFEU and Article 102 TFEU are the two primary provisions governing anti-competitive behaviour. Article 101 (1) TFEU prohibits agreements, decisions by associations of undertakings, and concerted practices that restrict competition, while Article 102 TFEU prohibits the abuse of a dominant position by one or more undertakings.

Although these two provisions serve distinct purposes, they sometimes overlap. The overlap occurs in two main scenarios: where an undertaking with a dominant position enters into agreements or practices that may also infringe Article 101 (1) TFEU and where two or more undertakings enter into agreements or practices that allow them to exercise, collectively, a dominant position.

In the first scenario, a dominant firm's agreements with its suppliers, distributors, or competitors may infringe both Article 101 (1) and Article 102 TFEU, for example, if a dominant firm enters into exclusive agreements that prevent its trading partners from dealing with its competitors, the agreement may be seen as an anti-competitive agreement under Article 101 (1) TFEU, and the dominant firm's behaviour may also be classified as an abuse of dominance under Article 102 TFEU, as it happened in *Hoffmann-La Roche*[245].

Also concerted practices involving dominant firms can lead to similar competition concerns, e.g.: if a dominant firm engages in informal coordination with competitors or other market participants to exclude competitors and hence restrict competition. These practices can include offering rebates to downstream partners that agree to purchase all or most of their inputs from the dominant firm, as it happened in *Intel v Commission*[246].

The Commission's Guidelines on the application of Article 102 TFEU[247] emphasize that exclusionary practices by dominant firms often involve agreements

[245] Case 85/76, Hoffmann-La Roche v. Commission.

[246] Intel v. Commission, Case T-286/09, Judgment of 12 June 2014, EU:T:2014:547.

[247] Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, 7-20.

or practices that could infringe both Article 101 (1) and Article 102 and state that both provisions may be applied in parallel to ensure that all aspects of the anti-competitive conduct are addressed.

Key issues in these cases relate to whether the provisions should be applied simultaneously or sequentially and the potential for dual liability, where an undertaking can be found in breach of both articles for the same conduct. While the first issue seems to depend mainly on the Commission's enforcement priorities, the CJEU has clarified that the imposition of fines for breaches of both Article 101 (1) and Article 102 is permissible if the conduct violates both provisions[248].

In the second scenario, the intersection between Article 101 (1) and Article 102 TFEU verifies with respect to "collective dominance", which represents a hypothesis where undertakings act together in such a way as to exert market power similar to that of a single dominant entity.[249] For collective dominance to be in place is not necessarily explicit coordination. In oligopolistic markets it can also arise from tacit collusion or mutual awareness of each other's market strategies, resulting in similar outcomes to a single firm's dominance[250], since undertakings are aware of each other's behaviour and can align their market strategies without the need for explicit coordination, there is no competitive pressure from outside the group and consumers or customers cannot significantly influence market conditions to prevent anti-competitive outcomes.

Even if explicit coordination is not necessary, of course, the existence of an agreement or concerted practices is certainly sufficient for collective dominance to be in place. This is the case, e.g., where undertakings fix prices and allocate markets collectively acting as a single economic entity, thus restricting competition, as it happened in *Italian Flat Glass*[251] or competitors form an entity that collectively holds a dominant position in the market and excludes competitors and imposes predatory pricing, as in *Compagnie Maritime Belge*[252].

Also, in cases of collective dominance, the same behaviour can simultaneously breach both Article 101 (1) and Article 102 TFEU[253].

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[248] Case C-382/12, P MasterCard v. Commission.

[249] Emiliano Marchisio, "Critical Remarks on Collective Dominant Position in EU and Italian Antitrust Law". European Competition Law Review (2013): 559-569.

[250] Case T-342/99, Airtours v. Commission.

[251] Italian Flat Glass, Cases T-68/89, T-77/89, and T-78/89, Judgment of 10 March 1992, EU:T:1992:38.

[252] Joined Cases C-395/96 and C-396/96, Compagnie Maritime Belge.

[253] British Airways v. Commission, Case T-219/99, Judgment of 17 December 2003, EU:T:2003: 343.

2.6. Agreements and mergers: joint ventures and ancillary restraints

Article 101 (1) TFEU interacts with merger control in two main areas: that of joint ventures and that of the ancillary restraints. Joint ventures (JVs) are a form of horizontal cooperation agreement where two or more undertakings create a new entity or jointly carry out a specific activity, sharing risks and rewards. JVs can be full-function or non-full-function. Full-function JVs are those that operate independently on a lasting basis, while non-full-function JVs typically involve co-operation on specific projects or activities without establishing a separate entity. The competition law assessment of joint ventures depends on the structure and objectives of the collaboration.

Full-function joint ventures, which operate as autonomous economic entities, are treated as mergers under EU competition law and are subject to the EU Merger Regulation (Regulation (EC) No 139/2004). This regulation requires the European Commission to assess whether the joint venture will lead to a significant impediment to effective competition (SIEC) in the relevant market. The Commission's evaluation of full-function joint ventures typically considers factors such as market share, competitive dynamics, and potential efficiencies resulting from collaboration.

However, Article 101 TFEU may still apply to aspects of the joint venture, particularly during the formation phase, where restrictions that are not directly related to the operation of the joint venture (so-called "ancillary restraints") could infringe competition law. For instance, restrictions on the parties' freedom to compete outside the joint venture might be considered anti-competitive unless they are necessary for the functioning of the JV and meet the criteria for exemption under Article 101 (3) TFEU.

Non-full-function joint ventures do not operate as independent economic entities and are typically assessed under Article 101 TFEU. The competition concerns surrounding non-full-function JVs depend on the nature of the collaboration and the level of coordination between the parties. These joint ventures often involve cooperation in specific areas, such as production, marketing, or distribution, without the creation of a new entity.

In cases where a joint venture reduces competition between the parties, it may be considered a restriction by object or effect under Article 101 (1) TFEU. For example, joint ventures that lead to price-fixing or market-sharing agreements would likely be considered anti-competitive "by object." However, non-full-function joint ventures may qualify for an exemption under Article 101 (3) TFEU if

they result in efficiencies, such as improved production methods or lower costs, that benefit consumers.

The European Commission's Horizontal Guidelines provide specific guidance on how to assess the competitive impact of non-full-function joint ventures, with particular emphasis on whether the collaboration restricts competition more than is necessary to achieve the pro-competitive benefits. Joint ventures that limit competition only to the extent required to achieve their legitimate objectives are more likely to qualify for an exemption under Article 101 (3).

In EU competition law, ancillary restraints refer to restrictions or obligations that are directly related to, and necessary for, the implementation of a merger or acquisition. This concept follows the recognition that mergers and acquisitions often require certain restrictive clauses to ensure their efficient and effective implementation. These restrictions may limit competition and fall within the prohibition of Article 101 (1) TFEU, but they can be justified if they are necessary to achieve the efficiencies and objectives of the merger[254].

The European Commission's Notice on ancillary restraints[255] provides the primary guidance on the assessment of restrictions directly related and necessary to concentrations. To qualify as "directly related and necessary to the implementation of a concentration", and therefore fall outside the scope of Article 101 (1) TFEU, restrictions must meet three criteria. First of all, the restraint must be directly related to the merger or joint venture (Direct Connection to the Main Transaction). It should be essential to protect the buyer's or the joint venture's legitimate interests, such as securing customer goodwill or ensuring access to key inputs. Secondly, the restraint must be indispensable for the successful implementation of the merger (Necessity). This means that the transaction would be difficult or impossible to achieve without restriction. Thirdly, the scope, duration and geographic reach of the restraint should be proportionate to the objectives of the transaction (Proportionality). If the parties could achieve the same results through less restrictive means, the restraint is unlikely to be considered ancillary. Non-compete clauses, for example, should not exceed the period necessary to protect the buyer's investment.

If these restrictions or obligations are not strictly necessary for, or proportionate to, the implementation of the merger, they may be found in breach of Article 101 (1) TFEU and be exempted under Article 101 (3) TFEU, if the relative conditions are in place.

254 Case C-382/12 P, MasterCard Inc. and Others v Commission.

255 Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24–31.

Ancillary restraints most commonly take the form of non-compete clauses. In the context of a merger, a non-compete clause may prevent the seller of a business from re-entering the market and competing with the buyer for a limited period after the sale. These clauses are often necessary to protect the value of the acquired business, as the buyer may be paying for the seller's goodwill, customer relationships, and market position. Non-compete clauses fall within the concept of ancillary restraints if their duration does not exceed what is necessary to protect the buyer's legitimate interests (up to three years if only goodwill is transferred and up to five years if both goodwill and know-how are transferred), the geographic scope of the non-compete should correspond to the market in which the acquired business operated and the scope of activities covered by the non-compete should be limited to those relevant to the acquired business[256].

Ancillary restraints could also consist in exclusivity clauses when they ensure a stable supply or distribution arrangement for the merged entity. For instance, if the buyer of a business needs to ensure a secure source of input or maintain continuity in the distribution of products, exclusive agreements with suppliers or distributors may be allowed. Such clauses are generally accepted as ancillary restraints if they are limited in scope and duration, and if they are necessary for the buyer to fully exploit the assets acquired in the merger[257].

In some mergers, also licensing agreements are necessary to allow the buyer to use the intellectual property rights (IPRs) of the seller. For example, a buyer might acquire a manufacturing business that relies on certain patents owned by the seller. To continue operating the business, the buyer may require a license to use those patents. Licensing agreements can be considered ancillary restraints if they are directly related to the operation of the business being transferred and are necessary to ensure the viability of the merged entity.

2.7. Public undertakings and undertakings to which Member States grant special or exclusive rights (brief remarks)

Article 106 (1) TFEU provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, "Member States shall neither enact nor maintain in force any measure contrary to the rules

256 DaimlerChrysler/Hyundai, Commission Decision of 17 September 2001, Case COMP/M.1846, OJ C 297, 20.10.2001, p. 2; Remia BV and Others v. Commission, Case 42/84, Judgment of 11 July 1985, EU:C:1985:327.

257 Case T-112/99, Métropole Télévision (M6) and Others v. Commission.

contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109", as it was shows in the *Telecom Italia* case[258].

EU competition law, in fact, applies to public undertakings (i.e.: entities over which the State exercises direct or indirect control, either by ownership or through other means of influence, e.g.: by appointing most board members) if they engage in economic activities in a manner that impedes competition[259]. Special or exclusive rights are privileges conferred by Member States on certain undertakings, giving them the exclusive ability to operate in a specific market or to provide a particular service. These rights are often granted in sectors where competition is limited due to high infrastructure costs or natural monopolies, such as energy, water, telecommunications, and transportation. Undertakings granted special or exclusive rights are anyway subject to competition rules[260].

Under Article 106 (2) TFEU, then, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the TFEU, "in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". The development of trade, in thi case, must not be affected to such an extent as would be contrary to the interests of the Union.

Services of general economic interest (SGEI) refer to services provided by public or private undertakings that fulfil a specific public interest function, often involving essential services such as energy supply, telecommunications, postal services, and public transportation. These services are usually subject to obligations imposed by the State to ensure their universal provision, even if they may not be commercially viable under normal market conditions. Article 106 (2) TFEU provides a limited exemption from competition law for undertakings entrusted with SGEI that allows these undertakings to operate without being fully subject to Article 101 TFEU, but only if the application of competition rules would obstruct the performance of the SGEI task assigned to them[261].

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258 Commission v. Italy (Telecom Italia), Case C-41/90, Judgment of 19 March 1991, EU:C:1991:139.

259 Commission v. France (Postal Services), Case C-220/06, Judgment of 23 April 2008, EU:C:2008:231.

260 Höfner and Elser v. Macrotron GmbH, Case C-41/90, Judgment of 23 April 1991, EU:C:1991:161; RTE and ITP v. Commission (Magill TV Guide), Joined Cases C-241/91 and C-242/91, Judgment of 6 April 1995, EU:C:1995:98.

261 Corbeau, Case C-320/91, Judgment of 19 May 1993, EU:C:1993:198.

2.8. Prohibition of anticompetitive agreements and public procurement

Public procurement refers to the process by which public authorities, such as government bodies and state-owned enterprises, purchase goods, services, and works. This sector is heavily regulated by the EU[262], aimed at ensuring free competition, non-discrimination, and transparency in awarding contracts. Public procurement is a significant market activity within the European Union (EU), accounting for a substantial portion of EU GDP so that agreements related to public procurement are central concerns under EU competition law. EU competition enforcement, in this regard, is aligned with international instruments, such as the United Nations Convention Against Corruption (UNCAC)[263] and the Organisation for Economic Co-operation and Development (OECD) guidelines[264], which underscore the global need to curb anti-competitive practices in public procurement.

The key forms of anti-competitive agreements in this area include bid-rigging, which involves coordination between bidders to manipulate the outcome of the bidding process, e.g. by way of allocating customers and coordinating pricing in public procurement processes, like it happened in *Trafilerie Meridionali*[265]. This can take various forms, such as cover bidding (submitting deliberately high or non-competitive bids to allow a pre-agreed winner to secure the contract), bid rotation (bidders taking turns to win contracts), and market allocation (dividing the market geographically or by product type among bidders).

Market allocation agreements may also occur when undertakings agree not to compete in specific geographic areas or customer groups, e.g. by not submitting bids for contracts in certain regions or only targeting specific types of contracts. In this context also price-fixing agreements are relevant, where competing undertakings set a minimum price or agreeing on bid pricing strategies to artificially inflate contract prices, as happened in the *European Sugar Cartel* case[266].

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[262] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.

[263] United Nations Convention Against Corruption, adopted by the General Assembly of the United Nations on 31 October 2003, entered into force on 14 December 2005.

[264] OECD, "Recommendation of the Council on Fighting Bid Rigging in Public Procurement", adopted on 17 July 2012, including the "Guidelines for Fighting Bid Rigging in Public Procurement".

[265] Case T-141/89, Trafilerie Meridionali v. Commission.

[266] European Sugar Cartel, Commission Decision of 18 July 2016, Case COMP/39.188, OJ C 273, 26.7.2016, p. 4.

2.9. Artificial intelligence, algorithms, and Article 101 TFEU: opportunities, issues, and risks in EU competition law

The rapid development and integration of artificial intelligence (AI) and algorithms into business practices have created profound changes across multiple industries, reshaping market structures and competition dynamics. While AI and algorithms offer considerable potential for enhancing market efficiency, they also present new challenges and risks under EU competition law, particularly in relation to Article 101 TFEU.

These risks primarily relate to how AI and algorithms can facilitate anti-competitive behaviour, even without explicit agreements between undertakings. With the rise of AI and algorithms, collusion may occur without any explicit agreement between firms. This phenomenon is often referred to as "tacit" or "algorithmic" collusion. AI-driven pricing algorithms, for instance, can observe and mimic the pricing strategies of competitors without any human intervention. If multiple firms use similar algorithms that are programmed to maximize profits by responding to competitors' prices, these algorithms may independently "learn" to coordinate their pricing in a way that avoids price competition. In *Eturas*[267], *e.g.,* the CJEU dealt with an online travel platform that used software to restrict discounts. The CJEU ruled that even if no explicit agreement existed, the use of the software could create a presumption of concerted practice if the parties knew or ought to have known about the restriction.

Here the main question relates to the autonomous nature of self-learning algorithms, which are designed to learn and adapt over time without human intervention. While traditional algorithms follow pre-set rules, self-learning algorithms can evolve based on new data inputs, potentially leading to unforeseen outcomes. In the context of Article 101 TFEU, self-learning algorithms raise questions about liability and accountability. If an AI system autonomously "learns" to collude with other firms' algorithms to set higher prices or reduce output, it may be difficult to assign responsibility to human operators, the firms deploying the technology, or the creators of the algorithms.

Another anticompetitive scenario due to AI and algorithms is that of "hub-and-spoke" collusion, where a central platform or intermediary (the hub) shares pricing or other strategic information between competing firms (the spokes), allowing them to coordinate their behaviour. This type of collusion can occur in industries where firms rely on third-party platforms, such as online marketplaces or ride-sharing platforms, to set prices or allocate resources. Here coordination

[267] Case C-74/14, *Eturas and Others v Lietuvos Respublikos konkurencijos taryba.*

does not require any direct communication between undertakings because it is induced using the intermediary platform. For example, if an online marketplace uses an AI-driven algorithm to set uniform prices for all sellers on the platform, this could lead to a reduction in price competition between the sellers, even though they do not directly collude with each other.

This coordination effect is exacerbated by the fact that AI and algorithms rely heavily on large volumes of data to train and function effectively. In markets where data is concentrated among a few key players, firms that control significant datasets may have an advantage in using AI-driven algorithms to engage in coordinated behaviour or to foreclose competitors. Data-driven algorithmic collusion may also arise in oligopolistic markets where a small number of firms control most of the market share.

2.10. Sustainability agreements and competition law

European enterprises are encouraged by legislation, if not required, to incorporate ESG principles in their management. To ensure compliance, they may want, or even be required, to cooperate, in order, e.g., to reach a sufficient scale or combine the know-how required to that end.

EU law certainly shows an increasing relevance of ESG goals, as it is demonstrated by the issuance of Directive (EU) 2024/1760 on corporate sustainability due diligence[268] which lays down rules on "obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies", liability for following violations and "the obligation for companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, compatibility of the business model and of the strategy of the company with the transition to a sustainable economy and with the limiting of global warming to 1,5° C in line with the Paris Agreement".

However, collaboration in any relevant market with other enterprises, either competitors or suppliers/buyers, may raise concern under Article 101 TFEU. As it was clarified above, sharing information between undertakings (whatever the counterpart) is considered a sensitive issue under EU competition law and the

[268] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

fact that such sharing relates to the pursuit of ESG goals cannot represent a safe harbour to the prohibition of collusive practices.[269]

It is currently under debate the way sustainability and competition should be balanced against each other and whether and how competition law should adjust to consider ESG-goals or ESG-standards.

At the EU level, some pieces of legislation were enacted to deal with the issue. E.g., Article 210 of the European Regulation establishing a common organisation of the markets in agricultural products ("CMO")[270] provides for a special exemption in favour of sustainability agreements concluded between producers of agricultural products from competition law. What is of specific interest, here, is that the EU Commission expressly dealt with sustainability agreements, which are defined as "any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of cooperation", in a specific chapter within the 2023 revision of the guidelines on horizontal cooperation agreements.

First of all, the EU Commission highlights that if sustainability agreements do not affect parameters of competition (e.g.: price, quantity, quality, choice or innovation), then they are not caught by Article 101 TFEU because they do not raise competition law concerns. This includes, for instance, agreements „aimed exclusively at ensuring compliance with precise requirements or prohibitions in legally binding international treaties, agreements or concentrations such as fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants".

As it is a general rule, secondly, if a sustainability agreement affects negatively one or more parameters of competition, it needs be assessed under Article 101 (1) TFEU. In this respect, the EU Commission declared it will consider, in principle, sustainability agreements as not having anticompetitive object, unless they disguise a cartel. In assessing whether they have an anticompetitive effect, the EU Commission will assess, among others, the market power of the parties; the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition; the market coverage of the agreement; the extent to which commercially sensitive information is exchanged in the context of the agreement; and whether the agreement results in

[269] Emiliano Marchisio, "Inconsistency of EU competition law as regards co-opetition for information advantages". European Competition Law Review (2020): 283-291.

[270] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.

A specific “soft safe harbour” for sustainability standardisation agreements is provided, for the case where undertakings set out the criteria that producers, processors, distributors, retailers, or service providers in a supply chain have to meet in relation to a wide range of sustainability metrics (e.g.: the environmental impacts of production). Specific criteria are provided for an agreement to qualify for such a soft safe harbour. Among others, the procedure for developing the sustainability standard must be open to participation and transparent; the sustainability standard must be voluntary; participating undertakings must remain free to apply higher sustainability standards; commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard must not be exchanged; there must be effective and non-discriminatory access to the outcome of the standard-setting process; the sustainability standard must either not lead to a significant increase in price or a significant reduction in quality of the products concerned or the combined market share of the participating undertakings must not exceed 20 % on any relevant market affected by the standard.

Thirdly, sustainability agreements restricting competition under Article 101 (1) TFEU are not necessarily prohibited, since it is necessary to assess whether they fall under the provision of Article 101 (3) TFEU, if the parties can prove the recurrence of all elements required for exemption. In particular, efficiency gains capable of being considered to this end relate, e.g., to the use of less polluting production or distribution technologies, more resilient infrastructure, and improved conditions of production and distribution. The evaluation of whether benefits deriving to consumers from the agreement can outweigh the harm caused by the agreement must be carried out with reference to three different scenarios: individual use value benefits derived from the use of the products covered by the agreement or its consumption; individual non-use value benefits resulting from consumers’ appreciation of the impact resulting from consumers’ appreciation of the impact; collective benefits that arise independently of the individual consumer’s appreciation of the product and that accrue to a wider part of society than just the consumers in the relevant market.

It ought to be noted that the guidelines provided on sustainability agreements show vague on several details and it is not clear how the principles behind them will be applied to agreements different to horizontal ones (i.e.: vertical and conglomerate sustainability agreements).

3. ABUSE OF A DOMINANT POSITION[271]

3.1. Article 102 TFEU - general principles

One of the main objectives of European Union competition law is to ensure that competition is not distorted within the internal market. Abuse of dominance is one way in which one or two or more undertakings can distort competition within the internal market. Article 102 of the Treaty on the Functioning of the European Union, hereinafter called TFEU prohibits the abuse of a dominant position by undertakings. Enforcing Article 102 TFEU has been instrumental in disciplining the conduct of dominant undertakings, which have a responsibility to avoid behaviour that could harm genuine and undistorted competition. Article 102 TFEU is therefore an essential tool to promote competition in the internal market and benefits consumers and businesses alike. These undertakings have a special responsibility not to distort or hinder competition on the market. They are, however, free to engage in activities on the market exactly as their competitors do. The special responsibility for dominant undertakings not to distort or hinder competition on the market was first established by the ECJ[272] in Michelin v Commission[273]. In the case at hand, the court stated that the dominant position of an undertaking is not in itself a violation of Article 102 of the TFEU unless the undertaking impairs genuine undistorted competition on the common market.[274]

Thus, Article 102 TFEU does not prohibit dominance but instead places restrictions on undertakings that do in fact have a dominant position. With this being said, an abuse must exist in order to be placed as a violation of Article 102 TFEU. Article 102 TFEU reads as follows: *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse, may, in particular, consist in:*

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b) limiting production, markets or technical development to the prejudice of consumers;

c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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271 **Olesea Plotnic**, Full professor, Faculty of Law, Moldova State University.

272 European Court of Justice.

273 Case 322/81 *Michelin v Commission* [1983] ECR 3461.

274 Ibid. para. 57.

d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. [275]

According to Article 102 TFEU, it is possible to identify four conditions that have to be met in order for there to be a violation. These are:

a) dominant position by one or more undertakings within the internal market;

b) abuse of the dominant undertaking;

c) the abuse is within the internal market or in a substantial part of the market;

d) the abuse may affect trade between Member States[276].

What has to be drawn attention to is that these conditions that derive from the first sentence of Article 102 TFEU do not define the elements of a dominant position or the abuse of it. They are solely jurisdictional conditions establishing the circumstances in which an abuse of a dominant position by an undertaking becomes relevant and therefore opens up the possibility of being assessed under Article 102 TFEU.[277]

The European Union's competition law is fundamental to ensuring the preservation of a fair and efficient internal market. One of the key provisions that protect this goal is Article 102 of the TFEU, which prohibits the abuse of a dominant position by undertakings. The overarching objective of this article is to prevent distortions in competition caused by companies that, due to their significant market power, might engage in conduct that is harmful to competition, consumers, and market dynamics. The legal landscape shaped by Article 102 TFEU reflects the European Union's commitment to maintaining competitive markets where innovation and consumer welfare are prioritized.

At its core, Article 102 TFEU does not prohibit dominance itself. Dominance in a market, after all, can arise from factors such as efficiency, innovation, or the legitimate growth of a company through sound business practices. However, with this dominance comes a "special responsibility." Companies that hold a dominant position are subject to stricter scrutiny regarding their conduct compared to their competitors. The European Court of Justice first established this responsibility in the landmark case of Michelin v Commission. In this case, the court emphasized that while dominance itself is not prohibited, the abuse of that dominant position—specifically actions that hinder genuine, undistorted competition—consti-

[275] Article 102 TFEU.

[276] Gabriel Peric, *EU Competition Law and Abuse of Dominance (2022),*p. 4-5.

[277] Ibid.

tutes a violation of Article 102 Therefore, Article 102 imposes a critical obligation on dominant firms: they must refrain from actions that could distort market competition or prevent the market from functioning efficiently.

Article 102 TFEU has been pivotal in shaping the behaviour of dominant undertakings. These companies, by virtue of their market power, have the potential to impose conditions or engage in practices that are unfair to consumers and competitors alike. The legal mechanism provided by Article 102 aims to prevent the misuse of such power, thus safeguarding competition and promoting a healthier market environment. The text of the article is concise but comprehensive, prohibiting any abuse of a dominant position within the internal market or a substantial part of it, in so far as it may affect trade between Member States. The types of abuse specified in the article include imposing unfair purchase or selling prices, limiting production or market access, applying dissimilar conditions to equivalent transactions, and making contracts conditional on supplementary obligations that bear no relevance to the primary transaction.

One of the defining features of Article 102 is its emphasis on jurisdictional conditions. The provision outlines four conditions that must be met for an abuse to fall under its scope: there must be a dominant position, the abuse must occur within the internal market or a substantial part of it, and the abuse must have the potential to affect trade between Member States. However, it is essential to note that these jurisdictional conditions do not define the substantive elements of dominance or abuse; rather, they serve to establish when the actions of a dominant firm are relevant under the framework of Article 102.

The determination of whether an undertaking holds a dominant position requires a detailed analysis of the market structure, market shares, and the ability of the undertaking to operate independently of competitive pressures. This concept of dominance was elaborated in the ECJ's ruling in United Brands v Commission, where the court described a dominant position as a situation of economic strength that allows the firm to behave independently of its competitors, customers, and ultimately, consumers. This independence is what makes dominant firms particularly capable of distorting competition if they misuse their power.

In interpreting Article 102, the courts have further clarified what constitutes an abuse. Abuse can take many forms, ranging from exploitative to exclusionary practices. Exploitative practices typically involve the dominant firm using its position to impose unfair conditions on consumers, such as excessive pricing. Exclusionary practices, on the other hand, are aimed at preventing competitors from entering or expanding in the market. Such practices may include predatory pricing, refusal to supply essential inputs to competitors, or tying the sale of two

products together, forcing customers to purchase products they do not want or need. What these practices have in common is that they prevent markets from functioning efficiently, limit consumer choice, and stifle innovation.

The non-exhaustive list of abusive practices provided in Article 102 includes several specific examples of harmful conduct. One such example is the imposition of unfair purchase or selling prices, or other unfair trading conditions. This conduct can harm consumers by leading to higher prices, reduced quality, or less innovation. Another example is limiting production, markets, or technical development to the prejudice of consumers. This practice can create artificial scarcity, prevent the development of new products or services, or restrict access to certain markets, all of which can significantly harm consumer welfare. Moreover, dominant firms may apply dissimilar conditions to equivalent transactions with trading parties, which places some competitors at a disadvantage and distorts competition. Finally, dominant firms might make the conclusion of contracts conditional on the acceptance of supplementary obligations that have no connection to the subject matter of the contract, which can impose unnecessary burdens on customers and restrict their freedom to choose between different suppliers or products.

The underlying economic rationale of Article 102 is to protect the competitive process itself rather than individual competitors. The enforcement of this provision is designed to ensure that dominant firms do not abuse their position in ways that hinder the development of a competitive market. Dominant firms may enjoy substantial power over price, quality, or innovation within a market. If left unchecked, these firms could undermine the competitive process, reduce consumer welfare, and create an uneven playing field for other companies. However, it is crucial to distinguish between legitimate competitive behaviour—where a dominant firm competes on the merits, offering better products or services—and behaviour that crosses the line into abuse, where the firm uses its position to stifle competition.

Moreover, the application of Article 102 has broader implications for the European internal market. Given that the abuse must have the potential to affect trade between Member States, the provision plays a key role in ensuring that competition within the European Union remains open and undistorted. This is especially important in a market as integrated as the EU, where trade barriers have been reduced, and businesses operate across borders. The provision helps maintain the integrity of the internal market by preventing dominant firms from engaging in practices that could fragment the market or create barriers to entry.

In conclusion, Article 102 TFEU is a cornerstone of European competition law. It reflects the EU's commitment to protecting competition by preventing the

abuse of dominant market positions. While dominance itself is not prohibited, companies in dominant positions have a special responsibility to ensure that their behaviour does not harm competition or consumers. Through a combination of case law, judicial interpretation, and economic analysis, Article 102 has become an essential tool for maintaining the health and integrity of the internal market, fostering innovation, and ensuring that consumers and businesses can benefit from genuine competition. The general principles of Article 102 underscore the importance of balancing market power with the need for competitive fairness, and they continue to evolve in response to the challenges posed by dominant firms in an increasingly complex and interconnected European economy.

3.2. Dominance and joint dominance

Dominance, as outlined in Article 102 of the TFEU, serves as a critical concept within the EU's competition law. This paragraph addresses situations where an undertaking holds a dominant market position, which, if abused, can disrupt competition within the internal market. While dominance itself is not inherently illegal, it becomes problematic when it leads to the distortion or restriction of market competition. Understanding the concept of dominance and joint dominance is therefore essential to the enforcement of Article 102, as the interpretation of this position shapes the boundaries of competitive conduct in the European Union. The challenge lies in the legal and economic definition of dominance, which has evolved through case law but remains subject to ongoing interpretation and clarification.

Article 102 of the TFEU applies only to dominant undertakings. However, the definition of the term "dominant position" originally established by the EU Court[278] poses some problems of interpretation.[279] It is now well-established that a pre-condition of finding a breach of Article 102 TFEU is that the undertaking in question be in a dominant position. Understanding what constitutes a "dominant position" is therefore the keystone to the application of Article 102 TFEU. However, the TFEU does not define the term "dominant position", much less does it detail how it is to be assessed. It has fallen on the Court of Justice of the European Union, the General Court and the EU Commission to define the term "dominant position".[280]

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278 Court of Justice of the European Union.

279 Annalies Azzopardi, *Dominant Position: A Term in Search of Meaning,* available: https://www.qmul.ac.uk/icc/media/icc/gar/gar2015/Annalies-Azzopardi.Dominant-position---a-term-in-search-of-meaning.pdf.

280 Ibid.

The EU Court first had to determine what the term "dominant position", as used in Article 86 of the EEC Treaty[281] as follows: *To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited. Such improper practices may, in particular, consist in:*

a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

b) the limitation of production, markets or technical development to the prejudice of consumers;

c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract[282].

If speaking about certain law-cases that gave a legal definition to the "dominant position", there is *United Brands Continental BV v Commission of the European Communities*[283], where EU Court defined "dominant position" as being a *position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers,*[284] therefore EU Court accepted "dominant position" as a position of economic strength, that is in turn described as enabling the undertaking in question to prevent effective competition being maintained on the market through three methods:

i. by enabling the undertaking to behave to an appreciable extent independently of competitors;

ii. by enabling the undertaking to behave to an appreciable extent independently of its customers; and

[281] Treaty establishing The European Economic Community and Related Instruments.

[282] *World Intellectual Property Organization*, available: https://www.wipo.int/wipolex/en/legislation/details/1429.

[283] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207.

[284] Annalies Azzopardi, *Dominant Position: A Term in Search of Meaning,* available: https://www.qmul.ac.uk/icc/media/icc/gar/gar2015/Annalies-Azzopardi.Dominant-position---a-term-in-search-of-meaning.pdf

iii. by enabling the undertaking to behave to an appreciable extent independently of consumers.[285]

Therefore, the EU Court gave a certain definition of "dominant position" after the law-case *United Brands in Hoffmann-La Roche,*[286] which has now become the standard definition of dominance in EU competition Law. After the case, EU Court stated that: *Such a position does not preclude some competition, which it does where but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.* The Commission describes the definition as having three elements: *This definition of dominance consists of three elements, two of which are closely linked: (a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent. The first element implies that dominance exists in relation to a market. It cannot exist in the abstract. It also implies that an undertaking either on its own or together with other undertakings must hold a leading position on that market compared to its rivals. The second and third elements concern the link between the position of economic strength held by the undertaking concerned and the competitive process, i.e. the way in which the undertaking and other players act and inter-act on the market.*[287] This was the attempt of the EU Commission to clarify the legally definition of a "dominant position" in the EU Competition Law, after all, there still remain uncertainties between the right definition of dominant position. EU Court interpreted and applied the concept of dominance in each case.[288] As a comparative study, we would like to start with the subject of the legal cases, where *United Brands Continental BV v Commission of the European Communities*, involved United Brands, a company that was accused of being in a dominant position in the banana market[289] and *United Brands in*

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[285] Ibid.

[286] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 464.

[287] Annalies Azzopardi, *Dominant Position: A Term in Search of Meaning,* available: https://www.qmul.ac.uk/icc/media/icc/gar/gar2015/Annalies-Azzopardi.Dominant-position---a-term-in-search-of-meaning.pdf.

[288] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207. And Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 464.

[289] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207 available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89300&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2995329, (p. 210).

Hoffmann-La Roche, which was focused in the vitamin market.[290] According to EU Court documents, in the case *United Brands Continental BV v Commission of the European Communities*, the EU Court defined a dominant position as a situation where a company has the power to behave independently of its competitors, customers, and consumers. As well as in the case *United Brands in Hoffmann-La Roche,* the EU Court highlighted almost the same definition of dominance, mostly the ability to act independently. These are the most known legal cases when talking about the definition of a dominant position that had a huge impact on the legal interpretation of dominance, the decision of the EU Court in the first case *United Brands Continental BV v Commission of the European Communities* stipulated that United Brands held a dominant position, where they had a market share of 40-45%, with this being said, the EU Court got to the conclusion that United Brands indeed implemented some abusive practices, some of them being refusal to supply to distributors, that lead to limiting market access for competitors and the excessive pricing that was not justified.[291] In the case of *Hoffmann-La Roche & Co AG v Commission*, the EU Court decided that it held a dominant position by implementing a system of loyalty rebates, where they forced buyers to purchase from the dominant firm and exclusive purchasing agreements.[292] As a conclusion of the cases and a comparative analysis of the decision, in both cases EU Court established that there was a dominant position, but focused on different areas, however, while *United Brands Continental BV v Commission of the European Communities* highlighted brand loyalty, *Hoffmann-La Roche & Co AG v Commission* focused on how to use certain practices in order to maintain the dominance. Collective[293] or joint dominance under Article 102 TFEU, was firstly stipulated in the case *Italian Flat Glass*[294] In the case, the General Court also noted the difference between the single economic entity and a 'collective entity', stating that

[290] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 464, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0085, (p. 465).

[291] Case 27/76 *United Brands Continental BV v Commission of the European Communities* [1978] ECR 207 available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89300&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2995329, (p. 285).

[292] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 464, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0085, (p. 535).

[293] Philip Bergkvist, Collective Dominance and EU Competition Law An assessment of the concept and the challenge facing the European Court of Justice, 2019.

[294] Judgment of 10 March 1992, *Societa Italiana Vetro SpA and others v Commission*, T-68/89, EU:T:1992:38.

Article 101 TFEU could not be applied to the undertakings belonging to the same economic unit.[295] Article 101 TFEU states that:

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:*
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.*
2) *Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*
3) *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
a) *any agreement or category of agreements between undertakings,*
b) *any decision or category of decisions by associations of undertakings,*
c) *any concerted practice or category of concerted practices, 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:*
i) *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
ii) *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*[296]

The case *Italian Flat Glass*[297] involved three Italian companies (SIV, FP and VR[298]), that were presumed to have a joint dominance position in Italy. The EU

[295] Ibid. paragraph 357.
[296] Article 102 TFEU.
[297] Judgment of 10 March 1992, *Societa Italiana Vetro SpA and others v Commission*, T-68/89, EU:T:1992:38.
[298] Società Italiana Vetro, Fabbrica Pisana, Vetro Revet.

Commission argued that the three companies may behave as a single dominant entity. The decision of the General Court was that the dominance could exist even if they were separated companies, but the Commission's decision was annulled, because it did not provide enough evidence. Even if the decision was annulled, the case has significant importance, because it established the legal concepts of joint dominance, highlighting the fact that even if it is a well-coordinated behaviour of the firms involved in a business, it still can lead to collective/joint dominance.[299]

In conclusion, the legal framework surrounding dominance and joint dominance under Article 102 TFEU remains a complex and evolving area of EU competition law. While the European Court of Justice and the European Commission have clarified aspects of what constitutes a "dominant position" through case law, challenges persist in defining the exact boundaries of this concept. Cases such as United Brands and Hoffmann-La Roche provide valuable precedents in understanding how dominance can be misused, while the Italian Flat Glass case introduces the concept of joint dominance, further expanding the scope of Article 102 Despite these clarifications, the nuanced nature of dominance—whether held by a single entity or collectively—requires ongoing judicial interpretation, especially as markets and competitive practices evolve.

3.3. Abuse: exploitative and exclusionary practice

The concept of *abuse*[300] covers both exploitative (excessive pricing or imposing unfair trading conditions) and exclusionary practices (tying, refusal to supply or exclusive dealing), as understood from Article 102 of the TFEU. As stressed initially, the provision of Article 102 TFEU contains no conclusive definition of what constitutes abuse. Rather, it provides a non-exhaustive catalogue listing measure, themselves being open and vague legal terms (as, for example, no hint of what might constitute an unfair purchase or selling price is given) thereby exemplifying what, in principle, could constitute an abuse[301]. Therefore, the notion of abuse has ever since been a controversial topic; an issue that has not yet been solved until today[302] and which might be owed to the lack of extensive case law and Article 102 decisions[303]. Nevertheless, there is no doubt that different types of abuse have been developed by the case law covering the following practices, such us:

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299 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61989TJ0068&from=IT.
300 Cleary Gottlieb Steen & Hamilton LLP in brief: Abuse of dominance in European Union, 2023.
301 Bernardette Zelger, *Restrictions of EU Competition Law in the Digital Age,* 2023, p. 85.
302 Ibid.
303 O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU,* 2013, p. 68.

a) Exclusive dealing covering practices such as exclusive purchasing as well as conditional rebates.
b) Tying and bundling.
c) Refusal to supply.
d) Predatory pricing.
e) Margin squeeze.
f) Price discrimination.[304]
g) Excessive pricing.
h) Access on less favourable terms.
i) Removal of a railway track.[305]

Furthermore, as already stressed in the preceding section, the different forms of abuse listed can in principle be divided and grouped into different categories. Looking at the Treaty provision of Article 102 TFEU there are exploitative abuses[306], exclusionary abuses[307], discriminatory abuses[308] and tying abuses[309]. The categories found in the literature consist of exploitative abuse, exclusionary abuse, as well as single market[310] and discriminatory or reprisal abuses[311]. Whereas some authors distinguish between exclusionary, exploitative and single market abuses, others divide abuses into exclusionary, exploitative and discriminatory or reprisal abuses. Furthermore, abuses can also be divided by means of their having a 'pricing' or 'non-pricing' component.[312] In the next chapter, we will give law case examples for some kind of abuse that we have mentioned in this paperwork. Mentioning tying and bundling, one of the most prominent cases concerning this kind of abuse in EU Competition Law is *Microsoft Corp. v Commission.*[313] Where the EU Commission accused Micro-

[304] Case 27/76 *United Brands v Commission* [1978] ECLI:EU:C:1978:22 (United Brands); Case C-395/96 P *Companie Maritime Belge Transport and Others v Commission* [2000] ECLI:EU: C:2000:132 (Companie Maritime Belge); Case T-228/97 *Irish Sugar v Commission* [1999] ECLI: EU:T:1999:246 (Irish Sugar); Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECLI:EU: C:2002:617.
[305] Bernardette Zelger, *Restrictions of EU Competition Law in the Digital Age,* 2023, p. 87.
[306] Article 102 (a) TFEU.
[307] Article 102 (b) TFEU.
[308] Article 102 (c) TFEU.
[309] Article 102 (d) TFEU.
[310] Whish and Bailey, *Competition Law* (2021), p. 209.
[311] O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU,* 2013.
[312] Bernardette Zelger, *Restrictions of EU Competition Law in the Digital Age,* 2023, p. 88.
[313] Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=62940&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3580042.

soft of having a dominant position in the market for PC operating system by tying its Windows operating system with its Windows Media Player (hereinafter WMP). The main issue of this case, as we mentioned was the tying and the bundling between Microsoft and WMP. As a matter of fact, it was the Court's decision if this constituted an abuse of dominance under Article 102 of the Treaty of the Functioning of the European Union. According to the case, the bundling of WMP with Windows meant that every buyer automatically received WMP, even if they wanted it or not.[314] As a decision of the EU Commission, it found Microsoft guilty of abuse of dominance and had to pay obligations, as well, the Commission imposed a record fine on Microsoft to be sure that manufacturers and consumers could choose alternative media players, not only WMP[315]. The GC decision agreed with the EU Commission, that Microsoft abuses a dominant position and the Court agreed that the tying practice harmed completion by giving Microsoft an unfair advantage in the media player market.[316] Another important case in the exclusionary practice, with the main issue being the abuse of dominance, the refusal to supply is *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*[317]. From our perspective, this case has significant importance for the EU Competition Law over the time, because it highlighted the importance of keeping and balancing the need to prevent anti-competitive practices with the idea that dominant firms are not obliged to assist their competitors, no matter if they have a great influence or not. The legal background of the case was that Oscar Bronner GmbH & Co. KG, a small Austrian newspaper publisher claimed the fact that Mediaprint, the dominant newspaper publisher in Austria, abused its dominant position by refusing to allow Bronner the access to its delivery system. Mediaprint operated the only extensive delivery system in Austria, which was essential for an effectively distribution of the newspapers[318]. The main issue of the case was the certain question, if Mediaprint's refusal to grant access to Oscar Bronner GmbH & Co. KG constituted an abuse of a dominant position under Article 102 of TFEU. As we mentioned before, this case is more special, because the decision of the EU Court ruled in favour of Mediaprint, claiming that the refusal to

314 Microsoft Corporation v. Commission of the European Communities, Court of First Instance (Grand Chamber) T-201/04 [2007], Ryan McCarthy, accessed September 1, 2024 JD https://www.quimbee.com/cases/microsoft-corporation-v-commission-of-the-european-communities.

315 European Commision vs Microsoft: chronology of the case, accessed September 1, 2024, https://fsfe.org/activities/ms-vs-eu/timeline.en.html.

316 Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=62940&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3580042.

317 Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791, available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=43901&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3588268.

318 Ibid.

supply did not constitute an abuse of dominance[319]: *The refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute the abuse of a dominant position within the meaning of Article 86 of the EC Treaty.*[320] As an exploitative practice is **predatory pricing** and a significant case in the EU Competition Law is *AKZO Chemie BV v Commission*[321]. As a background and the origin of the dispute, according to the official documents, AKZO Chemie BV, a chemical company, was accused by the EU Commission of implementing predatory pricing practices to drive a competitor, ECS, out of the market. It was mentioned that AKZO was dominant and allegedly sold its products at below-cost prices with the goal to eliminate ECS of the market. As well as the previous cases, the AKZO's actions were examined whether they were an abuse of a dominant position under Article 102 of the TFEU. The Court decision found AKZO guilty[322], because it had deliberately priced its products below average variable costs (hereinafter AVC), with a mischievous goal, to drive ECS out of the market.[323] This case has a significant importance, as we specified, because it set out the criteria for evaluating the predatory pricing, particularly the ones that go below the AVC and the need to investigate behind the intentions of such prices. Also, the AKZO decision shaped the approach of EU authorities, ensuring that dominant firms cannot use their market power to eliminate competitors using unfair pricing strategies. Another case that concerned EU Competition Law was Konkurrensverket v TeliaSonera Sverige AB[324], where the main problem was domi-

319 Ibid.

320 Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791, available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=43901&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3588268 (p. 7833-7834).

321 Judgment of the Court (Fifth Chamber) of 3 July 1991. - *AKZO Chemie BV v Commission of the European Communities.* - Article 86 - Eliminatory practices of a dominant undertaking. - Case C-62/86. Available: https://eur-lex.europa.eu/resource.html?uri=cellar:4905ac67-5a02-44a0-ae93-7724be6073b0.0002.06/DOC_2&format=PDF.

322 https://curia.europa.eu/juris/showPdf.jsf?text=&docid=94611&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3605276 (p. 3473- 3476).

323 Judgment of the Court (Fifth Chamber) of 3 July 1991. - *AKZO Chemie BV v Commission of the European Communities.* - Article 86 - Eliminatory practices of a dominant undertaking. - Case C-62/86. Available: https://eur-lex.europa.eu/resource.html?uri=cellar:4905ac67-5a02-44a0-ae93-7724be6073b0.0002.06/DOC_2&format=PDF.

324 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0052.

nating using **margin squeeze,** another abuse according to Article 102, TFEU. In another words, TeliaSonera Sverige AB, telecommunications operator in Sweden, was accused of engaging in a margin squeeze in the market. In order to clear things, margin squeeze occurs when a dominant firm sets the price of its wholesale product, which competitors need to buy, at such a high level or a retail price at such a low level, that no one could compete profitably in the market.[325] At this case, there are legal sources that strongly believe that margin squeeze is an abuse in its own rights and if it will not be treated that why, then Article 102 TFEU will be infringed. *TeliaSonera is the incumbent telecoms operator in Sweden. Its competitors accused it of supplying them with a wholesale ADSL (asymmetric digital subscriber line) product at prices that did not allow them to compete profitably with TeliaSonera's consumer broadband offering. In contrast with previous telecoms cases, TeliaSonera was not under any regulatory obligation to provide the wholesale product, and the product was arguably not indispensable to competitors. This forced the ECJ (to which the case was referred by the Swedish competition court) to re-examine the fundamental prerequisites for a finding of margin squeeze. The Advocate General's (AG) view was that margin squeeze should be treated as a form of refusal to supply that would only arise if the supply was indispensable or if another abuse was also involved (for example, predatory or excessive pricing). If a dominant company could lawfully have refused to provide the products, why should it be reproached for providing those products at conditions which its competitors might not consider advantageous? However, the ECJ roundly rejected this approach. Policy considerations carried the day: if margin squeeze were merely a form of (constructive) refusal to supply, the European Commission (the Commission) would need to apply the stringent refusal to supply requirements each time a pricing abuse was alleged. This would unduly emasculate Article 102 of the Treaty on the Functioning of the European Union (TFEU) (Article 102), which prohibits the abuse by companies of their dominant market position in the EU, or a substantial part of the EU. Instead, margin squeeze should be treated as an abuse in its own right.*[326]Also, the EU Court in one of the decisions wrote: *Having regard to all of the foregoing, the answer to the questions referred is that, in the absence of any objective justification, the fact that a vertically integrated undertaking, enjoying a dominant position on the wholesale market for ADSL input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102*

325 Ibid.

326 *Margin squeeze: an abuse in its own right,* available: https://uk.practicallaw.thomsonreuters.com/3-505-2997?transitionType=Default&contextData=(sc.Default)&firstPage=true.

TFEU.[327] These being said, this case represents a legal framework for assessing margin squeeze under EU Competition Law, because it establishes that a margin squeeze can be considered an abuse of dominance, even if the wholesale and retail prices are not independently abusive. Also, it confirmed that margin squeeze is an abuse of dominance when it restricts competitors' ability to compete effectively and at the same level in the market. A prominent case related to another kind of dominance, access on less favourable terms in EU Competition Law is *Clearstream Banking AG v Commission*[328]. Clearstream Banking AG, a central securities depository (hereinafter CSD), was accused by the EU Commission of abusing its dominant position in the market. The company allegedly provided access to its services to a particular customer, Euroclear Bank, on less favourable terms compared to those offered to other customers.[329] The main issue was whether Clearstream's practice of offering different terms and conditions for access to its CDS constituted an abuse of dominance. This case was also examined under Article 102 TFEU. The Court found that Clearstream had abused its dominant position by providing access to its services on less favourable terms to Euroclear Bank compared to other costumers, the EU Commission imposed fines and ordered it to cease the discriminatory practices, ensuring that all customers would have access to its service on equivalent and legal terms.[330] Another abuse of dominance discussed is the **removal of a railway track**, a notable case concerning this kind of abuse is *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (hereinafter GVL) v Commission (Commercial Solvents)*[331]. As a short introduction into the case, Commercial Solvents Corporation (hereinafter CSC) had a dominant position in the production of raw material used in the manufacture of a tuberculosis drug. The dispute arose when CSC, through its subsidiary in Italy, sought to remove a railway track that connected its facilities to a competitor GVL, which relied on this railway for transporting the materials. The main problem was the fact that the removal of the railway track constituted an abuse of dominance by effectively cutting off a competitor's access to critical resources, as the others, this case was examined under Article 102 TFEU. The EU Commission found that CSC actions were abusive, at that point, EU Commission ordered CSC to restore the railway track and cease its behaviour, ensuring that GVL will have access to the necessary raw materials.[332] As a

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327 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0052.

328 Case T-301/*04 Clearstream Banking AG v Commission* [2009] ECR II-3155, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004TJ0301.

329 Ibid.

330 Ibid.

331 Case 7/82 *GVL v Commission (Commercial Solvents)* [1974] ECR 223, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0007.

332 Ibid.

conclusion to these law cases, that were all from EU jurisdiction, all related to certain abuses, where a party was discriminated by another one, we would like to say that all the EU Court decisions were made in order to help the market to have a certain balance, to help stabilizing a fair trade competition between businesses and consumers. All the EU Court decisions and cases were analysed under Article 102 of TFEU.

Now, if talking about countries that are not in the European Union, as Republic of Moldova, Georgia, there are some interesting cases and decisions regarding the abuse of dominance. For example, in Georgia, abuse of dominance cases is handled by the Georgian Competition and Consumer Agency (hereinafter GCCA) which is responsible for investigating and acting against anti-competitive practices, including the abuse of a dominant market position. GCCA was established on 14 April 2014, according to the Georgian Law on Competition. It represents an independent regulatory body, entitled to enforce competition legislation in Georgia. The principal objective of the Agency is to protect fair and undistorted competition on Georgian market. In doing so, the Agency ensures adequate access of economic agents to relevant markets, monitors anti-competitive conduct by economic agents, including cartels, abuse of dominance and anti-competitive market concentrations, as well as cases of unfair competition, regulates exclusive rights granted by various public bodies and monitors state aid, and finally, studies market situation to reveal and remedy existing market inefficiencies. The Agency operates based on the principles of transparency, objectivity and non-discrimination. It encourages and advocates co-operation among various state and private stakeholders to make Georgian market more competitive and attractive for both domestic and international players.[333] In order to move to a specific case, we will provide the Georgian Law on Competition, the legal framework of Georgia that handles the abuse of dominance.

Article 6 - Abuse of dominant position

1. *Any abuse of a dominant position by one or more undertakings (in the case of joint dominance) is prohibited.*
2. *The following may be regarded as the abuse of dominant position:*
   a) *imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;*
   b) *limiting production, markets or technical development to the prejudice of consumers;*

[333] GCCA Georgian Competition and Consumer Agency. accessed September 1, 2024, https://www.linkedin.com/company/competition-agency-of-georgia/about/ and https://gcca.gov.ge/index.php?m=2.

c) applying dissimilar conditions to equivalent transactions with specific trade parties, thereby placing them at a competitive disadvantage;

d) entering into contracts subject to acceptance by other parties of supplementary obligations that have no connection to the subject of the contract, etc.[334]

One of the notable cases in Georgia, judged under Article 6, Law of Georgia on Competition is *Wissol Petroleum Case,* one of the largest oil and gas companies in Georgia that was investigated by the GCCA for abusing its dominant position in the fuel market.[335] The company was accused of setting unfair high fuel prices and engaging in practices that limited competition in the market. The GCCA found that Wissol Petroleum indeed abused its dominant position and as an outcome of this, the company was fined and implemented measures to restore competitive conditions in the fuel market. This case demonstrates Georgia's efforts to stabilize the abuse of dominant position in the market. The Georgian Competition and Consumer Agency and Law of Georgia on Competition, no. 2159, play a crucial role in enforcing competition law and ensuring that dominant companies do not exploit their market power to the detriment of competitors and consumers. If speaking about countries that are not in the European Union, but also deals with cases were abuse of dominance is involved, Republic of Moldova is one of them. The legal framework in Republic of Moldova that deals with abuse of dominance is Competition Law no.183 from 11.07.2012; Law on Protection of Competition no. 1103 from 30.06.2000; Regulation on the establishment of market dominance and assessment of the abuse of dominant position, approved by the Competition Council Decision no. 16 of 30.08.2013; Regulation on the assessment of anticompetitive vertical agreements, approved by the Competition Council Decision no. 13 of 30.08.2013; Regulation on the evaluation of anti-competitive horizontal agreements, approved by the Competition Council Decision no. 14 of 30.08.2013[336]; etc. According to the Law on competition of the Republic of Moldova, it is presumed, until proven otherwise, that one or more enterprises are in a dominant position on a relevant market if the share or combined shares on the market concerned, recorded during the period under analysis, exceed 50%[337], Competition Law *transposes the provisions of Article 101–106 of the Treaty on the Functioning of the Euro-*

334 Law of Georgia on Competition No 2159 of 21 March 2014 - website, 27.3.2014, available: https://matsne.gov.ge/ka/document/download/1659450/4/en/pdf.

335 Wissol Disputes GEL 10.4m Fine Imposed by Competition Agency, accessed September 1, 2024, https://civil.ge/archives/124765.

336 *Some aspects of abuse of dominant position in the Republic of Moldova,* available: https://ibn.idsi.md/sites/default/files/imag_file/255-259_14.pdf.

337 Law on Competition, no. 183/2012, available: https://www.legis.md/cautare/getResults?doc_id=139070&lang=ro#.

pean Union.[338] According to the Law on Competition, no.183/2012, Article 11: *(1) Abusive use by one or more enterprises of a dominant position held on the relevant market is prohibited. These abusive practices may consist in particular of:*

a) imposing, directly or indirectly, sale or purchase prices or other unfair trading conditions;

b) limitation of production, commercialization or technical development to the disadvantage of consumers;

c) the application in relations with commercial partners of unequal conditions for equivalent services, thus creating a competitive disadvantage for them;

d) conditioning the conclusion of contracts on the acceptance by the partners of some additional services which, by their nature or in accordance with commercial usages, are not related to the subject of these contracts;

e) practicing an excessive price or a ruinous price in order to eliminate competitors;

f) unjustified refusal to contract with a certain supplier or to make deliveries to a certain beneficiary;

g) breaking a contractual relationship previously established on the relevant market for the sole reason that the partner refuses to submit to unjustified commercial conditions.[...]

The main authority in the Republic of Moldova, responsible for investigating and enforcing Competition Law is the Competition Council of the Republic of Moldova.[339] One of the cases that involved abuse of dominance was Case *of Moldcell S.A. and Orange Moldova S.A.* According to the report of the National Regulatory Agency for Electronic Communications and Information Technologies (ANRCETI), two companies own about 90% of the public electronic communications market including mobile telephony and the Internet, fixed telephony and the Internet, television, etc. On 22 February 2011, the National Agency for Protection of Competition has received from Moldcell S.A. a complain on Orange Moldova S.A. action which was referred to a below-cost pricing offer presented by complained to the public tender organized by Parliament Apparatus on 27 December 2010 for purchasing mobile services. During the investigation it was examined the behaviour of the Orange Moldova S.A., Moldcell S.A. and Moldtelecom S.A., as all three parties have practiced comparable offers in public tenders similar to the one held by Parliament Apparatus. However, it was not established dominance of Orange Moldova JSC on the relevant markets defined in the investigation within

[338] Ibid.

[339] https://www.competition.md/pageview.php?l=en&idc=67&t=/About-us/President-of-the-Competition-Council.

the period under examination. Thereby, due to the Competition Council Plenum decision, on 18 February 2016 it was ceased the investigation of the case, on the ground that during the investigation there were not found sufficient proofs related to the infringement of the provisions of the Article 6 let. b) of the Law no.1103-XIV from 30 June 2000 on the protection of competition which could substantiate the application of remedies or sanctions.[340] If to compare, from our point of view, Republic of Moldova still has a lot to improve in the branch of researching the abuse of domination, but with specialized people and a strong legal framework, it is possible for our country to grow at the level of European Union countries. In general, EU countries have a better legal framework, system, and jurisdiction that can solve cases of abuse of dominance quicker and better than other countries. They have a powerful background of decisions that can help the EU Court and EU Commission to deal with these cases faster and their practice allows them to investigate on a deep level and this is important to take a correct decision and to apply the corresponding sanctions.

3.3.1. Exploitative practices

As we mentioned in the last paragraph, the abuse of dominance in the EU Competition Law is divided mainly into two sections, these being exploitative and exclusionary practices. Some specialists have the opinion that exploitative practices, that is, as specified in Article 102, TFEU 'unfair purchase or selling prices' (known under the *terminus technicus* 'excessive pricing') as well as 'other unfair trading conditions' are not ranked in the top tier when it comes to the EU Commission's enforcement priorities.[341] Meanwhile, other specialists share a different opinion: *excessive pricing is one of the highly debated topics in Competition Law. In brief, it could be defined as the designated price that is consistently higher than the fair price in the market. It is considered as a type of unfair pricing. Excessive pricing is interpreted differently in various legal systems, especially in the European Union (EU) and United States of America (USA). In the USA, excessive pricing is not considered as an abuse; whereas, in the EU, the competition authority in various cases considers it to be an abuse under Article 102 (a) of the TFEU. Turkish Competition Law maintains a parallel stance as compared to EU practice.*[342]

340 *Some aspects of abuse of dominant position in the Republic of Moldova,* available: https://ibn.idsi.md/sites/default/files/imag_file/255-259_14.pdf (p. 259).

341 *Guidance on Article 102 Enforcement Priorities* (Chap. 1, n 38) para 7. Bernardette Zelger, *Restrictions of EU Competition Law in the Digital Age,* 2023 (p. 84).

342 Excessive Pricing, June 2017, Mehveş Erdem Kamiloğlu, accessed September 1, 2024, https://www.erdem-erdem.av.tr/en/insights/excessive-pricing Mehveş Erdem Kamiloğlu, Erdem& Erdem Turkish Law Firm.

As to compare the opinions that these two experts are giving us, we would say that the Turkish experts think that excessive/unfair pricing is both, exclusionary and exploitative practice, meanwhile the American experts believe that excessive/unfair pricing is only an exploitative practice. According to the Turkish specialist, excessive pricing could be both exclusionary and exploitative. When an undertakes resorts to excessive pricing with an aim to weaken its competitors' position in the market, the action is regarded as exclusionary. This kind of behaviour is mostly seen in vertical relationships. However, exploitative excessive pricing has a direct effect on customers. This direct effect is also considered to be grounds to accept excessive pricing as abuse behaviour. Excessive pricing is accepted as a manner in which a monopolist undertaking abuses its dominant position. Even though it is considered as an abuse in EU and Turkish practice, excessive pricing is not regarded as a clear manner of abuse in each jurisdiction, there are certain conditions under which competition authorities must adhere to throughout their investigations.[343] When EU and Turkish practice are compared, one of the major differences lies in the wording of Article 102 (a) of the TFEU and Article 6 of the *Act on the Protection of Competition numbered 4054 ("Act").* Article 102 (a) of the TFEU provides that imposing, directly or indirectly, unfair purchase or selling prices shall be considered as an abuse of an undertaking in a dominant position. Under EU practice, excessive pricing is interpreted under this Article. On the other hand, Article 6 of the Act, which is the equivalent of Article 102, does not contain similar wording. However, as Article 6 list types of abuses by way of illustration, it is considered, in practice, that excessive pricing is an abuse that should be evaluated under Article 6. *Abuse of Dominant Position Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited. Abusive cases are, in particular, as follows:*

a) *Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,*
b) *Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,*
c) *Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to*

343 Excessive Pricing, June 2017, Mehveş Erdem Kamiloğlu, accessed September 1, 2024, https://www.erdem-erdem.av.tr/en/insights/excessive-pricing Mehveș Erdem Kamiloğlu, Erdem&Erdem Turkish Law Firm.

the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

d) *Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,*

e) *Restricting production, marketing or technical development to the prejudice of consumers.*[344]

In practice[345], there are differing views about excessive pricing and the conditions that are to be considered as abusive behaviour. Another Turkish' specialists think that excessive pricing has an unbreakable connection with monopoly and dominant position. In this respect, one of the views is that the prohibition of excessive pricing would also mean preventing an undertaking in a dominant position to maximize its profit. This view also points out that the supra-monopoly prices shall be considered as unfair[346]. Another aspect debated in practice is whether competition authorities would be able to monitor the constant increases in prices. It is also questioned whether the competition authorities are the right instrument to deal with excessive pricing.[347] As to make it clearer, we would like to compare some EU practices with the Turkish ones, to highlight the fact that, indeed, excessive/unfair pricing is an abuse of domination. Speaking about EU doctrine and practice, one of the first cases in which was involved the excessive price issue was *General Motors Continental NV v Commission*[348]. The Commission, in its decision, considered a price that is excessive in the relation to the economic value of the service provided as abusive. Following the Commission's decision, excessive pricing is, theoretically, established as abuse. However, many believe that the Commission is reluctant to interfere with unfair prices[349] and is more amendable to investigate exclusionary abuses[350].

[344] *The Act of The Protection of Competition (The Act no. 4054)* Available: https://www.lawsturkey.com/law/4054-the-act-on-the-protection-of-competition.

[345] https://www.erdem-erdem.av.tr/en/insights/excessive-pricing *Mehveş Erdem Kamiloğlu, Erdem&Erdem Turkish Law Firm.*

[346] *Ünal, Çiğdem, Aşırı Fiyat Kavramı ve Aşırı Fiyatlama Davranışının Rekabet Hukukundaki Yeri, Ankara 2009, p. 11-12.*

[347] *Ibid.*

[348] *Judgment of the Court of 13 November 1975. - General Motors Continental NV v Commission of the European Communities. - Case 26-75; Available:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61975CJ0026.

[349] https://www.erdem-erdem.av.tr/en/insights/excessive-pricing *Mehveş Erdem Kamiloğlu, Erdem&Erdem Turkish Law Firm.*

[350] Ibid.

In the Turkish practice, one of the decisions of the Board that was subject to excessive pricing was *Botaş-Ego-İzdaş-İgdaş decision*. In this decision, the Board provided that in the undertakings, which are subject to pricing regulation, excessive pricing should not be regarded as abuse. It could be concluded that the Board was not in favour of analysing excessive pricing for regulated markets. It is clear that the Turkish competition authority finds excessive pricing as a type of abuse. However, it embraced different levels considering regulated markets and the presence of a monopoly.[351] As a conclusion to these two practices, EU and Turkish, from our perspective, excessive pricing is considered an abuse, both under Article 102 of the TFEU and Article 6 of the Act no. 4054. The EU Commission and the Board are both fighting against this kind of abuses, trying to maintain equilibrium in the market. In order to move on with another case, we would like to spotlight once again Article 102 of TFEU, mainly points (a) and (b), which indicates: *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;[352]

b) limiting production, markets or technical development to the prejudice of consumers;[353]

These points are related to the case where the European Commission has adopted a decision imposing on Gazprom a set of obligations that address the Commission's competition concerns and enable the free flow of gas at competitive prices in Central and Eastern European gas markets, to the benefit of European consumers and businesses.[354] The case was related to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (mentioned before) and Article 54 of the EEA Agreement, which says *Article 54 Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties. Such abuse may, in particular, consist in:*

351 Ibid.

352 Article 102 TFEU.

353 Ibid.

354 *Commission imposes binding obligations on Gazprom to enable free flow of Gas at competitive prices in Central and Eastern European gas markets,* available https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921.

a) *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
b) *limiting production, markets or technical development to the prejudice of consumers;*
c) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
d) *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.*[355]

As to be seen, these two articles provide the conditions that Gazprom was not respecting at that time. The EU Competition Chief, Margrethe Vestager, said: *All companies doing business in Europe have to respect European rules on competition, no matter where they are from. Today's decision removes obstacles created by Gazprom, which stand in the way of the free flow of gas in Central and Eastern Europe. But more than that – our decision provides a tailor-made rulebook for Gazprom's future conduct. It obliges Gazprom to take positive steps to further integrate gas markets in the region and to help realise a true internal market for energy in Europe. And it gives Gazprom customers in Central and Eastern Europe an effective tool to make sure the price they pay is competitive. As always, this case is not about the flag of the company – it is about achieving the outcome that best serves European consumers and businesses. And the case doesn't stop with today's decision – rather it is the enforcement of the Gazprom obligations that starts today.*[356] The Commission decision in the case AT.39816 – *Upstream Gas Supplies in Central and Eastern Europe*[357] in the paragraph *8.2.2.Commitment dealing with pricing* states that The Commission's concern, is that Gazprom may have charged excessive prices in the five CEE countries compared with competitive Western European price benchmarks.[358] The Commission's investigation concerns the prices that Gazprom's customers such as gas wholesalers and industrial customers pay for their gas. These wholesale prices play an important role in determining the prices for gas charged at retail level to households and businesses. They can also impact the prices of industrial

355 *Agreement on the European Economic Area,* available: https://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf#page=19.

356 Ibid.

357 CASE AT.39816 – Upstream gas supplies in Central and Eastern Europe ANTITRUST PROCEDURE Council Regulation (EC) 1/2003, accessed September 1, 2024, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

358 Ibid. p.33.

goods for which energy costs are an important factor in the production costs. Generally, Gazprom pegs the price of the natural gas it sells to several oil products (so-called "oil indexation"). The Commission investigated whether, and to what extent, the individual price levels in a country are unfair and how Gazprom's specific price formulae based on oil indexation have contributed to the unfairness. The Commission does not consider that indexing a product›s price to oil products or any other product is in itself illegal. It also does not take issue with the fact that gas prices are different in different countries. Competitive conditions may vary in Member States, such as the importance of gas as an energy source in a country's "energy mix". To assess whether individual price levels in a country are unfair, the different Member State prices were compared to a number of different benchmarks, such as Gazprom's costs, prices in different geographic markets or market prices. Based on this analysis, the Commission has come to the preliminary conclusion in its Statement of Objections that the specific price formulae, as applied in Gazprom's contracts with its customers, have contributed to the unfairness of Gazprom's prices: Gazprom's specific price formulae which link the price of gas to the price of oil products seem to have largely favoured Gazprom over its customers. The Commission's preliminary conclusion, as outlined in the Statement of Objections, is that Gazprom has charged unfair prices in five Central and Eastern European countries (Bulgaria, Estonia, Latvia, Lithuania and *Poland*) The Commission has concerns that Gazprom leveraged its market dominance in Bulgaria and Poland by making gas supplies conditional upon obtaining certain infrastructure-related commitments from wholesalers. In Bulgaria, the Commission's preliminary view is that Gazprom made wholesale gas supplies conditional upon the participation of the Bulgarian gas incumbent wholesaler in a large-scale infrastructure project of Gazprom (the South Stream pipeline project) despite high costs and an uncertain economic outlook. In Poland, the Commission's preliminary view is that Gazprom made gas supplies conditional upon maintaining Gazprom's control over investment decisions concerning one of Poland's key transit pipelines (Yamal). This pipeline is one of the main infrastructures that could allow gas from suppliers – other than Gazprom – to enter the Polish market. From our point of view, Gazprom's practices were abusive there, was a clear abuse of dominance under EU Competition Law. The decisions made by the EU Court were designed to stop the anti-competitive practices and to restore the fair market conditions in the affected EU countries. As to mention that, the Gazprom case is a critical example of European Union efforts to ensure that dominant companies do not abuse their market power, especially in strategic sectors like energy.

3.3.2. Exclusionary practices

The exclusionary practice in the EU Competition Law is defined as 'behaviour by a dominant firm designed to, or which might have the effect of, preventing the development of competition.'[359] Another point of view regarding the definition of exclusionary refers to a form of anticompetitive conduct that forecloses a market to rivals (leading to their exit) or that deters potential entrants from entering a market. It is considered anticompetitive when it is used to maintain or strengthen market power. Foreclosure is not anticompetitive when it is the result of a firm's superior performance (e.g. greater efficiency). The conduct also encompasses restrictions that do not force rivals to exit the market but that may cause them significant disadvantages, for example, by impeding their expansion[360]. Also, the Colombian expert believes that the term "exclusionary practices" is usually not found in competition laws. Instead, the term is used in case law and textbooks to refer to different types of behaviour that forecloses rivals and potential competitors with the objective of maintaining or strengthening a dominant position. Such practices include strategies that force competitors to exit markets, limit their possibility of expansion, and/or that deter new companies from entering a market. Exclusionary acts may cause horizontal foreclosure (e.g. dominant firm acts against competitors in the market in which it is dominant) and vertical foreclosure (e.g. vertically integrated dominant firm acts against a downstream rival). Exclusionary methods may consist of single-firm behaviour such as the imposition of constraints on rival conduct (e.g. raising rivals' costs), predatory pricing, margin squeezing, tying and bundling, price discrimination, exclusive dealing, fidelity discounts and rebates, refusing to sell or supply, refusing to provide interoperability information and refusing to licence intellectual property rights, among others. Exclusionary practices may also take the form of collective boycotts. There is a significant variation among jurisdictions on the legality of specific conducts, the elements of each type of exclusionary conduct, the burden of proof and enforcement practices in general.[361]

Another legal definition of "exclusionary practice" is practice by a dominant company that tends to impair the opportunities of competitors based on considerations other than competition on the merits. An example would be the decision, by a company dominant on the market for production of a certain product, not to

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359 Richard Whish and David Bailey *Competition Law* (Oxford University Press, 2021), 211.

360 Juan David Gutiérrez Rodriguez, Exclusionary practice, *Global Dictionary of Competition Law, Concurrences,* Article No. 12334, available: https://www.concurrences.com/en/dictionary/exclusionary-practice.

361 Ibid.

supply a client, because he is a competitor active in the market for distribution of this product.[362]

Now, moving on to the cases related to exclusionary practices, we would like to highlight the legal framework of Ukraine, a country that aims to join the European Union. The main authority responsible for investigating and enforcing Competition Law, including the exclusionary practices is the Antimonopoly Committee of Ukraine[363] (hereinafter AMCU). The legal framework of Ukraine that deals with competition is Law of Ukraine on protection economic competition[364], This law reflects the principles of regulation of competition, which generally correspond to similar provisions of EU law. In particular, the wording regarding concerted actions (cartels) and abuse of a monopoly (dominant) position, the number of fines for violations (up to 10 % from turnover) are coinciding to a large extent. According to the results of the analysis conducted by the experts, it was noted that the comparison of Competition Law with the best international practices shows that the legal framework of Ukraine does not need radical changes.[365] However, signing of the Association Agreement between Ukraine on the one hand, and the European Union, the European Atomic Energy Community and their Member States[366] on the other hand, require further harmonization of Ukrainian Competition Law. Chapter 10 of this Association Agreement is devoted to competition issues (Articles 253 - 261). Article 256 of the Association Agreement provides for further approximation of Ukrainian legislation to EU law and has a list of provisions of EU Regulations that need to be implemented into Ukrainian legislation. The changes envisaged in this list, even though not radical, are highly anticipated and important in some instances. It should be noted that most of these activities are carried out with the involvement of international technical assistance: through the implementation of individual projects, through EU assistance instruments, such as EU technical assistance projects (including Twinning and TAIEX[367]), as well as bilateral interagency cooperation with the competition

362 *Glossary of terms used in EU competition policy*, available: https://ec.europa.eu/translation/spanish/documents/glossary_competition_archived_en.pdf.

363 https://amcu.gov.ua/en.

364 *Law of Ukraine on protection economic competition, available: https://zakon.rada.gov.ua/laws/show/en/2210-14#Text .*

365 https://amcu.gov.ua/en/european-integration-activities.

366 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0529(01) and https://www.kmu.gov.ua/en/yevropejska-integraciya/ugoda-pro-asociacyu.

367 Technical Assistance and Information Exchange instrument of the European Commission, available: https://neighbourhood-enlargement.ec.europa.eu/funding-and-technical-assistance/taiex_en.

authorities of the EU Member States.[368] The methodology of quantifying the value of an anticompetitive overcharge in Ukraine is similar to the European approach. It involves comparing the actual performance of the company (especially prices) with performance which would have existed in the absence of the infringement (non-infringement scenario). So, the key challenge in assessing the value of harm from antitrust infringements is the formulation of a non-infringement scenario. The method of 'comparing data from other geographic market' is used in Ukrainian antitrust practice when the infringement is committed on a regional market that is close or even identical to several adjacent geographic markets. An example here is provided by the cartel case that occurred on the milk procurement market in some districts of the Ivano-Frankivsk region. The actual procurement prices were understated by a factor of 1.4–1.67 by four dairy plants (Kolomyisky syrzavod, Snyatynsky syrzavod, Gorodenkivsky syrzavod and Maslozavod (Tlumach town)), which together occupy a dominant position on the relevant market. The Ivano-Frankivsk Territorial Office of AMCU compared these plants' prices with the prices on the milk procurement markets in other districts of the Ivano-Frankivsk region. The authorities found that their prices were 25%–40% lower than comparable rates in other districts. The plants involved were obliged to compensate the incurred losses to injured households. The value of the losses was quantified as a difference between the average region price of milk procurement and the price paid to households under the infringement, multiplied by the volume of milk procured under the infringement.[369] In the cases of non-price infringements, that is also considered an exclusionary practice is *JCC Kyivguma vs JCC Kyivoblenergo*. Kyivoblenergo (monopolistic owner of electricity transmission infrastructure in the Kyiv region) precluded an independent electricity supplier – The Central Power Company – from using electricity transmission infrastructure. The monopolist wanted to prevent consumers (Kyivguma was one of them) from buying electricity from The Central Power Company in favour of Kyivoblenergo, who also operated on the electricity supply market. However, the price of electricity charged by the competitor (The Central Power Company) was lower than that of the monopolist (Kyivoblenergo). Hence the consumer, Kyivguma, claimed compensation for its additional costs caused by the price difference, this case provided only partial compensation. Kyivguma (injured 'consumer') has gotten compensation, but The Central Power Company (injured 'competitor') has not. The latter did not even try to get compensation through the courts, not-

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[368] https://amcu.gov.ua/en/european-integration-activities.

[369] Anzhelika Gerasymenko, Nataliia Mazaraki *Antitrust Damages Actions in Ukraine: Current Situation and Perspectives,* p. 202-203. available: https://yars.wz.uw.edu.pl/images/yars2015_8_12/195.pdf.

withstanding the significant value of its lost profit. The reason for such behaviour could be found in the complexity of quantifying and grounding as well as getting a court confirmation of the value of lost profit.[370] As a conclusion to the legal framework of Ukraine is the fact that, even though Ukraine is not a part of the European Union, yet, it still aims to take and implement EU practices in order to keep developing the system. From our point of view, the *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part* is one of the biggest steps for Ukraine, because it literally gives the possibility to act and think as a European country.

370 Ibid.

4. MERGER CONTROL[371]

4.1. Regulation 139/2004 - General principles and jurisdiction

Exactly 20 years have passed since the adoption of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (hereinafter referred to as the ECMR)[372].

The evolution of EU concentration rules has been significantly shaped by Council Regulation (EEC) No 4064/89 and its successor, Council Regulation (EC) No 139/2004, reflecting the need for continuous amendments to address new challenges and align competition law with the dynamics of the EU internal market since 1989.[373] To meet these needs, the Regulation (EEC) No 4064/89 was recast to ensure greater clarity and efficiency in regulating concentrations across the EU, leading to the adoption of Council Regulation (EC) No 139/2004 on January 20, 2004.[374]

In the period from 21 September 1990 to 31 August 2024, according to publicly available statistics, DG Competition processed 9,349 notified cases.[375] During the same period, a total of 56 decisions were made under Article 6.1 (a) of the ECMR for cases out of the scope of the ECMR, while under Article 6.1 (b) of the ECMR for compatible cases, a total of 8,367 decisions were made, which includes 5,875 decisions made under the simplified procedure mentioned in Article 6.1 (b) of the ECMR. Additionally, under Article 6.1 (b) of the ECMR in conjunction with Article 6.2 of the ECMR (compatible with commitments), a total of 355 decisions were made, and 303 procedures were initiated according to Article 6.1 (c) of the ECMR.[376]

Regarding the statistics for decisions from Phase II, the following are noted: a total of 65 decisions were made under Article 8.1 of the ECMR (compatible, 8.2 under Reg. 4064/89), 151 decisions were made under Article 8.2 of the ECMR

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[372] OJ L 24, 29/01/2004, p. 1–22.

[373] Recital 1 of ECMR.

[374] Recital 2 of ECMR.

[375] European Commission, Merger cases statistics, accessed September 29, 2024, https://competition-policy.ec.europa.eu/document/download/4b083559-e36c-44c2-a604-f581abd6b42c_en?filename=Merger_cases_statistics.pdf.

[376] Ibid.

(compatible with commitments), 33 decisions were made under Article 8.3 of the ECMR (prohibition), and 6 decisions were made under Article 8.4 of the ECMR (to restore effective competition).[377]

Merger control was not initially included in the EC Treaty of 1957, despite its significance to economic and industrial policy.[378] Discussions on merger control emerged in 1966 with the Memorandum on the Concentration of Enterprises in the Common Market, but no specific agreement followed.[379] Lacking clear legal competence, according to recital 7 from the ECMR, the European Commission resorted to Articles 81 and 82 of the EC Treaty to regulate mergers.[380]

In *BAT and Reynolds v. Commission,* the CJEU ruled that acquiring shares in a competitor, though not automatically restrictive, could influence behaviour and lead to anti-competitive practices, thereby extending Article 81's scope and prompting Member States to adopt the first European Community Merger Regulation (ECMR).[381]

In Europe Packaging Corporation and Continental Can Co v. Commission, the CJEU held that mere strengthening of dominance, without active use of market power, could breach Article 82, thereby expanding the Commission's authority over mergers to prevent anti-competitive behaviour using both Articles 81 and 82.[382]

In response to shortcomings identified in the old Merger Regulation and a series of 2002 Court of First Instance rulings that overturned three merger prohibition decisions—Airtours/First Choice, Schneider/Legrand, and Tetra Laval/

377 Ibid.

378 Oliver Bretz, Marie Leppard, "EU Merger Control", accessed September 8, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385447, p.4.

379 Ibid.

380 Investigations under Articles 81 and 82 present several issues. First, there is no formal timetable, which can hinder merging parties. Second, financial penalties may not effectively address market power concerns, as a post-merger monopolist could raise prices to offset fines. Additionally, Article 82's application is limited since it only applies to dominant companies. If a company is not dominant before the merger, Article 82 cannot be invoked. Recognizing these limitations, the European Commission introduced the European Community Merger Regulation (ECMR) in 1989, which came into force in 1990. The ECMR streamlined cross-border mergers and created a more uniform evaluation process. It used turnover thresholds to determine jurisdiction and set strict timelines for decisions: one month for Phase I and four months for Phase II investigations. In 1998, the ECMR was amended to include: (1) a second tier of turnover thresholds for mergers affecting three or more Member States, (2) gross income as the relevant turnover measure for financial institutions, (3) inclusion of more joint ventures, (4) First-phase remedies, (5) a suspension obligation preventing mergers from closing without clearance and (6) more flexible merger referral system between the Commission and Member States. Oliver Bretz, Marie Leppard, op. cit., p.4-6.

381 Ibid, p. 4-5.

382 Ibid, p. 4.

Sidel—due to procedural unfairness, failure to meet the burden of proof, and flawed economic analysis, the European Commission proposed significant reforms, including a new regulation, Horizontal Merger Guidelines, and measures to improve transparency, culminating in the adoption of the updated ECMR in January 2004, which introduced a focus on preventing significant impediments to effective competition and created the role of Chief Competition Economist to enhance economic analysis.[383]

If we analyse the period of ECMR application from 2004 onwards, various approaches are evident in theory and literature. Some of these approaches have essential theoretical significance. In this sense, EU merger control is a balancing act between enforcing market competition and fostering large, cross-national European firms, suggesting the Commission's leniency supports this integrationist policy.[384] However, the theory also known opposing views, so some experts argue that, rather than leading to neo-mercantilist outcomes as suggested by Thatcher, merger policy has actually contributed to the convergence of European capitalism around market-centred principles, with DG COMP emerging as an integrationist force comparable to key developments such as the Single European Act and the expansion of the European Central Bank's powers.[385]

In addition, several authors mention the Dow/DuPont approach as a new tendency; although it may seem revolutionary, its implications are likely limited.[386] Conversely, the Commission's increasing tendency to challenge traditional mergers involving pipeline products with a lower standard of proof could have more damaging effects, influencing a larger number of ordinary transactions and potentially leading to legal challenges regarding the standard of proof.[387]

When discussing the legal framework for merger control at the European Union level, the following are also included in addition to the ECMR:

- Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation

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383 Ibid, p.6.

384 Mark Thatcher, „*European Commission Merger Control: Combining Competition and the Creation of Larger European Firms*", European Journal of Political Research, Vol. 53, No. 3, pp. 443–464.

385 Ibid.

386 Mario Todino, Geoffroy van de Walle, and Lucia Stoican "EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation)", The Antitrust Bulletin, 1-20, (2018), accessed September 9, 2024, https://DOI: 10.1177/0003603X18816549.

387 Ibid.

(EC) No 802/2004 (hereinafter "Implementing Regulation") (Text with EEA relevance);[388]

- Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (hereinafter "Jurisdiction Notice");[389]
- Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings;[390]
- Commission Notice on case referral in respect of concentrations;[391]
- Commission Notice on the definition of the relevant market for the purposes of Community competition law;[392]
- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings;[393]
- Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings;[394]
- Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22 October 2008;
- Commission Notice on restrictions directly related and necessary to concentrations;[395]
- Commission Notice on the rules for access to the Commission file in case pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004[396].

The recitals of the ECMR provide the foundational principles and context for the regulation. They outline the objectives of EU competition law, the need for control over corporate concentrations, and the importance of maintaining competition within the internal market. These recitals set the stage for the legal provisions that follow, justifying the regulation's role in preserving a fair and

[388] OJ L 119, 5.5.2023, p. 22–102.
[389] OJ C 95, 16.4.2008, p. 1–48.
[390] OJ C 160, 5.5.2023, p. 1–10.
[391] OJ C 56, 5.3. 2005.
[392] OJ C 372 9.12. 1997, p.5.
[393] OJ C 31, OJ C 31, 5. 02. 2004, p. 5.
[394] OJ C 265, 18 October 2008, p. 6.
[395] OJ C 56, 5 March 2005, p. 24
[396] OJ C 325, 22 December 2005, p.7.

competitive market while accommodating corporate reorganizations. Recital (2) emphasizes that the Treaty establishing the European Community, Treaty on the Functioning of the European Union (TFEU) sets out key objectives for the EU, including ensuring that competition in the internal market is not distorted. Specifically, Article 3(1)(g) of the Treaty lays down the principle of instituting a system of undistorted competition, while Article 4 (1) establishes that the EU's activities must adhere to the principle of an open market economy with free competition.

Recital (3) highlights that the internal market's completion, EU enlargement, and global trade growth drive corporate reorganizations, necessitating EU oversight to prevent dominant players while ensuring competition, growth, and efficiency within the market. While Recital (4) highlights the benefits of concentration, Recital (5) stresses that such corporate reorganizations must not result in lasting damage to competition. It states that Community law must provide rules to govern concentration that could significantly impede effective competition within the internal market or in a substantial part of it. This recital sets out the problem that the regulation is designed to address concentration, while beneficial in some cases, can also create dominant players that stifle competition. The focus is on preventing anti-competitive mergers that would lead to a reduction in consumer choice, higher prices, or reduced innovation.

The ECMR introduced two key elements: the "one-stop shop" for reviewing mergers impacting multiple EU jurisdictions and the "significant impediment to effective competition" (SIEC) test.[397] The one-stop shop grants the European Commission exclusive authority over mergers with a community dimension, while the SIEC test allows the Commission to block mergers that significantly hinder competition, replacing the earlier "dominance" test. If jurisdictional thresholds are not met, National Competition Authorities (NCAs) handle reviews, with referral mechanisms ensuring that the appropriate authority oversees each merger.[398]

4.1.1. Concentrations: transactions covered

The definition of concentration is contained in Article 3 of the ECMR. According to paragraph (1) of Article 3, a concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by

[397] Oliver Bretz, Marie Leppard, op. cit. p. 29.
[398] Ibid p.3.

contract, or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. Hence, based on the content of this relevant provision, it can be concluded that Article 3 (1) of the ECMR distinguishes between mergers (as defined in subparagraph (a)) and acquisitions of control (as defined in subparagraph (b)).

Recital 20 of the ECMR, defines the concept of "concentration" to cover operations that result in lasting changes in control and market structure. It includes joint ventures that function as independent entities and treats closely connected transactions as a single concentration when linked by conditions or occurring within a short timeframe. This ensures comprehensive regulation of such operations under the Merger Regulation.

According to Jurisdiction Notice, a merger under Article 3 (1)(a) of the Merger Regulation occurs when two or more independent undertakings combine to form a new entity, ceasing to exist as separate legal entities. Alternatively, a merger can happen when one company absorbs another, with the absorbed entity losing its legal status.[399] A merger may also be deemed to occur without a formal legal merger if previously independent companies combine their activities into a single economic unit through contractual agreements, such as common economic management or a dual-listed structure.[400] Key factors include permanent unified management, profit and loss compensation, revenue sharing, joint liability, or risk-sharing. Cross-shareholdings can further reinforce such arrangements.[401]

Article 3 (1)(b) states that concentration occurs when control is acquired by one undertaking acting alone or by multiple undertakings acting jointly.[402] Article 3 (2) defines control as the ability, through rights, contracts, or other means, to exercise decisive influence over an undertaking, particularly through ownership of assets or rights affecting the composition, voting, or decisions of its governing bodies.[403]

Control is generally acquired by entities holding rights under relevant contracts (Article 3 (3)(a) of the ECMR), but sometimes the entity with actual control differs from the formal rights holder.[404] For example, an undertaking may use another entity to acquire a controlling interest, while maintaining real control behind the scenes (Article 3 (3)(b) of the ECMR).[405] The Court of First Instance

399 Ibid.
400 Paragraph 10 of the Jurisdiction Notice.
401 Ibid.
402 Paragraph 11 of the Jurisdiction Notice.
403 Paragraph 16 of the Jurisdiction Notice.
404 Paragraph 13 of the Jurisdiction Notice.
405 Ibid.

held that control can be attributed to exclusive or majority shareholders and, in cases of distributed shareholdings, to the entity overseeing the formal holders, with indirect control determined through factors like contractual relationships, financing, or family ties.[406]

Whether an operation gives rise to an acquisition of control therefore depends on several legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.[407]

Control can be acquired on a contractual basis if the contract grants control over the management and resources of the other undertaking, like acquiring shares or assets.[408] Such contracts, which must typically be of long duration without early termination options, can lead to structural changes in the market and may confer joint control if both parties hold veto rights over key strategic decisions.[409]

Franchising agreements generally do not confer control over the franchisee's business, as the franchisee typically operates its entrepreneurial resources independently, even if key assets belong to the franchisor.[410] Similarly, financial agreements like sale-and-lease-back transactions, with buyback options, do not usually constitute concentration, as they do not alter control over management and resources.[411]

However, control can be established through other means, including economic relationships.[412] In rare cases, economic dependence, such as significant long-term supply agreements or credits paired with structural links, may confer decisive influence, leading to de facto control.[413] The Commission will assess if such economic and structural ties result in lasting control.[414] Control may also arise unintentionally or passively, such as through inheritance or the exit of a shareholder, shifting control from joint to sole. Article 3 (1)(b) covers these situations, stating that control may be acquired "by any other means."[415]

The ECMR (Article 3 (1)(b), (2)) states that control over undertakings, parts, or assets constitutes a concentration if these assets generate turnover, but simple

[406] Ibid.
[407] Paragraph 17 of the Jurisdiction Notice.
[408] Paragraph 18 of the Jurisdiction Notice.
[409] Ibid.
[410] Paragraph 19 of the Jurisdiction Notice.
[411] Ibid.
[412] Paragraph 20 of the Jurisdiction Notice.
[413] Ibid.
[414] Ibid.
[415] Paragraph 21 of the Jurisdiction Notice.

outsourcing without asset or employee transfer is considered a service contract and does not qualify as a concentration.[416] However, if the outsourcing provider receives assets or personnel that form a business with market access, a concentration may occur, especially if the transferred assets enable the supplier to offer services to third parties.[417]

If the transferred assets only serve the outsourcing customer, there is no lasting market change, and the contract remains a service agreement, not a concentration.[418] The Commission assesses whether the assets transferred can enable the acquirer to establish a market presence within a timeframe like joint ventures, considering business plans and market characteristics. If not, the transaction is not regarded as a concentration.[419]

4.1.2. Concentrations which have „Community Dimension"

Any activity that qualifies as concentration under Article 3 of the ECMR and meets the threshold criteria defined in Article 1 of the ECMR is considered to have a community dimension. Article 1 (2) of the ECMR determines which concentrations will have this community dimension. Additionally, even if a concentration is not covered by Article 1 (2), it may acquire the community dimension if it falls under Article 1(3) of the ECMR.

The primary purpose of the criteria set out in Article 1 (2) and Article 1 (3) is to establish whether a specific concentration falls under the jurisdiction of the Commission. However, this should not prejudice the application of Article 4 (5) and Article 22, as the ECMR applies to all concentrations with a community dimension as defined in this Article.

Article 1 (2) of the ECMR sets out three distinct criteria: the worldwide turnover threshold assesses the overall size of the undertakings involved; the Community turnover threshold determines whether the concentration meets a minimum level of activity within the Community; and the two-thirds rule serves to exclude transactions that are purely domestic from Community jurisdiction.[420] A concentration has a Community dimension if the combined total worldwide turnover of all the companies involved exceeds EUR 5 billion. This measures the global scale and economic impact of concentration. In addition, at least two of the companies

416 Paragraph 24 of the Jurisdiction Notice.
417 Paragraph 25 of the Jurisdiction Notice.
418 Paragraph 26 of the Jurisdiction Notice.
419 Ibid.
420 Paragraph 125 of the Jurisdiction Notice.

involved must each generate more than EUR 250 million in turnover within the European Union. This ensures that the companies involved have a significant presence in the EU market. However, if each of the companies generates more than two-thirds of its EU turnover within a single Member State, the concentration is considered predominantly domestic and is excluded from EU-level oversight. In such cases, the national competition authorities of that Member State would have jurisdiction. The second set of thresholds, outlined in Article 1 (3), is aimed at addressing concentrations that do not meet the Community dimension under Article 1 (2) but would significantly affect at least three Member States, resulting in multiple notifications under their national competition laws.[421] To address this, Article 1 (3) establishes lower worldwide and Community-wide turnover thresholds, along with a minimum level of activity for the undertakings involved, both jointly and individually, in at least three Member States A concentration may still be considered to have a Community dimension if the combined worldwide turnover of all companies involved exceeds EUR 2.5 billion. This threshold is lower than the one in Article 1 (2), capturing smaller, but still significant, concentrations.

The concentration must have a notable presence in at least three EU Member States. In each of those Member States, the combined turnover of the companies involved must exceed EUR 100 million. This ensures that the concentration affects multiple EU countries rather than being limited to just one. In each of the three Member States identified, at least two of the companies involved must individually have a turnover of more than EUR 25 million. This condition confirms that the companies have substantial activity in those Member States. Additionally, at least two of the companies must have an EU-wide turnover of more than EUR 100 million each, ensuring that the undertakings have a significant economic footprint across the European Union. Like Article 1 (2), Article 1 (3) also includes a two-third rule to exclude predominantly domestic concentrations. For jurisdiction determination under the Merger Regulation, "undertakings concerned" are those involved in a concentration, with their turnover calculated per Article 5 rules to assess threshold criteria, while Article 5 (4) specifies how linked undertakings form a "group," distinct from terms like notifying or involved parties in related regulations.[422]

In a merger, the undertakings concerned are the merging entities, while in acquisitions, they are determined by who acquires control.[423] For newly created joint ventures, only the parent companies are considered undertakings concerned, and

421 Para 126 – jurisdiction notice.
422 Paragraphs 129, 130 and 131 of the Jurisdiction Notice.
423 Paragraphs 132 - 137 of the Jurisdiction Notice.

concentrations involving state-owned entities can qualify if the entities were previously independent economic units.[424]

4.1.3 Turnover: concept and calculation

The concept of turnover, as defined in Article 5 of the ECMR, refers to the amounts generated from the sale of products and the provision of services.[425] These figures usually appear in a company's accounts under "sales."[426] For products, turnover can be easily calculated by identifying each commercial transaction involving a transfer of ownership. However, for services, turnover is more complex and depends on the specific service provided and the legal and economic context.[427] Turnover is calculated based on "ordinary activities" - sales of products or services made in the normal course of business.[428] Net turnover reflects the real economic strength of an undertaking after deductions.[429] The Regulation excludes internal sales, or those between undertakings within the same group, from turnover calculations.[430] Turnover is based on the most accurate and reliable figures, typically from the audited financial accounts of the closest financial year to the transaction.[431]

Article 5 of the Merger Regulation addresses the need for adjustments to turnover calculations after the date of the last audited accounts. These adjustments reflect permanent changes in the economic situation of the companies involved in a merger, such as acquisitions or divestments that may not be fully captured in the accounts.[432] These changes are important to ensure that the turnover figures accurately reflect the true economic resources being concentrated, thus providing a clearer picture of the companies' financial status.[433]

Article 5 (4) of the EMCR outlines how turnover is attributed within a group of companies when determining whether the merger meets the thresholds for Commission review under Article 1 of the ECMR. The goal is to capture the full scope of economic resources being combined in a merger, regardless of whether the activities are carried out directly by the company in question or through sub-

424 Paragraphs 139 – 158 of the Jurisdiction Notice.
425 Paragraph 157 of the Jurisdiction Notice.
426 Paragraph 158 of the Jurisdiction Notice.
427 Paragraphs 157 - 160 of the Jurisdiction Notice.
428 Paragraphs 161-163 of the Jurisdiction Notice.
429 Paragraphs 164-66 of the Jurisdiction Notice.
430 Paragraphs 167-169 of the Jurisdiction Notice.
431 Paragraphs 169 - 171 of the Jurisdiction Notice.
432 Paragraphs 172-173 of the Jurisdiction Notice.
433 Ibid.

sidiaries and affiliated companies.[434] The regulation requires that, in addition to the turnover of the company directly involved in the merger, the turnover of any subsidiaries, parent companies, or other affiliated entities must be included if the company has certain rights or powers over them, as specified in Article 5(4)(b) of the EMCR.[435]

When considering turnover under Article 5 (4)(b) of the ECMR, the entire turnover of a subsidiary is included, regardless of the actual shareholding of the parent company.[436] In joint ventures, Article 5 (5)(b) specifies that turnover generated from third-party activities is to be divided equally among the concerned undertakings, irrespective of their capital or voting shares.[437]

Investment companies typically gain indirect control over portfolio companies through investment funds, exercising rights akin to those mentioned in Article 5 (4)(b).[438]

According to Article 5 (4) and recital 22 of the ECMR, turnover for State-owned companies should be calculated in a way that ensures no discrimination between public and private sectors.

Article 1 (2) and (3) of the ECMR establishes that turnover must be allocated geographically to determine the scope of the case within the European Community. Turnover is generally allocated to the location of the customer at the time of the transaction. This applies to both goods and services, with the goal of assigning turnover to the place where competition occurs.

Turnover should be allocated based on the location of the customer, which typically coincides with where the product is delivered or the service provided.[439] In Internet transactions, where customer location is hard to determine, focusing on the place where the service or product is delivered helps in assigning turnover correctly.[440]

For goods, the place of delivery usually takes precedence over the location where the contract was entered into or where the billing occurred.[441] In cases where a multinational company uses a central purchasing strategy, the location of the central purchasing organization is key for turnover allocation. If goods are

434 Paragraph 175 of the Jurisdiction Notice.
435 Paragraph 176 of the Jurisdiction Notice.
436 Para 185 of the Jurisdiction Notice.
437 Paragraphs 186-189 of the Jurisdiction Notice.
438 Paragraphs 189-191 of the Jurisdiction Notice.
439 Paragraph 196 of the Jurisdiction Notice.
440 Ibid.
441 Paragraph 197 of the Jurisdiction Notice.

delivered directly to subsidiaries across different Member States, turnover is allocated to the respective countries.[442]

For services, turnover is allocated to where the service is provided to the customer. Services involving cross-border elements fall into three categories: (1) the service provider travels, (2) the customer travels and (3) neither travels, but the service is delivered remotely.[443] In the first two categories, turnover is allocated to the destination.[444] In the third category, turnover is typically assigned to the customer's location.[445] For example, when software or films are distributed from outside the Community to a customer within the EU, the turnover is attributed to the EU.[446]

In cases like goods transport, turnover is allocated based on the customer's location, as the transport service is provided to the customer without them traveling.[447] In telecom cases, such as call termination, where a call originating in the EU is terminated in a non-EU country, turnover is allocated outside the EU, as that is where the service is delivered.[448]

4.2. Regulation 139/2004 - substantive analysis

The substantive analysis includes research on the advantages and disadvantages of the application of Regulation 139/2004, a comparative analysis of the benefits of Regulation 139/2004 in relation to Council Regulation (EEC) No 4064/89, the benefits of the implementation of the new system of testing and evaluation of concentrations , the application of the principle of subsidiarity from Article 5 of the Treaty on the Functioning of the EU, and the referral of specific cases from the Commission to the national authorities and *vice versa*.

Recital 8 from the Preamble explicitly established that: The provisions of this regulation should be applied to the essential (important) structural changes, the impact of which on the market goes beyond the borders of any member state. As a general rule, such concentrations should be assessed exclusively at Community level, applying the system of "providing services in one place" and in accordance with the principle of subsidiarity.

In substantive analytical sense, Regulation 139/2004 incorporates: the community dimension of its application, the quantitative and qualitative method of

442 Paragraph 198 of the Jurisdiction Notice.
443 Paragraph 199 of the Jurisdiction Notice.
444 Ibid.
445 Ibid.
446 Paragraph 200 of the Jurisdiction Notice.
447 Paragraph 201 of the Jurisdiction Notice.
448 Paragraph 202 of the Jurisdiction Notice.

assessing concentrations, the referral and cooperation between the national authorities for the protection of competition and the Commission, the nature and legal force of the decisions of the commission, the investigative powers of the Commission, the penal policy of the commission, and finally, the review of the decisions of the commission by the European Court of Justice, in terms of Article 229 of the Treaty establishing the EU.[449]

Fundamentally, the control on the concentrations in the EU is divided between the EC and the EU Member States.[450] The Commission has exclusive jurisdiction over concentrations that have a "community dimension", the concept of which we discuss previously. The exclusive jurisdiction of the Commission is closely related to the national jurisdiction of the authorities responsible for the protection of competition, which is foreseen by several regulations of the Regulation. This question is logically connected with the question for "referral" between the Commission and the national authorities, under precisely defined conditions provided by the Regulation 139/2004. The concept for "referral" determines who has the jurisdiction to conduct the concentration control test in certain cases and how to apply it.

In principle, the fundamental issue on which the entire Regulation 139/2004 is based on is the "concentration control test" and the "concentration assessment criteria". In the substantive-analytical approach of Regulation 139/2004, two issues have the central position: What is the notion of "substantive test", how is it applied, what are the advantages and disadvantages in relation to the test from Regulation 4064/89?! The position of the test is crucial, especially because Articles 101 and 102 of the Treaty are not sufficient to protect the interests of healthy and fair competition.

4.2.1. Substantive test

The new legal regime of concentration assessment, implemented by incorporation of a revised "substantive test" (SIEC) in Article 2 of Regulation 139/2004, represents one of the issues that has raised huge scientific and professional de-

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449 Article 262, TFEU, "Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."

450 John J. Parisi, *A Simple guide to the EC Merger Regulation*, Federal Trade Commission, 2010, p. 6. https://www.ftc.gov/system/files/attachments/key-speeches-presentations/ecmerger-regsimpleguide.pdf.

bate: Which are the advantages of the new (revised) test compared with the old test contained in Regulation 4064/1989, known as the "dominance test", what are the disadvantages of the "dominance test"?[451] Over-all, the supporters of the new "substantive test" base their views on the fact that the implementation of the "substantive test" will contribute to filling certain legal gaps in the assessment of concentrations[452] (mind the gap concept).[453] On the other hand, the opponents of this position point out that the revision of the concentration control test provided for in Regulation 4064/1989 is pure semantics, which in an economic sense does not change the situation in any segment.[454] In the context of this issue, the positions of the Commission and the European Parliament were diametrically opposed. Namely, according to the Commission's position regarding the implementation of the new concentration assessment test, it will only contribute to the creation of legal uncertainty regarding the implementation. In contradiction of this, the European Parliament was on the opinion that the new definition of a dominant position proposed by the Commission, as a way to include concentrations in the oligopolistic business structure, will only generate complications and legal uncertainty, so after several essential consultations, in November 2023 at a meeting realized within the work of the Council, a compromise[455] was reached and the SEIC test was implemented, with a focus on the standard „significant impediment of common market, instead of previously recorded "dominant position on the common market."

According to certain authors, the new test is a classic example of a compromise.[456] This compromise generated form three ideas: First, to close the alleged gap in the market dominance test; Second, the new test is meant to harmonize with U.S. law Third, legal certainty is assured through the reference to the creation or strengthening of a dominant market position. Of the stated reasons, only the first one is the subject of controversy, theoretical and practical deliberation. The second and third are more of a factual nature. Namely, considering the solutions

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451 Alexander Riesenkampf, "New E.C. Merger Control Test under Article 2 of the Merger Control Regulation", The Symposium on European Competition Law, Northwestern Journal of International Business Law, Volume 24, Issue 3, 2004, p. 721.

452 Lars–Hendrik R., Miguel de la Mano, The impact of the new substantive test in European Merger Control, European Commission, 2006, p. 2.

453 Riesenkampf A., op.cit., 720.

454 Werner Berg, The New EC Merger Regulation: "A First Assessment of its Practical Impact," Journal of international Law and business, Springer, 2024, p. 686, https://jilb.law.northwestern.edu/.

455 Pablo I Colombo, "EU merger control between law and discretion: When is an impediment to effective competition significant"? London School of Economics, 2021, p. 11-33.

456 Riesenkampf A., op.cit., 700.

from Article 1 of Regulation 139/2004, where it is determined that its application is tied to the effects caused by the concentrations, and not to the headquarters or the place of the registered activity, we are of the opinion that the approximation to the USA model is not a bad idea, on the contrary, it will contribute to a harmonized legal regime for the protection of competition worldwide.

The new Merger Regulation adopted on May 1st, 2004, reformulates the substantive test (SIEC). Namely, according to Article 2 (3), "*A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.*" In the same Article 2 (2), the Regulation points out in which cases concentrations do not represent a violation of competition rules, that is, in which cases concentrations are perceived as actions compatible with the common market.

In this direction, it is expressly emphasized: "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market". Despite the view that this is a pure inversion of the sentences, it is more than clear that according to the new test from Regulation 139/2004, the dominant position in the common market *per se* is not perceived as a basis for conditioning or prohibiting concentration. A comparative analysis of the old and new solutions is enough to state that the focus of new test is on the concept of „significantly impede effective competition" in the common market, regardless of whether this was achieved through the creation or strengthening of a dominant position. In the context of this claim, the EU Merger Regulation, adopted in 1990, prohibits mergers that "create or strengthen a dominant position as a result of which effective competition would be significantly impeded."

According to the concept of the test from Regulation 4064/1989, the creation or strengthening of a monopoly position in the common market is condition without which prohibited concentrations cannot be discussed, i.e. the creation or strengthening of a monopoly position is a necessary condition to prohibit a particular merger, takeover or joint venture. The essential question is whether the very interpretation of the definition implies that the creation or strengthening of a dominant position is in itself a sufficient condition to prevent the merger?!

Although there are several different views regarding this issue, our opinion fully corresponds with the opinion that the "dominance test" requires the cumulative fulfilment of both conditions. So "creation or strengthen a dominant position" is not a sufficient condition to prevent a certain merger or acquisition etc. In this

direction, the judicial practice has also ruled: Air France v. Commission (Case T-2/93).[457]

The new "substantive test" focuses on the determination of "significant impediment of effective competition", which in theory and practice has proven to be a more compatible concept in economic and legal terms.[458] *In concreto*, the new test focuses on evaluating whether the specific merger reflects the creation of a "significant impediment of effective competition' (SIEC)." This is applicable, even without a finding of dominance. *In concreto*, the new test focuses on evaluating whether the specific merger reflects the creation of a "significant impediment of effective competition' (SIEC)." This is appropriate, even without a finding of dominance.

A few analyses have been made regarding the effects of the SIEC Regulation 139/2004. In our opinion, the essence of the new test has the most beautiful elaboration in Roller L.Hendrik, Mano de la Miguel, through the two hypotheses he put forward: Hypothesis 1., dominance is not necessary, Hypothesis 2., dominance is not sufficient. Through these hypotheses, the authors want to indicate the real economic conditions of the market, emphasizing that the creation or strengthening of a dominant position in itself does not necessarily mean a violation of consumer welfare, on the contrary, there are numerous economic theories and practices that indicate that a merger can reduce prices, increase production, reduce marginal costs in the market and expand the range of products.[459] Hence, the monopoly position *per se* cannot in any case be an obstacle to a merger, and thus is no longer a necessary condition in assessing concentrations. According to the second hypothesis, the focus is on the effects of a violation of competition in the market, so in this direction, the interpretation that significant violations of effective competition can exist even in the case beyond „dominance". This has been perceived as the essential advantage of the new test, and a modus to fill the legal gap typical of oligopolistic markets.[460] Even after 20 years since Regulation

457 Andrew Renshaw, Jan Blockx, "Judicial review of mergers in the EU", The antitrust bulletin: Vol. 58, No. 2. 495.

458 Lars Hendrik Röller, Miguel de la Mano, "The impact of new substantive test in European Merger control", European Competition Journal, 2006, p. 14.doi:10.5235/ecj.v2n1.9.

459 Richard E. Caves, 1987. Effects of mergers and acquisitions on the economy: an industrial organization perspective, Federal Reserve Bank of Boston, vol. 31, p. 149. https://ideas.repec.org/a/fip/fedbcp/y1987p149-172n31.html.

460 Final Report for the European Commission Enterprise Directorate General by Europe Economics, Study on assessment Criteria for distinguishing between Competitive and Dominant Oligopolies in Merger Control, 2001, https://www.cea.fi/course/material/EuropeEconomics.pdf, accessed September 11, 2024.

139/2004, "substantive test", is facing numerous and new challenges. The attitudes regarding this issue are generally the same.[461]

4.2.2. Assessment of concentration

The assessment of market concentrations is based on the fundamental postulates/objectives provided by Regulation 139/2004 in general, and on the Treaty on the functioning of the EU too. The application of the legal regime anticipated in Regulation 139/2004, in connection with the assessment of concentrations, cannot and must not exclude the application of the fundamental principles of the EU Treaty, part three: Union policies and internal actions - title VII: common rules on competition, taxation and approximation of laws - chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 101 (ex-Article 81 TEC). However, essentially this issue is regulated by Regulation 139/2004, through solutions that regulate several different, but interrelated solutions.

Article 2 from the Regulation 139/2004, titled as "appraisal of concentration", emphasized that the assessment of concentration is conditioned with valuing the anticipated principles. In this context, Article 2 stressed that concentration within the scope of this Regulation shall be appraised in accordance with the objectives within the Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

ECMR Article 2 (1) requires the EC to consider the following factors when appraising a merger:

a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community;
b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[462] Additionally, article 2 (5) anticipated concrete standards that the Commission should take into account:

[461] EU Merger Regulation 139/2004: 20 years that made a difference, 20 years EUMR, The square, Brussels, 2024, https://www.youtube.com/watch?v=rkvkcpy33t8.
[462] Parisi J.J., op. cit., p. 11.

i) whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

ii) whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

In essence, the Commission considers whether a specific merger, acquisition, joint venture or other form of concentration significantly impede effective competition in the common market, or in a significant part of the market. Article 2 is closely related to "notion of concentration", "dominance position", "significant impediment of the effective competition."

In order to achieve the required level of assessment, the Commission adopts the "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2004/C 31/03), where, among other things, in Recital 7, expressly provides that the Commission's interpretation of the Merger Regulation as regards the appraisal of horizontal mergers is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

The logistics of the Court of Justice or the Court of First Instance of the European Communities in the appraisal process proved to be an effective solution. Practice abounds with cases where the decisions of the commission are reviewed by the Court, so in this direction, several decisions of the Commission are subject to analysis by the Court as well.[463] A relevant example in the context is the judgment from The Three/O2 case from 2020.[464] In this case, the Court is critical of the Commission's approach to the concept of 'an important competitive force' (ICF) in the context of non-coordinated effects.[465]

EU General Court annulled the European Commission's decision to block Three-O2 deal – potential implications for in-market mobile consolidation. Re-

463 Cristian Riss- Madsen, Attila Borsos et alia, European Court of Justice Strengthens the European Commission's Hand in Merger Control, 2023. https://www.gibsondunn.com/european-court-of-justice-strengthens-the-european-commissions-hand-in-merger-control/.

464 Darach Connolly, Three/02 – all-you-can-eat merger control? DLA PIPER, https://www.dlapiper.com/en.

465 Veronika Roberts, Kyriakos Fountoukakos. Et alia, General Court Landmark Ruling in Three/02 Commission Prohibition, Herbert Smith Freehills, London, 2020, https://www.herbertsmithfreehills.com/insights/2020-06/general-court-landmark-ruling-in-threeo2-commission-prohibition.

lated to this practice of the EU General Court is the Judgment of the Court in Case C-376/20 P | Commission v. CK Telecoms UK Investments. In this case, the Court of Justice annuls the judgment of the General Court and refers the case back to it.[466]

Apart from this, the greatest support in the process of evaluating the concentration comes from the "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings" (2004/C 31/03). Horizontal mergers present a merger of two companies that produce similar products or services in the same industry branch. The main aim of these guidelines is to help the Commission when assessing mergers of two competitors in the same relevant market. In essence, these guidelines find application when certain horizontal merger produce anticompetitive effects. Horizontal mergers may significantly impede effective competition by eliminating important competitive constraints and by producing coordinated effects.[467]

According to article 5 from the guidelines, "horizontal mergers are concentrations when the undertakings concerned are actual or potential competitors on the same relevant market." In 2016, the European Commission blocked the contemplated acquisition of Telefónica Europe Plc (O2) by CK Telecoms (Hutchison/Three) (Case M.7612), refereeing inter alia to guidelines for horizontal merger. The Commission's assessment of mergers normally entails:

a) definition of the relevant product and geographic markets;

b) competitive assessment of the merger.

Market definition is crucial for the proper assessment of the concentration. Guidance on this issue can be found in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law (guidelines article 10). Additionally, this Commission's Notice in correlation with the guidelines on the assessment of the horizontal mergers, serves as a main support of the Regulation 139/2004 in the part of the assessment of the concentration. The support comes from the detailed elaboration of some core elements of competition protections. Among many of them, the guidelines focus on the definition of "market share and concentration level", (Herfindahl-Hirschman Index (HHI),[468] Possible Anti-Competitive Effects of Horizontal Mergers etc.

[466] Case C-376/20, Commission v CK Telecoms UK Investments, EU:C:2023:561.

[467] Official Journal C 031, 05/02/2004 P. 0005 – 0018. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

[468] Antitrtust Devision U.S. Department of justice accessed September 15, 2024, https://www.justice.gov/atr/herfindahl-hirschman-index.

4.3. Regulation 139/2004 - procedural analysis

4.3.1. Introductory remarks – initiating of a procedure

When explaining and discussing procedures, rules, and phases, including Phase I and Phase II, one should always start with an analysis of Article 6 of the ECMR. Based on a detailed analysis of the provisions of Article 6 (1) of the ECMR, we can conclude that the European Commission is required to examine merger notifications immediately upon receipt of the notification to determine whether the concentration falls within the scope of the ECMR and whether it poses any competition concerns. This paragraph outlines three possible scenarios:

- 6 (1) (a) Out of Scope: If the concentration does not fall within the ECMR's scope (i.e., does not meet the thresholds for a "Community dimension"), the Commission will issue a decision confirming this. The merger would then not be subject to EU-level review.
- 6 (1) (b) No Competition Concerns: If the concentration falls within the scope of the ECMR but does not raise serious doubts about its compatibility with the internal market (i.e., no competition issues), the Commission will issue a decision declaring the concentration compatible with the common market. This effectively means the merger can proceed without further review. Such a decision also covers any restrictions that are directly related to and necessary to the implementation of the merger.
- 6 (1) (c) Serious Doubts - further investigation required: If the Commission concludes that the concentration may raise serious competition concerns, it will initiate formal proceedings (i.e., launch a Phase II investigation). These proceedings are aimed at conducting an in-depth analysis of the merger's potential effects on competition. If, however, the undertakings abandon the concentration, the proceedings are closed without further action.

4.3.2. Initiating the procedure: notification and pre-notification contacts

The initial step in the procedure for the assessment of concentrations is outlined in Article 4 of the ECMR. In accordance with this provision, concentrations with a Community dimension, as defined in the EMCR, must be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Additionally, it is important to highlight the provision that allows notification to be made when the undertakings concerned can demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a

public bid, when they have publicly announced their intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

In mergers (under Article 3 (1)(a) of the ECMR), both merging entities must jointly notify the Commission. In cases involving joint control (under Article 3 (1)(b) of ECMR), those acquiring control must jointly notify. In transactions where one party acquires control of one or more undertakings, the responsibility to notify lies with the acquiring party. This is also addressed in the Implementing Regulation. In accordance with Article 2 (1) of the Implementing Regulation, if submissions are made by authorized external representatives, they must provide written proof of their authority to act on behalf of the person or undertaking.

The Implementing Regulation stipulates in Article 3 that notifications must be submitted using Form CO (or Short Form CO under certain conditions), along with supporting documents. Regarding technical conditions, the forms and documents must be submitted to the Commission in accordance with Article 22 of the Implementing Regulation and Commission instructions. Furthermore, notifications must be drafted in one of the EU's official languages, which will also be used for the proceedings. Supporting documents should be in their original language, with translations provided if necessary. For notifications under the European Economic Area (EEA) Agreement, other EFTA languages can be used, but a translation into an EU official language must also be provided. This translated language will be used for the proceedings.

Pre-notification contacts are highly valuable for the undertakings concerned, as they typically lead to a significant reduction in the information required for notification, allow the Commission to offer notifying and other involved parties the opportunity to informally and confidentially discuss the intended concentration, help avoid wasted time and resources by clarifying whether the operation qualifies as a concentration or falls within the Community dimension, and can even prevent a decision of incompatibility by adapting the contract(s) to competition requirements in the common market, with effective consultation continuing throughout the entire procedure, including post-notification, as the Commission maintains close contact with the parties to address and resolve any legal or practical issues that arise.

The purpose of the pre-notification contacts step is specifically and thoroughly outlined in the Best Practices on the conduct of EC merger control proceedings, which aim to promote transparency and improve communication between DG Competition, notifying parties, and third parties in merger cases.[469]

469 Paragraph 29 from "Best Practices on the conduct of EC merger control proceedings", DG Competition, accessed September 11, 2024, https://competition-policy.ec.europa.eu/document/download/a288a6d8-3962-4072-b6a1-93e2ba08d12e_en?filename=proceedings.pdf.

The pre-notification phase is a crucial part of the DG Competition's review process, as it allows for informal, confidential discussions that address legal and jurisdictional issues, clarify required information, and identify potential competition concerns, ensuring complete notification forms and reducing the risk of delays—especially in cases with limited pre-notification contact.[470]

Pre-notification contacts should ideally begin at least two weeks before the expected notification date, though more complex cases may require a longer pre-notification period.[471] Early contact with DG Competition is recommended to facilitate case planning. The process starts with a memorandum providing background on the transaction, relevant markets, competition impact, and case language. In simpler cases, submitting a draft Form CO may suffice.[472] Depending on the case's complexity, DG Competition will decide whether to provide feedback orally or in writing, or if pre-notification meetings are necessary, especially for complex or procedural issues.[473]

4.3.3. Referral: pre-notification referrals and post-notification referrals

The ECMR establishes the legal rules for handling referral processes between the European Commission and Member States.[474] The relevant provisions are set out in Articles 4 (4), 4 (5), 9, and 22, which outline the steps required for cases to be referred to or from the Commission and Member States. The referral system is categorized into two types:

1. Pre-notification Referrals:
   a. Article 4 (4): From the Commission to Member States.
   b. Article 4 (5): From Member States to the Commission.
2. Post-notification Referrals:
   a. Article 9: From the Commission to Member States.
   b. Article 22: From Member States to the Commission.

Each article operates as a distinct mechanism for specific categories of mergers or concentrations. According to Recital 11 of the ECMR, the rules govern-

470 Paragraph 5 and 6.
471 Paragraph 10, Ibid.
472 Paragraph 11, Ibid.
473 Paragraph 12, Ibid.
474 Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) OJ C 56, 5.3.2005, p. 2–23. (Text with EEA relevance) para 47, p.177. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XC0305%2801%29.

ing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism considering the principle of subsidiarity. These rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

The Commission Notice on Case Referral outlines the rationale and legal criteria for the referral system under Articles 4 (4), 4 (5), 9, and 22 of the ECMR It provides guidance on recent changes, decision-making factors, and practical steps, focusing on pre-notification referrals.

Pre-notification referrals can only be requested by the undertakings concerned if the concentration has a Community dimension (Article 4 (4)) or is reviewable under the laws of at least three Member States (Article 4 (5)).[475] Member States have 15 working days to express agreement or disagreement with the request, after which the Commission has additional time to decide.[476] If no objections are raised, the case is either referred to Member States (under Article 4 (4)) or deemed to have a Community dimension (under Article 4 (5)), granting the Commission exclusive jurisdiction.[477]

Post-notification referrals can be initiated by Member States or following an invitation from the Commission under Articles 9 (2) and 22 (1).[478] Under Article 9, a Member State may request the Commission to refer a concentration with a Community dimension if it significantly affects competition within a distinct market in that Member State, with the Commission deciding within 35 to 65 working days depending on the case.[479] Under Article 22[480], a Member State can request the Commission to examine a concentration with no Community dimension if it affects trade between Member States and threatens competition within its ter-

475 Ibid, p.177.
476 Ibid, Paragraph 49, p.177.
477 Ibid, p.177.
478 Ibid, para 50, p.177-178.
479 Ibid. p.177-178.
480 Known as the Dutch clause due to its origins in a time when the Netherlands lacked a national merger control system and relied entirely on Commission referrals for problematic concentrations, this provision has become less relevant as most Member States have established their own national regimes for merger control, with Luxembourg as the only exception; consequently, the Commission has developed a practice of discouraging Member States from requesting Article 22 referrals for transactions beyond their jurisdiction, based on the belief that such transactions are generally small and unlikely to significantly impact the internal market. Jotte Mulder, Wolf Sauter, "A new regime for below threshold mergers in EU competition law? The Illumina/Grail and Towercast judgments", Journal of Antitrust Enforcement, 2023, 00, 1–11, p.3 https://doi.org/10.1093/jaenfo/jnad029.

ritory, allowing other Member States to join the request.[481] If the Commission accepts, it gains exclusive jurisdiction, and national proceedings in the referring Member States are terminated.[482]

When discussing the latest events related to referrals, it should be pointed out that two recent cases have significantly revised the functioning of Regulation 139/2004 and Regulation 1/2003[483] regarding the traditional division between ex-ante merger control and ex-post behavioural oversight.[484] In *Illumina/Grail* (2022), the General Court ruled that NCAs can refer a concentration to the European Commission even if they lack jurisdiction under national law, provided it affects trade between Member States and significantly impacts competition.[485] In *Towercast* (2023), the Court confirmed that NCAs can, ex-post, challenge concentrations that bypass national merger control thresholds using Article 102 TFEU, expanding the scope of merger control at both EU and national levels.[486]

4.3.4. Phase I Investigation

The Phase I investigation begins on the date the Commission receives the complete notification. A notification is only effective when the Form CO is fully complete and accurate. Notifying parties must ensure all information, especially contact details for customers, suppliers, and competitors, is correct.[487] Incomplete or incorrect information will delay the investigation and may result in the notification being declared incomplete.[488] To expedite the process, contact details should be provided electronically by the day of notification.[489] DG Competition may informally confirm the adequacy of a draft notification during pre-notification but may still declare it incomplete if issues are found later. If omissions are discovered after formal notification, parties usually have 1-2 days to correct them unless they severely impact the investigation.[490]

481 Commission Notice on Case Referral in respect of concentrations, op. cit., paragraph 50, p.177-178.
482 Ibid., paragraph 50, p.177-178.
483 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4.1.2003, p. 1–25.
484 Jotte Mulder, Wolf Sauter, op.cit, p. 2.
485 Ibid.
486 Ibid.
487 Paragraph 20, DG COMPETITION.
488 Paragraph 20, Ibid.
489 Paragraph 21, Ibid.
490 Paragraph 23, Ibid.

Without prejudice to Article 6 (4) of the ECMR, the decisions referred to in Article 6 (1) of the ECMR shall be made within a maximum of 25 working days.[491] This period commences on the working day following the receipt of the notification, or, in the case of incomplete information, on the working day following the receipt of all required information.[492] The time frame shall be extended to 35 working days if the Commission receives a request from a Member State in accordance with Article 9(2), or if the undertakings involved propose commitments under Article 6 (2) to ensure the concentration is compatible with the common market.[493]

A special rule is contained in Article 10 (6) of the ECMR. According to this rule, where the Commission has not taken a decision in accordance with Article 6 (1)(b), (c), or Article 8 (1), (2), or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed compatible with the common market, without prejudice to Article 9. It should also be noted that this rule applies to decisions in both Phase I and Phase II.

When the Commission determines that a notified concentration falls within the scope of the ECMR, it will publish the notification, including the names of the involved undertakings, their countries of origin, the nature of the concentration, and the relevant economic sectors.[494] In doing so, the Commission will also respect the legitimate interests of the undertakings, particularly in protecting their business secrets.[495]

Before notifying a concentration, companies can request that the EC refer the case to a specific Member State's national authority if it significantly affects competition in that state's distinct market, and if no objection is raised within 15 working days, the request is deemed accepted, allowing the EC to refer the entire case or parts of it, after which EU competition law no longer applies and the case is handled under national law.[496]

If a concentration falls below Community dimension thresholds but is reviewable under the laws of at least three Member States, companies may request the EC to examine it, and if no Member State objects within 15 working days, the concentration is deemed to have a Community dimension and must be notified to the EC, granting the EC exclusive jurisdiction and preventing national competition authorities from applying their laws.[497]

[491] Article 10 (1) of the ECMR.
[492] Article 10 (1) of the ECMR.
[493] Article 10 (1) of the ECMR.
[494] Article 10 (3) of the ECMR.
[495] Article 10 (3) of the ECMR.
[496] Article 10 (4) of the ECMR.
[497] Article 10 (5) of the ECMR.

As previously explained, Phase I will conclude either with the adoption of a decision in accordance with Article 6 (1)(a) - that the concentration does not fall within the scope of the Merger Regulation - or with the adoption of a decision in accordance with Article 6 (1)(b) - that the concentration does not raise serious doubts as to its compatibility with the common market (i.e., approval). If a decision is made in accordance with Article 6 (1)(c) - that the concentration raises serious doubts - Phase I will transition into Phase II.

4.3.4.1. Simplified procedures

In 2023, the Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2023/C 160/01) was adopted, replacing the Commission Notice on a simplified procedure for the treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04). This new notice sets out the conditions under which the Commission will review certain concentrations in a streamlined manner and provides guidance on the simplified procedure laid down in Annex II of Commission Regulation (EU) 2023/914 of 20 May 2023, which implements Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the "Implementing Regulation").

The European Commission applies a simplified procedure to certain types of concentrations, allowing faster approval processes for mergers and joint ventures that pose limited competitive concerns. These include Joint Ventures with No EEA Activity[498], Joint Ventures with eligible EEA Activity[499], Non-overlapping Markets[500], Minimal Market Share Overlap[501] and Acquisition of Sole Control.[502]

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498 When two or more companies acquire joint control of a joint venture with no current or expected turnover in the European Economic Area (EEA), or where there are no planned asset transfers within the EEA at the time of notification.

499 When the joint venture or contributed activities have a current and expected annual turnover below EUR 100 million in the EEA, and the total value of assets transferred to the joint venture is also less than EUR 100 million at the time of notification.

500 If two or more undertakings merge, or one or more undertakings acquire control of another company, the simplified procedure applies provided none of the involved parties are engaged in the same product or geographic market, or in upstream/downstream markets.

501 The procedure may apply if there is a horizontal overlap (same product/geographic market) and the combined market share is below 20%, or if it is below 50% with a limited market impact measured by the Herfindahl-Hirschman Index (HHI). In vertical relationships (upstream or downstream markets), the simplified process is available if individual and combined market shares are below 30%.

502 The simplified procedure applies when a party that already has joint control of a company acquires sole control.

The Commission may also apply the simplified procedure upon request for concentrations that do not strictly fall under the above categories. For instance: if the combined market share in a horizontal overlap is below 25%; or in vertical relationships, if individual and combined market shares in upstream and downstream markets are below 35%, or if one market has less than 50% while others are below 10%.

Additionally, the procedure can be used for joint ventures where the annual turnover and asset transfers in the EEA are both below EUR 150 million. The conditions outlined in different categories are applied alternatively and can be combined where applicable, offering flexibility in the review process.

This approach aims to expedite approvals for concentrations that are unlikely to harm competition, reducing the burden on both the Commission and businesses while maintaining effective regulatory oversight.

If the Commission determines that a concentration qualifies for the simplified procedure (under points 5, 8, or 9), it will typically issue a short-form decision. This occurs when no competition concerns are raised. The decision will confirm the concentration's compatibility with the internal market within 25 working days from the date of notification. However, during this period, the Commission retains the right to revert to the normal procedure if further investigation is deemed necessary. In such cases, the Commission may declare the notification materially incomplete if it does not meet all the requirements, such as submitting the Form CO. Once the short-form decision is made, the Commission will publish a notice in the Official Journal of the European Union, similar to full-clearance decisions.

4.3.5. Phase II - In-Depth investigation

The Phase II review entails a thorough investigation involving the collection and examination of information, market data, legal and economic opinions, and presentations. It also includes analysing studies and submissions from third parties. Based on this, especially third-party feedback, the Commission will assess the competition concerns linked to the proposed merger. Additionally, the Commission may scrutinize internal documents from the companies involved, particularly strategic materials.

Article 11 of the ECMR grants the European Commission the authority to request necessary information from individuals, undertakings, and associations to fulfil its regulatory duties. The Commission may issue a simple request or a formal decision, specifying the legal basis, purpose, required information, and deadlines. It also outlines potential penalties for providing incorrect or misleading informa-

tion, as set out in Article 14. Recipients of these requests are obligated to comply within the set time frame.

Article 13 of the ECMR outlines the European Commission's powers to conduct inspections of undertakings and associations of undertakings to enforce competition regulations. Authorized officials can enter premises, examine business records, take copies, seal locations, and request explanations from staff. Inspections require a written authorization specifying the purpose, and the Commission must notify the relevant Member State in advance. Companies are legally obliged to comply with inspections, and decisions include the scope, start date, penalties, and the right to appeal before the Court of Justice. The Commission consults with the Member State before issuing a decision.

The Commission's position will be formally outlined in a written Statement of Objections. Before consulting the Advisory Committee, the Commission shall hear the parties pursuant to Article 18 (1) and (3) of Regulation (EC) No 139/2004 when it intends to take a decision under Article 6 (3) or Article 8 (2) to (6) of that Regulation. Article 12 (2) of this Regulation applies mutatis mutandis if the Commission has taken a provisional decision under Article 8 (5) of Regulation (EC) No 139/2004, in line with Article 18(2).[503] The Commission shall address its objections in writing to the notifying parties in a statement of objections and may issue supplementary statements if new objections arise or previously raised objections are modified. The Commission will set a time limit for notifying parties and other involved parties to submit their comments in writing.[504]

Notifying parties and other interested parties may submit written observations within a set timeframe, request an oral hearing, and participate in meetings with the Commission to clarify concerns, align positions, and develop remedies to ensure the concentration's compatibility with the Common Market before the Statement of Objections is issued.

A separate chapter, Chapter IV of the Implementing Regulation, outlines the procedures for hearings and the right to be heard under the ECMR. According to Article 11, four categories of parties with the right to be heard are foreseen.[505]

According to Article 12 of the Implementing Regulation, if the Commission plans to suspend concentration, it must inform the notifying and involved parties,

503 Article 13 (1) of the Implementing Regulation.

504 Article 13 (2) of the Implementing Regulation.

505 The following entities are included: (i) notifying parties, those submitting a notification regarding a concentration; (ii) other involved parties, such as the seller and the target company in a concentration; (iii) third parties, including customers, suppliers, and competitors who have a sufficient interest, such as consumer associations and employee representatives; and (iv) parties facing fines, i.e., those against whom the Commission plans to impose penalties.

allowing them to present their views in writing within a set timeframe. If a provisional decision is made without consulting the parties, they must still be allowed to submit comments before a final decision is made.

Before making substantive decisions on concentration, the Commission must hear the parties involved, issue a written statement of objections with a deadline for response, and may issue additional statements for new objections, noting that comments submitted after the deadline are not guaranteed to be considered.[506]

Notifying parties and other involved parties can request oral hearings to present their arguments, especially if the Commission plans to take significant decisions, such as approving or blocking a merger.[507] Hearings may also be granted at other stages of the proceedings.[508]

Oral hearings, conducted by an independent Hearing Officer, are private proceedings where the Commission and Member State authorities can attend and ask questions, with participants permitted to be represented by legal or authorized representatives.[509]

Third persons can apply to be heard, and if accepted, the Commission must inform them of the case, provide a non-confidential version of the objections, set a deadline for written comments, and may invite them to participate in hearings.[510]

Special provisions for access to the file are contained in Article 17 of the Implementing Regulation, which allows parties involved in a case (those receiving a statement of objection) to request access to the file to defend themselves.

Confidential information, such as business secrets, will not be disclosed unless necessary for the proceedings, and parties must identify such material and provide a non-confidential version; if they fail to do so, the Commission may treat it as non-confidential and can require parties to specify confidential content in key documents, with non-compliance potentially resulting in the loss of confidentiality.[511]

Without prejudice to Article 8 (7) of the ECMR, decisions under Article 8 (1) to (3) of the ECMR regarding notified concentrations must be made within 90 working days from the initiation of proceedings. This period may be extended to 105 working days if the parties involved propose commitments under Article 8 (2), second subparagraph, to make the concentration compatible with the common market,

506 Article 13 of the Implementing Regulation.
507 Article 14 of the Implementing Regulation.
508 Article 14 of the Implementing Regulation.
509 Article 15 of the Implementing Regulation.
510 Article 16 of the Implementing Regulation.
511 Article 18 of the Implementing Regulation.

provided such commitments are offered no later than 55 working days after the proceedings begin. The time limits mentioned in the first subparagraph may also be extended if the notifying parties request an extension within 15 working days of the initiation of proceedings under Article 6 (1)(c). Only one such request is allowed. Additionally, the Commission may extend the time limits with the agreement of the notifying parties at any point after the proceedings have started. However, the total duration of any such extension(s) cannot exceed 20 working days.

Upon expiry of the relevant Phase II time period the Commission must take a decision under one of the following provisions: (i) Article 8 (1)—if the concentration is compatible with the Common Market; (ii) Article 8 (2)—if the concentration is compatible with the Common Market following modification by the parties; or (iii) Article 8 (3)—if the concentration is incompatible with the Common Market. In addition, the Commission can decide in accordance with Article 8 (4) for the dissolution of the merger in cases of premature implementation or implementation in breach of a condition for clearance, or in accordance with Article 8 (6) for the revocation of a clearance decision in cases of incorrect information or breach of obligation. The Commission can also decide on temporary measures in accordance with Article 8 (5).

4.3.6. Clearance and conditional clearance

"Clearance" and "conditional clearance" are part of the procedure for appraisal of concentration notified in the context of Article 6 from the Regulation 139/2004. Article 6 refers to "examination of the notification and initiation of proceedings" and one of the main obligations of the Commission is to examine the notification as soon as it received. Under article 6 (1b), where the Commission finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market. In article 6 (2), the Regulation incorporate the concept of "clearance" anticipating that "where the Commission finds that, *following modification by the undertakings concerned*, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b)". The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. For example, Hutchison 3G Italy/Wind/JV in Italy in August 2016 saw Iliad enter the Italian market as a full-blown fourth

MNO based on a remedy package."[512] This issue is related to the phase I and phase II form the procedure anticipated in the part "Examination of the notification and initiation of proceedings." There are two main conclusions of a phase I investigation: The merger is cleared, either unconditionally or subject to accepted remedies; or the merger still raises competition concerns, and the Commission opens a phase II investigation. This phase II most often opens the question of remedies.

4.3.6.1. Remedies

Remedies are the most used instrument by the Commission in merger approval procedures.[513] Some statistical data display that for a period of 30 years, the Commission has prohibited only 30 concentrations, and about 450 cases have been approved with the use of remedies.[514] Importance of remedies in the appraisal of concentration was confirmed by Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004.[515] According to paragraph 3, "this Notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that may be accepted by the Commission in cases under the Merger Regulation, the specific requirements which proposals of commitments need to fulfil in both phases of the procedure, and the main requirements for the implementation of commitments." Proper legal basis for the implementation of remedies in certain cases lays down in article 8 (2) which refer to the activities of the Commission in phase II. Namely, in the legal frame of the powers of decision, "Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2 (2) and, in the cases referred to in Article 2 (4), the criteria laid down in Article 81 (3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they

[512] Final report of the Hearing Officer, Official Journal of the European Union, Hutchison 3G Italy/WIND/JV (Case M.7758) (2016/C 391/04), accessed September 20, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=uriserv:OJ.C_.2016.391.01.0005.01.ENG.

[513] Südzucker/ED&F MAN, Case COMP/M.6286, Commission decision of 16 May 2012; Universal Music Group/EMI Music, Case COMP/M.6458, Commission decision of 21 September 2012; Outokumpu/ Inoxum, Case COMP/M.6471, Commission decision of 7 November 2012; and Hutchison 3G Austria/ Orange Austria, Case COMP/M.6497, Commission decision of 12 December 2012.

[514] For more statistical data see: Simon VANDE WALLE, Remedies in EU Merger Control – An Essential Guide, 2021, https://ssrn.com/abstract=3782333.

[515] OJ C 267, 22.10.2008, p. 1–27, accessed September 18, 2024. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC1022%2801%29.

have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. Finally, a decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of concentration. Where the Commission finds that a concentration: a) has already been implemented and that concentration has been declared incompatible with the common market, or (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2 (3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81 (3) of the Treaty, the Commission may:

- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,
- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

The theory and practice are aware with few types of remedies applicable in merger control: structural remedies (divestments of business, divestments of shares, termination of agreements), behavioural remedies, and hybrid" remedies. Divestitures is the most common type of remedy in EU merger control. Divestments of business or divestments of shares are one of the most used instruments in the appraisal procedure and approval of the merger, acquisition or joint venture. For example, In 2018, for instance, Bayer, a German-based multinational, agreed to divest part of its business as a remedy to obtain clearance for its acquisition of U.S. seeds company Monsanto. The resulting deal, which had a value of 7.6 billion euro.[516] Very famous cases of merger or acquisition have been realized with the help of remedies: Dow / DuPont, Commission decision of 27 March 2017., AB InBev / SAB Miller, GE / Alstom, Holcim / Lafarge, Ball / Rexam e*tc.* Namely,

- *"Under the Initial Commitments package AB InBev had already agreed to the sale, conditional on completion of the Transaction, of SABMiller's interest in*

[516] Case 1:18-CV-01241-JEB Document 25 Filed 02/08/19 Page 1 of 46, accessed September 1, 2024, https://www.justice.gov/atr/case-document/file/1165136/dl.

MillerCoors LLC (a joint venture in the US and Puerto Rico between Molson Coors and SABMiller) and of the Miller Global Brand Business (the Miller Brand) to Molson Coors ("the US Agreement")";

- „*On 8 April 2016, the Parties submitted the PGM package with the aim to remove overlaps between their businesses in Western Europe. It consists on the divestment of three entire businesses currently owned by SAB, namely the Peroni business in Italy, the Grolsch business in the Netherlands and the Meantime business in the United Kingdom*";

Furthermore, the Commission considers that the sale of the Peroni brands family would essentially removes the overlap between the Parties 'activities in Italy and the UK. The on-sale of the Grolsch brand family removes the overlap between the Parties activities in the Netherlands and in France etc. [517]

Anyway, in the last few year, this concept of remedies has been very criticized in the academicals and professional circles.[518] In this regard, the theory deals with the issues related to the effort invested by the commission and the costs it incurs, in the process of proving significant impediment to effective competition, personnel engagement, etc., bearing in mind that the concept of conditional approval is always option.

According to relevant experts, the concept of remedies should be used very carefully, and only in cases where all means have been exhausted by the commission to prove that the specific transaction is inadmissible from the point of view of competition law. As an argument in support of this opinion, there is the fact that mergers, acquisitions, joint investments, etc., have an essential role in the growth and development of the economy. Hence, insufficient investigation by the Commission of the conditions under which the concentration can be allowed or prohibited, may jeopardize the economy, and the well-being of the consumers for which the Commission basically advocates.[519]

4.3.7. Joint ventures

Joint ventures take a wide range of forms, from structural arrangements comprising the transfer by parents of assets or businesses into a commonly owned legal entity, to looser forms of cooperation that seek to achieve more discrete

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517 Walle Vande S., Ibid.

518 Markus K Dertwinkel, Cristian Wey., Evidence Production in Merger Control: The Role of Remedies, Review of Industrial Organization, 2021, pp.1-12.

519 Markus K Dertwinkel., Cristian Wey, op.cit., p. 6.

goals.[520] Theory and practice are familiar with 4 types of joint ventures: Project base joint ventures, Functional – Based joint ventures, vertical joint ventures, horizontal joint ventures.

For the purposes of competition law, joint ventures have been defined in 1998, in Official Journal C 066, 02/03/1998 P. 0001 - 0004 1998 OJ C 66, through the COMMISSION NOTICE on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/01). Under INTRODUCTION I from the COMMISSION NOTICE, "under the Community competition rules, joint ventures are undertakings which are jointly controlled by two or more other undertakings."

Joint ventures are subject of the committee's interest, mainly when it comes to the concept of full-function joint ventures. In cases where certain joint ventures do not fall under the application of Regulation 139/2004, the general rules from Article 101, 103 of the treaty are applied.

Regulation 139/2004 deals with joint ventures concept through a few articles. At the beginning, in the preamble of the Regulation, point 20, in defining the concept of concentration, the regulation includes joint ventures. Additionally, point 27 from the Preamble, anticipates that the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis. Related to this is the solution from article 3(4), which is crucial for appraisal of concentration. In this regard, "the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)".

The regulation 139/2004 has jurisdiction over joint ventures in terms of concentration assessment, expressly provided through the prism of multiple solutions (article 2 (4)).[521] In making this appraisal, the Commission shall take into account in particular:- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market.

- Whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of elimi-

[520] Malcom Walton, Christopher Humpe and Louis Delvaux, "European Union: The evolving assessment of joint ventures under EU law," 2024, globalcompetitionreview.com.

[521] To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

nating competition in respect of a substantial part of the products or services in question.

Practice abounds with cases assessing the concentration, in the case of a joint venture. Case T584/19, Thyssenkrupp v. Commission, judgment of 22 June 2022 Case T-399/16, CK Telecoms, judgment of 28 May 2020 Case C376/20 P, Commission v. CK Telecoms, Opinion of Advocate General Kokott of 20 October 2022, Case376/20 P, Commission v. CK Telecoms, judgment of 13 July 2023 Case C724/17, Skanska, judgment of 14 March 2019, Case C882/19, Sumal v. Mercedes Benz *Trucks España*, judgment of 6 October 2021.

One tremendously interesting case in the context of appraisal of concentrations in the case of a joint venture is the well-known case C-248/16 Austria Asphalt vs Bundeskartellanwalt.[522] The main question in the preliminary ruling was: Must article 3(1)(b) and (4) of [Regulation No 139/2004] constitutes a concentration in the event when in the process of joint venture between two undertakings, control becomes joint, on a permanent basis? Many opinions about this case have been given in the theory. As a part of the judgment, Kokott opinion is „The transfer of an existing undertaking or part of an undertaking from sole control by one company to joint control by the selfsame company and another company unrelated to it constitutes a concentration within the meaning of Article 3 [EUMR] only where the joint venture resulting from that transaction performs on a lasting basis all of the functions of an autonomous economic entity".[523]

[522] Case C – 248/16, Austria Asphalt GmbH & Co OG v Bundeskartellanwalt, EU:C:2017:643.
[523] Ibid.

5. COMPETITION LAW ENFORCEMENT IN THE EU[524]

EU competition law is implemented through three primary directions. The first direction pertains to the public enforcement of competition rules within the EU, as delineated in Article 101 (prohibition of anti-competitive agreements) and Article 102 (prohibition of abuse of a dominant position) of the TFEU. This enforcement is carried out by the EU Commission and national competition authorities (NCAs). In parallel, NCAs and courts enforce national competition laws that typically contain provisions analogous to those in Articles 101 and 102 TFEU.

The second direction of EU competition law application involves the control of concentrations, which is governed by Regulation 139/2004/EC[525] (the EU Merger Regulation, EUMR). The third direction relates to the private enforcement of rights as outlined in the Damages Directive[526], which governs civil actions for damages arising from violations of Articles 101 and 102 TFEU before national courts.[527]

When the Commission acts as the enforcer of EU competition law, it performs a combination of investigative, prosecutorial, and judicial functions. The decision-making responsibilities of the Commission are divided between the Directorate-General for Competition (DG COMP), which prepares draft decisions, and the college of commissioners, which renders the final decisions. DG COMP is composed of nine sectoral directorates (Table 5.1.), each focusing on specific areas of competition policy.[528]

524 **Kanita Imamović Čizmić**, Full professor, Faculty of Law, University of Sarajevo.

525 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L 24, 29. 1. 2004. p. 1–22.

526 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Text with EEA relevance), OJ L 349, 5. 12. 2014, p. 1–19.

527 Maciej Bernatt and Laura Zoboli, “The Enforcement of Competition Law in the EU: A Critical Overview”, 2-3.

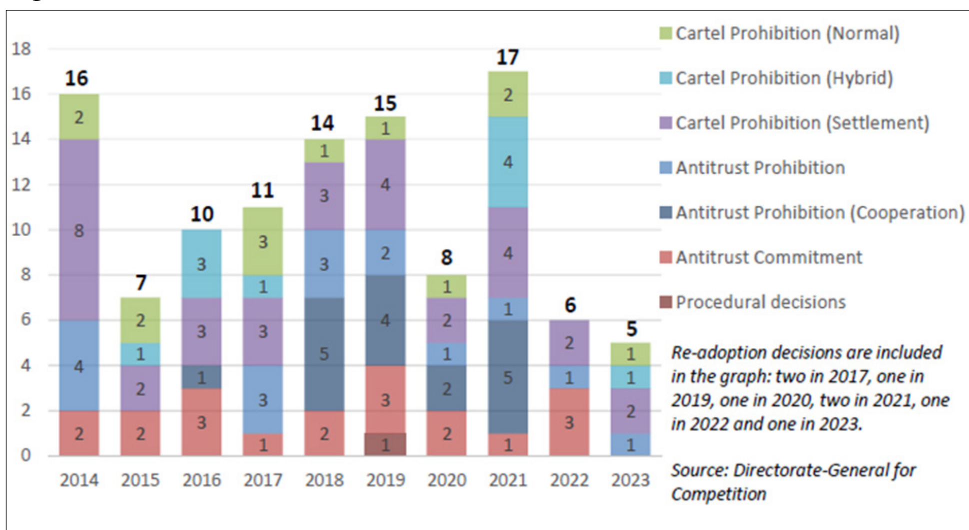
528 Cristina Teleki, “The Structure of the European Commission as Enforcer of Competition Law,” in *Due Process and Fair Trial in EU Competition Law* (Leiden: Brill; Nijhoff, 2021), 189.

Table 5.1. Directorate-General for Competition directorates

Directorate A: Policy and Strategy 1) Antitrust Case Support and Policy 2) Mergers Case Support and Policy 3) State Aid Strategy 4) European Competition Network 5) International Relations 6) Private Enforcement	Directorate B – Markets and Cases i: Energy and Environment 1) Antitrust: Energy, Environment 2) State Aid i 3) State Aid ii 4) Mergers
Directorate C – Markets and Cases ii: Information, Communication and Media 1)Antitrust: Telecoms 2) Antitrust: Media 3) Antitrust: it, Internet and Consumer Electronics 4) State Aid 5) Mergers 6) Antitrust: E-commerce and data economy	Directorate D – Markets and Cases iii: Financial Services 1) Antitrust: Payment Services 2) Antitrust: Financial Services 3) Task Force Financial Crisis 4) State Aid: Financial institutions i 5) State Aid: Financial institutions ii 6) State Aid: Financial institutions iii 7) Mergers
Directorate E – Markets and Cases iv: Basic Industries, Manufacturing and Agriculture 1) Antitrust: Pharma and Health Services 2) Antitrust: Consumer Goods, Basic Industries, Agriculture and Manufacturing 3) State Aid: Industrial Restructuring 4) Mergers 5) Task Force Food	Directorate F – Markets and Cases v: Transport, Post and Other Services 1) Antitrust: Transport, Post and Other Services 2) State Aid: Transport 3) State Aid: Post and Other Services 4) Mergers
Directorate G – Cartels 1) Cartels i 2) Cartels ii 3) Cartels iii 4) Cartels iv 5) Cartels v	Directorate H – State Aids: General Scrutiny and Enforcement 1) Infrastructure and Regional Aid 2) R&D&I, ipcei and environment 3) Fiscal Aid 4) Enforcement and Monitoring 5) Tax Planning Practices
Directorate R – Horizontal Management 1) Registry and Transparency 2) Finance and Internal Compliance 3) Information Technology	

According to the Statistical Bulletin for the COMMISSION as of 01/04/2024,[529] DG COMP has 881 staff members, including managers, case handlers, and assistants. DG COMP is led by a Director-General, assisted by three Deputy Directors-General, a Chief Economist, and a Legal Advisor. There are also two Hearing Officers who report directly to the Commissioner for Competition. The mission of the Hearing Officers is to ensure proper procedure, protect the procedural rights of parties, and contribute to the quality of decision-making. According to OECD data from 2022, the total budget for enforcing competition law amounted to 163.8 million euros.[530]

Figure 5.1. Commission decisions



Source: Commission staff working document Accompanying the document Report from the Commission Report on Competition Policy 2023 {COM(2024) 115 final}

From Figure 5.1. it is evident that the highest total number of decisions by the Commission was made in 2021. Within this year, the highest number of decisions pertained to antitrust prohibition cooperation (5), while the fewest related to antitrust commitment. The number of decisions regarding cartels (both normal and hybrid) was 6, the highest in the observed time period. A record low number of decisions, only 5, were made in 2023, four of which involved cartels. In 2023, less than 100 million euros were collected in fines from cartel participants, the lowest

529 European Commission, Statistical Bulletin for Commission on 01/04/2024.

530 Directorate for Financial and Enterprise Affairs, Competition Committee, *Annual Report on Competition Policy Developments in the European Union* (Paris: OECD, 2022).

amount in over a decade.[531] The funds from these fines directly contribute to the EU budget.

5.1. Competition law enforcement – general review from the angle of Regulation No 1/2003

The initial implementation mechanism for Articles 101 and 102 of the TFEU was established under Regulation No 17/62[532] and was characterized by centralized and a notification system. Centralization referred to the concentration of authority for competition law enforcement within a single entity, namely the EU Commission. The notification aspect required undertakings to inform the EU Commission of their agreements to assess their legality and determine whether conditions for exemption from prohibition existed. This mechanism conferred an exclusive right upon the Commission to evaluate the legality of the notified agreements, obligating all undertakings to disclose such agreements, with the Commission issuing exemption decisions accordingly.

At the time of its establishment, when the single market included only six Member States, this system effectively served its intended purpose. However, over time, it lost efficiency and failed to yield the expected results in detecting and sanctioning business practices that restricted, distorted, or prevented competition in the market. In the explanatory memorandum accompanying the proposal to amend Regulation 17/62, the Commission identified two primary weaknesses of the existing system.

The first weakness pertained to the Commission's monopoly over the application of Article 101 (3) and the associated notification system for cartel agreements or practices. This notification framework necessitated significant involvement from the relevant services in processing exemption applications under Article 101 (3) TFEU, which hindered the Commission's ability to adequately address serious infringements of competition law within the internal market. Consequently, cartel agreements that were not notified for exemption assessment often went unnoticed due to insufficient investigative capacity. Furthermore, the Commission was required to address all notifications within a reasonable timeframe, which consumed nearly half of the resources of the Directorate-General for Competition (DG COMP).

The second significant shortcoming of the notification system was its imposition of considerable administrative and financial burdens on companies with

531 Omar Shah, Jack Ashfield and J. Clayton Everett, *Global cartel enforcement report* 2023 (Boston etc.: Morgan Lewis, 2023), 5.

532 Regulation (EEC) No 17/1962 of 21 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/62, 21. 2. 1962, p. 204–211.

agreements compliant with Article 101. This was particularly problematic for small and medium-sized enterprises (SMEs), which are recognized by many, including the Commission, as vital contributors to economic development.[533]

The inadequacies of the existing mechanism and the new challenges arising from the enlargement of the EU led the Commission, in the late 1990s, to propose a revision of the competition law enforcement mechanism. The fundamental concepts of this revision were articulated in the White Paper on the Modernization of Rules on the Application of Articles 101 and 102[534], which were subsequently incorporated into Regulation No 1/2003[535]. This regulation is regarded as a pivotal act of procedural modernization of EU competition law at the beginning of the 21st century, replacing Council Regulation No 17/62 and introducing a new decentralized enforcement system.

In addition to Regulation No 1/2003, several other legislative acts were adopted, constituting the so-called modernization package[536], among which the Implementation Regulation (Regulation No 773/04[537]) is particularly significant. The grounds for modernization introduced by Regulation No 1/2003 include:

- Decentralization of the application of competition law, enabling National Competition Authorities (NCAs) and national courts to directly apply Articles 101 and 102 TFEU.
- Abolition of the notification and authorization system, allowing undertakings to independently assess the compliance of their agreements with competition rules.
- Enhancement of the Commission's implementing powers.

533 Nevenko Misita, "Elementi decentralizovanog sistema primjene prava konkurencije EU", *Zbornik radova Aktualnost građanskog i trgovačkog zakonodavstva i prakse*, no. 3 (2005): 52.

534 White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999], OJ C132/1, 12. 5. 1999, p. 1–33.

535 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4. 1. 2003, p. 1–25.

536 Part of this package consists of instruments that belong to the group of soft law sources.: Notice on co-operation within the Network of Competition Authorities, OJ C 101/43/04, Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, Oj C 101/54/04, Notice on guidelines on the application of Article 81(3) of the Treaty, 01 C 101197/04; Notice on guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ, C 101181/04, Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ C 101178104, Notice on the handling of complaints under Articles 81 and 82.

537 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), OJ L 123, 27. 4. 2004, p. 18–24.

- Provision for the imposition of significant fines for violations of competition rules.
- Strengthening of cooperation and information exchange between the Commission and NCAs, alongside coordinated investigations.

The procedural modernization of EU competition law is delineated in the ten chapters of Regulation No 1/2003. The first chapter, titled "Principles," addresses the immediate application of Article 101 (3) of the TFEU, the burden of proof, and the relationship between EU competition law and the competition laws of Member States. The second chapter outlines the powers of the Commission and national authorities in enforcing competition law. The third chapter deals with various decisions made by the Commission in the context of regulation application, while the fourth chapter regulates cooperation between the Commission and the competent authorities of Member States. Chapter Five governs the scope of investigative procedures, detailing actions taken by the Commission, and regulates the sanctions provided in Chapter Six for violations of EU competition law provisions. Chapters Seven and Eight address limitation periods, proceedings, and professional secrecy, while the ninth chapter discusses exemptions. The tenth chapter contains general provisions, and the eleventh chapter includes transitional and final provisions.[538]

5.1.1. The implementing powers of the Commission

The decentralization of the enforcement system should not be interpreted as a reduction in the Commission's powers under Articles 101 and 102 TFEU. On the contrary, Regulation No. 1/2003 has introduced several mechanisms that have strengthened the Commission's enforcement capabilities in three key areas. The first involves the various types of decisions and measures provided by Regulation No. 1/2003, enabling the Commission to address competition law infringements or their potential occurrence. The second area focuses on enhancing the Commission's investigative powers to gather the necessary evidence and information for effective enforcement, while also establishing a more comprehensive and stringent sanctions regime. The third area pertains to the Commission's punitive powers.[539]

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538 Nevenko Misita, "Elementi decentralizovanog sistema primjene prava konkurencije EU", 60.

539 Alan Riley, "EC Antitrust Modernization: The Commission Does Very Nicely – Thank you! Part One: Regulation 1 and the Notification Burden", *European Competition Law Review* 11, (2003): 607.

Chapters III and VI of Regulation No. 1/2003 delineate the types of decisions (measures) that the Commission is empowered to adopt: [540] orders to cease infringement, decisions on interim measures, decisions on commitments, and decisions regarding the imposition of fines.

The Commission issues an order to cease infringement[541] after determining the existence of a violation of Articles 101 and 102 TFEU. This decision may also outline measures and conditions for monitoring business activities or implementing structural measures. The criteria for determining structural measures within order to cease infringement are as follows:

1. Structural measures must be proportionate to the infringement committed.
2. Structural measures must be necessary to effectively eliminate the infringement.
3. There must be no equally effective monitoring measures available, or any alternative monitoring measure would impose a greater burden on the undertaking concerned than the proposed structural measure.

The designation of this type of decision by the Commission reflects the content of the order directed at enterprises. Through the order to cease infringement, the Commission directs enterprises to discontinue specific behaviours (business practices) that violate Articles 101 and 102 TFEU and to refrain from re-engaging in such behaviours or any other actions that have the same or equivalent effect as the infringing conduct. In this decision, the Commission may specify particular structural and behavioural remedies. [542] Structural remedies typically pertain to the assets of the enterprise and involve modifications to the enterprise's structure, effectively altering the market structure. Conversely, behavioural remedies impose restrictions on business freedom by requiring the enterprise to act or refrain from acting in a specified manner within the market, for example, in relation to pricing, contractual obligations, and other operational aspects. [543]

In utilizing these legal remedies, the Commission is guided by the principle of proportionality, which seeks to balance the achievement of the ultimate goal while limiting the Commission's power to impose measures outlined in Article 7 of Reg-

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[540] Wouter P. J. Wils, "EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights", *World Competition: Law and Economics Review* 34, No. 2 (June 2011): 189–213.

[541] Council Regulation (EC) No. 1/2003, Article 7.

[542] Rita Leandro Vasconcel, "The Adoption of Remedies under Regulation No.1/2003: Between Success and Coherence", *Market and Competition Law Review* 5, no. 2 (October 2021): 158.

[543] Directorate for Financial and Enterprise Affairs, Competition Committee, Global Forum on Competition: Remedies and commitments in abuse cases – Contribution from the European Union (Paris: OECD, 2022), 5.

ulation No. 1/2003. The principle of proportionality mandates that the burden placed on enterprises to terminate the infringement must not exceed what is appropriate and necessary to attain the desired outcome. If multiple potential solutions exist, the Commission is obliged to select the least burdensome option.[544]

Should enterprises fail to comply with this decision, Article 24 (1) (a) of Regulation No. 1/2003 permits the Commission to impose periodic penalty payments of up to 5% of the average daily turnover from the preceding business year, per day.

The decision on interim measures[545], whose legitimacy was affirmed by the Court of Justice of the European Union ("CJEU") in the Camera Care Case (792/79 R)[546], is made by the Commission in urgent situations before the investigation into the violation of EU competition rules concludes, particularly when there is a risk of significant and irreparable harm to market competition. Interim measures serve as a tool to ensure the effective conduct of the Commission's investigations, especially when the serious nature of the violation, combined with the duration of the proceedings, does not allow for timely intervention, resulting in a risk of irreparable harm to competition.[547]

For the Commission to issue a decision on interim measures, two cumulative conditions must be satisfied. The first relates to the urgency of the situation and the risk of serious and irreparable harm to competition and/or consumers. In

544 Vasconcel, "The Adoption of Remedies under Regulation No.1/2003", 158.

545 Council Regulation (EC) No. 1/2003, Article 8.

546 Camera Care Ltd v Commission of the European Communities, Order of the Court of 17 January 1980, Case 792/79 R, EU:C:1980:18.

547 In the case Case AT.40608 from 2019, the Commission initiated proceedings due to the alleged abuse of a dominant position by the American company Broadcom and simultaneously issued a Statement of Objections, requesting the imposition of interim measures. In October 2019, the Commission adopted a decision concluding that interim measures were necessary to prevent serious and irreparable harm to competition in global markets for system-on-chip (SoC) products used in (i) TV set-top boxes, (ii) xDSL modems, (iii) optical modems, and (iv) cable modems. This decision had a significant impact on the regulation of the semiconductor market in the EU, highlighting the importance of preserving competition in the technology sector. It marked a major step in EU competition law by demonstrating the Commission's willingness to employ interim measures to act swiftly in cases where there is a risk of serious and irreparable harm to competition. Furthermore, the Broadcom case emphasizes the importance of continuous market monitoring and ensuring that dominant companies do not exploit their position to exclude competitors. The decision against Broadcom reflects the Commission's determination to apply strict measures to protect competition in high-tech markets.
"Antitrust: Commission accepts commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes", European Commission, last modified October 7, 2020. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1852.

interpreting the term "serious and irreparable harm," it is important to note that such harm need not be inevitable; it is deemed "irreparable" when it can no longer be rectified by the Commission's final decision. The second condition pertains to the existence of prima facie evidence of a violation of competition law. To satisfy this condition, it is sufficient to demonstrate serious doubts regarding the legality of the conduct. Interim measures can take the form of positive obligations, such as the requirement to supply in cases of "refusal to deal," or negative measures, particularly cease-and-desist orders.[548]

The Commission adopts a Decision on Commitments[549] aimed at remedying breaches of Treaty provisions, where entrepreneurs involved in the breach propose commitments to eliminate the negative effects in accordance with the preliminary assessment provided by the Commission. The Commission then obliges them to implement these commitments through a formal decision. This type of decision is a complementary tool within the Commission's revised enforcement toolkit. The Court of Justice has noted that this mechanism, introduced by Regulation No 1/2003, aims to ensure the effective enforcement of the competition rules established in the Treaty. It does so through the adoption of commitment decisions, which are proposed by the parties and deemed suitable by the Commission, thus becoming binding. This approach seeks to provide a quicker resolution to competition issues identified by the Commission, rather than following a formal infringement procedure. Specifically, Article 9 of the regulation focuses on procedural efficiency, allowing companies to actively engage in the process by proposing solutions that they believe are most suitable for addressing the Commission's concerns.[550]

Commitment decisions enable the Commission to formally conclude investigations into alleged violations of Articles 101 and/or 102 TFEU without making a finding of infringement, while securing binding commitments from the concerned undertakings to modify their market behaviour or undertake structural changes. [551] Several key points are noteworthy in this context. First, the acceptance of commitments does not imply that the business entity acknowledges a breach of competition rules. Second, the Commission does not determine whether a breach has

548 Toni Pitesa, "Interim measures: A new enforcement pathway?!", *Kluwer Competition Law Blog*, April 9, 2020, https://competitionlawblog.kluwercompetitionlaw.com/2020/04/09/interim-measures-a-new-enforcement-pathway/.

549 Council Regulation (EC) No. 1/2003, Article 9.

550 Wouter P.J. Wils, "*Ten Years of Commitment Decisions Under Article 9 of Regulation 1/2003: Too Much of a Good Thing?* Concurrences Journal 6th International Conference 'New frontiers of antitrust' (2015):3.

551 Niamh Dunne, "Commitment decisions in EU competition law", *Journal of Competition Law and Economics* 10, no. 2 (2014): 402.

occurred; it only assesses whether the commitments are sufficient to address its concerns. If the Commission accepts the proposed commitments, it adopts a decision that renders these commitments binding on the undertaking and concludes the procedure without further investigation or sanctions. Third, the Commission retains the authority to monitor the implementation of commitments and may take action if the undertaking fails to comply. Non-compliance may result in penalties for the undertaking. This instrument offers two significant advantages. Firstly, it facilitates a swift resolution of market issues without the need for lengthy investigations and legal proceedings. From the perspective of businesses, it allows for flexible and creative solutions to specific market problems. Secondly, businesses can avoid the substantial fines that could arise from formal investigations and evidence of breaches of competition rules. While Article 9 of Regulation No. 1/2003 does not explicitly mention the principle of proportionality, the Commission applies proportionality as a general principle of EU law, which serves as a criterion for the legality of any institutional act. This criterion is satisfied when the Commission verifies that the undertaking has not proposed a less burdensome commitment, although it does not impose an obligation on the Commission to actively seek a less burdensome solution.

Decision on Imposing Fines:[552] Under the Guidelines[553]„ the Commission may impose fines of up to 10% of the total turnover in the preceding business year on undertakings and associations of undertakings that intentionally or negligently breach Articles 101 or 102 of the Treaty on the Functioning of the European Union.

The provisions of Chapter V grant the Commission substantial investigative powers. For instance, when there is suspicion of systematic competition infringements but insufficient information regarding specific cases of breaches of Articles 101 and 102 TFEU, the Commission may initiate investigations into specific economic sectors[554]

552 Council Regulation (EC) No. 1/2003, Article 23.

553 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (Text with EEA relevance), OJ C 210, 1. 9. 2006, p. 2-5.

554 A notable example of a sectoral inquiry conducted by the European Commission under Article 17 of Regulation No.1/2003 is the energy sector investigation launched in 2005. This inquiry encompassed both the gas and electricity markets and aimed at identifying potential barriers to competition and implementing measures to remove them. During the investigation, the Commission: a) Examined barriers to market entry, including vertical integration, control over key infrastructure (such as electricity and gas transmission networks), and other obstacles that could restrict market dynamics, b) Analysed pricing mechanisms and market transparency levels, investigating whether dominant companies were leveraging their market position to impose unfair prices. Special attention was given to access to network infrastructure, including transmission and distribution capacities for gas and electricity. c) Investigated the extent to which network operators were providing third-party access in a non-discriminatory manner. The inquiry identified several issues hindering effective competition, such as

and categories of agreements[555]. During these investigations, the Commission may require undertakings and associations of undertakings to provide all necessary information related to competition law violations, including data on their business activities and practices, financial information, accounting data, and any other relevant information.[556]

To gather evidence of potential competition law infringements, the Commission may take statements from any natural or legal person willing to provide information relevant to the subject matter under investigation.[557] A crucial investigative tool granted to the Commission by Regulation No. 1/2003 is the authority to conduct searches and inspections of the premises of undertakings, commonly referred to as "dawn raids." During these searches and inspections, the Commission is empowered to:[558]

a) Enter business premises and other locations, including the right to access all business premises, land, and transport vehicles of the undertaking if there is suspicion that relevant documents are located there;
b) Examine books and records, including the right to review and inspect all books and records related to the undertaking's business, regardless of the medium in which they are stored (e.g., paper documents, electronic files);
c) Make copies or extracts from any books and records examined, including electronic data and email messages;
d) Seal off premises or books, records, and documents during inspections for a period necessary for the inspection, not exceeding 72 hours;
e) Demand explanations on the spot from representatives or employees of the undertaking regarding facts or documents related to the subject of the investigation and record their responses;

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vertical integration, market concentration, limited access to networks, and a lack of transparency. Based on the findings, the Commission issued recommendations to enhance competition, including the need for unbundling of production and distribution activities, increasing transparency in price formation, and improving the regulation of network access. This inquiry underscored the Commission's proactive role in ensuring fair competition in essential sectors such as energy.

555 Council Regulation (EC) No. 1/2003, Article 17.
556 Council Regulation (EC) No. 1/2003, Article 18.
557 Council Regulation (EC) No. 1/2003, Article 19.
558 Council Regulation (EC) No. 1/2003, Article 20; European Commission, Directorate-General for Competition, Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation (EC) No. 1/2003, March 2024.

f) Seek assistance from National Competition Authorities (NCAs) in conducting inspections, whereby NCAs are obliged to provide assistance and facilitate the Commission's access to necessary premises and records.

Inspections are typically conducted based on a written order from the Commission, which must detail the purpose of the inspection and the legal grounds for it. These orders are issued by the Commission and are binding on undertakings. During inspections, undertakings possess certain rights, including the right to legal assistance and the protection of confidential information. However, they are obligated to cooperate and provide access to all relevant documents. Undertakings that fail to cooperate with inspections or that destroy documents may face substantial fines of up to 1% of their total annual turnover for non-cooperation.

The Commission may also conduct searches of premises other than business locations, including private premises, land, and vehicles belonging to directors, managers, and other employees of the undertaking, if there is reasonable suspicion that relevant books and records related to the undertaking are located there and could be pertinent to the investigation. Searches of private premises may only be conducted based on a prior judicial warrant, if required by the legal system of the respective Member State. Courts may issue such warrants when there is reasonable suspicion that the search may uncover evidence of serious violations of competition rules. The Commission is obligated to ensure that searches of private premises adhere to all relevant procedures and respect rights, including the right to privacy and data protection. Searches must be proportionate and focused solely on the collection of relevant evidence. If a person subject to a search refuse to cooperate or obstructs the search, the Commission may impose fines for obstruction. These fines can be significant to ensure compliance and cooperation.[559]

Regulation (EC) No. 1/2003 has significantly enhanced the European Commission's capacity to investigate and sanction violations of competition rules. The strengthening of investigative powers has facilitated more effective enforcement of antitrust regulations, improved cooperation between national authorities and the Commission, and contributed to the protection of consumers and the integrity of the EU's internal market.

5.1.2. The Commission and National Competition Authorities

Cooperation between the Commission and National Competition Authorities (NCAs) is crucial for ensuring the consistent application of competition rules

[559] Council Regulation (EC) No. 1/2003, Article 21.

within the European Union (EU) and for promoting fair market competition. This collaboration occurs within the framework of the European Competition Network (ECN), which serves as a platform for interaction between the European Commission and the NCAs of EU Member States. Each NCA commits to cooperation within the ECN through a written statement, specifically adhering to the principles outlined in the Commission Notice on cooperation within the Network of Competition Authorities.[560]

The ECN facilitates efficient information exchange, coordination of procedures, and joint action in the enforcement of competition rules throughout the EU. Regulation No. 1/2003 does not establish specific conditions that NCAs must meet; rather, it requires Member States, under Article 35, to establish such authorities without tribunal status, meaning they cannot refer to cases to the European Court of Justice for preliminary rulings. The choice of the authority responsible for applying competition law and the scope of its powers is determined by each member state.

Considering the modernization introduced by Regulation No. 1/2003, these bodies can directly apply Article 101 (3) of the Treaty on the Functioning of the EU, with the burden of proof for exemption resting with the interested undertaking. According to Regulation No. 1/2003, NCAs have the authority to apply Articles 101 and 102 of the Treaty in individual cases. For this purpose, under Article 5 of Regulation No. 1/2003, they can, either ex officio or acting on a complaint, issue decisions to:

- Require that an infringement be brought to an end,
- Order interim measures,
- Accept commitments,
- Impose fines, periodic penalty payments, or any other penalties provided for in national legislation.

The Court of Justice of the European Union (CJEU) has clarified that the list contained in Article 5 is exhaustive, meaning NCAs have the right to make these—and only these—types of decisions in this context. This limitation prevents national authorities from applying domestic rules that would compel them to conclude a procedure with a decision stating that there was no infringement of Article 102 TFEU. In other words, NCAs do not possess the authority to issue decisions of non-infringement regarding Articles 101 and 102 TFEU.[561]

[560] Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101, 27. 4. 2004, p. 0043–0053.

[561] Bernatt and Zoboli, "The Enforcement of Competition Law in the EU", 7.

Considering the provisions of Article 23 of Regulation No. 1/2003, which governs the relationship between Articles 101 and 102 TFEU and national competition laws, it is necessary to highlight three essential points:[562]

a) NCAs are obligated to apply Articles 101 and 102 TFEU whenever the case has a Union dimension, which is assessed using the "effect on trade" criterion.563
b) While the application of stricter national rules is generally permitted, NCAs cannot do so if the agreement is exempt under Article 101 (3) TFEU. In other words, if an agreement meets the conditions for exemption under Article 101 (3) TFEU, national competition authorities must not apply stricter national rules to sanction it.
c) Conversely, when an agreement is prohibited under Union law, NCAs cannot treat it as permissible under national law.

The relationship between the Commission and NCAs is regulated by Articles 11, 12, and 13 of Regulation No. 1/2003. Article 11 encourages cooperation between the Commission and NCAs to ensure the consistent application of competition rules across the EU while facilitating the exchange of information and mutual assistance, especially in cases with cross-border implications or those requiring joint resolution efforts. Under this article, the Commission provides NCAs with copies of key documents collected for the purpose of applying Articles 7, 8, 9, 10, and Article 29 (1). Upon request from an NCA, the Commission will provide copies of other existing documents necessary for case assessment. Conversely, NCAs must notify the Commission in writing before or without delay after the first formal investigative measure is taken in accordance with Article 101 or Article 102 of the Treaty. This information can also be shared with authorities from other Member States, ensuring that notifications of new cases and planned enforcement decisions occur between the Commission and NCAs. Essentially, the application of Article 11 allows both the Commission and NCAs to identify

[562] Nevenko Misita, *Pravo konkurencije Evropske unije* (Sarajevo: Revicon, 2012), 216.

[563] In 2004, the Commission published a Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. These Guidelines provide quantitative criteria for assessing the 'significance' of an effect on trade within the Community. According to the Guidelines, an agreement does not have an effect on trade within the Community if two conditions are met: The combined market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%; and In the case of horizontal agreements, the combined annual turnover of the parties within the Community in the products covered by the agreement does not exceed 40 million euros (paragraph 52). The Guidelines serve as an important tool for determining when agreements between undertakings are unlikely to impact trade between EU Member States and therefore fall outside the scope of EU competition law.

multiple procedures and initiate cooperation at an early stage. They inform each other about cases using a standardized form containing limited details, such as the authority handling the case, the relevant product, territories, interested parties, alleged infringement, suspected duration of the infringement, and the origin of the case. Planned enforcement decisions must be communicated at least 30 days before they are made, and information can be shared with other network members.[564]

In the process of applying competition law, the Commission and NCAs are authorized to exchange and use as evidence the factual situation or substantive law obtained, including confidential information.[565]

Given that Regulation No. 1/2003 establishes the jurisdiction of NCAs to apply Articles 101 and 102, it is possible for two or more NCAs, or the Commission itself, to initiate proceedings regarding the same case. For this reason, the Regulation addresses the suspension or termination of proceedings. Regulation No. 1/2003[566] stipulates that if the NCAs of two or more Member States receive a complaint or act ex officio under Articles 101 or 102 TFEU against the same agreement, decision of an association of undertakings, or conduct, the involvement of one authority in the case is sufficient grounds for others to suspend their proceedings or dismiss the complaint. Similarly, the Commission may dismiss a complaint on the grounds that an NCA of a member state is handling the matter.[567] If an NCA or the Commission receives a complaint regarding an agreement, decision of an association of undertakings, or conduct that has already been addressed by another competition authority, they may dismiss it.

To strengthen the position of NCAs as one of the pillars of public enforcement of EU competition law, Directive (EU) 2019/1 (the ECN+ Directive)[568] was adopted. Essentially, Directive 2019/1 aims to empower NCAs to enforce competition rules more effectively and ensure the proper functioning of the internal market, thereby creating a more uniform legal framework for competition within the EU. This directive provides competition authorities with better tools and greater pow-

564 OECD and European Competition Network (ECN), Competition co-operation and enforcement: Inventory of co-operation agreements, 2021, 2.

565 Council Regulation (EC) No. 1/2003, Article 12.

566 Council Regulation (EC) No. 1/2003, Article 13.

567 At the end of 2014, the General Court issued a ruling in the context of the Si.mobil case, interpreting the first of these provisions in a manner that further strengthens the Commission's "unlimited" discretionary power when rejecting complaints (the "Si.mobil Judgment").

568 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance), PE/42/2018/REV/1, L 11/3, 14. 1. 2019, p. 3–33.

ers to protect competition, contributing to the proper functioning of the internal market. The Directive ensures that NCAs have:[569]

- Minimum guarantees of independence in applying EU competition rules,
- Basic assurances regarding the human and financial resources necessary to perform their tasks,
- Effective tools for investigation and decision-making, including the collection of digital evidence stored on mobile devices,
- The ability to impose effective, proportionate, and dissuasive penalties,
- Effective leniency programs that encourage companies to report cartels across the EU.

The ECN+ Directive represents a significant step forward in the decentralization of EU competition law enforcement, ensuring that NCAs are well-equipped to tackle anti-competitive practices. By increasing cooperation, standardizing procedures, and strengthening the independence and resources of NCAs, the directive aims to create a more competitive and equitable internal market across the EU. While the directive brings substantial improvements, challenges remain in ensuring that all national competition authorities (NCAs) can fully utilize their new powers. Continuous efforts are necessary to provide training and support to NCAs, as well as to monitor and address any implementation issues.

5.1.3. The Commission and National Courts

Under the initial regime established by Regulation No. 17/62, national courts encountered significant challenges when addressing disputes concerning agreements that could potentially qualify for exemption from prohibition under Article 101 (3) TFEU. The authority to determine such exemptions rested solely with the European Commission. This issue typically manifested in national courts through the so-called "Euro defense," wherein the obligated party contended that an obligation arising from a contract contravened Article 101 (1) TFEU but could be justified under Article 101 (3) TFEU. In response to these challenges, the European Court emphasized in the Delimitis[570] case that national courts need not suspend proceedings if the conditions for applying Article 101 TFEU are clearly unmet or if the incompatibility of the agreement with that article is beyond reasonable

569 "ECN+ Directive", European Commission, accessed May 27, 2024, https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network/ecn-directive_en.

570 Stergios Delimitis v Henninger Bräu AG, Judgment of 28 February 1991, ECLI:EU:C:1991:91.

doubt. Furthermore, courts may continue proceedings if there is no significant risk that the Commission will arrive at a different decision.

The Court proposed several steps for national courts to follow when handling cases involving Article 101 TFEU. First, if such cases come before national courts, they should assess whether the disputed agreements fall under the prohibition. If this assessment yields a positive outcome, indicating that the agreement does indeed fall under the prohibition, the national courts should then evaluate the likelihood that the disputed agreement would qualify for exemption under Article 101 (3) TFEU. Should the courts determine that the likelihood of exemption is negligible, they are to apply the prohibition and declare the agreement null and void. Conversely, if there exists a reasonable possibility that the agreement could be exempted, the proceedings are suspended, and if necessary, a decision on interim measures is rendered, with the case being referred to the Commission for resolution. In evaluating the likelihood of applying Article 101 to the specific agreement in question, national courts draw on the practices of both the Commission and the European Court.[571]

With the modernization of the enforcement system brought about by Regulation No. 1/2003, national courts have been granted the jurisdiction to apply Articles 101 and 102 TFEU[572] and are now obligated to protect the rights of interested private entities. In the interplay of Union and national rules, national courts are empowered to award damages; if certain conduct results in violations of both Union and national competition laws, it may lead to parallel penalties. In line with national regulations, national courts have access to various interim measures. Unlike administrative proceedings before the Commission, parties involved in proceedings before national courts can seek compensation for procedural costs.

The cooperation between national courts, the Commission, and NCAs is governed by Article 15 of Regulation No. 1/2003, which is essential for ensuring the effective and consistent enforcement of EU competition rules. The provisions of Article 15 facilitate enhanced communication and cooperation among national courts, NCAs, and the Commission, ensuring that competition rules are properly enforced across all Member States. Specifically, national courts may request information or opinions from the Commission regarding the application of EU competition rules. The Commission, either at the request of a national court or on its own initiative, may submit written observations to the national court when necessary for the consistent application of competition rules. Moreover, the Commission may, with the permission of the national court, present oral observations

571 Misita, *Pravo konkurencije Evropske unije*, 210.
572 Council Regulation (EC) No. 1/2003, Article 6.

in its capacity as amicus curiae (friend of the court). It is important to distinguish that providing the Commission's opinion on the substance and application of Articles 101 and 102 TFEU is not equivalent to acting as amicus curiae, as the latter implies the Commission's involvement in the case itself. NCAs also could submit observations to national courts and can act as amicus curiae when permitted by the court. To facilitate cooperation between NCAs and law enforcement bodies, courts may forward relevant documents to enforcement agencies. Member States are required to promptly forward to the Commission a copy of any judicial decision concerning the application of Articles 101 or 102 TFEU.

In terms of applying national law, national courts are mandated to uphold the principles of efficiency and uniform application of Union law across the EU. This implies that if conduct is permissible under national law but prohibited under Articles 101 and 102 TFEU, it should be treated as prohibited, and vice versa. If the Commission is investigating a specific competition law matter while a national court is concurrently handling the same issue, the national court is obliged to ensure that its decision does not undermine the preliminary decision of the Commission, which may necessitate suspending the proceedings.[573]

This framework establishes conditions for the consistent enforcement of EU competition rules across the EU, enabling the Commission to intervene when necessary. National courts benefit from support and guidance from the Commission, which enhances legal certainty and efficiency in the enforcement of competition law. However, challenges persist regarding procedural and sanctioning autonomy. Differences in available procedures and sanctions raise fundamental questions about the nature of competition law and the achievement of fair procedure principles. It becomes problematic to speak of legal consistency when a violation of competition rules in Ireland could result in a criminal record and imprisonment for corporate officers, while in Sweden, imposing criminal sanctions is not an option. Thus, the question arises whether the hybrid nature of common and divergent rules is sufficient not only for legal coherence but also for the existence of such rules as 'good' law.[574]

5.1.4. Fines and sanction policy

The legal foundation for the sanctioning policy regarding violations of competition law is established in Article 23 of Regulation No. 1/2003, alongside var-

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573 Misita, *Pravo konkurencije Evropske unije*, 212.

574 Imelda Maher, "Competition law modernization: an evolutionary tale?" in *The evolution of EU Law*, eds. Paul Craig and Grainne de Burca (Oxford: OUP, 2011), 733.

ious soft law instruments, particularly the Guidelines for the Method of Setting Fines.[575] The European Commission possesses the authority to impose fines for several infractions, including specific procedural violations, breaches of Articles 101 and 102 TFEU, non-compliance with decisions concerning interim measures, and violations of commitment decisions.

Article 23 of Regulation No. 1/2003 permits the imposition of fines that may take the form of a lump-sum penalty or periodic payments. The maximum fine that the Commission can impose is capped at 10% of the total turnover of the undertaking in the preceding business year. This cap can result in substantial fines, as it is based on total turnover rather than the revenue generated within the relevant market or the EU market. In cases where fines are levied against an association of undertakings, the penalty cannot exceed 10% of the total turnover of each member undertaking active in the market impacted by the infringement of EU competition law. When determining the amount of the fine, the Commission evaluates the severity and duration of the infringement, and it has articulated the criteria for imposing fines in two specific notices. The first outlines the methodology for calculating fines, while the second addresses the possibility of reductions or rewards for cooperation in the detection and establishment of infringements, commonly referred to as "whistleblowing."[576]

Under Article 24 of Regulation No. 1/2003 and Article 16 of Directive (EU) 2019/1, the Commission is empowered to issue decisions regarding periodic penalties to ensure compliance with its rulings. These periodic penalties may be imposed to compel undertakings to adhere to decisions that terminate infringements, enforce interim measures, accept binding commitments, provide complete and accurate information, and submit to inspections. The maximum daily penalty has evolved over time and currently stands at 5% of the worldwide turnover of the undertaking.

Articles 25 and 26 of Regulation No. 1/2003 address the issue of limitation periods for imposing sanctions. Article 25 stipulates a limitation period of three years for breaches related to requests for information or inspections, while all other violations of the rules are subject to a five-year limitation period. The limitation period commences from the date the infringement occurs, except in cases of continuous or repeated violations, where it begins from the date the infringement ceases. Any action taken by the Commission or a National Competition Authority (NCA) aimed at investigating or prosecuting the infringement interrupts the limi-

575 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (Text with EEA relevance), OJ C 210, 1. 9. 2006, p. 2–5.

576 Misita, *Pravo konkurencije Evropske unije*, 218.

tation period[577], which can last for a maximum of six to ten years. The suspension of proceedings refers to the duration of judicial review by the European Court concerning the Commission's decision. Article 26 prescribes a five-year limitation period for the enforcement of fines, which starts from the date the decision becomes final. The interruption of this limitation period can occur under two circumstances: first, if there is a change in the initially determined amount of the fine or periodic penalty, or if a request for such a change is rejected; and second, if any action is taken by the Commission or a Member State, at the Commission's request, to enforce the payment of a fine or periodic penalty. Conversely, the limitation period for enforcing fines is considered suspended in two scenarios: while the approved payment time is active, and while the enforcement of the fine or payment is suspended in accordance with a court decision.

The imposition of fines is conducted in accordance with the Guidelines for the method of setting fines[578] and the Commission Notice on Immunity from fines and reduction of fines in cartel cases[579], which enhance the transparency of the Commission's sanctioning policy. This section highlights several key provisions outlined in these soft law instruments. The Guidelines specify aggravating and mitigating circumstances that the Commission considers when determining fines. The basic amount, the methodology for which is detailed in the Guidelines, can be increased if aggravating circumstances are identified, such as:[580]

- The undertaking's continuation of the same or similar infringement after the Commission or NCA has identified a violation of Articles 101 or 102 TFEU, leading to an increase of up to 100% of the basic amount for each confirmed instance of such infringement.
- A refusal to cooperate with the Commission or actions obstructing the Commission's investigations.

[577] Regulation No.1/2003 outlines the following activities: written requests for information that the Commission or NCAs provide to an undertaking or association of undertakings; written search orders issued by the Commission or NCAs to their officials; the initiation of proceedings by the Commission or NCAs; and the delivery of notifications regarding preliminarily established facts in the proceedings issued by the Commission or NCAs. This regulation delineates key procedural steps that the Commission and NCAs may undertake to ensure compliance with competition law, emphasizing their roles in gathering information, conducting investigations, and communicating findings to relevant parties.

[578] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No.1/2003 (Text with EEA relevance), OJ C 210, 1. 9. 2006.

[579] Commission Notice on Immunity from fines and reduction of fines in cartel cases, (Text with EEA relevance), OJ C 298, 8. 12. 2006, p. 17.

[580] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (Text with EEA relevance) OJ C 210, 1. 9. 2006, Point 28.

- The undertaking's role as the leader or initiator of the infringement, particularly any measures aimed at coercing other undertakings to participate in the infringement or retaliatory actions against them.

Conversely, the Commission may reduce the basic amount if mitigating circumstances are present, such as:[581]

- The undertaking's prompt cessation of the infringement following the Commission's intervention, excluding cases involving secret agreements or conduct (especially cartels).
- Demonstrating that the infringement was committed negligently.
- Evidence that the undertaking's participation in the infringement was significantly limited, showing that it opted for competitive behaviour rather than implementing the agreement constituting the infringement. Participation for a shorter duration than others is not considered a mitigating circumstance as it is already reflected in the basic fine amount.
- Effective cooperation with the Commission that exceeds the requirements of the Notice on Immunity from Fines and goes beyond the legal obligation to cooperate.

The Guidelines also provide for a specific increase in fines for preventive purposes, allowing the Commission to impose higher fines on undertakings that achieve particularly high revenues, in addition to those derived from the sale of goods or services related to the infringement.[582]

Commission Notice on Immunity from fines and reduction of fines in cartel cases serves as a framework outlining the criteria employed by the Commission for granting fine reductions, including the possibility of full immunity for cartel participants who cooperate with the Commission. This document delineates the conditions under which immunity can be granted, the procedural steps involved, and the specific mechanisms for reducing fines.

The principle of immunity from fines, or fine reduction, allows the Commission to offer either complete immunity or a reduction in fines that would otherwise be levied on a cartel member in exchange for disclosing information about the cartel and cooperating in the investigation. An undertaking seeking to report its participation in a cartel can request full immunity under two primary conditions: first, it must be the initial undertaking to disclose its involvement in the

581 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No.1/2003 (Text with EEA relevance) OJ C 210, 1. 9. 2006, Point 29.

582 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No.1/2003 (Text with EEA relevance) OJ C 210, 1. 9. 2006, Point 30.

specific cartel to the Commission; second, the quality of the evidence provided must meet established thresholds. The Notice specifies the requisite type and level of evidence necessary to qualify for immunity from fines.[583]

For undertakings unable to qualify for full immunity, there remains the option to seek a reduction in fines. To do so, they must disclose their participation in the cartel and provide evidence that adds significant value beyond what the Commission already possesses to establish the cartel's existence. The Notice further clarifies the relative evidentiary value of such information for assessing significant added value.[584] The first undertaking to satisfy these conditions may receive a fine reduction of 30-50%, the second may receive a reduction of 20-30%, while subsequent companies may be eligible for a reduction of up to 20%. Additionally, if a company provides independent evidence that assists investigators in establishing further facts that exacerbate the severity or duration of the infringement, this will not be considered when calculating the fine for that particular undertaking.

The granting of immunity or a reduction in fines is contingent upon the company's cooperation, which must be complete, continuous, and prompt throughout the entire investigative process. Moreover, the cooperation must be characterized by good faith.[585] Companies are required to furnish information that is accurate, complete, and non-misleading, and they must also withdraw from the cartel immediately. However, the Commission may exhibit flexibility regarding this requirement if it believes that strict adherence would impede its ability to conduct a thorough investigation.

Furthermore, during the period in which a company seeks immunity from fines or a reduction in fines, it must refrain from destroying, falsifying, or concealing any evidence related to the cartel.

[583] Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance), OJ C 298, 8. 12. 2006, Points 8(a), 9, and 10 or points 8(b) and 11, point 12.

[584] Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance), OJ C 298, 8. 12. 2006, Point 26.

[585] Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance), OJ C 298, 8. 12. 2006, Point 12.

Table 5.2. Imposed fines (not adjusted for court rulings) - period 2019 – 2023 by December 7, 2023

Year	Amount €[586]
2019	1 484 877 000
2020	288 080 000
2021	1 746 254 000
2022	188 594 000
++2023++	88 951 000
Total	3 796 756 000

Source: https://competition-policy.ec.europa.eu/document/download/b19175c3-c693-410b-b669-27d4360d359c_en?filename=cartels_cases_statistics.pdf

To illustrate the application of the Commission's sanction policy, several significant decisions from 2022 can be mentioned according to OECD data[587]. Regarding cartel penalties, in July 2022, the Commission fined metal packaging manufacturers Crown and Silgan a total of €31.5 million in a settlement procedure for participating in a cartel related to metal cans and closures in Germany.[588] Crown was granted a 50% fine reduction according to the Notice on immunity from fines, and both companies were granted a 10% reduction according to the Settlement Notice. In November 2022, the Commission fined Sunpor, Synbra, Synthomer, Synthos, and Trinseo a total of €157 million for participating in a cartel related to the purchase of styrene monomer.[589] In March 2024, the Commission imposed a fine of €1.8 million on Apple Inc. ("Apple") for the alleged abuse of its dominant market position, in violation of Article 102 TFEU, for the distribution of music streaming applications to iOS users through the App Store.[590]

5.2. Procedure before the Commission

At the end of 2011, the Commission adopted the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU

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586 Amounts of fines imposed by the Commission (incl. corrections following amendment decisions) and not corrected for changes following judgments of the Courts (General Court and Court of Justice) and only considering cartel infringements under Article 101 TFEU.

587 Directorate for Financial and Enterprise Affairs, Competition Committee, *Annual Report on Competition Policy Developments in the European Union*, 9.

588 Case T.40522, Metal packaging, Decision of 12 July 2022.

589 Case AT.40547, Styrene monomer, Settlement Decision of 28 November 2022.

590 Case AT.40437, Apple - App Store Practices (music streaming), Commission Decision of 4 March 2024.

(Notice)[591], which is regarded as a significant procedural reform. This Notice outlines a series of best practices aimed at enhancing the existing procedural framework. These measures facilitate timely communication with interested parties and improve the overall efficiency of the process, including a strengthened role for the Hearing Officer. In summary, the Notice is notable for its contributions to:

a) Clarity and transparency - It offers clear guidelines regarding the Commission's investigative and procedural approaches related to Articles 101 and 102 TFEU.
b) Fairness of the procedure - The Notice establishes procedural guarantees that protect the rights of all parties involved, ensuring that investigations are conducted equitably. This includes the rights of defence, access to case files, and opportunities for oral hearings.
c) Efficiency - It aims to streamline procedures, reduce the duration of investigations, and facilitate faster decision-making.
d) Consistency - By codifying best practices, the Notice ensures that similar cases receive comparable treatment, thereby enhancing predictability and fairness in the enforcement of competition law.
e) Legal certainty - It provides clear guidelines that help businesses understand their obligations and the potential consequences of their actions, which can positively influence their behaviour and promote competition in the market.
f) Greater inclusivity - The Notice encourages the participation of various stakeholders, including complainants and third parties, in the investigative process.

The Notice is organized such that Section 2 outlines the procedures followed during the investigation phase, applicable to all types of investigations, whether they result in prohibition decisions (Article 7 of Regulation No. 1/2003), commitment decisions (Article 9 of Regulation No. 1/2003), or decisions to dismiss complaints (Article 7 of the Implementing Regulation). Section 3 details the primary procedural steps and the rights of defence relevant to proceedings that may lead to prohibition decisions. Section 4 focuses on the unique aspects of the engagement procedure, while Section 5 addresses the rejection of complaints. The remaining sections have broader applicability: Section 6 discusses restrictions on the use of information, Section 7 covers the adoption, notification, and publication of decisions, and Section 8 looks at future revisions.[592]

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[591] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (Text with EEA relevance), OJ C 308, 20. 10. 2011, p. 6–32.

[592] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (Text with EEA relevance), OJ C 308, 20. 10. 2011, Point 3.

5.2.1. Initiating proceedings for violations of Articles 101 and 102 TFEU

European competition law has historically recognized a singular enforcement procedure. Under this framework, the Commission collects evidence related to alleged infringements of Articles 101 or 102 TFEU and subsequently issues a prohibition decision against one or more companies, imposing fines or remedial measures. However, over time, additional procedures have been developed for specific cases. Notably, the commitments procedure allows the Commission to reach binding agreements with the involved companies, while the settlement procedure can take either an informal or formal form. These procedural developments offer several advantages, such as enhanced efficiency and speed, reduced costs and administrative burdens on the Commission, and increased legal certainty. A fundamental requirement for initiating proceedings before the Commission concerning violations of Articles 101 and 102 TFEU is the knowledge of the alleged infringement. This knowledge may arise from a complaint - whether formal or informal - submitted by interested parties, as well as through investigations initiated by the Commission ex officio or from leniency applications filed by participants in a cartel.

The right to initiate proceedings before the Commission for alleged violations of Articles 101 and 102 is afforded to all legal and natural persons who can demonstrate a legitimate interest, as stipulated in Article 7(2) of Regulation 1/2003. In addition to possessing a legitimate interest, business associations are also empowered to initiate proceedings, provided they are authorized to represent the interests of their members and that the infringement directly threatens those interests.[593] For consumers, the Commission recognizes that individual consumers whose economic interests are adversely affected as buyers of goods or services subject to the infringement may also demonstrate a legitimate interest.[594] It is important to note that both theses preclude so-called pure public interest actions, as well as actions in the public interest by local and regional organizations and authorities.

A necessary condition for initiating proceedings before the Commission is the presence of a so-called Union interest or Community interest. In the absence of such interest, the Commission notifies the party concerned and directs them to provide further evidence of its existence. The Commission is obligated to carefully

593 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) OJ C 101, 27. 4. 2004, Point 35.

594 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) OJ C 101, 27. 4. 2004, Point 37.

examine the factual and legal elements presented by the complainant to assess the Community interest warranting further investigation.[595] The criteria for evaluating the existence of Community interest include:[596]

- Whether the complainant can safeguard their rights by pursuing enforcement actions before national courts. If so, the Commission may decline to initiate proceedings.
- The seriousness of the alleged infringement and its potential long-term effects. Generally, the Commission prioritizes complaints related to significant violations with substantial consequences, though it retains the discretion to address less severe infringements.
- The relevance of the suspected infringement concerning the operation of the common market, the likelihood of substantiating the existence of the violation, and the extent of the investigation required for the Commission to fulfil its mandate of ensuring compliance with Articles 101 and 102.
- Whether the company under investigation is inclined to modify its business practices in a manner suggesting a lack of common interest in intervention under the new circumstances.

The Commission is required to decide on complaints within a reasonable timeframe, considering the specifics of each case.[597] Although this period is indicative and should not exceed four months, the Commission must keep the interested parties informed of its intended actions. If the Commission declines to initiate proceedings, such a decision does not inhibit the NCA or national courts from pursuing the same matter. In such instances, these bodies may regard the Commission's decision as a "fact to be taken into account" in assessing whether a violation of the Union competition rules has occurred.

5.2.2. Investigation – first phase

The initial stage of any investigation involves the collection of relevant information. In the context of enforcing Articles 101 and 102 of the TFEU, the Commission employs various methods to gather this information, including:

1. Formal requests for information

[595] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) OJ C 101, 27. 4. 2004, Point 42.

[596] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) OJ C 101, 27. 4. 2004, Point 44.

[597] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) OJ C 101, 27. 4. 2004, Point 60.

2. On-site inspections (commonly referred to as “dawn raids”)
3. Interviews and witness statements
4. Leniency applications
5. Informal complaints and tips from third parties
6. Whistleblowing mechanisms
7. Public consultations and market surveys.

To facilitate effective investigations, Regulation 1/2003 empowers the Commission to require companies and their associations to provide the necessary information. This can be done either through a formal request or by issuing a decision, copies of which must be promptly delivered to the NCA or court. In the case of a formal request, the Commission is required to outline the legal basis and objective of the request, specify the information sought, set a deadline for submission, and clarify the penalties for non-compliance.[598] According to the Court, companies or associations are not legally obligated to respond to these requests, but penalties may apply if false or misleading information is provided.[599] When the Commission issues a formal decision to collect information, it must similarly provide the legal basis, the objective of the request, details of the required information, a deadline for submission, potential penalties for failure to comply, and guidance on available legal remedies.[600] In such cases, the company or association is legally required to supply the requested information.

Regulation 1/2003 delineates the obligations for providing information, specifying that legal entities, companies, managers, owners, or their legal representatives are required to comply. In cases involving associations of entrepreneurs without legal personality, their legal representatives must supply the requested information. Under this framework, authorized lawyers may also submit information on behalf of their clients, though the clients remain ultimately responsible for ensuring the completeness, accuracy, and truthfulness of the information.[601] Additionally, member state governments and National Competition Authorities (NCAs) are required to provide the Commission with all necessary information to fulfill its duties under Regulation 1/2003[602].

Information providers retain certain rights, including the right to withhold self-incriminating information and the protection of legal professional privilege

598 Council Regulation (EC) No. 1/2003, Article 18 (2).
599 Misita, *Pravo konkurencije Evropske unije*, 230.
600 Council Regulation (EC) No. 1/2003, Article 18 (3).
601 Council Regulation (EC) No. 1/2003, Article 18 (4).
602 Council Regulation (EC) No. 1/2003, Article 18 (6).

(LPP). However, in the Mannesmannröhren-Werke case[603], the Court ruled that the right to remain silent is not absolute. While companies cannot be compelled to make statements that directly incriminate them, this does not exempt them from providing existing documents, even if those documents may be used as evidence against them. The Court differentiated between requiring companies to supply pre-existing information and documents and compelling them to create new evidence that could lead to self-incrimination. The Court underscored the need to balance a company's right against self-incrimination with its obligation to cooperate during antitrust investigations. A similar principle was applied in the investigation of the thermoplastics industry under Article 101 TFEU, where the Commission requested information from Orkem[604] that could indicate involvement in anti-competitive practices. Orkem argued that providing such information would constitute self-incrimination, thus violating their rights. The Court acknowledged the company's right to remain silent when compelled to answer questions that could confirm their guilt. Nevertheless, the Court concluded that the Commission retains the right to require companies to provide factual information and documents, even if they might be used to substantiate claims of anti-competitive behaviour. However, the Commission cannot compel companies to make statements that explicitly admit to an infringement, which the Commission itself is responsible for proving.[605]

Since 2011, the Hearing Officer of the European Commission has been tasked with ensuring that these procedures are followed and can issue reasoned recommendations regarding the privileged status of certain information.[606] This framework reflects the balance between protecting the right against self-incrimination and fulfilling the enforcement requirements of Articles 101 and 102 TFEU. Recital 23 of Regulation 1/2003 reaffirms the consistent position of the Court of Justice that companies have the right not to provide self-incriminating information. This balance highlights the tension between two important interests: upholding the enforcement of competition law and safeguarding the fundamental rights of information providers.[607]

603 Mannesmannröhren-Werke v Commission, Judgement of 20 February 2001, T-112/98.

604 Orkem v. Commission of the European Communities, Judgment of 18 October 1989, C-374/87.

605 Pieter Van Cleynenbreugel, "The Privilege against Self-Incrimination in EU Competition Law: Time for a Case Law Update?", *Bialystok Legal Studies Białostockie Studia Prawnicze* 28, no. 4 (2023), 119.

606 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (Text with EEA relevance), 2011/695, OJ L 275, 20. 10. 2011, Article 4(b).

607 Misita, *Pravo konkurencije Evropske unije*, 233.

The current scope of LPP in EU competition investigations covers communications between a client and an independent external lawyer that are specifically made for the purpose of exercising the client's right of defence within the context of EU competition law. It also includes legal advice pertaining to the subject matter of the investigation.[608] Importantly, this privilege does not extend to communications with in-house lawyers of the company under investigation.

As outlined in the section on the *Commission's enforcement powers*, the Commission is authorized to conduct unannounced inspections, commonly known as "dawn raids," to gather evidence of potential violations. After obtaining a warrant, the Commission can enter company premises without prior notice to inspect and copy business records, emails, computer data, and other relevant documents. The Commission also has the authority to seal off areas and restrict access to certain parts of the premises to preserve the integrity of the evidence. These surprise inspections are intended to prevent the destruction or concealment of evidence, ensuring that companies do not have the opportunity to manipulate information. As a result, the evidence collected during dawn raids is generally considered more reliable and complete. This evidence can subsequently be used to support further investigations, including market analyses, economic assessments, and legal proceedings.

Companies and business associations are legally required to cooperate with these inspections. The Commission's decision initiating the inspection specifies the subject matter and purpose, sets the start date for the inspection, and outlines the penalties for non-compliance, as well as the right to appeal. These decisions are made in consultation with the National Competition Authority (NCA) of the country where the inspection takes place.

In addition to surprise inspections, Regulation 1/2003 grants the Commission the power to conduct interviews with relevant individuals, provided the parties agree. These interviews may involve employees, managers, or other key persons who can provide additional insights. The interviews can be formal or informal, depending on the circumstances, and serve as a means for the Commission to gather supplementary information.

The Leniency Program plays a critical role in uncovering cartels and other anti-competitive practices that are otherwise difficult to detect. Companies participating in the program voluntarily provide the Commission with detailed information about cartel operations, including the structure, activities, participants, and the impact of illegal conduct. In exchange for their cooperation and admission of involvement in the cartel, companies can receive a reduction in fines or, in some

608 Etsuko Kameoka, "Proposals for Legal Professional Privilege in EU Competition Investigations", *Market and Competition Law Review* 6, no. 1 (April 2022): 15.

cases, immunity from prosecution. These admissions are often pivotal in confirming the existence of a cartel and securing evidence for enforcement actions. Whistleblowers, particularly those with insider knowledge, offer valuable information on the internal workings of cartels, such as correspondence, meetings, and agreements, which helps the Commission build a comprehensive case.

Whistleblowing mechanisms further enhance the Commission's ability to detect anti-competitive practices. These tools allow individuals to anonymously or otherwise report suspicions of cartels or other violations, providing the Commission with information that may otherwise be inaccessible or unknown.

5.2.3. Access to the case file and oral hearing – second phase

After the collection of information and evidence, which marks the conclusion of the investigative phase, two crucial intermediate stages must be completed before a decision is made in a competition law infringement case. These stages are: (1) ensuring the parties' right to access the case file, and (2) the opportunity for an oral hearing.

Under Article 27 (2) of Regulation 1/2003, *"The rights of defence of the interested parties in proceedings will be fully respected. They will have the right to access the Commission's file, while considering the legitimate interests of companies in protecting business secrets."* However, this access excludes confidential information, internal Commission documents, and communications between National Competition Authorities (NCAs) and the Commission. Access to the file is only granted to individuals named in the Statement of Objections, a document issued to parties reasonably suspected of violating competition rules. The Statement of Objections outlines the Commission's preliminary position, detailing the alleged competition law violations. Importantly, the Commission cannot base its final decision on any matters not mentioned in this document.

The second intermediate phase, which also protects the defence rights of the parties under investigation, is the oral hearing. Although the term "hearing" is commonly used in legal literature, it does not refer to a formal legal debate or court trial in the traditional sense. Instead, it represents an administrative procedure where the parties involved have the opportunity to present their arguments. Before reaching a decision on whether competition laws have been violated and imposing sanctions, the Commission must allow the companies or associations under investigation to respond to the facts that have been preliminarily established during the procedure. This is critical because the Commission can only base its decisions on facts that the parties have had the opportunity to address.[609]

[609] Council Regulation (EC) No. 1/2003, Article 27.

Participation in this process is mandatory for the parties involved. Therefore, the oral hearing must include representatives from the company under investigation, the Commission, and the relevant NCA. The hearing typically lasts two to three days but can extend over several weeks, depending on the complexity of the case. The hearing is overseen by the Hearing Officer, who operates independently from the DG COMP and reports directly to the Commissioner. The role of the Hearing Officer, as regulated by Regulation 773/04/EC, is to ensure the fairness of the procedure, objectivity in establishing the facts, and the justification of the Commission's final decision.

During the hearing, the Commission first presents its position, followed by the defence from the company under investigation. Attendees, including NCA representatives, may then ask questions. A record of the hearing is maintained, but the report prepared by the Hearing Officer is not made public. The oral hearing provides a critical platform for ensuring that all parties are heard before any final decision is made.

5.2.4. Decision-making – third phase

The decision-making process regarding violations of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) represents a pivotal phase in the enforcement of EU competition law, during which the European Commission acts as a collective body. This process follows the hearing phase and involves several key sub-phases:

a) Draft decision preparation. After the hearing and thorough analysis of all evidence and arguments submitted, the Directorate-General for Competition (DG COMP) prepares a draft decision. This stage involves reviewing all the information gathered during the investigation, including responses to formal information requests, on-site inspections, witness statements, and any other pertinent evidence.
b) Submission to the Advisory Committee. Once the draft decision is ready, it is forwarded to the Advisory Committee on Restrictive Practices and Dominant Positions[610]. This committee is composed of representatives from EU Member States and plays an advisory role. Its purpose is to ensure that the perspectives of Member States are considered before a final decision is made. The Advisory Committee reviews the draft and issues an opinion, which, although not binding, is taken seriously by the Commission, which must inform the committee of its stance.

[610] Article 14 of Regulation No.1/2003 regulates the role of the Advisory Committee.

c) Final Decision. After receiving and considering the Advisory Committee's opinion, the Commission may make necessary revisions to the draft. The final decision is made by the College of Commissioners through a written procedure and signed by the Commissioner for Competition.

d) Notification of the Decision. Once the Commission reaches a final decision, it formally notifies the parties involved in the procedure. The decision is delivered to the companies under investigation and published on the Commission's official website, along with a press release summarizing the key points.

e) Right to Appeal. Companies dissatisfied with the Commission's decision have the right to appeal to the General Court of the European Union. Should they find the General Court's ruling unsatisfactory, they may further appeal to the Court of Justice of the European Union. During the appeal process, the courts examine the legality and proportionality of the Commission's decision and ensure the procedural rights of the companies were respected. The courts may annul, amend, or uphold the Commission's decision.

f) Finality and Enforcement. If no appeal is lodged, or if the decision is upheld by the courts, it becomes final and enforceable. Companies must comply with the measures imposed and pay any fines. The Commission monitors the implementation of the decision and may initiate further proceedings if companies fail to comply.

This decision-making phase is essential for ensuring compliance with EU competition rules. It aims to uphold fairness, transparency, and the right to legal recourse, ultimately protecting the market and consumers from anti-competitive practices.

5.2.5. Right to legal remedies

Decisions made by the Commission under Regulation 1/2003 are subject to judicial review by the Court of Justice of the European Union, as they fall under the general category of legally binding acts under Article 288 TFEU. According to Article 263 TFEU, privileged applicants, such as Member States and EU institutions, have standing to initiate proceedings. For private entities, standing is granted to those directly or indirectly affected by the decision, including companies to whom the decision is addressed.

Companies dissatisfied with a Commission decision regarding conduct permitted or prohibited under Articles 101 and 102 TFEU have the right to initiate proceedings before the General Court. Proceedings before the General Court typically involve reviewing factual findings and the application of substantive law. In

contrast, appeals to the Court of Justice focus solely on the legal aspects, examining whether the General Court correctly applied the law.

Under Article 261 TFEU, the Court of Justice has full jurisdiction in such cases and can annul, reduce, or even increase any fines imposed by the Commission. This process ensures judicial oversight of the Commission's decisions, safeguarding the rights of companies while reinforcing the enforcement of EU competition law.[611]

[611] Misita, *Pravo konkurencije Evropske unije*, 256-257.

6. JUDICIAL REVIEW OF COMMISSION DECISIONS[612]

6.1. Introduction

Judicial review has been central to the evolution of the EU competition law, as many of the substantive decisions that establish the objectives and boundaries of the discipline have emerged from challenges to Commission decisions.[613] In light of this, the chapter outlines the EU Court's jurisdiction in reviewing the Commission's decisions under Articles 101 and 102 TFEU and the Merger Regulation. It also examines the appeal procedure before the Court of Justice as the 2nd instance court which collectively form the framework of judicial review.

6.1.1. Importance of Judicial Review

Judicial review is a cornerstone of any legal system that upholds the rule of law. In the context of competition law enforcement, it ensures that the enforcement process and resulting decisions adhere to applicable legal provisions, respect the rights of the parties, and that competition authorities exercise their discretion within the limits prescribed by law.[614]

Furthermore, the procedural framework of competition law has a significant impact on the fundamental rights of the parties involved. Consequently, the courts are tasked with ensuring that procedural safeguards, such as the right to a fair trial and the right to an impartial hearing, are respected.[615]

This role becomes particularly significant given the broad powers entrusted to the Commission for enforcing EU competition rules. Acting as both investigator and decision-maker, the Commission exercises significant discretion, which must be balanced through comprehensive judicial review.[616] While the Commission handles the day-to-day administration of competition enforcement, the Courts, independent and impartial by design, have task to control the legality of admin-

612 **Dubravka Akšamović**, Full professor, Faculty of Law, University of Osijek, **Iva Kuna**, mag. iur.

613 Pablo Ibáñez Colomo, "Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law," *Cambridge Yearbook of European Legal Studies* 24 (2022): 143.

614 OECD (2019), "The Standard of Review by Courts in Competition Cases", *OECD Roundtables on Competition Policy Papers*, No. 233, OECD Publishing, Paris, 4.

615 Op. cit. Ibáñez Colomo, "Law," 143 - 145.

616 Ibid. 144.

istrative actions, declaring the law, and safeguarding citizens' rights.[617] Judicial review serves as a critical counterbalance to the Commission's broad powers, ensuring procedural due process, and upholding the substantive principles of competition law.[618]

The importance of judicial review is underscored by the fact that the Courts annul a relatively significant percentage of Commission decisions. According to available statistics "about one – third of applicants before the General Court in cartel cases achieve some reduction of the amount of the fine imposed by the Commission – be it by obtaining a partial or complete annulment and/or a reduction of the fine".[619]

Yet, legal review is not merely a matter of statistics. The critical question is not the volume of cases brought before the EU Courts but whether the quality of their review aligns with their distinct and complementary roles.[620] Despite opposing and frequently very critical opinions with regards to judicial review of Commission's decisions[621], EU Courts have, generally shown their willingness to engage in a thorough review of Commissions decisions[622] as well as to respond to the need

617 Laguna de Paz, José Carlos. Judicial Review in European Competition Law. Oxford: University of Oxford Faculty of Law, 2011., 4.

618 Dubravka Akšamović, "Judicial Review in EU and Croatian Competition Cases: The Procedure and Intensity of Judicial Review." in *EU Competition and State Aid Rules: Public and Private Enforcement*, ed. by Vesna Tomljenović, Nada Bodiroga Vukobrat, Verica Butorac Malnar, and Ivana Kunda, 213–233 Cham: Springer, 201, 68.

619 Dieter Paemen, Jonathan Blondeel, Appealing EU Cartel Decisions before the European Courts: Winning (and Losing) Arguments, *Business Law International*, vol 18, no.2, 2017, 156.

620 It remains true that the the role of the General Court differs from both national courts and the Court of Justice. The quality of review is a subject of debate among some legal professionals and academics, who argue that the General Court's scrutiny in competition law cases is insufficiently thorough. Critics often characterize this review as overly "deferential" toward the Commission. See e.g. Forrester, "A bush in need of pruning: The luxuriant growth of 'light judicial review'", in Ehlermann and Marquis (Eds.), European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases (Hart Publishing, 2011), pp. 407–453.

621 See: Lamadrid de Pablo, Alfonso, The Role of the EU Courts in Competition Cases: A View from the Bar, Chapter 11: The Role of the EU Courts in Competition Cases,(https://chillingcompetition.com/wp-content/uploads/2023/05/the-role-of-the-eu-courts-in-competition-cases_a-view-from-the-bar.pdf); See also; Pablo Ibáñez Colomo, Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU, Competition Law (September 5, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4,210327; Damien Geradin & Nicolas Petit, Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment, TILEC Discussion Paper No. 2011-008 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342.

622 Lamadrid de Pablo, Alfonso, The Role of the EU Courts in Competition Cases: A View from the Bar, Chapter 11: The Role of the EU Courts in Competition Cases, p. 220. (https://chilling-

to ensure the compliance with the standards set by the ECtHR.[623] In numerous occasions EU Courts provided authoritative interpretations on different notions and imprecise legal concepts in its rulings and thus have contributed to the evolution of EU competition law but also to the preservation of the legitimacy of the EU competition enforcement system.

6.1.2. Overview of the Two-Tier Judicial System

The EU judicial framework functions as a two-tier system, consisting of the General Court and the Court of Justice.[624]

Since its establishment, the General Court (formerly: Court of First Instance) was considered the Competition court of the EU.[625] The General Court conducts the initial review of Commission decisions in competition cases. It examines whether the Commission's findings are supported by sufficient evidence and comply with EU law.[626]

Judgments of the General Court may be appealed to the Court of Justice. The Court of Justice focuses on verifying whether the General Court committed an error in law, thereby ensuring consistency in the interpretation and application of EU law.[627]

Both the General Court and the Court of Justice typically decide cases in chambers composed of three or five judges, with one judge designated as the "judge rapporteur"[628], primarily responsible for preparing the Report for the Hearing and

competition.com/wp-content/uploads/2023/05/the-role-of-the-eu-courts-in-competition-cases_a-view-from-the-bar.pdf).

623 Lamadrid de Pablo, Alfonso, The Role of the EU Courts in Competition Cases: A View from the Bar, Chapter 11: The Role of the EU Courts in Competition Cases, p. 220. https://chilling-competition.com/wp-content/uploads/2023/05/the-role-of-the-eu-courts-in-competition-cases_a-view-from-the-bar.pdf).

624 Op. cit. Akšamović, "Judicial Review," 70.

625 Competition and civil service litigation were the first two types of proceedings transferred to the General Court and were used as justification for its creation regarding their factual complexity. Lefèvre, Silvère, Miro Prek, "Competition Litigation before the General Court: Quality if not Quantity?" *Common Market Law Review* 53, no. 1 (2016): 65–90, 65.

626 European Commission, Antitrust Manual of Procedures, 2019, Court litigation - 1.3.2.; Ortiz Blanco, Luis, ed. EU Competition Procedure. 3rd ed. Oxford: Oxford Academic, 2013., 647.

627 Article 256(2) TFEU and Article 51(1) of the Statute of the ECJ.

628 On Designation of the Judge-Rapporteur Article 15. of the Rules of Procedure of the Court of Justice.

drafting the judgment.[629] Additionally, the Advocate General[630], a function within the Court of Justice, contributes to the judicial process by delivering independent opinions on cases brought before the Court.

It is important to highlight the decentralization of EU competition law and the increasingly significant role of national courts. Decentralization has enabled national competition authorities and national courts to play a far bigger role in enforcement of competition rules. Consequently, disputes more often take alternative paths, bypassing actions for annulment against Commission decisions. Instead, such cases are now more frequently decide before national judges, often with indirect assistance from the Court of Justice through preliminary ruling procedures, or with the Courts assuming the role of amicus curiae to provide guidance.[631] According to article 15(3) of Regulation 1/2003, the EU Member State court may ask the EU Commission for the opinion regarding the application of EU competition rules. Also, the Commission may on its own initiative submit, with the permission of national judge, a written opinion before the courts of Member States[632].

6.1.3. Framework for Judicial Review

Judicial review in competition law is grounded in key provisions of the TFEU. The provisions of the Treaty are complemented by the Charter of Fundamental Rights of the European Union, which safeguards procedural rights essential in competition cases.[633] The procedural and substantive framework for judicial review is further defined by secondary legislation, including Regulation 1/2003, which governs the enforcement of Articles 101 and 102 TFEU, providing procedural rules for investigations and fines and Merger Regulation, which regulates the

629 European Commission, Antitrust Manual of Procedures, 2019, Court litigation - 1.3.2.

630 On Designation of the Advocate General Article 16. of the Rules of Procedure of the Court of Justice.

631 E.g. some key judgements have been delivered by the Court of Justice on request of national courts rather than in the course of an appeal lodged against a judgment of the General Court: Case C-8/08, T-Mobile Netherlands and Others, EU:C:2009:343, Case C-375/09, Tele 2 Polska, EU:C:2011:270, Case C-226/11, Expedia, EU:C:2012:795, Case C-557/12, KONE and Others, EU:C:2014:1317. Lefèvre, Silvère, and Miro Prek. "Competition Litigation before the General Court: Quality if not Quantity?" Common Market Law Review 53, no. 1 (2016): 65–90.

632 See: Amicus curiae observations archive (2006 - 2014), https://competition-policy.ec.europa.eu/antitrust-and-cartels/national-courts/amicus-curiae-observations/amicus-curiae-observations-archive-2006-2014_en.

633 Such as the right to good administration (Article 41), the right to a fair trial (Article 47), and the presumption of innocence and rights of the defence (Article 48).

control of concentrations between undertakings and sets procedural and substantive standards for Commission decisions in merger cases. Procedural guidance is also provided by the Rules of Procedure of the courts, which detail the procedural steps for actions brought before the Court of Justice and the General Court.

Judicial precedent are highly significant source of law in the interpretation of Treaties, norms and overall EU competition policy. The courts ensure consistent interpretation and application of Treaty rules, contributing to equal treatment and legal certainty in competition law enforcement across the EU.[634] Furthermore, the judiciary also brings a certain degree of flexibility to the implementation of the competition law, thus enhancing the development of the law and the application of current economic thinking.[635] Recognizing that it is very difficult to have general rules applicable to all different areas of litigation and all types of remedies, the Court of Justice has developed principles, which are specific to competition enforcement, acknowledging that its punitive nature requires standards that cannot be applied as such in other contexts.[636]

6.1.4. Legal Grounds for Filing an Appeal

The principal mechanism for initiating judicial review of the Commission's decisions in competition cases is the action for annulment (fr. *recours en annulation*), as provided under Article 263 TFEU. [637] This type of action allows affected parties to challenge the legality of a Commission act before the General Court.[638]

Furthermore, other forms of legal action also contribute to the broader framework of judicial review. For instance, actions for failure to act (fr. *recours en carence*) under Article 265 TFEU allow applicants to challenge the Commission's failure to adopt a required decision, though such actions are less frequent in competition cases.

634 Heike Schweitzer, "Judicial Review in EU Competition Law." *Journal of European Competition Law & Practice* 3, no. 6 (2012): 480–491. Available at SSRN: https://ssrn.com/abstract=2129147.

635 OECD (1997), "Judicial Enforcement of Competition Law: Key findings, summary and notes", *OECD Roundtables on Competition Policy Papers*, No. 13, OECD Publishing, Paris, https://doi.org/10.1787/a4118942-en.

636 De la Torre, Fernando Castillo; Gippini Fournier, Eric: Evidence, Proof and Judicial Review in EU Competition Law, 2017., Elgar Competition Law and Practice series, str. 26.

637 Provisions applicable to requests for annulment are Articles 263, 264 and 266 TFEU.

638 In most antitrust cases, addressees of fines seek above all annulment of the Commission decision in regard penalties imposed or at least a reduction thereof. Ortiz Blanco, Luis, ed. EU Competition Procedure. 3rd ed. Oxford: Oxford Academic, 2013.

Additionally, interim measures (fr. *référé*), governed by Articles 278 and 279 TFEU, are requested alongside a main action. For example, an applicant may seek to suspend payment of a fine imposed by the Commission while challenging the decision in main proceedings. Such requests are necessary because bringing the main action does not automatically suspend the obligations under the Commission's decision.[639]

Finally, preliminary rulings (fr. *renvoi préjudiciel*) under Article 267 TFEU enable national courts to seek guidance from the Court of Justice on questions of EU law, fostering uniform application of competition law across Member States.

6.2. Review by the General Court

6.2.1. Grounds for annulment

According to Article 263 TFEU action for the annulment of the Commission's decision may be brought on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.[640]

Common grounds in appeals brought before the General Court against Commission decisions in competition cases include[641]:

i. *Procedural irregularities*. Many appeals have relied on alleged breach of procedural rules,[642] or infringement of rules of law relating to the application of the Treaties, and some of them are delays in procedural notifications, failure to communicate decisions to all relevant parties, or unauthorized disclosure of confidential information. Those infringements may be raised before the EU courts by the parties involved in the Commission proceedings. The Courts can also examine procedural irregularities on its own motion. The Courts have not interpreted formal conditions relating to Commission procedures and decisions with excessive rigor. Formal defects are generally not a basis

[639] In merger cases, obtaining interim measures has proven challenging, with suspension orders granted only when it is demonstrated that, without such relief, the applicants would face a situation threatening their very existence or causing irreversible changes to their market position. David Bailey, Laura Elizabeth John, eds. *Bellamy & Child: European Union Law of Competition*. 8th ed. Oxford: Oxford Academic, 2018, 741.

[640] Bailey, David, and Laura Elizabeth John, eds. *Bellamy & Child: European Union Law of Competition*. 8th ed. Oxford: Oxford Academic, 2018, 1218.

[641] For more examples see: Bailey, David, and Laura Elizabeth John, eds. *Bellamy & Child: European Union Law of Competition*. 8th ed. Oxford: Oxford Academic, 2018., 1218-1224.

[642] See for example: C-607/18 P-OST - NKT Verwaltung and NKT v Commission, ECLI:EU:C:2021:537.

for annulling a decision unless they undermine the parties' defence rights or where it can be shown that, absent the irregularities, a different result might have been reached in the administrative procedure.[643]

ii. *Failure to respect the rights of defence*, including the right to be heard and access to the file, as essential for a fair process and any breach undermines the legality of a decision. Where the Courts find that there has been an infringement of the defence rights of undertakings, the Court is very quick to protect the rights of undertakings and annul the decision.[644]

iii. *Duty to state reasons* requires the Commission to provide clear, detailed reasoning to enable judicial review and allow addressees to assess the validity of its decisions. Adequacy of reasoning requires addressing principal issues but does not oblige the Commission to respond to every argument raised.

iv. *Insufficient evidence.* The Commission must provide precise and consistent evidence to support its findings. Any doubt benefits the undertaking, ensuring decisions are based on solid proof. E.g. in E.ON Energie AG v European Commission the General Court stated that "the *Commission must gather sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place*"[645].

v. *Breach of general principles of EU law* refers to violations of principles such as proportionality, equal treatment, and legitimate expectations frequently serve as grounds for appeal.

vi. *Lack of Competence* involves assessing whether the Commission had the authority to act - if not, the decision must be annulled as Commission acted ultra vires. Conversely, authority to act also means a duty to act, so it is also illegal if the Commission fails to fulfil this duty.[646]

vii. *Misuse of powers*, while never invoked successfully in competition cases, misuse of powers occurs when a measure was taken with the exclusive or main purpose of achieving an end other than that stated.[647] E.g. in *Deutsche Telekom*, the Court denied that when acting against the undertaking for anticom-

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[643] Distillers Company Limited v. Commission of the European Communities, Case 30/78, [1980] E.C.R. 2229.

[644] Ortiz Blanco, Luis, ed. EU Competition Procedure. 3rd ed. Oxford: Oxford Academic, 2013., 676.

[645] Case T-141/08, E.ON Energie AG v European Commission, ECLI:EU:T:2010:516, point 48.

[646] Such as imposing interim measures beyond the scope of its powers or implementing monitoring measures for which it lacks the requisite competence. Laguna de Paz, José Carlos. Judicial Review in European Competition Law. Oxford: University of Oxford Faculty of Law, 2011., 5.

[647] Joined Cases C-186/02 P and C-188/02 P Ramondín and Others v Commission [2004] ECR I-10653, para 44.

petitive behaviour the Commission really intended to act against the German authorities.[648]

6.2.2. Challengeable acts

The reviewability of a Commission act is determined by its substance rather than its form. While Regulation 1/2003 prescribes that the Commission acts through formal decisions, the Court of Justice in *IBM v Commission* clarified that it is the substantive content of the act, rather than its formal classification, that determines whether it can be subject to judicial review. Therefore, for an act to be deemed reviewable under Article 263 TFEU, it **must produce binding legal effects** that are **capable of directly impacting the applicant's interests** by **bringing about a distinct change in their legal position**. Also, in cases involving procedures with multiple stages, only the **final act or decision**, is subject to judicial review, and not "a provisional measure intended to pave the way for the final decision".[649]

Furthermore, although Regulation 1/2003 mandates formal decisions in certain cases, not all actions by the Commission fall explicitly within its scope. Case law has recognized that certain administrative measures, such as letters formally declining interim measures due to a lack of competence, communications rejecting complaints, or notices announcing the closure of a case file, may nonetheless qualify as challenging decisions if they produce binding legal effects.[650]

6.2.2.1. Locus standi

According to Article 263 (4) TFEU, any natural or legal person may institute proceedings if:

- a decision is addressed to them,
- they have legitimate interest to bring an appeal when a decision is not addressed to them but is of a direct and individual concern to them,

[648] Case T-271/03, Deutsche Telekom v European Commission [2008] ECR II-000, para 271.

[649] International Business Machines v Commission, Case 60/81, 1981, 9-10; For a comprehensive yet not a definitive list of reviewable acts, as well as non-reviewable 'acts' of the Commission see: Bailey, David, and Laura Elizabeth John, eds. *Bellamy & Child: European Union Law of Competition*. 8th ed. Oxford: Oxford Academic, 2018., 1213-1214 (Article 101 and 102) and 741-742 (Merger cases).

[650] Ortiz Blanco, Luis, ed. EU Competition Procedure. 3rd ed. Oxford: Oxford Academic, 2013., 668.

- a regulatory act of direct concern is not addressed to them and does not entail implementing measures.

In the latter two scenarios, the right to bring an appeal has been recognized in cases such as: a parent company challenging a decision addressed to its subsidiary (*Ford v Commission*[651]); a third party contesting a commitment decision that required the undertaking to terminate its contract with the third party (*Alrosa v Commission*[652]); and a non-profit organization (NGO) whose primary function is to represent the addressees of a Commission decision and facilitate cooperation between them (*CISAC v Commission*[653]).[654]

In merger cases, case law has clarified the category of people entitled to challenge Commission decisions. Alongside the parties to the merger and third parties with direct and individual concern, those eligible to bring an action include competitors, customers, trade associations, other representative bodies, employee representatives, and shareholders.[655]

It is also noteworthy to mention that a Member State may also lodge an appeal. While Member States often intervene in competition cases, it is relatively uncommon for them to exercise their independent right of appeal.[656]

6.2.2.2. Particular points of procedure

The procedure before the General Court and the Court of Justice consists of two phases: written[657] and oral[658].

In direct legal actions, the written procedure consists of several successive pleadings: the application (fr. *requête*), which initiates the procedure and forms

651 Ford v Commission, Case T-128/89, Judgment of the Court of First Instance of 27 February 1992, ECLI:EU:T:1992:21.

652 Alrosa Company Ltd v Commission, Case C-441/07 P, Judgment of the Court of Justice of 29 June 2010, ECLI:EU:C:2010:377.

653 CISAC v Commission, Joined Cases T-392/08, T-402/08, and T-410/08, Judgment of the General Court of 12 April 2013, ECLI:EU:T:2013:188.

654 Op. cit. Bailey, John, "Bellamy & Child: European Union Law of Competition," 1217.

655 Ibid. 743-745.

656 Ibid. 1217.

657 The rules on written part of the procedure are set out in Chapter 5. of the Rules of Procedure of the Court of Justice.

658 The rules on oral part of the procedure are set out in Chapter 8. of the Rules of Procedure of the Court of Justice.

the basis of the legal action[659]; the defense (fr. *défense*)[660], representing the Commission's response; the reply (fr. *réplique*), where the applicant addresses the Commission's arguments; and the rejoinder (fr. *duplique*), providing the Commission's final response to the applicant.[661] In cases of intervention, the intervener submits a statement in intervention (fr. *mémoire en intervention*), which allows a third party to formally join proceedings before the Court to support, in whole or in part, the position of one of the main parties. The statement is not an independent pleading but complement the arguments already presented by the party it supports.[662]

The purpose of the written procedure is to provide a comprehensive account of the facts, pleas, and arguments of the parties. Therefore, it is generally considered that written procedure has an essential role in the Court's understanding of the case.[663] It must allow the Court, by reading the written pleadings, statements of case, or observations lodged, to acquire a detailed and accurate idea of the subject matter of the case before it and the issues raised by that case.[664]

Parties must submit all the evidence they wish the Court to consider in the first exchange of pleadings.[665] To ensure procedural efficiency, the EU Courts limit the number and length[666] of written pleadings. The General Court's "fast-track proce-

[659] Which information shall application contain is prescribed by Article 76 of the Rules of the Procedure of the General Court and by Article 120 of the Rules of Procedure of the Court of Justice.

[660] Article 124 of the Rules of Procedure of the Court of Justice, Article 81 of the Rules of the Procedure of the General Court; The defence must meet the same formal requirements as the application and be lodged within two months of its service. As the application defines the legal framework, the defence should, as far as possible, align its arguments with the pleas in law or complaints raised in the application. Practice Directions to Parties Concerning Cases Brought Before the Court, p. 18.-24.

[661] Article 126 of the Rules of Procedure of the Court of Justice, Article 83 of the Rules of the Procedure of the General Court; Written pleadings must follow the same formal rules as the application and defence but should be shorter, as they are optional and supplementary.

[662] Op. cit. Akšamović, "Judicial Review," 71; Intervention is governed by Article 40 of the Statute of the Court of Justice and Articles 130–132 of the Rules of Procedure of the Court of Justice. Applications must be submitted within six weeks for direct actions or one month for appeals. It must adhere to formal requirements outlined in the Rules of Procedure and should not exceed 10 pages in length. Observations and statements in intervention must meet formal requirements, with interveners restricted to presenting supplementary arguments rather than repeating those of the main parties. See also: Practice Directions to Parties Concerning Cases Brought Before the Court, p. 41.-46.

[663] Loc. cit. Akšamović, "Judicial Review," (see note 51).

[664] Practice Directions to Parties Concerning Cases Brought Before the Court, p. 13.

[665] Article 85 of the Rules of Procedure of the General Court.

[666] The application and defence are limited to a maximum of 50 pages, while the reply and rejoinder are capped at 25 pages. However, the recommended length is 30 pages for the application and defence and 10 pages for the reply and rejoinder.

dure"[667] and the Court of Justice's appeal process typically involve only one round of written submissions.

Oral hearing is the second part of the procedure.[668] The Court will arrange oral hearing whenever it finds that oral hearing is likely to contribute to a better understanding of the case and the issues raised by it.[669] In proceedings where there is only one round of written pleadings, the oral hearing provides the first and only opportunity for the parties involved to personally comment upon the written observations made by the other party, or parties can clarify the forms of order sought, their pleas and arguments and points at issue between them during an oral hearing, or the court may examine expert witnesses.[670]

The procedure at a hearing before the Court, in general, consists of three separate parts: the oral submissions, questions from the members of the Court, and final replies. Oral submissions focus on addressing specific issues or questions identified by the Court, avoiding unnecessary repetition of written pleadings. Questions from members of the Court, typically posed after the oral submissions, seek clarification or additional information on key points. Finally, the participants are given an opportunity to provide brief final replies, lasting no more than five minutes, to address observations or responses raised during the hearing.[671]

The Court may decide to rule on a direct action without an oral part of procedure if main party does not request hearing or if the Court has sufficient information available to decide based on the materials in the file.[672]

An essential aspect to address is the introduction of new pleas and evidence during proceedings before the General Court. It is crucial to emphasize that an appeal to the General Court constitutes a review rather than a re-hearing, meaning the Court's examination is generally limited to the arguments and evidence presented in the Commission's decision.[673] Under the general standard of judicial review, the legality of a contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted.[674]

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[667] Article 76a of the Rules of Procedure of the General Court. This is especially the case in the merger cases (e.g. Schneider/Legrand, Tetra Laval/Sidel and ENI/EDP/GDP).

[668] Prescribed by Chapter 8 of the Rules of the Procedure of the General Court.

[669] Practice Directions to Parties Concerning Cases Brought Before the Court, p. 62.-80.

[670] Allan Rosas, "Oral Hearings before the European Court of Justice," *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014): 596–610.

[671] Practice Directions to Parties Concerning Cases Brought Before the Court, p. 62.-80.

[672] Article 106 (3) of the Rules of Procedure of the General Court.

[673] Op. cit. Bailey, John, "Bellamy & Child: European Union Law of Competition," 1231.

[674] Op. cit. De la Torre, Gippini Fournier, "Evidence, Proof," 271 – 272.

A distinction must be made between new facts and new evidence. While a fact that emerges after a decision is adopted cannot affect its legality, new evidence related to an earlier fact may do so.[675] The General Court has clarified that submission of new evidence is permissible, as long as it pertains to facts that were present at the time the decision was made, and provided that the opposing party is given an opportunity to respond.[676] [677]

This does not prevent the EU Courts from concluding, in certain cases, that the information provided is inadequate or that the Commission should have pursued further investigations. However, the EU Courts' review of pleas in law in annulment actions is neither intended to, nor capable of substituting the thorough investigation conducted during the administrative procedure.[678]

Regarding the deadlines, they are either mandatory or left to the Court's discretion. Regarding the deadline to lodge an action, an action must be brought within two months of the decision's publication in the Official Journal or its notification to the applicant, whichever comes first.[679] For individuals who are not direct recipients of the decision, the time limit begins 14 days after the decision's publication in the Official Journal. These deadlines are mandatory, and any late application will be considered as inadmissible. There is another group of deadlines – the ones occurring during the Court procedure.[680] The Court has a discretion to decide on those deadlines, so the parties to the proceedings can ask for extension. However, the General Court is reluctant to grant extensions because of the fact that proceedings before the EU Courts in competition cases, in average, last too long. On average, antitrust cases are resolved within 24 to 36 months for actions for annulment, failure to act, or damages (except cartel cases which generally take more time - 3 to 5 years).[681]

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675 Fuji Electric v Commission, n. 15, paras 122–125.

676 SLM v Commission, n. 14, paras 392–393.

677 If the applicant is permitted to present new evidence in support of its application, the Commission is equally entitled to submit new evidence to demonstrate why the applicant's evidence is insufficient to warrant annulment of the measure. However, the Commission is not allowed to introduce an entirely new factual basis for the decision. Instead, any new evidence provided by the Commission is relevant solely for assessing the probative value of the applicant's evidence. Castillo de la Torre, Fernando, and Eric Gippini Fournier. Evidence, Proof and Judicial Review in EU Competition Law. Elgar Competition Law and Practice Series. Cheltenham, UK: Edward Elgar Publishing, 2017., 274.

678 Loc. cit. De la Torre, Gippini Fournier, "Evidence, Proof," (see note 63).

679 Article 263 TFEU.

680 governed by the Statute of the Court of Justice, the Rules of Procedure of the Court of Justice and the Rules of Procedure of the General Court.

681 European Commission, Antitrust Manual of Procedures, 2019, Court litigation - 1.3.2., 30.

The language of the Court case is the EU official language in which the application before the Court is lodged.[682]

In cartel and merger cases, parties are required to have an agent or a lawyer. If they cannot afford one, they are entitled to apply for legal aid.[683]

6.3. Evidence, Proof and Scope of Judicial Review

6.3.1. Characteristics and categories of evidence

The general rule on admissibility of evidence is the principle of "unfettered evaluation of evidence", meaning that evidence may be freely adduced and is evaluated based on its reliability.[684] While having more evidence necessarily increases the weight of the argument and strengthens the conclusion of the case, competition authorities often face considerable challenges in gathering sufficient evidence to substantiate their cases.[685] However, competition authorities are not expected to collect all conceivable evidence. They should provide enough evidence to prove the infringements[686] and to support the conclusions drawn from it.[687] If the infringement decision is not supported by sufficient and consistent evidences, it can be declared void.[688]

Evidence can be categorized into various types.

i. Direct evidence demonstrates the relevant fact without the need for inference, whereas circumstantial (or indirect) evidence requires logical reasoning and piecing together multiple elements to establish a fact. Common forms of direct evidence include contemporaneous documents (such as formal agreements and meeting notes), and oral evidence (such as verbal statements given

682 Articles 36 and 37 of the Rules of Procedure of the Court of Justice.

683 Practice Directions to Parties Concerning Cases Brought Before the Court, p. 82.-84.

684 The concept of admissibility implies that certain categories of evidence, relevant in themselves to the issues at stake, are nonetheless excluded from consideration because of some principle which is perceived to be of greater importance than mere relevance and which therefore governs whether the evidence may be used. For instance, evidence obtained unlawfully, communications protected by legal professional privilege, or materials not falling within the scope of an inspection decision are deemed inadmissible. See more: Kalintiri, Andriani: Evidence standards in EU competition enforcement: the EU approach, 2019., Oxford, England: Hart Publications, str. 102.

685 OECD (2024), "The standard and burden of proof in competition law cases", *OECD Roundtables on Competition Policy Papers*, No. 318, OECD Publishing, Paris, 16.

686 Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, para 58; and Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, para 86.

687 Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, para 39; and Case C-525/04 P Spain v Lenzing [2007] ECR I-9947, paras 56 and 57.

688 Case C-12/03 P Tetra Laval [2005] ECR I-987, paras 46 and 48.

during investigations or leniency applications). Circumstantial evidence, on the other hand, typically includes economic data, patterns of behaviour, or communications between parties. While circumstantial evidence may need corroboration, it can, when taken together with other pieces of evidence, suffice to establish an infringement if it reveals an overall pattern of anticompetitive behaviour.[689]

ii. Written evidence includes contemporaneous documents such as agreements, meeting minutes, or monitoring records, as well as documents created during proceedings. Oral evidence includes verbal explanations given during inspections or accounts provided during oral hearings. In recent years, oral evidence has become increasingly significant as companies have sought to minimize written records.[690]

iii. Evidence can also be categorized as exculpatory or incriminating based on its purpose. Incriminating evidence supports the Commission's allegation of an infringement, while exculpatory evidence tends to prove the innocence of the accused party. According to settled case law, the Commission must disclose both types of evidence to the undertakings concerned, except in cases involving business secrets, internal Commission documents, or other confidential information.[691]

iv. Another distinction arises between contemporaneous evidence and evidence created during investigations or proceedings. Contemporaneous evidence refers to documents or records produced at the time of the alleged infringement, such as cartel agreements or meeting notes. These are often the most reliable forms of evidence, given their proximity to the events in question. In contrast, proceedings-based evidence includes submissions made during the course of an investigation, such as responses to information requests, leniency statements, or oral accounts provided during hearings.[692]

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689 Castillo de la Torre, Fernando. "Evidence, Proof and Judicial Review in Cartel Cases." *World Competition* 32, no. 4 (2009): 505–578., 528.–533.

690 Ibid.

691 Non-disclosure of exculpatory evidence requires the undertaking to demonstrate that its absence could have influenced the outcome of the proceedings. Castillo de la Torre, Fernando. "Evidence, Proof and Judicial Review in Cartel Cases." World Competition 32, no. 4 (2009): 505–578., 528.–533.

692 Castillo de la Torre, Fernando. "Evidence, Proof and Judicial Review in Cartel Cases." World Competition 32, no. 4 (2009): 505–578., 528.–533.

6.3.2. Standard and burden of proof

Burden and standard of proof are key legal mechanisms used to allocate the risks of an erroneous decision between the parties.[693] While the standard of proof specifies the criteria that must be met for facts to be considered proven, the burden of proof determines two things: first, which party is responsible for presenting the facts and, if necessary, providing supporting evidence; and second, which party assumes the risk if certain facts remain unresolved or allegations are not substantiated.[694]

Burden of proof addresses two key aspects: legal and evidential burden of proof. The legal burden of proof (or the burden of persuasion)[695], requires the Commission to establish its case to the required standard of proof.[696] The evidential burden of proof (or the burden of adducing evidence)[697], initially lies with the party alleging an infringement. However, evidence presented may shift the burden to the opposing party, requiring them to provide explanations or justifications. Failure to do so allows the original burden to be considered discharged. [698]

Additionally, to the burden of proof, it is noteworthy to mention presumptions, as legal tools that allow certain facts to be accepted as true without direct proof based on logical inferences or established principles. Once the standard of proof for the presumed fact is met, the burden of proof shifts to the opposing party to refute it.[699] For instance presumption of participation in a collusive arrangement (the so-called Anic Presumption[700]) establishes that undertakings participating in concerted practices and remaining active on the market are presumed to use the information exchanged with competitors when determining their market conduct. Similarly, the Aalborg Portland Presumption[701] holds that an undertaking participating in a cartel meeting is presumed to have aligned itself with the cartel's decisions unless it publicly distanced itself. In another case, the presumption was that a parent company holding 100% of a subsidiary's shares has a decisive influ-

693 Op. cit. Kalintiri, "Evidence standards,".
694 Case C-8/08 T-mobile Netherlands, ECLI:EU:C:2009:343, fn. 60.
695 Prescribed by Article 2 of Regulation 1/2003.
696 Case C-49/92 P Commission v Anic (1999) ECR I-4125, para 86.
697 Clarified in Aalborg Portland v Commission (C-204/00 P, paras. 78–79).
698 In Telefonica v Commission (C-295/12 P), the Court emphasized that undertakings must counter the Commission's claims with substantiated evidence capable of casting doubt on the probative value of the Commission's findings and cannot simply deny allegations. Op. cit. Kalintiri, "Evidence standards,".
699 OECD, "The standard and burden of proof," 17.
700 Case C-49/92 P, Anic Partecipazioni.
701 Case C-204/00 P, Aalborg Portland.

ence over the subsidiary's conduct (the so-called AKZO Presumption[702]). These presumptions, while facilitating the burden of proof, remain rebuttable, requiring strong evidence from the opposing party to challenge their application.

The standard of proof[703] defines how convincingly a party must prove its case, setting the threshold of evidence needed to establish a hypothesis for a decision.[704] A well-established case law is that "*in order to establish that there has been an infringement of Article 101 (1) TFEU, the Commission must produce* ***firm, precise and consistent*** *evidence. However, it is not necessary* ***for every item of evidence*** *produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the* ***body of evidence*** *relied on by that institution, viewed as a whole, meets that requirement*".[705]

The application of the standard of proof varies depending on the enforcement context and the potential consequences of the decision. Different thresholds, such as beyond reasonable doubt, clear and convincing evidence[706], and balance of probabilities[707], are tailored to suit specific legal and procedural settings.[708] The applicable standard of proof also differs between antitrust cases and merger control. In antitrust cases, the standard is less strict than 'beyond reasonable doubt' in criminal cases but higher than 'balance of probabilities', characteristic for civil and administrative cases. Merger control, requiring a prospective analysis with no sanctions imposed, typically applies to the lower 'balance of probabilities' stand-

702 Case C-97/08 P, Akzo Nobel.

703 It is relevant to distinguish standard of proof from standard of (judicial) review. While the standard of proof refers to the degree of probability or certainty required to establish that competition law has been violated, the standard of review pertains to the intensity with which a first-instance competition enforcement decision is scrutinized on appeal. These two concepts are interrelated, as the standard of review also assesses whether the decision-maker has met the requisite standard of proof. As observed, the more rigorous the standard of review, the more likely it is that the standard of proof will be high, since an intensive judicial review demands that the initial decision achieves a high level of accuracy to withstand court's scrutiny. OECD, "The Standard of Review," 9.

704 OECD, "The standard and burden of proof," 9 – 14.

705 Commission v. Keramag Keramische Werke GmbH and Others, Case C-613/13 P, Judgment of the Court (First Chamber) of 26 January 2017, ECLI:EU:C:2017:49, 52.

706 Requiring a firm conviction (meaning much more likely than not).

707 Meaning more likely than not.

708 Evidence that may suffice to prove a fact in civil proceedings might be inadequate in a criminal context. In cases involving criminal sanctions, a higher standard of proof is necessary to balance the unequal power dynamics between the state and the individual, reflecting the severity of the sanctions. By contrast, civil procedures do not warrant such stringent proof requirements.

ard, meaning a merger must be more likely than not to lessen competition to be prohibited.[709]

6.3.3. Scope and standard of Judicial Review

At the heart of every administrative decision lies the question: To what extent are the European Courts entitled to control administrative decisions?[710] This question in context of competition law enforcement demands thorough attention and has so far raised significant interpretative challenges among scholars and practitioners. Concepts such as scope and standard of judicial review, unlimited review and control of legality, and distinctions between comprehensive and limited review will be explored further in this section.

The scope of judicial review refers to the extent to which courts examine and potentially overturn Commission decisions. The standard of review refers to the intensity or degree of scrutiny that a court applies when reviewing Commission decision. It determines how closely the Court examines the reasoning, evidence, and discretion exercised by the Commission.[711]

Scope of judicial review is delineated by article 263 TFEU (control of legality) and Article 261 TFEU (so-called "unlimited jurisdiction"). Unlimited or full jurisdiction grants the Courts the authority to annul the contested decision, to modify it, or substitute it with their own, a power specifically applied to the Commission's decisions on penalties. In contrast, control of legality focuses solely on assessing whether the decision complies with procedural and substantive legal standards.[712] Further discussion will address two important and intriguing questions: Is the control of penalties genuinely "unlimited," and has the review of legality been unjustifiably labelled as "limited"?

First, regarding the review of legality, the Court exercises a "supervisory" jurisdiction, focusing on ensuring that the law is upheld. Its role is confined to assessing whether the Commission's decision was adopted lawfully. Errors of law arise when the Commission fails to ensure that "the interpretation and application of

[709] Op. cit. Kalintiri, "Evidence standards,".

[710] Op. cit. Laguna de Paz, "Judicial Review," 1.

[711] Understanding the standard of review applied by courts in competition enforcement cases is crucial for both decision-makers and affected parties. For decision-makers, the standard shapes of how investigations are conducted, evidence is collected, and decisions are formulated to ensure they can withstand judicial scrutiny. For affected parties, the applicable standard of review informs their assessment of whether to challenge a decision, guiding their evaluation of the available grounds for appeal and the likelihood of success at trial. Loc. cit. OECD, "The Standard of Review," (see note 3).

[712] Op. cit. Laguna de Paz, "Judicial Review,".

the Treaties is observed."[713] However, if the Court finds a Commission decision unlawful, it cannot replace its own assessment for that of the Commission. In essence, that means that the EU Court cannot adopt or re-adopt a decision after declaring it invalid.

That said, it is important to stress that "*limits in judicial review should not be linked to the way of challenging the administrative performance (control of legality or unlimited jurisdiction), but to the intensity of powers entrusted to the European Commission (discretionary powers) and to the principle of separation of powers (margin of appraisal in complex economic and technical issues)*."[714] The Court conducts a comprehensive and a detailed evaluation of the legality of the Commission's decisions, encompassing not only the infringement of EU law but also the facts and their appraisal.[715]

While Article 263 TFEU does not explicitly refer to control of the facts, control of legality inevitably involves an appraisal of the facts. This is because verifying the legality of a decision requires a detailed examination of the facts underlying the decision, and the evidence provided by the Commission to support its findings.[716] The General Court, has exclusive jurisdiction to "find the facts and to appraise those facts"[717], conducting that way a comprehensive review without deferring to the Commission's margin of discretion. As clarified in the *Seamless Steel Tubes* case, the General Court's role in an annulment application against a Commission is 'to assess whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement'.[718]

Furthermore, when discussing the control of legality, it is important to mention the issue of judicial review and assessment of complex economic and technical issues. To what extent does judicial review differ in such situations, and is it fair to say that the review of these matters is limited? The Courts acknowledge that the Commission enjoys a degree of discretion in these cases. In so-called Remia case, where the Court of Justice made a difference between a 'comprehensive judicial review' which it will apply 'as a general rule', and the standard to be

[713] Article 19(1) TEU.
[714] Loc. cit. Laguna de Paz, "Judicial Review," (see note 6).
[715] Ibid. 5.
[716] Ibid. 8.
[717] *AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE v Commission of the European Communities*. Case C-425/07 P, ECLI:EU:C:2009:253, judgment of 23 April 2009, para 44.
[718] *JFE Engineering Corp. and Others v Commission*, Joined Cases T-67/00, T-68/00, T-71/00, and T-78/00, 2004, 175.

applied when the Commission has to appraise complex economic matters.[719] This deference to the Commission's evaluations, however, raises notable challenges. Despite well-established case law, the exact meaning and scope of judicial deference remain ambiguous.[720]

However, even within this type of review, the Court conducts a comprehensive examination of the factual accuracy of the case.[721] As de la Torre observed: "*EU Courts do not refrain from reviewing something just because it is complicated, or takes time. Examples abound of very complicated issues which have been scrutinized thoroughly. Complex economic assessments are not a homogeneous group, and 'complexity' in this context refers more to the nature of the assessment than to its degree of difficulty*."[722]

The Court of Justice also has made it clear that the Commission's margin of discretion does not exempt it from judicial scrutiny. For example, in Commission v Tetra Laval, the Court of Justice held: "*Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.*"[723] This judgment illustrates that while the EU Courts respect the Commission's discretion, they will not condone negligence in its assessments of complex economic appraisals.[724]

719 C-42/84, Remia and Others v Commission, EU:C:1985:327. See also: Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, para 39; Case T-201/04 Microsoft v Commission [2007] ECR II-3601, para 89; Case T-301/04 Clearstream v Commission [2009] ECR II-3155, para 95; Case T-398/07 Kingdom of Spain v European Commission, para 62; Case C-452/10 P, para 103; Joined Cases T-29/10 and T-33/10, Netherlands and ING v Commission, para 103.

720 Op. cit. Laguna de Paz, "Judicial Review," 12.

721 Op. cit. De la Torre, Gippini Fournier, "Evidence, Proof," 268.

722 Ibid. 298.

723 Commission of the European Communities v. Tetra Laval BV, Case C-12/03 P, [2005] ECR I-987., 39. In later judgments in very different contexts the General Court has referred to a duty to 'examine carefully and impartially all relevant evidence in the case in question' (Case T-369/03, Arizona Chemical and Others v Commission, EU:T:2005:458, para. 85), to a 'sufficiently thorough analysis of the file' (Case T-210/02, British Aggregates v. Commission, EU:T:2006:253, para. 178), to 'the duty of the Commission to gather, in a diligent manner, the factual elements necessary for the exercise of its broad discretion' (Case T-333/10, Animal Trading Company (ATC) BV and Others v Commission, EU:T:2013:451, para. 84). Op. cit. De la Torre, Gippini Fournier, "Evidence, Proof," 296.

724 Op. cit. Ortiz Blanco, "EU Competition Procedure," 656.

Courts conduct a full control of the legality of the Commissions' decisions, irrespective of the complexity of the underlying economic assessments. Over the past several decades, established case law has significantly narrowed the scope of the Commission's discretion. Clear legal criteria derived from case law can transform discretionary powers into a "duty to act in a certain way".[725]

The review of decisions involving complex economic and technical assessments focuses on specific criteria, as established by settled case law[726], and aims to verify several key aspects: whether the relevant procedural rules have been followed, whether the statement of reasons is comprehensive, and whether there are any errors of law. It also examines the accuracy, reliability, and consistency of the facts, as well as whether the evidence presented includes all relevant data necessary to assess a complex situation. Additionally, the review seeks to identify any manifest errors in the assessment[727] of those facts or any misuse of powers. Finally, it determines whether the evidence can legitimately support the conclusions reached in the decision.[728]

Ultimately, the concept of "limited" judicial review underscores the boundaries imposed by the principle of separation of powers. When Courts acknowledge the limits of their review in the context of complex assessments, they recognize that stepping beyond these boundaries would violate this foundational principle. Any judicial attempt to decide would not constitute a review but rather an overreach into policy making. In such cases, courts are confined to determining whether there has been a manifest error of appraisal and can annul the Commission's decisions but cannot replace them with their own.[729] This situation gave rise to the concept

725 Op. cit. Laguna de Paz, "Judicial Review," 13.

726 Joined Cases T-80/06 and T-182/09 Budapesti Erőmű Zrt v European Commission, para 65; Case T-36/99 Lenzing v Commission [2004] ECR II-3597, para 150 and the case-law cited, upheld by the Court of Justice in Case C-525/04 P Spain v Lenzing [2007] ECR I-9947, para 59; Case T-11/07, Frucona v European Commission, para 108; Case T-196/04 Ryanair v Commission [2008] ECR II-3643, para 41; Case 42/84, Remia and others v Commission, Rec. p. 2545, para 34; Case 142/84 and 156/84 BAT and Reynolds v Commission, Rec. p. 4487, para 62; Case C-194/99 P Thyssen Stahl v Comisión, Rec. p. I-10821, para 78; Case T-271/03, para 185; Case T-398/07 Kingdom of Spain v Commission, para 60; Case T-336/07 Telefónica v Commission, para 69.

727 What does manifest error mean? For Bailey this implies 'an error (or series of errors) which is so serious as to cast sufficient doubt on the correctness of the conclusion. See more: Op. cit. De la Torre, Gippini Fournier, "Evidence, Proof," 300.

728 Op. cit. Laguna de Paz, "Judicial Review,".

729 In these situations, when the Commission makes competition policy options (discretionary powers), it is justified to call the courts review limited. In these cases, the Commission can decide what is most convenient to achieve the Treaty goals. For example, the Commission exercises discretion in setting priorities, launching sector inquiries, or allowing State aid under Article 108(3) TFEU. See more in: Op. cit. Laguna de Paz, "Judicial Review,".

of "marginalization of the marginal review," which suggests that marginal review should apply only when the Commission makes explicit economic policy choices, rather than being determined by the complexity of the assessment at hand. From this perspective, while cases involving economic policy would be categorically excluded from comprehensive review, all other economic factors—regardless of their complexity—would remain subject to full review under the EU Court's oversight.[730]

Second, in matters involving fines, it is important to note that the Commission determines the amount of fines according to very detailed criteria.[731] The General Court, in exercising its unlimited jurisdiction over fines, conducts a full merits review, effectively "standing in the shoes of the primary decision-maker."[732] This empowers the Court to annul, reduce, or even increase[733] the fines or penalty payments imposed by the Commission, regardless of whether the fines themselves have been specifically challenged.[734]

While Article 261 TFEU permits the General Court to substitute its assessment for that of the Commission, the Court is not obliged to conduct a new and comprehensive investigation of the case file, as the proceedings before the Courts of the European Union are inter partes. So, the burden lies with the applicant presenting arguments and evidence challenging the decision.[735]

Furthermore, as the fines are an instrument of competition policy, the Courts have been mindful of their role in ensuring compliance with EU competition law.[736] The Courts are not enforcement authorities; that role belongs exclusively to the Commission. Nor are the Courts the primary decision-making body, and

730 Op. cit. Lefèvre, "Competition Litigation," 74.

731 When determining the amount of a fine, the Commission considers both the gravity and the duration of the infringement. It applies its Guidelines, which set out the method the Commission is bound to follow in calculating fines, thereby ensuring legal certainty for undertakings. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 1.9.2006 (2006/C 210/02).

732 Loc. cit. Laguna de Paz, "Judicial Review," (see note 6).

733 The General Court is generally reluctant to increase fines. See more: Op. cit. Bailey, John, "Bellamy & Child: European Union Law of Competition," 1211; Principle of prohibition of 'reformatio in peius', known in certain Member States, does not apply at EU level. Czech Republic, Estonia, Spain, Latvia, the Netherlands and Slovenia. Op. cit. De la Torre, Gippini Fournier, "Evidence, Proof," 267.

734 Unlike the Commission, the General Court is not bound by the Fining Guidelines when exercising its powers under Article 261 TFEU. Nevertheless, the Court has generally adhered to the principles outlined in the Guidelines when reviewing fines. *BASF AG and UCB SA v Commission, Joined Cases T-101/05 and T-111/05, 2007,* 213 – 214. Article 261 TFEU, Article 16 of the Merger Regulation, Article 31 of the Regulation 1/2003; *Groupe Danone v Commission, Case C-3/06 P, 2007, 61, 62, 65.*

735 Op. cit. Bailey, John, "Bellamy & Child: European Union Law of Competition," 1209.

736 Op. cit. Ortiz Blanco, "EU Competition Procedure," 657.

they lack the resources and mandate to independently determine an alternative fine. For this reason, in practice, Courts do not have too much room for amending the fine.[737] Instead, the Courts recognize the significant discretion granted to the Commission in assessing conduct and setting fines, noting that "the Commission enjoys a wide discretion when exercising its power to impose such fines".[738] The Courts may substitute the administrative decision only in cases where it is evident that the conduct warrants a different fine. Any adjustment must be based on evidence presented during the proceedings, either from the materials gathered in the administrative procedure or from evidence provided by the applicant to support their legal arguments, as the Courts are not expected to conduct independent investigations.[739]

One might question why fines are subject to full review, while in the context of legality review, the focus remains on upholding the principle of separation of powers. The extent of the General Court's review under its unlimited jurisdiction requires balancing conflicting considerations. On the one hand, legislature has intentionally granted the Commission a certain level of discretion in determining fines or penalty payments. On the other hand, the exceptionally high fines imposed by the Commission, combined with the fact that they are set by an administrative body, raise concerns about compatibility with fundamental rights under Article 6 (1) ECHR and Article 47 of the EU Charter. Reconciling these interests: preserving institutional balance while mitigating the significant adverse effects of fines on undertakings, explains the divergence between the full review of fines and the limited scope of legality review.[740]

6.4. Outcomes of Judicial Review

When the Court determines that an action for annulment is well-founded, it declares the contested act void, either in whole or in part, and issues a judgment.[741] Following annulment, the Commission is obligated to take the necessary

737 Case C-386/10 P, para 76.

738 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, para 172; Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, para 123; and Case T-76/08 EI du Pont de Nemours and others v Commission, para 124.

739 Case C-389/10 P, para 129; and Case C-386/10 P Chalko v Commission, para 52.

740 Op. cit. Lefèvre, "Competition Litigation," 75.

741 Article 264 TFEU; Article 87 of the Rules of Procedure of the Court of Justice; Judgments must include key elements such as the identification of the Court, the date of delivery, the names of participating judges, the Advocate General, and the Registrar, as well as a summary of the facts, legal grounds, and the operative part of the decision, including cost determinations.

measures to comply with the judgment.[742] This may involve issuing a new decision, revisiting the case, or making adjustments to rectify the legal deficiencies identified by the Court.

In cases involving fines, the outcome often includes full annulment of the fine as set by the Commission. Utilizing its unlimited jurisdiction, the General Court frequently adjusts the amount of the fine directly, applying the Commission's own guidelines rather than its own methodology. This approach avoids remitting the case back to the Commission for recalculation.[743]

Judgments become binding from the date of delivery.[744]

In certain circumstances, the Court may issue an order (fr. *ordonnance*). Such orders can also conclude a case, for instance, by declaring the action inadmissible, noting the withdrawal of proceedings, or determining that there is no longer a need to rule on the substance of the case.[745]

Additionally, during the proceedings, the Court may issue orders on incidental matters that do not conclude the case, such as granting third-party interventions, addressing confidentiality issues, or deciding on requests for interim measures.[746] Such orders cannot be challenged independently but may be addressed in an appeal against the Court's final decision.

6.5. Appeals to the Court of Justice

Judgments of the General Court may be appealed, in whole or in part, to the Court of Justice by the party that was unsuccessful. Each year, a significant number of General Court judgments in competition cases are brought before the Court of Justice.[747]

Decisions of the General Court may be appealed to the Court of Justice on the following grounds:

- lack of competence of the General Court
- procedural errors before the General Court that adversely affect the appellant's interests
- infringement of EU law by the General Court.[748]

742 Article 266 TFEU.
743 Op. cit. Ortiz Blanco, "EU Competition Procedure," 658.
744 Article 91 of the Rules of Procedure of the Court of Justice.
745 European Commission, Antitrust Manual of Procedures, 2019, Court litigation.
746 Ibid.
747 Ibid.
748 Article 58 of the Statute of the Court of Justice.

Appeals can be brought against:

- final decisions of the General Court
- decisions of the General Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.[749]

The appellant may request the decision to be set aside in whole or in part but cannot seek a different form of order than that sought at first instance. To avoid inadmissibility, the appeal must specify the contested points of the General Court's reasoning and provide detailed arguments on alleged errors of law. [750]

6.5.1. Procedure for appeals

The procedural framework for appeals is outlined in the Statute of the Court of Justice and its Rules of Procedure.

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against. Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, intervenes other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.[751]

The review of General Court decisions is conducted by a Reviewing Chamber of five judges, designated annually for this purpose.[752] The Registry of the Court of Justice transmits the decision along with the case file to the First Advocate General, who may propose a review of a General Court decision, forwarding the proposal to the Presidents of the Court of Justice and the Reviewing Chamber. Upon receipt, the Registrar communicates the case file to the Reviewing Chamber members, and the President of the Court appoints a Judge-Rapporteur from the Reviewing Chamber. The Reviewing Chamber decides whether to proceed with the review based on the Judge-Rapporteurs proposal. If a review is granted, the decision identifies the specific questions for examination. The Registrar promptly notifies the General Court, parties to the original proceedings, and other interested persons of the decision, and publishes the review details and questions in the Official Journal.[753]

749 Article 56 of the Statute of the Court of Justice.
750 Practice Directions to Parties Concerning Cases Brought Before the Court, p. 25.-37.
751 Article 56 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union.
752 Article 191 of the Rules of Procedure of the Court of Justice.
753 Article 192 and 193 of the Rules of Procedure of the Court of Justice.

The procedure before the Court of Justice is divided into two stages: written and oral.

The written procedure in an appeal closely resembles the procedure for direct actions. The written procedure involves the submission and exchange of documents, including applications, statements of case, defences, observations, and replies, as well as supporting papers and certified copies. These are communicated to the parties and the relevant EU institutions whose decisions are being challenged. [754]

The oral procedure, on the other hand, includes hearings where agents, advisers, and lawyers present their arguments, and the Advocate-General delivers their submissions. Witnesses and experts may also be heard during this stage. However, if the Court determines that the case does not raise any new points of law, it may decide, after consulting the Advocate-General, to proceed without a submission from them.[755] In accordance with conditions laid down in the Rules of Procedure, the Court of Justice, having heard the Advocate-General and the parties, may dispense with the oral procedure.[756]

Parties with an interest in the appeal may submit a response within two months of receiving the appeal. Responses should focus on whether the appeal should be allowed or dismissed and must address the pleas in law raised by the appellant without reiterating unnecessary factual or legal background unless disputed. [757]

If a party wishes to dispute an aspect of the General Court's decision not addressed in the main appeal, they must file a cross-appeal as a separate document within the same time limit for responses. Cross-appeals, must set out distinct pleas in law and legal arguments. Other parties may respond to the cross-appeal within two months, with responses limited to addressing the pleas raised in the cross-appeal.[758]

6.5.2. Scope of review by the Court of Justice

An appeal to the Court of Justice shall be limited to points of law.[759] The Court of Justice does not re-examine the facts unless it is shown that the General Court has clearly misinterpreted the evidence.

[754] Practice Directions to Parties Concerning Cases Brought Before the Court, p. 25.-37.
[755] Article 20 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union.
[756] Article 59 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union.
[757] Practice Directions to Parties Concerning Cases Brought Before the Court, p. 25.-37.
[758] Articles 177 and 178 of the Rules of Procedure of the Court of Justice.
[759] Article 58 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union.

Also, it should be emphasized that the Court of Justice focuses on reviewing the judgment of the General Court, not the administrative decision that was the subject of the General Court's judgment. Therefore, the purpose of the review is to determine whether the General Court in its decision properly considered all the arguments raised by the appellant. The appellant must specify the precise aspects of the judgment they are challenging and present legal arguments to support their appeal, without merely repeating arguments already rejected by the General Court. Additionally, the appellant cannot rely on legal arguments that were not raised before the General Court.[760]

Regarding the factual state of the case, the Court of Justice reviews the General Court's legal characterization of the facts and the legal conclusions drawn from them. The General Court alone determines the value of the evidence presented, provided the evidence was properly obtained and the general principles of law, including procedural rules on the burden of proof and evidence-taking, were observed. Unless the General Court has fundamentally misconstrued the evidence, its appraisal does not constitute a point of law subject to review by the Court of Justice.[761]

6.5.3. Outcomes of the review

If an appeal to the Court of Justice is successful and the General Court's judgment is quashed, the Court of Justice may either deliver a final judgment itself or remit the case to the General Court for a final ruling. In the latter scenario, the General Court is bound by the Court of Justice's findings on points of law.[762]

In merger cases, if the Court of Justice annuls all or part of a Commission decision subject to the time limit in Article 10 (5) of the Merger Regulation, the concentration must be re-examined by the Commission under Article 6 (1). This requires the Commission to reopen its investigation unless the concentration has been abandoned in the meantime. The re-examination must account for the prevailing market conditions at the time.[763]

An appeal to the Court of Justice does not automatically suspend the judgment of the General Court.[764] However, under Articles 278 and 279 TFEU, the Court of Justice may order the suspension of the General Court's judgment and impose any necessary interim measures.

[760] Op. cit. Bailey, John, "Bellamy & Child: European Union Law of Competition," 1247.
[761] Ibid. 1246.
[762] Article 61 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union
[763] Op. cit. Bailey, John, "Bellamy & Child: European Union Law of Competition," 750.
[764] Article 60 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union.

6.6. Interim measures

The appeal against the Commission's decisions to the General Court does not have a suspension effect. In order to prevent the enforcement of the Commission's decision parties to the proceedings may, based on articles 278 and 279 of the TFEU and in accordance to articles 156 to article 160 of the Rules of procedure of the General Court[765], request from the General Court to order suspension of the decision or other interim measures.

Proceedings for interim measures before the General Court constitute provisional legal protection granted in favour of a party before the main action is decided before the General Court[766]. These proceedings are ancillary to the main proceedings, and it is admissible only if applicant is challenging Commission's decisions in main proceedings. It is important to emphasize that proceedings for interim measures may not in any way prejudice the judgement of the EU Courts in the main proceedings. In that sense the Court's decision on interim measure may not be such that in advance neutralize the consequence of the decision on the substance.

6.6.1. Types of measure and substantive requirements

Parties who are challenging Commission's decision in the proceedings before the General Court can based on article 278 of the TFEU request from the General Court to suspend Commission decisions. If the Court find that request justified contested decision will not be enforced until the Court decide on the merits in the main proceedings.

If the suspension of the operation of the contested decision does not suffice to prevent irreparable damage from occurring, the Court may prescribe any other interim measure[767]. The legal possibility which enables to Court to suspend contested decision or/and to prescribe any other interim measure empowers the Court to impose the interim relief tailored to the case. In line with that, the General Court will be based on detailed analysis in each case and considering all circumstances of each case decide whether the requested measure is necessary to prevent serious and irreparable damage.

The General Court will grant suspension of the decision or/and interim measure if it finds that three conditions are met cumulatively:

765 Rules of procedure of the General Court, *OJ L 105, 23.4.2015, p. 1–66.*

766 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, "EU Procedural Law," Oxford: OUP Oxford, 2014, 563.

767 Ibid. 566.

1. that the action in main proceedings does not appear *prima facie* (at the first sight), to be without reasonable substance;
2. that the proposed measure is urgent and that it is necessary to prevent serious and irreparable harm to applicant;
3. that the interest in obtaining the interim measure outweighs potential harm (so called balance of interest test).[768]

Interim measures before the General Court are granted very rarely. According to available data, 80 percent of the applications for interim measures are dismissed, what have been criticized by legal scholars[769]. For example, in Pellegrini v. Commission[770], the General Court dismissed the request for interim measure stating that the claim did not show *prima facie* that the EU law has been violated. In case *Van den Bergh Food v. Commission*[771] the General Courts granted interim relief saying that "immediate execution of the contested decision pending the conclusion of the proceedings on the main action would entail the danger not only of causing the applicant serious and irreparable damage but also of furthering a situation of legal uncertainty".[772]

6.6.2. Procedure for the interim measure before the General Court and the Court of Justice

An application for interim measure is adjucated upon way of summary procedure[773]. The President of the General Court has a sole power to decide on the interim measure. According to the article 157 of the Rules of procedure of the General Court the President of the General Court may also decide to send application to opposite party of may grant the application even before the observation of the opposite party have been submitted. Further, the President of the Court

768 See more on that: Koen et al, "EU Procedural Law," 591 – 615.

769 Barbier La Serre, Eric, Interim Relief Before the EU Courts: Three Great Fundamentals and Two Fundamentals That Need a Rethink, May 2013 (https://www.pymnts.com/cpi-posts/interim-relief-before-the-eu-courts-three-great-fundamentals-and-two-fundamentals-that-need-a-rethink/).

770 Case C-114/08 P(R), Pellegrini v. Commission, Order of the president of the Court of 17 July 2008, ECLI:EU:C:2008:438.

771 Case T-65/98 R, Van den Bergh Foods v Commission, Order of the President of the Court of First Instance, 7 July 1998. https://curia.europa.eu/juris/showPdf.jsf;jsessionid=1AE0D27C5045C17C45A401C9E073F-C53?text=&docid=104092&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1814753.

772 Ibid. point 74.

773 See: Chapter 16 of the Rules of Procedure of the General Court, Section 1, Expedited Procedure.

may, if he finds it appropriate prescribe measures of organization of procedure and measures of inquiry. The decision of the President of the General Court is in the form of reasoned order[774]. As was emphasized earlier in the text, the order shall have only an interim effect and shall be without prejudice to the decision of the General Court on the substance of the case[775]. Application for interim measures can also be requested before the Court of Justice[776]. Application for interim measures before the Court of Justice can only be made by the party to a case before the Court and if the application relates to that case[777]. Procedure for interim measures before the Court of Justice is similar to the procedure regulated by the Rules of procedure of the General Court.

[774] Article 158 (1) of the Rules of Procedure of the General Court.
[775] Article 158 (4) of the Rules of Procedure of the General Court.
[776] Articles 160 – 164 Rules of Procedure of the of the Court of Justice.
[777] Articles 160 (2) Rules of Procedure of the of the Court of Justice.

7. STATE AND COMPETITION[778]

7.1. Introduction

This section explores the anticompetitive measures of Member States that may infringe competition and breach the general obligation of Member States regarding sincere cooperation and their specific obligations related to public and privileged undertakings. The purpose of this section is to shed light on the limitations of the Member States, in particular public authorities, to intervene in the markets, when the effect of that intervention could be the distortion of competition within the internal market. These limitations frame the general duty of the state to intervene in the market, with a view to achieving legitimate public policy goals and support the concept of a social market economy.[779]

The primary aim of this Section is to describe the main idea behind Article 4 (3) of the Treaty on European Union (TEU) related to the Member States' obligations of sincere cooperation and Article 106 of the Treaty on the Functioning of the European Union (TFEU), whose goal is to prevent the anticompetitive behaviour of Member States related to public and privileged undertakings, to establish limits and conditions for exceptional no application of competition rules with a view to ensure effective performance of public service obligations assigned to those undertakings. The duty of sincere cooperation essentially aims to ensure that European competition law, as a specific segment of the supranational European Union law, is not deprived of its *effet utile*, even in situations where the Member States exercise their own competences. The exercise of such competences could lead to encouragement or even mandating the undertakings to behave in line with the EU competition rules, or to reinforcing the anticompetitive effects of such behaviour. It could also take the form of direct measures, notably legislation, delegating powers to private economic operators to take decisions that may affect competitive markets. Article 106 TFEU represents an exception to this duty. Considering that its provisions are brief, while at the same time they represent limitations, but also allow deviation from the rules on the protection of competition, it is very important to look at the practice of the European Court of Justice (ECJ), which has in the past few decades been especially focused on defining the legitimate interests of the Member States.

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[779] Consolidated version of the *Treaty on the Functioning of the European Union (TFEU)*, OJ C 326, 26.10.2012, p. 47–390, Article 3(3)

7.2. The normative framework on the obligation of competitive conduct of a State

7.2.1. General obligation of competitive conduct: Article 4 TEU in the context of application of Articles 101, 102, and 106 TFEU

Article 3 (3) of the TEU, further elaborated in Protocol 27 to the Treaties, stipulated a general principle of the protection of competition and set the objective of a highly competitive social market economy. Article 3 (1)(b) TFEU as the "fundamental and independent principle to which the competition provision is merely ancillary,"[780] attributing to the Union the exclusive competence in establishing the competition rules necessary for the functioning of the internal market. The requirement to observe the principle of an open market economy and free competition is further stressed in Article 119 (1) TFEU, which applies to the activities of the Member States.

In the Treaty of Lisbon, the rule corresponding to Article 10 EC is now Article 4 (3) TEU and it stipulates the general duty of sincere cooperation or loyalty of the Member States. This article imposed a duty on Member States to take all appropriate measures to secure fulfilment of the obligations stipulated in the Treaties, and introduced the negative obligation to abstain from measures that could jeopardize the fulfilment of the objectives of the European Union. Essentially, this article is intended to prevent the Member States from adopting measures depriving TFEU rules of their *effet utile*.[781] Several Court of Justice cases reviewed the application of this article, where parties claimed that national legislation or implementing regulatory measures that are not compatible with the rules on competition stipulated in the TFEU, are not enforceable. The duty to cease to implement national legislation that contravenes the competition provisions of the Treaty applies not only to national civil or criminal courts, but also regulatory agencies, including competition protection bodies.[782] The Court of Justice strived to narrow the interpretation of this doctrine, and in a number of cases in the early 1990s it formulated a strict criteria, clarifying that anticompetitive state measures are

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780 Joined opinion of Mr Advocate General Tesauro delivered on 14 July 1993, Criminal proceedings against Wolf W. Meng, EU:C:1993:308, paragraph 25.

781 José Luís Buendía Sierra, "Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures," in *The EU Law of Competition*, eds. Jonathan Faul and Ali Nikpay (Oxford: Oxford University Press, 2014), 810–811.

782 Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, Judgment of 9 September 2003, EU:C:2003:430, paragraphs 49–50.

those which impose or induce anticompetitive behaviour or delegate significant powers to private undertakings.[783]

Additionally, in its chapter devoted to competition protection, the TFEU contains several private law provisions that impose certain obligations on undertakings, such as Articles 101 and 102. However, Member States might well incite the breach of both articles. This will briefly be discussed further in the text, regarding Article 106 (1), related to undertakings that exercise special or exclusive rights, and illustrated by landmark cases of the EU courts which relate to infringements and abusive behaviour prohibited in Articles 101 and 102, in the context of application of Article 106 (1). The Court of Justice aimed to strike a balance between the need of the state to secure the effective provision of public services and acting as the agent of dominant undertakings. The case law where Article 4 (3) is invoked often relates to state action doctrine and it is important to note that Article 4 (3) TEU does not represent grounds for application if the Member State requires or reinforces an anticompetitive agreement or delegates powers to private undertakings.[784] The landmark *G.B.-INNO* case specified a doctrine that a combined effect of Article 4 (3) TEU and Articles 101 and 102 TFEU imply that a Member State could infringe EU law by maintaining in force rules that deprive the competition rules of their effectiveness.[785] As the Court of Justice concluded in case *P Van Excke v ASPA*, a Member State would be in breach of Article 4 (3) in conjunction with Article 101 TFEU if it requires or favours "the adoption of agreements, decisions or concerted practices contrary to Article (101) or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders' responsibility for taking decisions affecting the economic sphere."[786]

Article 106 (1) TFEU applies both to state-owned undertakings and undertakings that are privately owned. The EU law is neutral on the character of the economic system of a Member State and the issue of public ownership of enterprises operating in the public sector of the economy; it also does not prejudice the rules

783 Criminal proceedings against Wolf W. Meng, Judgment of the Court of 17 November 1993, EU:C:1993:885; Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG., Judgment of the Court of 17 November 1993, EU:C:1993:886.

784 See Criminal Proceedings against Wolf W. Meng, Judgment of 17 November 1993, EU:C:1993:885, paragraph 14; Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di. Genova Coop, arl and Others, Judgment of 18 June 1998, EU:C:1998:306.

785 SA G.B.-INNO-B.M. v. Association des détaillants en tabac (ATAB), Judgment of 16 November 1977, EU:C:1977:185.

786 Pascal Van Eycke v. ASPA NV, Judgment of 21 September 1988, EU:C:1988:427, paragraph 16. See also Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG., Judgment of 17 November 1993, EU:C:1993:886, paragraph 14.

governing the system of property ownership in Member States.[787] This principle of neutrality coincides with the duty of the Member States to not enact or maintain in force measures contrary to the competition rules, as stipulated in Article 106 (1). In the context of Article 106 (2), which provides a certain exception for services of general economic interest and derogation from competition rules, both provisions aim to reconcile the Member State's interest in protecting the public sector as the instrument of economic and social policy, with the interest of the EU to ensure compliance with the rules on competition and preserve the unity of the internal market.[788] Although not addressed in this section, the rules on State Aid (Articles 107 and 108) are relevant as the most significant instruments of anticompetitive regulation.

Article 106 (1) goes beyond Article 4 (3), broadening the sphere of application beyond the general principle of sincere cooperation. It imposes strict duty on Member States on top of competition rules and included infringements of the rules on free movement, such are Article 34 TFEU on free movement of goods and Article 54 related to services. State anticompetitive measures also affect rules on the common market in the areas covered by free movement provisions, such as Articles 34 and 56 TFEU. The application of free movement provisions and the ECJ practice show that in regulating anticompetitive state action, Article 4 (3) TEU should be understood as a subsidiary in a sense that the Member States are obliged to abstain from measures which could jeopardize the attainment of the objectives of the Treaty.[789]

Moreover, different aspects of loyalty stipulated in Article 4 (3) TEU are related to Articles 288 and 291 TFEU regarding the duty of the Member States to take measures required to implement European Union directives and other binding acts, as well Article 197 TFEU related to the effective implementation of EU law, Articles 114 (4) and (5) on deviations from harmonization measures.[790]

787 TFEU, Article 345.

788 Commission of the European Communities v. Kingdom of Spain, Judgment of 13 May 2003, EU:C:2003:272, paragraph 82.

789 See, for example, Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg, Judgment of 7 May 1991, EU:C:1991:193, paragraph 14; Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others, Judgment of 15 October 1987, EU:C:1987:442, paragraph 12.

790 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014), 13 –14.

7.2.2. The importance of Article 106 in defining specific duties related to the competitive neutrality of state-owned and privileged enterprises

Article 106 stands as a specific manifestation of the duty of loyalty to the European Union. It contains two prohibitions and provides the European Commission with powers to ensure compliance with the provisions of this Article. Article 106 (1) represents a prohibition addressed directly to Member States, as it applies only to them.[791] This Article is ambiguous. While its first paragraph (Article 106 (1) TFEU) can be said to foster liberalization and open state monopolies to competition law, the second paragraph (Article 106 (2)) provides that state monopolies are permitted and may be exempted from competition law based on the general interest criterion.[792]

Art 106 TFEU (former Article 86 of the Treaty Establishing the European Community)

1. *In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*
2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*
3. *The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*

From the outset it is worth noting that Article 106 (1) does not apply independently, but only in conjunction with other articles of the Treaties. Rules provided for in Article 18 TFEU (non-discrimination provision) and Articles 101 to 109 TFEU (competition provisions) are expressly mentioned, but measures that infringe the free movement of goods and services, freedom of establishment, and free movement of workers could also trigger state liability for the abuses carried

[791] Criminal proceedings against Paul Corbeau, Judgment of 19 May 1993, EU:C:1993:198, paragraphs 10–12.
[792] Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007), 445.

out by the state- or privately-owned enterprises. Article 106 (1) further accentuates that free movement rules must be respected when adopting measures related to public or privileged undertakings and opens the possibility to apply special procedures provided for by Article 106 (3).

Article 106 (2) is a strict exemption to a competitive neutrality of the state, which applies only "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned" to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly. In both situations, privileged undertakings could be owned by the state, local authorities, private parties, including mixed ownership and concession arrangements.

Therefore, Article 106 represents the European competitive neutrality framework, and similar frameworks exist in non-European countries.[793] In the context of the public sector of the economy, competitive neutrality means that public undertakings may not be advantaged by enjoying privileges and immunities that are not given to their private competitors. In providing services of general economic interest, many such entities are market incumbents and enjoy government subsidies, mostly as compensation for public services obligations. The most common rationale for protecting state-owned enterprises from competition in network industries relates to public service obligations and the provision of essential services at affordable rates. In some countries public enterprises are tools of industrial policy and/or represent a source of fiscal revenues that the national treasury depends on. In some countries public undertakings owned by state are major employers, and their existence and preferential treatment is backed by interest group pressures. In network industries the outcome of such treatment usually raises concerns regarding predatory pricing, cross-subsidization and limitation of access to infrastructure for privately held enterprises.[794]

7.2.3. The ambit of Article 106 (3) TFEU in fostering market liberalization

Through harmonization, based on Article 114 TFEU, the EU has pursued the opening of sectors previously reserved for state enterprises. Article 106 (3) TFEU

793 On the international level, Competitive neutrality is supported by the OECD. OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD, 2015), first adopted in 2005.

794 Antonio Capobianco, Hans Christiansen, "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options," *OECD Corporate Governance Working Papers*, No. 1, (Paris: OECD 2011), https://doi.org/10.1787/5kg9xfgjdhg6-en.

provides both a special procedure for the adoption of legal acts, regarding the general procedural framework specified in Articles 289 to 297 of the TFEU, and an enforcement mechanism which falls outside of the application of Article 258 TFEU, as the general enforcement provision. Article 106 (3) stipulates that the Commission will ensure the application of Article 106 (1) and address appropriate decisions or directives to Member States, where necessary. The Commission adopts decisions in situations where it has been established that a Member State is in breach of an EU obligation. In the case of some of the decisions – which are an additional tool for further liberalization of transport, telecommunications, postal services and energy – Member States challenged them before the Court of Justice, claiming that the Commission was acting ultra vires, since decisions are binding on the Member States.[795]

The European Commission has the power to legislate the elimination of existing and prevention of future infringements of the Treaty through directives. The Commission explicitly stated that, by way of directives, it aims to progressively reduce *ex ante* sector specific legislation as competition in the markets develops. It also expressed the priority of applying competition law only, while maintaining *ex ante* regulatory instruments only where there is no effective or sustainable competition. As an example, the concern regarding the fragmented nature of the telecommunications market in the EU has led the Commission to adopt two directives, on the telecommunications terminal equipment market[796] and on telecommunications,[797] to specify the obligations of Member States arising under Article 106 (1). Both directives were challenged before the Court of Justice,[798] which upheld the Commission's competences, but annulled several articles of the Directive on terminal equipment since the Commission had failed to determine the special character of rights. It is worth noting that the Commission has rel-

795 Commission of the European Communities v. Hellenic Republic, Judgment of 30 June 1988, EU:C:1988:354.

796 Commission Directive 88/301/EEC *Commission Directive 88/301/EEC* of 16 May on competition in the markets in telecommunications terminal equipment, OJ L 131/73 1998, replaced with Commission Directive 2008/63/EC, OJ L 162/20. This Directive was repealed by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) *OJ L 321, 17.12.2018, p. 36–214.*

797 Commission Directive 90/388/EEC, OJ L 192/10, replaced by Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, Text with EEA relevance, *OJ L 249, 17.9.2002, p. 21–26.*

798 French Republic v. Commission of the European Communities, Judgment of 19 March 1991, EU:C:1991:120; Judgment of the Court of 17 November 1992, Kingdom of Spain, Kingdom of Belgium and Italian Republic v. Commission of the European Communities, Judgment of 17 November 1992, EU:C:1992:440.

atively wide discretion, and third parties, as a rule, cannot bring action against Commission decisions brought under Article 106 (3).[799] Apart from specifying the meaning and extent of obligations under Article 106 (1), the second purpose of the directives, as quasi-legislative instruments, is to detect future infringements. The best example of a directive being used as an instrument for detection is the Directive on the transparency of financial relations between Member States and their public undertakings, enacted with the aim of contributing to the detection of State aids, which set up the obligation of maintaining transparent and separate accounts for undertakings with special or exclusive rights or entrusted with the operation of services of general economic interest, but also perform other activities.[800]

So far, the Commission has used directives enacted under Article 106 (3) in relation to the telecommunications sector and financial transparency of public undertakings, but not in the wider context of liberalization of network industries. It is worth mentioning that the competence of the Commission in this context overlaps with Article 14 TFEU, granting legislative competences to the Council and the European Parliament to regulate services of general economic interest by means of regulations, based on the Commission's initiative.

Whereas decisions have direct effect, directives do not declare that infringements have been committed. In principle, directives are not directly applicable but require the adoption of national implementation measures. Unlike decisions, directives can be horizontal and be binding on all Member States. In addition to specifying the extent of the application of Article 106 (1), horizontal decisions may also further specify the extent of the exception related to public service compensation provided by Article 106 (2) TFEU, as a quasi-legislative instrument in the "post-Altmark package" (so-called "Almunia package").[801] However, directives do not relate to the behaviour of undertakings, but to the Member States and their measures related to the conduct of public or privileged undertakings.

799 Regarding of the rights of third parties, see Commission of the European Communities v. T-Mobile Austria GmbH, Judgment of 22 February 2005, EU:C:2005:98.

800 Commission Directive 80/723/EEC concerning the transparency of financial relations between Member States and their public undertakings, now Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17–25.

801 An example is the Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106 (2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest OJ L 7, 11.1.2012, p. 3–10.

7.2.4. State monopolies of commercial character

Article 37 TFEU aims to prevent state monopolies of a commercial character from discriminating against undertakings that are nationals of other Member States. It contains a general prohibition of discrimination regarding the conditions under which goods are marketed. Its importance in mandating the policy of non-discrimination in the exercise of state trading and its liberalization has been extensively elaborated in academic literature.[802] In fact, the liberalization of the public sector of the economy has led to the weakening of the importance and reduction of the domain of state monopolies.

The first paragraph of Article 37 states: "Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States." It further clarifies that this requirement is applicable to any entity through which the state, either by law or in fact, directly or indirectly, supervises, determines or influences in a significant way imports or exports between Member States, or delegates the monopoly to others. The requirement for the control or appreciable influence on the behaviour of an undertaking clarifies that this provision relates to both the public and privileged undertakings in the sense of Article 106 (1). Discrimination under Article 37 relates to legal monopolies, exclusive and special rights, but as a rule cannot be the outcome of a dominant position. The reference to a monopoly does not mean the State's influence of a single undertaking; it can also apply to an oligopoly.[803] Pursuant to Article 37 (2) TFEU, Member States must refrain from introducing any new measure that is contrary to Article 37 (1) TFEU or that restricts the scope of the Treaty provisions dealing with the prohibition of customs duties and quantitative restrictions between Member States, with the exception set out in Article 37 (3) TFEU providing more leeway for agriculture.

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802 See in particular Sierra, "Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures," 809–882; José Luís Buendía Sierra, *Exclusive rights and state monopolies under EC law* (Oxford: Oxford University Press 1999); Erika M. Szyszczak, *The regulation of the state in competitive markets in the EU* (Oxford: Hart Publishing, 2007); Janja Hojnik, "Article 37 [State Monopolies of Commercial Character]," in *Treaty on the Functioning of the European Union – A Commentary, Volume I: Preamble, Articles 1–89*, eds. Hermann-Joseph Blanke, Stelio Mangiameli, Springer Commentaries on the International and European Law (Cham: Springer International Publishing, 2021), 813–826. The text in this Chapter is based on the author's broader analysis published in: Aleš Ferčič, Tatjana Jovanić, "Anti-Competitive Measures of Member States: General Observations on Market Intervention," in *European Union Competition Law*, ed. Aleš Ferčič (Zutphen: Europa Law Publishing), 415–418.

803 Corinne Bodson v. SA Pompes funèbres des régions libérées, Judgment of 4 May 1988, EU:C:1988:225.

In cases of the alleged breach of the general duty to not discriminate against undertakings that are nationals of other Member States, the European Commission may bring the matter before the Court of Justice, in line with Article 258 TFEU, or act in line with the provision of Article 106 (3) TFEU. It can also address the appropriate directives or decisions to Member States, in the case of national monopolies. As this article is directly effective, the nationals of Member States can bring action. Article 37 TFEU obligates Member States to avoid imposing any new measure contrary to the principles stated in Article 37 (1) TFEU, or the measure limiting the scope of the Treaty Articles on the prohibition of customs duties and quantitative restrictions between Member States. Control over import or export does not have to be absolute; the measure should result in an appreciable influence on trade.[804]

Prohibited discriminatory behaviour has been detected in measures such as customs- and tax-related duties, entry restrictions in the form of quantitative limits related to the import and export of goods, including price controls for services. It should be noted that Article 37 is not applicable to services, unless a monopoly over certain services appreciably influences the trade in certain goods.[805] However, if the provision of services is related to the abuse of a dominant position, related to exclusive and special rights, as core elements of a revenue-producing monopoly, this could trigger the application of Article 106 TFEU. Discriminatory measures may take the form of exclusive rights, discriminatory taxation, duties on imports, etc. The obstacles are often introduced by quantitative restrictions or measures with equivalent effects, and states have attempted to defend them by referring to public interest aims.[806] In any case, measures should not be based on arbitrary discrimination and must be proportionate.[807] If the monopoly relates to the provision of services, in addition to the provisions on the free movement of services (Articles 56 to 62 TFEU), Article 106 (2) TFEU could be invoked to justify the revenue producing monopoly, if it is necessary to ensure the execution of services of general economic interest. If invoked, Article 106 (2) TFEU would imply that general economic interest is performed as an economically viable activity, the existence of a monopoly right is not the key element that enables an undertaking

[804] Commission of the European Communities v. Hellenic Republic, Judgment of 13 December 1990, EU:C:1990:470, paragraph 41.

[805] Corinne Bodson v. SA Pompes funèbres des régions libérées, Judgment of 4 May 1988, EU:C:1988:225, paragraph 10.

[806] See, for example, health goals as in the following case: Criminal proceedings against Harry Franzén, Judgment of 23 October 1997, EU:C:1997:504.

[807] Verein gegen Unwesen in Handel und Gewebe Köln e.V. v. Mars GmbH, Judgment of 6 July 1995, EU:C:1995:224, paragraph 15; Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag, Judgment of 26 June 1997, EU:C:1997:325, paragraph 19.

to operate, and it is not necessary to demonstrate that the survival of an undertaking would be threatened in the absence of such a monopoly.[808]

7.3. The duty of Member States concerning public and privileged undertakings under Article 106 (1)

7.3.1. The character of duty of the state regarding state measures under Article 106 (1) TFEU

Article 106 (1) imposes an obligation on the Member State to abstain from enacting or maintaining in force measures that are contrary to the rules contained in the Treaties, especially rules provided in Article 18 and Articles 101 to 109 of the TFEU. It should be emphasized that it obliges only the Member State, does not apply independently and is not limited only to conduct that could jeopardize competition. The potential for Member States to distort competition through measures that lead to the breach of Articles 101 and 102 would be scrutinized by reference to the principles derived from extensive court practice.

Article 106 (1) refers to State measures as acts undertaken by a State body in the exercise of public authority in the form of laws, implementing regulations, administrative measures and other public law instruments. The concept of State includes any public authority, including local administration.[809] However, as different Member States use different legal instruments, the criterion of private or public law must be complemented with the criterion related to the functional nature, in order to regulate the marketplace in the public interest.[810] Therefore, the term “state measure” encompasses administrative contracts and private contracts on concessions and similar forms of public–private cooperation that specify regulatory powers from the perspective of public interest.[811] The measure must not be of a general nature, but should be directed at public or privileged undertakings. If the measure applies in the same way to all undertakings in a particular sector and area, Article 106 (1) is not applicable. As explained above, the state measure falls

808 Richard Whish, David Bailey, *Competition Law* (Oxford: Oxford University Press, 2012), 245.

809 Société Civile Agricole du Centre d’Insémination de la Crespelle v. Coopérative d’Elevage et d’Insémination Artificielle du Département de la Mayenne, Judgment of 5 October 1994, EU:C:1994:368.

810 Sierra, “Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures,” 814.

811 If the exclusive rights were not stipulated by a concession contract between the public authorities and the operator, but the agreement between parties, they are not relevant for the application of Article 106 (1). Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, Judgment of 27 April 1994, EU:C:1994:171, paragraph 31.

under this article only if it is at the same time contrary to another provision of the Treaty on the Functioning of the European Union, as this article cannot be applied without the infringement of another rule of the TFEU and depends on the context of the consecutively applied rule. Rules provided for in Articles 18 (general principle of non-discrimination) and 101 to 109 TFEU (competition protection) are of particular importance, as are the rules on the free movement of goods, services and the freedom of establishment.

The effect of a State measure, in the form of granting special or exclusive rights, has a negative impact on the ability of the competitors to exercise economic activity under substantially equivalent conditions.[812] Measures include active deeds such as the imposition of more stringent requirements, such as a license fee not levied previously, imposition of discriminatory tariffs, the refusal to grant access to state-owned infrastructure, etc.

As interpreted by the Court of Justice and the European Commission, a State measure falls under Article 106 (1) when it *benefits* public undertakings or undertakings to which Member States grant exclusive or special rights, and/or these *undertakings represent the instrument* used by the Member State for the implementation of the measures, and/or the measure relates to granting or maintenance in force of an *exclusive right*.[813] Even though an undertaking may not directly receive benefits, the grant of exclusive rights could be used as an instrument for discriminating against other undertakings.

7.3.2. The notion of public and privileged private undertakings, exclusive and special rights

Article 106 (1) applies to State measures aimed at "public undertakings" and "undertakings to which Member States grant special or exclusive rights", which are distinct concepts. The Treaty does not define the term "undertaking", and therefore this concept should be considered in the context of Articles 101 and 102.[814] Since the Court of Justice has clarified that the concept of an undertaking encompasses any entity engaged in an economic activity, regardless of its status and the

[812] Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577, paragraph 24.

[813] Sierra, "Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures," 821–822.

[814] Whish and Bailey, *Competition Law*, 83–99; Okeoghene Odudu," The meaning of undertaking within 81 EC," in *Cambridge Yearbook of European Legal Studies*, Vol. 7, eds. John Bell and Claire Kilpatrick (Cambridge: Cambridge University Press, 2005), 209 –239.

means of financing,[815] it was necessary to determine what falls under "economic activities". The Court held that any activity related to offering goods or services in a given market represents an economic activity. [816] Case law has sometimes relied on other criteria, such as the exercise of the tasks in the public interest and prerogatives, e.g., "*rights and powers of coercion which derogate from ordinary law*",[817] the pursuit of objectives of general interest and "*public authority powers*".[818]

Even when the exercise of public powers is undisputable, when an entity is vested with public powers, this does not prevent it from being classified as an undertaking, given the remainder of its economic activities.[819] The Court assessed that for each activity exercised as an economic activity, an assessment must be carried out separately for each activity.[820]

Although some services provided by the State, such as defence and education, have a social character, utilities are considered economic services. In several decisions, the Court of Justice held that some social services may represent economic activities, such are ambulance services provided for remuneration,[821] employment procurement,[822] pension funds acting as an undertaking,[823] a body providing insurance against accidents at work and occupational diseases,[824] etc. However, in every case the relevant criterion is "solidarity" as a concept, as opposed to provision of services in the market. The solidarity principle transcends the social ob-

[815] Klaus Höfner and Fritz Elser v. Macrotron GmbH, Judgment of 23 April 1991, EU:C:1991:161, paragraph 21.

[816] Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten, Judgment of 12 September 2000, EU:C:2000:428, paragraph 75.

[817] SAT Fluggesellschaft mbH v. Eurocontrol, Judgment of 19 January 1994, EU:C:1994:7, paragraph 24.

[818] Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG), Judgment of 18 March 1997, EU:C:1997:160, paragraph 23.

[819] Aéroports de Paris v. Commission of the European Communities Judgment of 12 December 2000, EU:T:2000:290.

[820] Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio, Judgment of 1 July 2008, EU:C:2008:376.

[821] Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577, paragraphs 19–22.

[822] Federal Employment Office was the undertaking in Case C 41/90, Klaus Höfner and Fritz Elser v. Macrotron GmbH, Judgment of 23 April 1991, EU:C:1991:161.

[823] L.C. Nungesser KG and Kurt Eisele v. Commission of the European Communities, Judgment of 8 June 1982, EU:C:1982:211.

[824] Kattner Stahlbau GmbH v. Maschinenbau- und Metall- Berufsgenossenschaft, Judgment of 5 March 2009, EU:C:2009:127.

jective for the existence of an insurance or social security scheme and essentially entails involuntary subsidization and redistribution of wealth.[825]

Therefore, an undertaking is not subject to the Treaty competition provisions if it fulfils an exclusively social function (which undertakings in a particular branch of industry and a particular territory must be affiliated with), when the principle of solidarity is applied and the undertaking is subject to State supervision.[826] The other extreme of the solidarity principle, i.e., the situation when the economic nature is obvious but the service is financed on a solidarity basis, may see the application of Article 106 (2).

State-owned companies and bodies entrusted by the State, as well as quasi-governmental bodies, can all be considered undertakings for the purpose of Article 106,[827] unless they exercise the powers of public authority. "[A] d*istinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market [...] is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights.*"[828]

Performance of an essential public interest task may also be applicable to private enterprises as a criterion to be exempt from the application of Article 106 (1). Public enterprises are defined in Article 2(1)(b) of the Transparency Directive as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."[829]A dominant influence of the undertaking is presumed when a public authority directly or indirectly holds the major part of the capital, controls the majority of votes, or is authorized to appoint more than half of the members of the undertaking's governing body. The

825 Christian Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon, Judgment of 17 February 1993, EU:C:1993:63, paragraph 10.

826 "[W]here the scheme is financed by contributions the rate of which is not systematically proportionate to the risk insured and the value of the benefits paid is not necessarily proportionate to the insured person's earnings." Kattner Stahlbau GmbH v. Maschinenbau- und Metall-Berufsgenossenschaft, Judgment of 5 March 2009, EU:C:2009:127, paragraphs 50–55.

827 L.C. Nungesser KG and Kurt Eisele v. Commission of the European Communities, Judgment of 8 June 1982, EU:C:1982:211.

828 Diego Cali & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG), Judgment of 18 March 1997, EU:C:1997:160, paragraphs 16–17; Commission of the European Communities v. Italian Republic, Judgment of 16 June 1987, EU:C:1987:283, paragraphs 7–8.

829 Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version), *OJ L 318, 17.11.2006, p. 17–25.*

influence may be exercised by all levels of the state, including the local administration, or undertakings organized as entities without legal personalities performing an economic activity.

Article 106 (1) applies to State measures related to "privileged" undertakings having exclusive or special rights, which may be publicly or privately owned. Therefore, it is necessary to explain what the special or exclusive rights entail, as the privilege in the form of a special or exclusive right is a key determinant of the notion of the privileged undertaking. Initially, it was unclear whether special and exclusive right were the same concept. However, the Court of Justice reasoned that exclusive rights are distinct from special rights,[830] and the difference has been expressed in the Transparency Directive.

As stated in Article 2(g) of the Directive 2006/111/EC, special rights mean: *rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area:*

i. limits to two or more the number of such undertakings, authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria; or

ii. designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an activity; or

iii. confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.[831]

Special rights are related to the provision of services or economic activities; they are granted to a limited number of undertakings based on a discretionary decision by a public authority, which results in limitation of the number of operators

[830] French Republic v. Commission of the European Communities, Judgment of 19 March 1991, ECLI:EU:C:1991:120.

[831] Regarding the third criterion on legal and regulatory advantages, it should be noted that after several articles of the Commission Directive 8/301/EEC on Telecommunications Equipment (OJ L 131/73, 1988) have been declared void, in the subsequent Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment (OJ L 162/20, 21 June 2008, 44.), the concept of special rights was defined as "advantages which substantially affect the ability of any other undertaking to import, market, connect, bring into service and/or maintain telecommunication terminal equipment in the same geographical area under substantially equivalent conditions".

or the selective choice of the operators. Situations where access to an activity is regulated by nonarbitrary predetermined criteria and there is no limit to the number of operators, are not considered as the granting of special rights. Therefore, if a body has been entrusted with registration and certification tasks, according to a predefined criterion, and if no competitive advantages can be created favoring certain undertakings, to the detriment of other undertakings, such tasks cannot be considered as the granting of special or exclusive rights.[832] However, such schemes could be assessed under the free movement provisions of the Treaty.

Other than restricting the number of operators, special rights may be the consequence of granted privileges resulting in competitive advantage, either by exercising a specific activity or conferring specific rights to a designated entity, which may affect the economic activity of competitors in the same geographical area.[833] Such privileges for the performance of economic activities transcend the sphere of general economic interest services and may apply to a wide array of economic activities.

Exclusive rights establish legal monopolies, which could eventually remedy market failures, enhance welfare and contribute to the realization of nonmarket values, such are social justice and environmental concerns.[834] An exclusive right is a legal monopoly granted by the public authority to an entity that exercises a particular economic activity on an exclusive basis. Sometimes an oligopoly of firms entitled to exercise the same activities on the exclusive basis may also be considered as the exclusive right, as the Court of Justice ruled in a case related to waste collection.[835] Pursuant to Article 2(f) of Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings, exclusive rights means "rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area." Exclusive rights may be granted to different undertakings operating in different geographical areas, meaning that a public authority may grant more than one exclusive right, but only one for a specific territory.[836]

[832] Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v. SOA Nazionale Costruttori – Organismo di Attestazione SpA, Judgment of 12 December 2013, EU:C:2013:827 paragraph 42.

[833] Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577, paragraph 24.

[834] Richard B. McKenzie and Dwight R. Lee, *In Defense of Monopoly, How Market Power Fosters Creative Production* (Ann Arbor: The University of Michigan Press, 2008).

[835] Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune, Judgment of 23 May 2000, EU:C:2000:279.

[836] Société Civile Agricole du Centre d'Insémination de la Crespelle v. Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne, Judgment of 5 October 1994,

In a number of cases, some of which will be addressed further in text, court practice has determined particular economic activities, performed on an exclusive basis, that qualify as exclusive rights, such as the monopoly over the provision of recruitment services, monopoly over postal services (other than the universal service obligation), waste management, broadcasting, operating a particular air route, managing contributions under a compulsory social insurance scheme, etc.

Although the Commission considers that a state measure can result from any legislative, regulatory or administrative instrument, the form of the act and public law character is not decisive. A specific requirement is that the granting of exclusive rights must be the result of a discretionary measure such as the limiting of the number of players or a choice of operator.[837] It must be noted that the concepts of exclusive rights and dominant position are two different concepts. The fact that an entity with a dominant position exercised conferred powers is not sufficient to establish the exercise of exclusive rights.[838] Whereas an explicit conferral of economic activities by legal means is necessary to claim the existence of exclusive rights, and the performance of exclusive rights often creates a dominant position, the key issue is the functional criterion and the relevance of the market in question.[839]

7.3.3. Article 106 (1) and the main conditions for the application of Articles 101 and 102

Anticompetitive public measures are by their very nature able to distort competition, to affect trade between Member States, and, ultimately, to create hurdles in the internal market. Article 106 (1) is addressed to the Member States and mostly applies jointly with articles related to the anticompetitive conduct of enterprises (Articles 101 and 102 TFEU) and the free movement rules in the TFEU. When invoked in combination with Article 106 (1), the logic of Articles 101 and 102 presupposes adaptation in line with the nature and effect of State measures.

Article 101 TFEU targets agreements between undertakings, decisions by associations of undertakings, and concerted practices that 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. Article 106 (1) can apply

EU:C:1994:368, paragraph 17.

837 Sierra, "Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures," 819.

838 Criminal proceedings against Giorgio Domingo Banchero, 14 December 1995, EU:C:1995:439.

839 Corinne Bodson v. SA Pompes funèbres des régions libérées, Judgment of 4 May 1988, EU:C:1988:225.

jointly with the prohibition of anticompetitive agreements in situations where a State measure imposes or induces public or privileged undertakings to restrict competition.[840] The key idea for joint application of both articles is not the agreement between them and/or other undertakings to restrict competition, but the fact that the State measure reinforces the effects of anticompetitive agreements where there is at least one public enterprise or privileged undertaking. In the case of an agreement between a public authority and an undertaking, Article 101 does not apply, but rather Article 102[841] It may be concluded that Article 101 should be used to prevent indirect influence, whereas Article 102 can relate to both the indirect and direct behaviour of public authorities. Article 102 prohibits Member States from obliging or inducing their public or privileged undertakings. Therefore, under Article 106 (1) TFEU the State may be responsible for abuses, which does not automatically exclude the liability of the undertaking that carried out the prohibited action. The undertaking is potentially liable, depending on whether it had a clear opportunity to avoid the breach.

The dominant position is often a result of State measures, as the grant of exclusive rights often puts the undertaking in such a position. However, the mere existence of a dominant position, because of the granting of exclusive rights, does not necessarily trigger the responsibility of the State.[842] In addition to defining the type of direct or indirect State measure, determination of the economically relevant market features is one of the key issues on which the Court of Justice bases its appraisal when applying both articles simultaneously. The Court has emphasized the need to define the substantial part of the common market in which the undertaking may be able to hinder effective competition.[843] The definition should comprise all the products or services which, in view of their characteristics, are suited to satisfy constant needs and are interchangeable with other products and services to a limited extent.[844]

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[840] For example, in Case C 66/86, the Court of Justice found that the approval of tariffs agreed by two air operators urged for the joint application of both articles. Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. Judgment of 11 April 1989, EU:C:1989:140, paragraphs 47 et seq.

[841] Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577.

[842] Société Civile Agricole du Centre d'Insémination de la Crespelle v. Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne, Judgment of 5 October 1994, EU:C:1994:368; *Merci Convenzionali Porto di Genova SpA* v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991,* EU:C:1991:464.

[843] GT-Link A/S v. De Danske Statsbaner (DSB), Judgment of 17 July 1997, EU:C:1997:376, paragraphs 34–36.

[844] AKZO Chemie BV v. Commission of the European Communities, Judgment of 3 July 1991, EU:C:1991:286, paragraph 51.

Article 106 (1) can be infringed only if a causal link is established between a legislative or administrative intervention of the Member State and the anticompetitive behaviour of an undertaking. In combination with Article 102, Article 106 (1) applies when an undertaking occupies a dominant position on a substantially relevant market, and the following conditions are met: the measure inevitably leads the undertaking to abuse its dominant position; the state created a situation in which the undertaking cannot avoid abusing its dominant position; the measure has the potential to induce the undertaking to behave in such a way that it abuses its dominant position, gives rise to the risk of abuse, or has similar effects; and the abuse or the effects may affect the trade between Member States in any way.[845] In applying both articles, it is not necessary to establish that trade has actually been affected. Therefore, not only actual, but potential abuse is enough to satisfy this condition.[846] In a number of cases the Court of Justice took the view that, a fortiori, an infringement of Article 106 (1) exists if a statutory monopoly in provision of services of general economic interest exceeds the level that can be justified under Article 106 (2).[847] Therefore, the Member State may be held responsible for requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Articles 101, the abusive practices of dominant undertakings contrary to 102 TFEU, or if the Member State reinforces their effect.[848] The doctrine of the Court of Justice determined that an actual abuse does not have to be proven.[849] An even more loose justification was taken by the Court in the *Dusseldorp* case, where the court held that a Member State infringes Article 106 (1) if it adopts any law, regulation or administrative provision enabling an undertaking, on which the

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845 Klaus Höfner and Fritz Elser v. Macrotron GmbH, Judgment of 23 April 1991, EU:C:1991:161, paragraph 29; Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Others, Judgment of 18 June 1991, EU:C:1991:254, paragraph 37; Merci Convenzionali Porto di Genova *SpA* v. Siderurgica Gabrielli SpA, Judgment of 10 December 1991, EU:C:1991:464, paragraphs 16 and 17; Société Civile Agricole du Centre d'Insémination de la Crespelle v. Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne, Judgment of 5 October 1994, EU:C:1994:368, paragraph 18.

846 Klaus Höfner and Fritz Elser v. Macrotron GmbH, Judgment of 23 April 1991, EU:C:1991:161, paragraph 32; Merci Convenzionali Porto di Genova *SpA* v. Siderurgica Gabrielli SpA, Judgment of 10 December 1991, EU:C:1991:464, paragraph 20.

847 Wolf Sauter and Hans Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge: Cambridge University Press, 2009), 161.

848 Vereniging van Vlaamse Reisbureaus v. Sociaale Dienst van de plaatselijke en gewestelijke Overheidsdiensten, Judgment of 1 October 1987, EU:C:1987:418; Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577, paragraph 43.

849 Régie des télégraphes et des téléphones v. GB-Inno-BM SA, Judgment of 13 December 1991, EU:C:1991:474, paragraphs 23–25; Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio, Judgment of 1 July 2008, EU:C:2008:376, paragraph 49.

rights are conferred, to abuse its dominant position.[850] According to the case law, "it is sufficient to show that that potential or actual anti-competitive consequence is liable to result from the State measure at issue; it is not necessary to identify an abuse other than that which results from the situation brought about by the State measure at issue."[851]

The rules on competition in Articles 101 and 102 TFEU normally apply to behaviour that is the result of autonomous acts by undertakings. If the autonomy of a decision is excluded due to binding State measures, such an undertaking may invoke the "State compulsion defence" argument to avoid liability, shifting liability to the state under Article 106 (1) TFEU.[852] The basis of the state compulsion defence can be tracked back to the *Suiker Unie* judgment,[853] subsequently refined into distinct state action defence in another cases where the Court stressed the centrality of independent behaviour,[854] unwilful exercise of competitive conduct by the undertaking,[855] and the fact that conduct was unilaterally imposed by the national authorities "through the exercise of irresistible pressures".[856]

7.3.4. A brief overview of the typology of case law on measures rendering abuse of dominant position unavoidable or urging the undertaking to abuse its dominant position

The case law of the Court of Justice on state liability reveals differences in determining the causal link, since the type of the measure and the actual or supposed likelihood of abusive behaviour vary from case to case. Although the justi-

850 Régie des télégraphes et des téléphones v. GB-Inno-BM SA, Judgment of 13 December 1991, EU:C:1991:474, paragraph 20; Chemische Afvalstoffen Dusseldorp BV and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer**,** Judgment of 25 June 1998, EU:C:1998:316, paragraph. 61.

851 European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI), Judgment of 17 July 2014, EU:C:2014:2083, paragraphs. 46–47.

852 State action defense is applied when there is a Member State compulsion, regulatory elimination of competition, or when private actors perform a public-interest function under the supervision of the Member State. Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Oxford: Hart 2013), 21–24.

853 Coöperatieve Vereniging 'Suiker Unie' UA and others v. Commission of the European Communities, Judgment of 16 December 1975, ECLI:EU:C:1975:174.

854 Commission of the European Communities and French Republic v. Ladbroke Racing Ltd, Judgment of 11 November 1997, EU:C:1997:531, paragraph 33.

855 Deutsche Telekom AG v. European Commission, Judgment of 14 October 2010, ECLI:EU:C:2010:603.

856 Asia Motor France SA, Jean-Michel Cesbron, Monin Automobiles SA, Europe Auto Service (EAS) SA and SA Somaco SARL v. Commission, Judgment of 18 September 1996, EU:T:1996:120, paragraph 65.

fications of measures imputable to the State are different, and often overlapping, it is difficult to categorize the main cases in jurisprudence involving the joint application of Articles 102 and 106 (1) TFEU. As the mere creation of a dominant position by the granting of exclusive rights would not normally infringe both articles, the Court of Justice examined whether state action towards privileged undertakings have made abuse inevitable and whether such privileges could be justified by public interest. Therefore, in determining the existence of a causal link between the abusive behaviour and privileges, both the legitimate interest and the proportionality tests have to be fulfilled, in addition to the requirements to assess the impact of national rules in the economic and factual contexts.[857] The typology of justifications of imputability to the state is a difficult task, as they are different but interconnected.[858] One possible typology differentiates on the basis of problematic issues, such as the inability to meet demand, bundling of activities, and extension of exclusive rights that lead to a conflict of interest, pricing abuses and refusal to supply.[859]

With regard to the inability to meet demand, the granting of an exclusive right will inevitably lead the undertaking to commit an abuse if it is not in a position to satisfy the existing need for the given type of service, due to a structural failure and not only inefficient management.[860] Abusive practice exists when a Member State grants an undertaking the exclusive right to carry out certain activities, creating a situation where an undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind.[861]

The combined application of Article 102 TFEU and Article 106 (1) TFEU may also indicate infringements in situations where a Member State entrusts a public or privileged undertaking with regulatory tasks, resulting in a conflict of interest between its public authority mission and commercial operation in a competitive market, notably in situations where such an undertaking uses its powers to put its competitors in a disadvantageous position. The case law significantly underpins the cumulative application of these articles, confirming that the substantive

857 Criminal proceedings against Silvano Raso and Others, Opinion of the Advocate General Fennely delivered on 9 October 1997, EU:C:1997:477, paragraph 65.

858 See, for example, Alison Jones and Brenda Sufrin, *EU Competition Law, Text, Cases and materials*, (Oxford: Oxford University Press 2014), 628–630; Sierra, "Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures," 823–834.

859 Ferčić and Jovanić, 387–396.

860 Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577, paragraphs 62–65.

861 Klaus Höfner and Fritz Elser v. Macrotron GmbH, Judgment of 23 April 1991, EU:C:1991:161; Job Centre coop arl., Judgment of 11 December 1997, EU:C:1997:603; AG2R Prévoyance v. Beaudout Père et Fils SARL, Judgment of 3 March 2011, EU:C:2011:112, paragraph 69.

regulatory power would inevitably lead the privileged undertaking to act in an noncompetitive manner on its own initiative,[862] despite the possible functional unbundling of technical expertise and delegated regulatory activities from commercial activities.[863] However, if the regulatory functions are related to control or verification, or the undertakings entrusted with certain regulatory tasks are subject to control by the public authorities or review, such powers may escape the ambit of joint application of the two abovementioned TFEU articles.[864]

Another group of cases refers to pricing abuses and refusal to supply, because of the extension of rights. Price regulation is an instrument of economic regulation and a common intervention tool in the utilities sectors, especially in network industries. Tariffs are often determined or approved by public authorities. When approving tariffs established by public or privileged undertakings, public authorities could back discriminatory or excessive pricing, especially in situations where undertakings apply dissimilar conditions to equivalent transactions with trading partners that use essential facilities,[865] charge disproportionate prices, or grant price reductions to some users, while offsetting them by increasing prices and discriminating other customers.[866] The Court of Justice of the European Un-

[862] French Republic v. Commission of the European Communities, Judgment of 19 March 1991, EU:C:1991:120; Régie des télégraphes et des téléphones v. GB-Inno-BM SA, Judgment of 13 December 1991, EU:C:1991:474, paragraph 28.

[863] Criminal proceedings against Francine Gillon, née Decoster, Opinion of Mr Advocate General Tesauro delivered on 3 June 1992, EU:C:1992:240.

[864] See, for instance, Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Opinion of Advocate General Jacobs on 28 January 1999, EU:C:1999:28; Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio, Judgment of 1 July 2008, EU:C:2008:376; Criminal proceedings against Paul Corbeau, Judgment of 19 May 1993, EU:C:1993:198; Criminal proceedings against Paul Corbeau, Opinion of Mr Advocate General Tesauro delivered on 9 February 1993, EU:C:1993:52; Régie des télégraphes et des téléphones v. GB-Inno-BM SA, Judgment of 13 December 1991, EU:C:1991:474; Centre belge d'études de marché – Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), Judgment of 3 October 1985, EU:C:1985:394; Dimosia Epicheirisi Ilektrismou AE (DEI) v. European Commission, Judgment of 15 December 2016, EU:T:2016:733; Merci Convenzionali Porto di Genova *SpA* v. Siderurgica Gabrielli SpA, Judgment of 10 December 1991, EU:C:1991:464; Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência, Judgment of 28 February 2013, ECLI:EU:C:2013:127.

[865] Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di. Genova Coop, arl and Others, Judgment of 18 June 1998, EU:C:1998:306.

[866] *Merci Convenzionali Porto di Genova SpA* v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991,* EU:C:1991:464, paragraph 19; Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. Judgment of 11 April 1989, EU:C:1989:140.

ion admitted that Article 102 TFEU may be infringed by pricing policy (margin squeeze), despite the prices having been approved by the national regulator.[867]

Refusal to supply can be an outcome of extension of exclusive or special rights, especially when the operator has a natural monopoly. In such cases the public undertaking is under strict responsibility not to act abusive, and is obligated, under the essential facilities doctrine, to grant access to infrastructure on a non-discriminatory basis. An abusive refusal to deal assumes the following circumstances: the input or facility of a dominant undertaking is indispensable to its competitors in the downstream market, and the refusal to deal with competitors, which cannot be objectively justified, eliminates all effective competition in the relevant downstream market.[868] Privileged undertakings may refuse to deal with a customer entirely, or refuse to operate by creating burdens for competitors to deal under unreasonable terms and conditions. Anticompetitive foreclosure of the downstream market is sufficient to justify the imposition of an obligation to deal, when the indispensability requirement has been met.[869]

7.4. Services of general economic interest

7.4.1. The purpose of Article 106 (2)

Article 106 (2) TFEU (formerly Article 86 (2) EC and previously Article 90 (2) EC) allows for the nonapplication of the Treaty rules, especially rules on competition, when a Member State entrusts an undertaking with the performance of a service of general interest. This article reaffirms the need to create a balance between the different concepts of the role of the State in market regulation and provision of services.

Confirming the application of the Treaty on undertakings entrusted with the operation of services of general economic interest (SGEI) or having the character of a revenue producing monopoly, Article 106 (2) acknowledges the importance

[867] Deutsche Telekom AG v. European Commission, Judgment of 14 October 2010, ECLI:EU:C:2010:603.

[868] See, for example, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities, Judgment of 6 April 1995, EU:C:1995:98, paragraphs 51–57; Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs and others, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264, paragraph 41.

[869] Niamh Dunne, "Dispensing with Indispensability," *LSE Legal Studies Working Paper* No. 15/2019, 6–9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476938. Regarding the US essential facilities doctrine, see Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs and others, Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, EU:C:1998:264, paragraphs 45–47.

of competition rules. It therefore mandates the justification for what would otherwise be taken as an infringement of the competition rules and derogates the application of Articles 101 and 102 TFEU "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks" assigned to undertakings performing SGEIs. The nonapplication of supranational competition rules should be interpreted strictly, and it is the duty of the undertaking aiming to rely on this provision to prove that the restriction of competition is proportionate.[870] As this article sets the requirement that the development of trade must not be affected to an extent contrary to the interests of the EU,[871] the burden of proof is shifted to the Commission or complainants,[872] unless it is applied in the context of State aid. As many public service compensation schemes imply State aid, the exception stipulated in Article 106 (2) could also trigger State aid rules, unless certain types of compensation are explicitly declared compatible with Article 106 (2) and exempted from the notification obligation provided in Article 108 TFEU. In the context of the application of Article 106 (1), it becomes clear that Article 106 (2) could also be invoked if applied to State measures that combine Article 106 (1) with Articles 34, 37, 49, and 102 TFEU, i.e., free movement provisions and general prohibition of the abuse of dominant position. In addition to the proportionality requirement, the effect of derogation of Articles 101 and 102 often presupposes establishing a public service obligation, which would justify a Member State's attempt to ensure viable functioning of SGEIs. Article 106 (2) therefore represents a supranational compromise in balancing conflicting economic and noneconomic public policy aims.

To strengthen the importance of Article 106 (2), Article 14 TFEU specifies that, due to the place SGEIs have in the shared values of the Union, and their role, "the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions." By virtue of this article, the European Parliament and the Council may establish principles and set these conditions without prejudice to the competence of Member States.

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870 For example, Commission of the European Communities v. Kingdom of the Netherlands, Judgment of 23 October 1997, EU:C:1997:499, paragraphs 49–51.

871 The second sentence of Article 106 (2), which reads "The development of trade must not be affected to such an extent as would be contrary to the interests of the Union", practically reaffirms the proportionality requirement specified in the first sentence.

872 For instance, Commission of the European Communities v. French Republic, Judgment of 23 October 1997, EU:C:1997:501.

7.4.2. The SGEI concept and normative framework

The various national traditions in Europe have led to discussions about commercial public services.[873] With its rules on SGEI, the Rome Treaty attempted to make a compromise between northern and southern Europe and accommodate the practices of the Continental traditions of public services and State involvement in the latter. The concept of SGEI was expanded with an additional provision by the 1997 Treaty of Amsterdam, its Article 16, now Article 14 TFEU. As stated above, the new provision required the Community and Member States to ensure that SGEIs operate in a way that enables them to fulfil their missions, while respecting the principles of quality, equality of treatment, and continuity, which were applied by the Court of Justice. In 2000 the European Commission published a Communication on services of general interest, with a view to stressing the importance of ensuring the good functioning of such services in the internal market. The Commission has stressed the necessity for the relevant public authorities to act transparently and has called for a special place for such services in the shared values of the European citizenship.[874] This was welcomed in Article 36 of the Charter of Fundamental Rights in 2000, under the heading "Access to services of general economic interest". Although the rules on free movement limit State intervention in the public sector of the economy, and the promotion of social and territorial cohesion, this article, together with Article 14 TFEU, represented a shift toward positive recognition of social rights and solidarity.[875] In 2003 the European Commission published the Green Paper on SGEI, further developing the principles of good governance in provision of services.[876] The Commission has subsequently published the White Paper on SGEI, where it addressed issues of public service obligations with more caution, stressing the importance of the specific European model of social market economy and the need to respect the diversity of different types of services.[877]

[873] Sauter and Schepel, *State and Market in European Union Law*, 180.

[874] Commission of the European Communities, Communication from the Commission – Services of general interest in Europe, COM(2000)580 final, 20 September 2000.

[875] Malcolm G. Ross, "Promoting solidarity: From public services to a European model of competition," *Common Market Law Review* 44, no. 4 (2007): 1063–1064.

[876] Commission of the European Communities, Green Paper on services of general interest, COM (2003) 270 final, 21 May 2003, OJ C 76 of 25.3.2004. This document should be interpreted in line with Commission of the European Communities, Communication from the Commission of 25 July 2001 "European governance – A white paper," COM(2001) 428 final, OJ C 287 of 12.10.2001.

[877] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

The draft Constitutional Treaty of 2003 provided a new framework directive on SGEI, however, the proposal was rejected. Since 2009, the Lisbon Treaty included the power of the European Parliament and the Council to legislate in the SGEI field, establishing principles and conditions that would enable services of general economic interest to fulfil their missions.[878] It was followed by Protocol 26 related to the broader category of SGEI, which includes noneconomic social services, which the rules on competition normally do not apply to, but which may be subject to the main rules of the internal market. The Protocol stressed the role and discretion of national, regional and local authorities in providing and organizing SGEIs to fit the needs of the users. It also addressed the diversity between various services and highlighted the need for a high level of quality, safety and affordability, equal treatment, and the promotion of universal services. The European Commission subsequently provided guidance on several issues and stressed the need to further develop sector specific policies.[879]

As stated in the Report to the Laeken European Council on Services of General Interest, these services contribute to the quality of life of citizens and are a prerequisite for exercising many of their fundamental rights.[880] The uncertainty in the definition of the Member States' historical, economic, cultural, social and political traditions has led to confusion regarding the scope of services. This urged the Commission to propose definitions on services of general interest and to address terminological differences.[881] The term "services of general interest" is not used in the Treaty and is broader than the term "services of general economic interest" mentioned in the Treaty, which covers both commercial and non-commercial activities subject to specific public service obligations.

Although mentioned in Articles 14 and 106 (2) TFEU, services of general economic interest were also not defined in secondary legislation. As derived from the Commission's interpretative soft law tools, the term refers to services of an

Committee of the Regions of 12 May 2004 "White Paper on services of general interest," COM(2004) 374 final.

[878] Markus Krajewski, "Providing legal clarity and securing policy space for public services through a legal framework for services of general economic interest: squaring the circle?" *European Public Law* 14, no. 3 (2008): 377–398.

[879] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on "A single market for 21st century Europe" – Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final.

[880] Commission of the European Communities, Report to the Laeken European Council – Services of General Economic Interest COM(2001) 598 final.

[881] Commission of the European Communities, Green Paper on services of general interest, COM (2003) 270 final.

economic nature, which are subject to public service obligations under the general interest criterion. The term "public service obligations" refers to specific requirements that are imposed by public authorities on service providers. The ECJ sometimes uses the terms "public service" and "service of a general interest" interchangeably.[882] Services of general economic interest have specific characteristics compared to those of other economic activities.[883] Although the EU Member States have relative discretion in defining the domain of services of general economic interest, the European Commission defines them as economic activities whose delivery results in overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment, and universal access)[884] by the market without public intervention. Public service obligations are imposed on the provider by way of an entrustment and based on a general interest criterion, which ensures that the service is provided under conditions that allow it to fulfil its mission.[885]

Some authors underline the difference between public and general interest, as the latter is a matter of the specific objective characteristics of the individual service or activity, while the public interest is determined by a legal act or act of entrustment, as a matter of a (relatively) subjective political decision. For instance, there are numerous economic services that are of general interest (for example food service, clothing), but do not necessitate public intervention.[886] General interest encompasses economic and noneconomic services subject to specific public service obligations.[887] These are specific public law requirements imposed by Member States, including central regional and local public authorities, on the providers of the particular service of general economic interest, to ensure that certain public interest objectives are met.[888] A sublayer of these obligations are "universal service obligations" as a special type of public service obligations whose goal is to ensure affordable universal access and minimum specified quality of the

882 Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, Judgment of 27 April 1994, EU:C:1994:171.

883 Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di. Genova Coop, arl and Others, Judgment of 18 June 1998, EU:C:1998:306.

884 European Commission, Staff Working Document "Guide to the application of EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services," SWD(2013) 53 final, 2.

885 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A quality Framework for Services of General Interest in Europe," COM(2011) 900 final, 3.

886 Ferčić and Jovanić, 406.

887 European Commission, "A quality Framework for Services of General Interest in Europe," COM (2011) 900 final, 3–4.

888 COM(2003) 270 final, 7.

service in question.[889] Under "user and consumer protection", the Commission particularly emphasizes the continuity, quality and affordability of services.[890] By imposing universal services obligations, the state can redistribute public services to consumers who cannot afford them.[891]

7.4.3. The concept of undertaking in the meaning of Article 106 (2) and the scope of services of general economic interest

In EU competition law, the term "undertaking" refers to any entity engaged in an economic activity, regardless of the legal status of that entity, its legal form, and the way in which it is financed.[892] Therefore, the concept of "undertaking" in Article 106 (2) TFEU is the same as in Articles 101, 102, 106 (1), and 107 TFEU. An undertaking that can rely on the exception must be entrusted with the operation of SGEI or fall into the category of undertakings that are revenue producing monopolies. However, the latter category often falls outside of this exception, because such undertakings are often unable to satisfy the proportionality criteria or are subject to Article 37 TFEU. The concept of an undertaking in the meaning of Article 106 (2) is based on the functional approach, where the relevant questions are: Is the given service of (general) economic interest? Is there a market for the service in question? And would private subjects be interested in competing for its provision?

Article 106 (2) TFEU stipulates that an undertaking entrusted with the operation of services of general economic interest is subject to the rules on competition, but the party arguing for the application of the exemption must prove that the service in question is indeed of general economic interest, and that the rules on competition would obstruct its performance.

Economic activities to which Article 106 (2) applies are often special or exclusive rights or state monopolies,[893] and are granted either to private or to state-

889 European Commission, "A quality Framework for Services of General Interest in Europe" COM(2011) 900 final, 4.

890 Commission of the European Communities, Green Paper on Services of general interest, COM (2003) 270 final, 15–22.

891 On various aspects of financing redistributive character of services of general interest see Erika Szyszcak, "Introduction," in *Financing Services of General Interest. Reform and Modernization*, eds. Erika Szyszcak and Johan W. van de Gronden (TMC Asser Press/Springer, 2013), 1–34.

892 For example, Klaus Höfner and Fritz Elser v. Macrotron GmbH, Judgment of 23 April 1991, EU:C:1991:161, paragraph 21.

893 The application of Article 106 (2) does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out. Distinction

owned undertakings. "The grant of a special or exclusive right to an operator is merely the instrument, possibly justified, which allows that operator to perform the public service as a mission."[894] In the absence of an exclusive or special right, it is sufficient that the operator is entrusted with the obligation to provide the service in question to any user requesting it.[895]

The key determinant is the performance of a service of general economic interest. It is an economic service that is considered essential for citizens, where public authorities intervene to control the quality and conditions under which the service is provided. To qualify as a service of general economic interest, a service should be provided continuously (continuity), for the benefit of all consumers in the relevant territory (universality), at a uniform and affordable price.[896] The entrusted mission must be of a universal and compulsory nature.[897]

Services of general interest are subject to specific public service obligations. The term covers both services of general economic interest and noneconomic services. Social services of general interest include social security schemes covering the main risks of life and other essential services, and depending on the criteria of solidarity, they may cover both economic and noneconomic activities.[898] Many local utility services (water distribution, waste management, parking services, etc.), nation-wide network industries such as public telecommunications networks, television broadcasting, provision of electricity and gas, basic postal services, certain transport services, social security insurance, certain airport services, etc., qualify as SGEIs, depending on circumstances. In its practice, the Court of Justice has extensively determined the notion of "economic" and expanded it toward a

must be drawn between a special or exclusive right conferred on an operator and the SGEI mission, which, where appropriate, is attached to that right. In that regard, see *Merci Convenzionali Porto di Genova SpA* v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991,* EU:C:1991:464, paras. 9 and 2–27; Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, Judgment of 27 April 1994, EU:C:1994:171, paragraphs 46 to 50.

894 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v. Commission of the European Communities, Judgment of 12 February 2008, EU:T:2008:29, paragraph. 179.

895 *Merci Convenzionali Porto di Genova SpA* v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991,* EU:C:1991:464; GT-Link A/S v. De Danske Statsbaner (DSB), Judgment of 17 July 1997, EU:C:1997:376.

896 See, for example, Federutility and Others v. Autorità per l'energia elettrica e il gas, Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 20 October 2009, EU:C:2009:640, paragraphs 54–55.

897 British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v. Commission of the European Communities, Judgment of 12 February 2008, EU:T:2008:29, para. 172.

898 European Commission, "A quality Framework for Services of General Interest in Europe," COM(2011) 900 final, 3–4.

broader concept of "economic interest", to include various linked noneconomic activities. However, to prevent abuse by the Member States, the ECJ has limited exemption in a number of cases, specifying which activities are detachable from core services.[899]

In some of the cases the Commission challenged the status of SGEI granted by a Member State to an activity, as was the situation in the *SNCM* case, where France considered that including additional service operated by Société Nationale Maritime Corse-Méditerranée (SNCM) within the scope of a public service, to meet peak passenger transport needs, was justified, while the Commission held that other market operators were capable of meeting the demand. On appeal, the General Court confirmed the decision of Commission.[900]

Therefore, a recurrent question is what practically qualifies as a service of general economic interest. Port services may serve as an example. In an older case related to port services, the Court of Justice explained that company operating the river port in Luxembourg enjoyed the exemption as it was responsible for ensuring the navigability of the State's most important waterway.[901] In other cases it held that mooring services are of general economic interest,[902] but the dock work, which encompasses loading, unloading, storage and movement of goods and materials, is not necessarily of general economic interest.[903]

The issue of solidarity was particularly relevant in national social insurance schemes, which were challenged by persons who wished to stop making compulsory contributions, and faced questions regarding whether the national social insurance scheme represented an undertaking and whether commercial activities could be separated from public service mission.[904] When a public service implements a scheme, such as a benefits fund for workplace accidents and occupational diseases, it is not considered an undertaking in the meaning of Article 106 if the scheme operates according to the principle of solidarity[905] and the benefits are

899 *Merci Convenzionali Porto di Genova* SpA v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991,* EU:C:1991:464, paragraph 27.

900 French Republic v. European Commission*, Judgment of 1 March 2017,* EU:T:2017:135.

901 Ministère public luxembourgeois v. Madeleine Muller, Veuve J.P. Hein and others**,** Judgment of 14 July 1971, EU:C:1971:85.

902 Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di. Genova Coop, arl and Others, Judgment of 18 June 1998, EU:C:1998:306.

903 *Merci Convenzionali Porto di Genova* SpA v. Siderurgica Gabrielli SpA, *Judgment of 10 December 1991,* EU:C:1991:464.

904 Alexander Winterstein, "Nailing the Jellyfish: Social Security and Competition Law," *European Competition Law Review* 20, no. 6 (1999): 324–333.

905 Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), Judgment of 22 January 2002, EU:C:2002:36, paragraph 44.

not based on the financial results achieved by the fund, in which case it would be considered an undertaking.[906] Even if a social fund is based on a high degree of solidarity, it will be considered an undertaking if the beneficiaries have chosen, on the basis of financial and economic considerations, from among other competing undertakings providing the same services in the market.[907] The ECJ has extended its solidarity doctrine beyond the provision of the service. For instance, in the *AOK Bunderverband* cases it tolerated the price fixing of fees that insured patients were supposed to pay when purchasing medicines, even though this was not considered a core task, but a commercial activity. [908]

7.4.4. The main criteria for application of Article 106 (2): Conditions for exemption from the application of rules on competition protection

Undertakings entrusted with the operation of services of general economic interest must have been assigned that task by an act of a public authority.[909] The mission to perform a service of general economic interest is an act of a public authority, which should clearly define the obligations in question.[910] Such authorities may be national, regional or local, as long as the authority exercises its prerogative on the basis of a law, secondary legislation, public contracts, grants or some other instrument of exercising public functions.[911] A task of general economic interest may be granted to one or more undertakings; however it must be done by an individualized public act of entrustment. It commonly represents an award to perform an exclusive right; however, this is not strictly necessary. The act of entrustment supersedes the authorization or permit, and it manifests itself as public authority function that assigns the public service. In the legal sense, the undertak-

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906 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Opinion of Advocate General Jacobs on 28 January 1999, EU:C:1999:28.

907 AG2R Prévoyance v. Beaudout Père et Fils SARL, Judgment of 3 March 2011, EU:C:2011:112

908 AOK Bundesverband and Others v. Ichthyol- Gesellschaft Cordes, Hermani & Co, Mundipharma Gmbh, Gödecke GmbH, and Intersan, Institut für pharmazeutische und klinische Forschung GmbH, Judgment of 16 March 2004, EU:C:2004:150, paragraphs 63 and 64.

909 *BRT and Société Belge des Auteurs, Compositeurs et Éditeurs v. SABAM and Fonior , Judgment of 30 January 1974,* EU:C:1974:6, *paragraph 20,* Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di. Genova Coop, arl and Others, Judgment of 18 June 1998, EU:C:1998:306, *paragraph 47.*

910 See, for example Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. Judgment of 11 April 1989, EU:C:1989:140, paragraph 55.

911 *BRT and Société Belge des Auteurs, Compositeurs et Éditeurs v. SABAM and Fonior , Judgment of 30 January 1974,* EU:C:1974:6, *paragraph 20.*

ing becomes obliged and responsible for carrying out a particular public service obligation.[912] However, the act of entrustment does not divest the Member State (and its authorities) of liability and responsibility for the public service obligation. The public authority does select and entrust the eligible undertaking with the operation of services of general economic interest, but, as a principal, it retains control over the service, as a specific task that remains a matter of public authority.[913]

The derogation in Article 106 (2), for activities representing services of general economic interest, can be invoked only if the application of the Treaty rules would obstruct the performance of the tasks assigned to such undertakings. Therefore, this article applies only in situations where restriction is necessary for the fulfilment of the service in question, if the proportionality of the measure can be proved.[914] The proportionality test is considered to be met when the following elements are proved: a) there is a causal link between the measure and the objective of general interest; b) restrictions introduced by the measure are balanced by the benefits to the general interest; and c) the objective of general interest cannot be achieved through other less restrictive means.[915]

Until 1993, the Court of Justice had a very strict view of what constitutes obstruction. In the text above, some of these cases were briefly presented in relation to the application of Article 106 (1). As an example, in the *GB-Inno* case, the Court held that an undertaking entrusted with the public telephone network goes beyond the necessary extent in its power to lay down the standards for telephone equipment and to check rival equipment suppliers' compliance. However, in the *Corbeau* case, as mentioned above, the Court applied a proportionality test. In this case the Court accepted that basic postal services, as a service of general economic interest, require that competition law should not be applied to the extent necessary to preserve it through cross subsidization. If the competitors' cream-skim the most profitable services, the exclusive right cannot operate under economically acceptable conditions. The entrusted undertaking is not required to prove that there was no other way to perform its tasks and that its economic viability could be threatened; it is sufficient to prove that an undertaking would not be able to continue executing the particular entrusted task.[916] However, this

912 Ferčić and Jovanić, 402.

913 Ferčić and Jovanić, 401, footnote 153.

914 Leonor Moral Soriano, "How Proportionate Should Anti-Competitive State Intervention Be?" *European Law Review* 28 (2003): 112–123.

915 Sierra, "Article 106 – Exclusive or Special Rights and Other Anti-Competitive State Measures," 854.

916 Commission of the European Communities v. Kingdom of the Netherlands, Judgment of 23 October 1997, EU:C:1997:499, paragraphs 53–58; Criminal proceedings against Paul Corbeau, Judgment of 19 May 1993, EU:C:1993:198, paragraphs 14–16.

should not preclude competition in the provision of the additional services that are separable from the basic public service, if they could be offered by other undertakings. In *Corbeau* the Court did not elaborate on the separation of universal service and cross-subsidization within a monopolist, as the State may subsidize the universal service. Therefore, it is necessary to apply economic analysis on a case-by-case basis.

The proportionality principle is applied by the Court with a degree of flexibility. For instance, in the *Almelo* case, the Court held that "[t]he restrictions on competition from other economic operators must be allowed in so far as they are necessary to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject."[917] In this case, the litigation between local electricity distribution companies and a regional distribution company, which had prevented the direct import of electricity from other Member States, was settled by accepting that the universal distribution of electricity needs to be organized as a monopoly, otherwise the profitable activities would be taken by the competition and the universal service operator would incur losses.

Environmental concerns are particularly important and often represent successful claims based on Article 106 (2). For instance, the burial of building waste was a serious environmental problem around Copenhagen, and the municipality considered it necessary to ensure that a new high-capacity recycling centre would be profitable by granting it the exclusive processing right.[918]

The rationale that undertakings entrusted with SGEI must perform their operations with a minimum level of efficiency was mentioned in the *Ambulanz Glöckner* case, in relation to application of Article 106 (1) and the inability to meet demand. The extension of exclusivity to cover nonurgencies has made it possible to assume both activities; however, the justification for extension of exclusive rights, based on the task of general interest, cannot be accepted only if the organization entrusted with the operation of the public ambulance service is manifestly unable to satisfy demand for emergency ambulance services and patient transport, as noted by the Advocate General.[919]

917 Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, Judgment of 27 April 1994, EU:C:1994:171, paragraph 49.

918 Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune of 23 May 2000, EU:C:2000:279, paragraphs 77–83.

919 Ambulanz Glöckner v. Landkreis Südwestpfalz, Judgment of 25 October 2001, EU:C:2001:577, paragraph 62.

The character of the "obstruction" to the performance of the assigned tasks is often interpreted strictly, meaning that it requires more than the mere hinderance or complication of the tasks. Article 106 (2) is therefore invoked to justify both the legitimacy of the ends and the means of public service provision, requiring the assessment of whether there are other, less restrictive, means to reach the same end. In the *Air Inter* case, despite the existence of former Regulation 2408/92 on access for Community air carriers to intra-Community air routes,[920] which provides that loss-making routes that have been declared to be of general interest cannot be financed through cross-subsidization based on the grant of exclusive rights over profitable routes, the French public undertaking attempted to defend the cross-subsidy by referring to the necessity of its exclusive rights to operate profitable and nonprofitable routes, and to offset the profit earned from the former to support the latter. Although Air Inter defended the legality of its exclusive rights by referring to its contribution to regional development, the General Court declared that Article 106 (2) did not apply. The General Court reached similar conclusions in respect of a German undertaking that was entrusted with the operation of SGEIs in managing the nation-wide system of collection and recovery of sales packaging. The fact that such an undertaking could not be remunerated for a service provided by another system did not threaten the existence of its exclusive right.[921]

7.4.5. Proportionate compensation for the operation of services of general economic interest

In delivering services of general economic interest, undertakings with exclusive or special rights are often accused of cross-subsidization and predatory pricing, based on the use of their monopoly or resources to undercutting the prices of private competitors in commercial markets. The key point is the allocation of costs between SGEI activities and commercial activities. Public funding for financing SGEIs would be regarded as state aid within Art 107 (1) TFEU only when and to the extent that any economic advantage exceeds the market price as appropriate remuneration for delivered services, and if there is a manifest relationship between the financing and the clearly specified public service obligations.[922]

[920] Council Regulation (EEC) 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, *OJ L 240, 24.8.1992, p. 8–14.*

[921] Der Grüne Punkt – Duales System Deutschland GmbH v. Commission of the European Communities, Judgment of 24 May 2007, EU:T:2007:154, paragraphs 207–209.

[922] For more insight into financing of SGI in the EU see, for example, Szyszcak and van de Gronden, *Financing Services of General Interest. Reform and Modernization.*

According to the criteria established in the *Altmark* case, public funding does not constitute state aid if public services are clearly defined, the calculation for compensation is established transparently and in an objective manner, and compensation does not exceed costs plus a reasonable profit of a typical (private) undertaking. In the absence of public procurement, compensation should be determined by reference to the *Altmark* criteria regarding the analysis of the costs and profit structure of a typical undertaking in a similar situation.

The tool used to determine whether public financing may be regarded as compensation for services provided by undertakings entrusted to carry out services of general economic interest is the Altmark test, which is based on four cumulative conditions. The first condition is satisfied if the undertaking performing services of general economic interest is entrusted to perform clearly defined public service obligations. The second condition is related to the parameters based on which compensation is calculated; such parameters must be established beforehand in an objective and transparent manner, although it is not necessary to define the exact amount of compensation. The third condition regards the compensation, which should not exceed what is considered necessary to cover all or part of the costs needed to secure the performance of public services obligations. Reasonable profit and relevant receipts should be considered in the calculation of these costs, and there should be no room for arbitrariness. To avoid the risk of overcompensation, the principle of the net additional costs of the recipient undertaking is applied.[923] In cases when an undertaking is not chosen in a public procurement procedure, the fourth condition requires that the level of compensation be determined on the basis of an analysis of the costs which a typical undertaking (well-run and adequately provided with means to meet tččhe necessary public service requirements) would have incurred in discharging these obligations. Relevant receipts and a reasonable profit are considered as a key factor here too. The compensation must either be the result of a public procurement procedure, allowing for the selection of the tenderer capable of providing the services at the least cost, or derived through a benchmark based on the typical undertaking.

To provide clarity and transparency, the European Commission issued two documents ("packages") in 2005 and 2011/2012. The package currently in force is the "Almunia" or SGEI II package. The conditions for application of Article 106 (2) in the context of state aid rules are clarified in Commission Decision 2012/21/EU on the application of Article 106 (2) TFEU to State aid in the form of public ser-

[923] Opportunity costs, such as the cost of invested capital, may be included, taking a reasonable profit into account. When all costs and reasonable profit are identified, revenues gained from the provision of the service of general economic interest are subtracted.

vice compensation granted to certain undertakings entrusted with the operation of SGEI[924] and Regulation on *de minimis* aid[925] (the so-called "Almunia" Package). The package specifies that compensation below a certain threshold and fulfilling certain conditions may be declared compatible with Article 106 (2). The Commission also adopted several other instruments explaining aid related to SGEIs and the approach it uses in examining compensations on an individual basis.[926] Whereas the Altmark test involves the assessment of economic efficiency, the issue of whether an undertaking entrusted with the SGEI may fulfil its public service obligation at a lower cost is irrelevant for the assessment of the compatibility of State aid with Article 106 (2) TFEU.[927]

As indicated above regarding the application of Article 106 (1) jointly with the Treaty rules on free movement, when public authorities exclude competition in a given market due to reasons that justify the provision of services of general economic interest, they must nonetheless ensure a sufficient degree of competition in that market, in order to ensure an undistorted rivalry of market operators in the bidding phase for that right. In the process of provision of goods, services and works, including concession for services, Member States must respect the Treaty rules on free movement, which transcend the requirement to eliminate discrimination based on nationality and any form of discrimination that constitutes an obstacle of a cross-border character. The process of granting rights to perform a SGEI should also be in line with the requirement for equal treatment and transparency, irrespective of whether the right to provide SGEI is awarded by means of a public contract or a private act.

The award criteria in public procurement should be the most economically advantageous tender. The award criteria in the tendering procedure represent an

924 Commission Decision 2012/21/EU, p. 3–10.

925 Commission Regulation (EU) 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8–13.

926 European Commission, Communication from the Commission "European Union framework for State aid in the form of public service compensation," OJ 2012 C8/15, 11.1.2012; European Commission, Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (Text with EEA relevance), *OJ C 8, 11.1.2012, p. 4–14.* For more about legal provisions and the effect of these instruments, see José Luís Buendía Sierra and José Manuel Panero Rivas, "The Almunia Package: State Aid and Services of General Economic Interest," in *Financing Services of General Economic Interest*, eds. Erika M. Szyszczak and Johan Van Gronden (The Hague: Asser Press, 2013), 125–148.

927 *Coordination bruxelloise d'institutions sociales et de santé (CBI) v. Commission*, Judgment of 7 November 2012, EU:T:2012:584, paragraph 293; Télévision française 1 (TF1) *v. Commission*, 16 October 2013, EU:T:2013:535, paragraph 134.

important indicator that the services entrusted through a public contract or a concession are rendered at a market price and that there is no state aid.[928] Following the great reform of the EU procurement framework, two directives from 2014 address public procurement: one of a general character[929] and other specifically related to procurement from entities operating in the water, energy, transport and postal services.[930] The latter applies without prejudice to the freedom of regional and local authorities to define, in conformity with Union law, the services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, its organization, financing and public services obligations.[931]

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928 European Commission, Staff working document, Frequently asked questions concerning the application of public procurement rules to social services of general interest, accompanying document to the Communication on "Services of general interest, including social services of general interest: a new European commitment" SEC(2007) 1514, 21.11.2007.

929 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94, 28.3.2014, p. 65–242.

930 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374.

931 Preamble 9 and Article 1 (4). This Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No. 26.

8. STATE AID[932]

8.1. Introduction to the State Aid Law and Policy

State aid law forms part of general competition law and primarily addresses the actions of States in the market. While traditional competition law focuses on the conduct of businesses and competition between them, State aid law concerns itself with competition between Member States. This area of law examines the ways in which public authorities can distort market competition through their actions.

States may disrupt competition by favouring certain businesses or groups of entrepreneurs over others, for instance, by providing subsidies, forgiving tax debts, issuing state guarantees, or offering other economic benefits. Such advantages may ease the financial burden of specific businesses in ways that would not arise under normal market conditions without state intervention.

This behaviour not only undermines fair competition by disrupting the level playing field for all market participants but also poses a threat to the integrity of the European Union's internal market.

The primary objective of EU State Aid Law is to safeguard the integrity of the European Union's internal market. The EU's system for controlling State aid is unique globally and operates under the authority of the European Commission, a supranational body. The Commission holds exclusive powers, as outlined in the Treaty on the Functioning of the European Union (TFEU), to oversee State aid granted directly or indirectly by Member States to businesses.

This system is founded on the principle that State aid is generally prohibited unless it has been approved in advance by the European Commission. Without such oversight, Member States could freely support their national businesses based on domestic interests, leading to a fragmented market. This would undermine the process of market integration and conflict with the goal of preserving the internal market, as mandated by Article 3(3) of the Treaty on European Union (TEU).

The significance of State aid law and its status within the European Union can also be observed in the context of EU enlargement. The importance of compe-

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This chapter of this textbook was authored as follows: Marijana Liszt authored Sections 8.1 to 8.2.5 and Section 8.8, while Lidija Šimunović authored Sections 8.3 to 8.7.

tition and State aid control is so pronounced that EU institutions have consistently prioritized it in the accession negotiations and successive generations of association agreements. For instance, the Croatian Stabilization and Association Agreement[933] included stringent requirements for State aid control, as do similar agreements with e.g. Serbia, Montenegro, Bosnia and Herzegovina, Albania, etc. Even the Free Trade Agreement[934] between the EU and Ukraine incorporates provisions on State aid control, which are applied almost as though Ukraine were already a Member State.[935]

This demonstrates the far-reaching importance of these legal norms, which extend beyond EU borders through international agreements. Their purpose is to support further integration, protect and preserve the internal market, and ensure that its potential expansion does not destabilize competition. By promoting consistent rules and fair conditions across both the internal and associated markets, these provisions aim to create a level playing field for all businesses.[936]

In discussions about State aid, the term *State aid policy* frequently arises alongside State aid law. From the perspective of a Member State, State aid policy refers to the strategic goals a government aims to achieve by providing compatible aid at the national level. For example, a state might allocate public funds to build renewable energy infrastructure or support specific groups, such as micro-entrepreneurs or women-led businesses, through initiatives like venture capital programs.

However, when viewed in the context of the European Commission's role as the central authority in this field, State aid policy takes on a broader dimension. As the EU's primary political body, the Commission not only oversees compliance with State aid rules but also advances the Union's industrial and economic strategies. It achieves this, in part, by establishing and enforcing rules on what constitutes compatible State aid, ensuring alignment with the EU's overarching policy objectives.

Following all of the above, it can be concluded that State aid law is a real primordial law of the European Union, that its purpose is closely related to the goal of integration and preservation of the internal market, and that the key role in this

933 Marijana Liszt, Siniša Petrović, *Croatia – National Report*, in *The Effective Application of EU State Aid Procedures – The Role of National Law and Practice*, ed. Paul Nemitz, (Alphen aan den Rijn, 2007, Kluwer Law International, 2007) 123-141.

934 Deep and Comprehensive Free Trade Agreement (DCFTA) is an integral part of the 2014 Association Agreement between Ukraine and the EU.

935 Vlatka Butorac Malnar, Jasminka Pecotić Kaufman, Siniša Petrović, Dubravka Akšamović and Marijana Liszt, *Pravo tržišnog natjecanja i državnih potpora*, (Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2021), 509-510.

936 *Ibid.*

is played by the main supervisory authority – the European Commission, which is also the main policy maker of the Union. Thus, the very content of State aid law, especially in the part that regulates the topic of good and compatible State aid, will reflect the ideas and principles behind which the Commission itself stands (e. g. measures that contribute to the implementation of the European Green Deal, while helping to end the dependence on Russian fossil fuels and fast forward the green transition as set out in the REPowerEU Plan[937], or "matching aid" in the sense of the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia,[938] etc.)

8.2. General concepts of State Aid

8.2.1. Definition of State Aid

The definition of State aid as a legal concept is critically important from the outset, particularly when determining whether a measure needs to be notified to the European Commission for evaluation and potential approval. The Commission is not tasked with monitoring or assessing all measures adopted by Member States that could impact the market but only those that meet the criteria outlined in Article 107 (1) TFEU. Additionally, the definition of State aid carries significant implications because providing aid without following the required notification procedure can lead to serious consequences. This is especially true for the recipient of the aid, who may be required to repay any unlawfully granted State Aid.

Article 107 (1) TFEU defines State aid as "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States*".

In the absence of a precise definition of State aid and of an exhaustive list of state measures that could constitute State aid within the meaning of Article 107 TFEU, the concept of State aid has been interpreted by the Commission in its Article 108 proceedings and in its soft law documents,[939] but the key outlines of

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937 E.g. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2090. Accessed 1.10. 2024.

938 Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (2023/C 101/03).

939 E.g. Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01) (Notice on Notion of Aid), but also all the other Guidelines, Frameworks, Communications, Recommendations, etc. See: https://competition-policy.ec.europa.eu/state-aid/legislation_en. Accessed 1.10.2024.

the concept have been given by the Courts of the European Union, which have the exclusive power to interpret the provisions of the Treaty. The Court said that the concept of State aid does not include only positive measures such as state subsidies, but also other measures that in any way alleviate the economic burden that would otherwise have to be borne by the undertaking - beneficiary of the aid, in the absence of such a measure.

In Steenkolenmijnen,[940] one of the first cases in which the Court ruled in the field of State aid, State aid was defined as follows:

"A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect."

The Court therefore unequivocally eliminated the dilemma by stating that the concept of State aid was broader than a subsidy and included all those measures that in some way alleviated the burden that would otherwise have to be borne by the beneficiary, allowing him to make "savings".[941] Also, an omission attributed to a Member State may result in the emergence of State aid.[942]

State aid, therefore, means a certain advantage that the public authority grants to the beneficiary undertaking without any compensation from that undertaking or with a fee that corresponds only to only part of the value of the awarded advantage. To determine whether a state measure constitutes aid within the meaning of Article 107 TFEU, it is necessary to determine whether the beneficiary undertaking has received an economic advantage which it would not otherwise have received under normal market conditions. Thus, the Court held that the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is

940 *Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, Judgment of 23 February 1961, ECLI:EU:C:1961:2, paragraph 19. This was aid under the Treaty establishing the European Coal and Steel Community.

941 *Italy v Commission (Textiles),* Judgment of 2 July 1974, EU:C:1974:71, *Van der Kooy v Commission*, judgment of 2 February 1988, EU:C:1988:38.

942 *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others*, Judgment of 19 March 2013, EU:C:2013:175, paragraphs 100 to 103.

capable of constituting State aid if the remuneration received in return is less than that which would have been demanded under normal market conditions.[943]

Speaking of the challenges of defining the concept of aid, one cannot circumvent the very important prerequisite for the application of Article 107 (1) TFEU, which requires that, to constitute State aid at all, the beneficiary receiving must be an undertaking. When a measure targets a beneficiary that is not considered to be an undertaking, such as a private individual or public authority or other non-economic activities, it falls outside the scope of the EU State aid rules.

The concept of undertaking in State aid law corresponds to that of undertaking in general competition law, thus, the status of that entity under national law (e.g. an association or a sports club) or whether that entity was established with a view to making a profit or not is not decisive. The only relevant criterion is whether such an entity carries out economic activity, that is, an activity consisting in the provision of goods and services on the market.

Over the past two decades, the scope of the concept of State aid has significantly expanded, particularly regarding the criterion of "economic activity." This shift has brought areas traditionally excluded from State aid control, such as infrastructure development, under scrutiny. Previously, infrastructure construction, whether roads, bridges, or airport facilities - was considered a general public policy measure and was not subject to State aid oversight, even when publicly funded.

However, the Court of Justice's Aéroports de Paris[944] ruling marked a turning point by classifying airport operation as an economic activity. This was further reinforced in the landmark Leipzig/Halle case,[945] where the Court held that even the construction of a commercial airport runway constitutes an economic activity. This reinterpretation has since been extended to other types of infrastructure intended for future commercial use.

The scope of State aid control has also been broadened to include the realm of sports. Prominent football clubs, such as Real Madrid and FC Barcelona, undeniably engage in economic activities. In its decision regarding unlawful State aid to Real Madrid, the European Commission determined that the club operated as a professional football organization for profit. It generated income through ticket sales, marketing activities, television broadcasting rights, merchandise sales, sponsorships, and other commercial avenues. Consequently, the Commission

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943 *Syndicat français de l'Express international (SFEI) and Others v La Poste*, judgment of 11 July 1996, EU:C:1996: 285.

944 *Aeroports de Paris v Commission*, judgement of 12 December 2000, EU:T:2000:290.

945 *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commissio*n, judgement of 19 December 2012, EU:C:2012:821.

concluded that Real Madrid qualifies as an undertaking within the meaning of Article 107 (1) TFEU.[946]

State aid control has also extended to religious institutions, including the Catholic Church. A notable case involved the Congregación de Escuelas Pías Provincia Betania, which requested a tax refund from the Municipality of Getafe for construction work on a hall within a Catholic school, citing a tax exemption granted to the Catholic Church under national law. This raised the question of whether such a tax exemption constituted prohibited State aid under Article 107 (1) TFEU, particularly when it applied to activities that were not strictly religious in nature.[947]

A key source for considering the concept of State aid in practice is the Commission Notice on the notion of State aid (NoA). It contains a comprehensive overview of the case law of the Courts and how it has defined individual elements of the concept of aid under Article 107 (1) TFEU. The Notice states that the concept of aid is an objective legal concept defined by the Treaty and that the Commission is bound by that objective concept and has only limited discretion in its application. The Court recently reiterated that "the classification as State aid within the meaning of Article 107 (1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or 'through State resources', that the intervention be liable to affect trade between Member States, that that intervention confer a selective advantage on the beneficiary and that the same intervention distort or threaten to distort competition."[948]

Therefore, if the recipient of an aid measure is an undertaking, and if all the conditions or elements of the first paragraph of Article 107 TFEU are cumulatively met, such a measure will be considered State aid and will be subject to the implied prohibition of such a measure. The prohibition, i.e. "incompatibility with the internal market", has the character of a rebuttable presumption, since the paragraphs (2) and (3) of Article 107 TFEU foresee possible exceptions to the prohibition, but these possibilities will be considered later.

In the text that follows each element of aid that must be cumulatively fulfilled in the sense of the Article 107 (1) TFEU shall be individually analysed.

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[946] *Commission Decision (EU) 2016/2393 Spain for Real Madrid CF* of 4 July 2016, SL [2016] L 358/3.

[947] *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, judgement of 27 June 2017, EU:C:2017:496.

[948] *DOBELES HES SIA*, judgement of 23 January 2023, ECLI:EU:C:2023:1.

8.2.2. Economic advantage

An advantage, within the meaning of Article 107 (1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. Whenever the financial situation of an undertaking is improved because of State intervention on terms differing from normal market conditions, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken.[949]

Also, the advantage lies in the fact that the intervention of the public authority reduces the cost that is normally included in the budget of an undertaking. Namely, the Court repeatedly held that the concept of aid was wider than that of a subsidy because it embraced not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, were similar in character and had the same effect.[950] It is important to note that the term "intervention of the public authorities" does not refer only to positive actions of the state, but also includes situations in which the competent authorities fail to take measures for which they are otherwise competent, for example in relation to the collection of debts.[951] If the beneficiary is obliged to pay some compensation for the received support, but such compensation is insufficient or disproportionate, it will again present an economic advantage.

In the case JCDecaux v. Commission, the Court recalled the meaning of the concept of advantage in Article 107 (1) TFEU by stating the following: "…the concept of advantage, which is intrinsic to the classification of a measure as State aid, is an objective one, irrespective of the motives of the persons responsible for the measure in question. Accordingly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. Article 107 (1) TFEU does not distinguish between the causes or the objectives of State aid measures but defines them in relation to their effects."[952]

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[949] Notice of Notion of Aid, paragraphs 66 and 67.

[950] C-387/92 *Banco de Crédito Industrial SA*, later *Banco Exterior de España SA v. Ayuntamiento de Valencia*, judgement of 15 March 1994., EU:C:1994:100, paragraph 13.

[951] C-480/98 *Magefesa*, Judgment of 12.10.2000, ECLI:EU:C:2000:559, paragraphs 19 and 20.

[952] C-710/22 *JCDecaux Street Furniture Belgium SA v. Commission*, judgement of 26 September 2024, ECLI:EU:C:2024:787, paragraph 43.

At the same time, the precise form of measure is irrelevant in establishing whether it confers an economic advantage on the undertaking. In a case dealing with aid granted by French Authorities to EDF, the Court confirmed that the form in which a measure is implemented is irrelevant as regards its classification as State aid.[953] The various forms may include tax exemptions, tax credits, reduced tax rates, reduced taxable amount, accelerated depreciation, sale of land, buildings, shares, assets, state guarantees (even if the guarantee is not called), loans and investments.

However, if the State behaves like a "normal" player on market, then there would be no advantage. Namely, due to the principle of neutrality of property ownership of the TFEU[954], any State has right to act on market like any other market player. If the State (any public body, including public undertakings) behaved like a private player, alleged beneficiary would not obtain anything outside the "normal market conditions" - such economic transactions do not confer an advantage on its counterpart, and therefore do not constitute aid. At the same time, when public authorities directly or indirectly carry out economic transactions they are subject to Union State aid rules. Related to this, the Union courts have developed the 'market economy investor principle'[955] to identify the presence of State aid in cases of public investment (in particular, capital injections). To determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question.[956]

The successful application of the so called MEO Test rules out the presence of economic advantage and, consequently, of State aid.

The other important situation that excludes economic advantage concerns compensation for costs incurred to provide a service of general economic interest. In the famous Altmark judgement[957] the Court made clear that the granting of an advantage can be excluded if four cumulative conditions are met. First, the recip-

953 *Commission v EDF*, Judgement of 5 June 2012, ECLI:EU:C:2012:318.

954 Article 345 of the TFEU provides that 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

955 The EU courts have also developed the 'private creditor test' to examine whether debt renegotiations by public creditors involve State aid, and the 'private vendor test' to assess whether a sale carried out by a public body involves State aid. All those tests are variations of the same basic concept that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions. The Commission refers therefore to the general term 'market economy operator' (MEO) test as the relevant method to assess whether aid is included.

956 Notice of Notion of Aid, paragraphs 73-114.

957 *Altmark Trans*, Judgement of 24 July 2003, EU:C:2003:415, § 84.

ient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters based on which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, considering the relevant receipts and a reasonable profit. Fourth, where the undertaking that is to discharge public service obligations is not chosen following a public procurement procedure to select a tenderer capable of providing these services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[958] This topic on the services of general economic interest has been dealt with in chapter 7. above.

8.2.3. State resources and imputability to the State

The State origin of the resources is one of the cumulative conditions to find State aid as defined in Article 107 (1) TFEU. The notion of "State" here encompasses all levels of public authorities in a certain Member State (decentralised, federated, regional, local, or other), so the State resources refer to all resources of the public sector, including, as the case may be, the public undertakings and in some cases even resources of private bodies, if the State exercises control over such resources.

Only the advantages granted directly or indirectly through State resources can constitute State aid. Such transfers can take many forms, including positive transfers of funds such as grants, loans, benefits in kind, foregoing of State revenues otherwise due such as tax exemptions or transactions at below market rates, firm and concrete commitment to make State resources available later, and creation of concrete risk of imposing an additional burden on the State in the future.

Also, funds must be regarded as state resources within the meaning of Article 107 (1) TFEU if they derive from compulsory contributions imposed by the legislation of the Member State concerned and are managed and apportioned in accord-

[958] These conditions have been further elaborated by the Commission in its Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest.

ance with that legislation.[959] In the recent judgement DOBELES HES, the Court ruled that funds financed by a levy or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation indeed constitute state resources within the meaning of Article 107 (1) TFEU. However, there must be another criterion fulfilled: the sums must constantly remain under public control, and therefore available to the competent national authorities.[960]

Apart from the transfer of State resources, for a measure to form State aid, another cumulative criterion needs to be present: such transfer must be at the same time imputable to the State.[961] In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State. The same applies if a public authority designates a private or public body to administer a measure conferring an advantage.

However, imputability is less evident if the advantage is granted through public undertakings. In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure. The mere fact that a measure is taken by a public undertaking is not per se sufficient to consider it imputable to the State.[962] The assessment needs to be done on a case-by-case basis.

Commission and the Court have created a list of possible indicators to establish whether a measure is imputable to the State: structural and organisational links, governing rules of the public undertaking, activities of the public undertaking and exercise on the market, scope of the measure, its content or the conditions contained.

8.2.4. Selectivity

Article 107 (1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid. So, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors. Measures of purely general application which do not favour certain undertakings only or the production of certain goods only do not fall within the scope of Article 107 (1) of the Treaty (e.g. corporate tax rate).

959 *Association Vent De Colère! and Others*, Judgement of 19 December 2013, EU:C:2013:851, paragraph 25.

960 DOBELES HES SIA, judgement of 23 January 2023, ECLI:EU:C:2023:1, paragraph 39.

961 *France v Commission (Stardust)*, Judgment of the Court of Justice of 16 May 2002, ECLI:EU:C:2002:294, paragraph 24.

962 Notice of Notion of Aid, paragraphs 39-41.

We distinguish between material and regional selectivity. Regional or geographical selectivity n refers to measures that don't apply to the entire territory of the Member State but only to certain parts of the territory of a Member State.[963] In that case the measures are automatically selective. Material selectivity can further be divided into de jure and de facto selectivity. De jure selectivity is selectivity which derives from the "law", and it refers to measures which have been reserved only to certain undertakings. De facto selectivity concerns measure which formally seems general, but the structure of the measure is such that it "significantly favours a particular group of undertakings". Namely, the case-law has made it clear that even interventions which, at first appearance, apply to undertakings in general may be selective to a certain extent and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods.[964]

Material selectivity in general is currently very broad and topical area of State Aid law with important recent case law in which there are still often tensions and not all aspects are clear and settled. This especially concerns the tax measures and tax rulings. The Commission has increasingly focused on tax rulings issued by Member States to multinational corporations as these rulings, often related to transfer pricing, can be considered State aid if they allow companies to artificially lower their tax burden, thereby gaining an undue competitive advantage. Significant cases like Apple (Ireland), Fiat (Luxembourg), and Amazon (Luxembourg) highlight the Commission's efforts to combat aggressive tax planning practices facilitated by Member States as such preferential treatment can amount to selective State aid.[965] On that thought, as a matter of curiosity, a couple of weeks ago the Court of Justice delivered its judgment in the much discussed case of Commission v Ireland and Others[966] confirming a decision from the Commission finding State aid had been granted in tax rulings issued by Ireland in favour of Apple. Namely, in 2016 the European Commission concluded that Ireland granted illegal State aid to two Apple group subsidiaries in two tax rulings granted in 1991 and 2007. The General Court had annulled this Decision, but the CJEU has now upheld the Commission Decision in full and has given final judgment on the matter with no remittance back to the General Court and no ability to appeal.

[963] *Azores Tax Breaks*, Judgment of the Court (Grand Chamber) of 6 September 2006, EU:C:2006:511, *UGT-Rioja*, Judgment of the Court of 11 September 2008. EU:C:2008:488.

[964] *Commission and Spain v Government of Gibraltar and United Kingdom*, Judgement of the Court of 15 November 2011, ECLI:EU:C:2011:732.

[965] *Fiat Chrysler Finance Europe v Commission*, Judgment of the Court of 8 November 2022, ECLI:EU:C:2022:859, *Engie*, Judgement of the Court of 5 December 2023, ECLI:EU:C:2023:948, *Amazon*, Judgement of 14 December 2023, ECLI:EU:C:2023:985.

[966] *European Commission v Ireland and Apple Sales International*, Judgment of the Court (Grand Chamber) of 10 September 2024, ECLI:EU:C:2024:724.

8.2.5. Distortion of competition and effects on trade

Article 107 (1) TFEU prohibits aid which affects trade between Member States and distorts or threatens to distort competition. Distortion of competition and effects on trade are two distinct and necessary elements of the notion of aid. In practice, however, these criteria are often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked.

As the Court reiterated in the OTP Bank case,[967] for the purpose of categorising a national measure as State aid, it is not necessary to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, it being necessary only to examine whether that aid is liable to affect such trade and distort competition. It went on to say that, in particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, those undertakings must be regarded as affected by that aid. In that connection, it is not necessary that the beneficiary undertaking should itself participate in the intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State.[968] Given the high level of economic integration achieved within the EU, aid that distorts competition between companies will in most cases also have an impact on intra-EU trade.

However, if State support is granted to an activity which has a purely local impact, where the beneficiary of state support supplies goods or services to a limited area within a Member State, and is unlikely to attract customers from other Member States, there may be no effect on intra-EU trade and therefore no State aid within the meaning of the EU rules. To be free of aid, the measure should also have no - or at most marginal – foreseeable effects on cross-border investment in the sector or on the establishment of companies within the EU's Single Market. In 2015 the European Commission has concluded in relation to seven measures granting public support to purely local operations that they do not involve state aid within the meaning of EU rules, because they are unlikely to have a significant effect on trade between Member States. The decisions concerned the Czech Re-

[967] *OTP Bank Nyrt. v Magyar Állam and Magyar Államkincstár*, Judgment of the Court of 19 March 2015, ECLI:EU:C:2015:185, paragraphs 54-56.

[968] The Court referred also to judgment in *Unicredito Italiano*, Judgement of the Court of 15 December 2005, EU:C:2005:774, paragraph 58.

public,[969] Germany,[970] the Netherlands[971] and the UK.[972] These decisions were part of the Commission's effort to focus State aid control on bigger cases that genuinely impact competition in the Single Market, to the greatest benefit of consumers.

In any case, should a measure lack any of the cumulative criteria that need to be fulfilled for a measure to be State aid in the sense of the Article 107 (1) TFEU, then the measure will not be submitted to the Commission's scrutiny.

8.3. De Minimis aid

De minimis aid is aid of less than EUR 300,000 per undertaking over the last three years.[973] In other words, if the aid is less than EUR 300,000 in the last three years, such aid is considered *de minimis* and does not have to be formally notified to the European Commission or receive prior approval. It is worth noting that the previous threshold for de minimis aid until December 2023 was EUR 200,000 over the last three years. This is aid that the EU considers to be so small that it will not distort competition. The legal basis for de minimis aid is, inter alia, Article 109 TFEU, which provides that the Council may determine categories of aid that are exempt from this notification requirement.[974] Furthermore, Article 108 (4) TFEU provides that: "The Commission may adopt regulations relating to those categories of State aid. Accordingly, in Regulation (EU) 2015/1588, the Council decided, in accordance with Article 109 of the Treaty, that de minimis aid (i.e. aid granted to the same undertaking over a certain period and not exceeding a certain fixed amount) may be one of those categories. On this basis, *de minimis* aid is considered not to meet all the criteria of Article 107 (1) of the Treaty and is therefore not subject to the notification procedure as other State aid measures."[975]

The *De minimis* Regulation requires public authorities to keep official records of all *de minimis* aid paid for 10 years from the last payment. In addition to public authorities, beneficiaries are also required to keep records of *de minimis* aid for the

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969 Czech Republic - Hradec Králové public hospitals (SA.37432).

970 Germany – Medical centre in Durmersheim (SA.37904), Germany – Städtische Projektgesellschaft „Wirtschaftsbüro Gaarden – Kiel“ (SA.33149), Germany – Landgrafen-Klinik (SA.38035).

971 The Netherlands – Investment aid for Lauwersoog port (SA.39403)

972 United Kingdom - Glenmore Lodge (SA. 37963), United Kingdom – Member-owned golf clubs (SA.38208).

973 Art 3 of the Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, C/2023/9700, *OJ L, 2023/2831, 15.12.2023. (Hereinafter: De minimis Regulation).*

974 Preambula (1) of the *De minimis* Regulation.

975 Article 108 (4) of the TFEU.

last 3 years, as well as to keep records of whether the aid meets the criteria to be declared *de minimis*. In relation to *de minimis* aid, it is worth noting that an economic entity is not limited to one company, but also includes affiliated companies.[976]

The conditions from the *De minimis* Regulation do not apply to subsidies given to economic entities for: "primary production of fishery, aquaculture and agricultural products; processing and placing on the market fishery, aquaculture and agricultural products where the amount of support is fixed based on the price or quantity of items purchased or put on sale, or additionally in the case of agricultural products, where the support has partially or fully ceased for primary producers; activities related to exports, such as a distribution network, to Member States of the European Union (EU) or countries outside the EU; the use of domestic goods and services compared to imported ones."[977]

The *De minimis Regulation* clarifies that the aid is considered granted at the moment when the undertaking obtains a legal right to receive it, regardless of the timing of the actual payment. [978] In cases where the beneficiary undertaking is subsequently divided into two or more separate legal entities, the aid is deemed to have been granted to the entity that continues the activity for which the aid was originally intended.[979]

8.4. Automatic compatibility of State Aid

Article 107 (2) of the TFEU enumerates the categories of State aid that are automatically considered compatible with the internal market. Nevertheless, the Member States are invited to notify even such aid measures to the European Commission. However, the Commission's role is limited to formally verifying whether the conditions set out in the Treaty are met. These categories of aid are as follows:

a) Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination based on the origin of the products concerned;
b) Aid to compensate for damage caused by natural disasters or exceptional occurrences;
c) Aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is necessary to offset the economic disadvantages caused by that division. Five years after the entry

[976] Article 3. Of the *De minimis Regulation.*
[977] Article 1 of the *De minimis Regulation.*
[978] Article 3 (3) of the *De minimis Regulation.*
[979] Article 3 (9) of the *De minimis Regulation.*

into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this provision.[980]

8.5. Discretionary compatibility of State Aid

Under EU State aid law, there are categories of aid that may be deemed compatible with the internal market, subject to conditions. These are regulated by Article 107(3) TFEU and include the following:

a) Aid to promote the economic development of areas where the standard of living is abnormally low, or where there is serious underemployment, including the regions referred to in Article 349 TFEU, in light of their structural, economic, and social situation;

b) Aid to support the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

c) Aid to facilitate the development of certain economic activities or economic areas, provided such aid does not adversely affect trading conditions to an extent contrary to the common interest;

The exception under Article 107 (2) (b) has been by the Commission very often recently during the COVID 19 crisis which was considered in the decisional practice of the Commission as an exceptional occurrence. At the same time, the exception under 107 (2) (c) has nowadays only historical significance and is void of any practical importance.

d) Aid to promote culture and heritage conservation, provided that such aid does not distort competition or affect trading conditions in the Union to an extent contrary to the common interest;

e) Such other categories of aid as may be specified by a decision of the Council, acting on a proposal from the Commission.[981]

By invoking one of the legal grounds for compatibility with an aid measure as enumerated above, the Commission has exclusive competence to assess the compatibility with the internal market of any notified or unlawful State aid. Most of these legal grounds stemming from Article 107(3) have been extensively elaborated through the Commission's soft law [982] which is of utmost importance for all the stakeholders in this field of law.

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980 Article 107 (2) of the TFEU.

981 Art 107 (3) of the TFEU.

982 https://competition-policy.ec.europa.eu/state-aid/legislation_en.

8.6. General Block Exemption Regulation

The general procedural rule concerning State aid is that all aid measures need to be ex ante notified to the Commission.[983] However, there are categories of aid that have been previously assessed compatible with the internal market by the Commission and are thereby exempted from the previous notification.

The main document that regulates these types of aid measures is GBER.[984] If the conditions from the GBER are fulfilled, aid does not require prior Commission notification and authorisation.[985] In other words, the GBER encourage the EU Member States to grant money to companies to accomplish economic growth of the EU.

Among others, the GBER covers the following categories and types of aid measures regional aid; aid to small and medium-sized enterprises (SMEs);[986] aid for access to finance for SMEs;[987] aid for research and development and innovation, etc.[988]

The GBER is not applicable to aid to export-related activities; aid contingent upon the use of domestic goods over imported goods; aid to facilitate the closure of uncompetitive coal mines; an undertaking which is subject to an outstanding recovery order; aid to undertakings in difficulty.[989]

8.7. State Aid Enforcement

Main actors involved in the enforcement of the State aid control are the Member States and the Commission. Within the administrative procedure based on Article 108 TFEU, the Member States have the duty to notify the measures to the Commission and to respect the standstill obligation foreseen in the last sentence of Article 108 (3) - the prohibition to implement (compatible) State aid before the

983 Article 108 (3) TFEU.
984 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, as amended by Commission Regulation (EU) 2017/1084 of 14 June 2017, Commission Regulation (EU) 2020/972 of 2 July 2020, Commission Regulation (EU) 2021/452 of 15 March 2021, Commission Regulation (EU) 2021/1237 of 23 July 2021, Commission Regulation (EU) 2023/917 of 4 May 2023 and Commission Regulation (EU) 2023/1315 of 23 June 2023.
985 Article 3 of the GBER.
986 Article 4. of the GBER.
987 Article 4 (g) of the GBER.
988 Article 4 (i) of the GBER. See: https://eur-lex.europa.eu/EN/legal-content/summary/general-block-exemption-regulation.html. Accessed 9.1.2025.
989 *Ibid.*

Commission's approval. In case of unlawful and incompatible aid, the Member States are also required to recover illegal aid from the beneficiary.

The Commission, on the other hand, has exclusive competence to assess the compatibility of State aid in the procedure set out in the Procedural Regulation[990] as the procedure between the Commission and the notifying Member State. Other actors that may be included in the State aid enforcement are the concerned parties: beneficiaries, competitors, or trade associations as "interested parties", but their role in the procedure is limited to the possibility of submitting complaints to the Commission, participation in the formal investigation procedure, appeal before the EU Courts and private enforcement before the national judicature.

Also the national courts play a pivotal role in the enforcement of the State aid law, especially in the following scenarios: Article 108 (3) TFEU provides that Member States may not implement new State aid measures before they have been approved by the Commission (standstill obligation), so due to the "direct effect" of that provision, the parties affected by unlawful State aid can bring direct action before national courts for damages, recovery and/or injunctive measures. National courts also play an important role in the enforcement of recovery decisions adopted by the Commission under the Procedural Regulation.[991]

8.7.1. An overview of the role and powers of the European Commission

According to the TFEU and its' Article 107 (1),[992] any State aid is *prima facie* prohibited, or "incompatible with the internal market". "Save as otherwise provided in the Treaties" from the wording of Article 107 (1) TFEU refers principally to Articles 107(2) and (3) and Article 106 (2) TFEU which set path for compatible aid. Namely, in some circumstances, government intervention is necessary. So, the TFEU allows for several policy objectives that may be supported through State aid to be considered compatible with the internal Market. The Commission is responsible for enforcing the EU State aid rules and Alpha and Omega when

990 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (Text with EEA relevance), OJ L 248, 24.9.2015.

991 Communication from the Commission - Commission Notice on the enforcement of State aid rules by national courts 2021/C 305/01, C/2021/5372, OJ C 305, 30.7.2021.

992 Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

it comes to the determination whether the aid is compatible with the internal market. This is associated to the fact that the Commission is also the main policy maker of the Union, as mentioned in the Introduction.

Contrary to the wide discretion of the Commission concerning the compatibility of aid, there is no margin of discretion for the Commission as to the qualification of a measure as State aid. This will require comprehensive jurisdictional review. However, the status of the measure as State aid in sense of Article 107 (1) TFEU triggers the application of Article 108 TFEU and the corresponding procedural rules.

The Article 108 TFEU as the basic procedural framework for the control of State aid distinguishes two main types of procedures before the Commission: the existing aid procedure and the new aid mandatory notification procedure. The procedure regarding the existing aid schemes requires the Commission, in co-operation with Member States, to keep under constant review all systems of aid existing in those States. The Commission shall propose to the Member State any appropriate measures required by the progressive development or by the functioning of the internal market. This is also dealt with more detail in the chapter VI of the Procedural Regulation. The Procedural Regulation deals with four different types of procedures conducted by the Commission: the procedure regarding notified aid, the procedure regarding unlawful aid, the misused aid procedure and the existing aid procedure.

The new aid notification procedure consists of two phases: phase 1 as the preliminary examination of the measure, which is a dialogue between the Commission and the Member State concerned and phase 2 – the formal investigation procedure, as will be presented below.

8.7.2. Preliminary review and formal investigation

In accordance with Article 4 of the Procedural Regulation, the Commission shall examine the notification as soon as it is received and take one of the following decisions: where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107 (1) TFEU, it shall decide that the measure is compatible with the internal market ('decision not to raise objections'). But, where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified

measure, it shall decide to initiate proceedings pursuant to Article 108(2) TFEU ('decision to initiate the formal investigation procedure').

Where the Commission has not taken a decision in accordance with the above, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision within a period of 15 working days following the receipt of the notice.

In case the Commission decides to open a formal investigation procedure, in the decision to initiate the formal investigation procedure it shall summarise the relevant issues of fact and law, shall include its' preliminary assessment as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period.

Within the formal investigation procedure particularly regarding technically complex cases subject to substantive assessment, the Commission may, if the information provided by a Member State concerned during the course of the preliminary examination is not sufficient, request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete its assessment of the measure at stake taking due account of the principle of proportionality, in particular for small and medium-sized enterprises.

As set in Article 9 of the Procedural Regulation, the formal investigation procedure shall be closed by means of a decision: a "non-aid" decision if the notified measure does not constitute aid, a "positive decision" if the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the internal market have been removed and the aid is compatible with the common market based on a certain exception under the TFEU, a "conditional decision" if the Commission attaches to a positive decision conditions subject to which aid may be considered compatible with the internal market and lays down obligations to enable compliance with the decision to be monitored or, finally, a "negative decision" if the Commission finds that the notified aid is not compatible with the internal market, in which case aid shall not be put into effect.

The Commission shall as far as possibly endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.

It is worth mentioning also a non-binding but useful tool in the form of European Commission's Best Practices Code for State Aid Control.[993] It encourages early engagement between Member States and the Commission during the pre-notification phase to identify potential issues and expedite decision-making and promotes streamlined processes, particularly for measures that clearly align with EU rules. It also provides indicative timelines to ensure procedural certainty.

8.7.3. Types of actions and the role of the European Court

According to Article 263 TFUE the Court of Justice reviews the legality of acts of, *inter alia*, of the Commission. Article 256 TFEU sets the jurisdiction of the General Court to hear and determine at first instance actions or proceedings referred to in Article 263 (...). Decisions given by the General Court under this provision may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute for the Court of Justice.

In the Article 263 proceedings the actions can be brought by the Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Also, any natural or legal person may, under the conditions laid down in that Article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. Evolution of the procedural legal framework regarding the concept of an act which is open to a challenge as well as the legal standing of the interested parties such as beneficiaries has occurred through abundant jurisprudence.[994]

As mentioned before related to the existing aid regime, the Commission keeps such measures under constant review. If necessary, it proposes appropriate measures to the Member States. However, if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a

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993 Commission Notice on a Best Practices Code on the conduct of State aid control proceedings - OJ C 253, 19.7.2018.

994 *Deutsche Lufthansa*, Judgment of the Court of 15 July 2021, ECLI:EU:C:2021:608; *Deutsche Post*, Judgement of the Court of 13 October 2011, ECLI:EU:C:2011:656; *Hungary v. Commission*, Judgement of the Court of 4 June 2020, ECLI:EU:C:2020:421; *Plaumann v. Commission*, Judgment of the Court of 15 July 1963, EU:C:1963:17; *Ja zum Nürburgring eV*, Judgment of the Court of 2 September 2021, ECLI:EU:C:2021:666; *Braesch v. Commission*, Judgement of 31 January 2023, ECLI:EU:C:2023:58.

State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259 (without the need to issue an reasoned opinion on the matter and giving the State concerned the opportunity to submit its observations), refer the matter to the Court of Justice of the European Union directly.

The role of the Court of Justice in the field of State aid is also extremely important with regard to its jurisdiction to give preliminary rulings pursuant to Article 267 TFEU, as many of the landmark judgments, which have paved the way for the development of crucial notions in this subject matter, have been rendered in that kind of proceedings.[995]

8.7.4. Enforcement by the national courts

The amount of aid granted based on block exemptions has significantly increased in the last fifteen years as the Commission introduced more possibilities for the Member States to grant aid without prior Commission scrutiny by providing additional exemptions from the obligation to notify the Commission of any planned State aid measure. Thereby the role of the national courts in ensuring compliance with State aid rules has grown more important. The role of the national courts in the enforcement of State aid is twofold: it refers to cases where national courts are involved in drawing the consequences of the unlawful implementation of aid ("private enforcement") and to cases where national courts are involved in implementing Commission decisions ordering recovery ("public enforcement"). Still, the overarching practice in the Members States shows that this recourse is to rarely used.[996]

To support the national courts the Commission is invited to cooperate with them loyally in line with the Article 29 of the Procedural Regulation. The courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid

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995 E.g. *Altmark Trans*, Judgement of the Court of 24 July 2003, ECLI:EU:C:2003:415; *Eventech*, Judgement of the Court of 14 January 2015, ECLI:EU:C:2015:9; *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, judgement of 27 June 2017, EU:C:2017:496; *OTP Bank*, Judgment of the Court of 19 March 2015, ECLI:EU:C:2015:185, etc.

996 Communication from the Commission - Commission Notice on the enforcement of State aid rules by national courts C/2021/5372, OJ C 305, 30.7.2021.

rules, the Commission also may submit written or sometimes oral observations to the courts of the Member States that are responsible for applying the State aid rules.

Also, to facilitate the enforcement of the State aid rules by the national courts, the Commission published two communications: the Notice on the enforcement of State aid rules by national courts which provides national courts and other interested parties with practical information on the enforcement of State aid rules at national level and the Notice on the Recovery of unlawful and incompatible State aid[997] which addresses the aspects related to public enforcement.

[997] Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid C/2019/5396, OJ C 247, 23.7.2019.

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