Complete EU Law: Text, Cases, and Materials (5th edn)
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13. Competition law: Article 101 TFEU

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Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter focuses on Article 101(1) TFEU, which prohibits 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. All three elements must be satisfied to establish a breach of Article 101(1). This chapter also considers the implications of the new Commission Notice on Agreements of Minor Importance (de minimis) (2014), as well as Brexit.

Keywords: EU law, anti-competitive behaviour, Article 101 TFEU, competition law, agreements, trade, de minimis, Regulation 330/2010, Brexit

Key Points

By the end of this chapter, you should be able to:

- understand and appreciate the general aims of EU competition law;
- explain and analyse the scope of the Article 101(1) TFEU prohibition;
- explain and analyse the key elements of Article 101 TFEU;
- understand the applicability and scope of the exceptions under Article 101(3) TFEU, both individual and block; and
- recognize the impact of Brexit on EU competition law.

Introduction

Competition law

As was discussed as early as Chapter 1, the creation of an internal market has been a fundamental aim of the European Union (EU) since 1957. In this regard, there are a number of Articles contained in the Treaties that prohibit tariff and non-tariff barriers to trade, with a view to ensuring the free movement of goods—one of the four fundamental freedoms. These rules have been, and indeed continue to be, vital to the effective operation of the internal market. Such measures target restrictions implemented by Member States, usually in the form of national legislation. It must be recognized, however, that Member State action is not the only threat to effective operation of the internal market; restrictive business practices can also have harmful consequences. Indeed, not only do such practices prejudice the operation of the internal market, but also they can have a detrimental effect on business efficiency, can harm consumers, and, if engaged in by large and powerful companies, are likely to disadvantage small and medium-sized enterprises (SMEs).

The two key Articles concerning the prohibition of anti-competitive behaviour are Articles 101 and 102 TFEU. This chapter focuses on Article 101 TFEU (agreements between businesses that may affect competition and interstate trade), whilst Chapter 14 focuses on Article 102 TFEU (abuse of a dominant position). Finally, Chapter 15 focuses on the enforcement of EU competition law.

Article 101 TFEU

The focus of Article 101 TFEU is upon trade agreements or less formal trade arrangements that are intended to or have the possibility of preventing, restricting, or distorting competition within the internal market to the extent that such agreements/arrangements affect trade between Member States.

For example, suppose that Pear Ltd and Melon Ltd, two Germany-based technology companies that, together, supply 85 per cent of all laptops sold in the EU, decide that it is not p. 570 in their ↵ interests to constantly compete against each other. Doing so has resulted in each company making only a very small profit margin and has resulted in huge marketing costs. They agree that if they each concentrate on the markets in separate countries and agree set prices, then their advertising budgets could be reduced and their profit margins restored to healthy rates. They suspect that this may not be totally legitimate and so are careful not to create a formal contract between them. Nevertheless, they reach an agreement whereby the EU market is divided up between them along national boundaries and a set pricing scheme is introduced.

It is this type of agreement that Article 101 TFEU is designed to prevent. Such an agreement ensures that Pear Ltd and Melon Ltd are, to a large extent, free from competitive pressures in their respective markets—but consumer choice is reduced and the expectation is that prices would be set at artificially high levels. Furthermore, it would be difficult for potential new competitors to access the market as Pear Ltd and Melon Ltd would each have a virtual monopoly in each Member State due to the market portioning resulting from the agreement. Thus the agreement has adverse effects on both consumers and potential competitors, and hence, as the agreement has the object of distorting competition within the internal market and will affect trade between Member States, it is likely to be within the scope of Article 101 TFEU.

13.1 Outline of Article 101 TFEU

Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (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:
   - any agreement or category of agreements between undertakings,
   - any decision or category of decisions by associations of undertakings,
   - any concerted practice or category of concerted practices,

   p. 571 ↵ which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101 TFEU is broad, covering formal agreements and also informal arrangements.

Under Article 101(2) TFEU, agreements or decisions within Article 101(1) are automatically void, although if it is possible to sever (that is, remove) restrictive clauses from an agreement, only those clauses will be void (Joined Cases 56 & 58/64 *Établissements Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299).

Article 101(3) TFEU provides for exemption, so that Article 101(1) may be declared inapplicable to an agreement, decision, or concerted practice if certain conditions are satisfied.

13.2 Article 101(1) TFEU: the prohibition

It is therefore important, in applying Article 101(1) TFEU, to take a structured approach.

Review Question

> Article 101(1) TFEU can be broken into three distinct elements. Can you identify them?
>
> *Answer*: Article 101(1) covers (a) agreements between undertakings, decisions by associations of undertakings, and concerted practices that (b) may affect trade between Member States and (c) have as their object or effect the prevention, restriction, or distortion of competition within the internal market.

13.2.1 Agreements between undertakings, decisions by associations of undertakings, and concerted practices

Before considering the nature of the agreements, etc that fall within Article 101(1) TFEU, it is first important to ensure that we are dealing with 'undertakings'.

The term itself is not defined within the Treaty. As such, we need to consider its interpretation within case law.

13.2.1.1 Undertakings

In Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, the Court of Justice considered the capacity of an
p. 572 employment agency. The Commission took the view that such an agency fell ↵ within the meaning of an undertaking within what is now Article 101(1) TFEU. The German government did not feel that this was the case with a public employment agency insofar as the employment procurement services were provided free of charge, as was the case here. The Court of Justice, in applying a wide definition of the term 'undertaking', held as follows.

Case C-41/90 *Höfner and Elser* [1991] ECR I-1979

> 21. It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.
>
> 22. The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.
>
> 23. It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community [now Union] competition rules.

Thus the term 'undertaking' has been interpreted widely and includes any legal or natural person engaged in some form of economic or commercial activity.

13.2.1.2 Agreements

'Agreement' clearly covers formal binding contracts, but it is not, on the face of it, clear whether it extends to less formal agreements. This matter was considered by the Court of Justice in Case 41/69 *ACF Chemiefarma NV v Commission ('Quinine Cartel')* [1970] ECR 661.

Thinking Point

> Why do you think the term 'agreement' does not have a Treaty definition?

In the *Quinine Cartel* case, the companies concerned agreed to retain their respective domestic markets and provided for the fixing of prices, rebates, and the allocation of export quotas for the export of quinine and quinidine to other countries. This was extended to all sales within the internal market by way of a 'gentlemen's agreement'. The companies argued that such an agreement did not constitute an 'agreement' within the meaning of what is now Article 101(1) TFEU. The Court of Justice held that '[a] gentlemen's agreement constitutes a measure which may fall under the prohibition contained in Article 85(1) [EC, now Article 101(1) TFEU] if it contains clauses restricting competition in the common market within the meaning of that Article and its clauses amount to a faithful expression of the joint intention of the parties' (*Quinine Cartel*, at para 9).

p. 573 ↵ It is therefore clear that the term 'agreement' is interpreted widely to include both formally and non-formally constituted agreements. In this regard, it would seem that the emphasis is on substance above form.

Thinking Point

> Why do you think that identifying the precise boundaries of an 'agreement' is less important than it otherwise might be? Reflect upon this as you familiarize yourself with all elements of Article 101(1) TFEU.

13.2.1.3 Decisions by associations of undertakings

The focus of 'decisions by undertakings' is trade associations. A trade association is simply an organization made up of members involved in a particular trade or business to promote a common interest. Such associations usually lay down membership rules that have the effect of regulating standards and behaviour. The decisions of such are therefore subject to Article 101(1) TFEU insofar as they are intended or have the possibility of preventing, restricting, or distorting competition within the internal market and to the extent that they are capable of affecting trade between Member States. An example of a decision by an association of undertakings therefore would be where a trade association for mobile phone manufacturers lays down rules stating that all manufacturers are to impose restrictive clauses in sales contracts.

In Joined Cases 96–102, 104, 105, 108, & 110/82 *IAZ International Belgium NV v Commission* [1983] ECR 3369, even a non-binding recommendation of a trade association concerning the connection of washing machines and dishwashers to the water supply was held to fall within Article 101(1) TFEU. Attention was drawn to the fact that such a recommendation, even if it had no binding effect, could not escape what is now Article 101(1) where compliance with the recommendation by the undertakings to which it was addressed would have an appreciable influence on competition in the market in question.

The focus of 'decisions of undertakings' is arguably upon trade associations, but, as with other elements of Article 101(1) TFEU, this has been interpreted widely to include professional associations. Thus, in Case C-309/99 *Wouters and others v Netherlands Bar* [2002] ECR I-1577, consideration was given to a regulation of the Dutch Bar Association prohibiting multidisciplinary partnerships and whether this was a decision of an association of undertakings, since it expressed the intention of members to carry out their economic activity in a particular way. It was held by the Court of Justice that, in such situations, the Dutch Bar Association acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

Case C-309/99 *Wouters and others v Netherlands Bar* [2002] ECR I-1577

> 66. … The legal framework within which such agreements are concluded and such decisions taken, and the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community [now Union] rules on competition, and in particular Article 85 of the Treaty [now Article 101 TFEU], are concerned …
>
> ↵ […]
>
> 71. … [A] regulation concerning partnerships between members of the Bar and members of other liberal professions … adopted by a body such as the Bar of the Netherlands, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty [now Article 101(1) TFEU].

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13.2.1.4 Concerted practices

A concerted practice is less easy to define than an agreement or a decision and a finding of such often requires a careful analysis over time of the interaction between undertakings in the absence of a formally or informally constituted agreement.

The first case to consider the meaning of 'concerted practice' was the leading case of Case 48/69 *Imperial Chemical Industries Ltd v Commission ('Dyestuffs')* [1972] ECR 619, which followed three general and uniform increases in the prices of dyestuffs between January 1964 and October 1967. A Commission Decision found that such uniform increases in prices were a result of coordinated behaviour between the undertakings concerned amounting to a concerted practice within Article 101(1) TFEU. Attention was drawn to the fact that the prices introduced for each increase by the different producers in each country were the same, that, with very rare exceptions, the same dyestuffs were involved, and that the increases were put into effect over only a very short period, if not actually on the same date. However, this was challenged by ICI, which argued that the simultaneous increases in price could be explained by, amongst other things, the nature of the **oligopolistic market** within which the undertakings were operating.

oligopolistic market

An oligopolistic market is a market within which only a few undertakings operate.

Thinking Point

> Why do you think that the behaviour of undertakings in an oligopolistic market is more likely to raise questions pertaining to a concerted practice than a market in which many undertakings operate?

The Court of Justice considered the content of what is now Article 101(1) TFEU and, in so doing, provided a definition that drew a distinction between market forces and evidence of collusion.

Case 48/69 *Imperial Chemical Industries Ltd v Commission ('Dyestuffs')* [1972] ECR 619

> 64. Article 85 [EC, now Article 101 TFEU] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that Article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.
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> p. 575
>
> 65. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.
>
> 66. Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.
>
> 67. This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.

The Court held that the companies had not reacted spontaneously to each other's pricing strategies. There were sufficient producers to allow natural competition to take place and the firms could realistically be expected to adopt their own pricing strategies, especially since the market was broken down into five separate

national markets. Advance announcements of price increases had eliminated all uncertainty between them as to their future conduct and their actions demonstrated a 'common intention' to fix prices. The Court therefore held that the behaviour was not the result of an oligopolistic market, but the result of a concerted practice.

The case can be usefully compared to Joined Cases C-89, 104, 114, 116, 117, & 125–9/85 *Ahlström and others v Commission ('Woodpulp')* [1988] ECR 5193. *Woodpulp* concerned bleached sulphate pulp, which is used in the production of high-quality paper. The practice of quarterly announcements was well established on the European pulp market, whereby some weeks—even, at times, some days—before the beginning of each quarter, producers communicated to their customers and agents the prices that they wished to obtain.

After carrying out investigations, the Commission stated that it had discovered the existence in the pulp industry of a number of restrictive practices and agreements, and had decided to commence a proceeding against 57 pulp producers that were alleged to have participated in price-fixing by way of concerted practices and in decisions by associations.

The Court of Justice accepted that the market consisted of a series of oligopolies and that the quarterly price announcements were at the request of customers. It considered the market to be highly transparent and this explained the near-simultaneous price announcements. There was no evidence of communication between the parties and the parallel conduct could therefore be explained by the nature of the market.

Thinking Point

> Refer back to the definition of 'concerted practice' in *Dyestuffs*, and in particular the following extract. Do you think a clear distinction between a concerted practice and the usual behaviour of an oligopolistic market can ever be made?

p. 576 ↵ It is clear that, with such a wide definition of concerted practice under Article 101(1) TFEU, the precise boundaries of an agreement are not a key consideration in a finding of a breach.

13.2.1.5 Cartels

A cartel is a group of independent, but similar, undertakings that work together to reach agreements that have anti-competitive effects. Such cartels reveal information between the companies involved about the course of action each plans to take and agreements may be made regarding pricing, marketing, and market-sharing. Whilst it is clear that such activity is anti-competitive and damaging to customers and potential competitors, cartels are difficult to find for the authorities. They are secretive in nature and have often developed quite sophisticated strategies to ensure that their operations remain undetected.

In view of this, the Commission has provided incentives to cartel members willing to reveal details about the cartel. The Commission's reasoning is clear.

Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17

I. Introduction

> (1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community [now Union]. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC [now Article 101 TFEU].
>
> [...]
>
> (4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.
>
> (5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

Thus those members of a cartel who are willing to cooperate with the Commission and thereby enable it to detect and investigate the cartel may be entitled to substantial benefits in terms of reductions in, and sometimes even total immunity from, fines.

Cross-Reference

See Chapter 15 on enforcement of EU competition law.

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13.2.1.6 Vertical and horizontal agreements

In its wording, Article 101(1) TFEU does not distinguish between **horizontal agreements** and **vertical agreements**.

horizontal agreements

Horizontal agreements are agreements between parties operating at the same level of the production/distribution chain, for instance an agreement between manufacturers or between retailers.

vertical agreements

Vertical agreements are agreements between parties operating at different levels of the production/distribution chain, for instance a distribution agreement between a manufacturer and a distributor.

In Joined Cases 56 & 58/64 *Établissements Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, Grundig, under a dealership agreement, supplied its electronic products to Consten, as its only French distributor, for resale in France. Under the agreement, Consten had to take a minimum order, had to provide publicity and an after-sales service, and could not sell the Grundig products directly or indirectly outside France or sell the products of competing manufacturers. Grundig assigned its trade mark to Consten, which could use it against unauthorized sales in France. Grundig distributors in other countries could not sell Grundig products in France. This ensured that Consten had absolute territorial protection in France, as did other distributors in other countries.

When a company purchased Grundig goods and then sold them in France at a price below that of Consten, Consten took action for infringement of its trade mark. The question arose as to whether the agreement breached what is now Article 101(1) TFEU.

Thinking Point

> Was the agreement between Consten and Grundig a vertical or horizontal agreement? Look back at the definitions given.

This agreement was between a manufacturer and a distributor; thus it was a vertical agreement. Consten submitted that the prohibition in what is now Article 101 TFEU applied only to horizontal agreements. However, the Court of Justice disagreed.

Joined Cases 56 & 58/64 *Établissements Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 339

> Neither the wording of Article 85 [EC, now Article 101 TFEU] nor that of Article 86 [EC, now Article 102 TFEU] gives any ground for holding that distinct areas of application are to be assigned to each of the two Articles according to the level in the economy at which the contracting parties operate. Article 85 refers in a general way to all agreements which distort competition within the common market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the Treaty does not make any distinction.

Therefore it is clear that, given that the Treaty makes no such distinction, Article 101 TFEU applies to both horizontal and vertical agreements.

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13.2.2 Which may affect trade between Member States

Remember that, for the purposes of the structure of arguments in this area, the three elements of the prohibition under Article 101(1) TFEU are (a) agreements between undertakings, decisions by associations of undertakings, and concerted practices that (b) may affect trade between Member States and which (c) have as their object or effect the prevention, restriction, or distortion of competition within the internal market. We shall now turn to the second of these.

Article 101(1) TFEU is breached only if the agreement, decision, or concerted practice is one that may affect trade between Member States. The function of the notion 'may affect' is to define the nature of the required impact on trade between EU countries.

In line with the Court of Justice's approach to most provisions for the protection of effective competition, the interpretation of this second requirement has been (unsurprisingly) wide.

In Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, Maschinenbau (MU) was a German manufacturer of grading equipment, and an agreement between MU and Société Technique Minière (STM) provided that STM would sell this equipment in France. The terms of the agreement provided that STM had an exclusive right to sell the equipment in France. However, and in contrast with *Consten*, STM could also sell the equipment outside France and French buyers were able to source the equipment from other suppliers outside France. The relationship between the parties deteriorated and STM argued that the agreement breached Article 101 TFEU. The Court of Justice stated as follows, in considering the second element of the Article 101(1) prohibition and ultimately concluding that the agreement did not breach the Article.

Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, 249

> … It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in Community law [now EU law] found in Article 85 [EC, now Article 101 TFEU], whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Therefore, in order to determine whether an agreement which contains a clause 'granting an exclusive right of sale' comes within the field of application of Article 85, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.

Thus there would be an effect on trade wherever it was 'possible to foresee with a sufficient degree of
p. 579 probability on the basis of a set of objective factors of law or of fact that the agreement ↵ in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'. This broad test is easily satisfied.

In Commission Decision 77/160/EEC of 20 January 1977 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.442—*Vacuum Interrupters Ltd*), OJ 1977 L48/32, Associated Electrical Industries Ltd and Reyrolle Parsons Ltd, two UK companies, were major manufacturers of switchgear apparatus used for switching on and off the power flowing from generating stations and acting as a safety device in the event of faults. They were both working on a new product, a vacuum interrupter. However, the cost of development was significant, and the two companies decided to collaborate and pool resources, establishing a joint facility for research and development by way of a joint venture agreement. When applying the provisions of what is now Article 101(1) TFEU, the Commission gave consideration as to whether the joint venture agreement may affect trade between Member States. Giving consideration to the future possibility of impact, the Commission found as follows.

Commission Decision 77/160/EEC of 20 January 1977 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.442—*Vacuum Interrupters Ltd*), OJ 1977 L48/32

17. … It is reasonable to assume that if a market were to develop in the other Member States of the EEC [now EU] for the vacuum interrupter and if both Associated Electrical Industries Ltd and/or their associated companies and Reyrolle Parsons Ltd had developed and manufactured the vacuum type interrupter independently of each other, each should have been able to obtain a market for it in the other Member States, where they would have been in direct competition not only with each other but also with such other undertakings as might manufacture this type of interrupter. There could have developed an export trade between each of these undertakings in the United Kingdom and customers in other Member States in which each would have been in competition with the other and with local manufactures. Exports from the UK to other Member States are now likely to start earlier and form a different pattern, thus affecting the flow of trade from the United Kingdom to other Member States. Further, both Associated Electrical Industries Ltd and Reyrolle Parsons Ltd have as customers in the United Kingdom the Central Electricity Generating Board and other area boards and most of the large industrial undertakings which take electricity from high voltage lines. The fact that two companies, each with an important market position in heavy electrical equipment in the United Kingdom, have combined their activity in the field of vacuum interrupters in a joint subsidiary must reduce the possibility that another manufacturer or other manufacturers of electrical equipment from other Member States of the EEC would be able to enter the United Kingdom for the purpose of manufacturing and selling or selling only the vacuum interrupter in competition with Vacuum Interrupters Ltd. It might well have been easier for such manufacturers to build up a market for the vacuum interrupter in the United Kingdom if they were not to be in competition with one economically and technically strong competitor but with two competitors, each separately economically and technically weaker. The market position of Vacuum Interrupters Ltd, having regard to that of the parent undertakings and of other manufacturers of switchgear equipment in the UK who are also in a position to sell switchgear equipment utilizing the interrupters designed and made by Vacuum Interrupters Ltd, would make it more difficult for new market entrants to capture a share of the market. The result therefore of the establishment of Vacuum Interrupters Ltd is that the economic penetration of the United Kingdom by manufacturers of electrical apparatus from the other Member States of the EEC will be rendered more difficult. Thus the effect of the restriction on competition arising from the creation of the joint subsidiary with which this decision is concerned is that the potential competition between the parent companies to be offered from the United Kingdom to other Member States will be reduced, as will the potential for competition by companies from other Member States within the United

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> Kingdom. Further, because there are no other manufacturers of vacuum interrupters in the common market at present and there are relatively few potential manufacturers therein, a joint venture between two potential manufacturers affects the structure of competition in the common market. Trade between Member States may thus be affected by the agreement of 25 March 1970.

Thus the Commission concluded that although the two companies concerned were both based in the UK, the possibility of a rival company emerging was reduced due to the combined strength the joint venture had afforded them. Furthermore, the pattern of trade between Member States was likely to be different from that which may have arisen if each independent company had developed a product separately and become export competitors. As such, the agreement was found to have been capable of affecting trade between Member States.

The 'legal and economic context' of an agreement, concerted practice, or decision will also be a factor to take into account. In considering this, it is clear that the existence of similar contracts should be analysed when, if such similar contracts are considered together, they may result in an effect on Member State trade. In Case 23/67 *Brasserie de Haecht SA v Wilkin (No 1)* [1967] ECR 407, Mr and Mrs Wilkin had undertaken to obtain all of their supplies of beer and soft drinks exclusively from the brewery under which they had made loan agreements. When Mr and Mrs Wilkin breached the obligation by purchasing beverages elsewhere, the brewery sought repayment of the loan. In legal proceedings relating to this breach of contract, the argument was advanced that the agreement in question breached what is now Article 101(1) TFEU. A key consideration for the Court of Justice in assessing the validity or otherwise of the agreement alongside EU competition law was whether the agreement and its effect on Member State trade should be assessed solely on the basis of the single agreement in question or whether the context of a network of similar agreements was a factor.

Case 23/67 *Brasserie de Haecht SA v Wilkin (No 1)* [1967] ECR 407, 415

> [...] in order to examine whether it is caught by Article 85(1) an agreement cannot be examined in isolation from the [...] context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition. The existence of similar contracts may be taken into ↵ consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade.
>
> Lastly, it is only to the extent to which agreements, decisions or practices are capable of affecting trade between Member States that the alteration of competition comes under Community [now Union] prohibitions. In order to satisfy this condition, it must be possible for the agreement, decision or practice, when viewed in the light of a combination of the objective, factual or legal circumstances, to appear to be capable of having some influence, direct or indirect, on trade between Member States, of being conducive to a partitioning of the market and of hampering the economic interpenetration sought by the Treaty. When this point is considered the agreement, decision or practice cannot therefore be isolated from all the others of which it is one.
>
> The existence of similar contracts is a circumstance which, together with others, is capable of being a factor in the economic and legal context within which the contract must be judged. Accordingly, whilst such a situation must be taken into account it should not be considered as decisive by itself, but merely as one among others in judging whether trade between Member States is capable of being affected through any alteration in competition. ...

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The existence of similar contracts is therefore a key factor to be taken into account.

Guidance is provided by the Commission Notice, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [now Articles 101 and 102 TFEU], OJ 2004 C101/81.

Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ 2004 C101/81

> 52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:
>
> (a) The aggregate market share of the parties on any relevant market within the Community [now Union] affected by the agreement does not exceed 5 per cent, and
>
> (b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro …
>
> In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro …

Thus, unless the parties' aggregate market share on any relevant EU market affected by the agreement exceeds 5 per cent and (for horizontal agreements) their aggregate turnover does not exceed €40 million or (for vertical agreements) the aggregate EU turnover of the supplier does not exceed €40 million, the agreement in question is not capable of affecting trade between Member States.

p. 582 ↵ Of course, market shares can be determined only with reference to a 'relevant market'. This concept is discussed in detail in Chapter 14 in relation to Article 102 TFEU, but is equally applicable to Article 101 TFEU.

Cross-Reference

See Chapter 14.3.1 for a detailed discussion of the relevant market concept.

13.2.3 Object or effect: prevention, restriction, or distortion of competition

Returning to the three elements of the prohibition under Article 101(1) TFEU—that is, (a) agreements between undertakings, decisions by associations of undertakings, and concerted practices that (b) may affect trade between Member States and which (c) have as their object or effect the prevention, restriction, or distortion of competition within the internal market—we shall now consider the third element.

Article 101(1) TFEU is breached only if the agreement, decision, or concerted practice is one that not only may affect trade between Member States, but also has as its 'object or effect' the prevention, restriction, or distortion of competition.

In Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, the Court of Justice also considered the third element of the Article 101(1) prohibition.

Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, 249

> The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article 85(1) [EC, now Article 101(1) TFEU] must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.

Thus, as there clearly was no object of preventing, restricting, or distorting competition in this case, it was necessary to see whether this was the effect of the agreement.

The Commission has stated that, with regard to particularly objectionable restrictions, such as horizontal price-fixing or market-sharing, it will be unnecessary to establish any actual effect on the market. The mere existence of such a restriction is sufficient.

Commission Notice, Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ 2004 C101/97

p. 583

20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects. In other words, for the purpose of applying Article 81(1) [EC, now Article 101(1) TFEU] no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3) [EC, now Article 101(3) TFEU], on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein.

21. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community [now Union] competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

    [...]

23. Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers. As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales.

The determination of whether or not an agreement has as its object or effect the prevention, restriction, or distortion of competition within the internal market is increasingly important in view of 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 2014 C291/1, considered next.

13.2.3.1 Agreements of minor importance

The Court of Justice, in Case 5/69 *Volk v Établissements Vervaecke Sprl* [1969] ECR 295, considered the conditions of Article 101(1) TFEU alongside the potential effect on the market. Clearly, the extent to which an agreement may have an effect on a market can vary greatly due to the market strength of the undertakings concerned.

p. 584

Case 5/69 *Volk v Établissements Vervaecke Sprl* [1969] ECR 295, 302

> If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between states. Moreover the prohibition in Article 81(1) [EC, now Article 101(1) TFEU] is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the common market. Those conditions must be understood by reference to the actual circumstances of the agreement. Consequently an agreement falls outside the prohibition in Article 81 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. ...

This passage of the judgment draws attention to the fact that where an agreement's effect on the market does not meet a particular level (or has only an insignificant effect upon it), the agreement will fall outside Article 101(1) TFEU. Thus it recognizes a 'safe harbour' or a ***de minimis*** standard. However, the Court failed in *Volk* to quantify the relevant level against which that agreement's effect is to be assessed.

de minimis

From the Latin, meaning 'of minor importance'.

Thinking Point

> Why should an appreciable effect on the market be required? Does this mean that smaller undertakings can effectively behave as they would like?

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 2014 C291/1, sets out the Commission's view of *de minimis* agreements.

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 2014 C291/1

1. Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements between undertakings 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. The Court of Justice of the European Union has clarified that that provision is not applicable where the impact of the agreement on trade between Member States or on competition is not appreciable.

p. 585

2. The Court of Justice has also clarified that an agreement which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition. This Notice therefore does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market.

Paragraph 2 sees a departure from the approach taken in the 2001 *De Minimis* Notice (Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ 2001 C 368/13) in that it is made clear that agreements which have as their *object* the prevention, restriction, or distortion of competition cannot benefit from the Notice. This builds upon the decision in Case 226/11 *Expedia Inc v Autorité de la concurrence and others* EU:C:2012:795 concerning a number of agreements between SNCF and Expedia in relation to the sale of train tickets and travel over the internet. It was clear that the agreements in question breached Article 101(1) TFEU, but the market shares fell below those provided in the *De Minimis* Notice. The national court made a reference to the Court of Justice under Article 267 TFEU regarding the applicability of the Notice. The Court of Justice, in considering the question before it, drew attention to the difference between 'infringements by object' and 'infringements by effect'.

Case 226/11 *Expedia Inc v Autorité de la concurrence and others* EU:C:2012:795

> 36. In that regard, the Court has emphasised that the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (Case C-209/07 *Beef Industry Development Society and Barry Brothers ('BIDS')* [2008] ECR I-8637, paragraph 17, and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29).
>
> 37. It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.
>
> 38. In light of the above, the answer to the question referred is that Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its *de minimis* notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.

p. 586 ↵ The Court of Justice therefore concluded that an 'infringement by object' in itself has an appreciable effect on competition, even though the relevant market share may fall below the thresholds set out.

However, the thresholds remain important when considering agreements that have as their *effect* the prevention, restriction, or distortion of competition. The 2014 *De Minimis* Notice retains the thresholds set out in the 2001 *De Minimis* Notice. Remember, though, that market shares can be determined only with reference to a 'relevant market'. This concept is discussed in detail in Chapter 14 in relation to Article 102 TFEU, but is equally applicable to Article 101 TFEU.

Cross-Reference

See Chapter 14.3.1 for a detailed discussion of the relevant market concept.

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 2014 C291/1

> 8. The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:
>
>   - if the aggregate market share held by the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors); or
>   - if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors).
>
> In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 per cent threshold is applicable.

However, the safe harbour provided by the *De Minimis* Notice does not apply to all types of agreement. Point 13 of the Notice reiterates the approach in relation to agreements that have as their object the prevention, restriction, or distortion of competition, as set out in points 1 and 2. Furthermore, agreements containing 'hardcore restrictions' that are listed in block exemption Regulations are also unable to benefit from the Notice.

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ('*De Minimis* Notice'), OJ 2014 C291/1

> 13. In view of the clarification of the Court of Justice referred to in point 2, this Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market. The Commission will thus not
> p. 587 apply the safe harbour created by the market share thresholds set out in points 8, 9, 10 and 11 to such agreements. For instance, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. Likewise, the Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object.

These 'hardcore' restrictions, such as price-fixing and market-sharing, will therefore not enjoy the protection that the *De Minimis* Notice affords.

13.2.3.2 Prevention, restriction, and distortion of competition

Article 101(1) TFEU lists examples of anti-competitive behaviour.

Article 101(1) TFEU

> [...]
>
> (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 is a non-exhaustive list, but it includes agreements or individual restrictions that would amount to a 'prevention, restriction or distortion of competition'. It should be noted that there is no obvious distinction drawn between these terms.

13.3 Article 101(2) TFEU

Article 101(2) TFEU provides as follows.

Article 101(2) TFEU

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

p. 588 ↵ However, if it is possible to sever (remove) restrictive clauses from an agreement, only those clauses will be void. Joined Cases 56 & 58/64 *Établissements Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299 provides an illustration of such.

Joined Cases 56 & 58/64 *Établissements Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 344

> The provision in Article 85(2) [EC, now Article 101(2) TFEU] that agreements prohibited pursuant to Article 85 shall be automatically void applies only to those parts of the agreement which are subject to the prohibition, or to the agreement as a whole if those parts do not appear to be severable from the agreement itself. The Commission should, therefore, either have confined itself in the operative part of the contested Decision to declaring that an infringement lay in those parts only of the agreement which came within the prohibition, or else it should have set out in the preamble to the Decision the reasons why those parts did not appear to it to be severable from the whole agreement.

13.4 Article 101(3) TFEU: exemption from Article 101(1)

Article 101(3) TFEU provides that Article 101(1) may be declared inapplicable to any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, or any concerted practice or category of concerted practices that 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 impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Review Question

> Can you identify the four elements to Article 101(3) TFEU?
>
> *Answer*: The first two are expressed as positive requirements, whilst the latter two are expressed in the negative. In short, they are (a) that the agreements, etc must contribute to improving production, distribution, promoting technical or economic progress *and* (b) consumers must benefit *and* there should be (c) no unnecessary restrictions (i.e. proportionality) *and* (d) no substantial elimination of competition.

The wording used is clear that the exemption in Article 101(3) TFEU can apply both to individual agreements that are not covered by any of the block exemptions (regulations exempting certain groups of agreements) and to particular types of agreement that have been covered by a block exemption.

p. 589

Thinking Point

> Why do you think Article 101(3) TFEU makes reference both to agreements, decisions, or concerted practices *and* categories of agreements, decisions, or concerted practices?

13.4.1 Individual exemption

Under 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 [now Articles 101 and 102 TFEU], OJ 2003 L1/1, the main circumstance in which the question of whether an agreement is individually exempted will arise will be in relation to it being raised as a defence to enforcement proceedings by the Commission or national competition authorities (NCAs) or, indeed, in private actions against an undertaking. This is in stark contrast to the position before Regulation 1/2003, whereby it was, in principle, the Commission alone that had the power to pronounce whether Article 101(3) TFEU applied. Guidance on individual exemption is provided by Commission Notice: Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ 2004 C101/97.

13.4.1.1 Improving production or distribution of goods or promoting technical or econom-

ic progress

The Commission's 2004 guidelines concerning the first condition refer to 'efficiency gains'.

Commission Notice, Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ 2004 C101/97

> 50. The purpose of the first condition of Article 81(3) [EC, now Article 101(3) TFEU] is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for Article 81(3) to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.

These efficiency gains are categorized in the following way by the Commission.

Commission Notice, Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ 2004 C101/97

> 56. In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) [EC, Article 101(3) TFEU] must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialized or are likely to materialize.
>
> 57. In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.

p. 590

Thus it would seem that benefits can be both cost-based improvements (para 56) and quality-based improvements (para 57). It is clear from the Notice that there must be a sufficient and direct causal link between the restrictive agreement and the claimed efficiencies.

In Commission Decision 94/986/EEC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.252—*Philips-Osram*) OJ 1994 L378/37, the two parties entered into a joint venture agreement regarding the manufacture and sale of certain lead glass tubing for incandescent and fluorescent lamps. The joint venture company was to be based in Belgium, where the relevant factory had the necessary equipment, including complex and expensive hazardous gas conversion equipment to reduce the problems inherent in the production of lead glass—namely, dangerous emissions.

In considering the relevant efficiency gains, the Commission Decision stated as follows.

Commission Decision 94/986/EEC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.252—*Philips-Osram*) OJ 1994 L378/37

> (25) The joint venture achieves rationalization of production by allowing Osram to eliminate its obsolete facilities in Berlin and allowing Philips to relocate certain non-lead glass production from Lommel to other glass factories in the Philips group. The joint venture will offer greater flexibility in quantities and types of product and a lower risk of breakdown, and will have a production capacity substantially higher than that resulting from the combination of the production capacity of the facilities of the parent companies in the EEA [European Economic Area] for the production of lead glass prior to the creation of the present joint venture. The joint venture will result in lower total energy usage and a better prospect of realizing energy reduction and waste emission programmes.
>
> In addition, the parties will concentrate their R&D [research and development] activities in Philips' laboratories, achieving savings and economies of scale and a concentration of effort to tackle properly the common challenge of developing lead-free materials.

Thus the efficiencies in this case were both cost-based and quality-based.

p. 591

13.4.1.2 Allowing consumers a fair share of the resulting benefit

Commission Notice, Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ 2004 C101/97

> 85. The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1) [EC, now Article 101(1) TFEU]. In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely to be affected by the agreement. If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers. When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.
>
> 86. It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits. If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits. If not, the second condition of Article 81(3) is not fulfilled.

13.4.1.3 No restrictions that are not indispensable

The third condition for individual exemption under Article 101(3) TFEU amounts to the application of the principle of proportionality. Thus it is not simply enough that benefits are gained and that the consumer enjoys these benefits. Recognizing the restrictions placed upon free competition, it is essential that those restrictions have been achieved in a way that goes no further than is necessary.

Commission Decision 94/986/EEC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.252—*Philips-Osram*) OJ 1994 L378/37

(28) The joint venture is indispensable for achieving the improvements in terms of rationalization, flexibility, energy and cost savings, pooling of R&D efforts and lower emissions resulting from the declaration of intent.

An alternative to the joint venture would have been for Osram to set up a new facility. However this would have resulted in a disproportionately high and risky investment, in terms of the time required for the new facility to be operational and in terms of the money ↵ required not only to set up the factory but also to install the necessary equipment to comply with environmental protection requirements. In this respect, Philips' current facility can be adapted much more quickly and has the environmental protection equipment already installed.

p. 592

Another alternative would have been for Osram to enter into a long-term supply agreement with Philips (and possibly other suppliers). Osram has, however, explicitly stated that it was not interested in such an arrangement because it would have made Osram very dependent. As to Philips, such an agreement might not have provided sufficient certainty to make on its own the investments now made. This is the more so because of the limited size and the mature character of the market. The improvements resulting from the joint venture might therefore not have been achieved. Such an alternative would, therefore, most likely have resulted in a smaller quantity of lead glass being available for third parties than will be available due to the joint venture, the capacity of which will indeed be bigger than the combined previous capacity of the parent companies in the EEA.

As to the possibility of Osram obtaining supplies from its Sylvania facilities in the USA, it is sufficient to indicate that Osram Sylvania's spare capacity in the United States is not big enough to cover all of Osram's European lead glass needs.

It is therefore clear that some analysis is required by the Court of the alternative ways in which the benefits claimed by the undertakings could be achieved. In Philips/Osram, the Court of Justice held that the competitive restrictions were proportionate to the benefits by analysing the alternative ways in which such benefits may be realized.

13.4.1.4 No elimination of competition

Commission Notice, Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU], OJ 2004 C101/97

> 105. According to the fourth condition of Article 81(3) [EC, now Article 101(3) TFEU] the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.

p. 593

Thinking Point

> Which fundamental principle of EU law can you identify here?

13.4.2 Block exemption

As has been explained in 13.4.1, Article 101(3) TFEU allows Article 101(1) to be declared inapplicable to categories of agreements in addition to individual agreements.

Block exemption Regulations remove certain categories of agreement from the Article 101(1) TFEU prohibition. They arise in a number of different areas and include specific industries or sectors, specialization agreements, technology transfer agreements, and research and development agreements (amongst others). One particularly wide block exemption will be considered in detail by way of example.

13.4.2.1 Regulation 330/2010

Commission 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 2010 L102/1, concerns a block exemption for vertical supply and distribution agreements. It provides an excellent

example of the Commission's effect-based approach. Indeed, the words of Joaquin Almunia, Vice-President of the Commission and Competition Commissioner, when announcing the block exemption (which replaced Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L336/21), are notable in this regard.

European Commission, 'Antitrust: Commission adopts revised competition rules for distribution of goods and services', Press release IP/10/445, 20 April 2010

> 'A clear and predictable application of the competition rules to supply and distribution agreements is essential for the competitiveness of the EU economy and for consumer welfare. Distributors should be free to satisfy consumer demand, whether in brick and mortar shops or on the Internet. The rules adopted today will ensure that consumers can buy goods and services at the best available prices wherever they are located in the EU while leaving companies without market power essentially free to organise their sales network as they see best,' said Vice-President of the Commission and Competition Commissioner Joaquin Almunia.

p. 594

Thinking Point

> Think back to the concepts of horizontal and vertical agreements. Can you remember the difference between them? Why do you think a block exemption for vertical agreements exists, whilst there is no comparable block exemption for horizontal agreements?

Cross-Reference

See Chapter 13.2.1.6 for a definition of horizontal and vertical agreement.

Commission 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 2010 L102/1

Article 2

Exemption

> 1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.
>
>   This exemption shall apply to the extent that such agreements contain vertical restraints.

In broad terms, Article 2 of Regulation 330/2010 exempts from Article 101(1) TFEU vertical agreements relating to the conditions under which the parties may purchase, sell, or resell certain goods or services, to the extent that these agreements contain otherwise prohibited restrictions. These include, for instance, exclusive distribution, distribution franchise, and selective distribution agreements.

Commission 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 2010 L102/1

Article 3

Market share threshold

> 1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 per cent of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services.

The exemption is therefore subject to market-share thresholds. It applies only where both the supplier's market share does not exceed 30 per cent of the relevant market on which it sells the contract goods or services and the buyer's market share does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services.

p. 595

Commission 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 2010 L102/1

Article 4

Restrictions that remove the benefit of the block exemption—hardcore restrictions

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

(ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,

(iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and

(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

(e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

The benefit of the block exemption does not apply to vertical agreements containing certain hardcore restrictions, listed in Article 4 of the Regulation.

The impact of this is that an agreement containing hardcore restrictions is, in its entirety, outside the scope of the block exemption. The offending clauses cannot be removed.

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Commission 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 2010 L102/1

Article 5

Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:
   (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
   (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
   (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

Article 5 of the Regulation also provides that the block exemption does not apply to certain obligations contained in agreements. In contrast to Article 4, although the Article 5 restrictions themselves fall outside the block exemption, they may be severed, allowing the remainder of the agreement to be block-exempted. Severable restrictions comprise certain non-compete obligations (obligations on the buyer not to sell

competing goods), including non-compete clauses (obligations causing the buyer not to manufacture, purchase, sell, or resell goods or services that compete with the contract goods or services) exceeding five years.

Any restriction not referred to in Articles 4 and 5 is permitted.

13.5 Competition Law: Article 101 TFEU and Brexit

After the end of the transition period post Brexit, the UK is no longer bound by EU competition law. This means UK authorities enforcing competition law in the UK no longer have to apply relevant EU rules. UK businesses operating within EU territory are still bound by EU competition law, however, so Article 101 TFEU remains highly relevant in that context. Furthermore, the Political Declaration makes clear reference to open and fair competition and a level playing field between the UK and the EU in its future relationship, with reference to the UK's geographic proximity and economic interdependence with the EU. Exactly what that will look like remains to be seen though. Currently UK competition law is very similar to EU competition law and the aim was to minimize inconsistencies between both legal regimes. Post transition period no such duty
p. 597 exists anymore so it is possible that UK law will diverge significantly from ↵ EU law in the future. At the same time it is possible that the UK will decide that the current rules effectively govern the UK market even though no longer a part of the EU. It is to be seen what will be agreed in the future between the UK and the EU and domestically, within the UK.

Summary

- Article 101(1) TFEU prohibits 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.
- All three elements must be satisfied to establish a breach of Article 101(1) TFEU.
- The term 'undertaking' has been interpreted widely and includes any legal or natural person engaged in some form of economic or commercial activity.
- The term 'agreement' is interpreted widely and includes both formally and non-formally constituted agreements. In this regard, it would seem that the emphasis is on substance above form.
- In relation to decisions by associations of undertakings, the focus is upon trade associations, but, as with other elements of Article 101(1) TFEU, this has been interpreted widely to include professional associations.
- A 'concerted practice' is a form of coordination between undertakings that, without having reached the stage at which an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (*Dyestuffs*). This should be compared with the behaviour of a true oligopolistic market (*Woodpulp*).
- Article 101(1) TFEU applies to both horizontal and vertical agreements.

- The effect on trade between Member States will emerge wherever it is 'possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States' (*STM*).
- The 'legal and economic context' of an arrangement will also be taken into account (*Wilkin*).
- *Object or effect: prevention, restriction, or distortion of competition*: these are all alternative requirements. Note the important determination under the new (2014) *De Minimis* Notice.
- In relation to agreements of minor importance, an agreement is caught by Article 101(1) TFEU only if it has an 'appreciable' effect on the market (*Volk*).
- The prevention, restriction, and distortion of competition cover all forms of anti-competitive behaviour. Article 101(1)(a)–(e) TFEU provides examples.
- Any agreements or decisions prohibited pursuant to Article 101(2) TFEU shall be automatically void. However, if it is possible to sever (remove) restrictive clauses from an agreement, only those clauses will be void.
- Article 101(3) TFEU applies to both 'individual exemptions' and 'block exemptions'.
- To qualify for individual exemption, agreements must contribute to improving production, distribution, promoting technical or economic progress *and* must benefit the consumer *and* there must be no unnecessary restrictions *and* no substantial elimination of competition.
- Block exemptions apply to categories of agreement.
- Regulation 330/2010 comprises a block exemption for vertical agreements.

Brexit

- The UK is no longer bound by EU competition law but it remains to be seen whether UK competition law will depart significantly from EU competition law in the future. Furthermore, UK businesses operating in the EU will remain bound by EU competition law.

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Further Reading

Articles

A Jones, '*Woodpulp*: Concerted Practice and/or Conscious Parallelism?' (1993) 14 ECL Rev 273

A detailed look at the concerted practice/oligopolistic market issue.

L Kjølbye, 'The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81' (2004) 25(9) ECL Rev 566

Consideration of application and policy surrounding what is now Article 101(3) TFEU.

B Meyring, '*T-Mobile*: Further Confusion on Information Exchanges between Competitors—C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529' (2009) 1(1) Journal of European Competition Law & Practice Advance

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Detailed focus on a contemporary case within Article 101 TFEU.

C Nagy, 'The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law' [2015] ECL Rev 154

Concise discussion of the concept of anti-competitive object.

D Roitman, 'Legal Uncertainty for Vertical Distribution Agreements: The Block Exemption Regulation 2790/99 (BER) and Related Aspects of the New Regulation 1/2003' (2006) 27(5) ECL Rev 261

Historically interesting for consideration of change in approach to vertical agreements.

Books

P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 7th edn (Oxford: Oxford University Press, 2020), esp ch 27

Focused and accessible account of relevant cases and materials.

C Graham, *EU and UK Competition Law* (London: Pearson, 2013)

A specialized competition law text, with substantive coverage of Article 101 TFEU and the EU/UK approach.

O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford: Oxford University Press, 2006)

A comprehensive account of Article 101 TFEU.

Question

Kettles r us Ltd (Kettles), a Netherlands-based kettle manufacturer with a 28 per cent share of the relevant market, is in supply negotiations with PotsnPans Ltd, a Polish wholesaler with an 18 per cent share of the relevant market. PotsnPans is very keen to make an agreement with Kettles for its unique products, especially given Kettles' willingness to grant PotsnPans sole wholesaler status in Poland. In return, PotsnPans is considering agreeing not to sell any other kettles for an indefinite period and to accept the resale prices stipulated by Kettles.

Advise the parties as to the validity of the proposed agreement under Article 101 TFEU and consider whether Regulation 330/2010 applies as it stands, as well as what amendments could or should be made.

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-13-guidance-on-answering-assessment-questions?options=showName>***, and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-13-self-test-questions?options=showName>* **with feedback.**

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