European Competition Law

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ARTICLE 101(1) provides:
The following shall be prohibited as incompatible with the common 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 common market, and in particular those which:
ARTICLE 101(1)

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 to a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
ARTICLE 101(1)

• It must be proved:
  ▪ an undertaking or an association of undertakings
  ▪ collusion (agreement – decision – concerted practice)
  ▪ object or effect: prevention, restriction, distortion of competition
UNDERTAKING – functional approach

• Höfner and Elser v. Macrotron (1991) ECJ: “every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed”

• An “economic activity” is as such when:
  – it provides for the supply of goods or services on the market;
  – it could – in principle - be carried on by a private undertaking to make profit;
  – no matter if the body isn’t in fact profit making/isn’t set up for an economic purpose.

• Article 101 doesn’t apply to:
  – the exercise of sovereign powers of the state;
  – tasks performed in the public interest;
  – administrative functions.
ASSOCIATIONS OF UNDERTAKINGS – functional approach

• Wouters v. Alegemene Raad van de Nederlandse Order van Advocaten (2002) ECJ: “undertakings of the same general type all together responsible for representing and defending their common interests against other economic operators, government bodies and the public in general”.

• Trade associations
• Associations of collecting societies
• Professional associations
• A body set up by statute and with public functions if they represent the trading interests of the members
AGREEMENT

- **Bayer AG v. Commission (2000)** General Court: “a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market” regardless of the form.

  - “Gentlemen agreements”
  - Standard conditions of sale
  - Trade association rules
  - Agreements entered into to settle dispute, such as trade mark delimitation agreements
AGREEMENT - Interpretation of the ECJ

- **Van Landewych v. Commission (1980)**: An agreement exists once the parties agree on “good neighbour rules” or “establish practice and ethics” or “certain rules of the game which it is in the interests of all of us to follow”.

- **VBVB&VBBB v. Commission (1991)**: Agreements may be caught by Article 101 (1) even if they are encouraged or approved by national law.

- **SSI v. Commission (1985)**: Agreements may be caught by Article 101 (1) even if they entered into after consultation with the national authorities.

- **Industrial and Medical Gases (2003)**: Commission: “the notion of agreement is objective in nature. The actual motives (and hidden intentions) which underlay the behaviour adopted are irrelevant”.
AGREEMENTS BETWEEN UNDERTAKINGS OPERATING AT DIFFERENT LEVELS OF THE ECONOMY OR IN SEPARATE MARKETS

• **Consten Sa & Grunding v. Commission (1966)** ECJ: “It is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy. Article 101(1) refers in general way to all agreements which distort competition within the Common Market, even if the undertakings are placed at different levels in the economic process.

• **AC-Treuhand AG v. Commission (2008)** General Court: “Article 101(1) catches agreements between undertakings, even where the purpose of the agreement is to restrict competition on a market on which one of the undertakings is not active.
COMPLEX ARRANGEMENTS AND SINGLE CONTINUOUS INFRINGEMENTS

• **Polypropylene (1986):** the General Court agrees with the Commission on the fact that an agreement can consist of a whole complex set of arrangements spread over a period of time. The case involved fifteen firms in the petrochemical industry responsible for a long lasting cartel, based on an overall framework agreement or a common and detailed plan manifested in a series of more detailed sub-agreements worked out from time to time, constituting a single continuing agreement for the purpose of Article 101(1).

• **British Plasterboard v. Commission (2008):** the General Court confirmed that the Commission is legally entitled to conclude that various manifestations from part of a single infringement where they form elements of an overall plan designed to distort competition and that such an arrangement can be inferred from a number of facts which, taken together, may, in the absence of another plausible explanation constitute evidence of an infringement.
• Vertical agreements between a supplier and a dealer violate Article 101(1) when incorporate provisions imposing resale price maintenance or an export ban, suitable to distort competition.

• It must be drawn a distinction between cases in which:
  – A genuinely *unilateral measure* had been adopted (without express or implied participation of another).
  – The unilateral character of the measure was merely apparent, receiving at least the *tacit acquiescence* of the dealers.
VERTICAL AGREEMENTS AND UNILATERAL CONDUCT

• **AEG-Telefunken v. Commission (1983)** ECJ: “The systematic refusal by AEG to supply resellers, or to admit resellers who satisfied the qualitative criteria necessary to become a member of the selective distribution but didn’t adhere to a policy of charging minimum prices, arose out of the agreement, doesn’t constitute unilateral conduct, but forms part of the contractual relations between the undertaking and resellers, since the latter’s admission to the network is dependent upon their acceptance, express or tacit, of AEG’s policy.

• **Bayer AG v. Commission (2000)** the ECJ annulled the Commission’s decision (imposing a fine of €3 million on Bayer AG), holding that a concurrence of wills between Bayer and its wholesalers designed to prevent or limit competition had not been established.
PARTICIPATION IN MEETINGS

• **Cement (2004)** ECJ: “a party which tacitly approved of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement”.
CONCERTED PRACTICES

• **ICI v. Commission (1972)** ECJ: “the purpose of the term was to preclude co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical co-operation between them for the risks of competition”

• The concept doesn’t require “the working of an actual plan” (**Suiker Unie 1975**), but it seem to require *reciprocal cooperation or contact*, through direct or indirect contact, designed to influence the conduct of an actual or potential competitor or to disclose to them the course of conduct that will or may be adopted on the market.

• **Hüls AG v. Commission (1999)** ECJ: the concept requires both concertation between the undertakings and subsequent conduct on the market and a relationship of cause and effect between the two. Once the Commission finds evidence of concertation it’s up to the undertaking to establish that concertation hasn’t been followed by conduct on the market.
CONCERTED PRACTICES

• **T-Mobile Netherlands BV (2009)** ECJ confirmed that a concerted practice could result not only from meetings which occurred on a regular basis over a long period, but also from an *isolated exchange of information*.

• **Hercules NV v. Commission (1992)** The clear purpose of the competing undertakings participating in meetings, during which information was exchanged about prices, sales volumes, was to *eliminate any uncertainty about the future conduct* of their competitors.

• **Pioneer (1980)**: example of *vertical arrangement* between a manufacturer and its distributors, who engaged in concerted practices to prevent the parallel import of Pioneer products from the UK and Germany into France.
DECISIONS BY ASSOCIATION OF UNDERTAKINGS

• Membership of an association, particularly a trade association, may tempt the undertakings meeting within its auspices to collude together and to coordinate their action.

• Re Belgian Roofing Felt Cartel Belasco (1989):
  – The members of Belasco (Société Coopérative des Asphalteurs Belges) had agreed to adopt a common price list and minimum selling prices for roofing felt, to set quotas for sales on the Belgian market, and to advertise jointly their “Belasco” products.
  – Agreement implemented by resolutions passed at the general meeting of the association.
  – Active participation of Belasco in the operations.

• The association may simply collect and disseminate sensitive information and facilitate its exchange between competitors.
Agreements and other collusive practices are not prohibited unless they prevent, restrict or distort competition.

The words “object or effect” are read disjunctively.

**Consten and Grunging (1966):** if it’s clear from the terms of the agreement that its object is to prevent, restrict or distort competition, there’s no need to examine its effects.
OBJECT OR EFFECT OF THE PREVENTION, RESTRICTION, OR DISTORTION OF COMPETITION

• Examples of agreements prohibited unless they meet the Article 101(3) criteria:
  
  – Cartel agreements fixing prices, restricting output or sharing markets;
  
  – Vertical agreements fixing minimum resale prices or conferring absolute territorial protection on the dealer or otherwise limiting parallel trade.
AN APPRECIABLE EFFECT ON COMPETITION

• **Völk v. Vervaecke (1969)** ECJ: an agreement falls outside the prohibition in Article 101(1) 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.

• The insignificant position held by the undertakings causes the EU institutions to take the view that the agreement cannot possibly threaten the EU objectives.
COMMISSION NOTICE ON AGREEMENTS OF MINOR IMPORTANCE WHICH DO NOT "APPRECIABLY" RESTRICT COMPETITION

• Agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 101(1):

• if the aggregate market share held by the parties to the agreement does not exceed 10% 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 these markets.

• If the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, in case of undertakings which are not actual or potential competitors.
AN APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES

Although it is accepted that the EU has no jurisdiction over cases in which the effects of an agreement or conduct are confined to one Member State, the Commission has provided Member States a notice that applies the general principles set out in the cases to common types of agreements and abuses:

- Different types of agreements and abuses covering or implemented in several Member States;
- Agreements and abuses covering a single or only part of a Member State;
- Agreements and abuses involving imports and exports with undertakings located in third countries;
- Agreements and practices involving undertakings located in third countries.
PATTERN OF TRADE TEST

• **Société La Techinque Minière (1966)** ECJ set out a broad interpretation of the requirements that an agreement should affect trade so that it is easily satisfied. The test requires the following to be shown:

  - a sufficient degree of probability on the basis of a set of objective factors of law or of fact;
  - a direct or indirect, actual or potential influence on the pattern of trade between Member States;
Consten and Grundig (1966) ECJ: “the fact that an agreement encourages an increase, even a large one, in the volume of trade between states, is not sufficient to exclude the possibility that the agreement may affect such trade”.

The Court examined the contract, which precluded anyone other than Consten from importing Grundig products into France, and prohibited Consten from re-exporting the products into other Member States, concluding that it “indisputably affects trade between Member States.”
COMMISSION NOTICE ON AGREEMENTS WHICH APPRECIABLY AFFECT TRADE BETWEEN MEMBER STATES

• In principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:
  – the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%;
  – 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 agreements concerning joint buying of products the relevant turnover shall be the parties’ combined purchases of the products covered by the agreement.

• For agreements that, by their very nature, are capable of affecting trade between Member States, such as agreements concerning imports and exports or covering several Member States, there is a rebuttable positive presumption that the effects on trade are appreciable when the turnover of the parties exceed €40 million, and/or the 5% threshold is exceeded.
Regulation 1/2003 Article 3 provides:

- Whenever an NCA or national court applies national competition laws to an agreement or practice that affects trade between Member States, it must also apply Articles 101 and 102.

- The application of national competition law may not lead to the prohibition of agreements which affect trade between Member States but:
  - don’t restrict competition within the meaning of Article 101(1);
  - fulfil the conditions of Article 101(3);
  - are covered by an EU block exemption.

- A national authority cannot authorize an agreement prohibited by EU law.
AGREEMENTS REQUIRED BY NATIONAL LEGISLATION OR ENCOURAGED BY NATIONAL GOVERNMENTS

• **Atlantic Container Line v. Commission** (2003) General Court:
  
  – If anti-competitive conduct is required of undertakings by national law or if the latter creates a legal framework eliminating any possibility of competitive conduct on their part, Articles 101 and 102 TFEU do not apply.
  
  – If a national law merely allows, encourages or make it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to the Treaty competition rules.
ARTICLE 101(2)

• **Société La Technique Minière** (1966) ECJ: the agreement as a whole is void only where the clauses affected by the Article 101(1) prohibition are not severable from the remaining terms of the agreement.

• The question whether any null clause or clauses in an agreement can be severed from the rest of the agreement must be decided by national, not EU, law. Each national court will have to apply its own national rules on severance to determine the impact of Article 101(2) on the agreement before it.
EXCLUSIONS

• **Merger Regulation** provides that concentrations, included certain joint venture agreements, should not generally be appraised under Article 101.

• **Regulation 1184/2006** provides that competition rules shall not apply to certain agricultural agreements between farmers or farmers’ associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices.

• **Art. 346(1)(b) TFEU**: nothing in the Treaty shall preclude the application by Member States of measure “it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material”.

EXCLUSIONS

• Article 106(2) TFEU: competition rules do not apply to some activities of public bodies or bodies entrusted with public services.

• In interpreting the elements of Article 101(1) the ECJ has excluded from its ambit:
  – agreements belonging to the realm of social policy;
  – agreements concluded by firms when carrying out tasks of a public or social nature;
  – agreements required by national legislation and matters which are of a purely sporting interest and have nothing to do with economic activity.