An overview of the EU competition rules

A general overview of the European competition rules applicable to cartels, abuse of dominance, forms of commercial cooperation, merger control, State aid and liberalisation

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Other Slaughter and May publications on the EU competition rules referred to in this publication:

- The EU competition rules on cartels  
- The EU competition rules on vertical agreements  
- The EU competition rules on horizontal agreements  
- The EU competition rules on intellectual property licensing  
- The EU Merger Regulation
1. Introduction

1.1 This publication provides a general overview of the competition rules applicable to companies carrying on business in Europe or whose business conduct may have effects in Europe. It identifies the broad areas where there is scope for investigations or legal proceedings under the competition rules.¹

1.2 The Treaty on the Functioning of the European Union (TFEU) (which incorporates the relevant provisions of the 1957 Treaty of Rome) provides for a single internal market with free movement of goods and services throughout the European Union (the EU). To achieve this, it includes rules to ensure that competition within the EU is not restricted or distorted inter alia by cartels or anti-competitive agreements, abuses of market power, certain mergers and acquisitions or unfair State aid. These European competition rules have the force of law throughout the European Economic Area (the EEA). They are enforced by the European Commission and, in certain circumstances, by the Member States’ national competition authorities (NCAs). The countries in the EEA each also have their own domestic competition rules which tend to be modelled on the EU rules.²

THE GENERAL ANTITRUST RULES

1.3 The EU’s general antitrust rules are set out at Articles 101 and 102 TFEU. Article 101(1) prohibits any agreement or concerted practice – formal or informal, written or unwritten – which is made between two or more “undertakings” (independent businesses), which may affect trade between Member States and which has the object or effect of preventing, restricting or distorting competition. It catches:

- Secret price-fixing or market-sharing cartels (considered in Part 2 of this publication). These are viewed as serious “hardcore” infringements (per se violations of the antitrust rules, to use US parlance) which will almost always be condemned (and will not meet the exemption criteria of Article 101(3)); and

- Other agreements between businesses that have the object or effect of restricting competition, for example by including exclusive dealing provisions or territorial restrictions. Depending on the surrounding circumstances (and provided they are properly drafted and implemented) many business agreements of

¹ For more detailed guidance on how the competition rules are applied, see the various Slaughter and May publications referred to elsewhere in this publication.
² The current 27 EU Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. By virtue of the 1992 EEA Agreement, the EU competition rules also extend to three other countries: Iceland, Liechtenstein and Norway (sometimes referred to as the EFTA contracting states). Together the EU Member States and EFTA contracting states make up the EEA.
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1.4 Article 102 makes it illegal for dominant companies to abuse their market power in a way which may affect trade between Member States (considered in Part 3 of this publication). Although these special rules on unilateral market behaviour and conduct only apply to undertakings enjoying a dominant position on a relevant market, the market can be defined narrowly for these purposes.

1.5 Agreements caught by the Article 101 or 102 prohibitions are unenforceable and expose the parties to third party actions for damages in national courts within the EEA. In addition, the European Commission and NCAs can investigate and they may impose substantial fines for serious breaches (of up to 10% of worldwide group turnover in the case of Commission fines). These European competition rules apply even to conduct or agreements entered into outside the EEA if they have effects within the EEA (the “effects doctrine”).

THE MERGER CONTROL RULES

1.6 The EU Merger Regulation complements Articles 101 and 102 by allowing the European Commission to control certain “concentrations” (mergers, acquisitions and joint ventures) involving companies operating in Europe, as considered briefly at Part 8 of this publication. If the parties meet certain worldwide and EU-wide thresholds they must generally notify the deal to the Commission, answering a detailed questionnaire (Form CO). The rules also provide for the possibility of parties benefiting from this “one-stop shop” principle in cases where the deal would otherwise be notifiable in at least three of the 27 Member States. Where a merger is not subject to notification under the Merger Regulation, national merger control regimes may instead be applicable at the Member State level.

RULES ON STATE AID AND LIBERALISATION

1.7 In addition, the EU competition rules contain special rules aimed at preventing Member States from distorting competition through the grant of State aid (considered in Part 9 of this publication). Furthermore, there are special rules applicable to State monopolies and which seek to encourage the liberalisation of markets within the EU (see Part 10 of this publication).

The precise rules of standing, procedure and quantification of damages vary between the Member States. If called upon to decide whether particular facts involve infringements of Articles 101 and 102, a national court is able to request guidance from the Commission. It is also possible for the national courts to refer questions to the Court of Justice for a preliminary ruling under Article 267 TFEU. In certain circumstances parties may also be exposed to damages actions elsewhere in the world, for example where the agreement also breaches US antitrust law.
ENFORCEMENT OF THE EUROPEAN COMPETITION RULES

1.8 The principal enforcement agency for the European competition rules is the European Commission, through its Directorate-General for Competition (DG Competition) based in Brussels. The NCAs also have powers to apply the European competition rules (as well as domestic competition rules) as explained below.

1.9 The European Commissioner responsible for competition matters is Joaquín Almunia. DG Competition is headed by its Director-General (Alexander Italianer). In addition there are three Deputy Director-General positions with special responsibility for respectively (a) Mergers and Antitrust, (b) State Aid and (c) Operations. Directorate A of DG Competition deals with policy and strategic support and coordination (including within the European Competition Network) and broader international relations, while Directorate R deals with planning and resourcing issues within DG Competition. Directorate G focuses on cartels and Directorate H focuses on State aid policy. Directorates B, C, D, E and F are organised on a sectoral basis (each having separate units dealing with antitrust, mergers and State aid). The sectoral responsibilities are organised as follows:  

- Directorate B: Energy and environment;
- Directorate C: Information, communication and media;
- Directorate D: Financial Services;
- Directorate E: Basic industries, manufacturing and agriculture;
- Directorate F: Health, transport, post and other services.

1.10 Commission decisions can be appealed to the General Court in Luxembourg under Article 262 TFEU. In turn, General Court judgments can be appealed on points of law to the Court of Justice (ECJ).

1.11 Since 1 May 2004 the implementation of Articles 101 and 102 has been governed by Council Regulation 1/2003. This is supplemented by a Commission Implementing Regulation (Regulation 773/2004) containing detailed procedural rules regarding complaints, the hearing of parties, issues on confidentiality, etc. and by a package of Commission Notices providing further guidance on how the regime should operate:

- Notice on cooperation within the network of competition authorities in the European Competition Network (ECN), i.e. the Commission and the NCAs in the Member States;

For details of who heads the different Directorates and units, see Commission organigram at http://ec.europa.eu/dgs/competition/directory/organi_en.pdf. In addition, DG Competition has a Chief Economist (currently Damien Neven, to be replaced by Kai-Uwe Kühn as of 1 May 2011) who heads a team of economists (the Chief Economist’s Team or CET) which provides economic support both in individual competition cases and on general policy issues.
– Notice on cooperation between the Commission and the courts of the Member States in the application of Articles 101 and 102;

– Notice providing guidelines on the effect on trade concept contained in Articles 101 and 102;

– Notice providing guidelines on the application of Article 101(3);

– Notice on informal guidance relating to novel questions concerning Articles 101 and 102 that arise in individual cases (guidance letters); and

– Notice on the handling of complaints under Articles 101 and 102.

1.12 Significant elements of the current European competition law regime include the following:

– NCAs and the domestic courts are able not only to apply the Article 101(1) prohibition on anti-competitive agreements but also to declare whether the criteria of Article 101(3) are met by a particular agreement. Previously, formal exemptions under Article 101(3) could only be granted by an express decision of the Commission following the submission of a detailed notification by the parties. Regulation 1/2003 replaced this old system of notification and exemption (which tied up Commission resources in the examination of formal notifications) with a system where undertakings are encouraged to “self-assess” (with advisers if appropriate) whether their conduct and agreements are compatible with the principles of Articles 101 and 102. Where disputes on the application of the competition rules arise, the national courts are able to rule on the case (including on the applicability of Article 101(3)), subject to ensuring that their ruling does not conflict with a decision taken or contemplated by the Commission.

– If an NCA applies its national competition rules to an agreement or conduct where trade between Member States is affected, they are obliged (by Article 3 of Regulation 1/2003) also to apply the EU competition rules. As a result, a substantially increased proportion of Article 101 and 102 cases (in practice, the vast majority) are now handled at the NCA level rather than by the Commission, and a substantially increased proportion of NCA decisions are now based on the EU competition rules rather than solely on domestic competition rules. Generally, national competition rules should not be used to prohibit agreements that are authorised under the EU competition rules nor to authorise agreements that are prohibited under the EU competition rules. However, there remains the possibility for NCAs to apply relevant national rules on the prohibition or sanctioning of unilateral conduct where those rules are stricter than the EU competition rules. Member States may also continue to apply national laws where

5 There are still initial opportunities to approach DG Competition (or the NCAs) for guidance on the application of the competition rules to cases that raise novel questions of law or fact which cannot be easily resolved by reference to existing case-law or Commission Notices. In exceptional circumstances the Commission may provide informal guidance in such circumstances by way of a reasoned statement (a “guidance letter”), a non-confidential copy of which would be published on DG Competition’s website.

6 The Commission has committed to assist national courts in the application of the EU competition rules by performing the role of amicus curiae. Member States are required to send the Commission copies of national judgments on the application of Articles 101 and 102 which the Commission then makes available on DG Competition’s website.

7 See observations at para. 3.7 (including footnote 14).
the predominant objective of those laws is different from the competition-focused objectives of Articles 101 and 102.8

– There is increased cooperation between the Commission and the NCAs, including the exchange of confidential information necessary to prove an infringement of the EU competition rules. As part of the regime established under Regulation 1/2003, the European Commission and NCAs have established the ECN as a forum for discussion and cooperation for the enforcement of EU competition policy. The various authorities exchange information *inter alia* using a common intranet, and cooperate through the ECN structures with a view to ensuring the efficient allocation and investigation of cases. In principle the Commission (rather than the NCAs) will generally be seen as the best placed authority to deal with any case where:

  – the relevant market affected by the agreement or conduct concerns more than three Member States;

  – the agreement or conduct is closely linked to other EU rules which may be exclusively or more effectively applied by the Commission;

  – a Commission decision is needed to develop EU competition policy; or

  – it is appropriate for the Commission to act in order to ensure effective enforcement of the antitrust rules.

– The Commission has increased powers of enforcement (including the power to take statements, to search private premises and to seal premises or business records) as well as increased powers to impose fines for procedural infringements (e.g. failure to provide information). The Commission has also been given express powers to impose structural remedies (such as breaking up a dominant company) in addition to its powers to impose fines for substantive breaches of the competition rules.

1.13 Investigations may be triggered by one or more of the parties approaching the Commission or NCAs (for example, as a “whistleblower” under the Commission’s leniency programme for cartel cases: see Part 2 of this publication), by a third party making a complaint, or by the authorities launching an inquiry of their own initiative. Complaints provide an important source of information for the Commission and the NCAs. The Commission’s principal powers of investigation include the power to require companies, wherever based in the world, to provide information (so-called “Article 18 requests/decisions”) and the power to conduct surprise inspection visits (so-called “dawn raids”) at company premises or employees’ homes within the EU.9

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8 For example this would permit the application of national legislation on unfair trading practices.
9 For more detailed guidance on dawn raids, see the separate Slaughter and May publication on *The EU competition rules on cartels*. The Commission’s powers to conduct investigations and dawn raids apply to any suspected infringement of Articles 101 or 102 (and not just cartels).
OTHER GENERAL POINTS

1.14 It is important to remember that the EU’s competition rules are part of the TFEU which has much wider policy objectives of creating an “ever closer union” among the peoples of Europe. Given this context, any attempts by businesses to partition the EU’s internal market along national or other territorial lines will be viewed as serious “hardcore” infringements of the competition rules; this extends to any attempts to impose export bans within the EU or to prevent dealers from engaging in “parallel trade” (selling goods in one Member State when the supplier may have envisaged that they would have been sold in another Member State). Other “hardcore” infringements under the competition rules include price fixing (including resale price maintenance) and other market sharing agreements (e.g. customer allocation between competitors) and, in particular arrangements which may be characterised as cartels.

1.15 The EU competition rules apply to undertakings rather than to individuals, so employees engaged in anti-competitive practices will not be individually liable to legal action under these rules; however, criminal or other proceedings could be brought under some national rules. Moreover, companies will be held liable for the improper actions of their employees. Where employees put their company in breach of the EU competition rules, they may also be subject to disciplinary proceedings for breach of competition law compliance policies their employer may have in place.

1.16 DG Competition’s responsibilities also extend to cooperation with other competition authorities around the world (including the US antitrust agencies). The EFTA Surveillance Authority, also based in Brussels, is a separate body with primary responsibility for enforcing the European competition rules in the three EFTA contracting states; it works closely with the European Commission.
2. Cartels

2.1 Any secret agreement or understanding between competitors which fixes prices, limits output, shares markets, customers or sources of supply, or involves other cartel behaviour such as bid-rigging, will almost inevitably be regarded as an agreement restricting competition within the meaning of Article 101.10

SERIOUS HARDCORE INFRINGEMENTS

2.2 Some agreements caught by the Article 101(1) prohibition are exempted provided the conditions of Article 101(3) are fulfilled.11 This requires that the efficiencies flowing from the agreement outweigh the anti-competitive effects, with a fair share of those benefits flowing to consumers. Cartels, however, will generally be viewed as involving blatant "hardcore" infringements which can be presumed to have negative market effects. It is therefore almost inconceivable that a cartel agreement would satisfy the criteria of Article 101(3).

FINES

2.3 There has been a clear trend towards increasing fines for hardcore cartels in recent years.12 In 2008 the Commission fined three companies a total of €1.3 billion for participating in illegal market sharing, and exchange of commercially sensitive information in the Car Glass case; the largest individual fine imposed was €896 million imposed on Saint-Gobain. Other recent examples of large fines imposed on cartel participants include French and German Gas Markets (2009: total fines of €1.106 billion, including a €553 million fine on each of E.ON and GDF Suez), Elevators and Escalators (2007: total fines of €992 million, including a €483 million fine on ThyssenKrupp), and Vitamins (2001: total fines of €855 million, including a €462 million fine on Hoffman-La Roche).

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10 For more detailed guidance, see separate Slaughter and May publication on The EU competition rules on cartels.
11 The four conditions are that the agreement (a) contributes to improving the production or distribution of goods or to promoting technical or economic progress, (b) allows consumers a fair share of the resulting benefit, (c) does not impose restrictions which are not indispensable to the attainment of (a) and (b), and (d) does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.
12 The competition authorities have likewise been imposing higher levels of fines for other serious infringements of Article 101 or Article 102 (e.g. a Commission fine of €1.06 billion imposed on Intel in 2009 for measures which sought to unfairly exclude AMD from the computer chips market).
LENIENTY

2.4 In December 2006, the Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (the 2006 Leniency Notice). The 2006 Leniency Notice takes account of the Commission’s previous experience with its 1996 Leniency Notice and the 2002 Leniency Notice. The 2006 Leniency Notice is essentially based on two principles: first, that the earlier undertakings contact the Commission, the higher the reward; second, that the value of the reward will depend on the usefulness of the materials supplied. The first case in which the Commission granted a total exemption from fines to a whistleblower was the Vitamins case (2001) where one member of the cartel was granted full immunity with regard to its participation in two of the cartels.

2.5 Virtually all Member States have also adopted leniency programmes relating to cartel investigations. An application for leniency to one authority within the ECN is not treated as an application to any other authority. Where a company is considering making an application for leniency to the Commission, it may therefore be in its interest to make parallel leniency applications to other NCAs which have competence to apply Article 101 and which may be considered well placed to act against the cartel. There remains a risk that NCAs which have not received a leniency application (or those which do not operate a leniency programme) will be able to initiate an investigation of their own without the parties being protected by the leniency application made to the Commission.

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13 Commission Notice of 8 December 2006 on immunity from fines and reduction of fines in cartel cases (amending the 2002 Notice, which replaced an earlier 1996 Notice on the non-imposition or reduction of fines in cartel cases).
3. Abuse of dominance

3.1 Article 102 TFEU provides that "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States".

DOMINANT POSITIONS

3.2 A dominant position is a situation where the economic power held by a company allows it to hinder the maintenance of effective competition in the relevant market by behaving to an appreciable extent independently of its competitors, customers and ultimately consumers. As a general rule of thumb, a company is unlikely to be dominant if it has a market share of less than 40%. For these purposes it is necessary to define the relevant product market as well as the relevant geographic market (which may be EU-wide, national or even local, depending on the facts).

ABUSIVE CONDUCT

3.3 Holding a dominant position is not itself unlawful. However, dominant undertakings have a special responsibility to behave in a way which does not damage or hinder the development of competition. Where a company has a dominant position, it will be in breach of the EU competition rules if it “abuses” that position.

3.4 Examples of unilateral conduct or behaviour which may be considered abusive include:

- Predatory pricing: This term is used to describe pricing at unfairly low levels (e.g. below average avoidable cost), particularly if there is evidence of intent to drive a competitor out of the market;

- Excessive pricing: High prices may be found to be abusive if they bear no reasonable relationship to the economic value of the goods;

- Fidelity rebates: Where a dominant company offers customers special financial rebates or discounts in return for securing all or an increased proportion of their business, this may be abusive if the rebate risks unfairly excluding efficient competitors from the market;
Refusal to supply: Article 102 requires dominant companies to have some reasonable and fair commercial reason for cutting off supplies to an existing customer. Objective justifications might include real concerns about the customer’s creditworthiness or a shortage of the relevant product.

Tying: Article 102 prohibits dominant companies from making the conclusion of contracts subject to supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject-matter of the contract. For example, a dominant company should not tie the supply of the product in question to a commitment to take ancillary products or services, particularly where the latter are not indispensable or where they could reasonably be provided by a third party; and

Discrimination: If a dominant company applies materially different trading terms (on prices or other conditions) to equivalent transactions, this may be an abuse in the absence of an objective justification.

In 2009 the Commission issued guidance on its enforcement priorities in respect of “exclusionary abuses”. This guidance was intended to introduce a more effects-based approach to the assessment of behaviour such as below cost pricing, the grant of fidelity rebates and the use of tying clauses. In particular, the guidance suggests that the Commission will only treat such behaviour as illegal where it genuinely risks the anti-competitive exclusion of competitors from the market.

RELEVANCE TO NON-DOMINANT UNDERTAKINGS AND OTHER CONSIDERATIONS

Relatively few companies enjoy such a position of market power that they are at real risk of being investigated under Article 102. That said, it should be borne in mind that markets can be defined narrowly for these purposes. Furthermore, where a company enjoys a significant market position, even falling short of dominance, it is also at greater risk of its market behaviour being subject to scrutiny under Article 101 if that behaviour is linked to the operation of an agreement or understanding with one or more other undertakings.

Unilateral conduct by companies with market power may also raise issues under national competition legislation (whether or not the conduct in question has an effect on trade between Member States). A few Member States do currently have national laws which can be applied to prohibit or remedy unilateral conduct in circumstances where there may not be an infringement of Article 102. That said, within the EU most national competition rules on unilateral conduct are closely modelled on Article 102; furthermore, under Regulation 1/2003 in any case where a NCA or national court applies national competition law to any conduct which would also be illegal under Article 102 it must also apply Article 102.

For example, in Germany the provisions on discriminatory and other restrictive conduct in the GWB (Gesetz gegen Wettbewerbsbeschränkungen), in particular Section 20, can be applied with respect to unilateral conduct of companies which do not enjoy Article 102 dominance. In the UK, the Enterprise Act 2002 gives the Competition Commission powers to take action or make recommendations if it decides (following a reference from the Office of Fair Trading) that features of a market adversely affect competition; these provisions could conceivably be used in respect of unilateral conduct which would not be prohibited by Article 102.
3.8 Non-dominant companies may be able to use the competition rules to their advantage. For example, if a competitor or supplier has a dominant position and uses that position to another company’s disadvantage, there may be remedies available to the latter under the EU competition rules (e.g. by complaining to the Commission or NCAs or by relying on Article 101 or 102 in domestic litigation).
4. Commercial cooperation generally

4.1 If a business’s commercial agreements or trading terms have sufficient effects on competition in the marketplace, then they may be caught by the Article 101(1) prohibition. If so, any restrictive provisions are unenforceable (Article 101(2)) – and in serious cases the parties may risk fines – unless they meet the exemption criteria of Article 101(3). It is important to bear in mind that third parties may take advantage of the competition rules by complaining to the Commission or NCAs, whether the agreement or conduct in question is already being investigated or not, they can also bring legal actions against the parties in the national courts if they suffer damage as a result of the operation of agreements which infringe the competition rules. By virtue of Regulation 1/2003 (Article 2), in any national or EU proceedings for the application of Article 101(1) or 102, the burden of proving an infringement rests on the party alleging the infringement; however, any party claiming the benefit of Article 101(3) has the burden of proving that those criteria are satisfied.

4.2 These issues are considered in more details below (at Parts 5, 6, and 7 of this publication) by reference to three broad categories of commercial cooperation – horizontal cooperation, vertical cooperation and intellectual property licensing.

NEED FOR AN APPRECIABLE EFFECT ON COMPETITION

4.3 An agreement will only be caught by Article 101(1) if it affects trade between Member States and restricts or distorts the free play of competition to an appreciable extent. This is not always easy to ascertain. It is essentially a question of fact and degree, involving identifying:

- Trade flows which may be affected: If there is no appreciable effect on trade between Member States, then any competition issues should be a matter exclusively for national competition rules;¹⁵ and

- The markets which may be affected by the agreement and the parties’ strengths on those markets: An agreement will not be caught if considerations such as the weak market position of the parties mean that it does not have an appreciable effect on market behaviour or on the opportunities available to third parties (customers, competitors and suppliers).

¹⁵ In connection with the implementation of Regulation 1/2003, in 2004 the Commission adopted a Notice providing guidance on this issue of appreciable effect of trade between Member States (including when such effects may be considered de minimis such that the EU competition rules are not applicable).
4.4 In appraising whether a commercial agreement is caught by the Article 101(1) prohibition, it is therefore necessary to identify the affected markets, taking account of relevant product and geographic market considerations. The Commission has issued a Market Definition Notice (in 1997) providing guidance on how it arrives at a relevant market definition for competition law purposes. The Notice emphasises that every case must be examined on an individual basis. The Commission’s analysis primarily consists of reviewing a product’s characteristics and intended use, taking account of the views of the parties, customers and competitors.

4.5 A further Commission Notice (issued in 2001) deals with the issue of appreciable effect on competition, doing this by reference to the parties’ market shares on the relevant market. This De Minimis Notice proceeds on the basis that agreements between actual or potential competitors are more likely to pose a threat to competition than agreements between non-competitors. Under the Notice:

- The Commission accepts that agreements between non-competitors will generally not be caught by the Article 101(1) prohibition if the parties have market shares of no more than 15%;
- For agreements between competitors (or for agreements that are difficult to classify as involving competitors or not) there is a lower 10% threshold;
- However, where an agreement contains “hardcore” restrictions – such as price fixing (including resale price maintenance) or territorial market sharing (including export bans or restrictions on parallel trade between EU Member States) – it is likely to be caught by the Article 101(1) prohibition even if the parties’ market shares are below the relevant 15% or 10% thresholds.

4.6 The thresholds in the De Minimis Notice are merely Commission guidelines. Vertical or horizontal agreements which exceed these limits may still not have an appreciable effect on competition and so may escape the Article 101(1) prohibition. That said, changing circumstances may mean that an agreement may subsequently be caught by the Article 101(1) prohibition (for example, if one party later merges with a competitor or if its sales of the products grow). There may therefore be good grounds for erring on the side of caution and drafting agreements to qualify for one of the Commission’s “block exemptions” (considered in more detail below) or otherwise minimising the scope for anti-competitive effects. That said, adopting a pragmatic approach may lead to the conclusion that the Article 101(1) prohibition does not apply to a particular agreement, or that the agreement is on balance pro-competitive and meets the criteria of Article 101(3).

THE EXEMPTION CRITERIA OF ARTICLE 101(3)

4.7 Even if an agreement is potentially caught by the Article 101(1) prohibition, it is not automatically prohibited. It may be pro-competitive and provide benefits to consumers. If so, it may satisfy the exemption criteria of Article 101(3) in order for the restrictions to be legally enforceable.\textsuperscript{16}

\textsuperscript{16} The four exemption criteria are set out in footnote 11 above.
4.8 If an agreement complies with a Commission “block exemption” regulation, it is automatically valid and enforceable (unless it involves an abuse of dominance under Article 102). Different block exemptions apply for different categories of agreements – as considered at Parts 5, 6 and 7 of this publication.\footnote{In addition, there are certain sector-specific block exemptions. These include the motor vehicle block exemption regulations (Regulation 1400/2002 and Regulation 461/2010) as considered in more detail in the Slaughter and May publication on The EU competition rules on vertical agreements. Other block exemptions apply to certain categories of agreements in the insurance sector, air transport and maritime transport.}
5. Horizontal cooperation

5.1 The competition authorities are generally suspicious of cooperative agreements between competitors. Some types of agreements between competitors risk being equated more to anti-competitive cartel agreements, for example information exchange agreements. That said, there are other types of "horizontal agreements" – between companies operating at the same level of trade – to which the authorities are more favourably inclined, even when they are between competitors.18

THE COMMISSION'S POLICY ON HORIZONTAL COOPERATION

5.2 In December 2010 the Commission adopted new Guidelines on horizontal cooperation (the "Horizontal Guidelines"), including a new chapter on information exchange and a revised chapter on standardisation. The guidelines take an "effects-based" approach, recognising that, where the companies involved do not enjoy market power, horizontal cooperation generally does not have anti-competitive consequences. The Horizontal Guidelines complement revised block exemption regulations on R&D collaboration and on specialisation agreements.

CLASSIFICATION OF HORIZONTAL AGREEMENTS

5.3 The Horizontal Guidelines explain how to apply the EU competition rules to various categories of horizontal cooperation. Where parties enter into agreements covering more than one type of cooperation, generally speaking all the relevant chapters of the Guidelines should be considered for the competition analysis. The Guidelines focus on the following categories of agreements:

– Information exchange: In some instances information exchange can be pro-competitive as it can lead to efficiency gains. The Guidelines give further guidance on the elements to be taken into account when assessing such agreements. They also describe circumstances in which information exchange gives rise to competition concerns (in particular where it can lead to collusive outcomes and/or have anticompetitive foreclosure effects);

18 For more detailed guidance, see separate Slaughter and May publication on The EU competition rules on horizontal agreements.
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- **Agreements on research and development:** The R&D block exemption encourages horizontal cooperation limited to joint R&D and paid for R&D. It also expressly permits cooperation extending to joint manufacturing and marketing, subject to a 25% market share threshold and other criteria;

- **Production agreements (including specialisation, sub-contracting and outsourcing):** The specialisation block exemption expressly permits certain types of cooperation in the field of production (which may extend to commercialisation), subject to a 20% market share threshold and other criteria;

- **Purchasing agreements:** In applying Article 101(1) to joint buying agreements, relevant factors include the parties’ positions on the purchasing markets concerned by the cooperation and on the downstream selling markets on which the parties are active. There is not a Commission block exemption for purchasing agreements. However, the Horizontal Guidelines indicate that the Article 101(1) prohibition will generally not be triggered if the parties’ market shares are below 15%;

- **Commercialisation agreements:** Likewise, in applying Article 101(1) to joint selling and marketing agreements, relevant factors include whether the parties are in fact competitors and, if so, whether they enjoy a significant degree of market influence – again by reference to a 15% threshold;

- **Standardisation agreements and standard terms:** The Guidelines provide guidance on the application of the EU competition rules, based on Commission experience in a number of recent cases. The assessment focuses on an analysis of the effects of this type of cooperation on the product or service markets concerned, on relevant technology markets, on the service markets for standard setting, and on markets for testing and certification of standard – compliant products. Generally, participation in standard – setting should be unrestricted and transparent; once the standard is adopted, access must be given on “fair, reasonable and non-discriminatory” (FRAND) terms to interested users. The Guidelines also provide guidance on the assessment of common standard conditions of sale or purchase which are agreed in certain industries; those which influence the prices charged to customers generally raise competition concerns, whereas those aimed at improving product or service levels for consumers (particularly if non-binding) are less likely to have negative effects.
6. Vertical cooperation

6.1 Companies get their goods and services to market in many different ways. Often they involve others in the process by entering into agreements with companies operating at a different level of trade. For EU competition law purposes, these are known as “vertical agreements”. Common vertical agreements include distribution and purchasing agreements, agency agreements and industrial supply contracts; a company’s agreements with its suppliers and its agreements with dealers and customers are examples of vertical agreements.

THE COMMISSION’S POLICY ON VERTICAL AGREEMENTS

6.2 In April 2010 the Commission adopted a block exemption regulation on the application of Article 101 to vertical agreements (Regulation 330/2010). The Commission also adopted some Guidelines on vertical restraints in 2010. These measures adopt an “effects-based” approach, focusing not so much on the form of the vertical agreement but rather on whether it has appreciable negative effects on competition in the relevant market. These Guidelines also provide guidance on the circumstances in which restrictions imposed on the use of the internet by retailers and distributors will amount to hard core restrictions relating to active or passive sales.

6.3 Where two (or more) competing manufacturers enter into vertical-type arrangements (for example, cross-supply agreements) then Article 101(1) is more likely to apply and the stricter standards governing horizontal agreements will be relevant (see Part 5 of this publication). Where the vertical agreement is not between competitors, however, it is more likely to be appraised favourably under Article 101.

SAFE HARBOUR FOR CERTAIN VERTICAL AGREEMENTS

6.4 The vertical agreements block exemption expressly exempts vertical agreements where the market shares of the relevant parties do not exceed a 30% threshold. Above that level, parties will need to assess the compatibility of their vertical agreements with Article 101, with assistance from the Vertical Guidelines.

6.5 The block exemption is not available if an agreement includes certain “hardcore” vertical restraints, such as practices involving the imposition of resale prices on the buyer (fixed or minimum prices) and certain restrictions on resale by the buyer (including bans on cross-border sales).

19 For more detailed guidance, see separate Slaughter and May publication on The EU competition rules on vertical agreements.
7. Intellectual property licensing

7.1 There are tensions between IP legislation, aimed at encouraging and rewarding innovations by protecting intellectual property rights (IPRs), and the EU’s competition rules which aim to promote competition and reduce barriers to cross-border trade. Since the licensing of IPRs is brought about by means of agreements, Article 101 is the principal competition law instrument used for regulating this form of cooperation. In exceptional cases, the way in which a company exploits its IPRs may also raise Article 102 issues.

THE COMMISSION’S POLICY ON INTELLECTUAL PROPERTY LICENSING

7.2 There is only one Commission block exemption dealing specifically with IPRs and that focuses on the licensing of technology (essentially patents and proprietary know-how).

7.3 In general terms, an IP licence will only be caught by Article 101(1) if it has an appreciable effect on competition in a relevant market. IP licences between competitors are more likely to have such effects. The EU competition rules will generally also catch licences which seek to impose hardcore restrictions such as resale price maintenance or the grant of absolute territorial protection to the licensor or licensee.

THE TECHNOLOGY TRANSFER BLOCK EXEMPTION

7.4 Recognising that technology licensing is generally pro-competitive, in 2004 the Commission adopted a new block exemption and a detailed set of guidelines on the application of Article 101 to technology transfer agreements. The block exemption provides a blanket exemption or “safe harbour” for all technology transfer agreements meeting certain criteria.

7.5 The block exemption is not available if the parties’ market shares exceed a 20% threshold (for agreements between competitors) or a 30% threshold (for agreements between non-competitors). An agreement will also fall outside the block exemption if it includes any “hardcore” restrictions, such as price-fixing restrictions, limitations on output, allocation of markets or customers, or restrictions on the exploitation of technology (for agreements between competitors).

For more detailed guidance, see separate Slaughter and May publication on The EU competition rules on intellectual property licensing.
7.6 If the agreement contains certain excluded restrictions, these must be individually assessed under Article 101 but the remainder of the agreement may still be able to benefit from the block exemption. The excluded restrictions are exclusive grant-backs by the licensee, no challenge clauses, and restrictions on exploiting technology (for agreements between non-competitors).
8. Merger control

8.1 The principal instrument for the control of mergers and acquisitions at the EU level is the EU Merger Regulation. The current version of the Merger Regulation (Regulation 139/2004) came into force on 1st May 2004.

THE EU MERGER REGULATION

8.2 The EU Merger Regulation gives the Commission jurisdiction to control certain "concentrations" meeting the relevant jurisdictional tests. Such transactions must be notified to the Commission for investigation and approval before they may be put into effect. Where a transaction does not have such an "EU dimension", it may instead be subject to scrutiny under national merger control rules. There are also procedures which allow jurisdiction to be transferred between the Commission and the NCAs (in either direction) in certain circumstances.

8.3 It is important to bear in mind that the concept of "concentration" also catches various joint venture (JV) transactions provided they display structural (rather than pure behavioural) characteristics. For example, two or more companies may formalise their cooperation by establishing a new JV undertaking, to be controlled jointly by the parent companies in accordance with a shareholders agreement. This company might take over part of its parents' existing activities or it might be a new start-up venture. Such "full-function" JVs need to be notified to the Commission under the EU Merger Regulation if they have an EU dimension.

APPLICATION OF ARTICLES 101 AND 102 TO COOPERATIVE ARRANGEMENTS

8.4 JVs which do not fall under the EU Merger Regulation regime may be subject to review under the general Articles 101 and 102 procedures, including possibly being able to benefit from the Commission's block exemptions (covered at Parts 5, 6 and 7 of this publication).

8.5 Where a cooperative joint venture or strategic alliance is not caught by the EU Merger Regulation and does not qualify for a block exemption, the parties will need to assess whether it is caught by Article 101(1) and, if so, whether the exemption criteria of Article 101(3) are satisfied (see general considerations at Part 4 of this publication). In short, the parties should analyse whether the deal:

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For more detailed guidance on the EU Merger Regulation (including its application to certain joint ventures) see separate Slaughter and May publication on The EU Merger Regulation. That publication also includes a brief overview of the national merger control rules in each of the EU Member States.
— appreciably restricts competition which there might otherwise have been between the parties (at the R&D, production/manufacturing and/or commercialisation/supply stages);

— appreciably affects the competitive position of third parties (suppliers, customers or competitors); or

— forms part of a wider network of cooperation between the parties or with third parties, particularly if in highly concentrated or oligopolistic markets.
9. State aid control

9.1 Where undertakings or products receive financial or other assistance from the State or other public funds, there is a risk that this favoured treatment may operate as a form of protectionism to the detriment of other undertakings or products, so disrupting normal competitive forces and threatening the EU’s internal market objectives. State aid may have the negative effect of delaying inevitable industry restructuring without helping the recipient actually to return to competitiveness. Instead unsubsidised undertakings, which have to compete with those receiving public support, may ultimately run into difficulties, damaging overall competitiveness and levels of employment.

9.2 This is why the TFEU’s competition rules contain provisions prohibiting State aid (and similar provisions are contained in the EEA Agreement). The Commission regards the control of State aid as being one of the most important aspects of EU competition policy. It maintains a detailed State aid register with information on pending and decided cases. It also publishes regular annual surveys on State aid in the EU.

THE CONCEPT OF STATE AID

9.3 Article 107(1) TFEU prohibits “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods … in so far as it affects trade between Member States”, unless the aid is permitted in accordance with Treaty rules.

9.4 The “State” for these purposes includes all levels, manifestations and emanations of public authority. The concept of “aid” is very wide, encompassing anything which may be of commercial benefit. Thus, State aid can take a variety of forms, including:

- grants or subsidies from the State or from regional or local government;
- tax or social security exemptions;
- the provision by the State (or State-controlled undertakings) of goods or services on preferential terms;

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23 The general EU rules on State aid are contained within the Chapter of the TFEU relating to competition (at Articles 106 to 109); special rules apply to the granting of aid for agricultural products (Article 42) and for transport (Article 93).
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- various other steps such as giving State guarantees, loans, debt write-offs or shareholdings/investments from public funds. A State aid will generally be found to exist if a Member State agrees to make funds available to an undertaking which would not be provided in the normal course of events by a private investor applying ordinary commercial criteria (the “market economy investor principle”); this may involve an examination of whether there will be an acceptable return on the provision of funds within a reasonable period of time.24

9.5 There can be difficulties in applying the State aid rules to the financing of public sector obligations.25 The Commission has therefore adopted specific measures relating to the payment of compensation to undertakings that perform services of general economic interest (see Part 10 of this publication).

THE COMMISSION’S ROLE IN INVESTIGATING STATE AID

9.6 There are certain circumstances in which State aid may be permitted. Article 107(2)(a)-(c) expressly permits the following forms of aid:

(a) aid having a social character, granted to individual consumers, provided it is granted in a way which does not discriminate according to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or other exceptional occurrences; and

(c) aid to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required to compensate for the economic disadvantage caused by that division.

9.7 Article 107(3)(a)-(d) provides that the following forms of aid may be permitted:

(a) aid to promote the economic development of underdeveloped areas of the EU (with abnormally poor living standards or high levels of unemployment);

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or areas (provided it does not adversely affect trading conditions to an extent contrary to the common interest); and

24 Other guidance issued by the Commission includes a Notice published in 2000 regarding State guarantees, a 2001 Communication on short-term export credit insurance, a 1998 Notice on measures relating to direct business taxation and a 1997 Communication concerning aid elements in land sales by public authorities.

(d) aid to promote culture and heritage conservation (again provided it does not affect trading conditions and competition in the EU to an extent contrary to the common interest).

9.8 The Commission has exclusive competence to decide whether or not State aid is permitted in accordance with State aid policy. Within the Commission, DG Competition now deals with State aid cases in most sectors (including energy and transport).

9.9 Under Article 108(3) Member States are required to notify the Commission of all plans to grant aid or to alter existing approved aid schemes. Notifications must be made through the Member States’ Permanent Representations in Brussels using a standard questionnaire published by the Commission. A recipient of State aid cannot itself seek Commission authorisation for the aid; rather, it may need to raise with the public authorities in question the need for a notification. In June 2009 the Commission adopted a Best Practices Code which provides guidance on the proper conduct of State aid proceedings.

9.10 State aid can be categorised as:

- Non-notifiable aid: If the aid falls within one of the block exemptions (see 9.14 below), it is not necessary to notify it to the Commission.

- Notified aid: Where aid has been duly notified, the Commission will investigate. Once the Member State has submitted a complete notification, the Commission normally has two months (which can be extended by agreement with the Member State) to decide:
  - that the notified measure does not involve State aid (or is covered by a block exemption);
  - to authorise the aid (on the basis that there are no doubts as to its compatibility with the TFEU); or
  - to initiate a formal Article 108(2) investigation (because of doubts as to its compatibility with the TFEU).

- Non-notified aid: Where a Member State fails to notify aid which should have been notified, it is illegal and should not be implemented. The Commission may investigate such situations of non-notified aid (whether following a complaint or otherwise) and may require the Member State to supply information (which may be done by way of a late notification) in connection with its investigations. The Commission will then be in a position to decide whether to authorise the aid (by not raising objections) or to open a formal Article 108(2) investigation. The Commission may also seek interim measures in such situations, pending completion of its investigations.

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26 Exceptionally, under Article 108(2), para. 3, the Council may (acting unanimously) decide that a specific grant of aid by a Member State is not illegal. This exceptional power was used in 2002 in respect of diesel tax subsidies granted to road hauliers in France, Italy and the Netherlands.

27 Within DG Competition, Directorates B, C, D, E, F and H deal with State aid. Other Directorates-General which handle State aid cases within their areas of responsibility are DG Agriculture and DG Fisheries. Prior to 2010, energy and transport cases were likewise handled by the DG with responsibility for energy and transport.

28 If the Commission does not take a decision within this period, the Member State may implement the aid provided it gives the Commission 15 days’ notice of its intention to do so. In June 2009 the Commission introduced a “simplified procedure” for aid which is clearly unproblematic. Aid which qualifies for this procedure can be cleared within 20 working days of notification.
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9.11 Where the Commission decides to open a formal Article 108(2) investigation procedure, it sends a letter to the Member State (which will also be published in the Official Journal). During the procedure, other Member States, the recipient of the aid and other interested third parties (e.g. competitors and trade associations) have the opportunity to submit comments. The procedure should generally not take longer than 18 months; if this time limit is reached, the Member State may request that the Commission takes a decision within two months, but these targets are not binding. A formal investigation ends with the Commission issuing either:

- a "positive decision" to close the proceedings and authorise the aid, in which case a letter is sent to the Member State (and published in the Official Journal). Such a decision may be made subject to conditions and obligations (a "conditional decision"); or

- a "negative decision" prohibiting the aid, in which case a letter and formal decision is sent to the Member State (and published in the Official Journal). Where the aid has already been implemented, the Commission has the power to require that illegally granted aid be repaid by recipients to the public authorities which granted it (with interest normally being payable from the date the aid was illegally paid). The Member State must recover the aid immediately in accordance with domestic procedures.

9.12 National courts should use all appropriate measures and provisions of national law to implement the direct effect of the Article 108(3) prohibition on implementation of unauthorised State aid (e.g. interim relief ordering the freezing or return of illegally paid amounts, award of damages to third parties whose interests have been harmed). If called upon to decide whether particular facts involve illegal State aid, national courts may refer questions to the Court of Justice for a preliminary ruling under Article 267 TFEU. They may also request guidance from the Commission.29

GUIDELINES AND FRAMEWORKS FOR THE APPLICATION OF STATE AID POLICY

9.13 Special rules and/or guidelines have been established at the EU level for the approval of State aid to particular industries, notably:30

- Shipbuilding: A special regime has been established for aid in the shipbuilding sector under the 2003 framework notice;

- Steel: Special regimes have likewise been established for State aid to the steel sector;

- Electricity: In a 2001 Communication the Commission set out criteria for the assessment of State aid aimed at compensating "stranded costs" in the electricity sector (i.e. investments, guarantees or other commitments designed to compensate for costs incurred by the electricity sector prior to its liberalisation and which cannot be recovered due to the liberalisation process);

29 In 2009 the Commission issued new guidance to help national courts apply the State aid rules, including the recovery of unlawful aid.

30 Prior to 2004 special regimes also existed for a number of other sectors, notably synthetic fibres and motor vehicles.
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- Postal services: In 1998 the Commission adopted a notice on the application of the competition rules to the postal sector, including the application of the State aid rules;

- Public service broadcasting: Given the significant number of State aid cases involving complaints from commercial broadcasters, in 2009 the Commission updated its Communication on the application of State aid rules to public service broadcasting;

- Audio-visual production: In 2009 the Commission updated its Communications relating to cinematographic and other audio-visual works;

- Broadband: In 2009 the Commission issued Guidelines on the public funding of broadband networks;

- Financial services: The Commission has issued a variety of Communications outlining its approach to the State aid being provided to the financial sector during the global financial crisis. These include guidance on recapitalisation schemes, the treatment of impaired asset schemes and conditions under which restructuring aid can be provided.

9.14 The Commission has also adopted two block exemptions for certain categories of “horizontal” State aid (i.e. aid which is not specific to particular industry sectors):

- General Block Exemption: In 2008 the Commission adopted a new general block exemption (Regulation 800/2008). This replaces the previous block exemptions on aid to SMEs, training aid and employment aid and also extends the benefit of the exemption to new areas, including aid for environmental protection, aid in the form of risk capital, R&D aid for large companies, innovation aid, aid for newly-created small enterprises and aid for enterprises created by female entrepreneurs;

- De minimis aid: In 2001 the Commission adopted a block exemption (Regulation 69/2001) for certain aid measures which are viewed as de minimis. In particular, the total de minimis aid granted to any one enterprise must not exceed €100,000 over any three year period.

9.15 In addition, the Commission has adopted guidelines for other categories of aid where it may be willing to take a favourable approach under Article 107(3) provided proper safeguards are in place and it is satisfied that the aid will not distort competition in the EU to an extent contrary to the common interest. These guidelines include the following:

- National regional aid: In 2006 the Commission issued revised and updated Guidelines on the criteria applied when examining aid to regions lagging behind in terms of development. These Guidelines are applied to regional aid schemes except where they relate to particular industries covered by special rules;

- Rescue and restructuring aid: In 2004 the Commission issued revised and updated Guidelines for State aid for rescuing and restructuring firms in difficulty. These were extended in 2009 and will remain in force until 2012.
10. State monopolies and liberalisation

THE AWARD OF SPECIAL OR EXCLUSIVE RIGHTS BY MEMBER STATES

10.1 The EU competition rules also include provisions governing the manner in which Member States grant special or exclusive rights to certain operators. The Commission also plays an important role in opening up market to cross-border competition.

10.2 The TFEU recognises that Member States may grant special or exclusive rights to public or private undertakings to perform "services of general economic interest" ("SGEIs"). These special or exclusive rights generally correspond to responsibilities linked to the performance of a public service entrusted to the undertaking. Under Article 106(1) TFEU, Member States must comply with the EU competition rules – including on the State aid rules – when granting special or exclusive rights to undertakings.\[31\]

10.3 Certain types of State aid may be justified on the basis of Article 106(2) TFEU which provides that undertakings entrusted with the operation of an SGEI or having the character of a revenue-producing monopoly shall be subject to the competition rules in so far as this does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Any measures which constitute State aid, and which are not covered by Article 106(2) TFEU, need to be authorised by the European Commission. Member States have some flexibility to decide what a SGEI is.

10.5 Where all the "Altmark criteria" (that is the criteria established in the ECJ's landmark decision in the Altmark case) are met, the public service compensation does not constitute State aid.\[32\] There will therefore be no need to notify the compensation to the Commission. The four cumulative criteria are:

- the recipient undertaking must actually have (clearly defined) public service obligations to discharge;
- the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;

\[31\] In 2005 the Commission adopted a package of measures providing greater legal certainty for the financing of SGEIs. This comprises: (i) Commission Decision 2005/842 exempting from the need to notify public service compensation (a) undertakings with annual turnover of less than €100 million receiving annual compensation of less than €30 million, (b) hospitals and social housing undertakings, and (c) certain low-volume air and maritime transport services, (ii) a Commission Framework for compensation payments not covered by the Decision, and (iii) an amendment to the Transparency Directive (Directive 80/723).

the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the
discharge of the public service obligations, taking into account the relevant receipts and a reasonable
profit. Cross-subsidisation resulting in compensation for discharging public service obligations being used
for other activities of the undertaking is not allowed; and

– where the undertaking which is to discharge the public service obligations, in a specific case, is not chosen
pursuant to a public procurement procedure, the level of compensation needed must be determined on
the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would
have incurred.

10.5 Where at least one of the Altmark criteria is not met, and the other State aid criteria are also present, the
public service compensation constitutes State aid and the Member State will have to notify the aid to the
Commission for approval.

LIBERALISATION DIRECTIVES

10.6 In accordance with Article 106(3) TFEU the Commission may also make proposals for the opening-up of
markets which are served by public undertakings or undertakings to which Member States grant special or
exclusive rights. It may itself adopt a European liberalisation Directive, or propose that such a Directive be
adopted by the Council and the European Parliament. The objectives laid down in a Directive must then be
incorporated into national legislation to be enforced by the Member States. The Commission monitors that
these objectives are actually achieved.

10.7 The EU has used these procedures to adopt Directives to initiate the opening-up of the following sectors to
competition:

– Transport (air, road, rail, inland waterways);
– Telecommunications;
– Postal services;
– Energy (electricity and gas).