SLAUGHTER AND MAY

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 and State aid

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Contents

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) provides for a single internal market with free movement of goods and services throughout the European Union (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 (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 that 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 – that is made between two or more "undertakings" (independent businesses) that may affect trade between Member States and that has the object or effect of preventing, restricting or distorting competition. It catches:

- secret price-fixing or market-sharing cartels (considered in Chapter 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 this type may nevertheless be compatible with the competition rules – either because they fall outside the scope of the Article 101(1) prohibition or because they meet the exemption criteria of Article 101(3) (see Chapter 3 of this publication for general observations, Chapters 4, 5 and 6 for more specific observations on "horizontal" agreements, "vertical" agreements and intellectual property licensing and Chapter 8 for observations on strategic alliances and joint ventures).

1.4 Article 102 makes it illegal for dominant companies to abuse their market power in a way that may affect trade between Member States (considered in Chapter 7 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 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 28 EU Member States are Austria, Belgium, Bulgaria, Croatia, 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.

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.[3] 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). 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 Chapter 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 28 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 Chapter 9 of this publication). Furthermore, there are special rules applicable to State monopolies that seek to encourage the liberalisation of markets within the EU.

Enforcement of the EU competition rules

1.8 The principal enforcement agency for the EU 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 Margrethe Vestager. DG Competition is headed by its Director-General, Johannes Laitenberger. In addition there are three Deputy Director-General positions with special responsibility for respectively (a) Antitrust, (b) Mergers, and (c) State aid. There are nine Directorates within DG Competition:

- Directorate A: Policy and Strategy
- Directorate B: Energy and Environment
- Directorate C: Information, Communication and Media
- Directorate D: Financial Services
- Directorate E: Basic Industries, Manufacturing and Agriculture

[3] Although the precise rules of standing, procedure and quantification of damages still varies between the Member States, a new Directive 2014/104/EU (OJ 2014 L349/1, 05.12.2014) came in to force in December 2014 that aims to harmonise the rules governing actions for damages under national law. Member States have until 27 December 2016 to implement the Directive. If called upon to decide whether particular facts involve infringements of Arts. 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 Art. 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.

- Directorate F: Transport, Post and other services
- Directorate G: Cartels
- Directorate H: State aid: General Scrutiny and Enforcement
- Directorate R: Registry and resourcing issues within DG Competition.

Directorates B to F each have separate units for antitrust, mergers and State aid. In addition, DG Competition has a Chief Economist, currently Massimo Motta, who heads a team of economists (the Chief Economist's Team or CET) that provides economic support both in individual competition cases and on general policy issues.[4] On 25 May 2016 it was announced that Tommaso Valletti will replace Massimo Motta as Chief Economist of DG Competition from September 2016.

1.10 Commission decisions can be appealed to the General Court in Luxembourg under Article 263 TFEU. In turn, General Court judgments can be appealed on points of law to the Court of Justice (ECJ).

1.11 The implementation of Articles 101 and 102 is governed by Council Regulation (EC) 1/2003.[5] This is supplemented by a Commission Implementing Regulation[6] 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;[7]
- Notice on cooperation between the Commission and the courts of the Member States in the application of Articles 101 and 102;[8]
- Notice providing guidelines on the effect on trade concept contained in Articles 101 and 102;[9]
- Notice providing guidelines on the application of Article 101(3);[10]
- Notice on informal guidance relating to novel questions concerning Articles 101 and 102 that arise in individual cases (guidance letters);[11] and
- Notice on the handling of complaints under Articles 101 and 102.[12]

[4] For details of who heads the different Directorates and units, see Commission organigram at http://ec.europa.eu/dgs/competition/directory/organi_en.pdf.

[5] OJ 2003 L1/1, 4.1.2003.

[6] Commission Reg. EC 773/2004 (OJ 2004 L123/18, 27.4.2004).

[7] Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C101, 27.04.2004).

[8] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C101, 27.4.2004).

[9] Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C101, 27.04.2004).

[10] Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (OJ 2004 C101, 27.04.2004).

[11] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (OJ C101, 27.04.2004).

[12] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ 2004 C101, 27.04.2004).

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 with a system where undertakings are encouraged to "self-assess" whether their conduct and agreements are compatible with the principles of Articles 101 and 102.[13] 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.[14]

- If an NCA applies its national competition rules to an agreement or conduct where trade between Member States is affected, they are obliged (by virtue of Article 3 of Regulation 1/2003) also to apply the EU competition rules. As a result, the vast majority of Article 101 and 102 cases are now handled at the NCA level rather than by the Commission, and a substantial proportion of NCA decisions are 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, NCAs may still apply relevant national rules on the prohibition or sanctioning of unilateral conduct where those rules are stricter than the EU competition rules.[15] Member States may also continue to apply national laws where the predominant objective of those laws is different from the competition-focused objectives of Articles 101 and 102.[16]

- The Commission and the NCAs cooperate extensively with each other, including in the exchange of confidential information necessary to prove an infringement of the EU competition rules. The ECN serves 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 to ensure 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 that may be exclusively or more effectively applied by the Commission;

[13] 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 that 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 (known as a "guidance letter"), a non-confidential copy of which would be published on DG Competition's website.

[14] 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 Arts. 101 and 102 that the Commission then makes available on DG Competition's website.

[15] See observations at para. 3.7.

[16] For example, this would permit the application of national legislation on unfair trading practices.

- a Commission decision is needed to develop EU competition policy; or
- it is appropriate for the Commission to act to ensure effective enforcement of the antitrust rules.

- The Commission has substantial powers of enforcement and investigation, including the power to require companies 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.[17] In addition to its powers to impose fines for substantive breaches of the competition rules, the Commission also has powers to impose structural remedies such as breaking up a dominant company. The Commission may also impose fines for procedural infringements, e.g. failure to provide information.

1.13 Investigations may be triggered by one or more of the parties engaged in the relevant conduct approaching the Commission or NCAs (for example, as a "whistleblower" under the Commission's leniency programme for cartel cases: see Chapter 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.

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 that may be characterised as cartels.

[17] 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 Arts. 101 or 102 (and not just 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 that 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 that 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.[18]

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.[19] 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 that 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.[20] In a series of decisions spanning 2013-2015, the Commission fined nine financial institutions a total of €1.53 billion for participating in interest rate derivatives cartels and in 2014 it fined participants in a cartel concerning automotive bearings a total of €953 million.

Leniency

2.4 In 2006, the Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (the Leniency Notice).[21] The 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.

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 that have competence to apply Article 101 and that may be considered well placed to act against the cartel. There remains a risk that NCAs that have not received a leniency application (or those that 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. The ECN's Model Leniency Programme seeks to facilitate the making of simultaneous leniency applications in multiple jurisdictions.

[18] For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on cartels*.

[19] 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 that are not indispensable to the attainment of conditions (a) and (b); and (d) does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

[20] The competition authorities have likewise been imposing higher levels of fines for other serious infringements of Art. 101 or Art. 102 (e.g. a Commission fine of €1.06 billion imposed on Intel in 2009 for measures that unfairly sought to exclude AMD from the computer chips market).

[21] Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C298/17, 8.12.2006).

3. Commercial cooperation generally

3.1 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).

3.2 It is important to bear in mind that third parties may take advantage of the competition rules by complaining to the Commission or NCAs. They can also bring legal action against the parties in the national courts if they suffer damage as a result of the operation of agreements that infringe the competition rules. 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.

3.3 These issues are considered in more detail below by reference to three broad categories of commercial cooperation – horizontal cooperation, vertical cooperation and intellectual property licensing – see Chapters 4, 5, and 6 of this publication.

Need for an appreciable effect on competition

3.4 An agreement will only be caught by Article 101(1) if it affects trade between Member States and restricts or distorts 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 that 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;[22] and

- the markets that 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).

3.5 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's Market Definition Notice[23] provides 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.

[22] In connection with the implementation of Reg. 1/2003, 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).

[23] Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C372/3, 9.12.1997).

3.6 The Commission's *De Minimis* Notice deals with the issue of appreciable effect on competition primarily by reference to the parties' market shares on the relevant market.[24] This 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, the safe harbours above do not apply to any agreement that has as its object the prevention, restriction or distortion of competition within the internal market. This will encompass any agreement that 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).

3.7 The thresholds in the *De Minimis* Notice are merely Commission guidelines. Agreements that 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)

3.8 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 on competition to be legally enforceable.[25]

3.9 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 Chapters 4, 5 and 6 of this publication.[26]

[24] Commission Notice on agreements of minor importance that do not appreciably restrict competition under Art. 101(1) of the Treaty on the Functioning of the European Union (OJ 2014 C291/1, 30.8.2014).

[25] The four exemption criteria are set out in footnote 19 above.

[26] In addition, there are certain sector-specific block exemptions, including those that apply to motor vehicles (as considered in more detail in the Slaughter and May publication on *The EU competition rules on vertical agreements*), insurance and maritime transport.

4. Horizontal cooperation

4.1 The competition authorities are generally suspicious of cooperative agreements between competitors. Some types of agreements between competitors, such as those relating to information exchange, are more likely to be viewed to anti-competitive cartel 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.[27]

The Commission's policy on horizontal cooperation

4.2 The Commission's guidelines on horizontal cooperation (the Horizontal 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.[28] The Guidelines complement block exemption regulations on R&D collaboration (Commission Regulation (EU) 1217/2010)[29] and on specialisation agreements (Commission Regulation (EU) 1218/2010).[30]

Classification of horizontal agreements

4.3 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 Horizontal Guidelines should be considered for the competition analysis. The Horizontal 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 Horizontal 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).

- 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. While there is no block exemption for

[27] For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on horizontal agreements*.

[28] Guidelines on the applicability of Art. 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ 2011 C11/1, 14.1.2011).

[29] OJ 2010 L335/36, 18.12.2010.

[30] OJ 2010 L335/43, 18.12.2010.

purchasing agreements, the Guidelines indicate that the Article 101(1) prohibition will generally not be triggered if the parties' combined market share is 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 assessment here 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 compliant products. In respect of standard setting, the Horizontal Guidelines state that participation should be unrestricted and transparent and that once the standard is adopted, access must be given on "fair, reasonable and non-discriminatory" (FRAND) terms to interested users. With regard to common standard conditions of sale or purchase, the Horizontal Guidelines note that those that 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.

5. Vertical cooperation

5.1 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.

The Commission's policy on vertical agreements

5.2 In 2010, the Commission adopted a new block exemption regulation on the application of Article 101 to vertical agreements (Commission Regulation (EU) 330/2010)[31] and issued new guidelines on vertical restraints (the Vertical Guidelines).[32] 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.[33] The Guidelines also provide guidance on the circumstances in which restrictions imposed on the use of the internet by retailers and distributors will amount to "hardcore" restrictions relating to active or passive sales.

5.3 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 Chapter 4 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

5.4 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.

5.5 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).

[31] OJ 2010 L102/1, 23.4.2010.

[32] Guidelines on Vertical Restraints (OJ 2010 C130/1, 19.5.2010).

[33] For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on vertical agreements*.

6. Intellectual property licensing

6.1 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.[34]

The Commission's policy on intellectual property licensing

6.2 The Commission block exemption dealing specifically with IPRs focuses on the licensing of technology (essentially patents and proprietary know-how). 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 that 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

6.3 Recognising that technology licensing is generally pro-competitive, the Commission adopted in 2014 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.

6.4 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).

6.5 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).

[34] For more detailed guidance, see separate Slaughter and May publication on *The EU competition rules on intellectual property licensing*.

7. Abuse of dominance

7.1 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

7.2 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

7.3 Holding a dominant position is not itself unlawful. However, dominant undertakings have a special responsibility to behave in a way that 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.

7.4 Examples of unilateral conduct or behaviour that 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 that, 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.

7.5 in 2009 the Commission issued guidance on its enforcement priorities in respect of "exclusionary abuses".[35] 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 undertaking and other considerations

7.6 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.

7.7 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 currently have national laws that can be applied to prohibit or remedy unilateral conduct in circumstances where there may not be an infringement of Article 102.[36] That said, within the EU, most national competition rules on unilateral conduct are closely modelled on Article 102. Furthermore, under Regulation 1/2003, where a NCA or national court applies national competition law to any conduct that would also be illegal under Article 102, it must also apply Article 102.

7.8 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).

[35] Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009 C45/2, 24.2.2009).

[36] For example, in Germany the provisions on discriminatory and other restrictive conduct in the Gesetz gegen Wettbewerbsbeschränkungen (GWB), in particular s. 20, can be applied with respect to unilateral conduct of companies that do not enjoy Art. 102 dominance. In the UK, the Enterprise Act 2002 gives the Competition and Markets Authority powers to take action or make recommendations if it decides that features of a market adversely affect competition; these provisions could conceivably be used in respect of unilateral conduct that would not be prohibited by Art. 102.

8. Merger control

8.1 The principal instrument for the control of mergers and acquisitions at the EU level is the EU Merger Regulation.[37] The current version of the Merger Regulation came into force on 1 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.[38] 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 that 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 that do not fall under the EU Merger Regulation regime may be subject to Articles 101 and 102 and may benefit from the Commission's block exemptions (covered at Chapters 4, 5 and 6 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 Chapter 3 of this publication). In short, the parties should analyse whether the deal:

- appreciably restricts competition that 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.

[37] Council Reg (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004).

[38] 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.

9. State aid control

9.1 Where undertakings receive financial or other assistance from the State or other public funds or entities, there is a risk that this will confer an economic advantage that will disrupt normal competitive forces and affect trade, operating as a form of protectionism and threatening the EU's internal market objectives.

9.2 This is why the TFEU's competition rules contain provisions declaring aid granted by Member States to be (subject to certain exceptions) incompatible with the internal market. Similar provisions are contained in the EEA Agreement. The European Commission regards the control of State aid as being one of the most important aspects of EU competition policy.[39]

The concept of State aid

9.3 Unless permitted in accordance with the State aid rules, Member States may not grant aid "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" (Article 107(1) TFEU).

9.4 The concept of aid is very wide, encompassing anything that may be of commercial benefit. Thus, State aid can take a variety of forms, including:

- grants or subsidies;
- tax or social security exemptions;
- the provision of goods or services on preferential terms; or
- measures such as guarantees, loans, debt write-offs or shareholdings and investments from public funds where these are not provided on commercial terms.[40]

Role of the Commission

9.5 The Commission has exclusive competence to permit State aid in accordance with State aid policy and the relevant Treaty provisions. Member States are required to notify the Commission of all plans to grant aid or to alter existing approved aid schemes. Unless an exemption applies, they must refrain from implementing the aid before the Commission's authorisation is obtained.

9.6 Following a preliminary investigation, the Commission will either approve the aid or open an in-depth investigation. An in-depth investigation ends with the Commission issuing:

- a "positive decision" to close the proceedings and authorise the aid;

[39] For more detailed guidance on the EU State aid rule, see separate Slaughter and May publication *The EU competition rules on State aid*.

[40] Where a Member State agrees to make funds available to an undertaking that would not be provided in the normal course of events by a private investor applying ordinary commercial criteria (the "market economy investor principle") then this is likely to involve State aid.

- a “negative decision” prohibiting the aid; or
- a “conditional” decision, authorising the aid subject to compliance with certain conditions.

9.7 Where the Commission has taken a “negative decision” and the aid has already been implemented, the Commission is required in principle to order the Member State to seek recovery of illegally granted aid from the recipients.

Guidelines and frameworks

9.8 Certain limited types of aid (such as social aid given to individual consumers) are expressly permitted by Article 107(2) TFEU. Although exempted automatically, these types of aid must still be notified to the Commission.

9.9 Other types of aid (such as aid to promote the economic development of underdeveloped areas of the EU) may, following the review of the notification, be deemed by the Commission to be compatible with the internal market under Article 107(3) TFEU. The Commission has considerable discretion for these purposes.

9.10 The Commission has adopted block exemptions covering various categories of aid measures to reduce the number of cases that it is required to examine. It has also published various guidelines setting out the criteria that it will apply when assessing the compatibility of particular categories of aid measures with Article 107(3) TFEU.

The award of special or exclusive rights by Member States

9.11 The TFEU recognises that Member States may entrust public or private undertakings to provide “services of general economic interest” (SGEIs). The entrustment of a public service remit is often accompanied by the granting of special or exclusive rights. Member States must comply with the EU competition rules – including the State aid rules – when granting special or exclusive rights to undertakings (Article 106(1) TFEU).

9.12 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 insofar as this does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Any measures that constitute State aid, and that are not covered by Article 106(2) TFEU, need to be authorised by the European Commission.[41]

Role of the courts

9.13 State aid decisions can be subject to judicial review by the European General Court. There are strict rules on who can bring an appeal.

[41] The European Commission has adopted an ‘SGEI package’ composed of several acts of secondary legislation and soft law governing, among other things, the application of Art. 106(2) TFEU to undertakings entrusted with the provision of a public service.

9.14 National Courts should use all appropriate measures and provisions of national law to implement the State aid rules, including:

- interim relief ordering the freezing or recovery of illegally paid amounts; and
- award of damages to third parties whose interests have been harmed.

9.15 National courts cannot rule on whether aid is compatible with Article 107 TFEU. They may, however, decide whether or not a measure amounts to State aid.

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