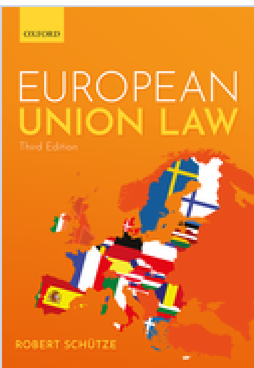

European Union Law (3rd edn)
Robert Schütze

p. 717

17. Competition Law

Private Undertakings

Robert Schütze

https://doi.org/10.1093/he/9780198864660.003.0017
Published in print: 03 June 2021
Published online: September 2021

Abstract

This chapter assesses the EU competition law on private undertakings. The relevant Treaty section is here built upon three pillars. The first pillar deals with anticompetitive cartels and can be found in Article 101 of the Treaty on the Functioning of the European Union (TFEU). The second pillar concerns situations where a dominant undertaking abuses its market power and is found in Article 102. The third pillar is unfortunately invisible, for when the Treaties were concluded, they did not mention the control of mergers. This constitutional gap has never been closed by later Treaty amendments, yet it has received a legislative filling in the form of the EU Merger Regulation.

Keywords: EU competition law, private undertakings, anticompetitive cartels, Treaty on the Functioning of the European Union, dominant undertaking, market abuse, merger control, EU Merger Regulation

Contents

Introduction

1. **Cartels I: Jurisdictional Aspects**
    - a. The Concept of ‘Undertaking’
    - b. The ‘Single Economic Unit’ Doctrine
    - c. Forms of Collusion: Agreements and Beyond
        - aa. Agreements I: Horizontal and Vertical Agreements
        - bb. Agreements II: ‘Tacit Acquiescence’ versus ‘Unilateral Conduct’

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

cc. Concerted Practices and Parallel Conduct

d. (Potential) Effect on Trade Between Member States

2. **Cartels II: Substantive Aspects**

a. Restrictions of Competition: Anticompetitive Object or Effect

aa. Two Dimensions: Inter-Brand and Intra-Brand Competition

bb. Restrictions by Object: European 'per se Rules'

cc. Restrictions by Effect: A European 'Rule of Reason'?

dd. Non-Appreciable Restrictions: The *de minimis* Rule

b. Article 101(3): Exemptions Through Pro-Competitive Effects

aa. Direct Exemptions under Article 101(3)

bb. Exemptions by Category: Block Exemption Regulations

c. In Particular: (Horizontal) Cooperation Agreements

d. In Particular: (Vertical) Distribution Agreements

aa. Exclusive and Selective Distribution Agreements

bb. The 'Vertical' Block Exemption Regulation

3. **Dominant Undertaking(s): Market Abuse**

a. The 'Market': Product and Geographic Dimensions

b. Market Dominance

aa. General Considerations

bb. Collective Dominance

c. Abuse of Market Dominance

aa. Article 102[2](a) and 'Predatory Pricing'

bb. Article 102[2](b) and 'Refusal to Supply'

cc. Article 102[2](c) and 'Discretionary Pricing'

dd. Article 102[2](d) and 'Tying or Bundling'

p. 718

d. Objective Justification: Apparently Abusive Behaviour?

4. **EU Merger Control**

a. Judicial Origins: Merger Control 'By Other Means'

b. Legislative Foundations: The EU Merger Regulation

aa. Jurisdictional Scope: The 'Union' Dimension

bb. Substantive Compatibility: Dominance and SIEC Tests

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

cc. Merger Defences: Objective Justifications?

dd. National Derogations: Public Policy Justifications

Conclusion

Further Reading

Introduction

Competitive markets are markets in which economic rivalry enhances efficiency. Market forces determine the winners and losers of this rivalry, and competition will—ultimately—force inefficient losers out of the market.

Who, however, forces the winner(s) to act efficiently? By the end of the nineteenth century, this question was first raised in the United States. After a period of intense competition 'the winning firms were seeking instruments to assure themselves of an easier life';[1] and they started to use—among other things—the common law 'trust' to coordinate their behaviour within the market. To counter the anticompetitive effects of these trusts, the US legislator adopted the first competition law of the modern world: the Sherman Antitrust Act (1890). It attacked the two cardinal sins within all antitrust law: anticompetitive agreements and monopolistic markets.[2] The meaning of what 'competition' is, and what exactly to prohibit, has nonetheless remained controversial. Two basic 'schools' have here traditionally competed with each other. Following the 'Harvard School', competition law is to prevent harm to consumers (exploitative offences) as well as harm to competitors (exclusionary offences), whereas the 'Chicago School' considers the enhancement of 'consumer welfare' as the sole objective of competition law.[3]

This US experience has significantly shaped the competition law of the European Union. The inclusion of a Treaty chapter on competition law was, however, originally p. 719 rooted not only in competition concerns as such. It was, in fact, primarily based on the 'general agreement that the elimination of tariff barriers would not achieve its objectives if private agreements of economically powerful firms were permitted to be used to manipulate the flow of trade'.[4] The chief function of EU competition law was indeed originally the prohibition of private party actions that would:

> tend to restore the national divisions in trade between Member States [and] might be such as to frustrate the most fundamental objectives of the [Union]. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.[5]

EU competition law was thus—at first—conceived as a complementary part to the internal market.[6] This also explains the position of the competition chapter within the EU Treaties. It can be found in Title VII of the TFEU that deals principally with internal market matters. The chapter is divided into two sections—one dealing with classic competition law, that is: '[r]ules applying to undertakings'; the other deals with public interferences in the market through '[a]ids granted by States'. Table 17.1 provides an overview of the

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

two sections. Both contain one or two (directly effective) prohibitions, as well as a Union competence for the adoption of p. 720 ↵ Union secondary law. The legislative competence(s) have been used to some extent, yet EU competition law is predominantly governed by executive instruments and the case law of the Court.

Table 17.1 Competition chapter: overview

Section 1: Rules Applying to Undertakings	Section 2: Aids Granted by States
Article 101: Anticompetitive Agreements	Article 107: State Aid Prohibition
Article 102: Abuse of a Dominant Position	Article 108: Commission Powers
Article 103: Competition Legislation I	Article 109: Competition Legislation II
Article 104: 'Transitional' Provisions	
Article 105: Commission Powers	
Article 106: Public Undertakings (and Public Services)	

This chapter concentrates on the EU competition law on private undertakings. The relevant Treaty section is here built upon three pillars. The first pillar deals with anticompetitive cartels and can be found in Article 101. The second pillar concerns situations where a dominant undertaking abuses its market power and is found in Article 102. The third pillar is unfortunately invisible, for when the Treaties were concluded, they did not mention the control of mergers. This constitutional gap has never been closed by later Treaty amendments; yet it has received a legislative filling in the form of the EU Merger Regulation.

Let us discuss, step by step, these three pillars of 'private' competition law. Sections 1 and 2 look into Article 101, Section 3 explores Article 102, and Section 4 introduces the EUMR.

1. Cartels I: Jurisdictional Aspects

The first pillar of European competition law is Article 101. It outlaws anticompetitive collusions between undertakings; that is, 'cartels'. Historically, this form of illegal behaviour has been the most dangerous anticompetitive practice.

The prohibition on collusions between undertakings to restrict competition in the internal market is set out in Article 101. It states:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market …
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>   - any agreement or category of agreements between undertakings,
>   - any decision or category of decisions by associations of undertakings,
>   - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
>   impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
>   afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

p. 721 ↵ Article 101 follows a tripartite structure. Paragraph 1 prohibits collusions between undertakings that are anticompetitive by object or effect if they affect trade between Member States. Paragraph 3 exonerates certain collusions that are justified by their overall pro-competitive effects for the Union economy. In between this dual structure of prohibition and justification—oddly—lies paragraph 2. It determines that illegal collusive practices are automatically void and thus cannot be enforced in court.[7]

This section analyses paragraph 1 of Article 101. We start by considering the kinds of undertakings and the types of collusive behaviour caught by Article 101(1), and we also look at the requirement of an 'effect on trade between Member States'. All three criteria are 'jurisdictional' criteria,[8] as they do not define an illegal behaviour as such, but merely trigger the applicability of Article 101. The two 'substantive' criteria within Article 101 are found in the requirement of an *anti*competitive collusion in Article 101(1), and its potential *pro*-competitive justifications in Article 101(3). These two substantive criteria will be discussed in Section 2.

a. The Concept of 'Undertaking'

The English word 'undertaking' has traditionally not meant what the European Treaties want it to mean.[9] The word is a translation from the German and French equivalents, and was deliberately chosen to avoid pre-existing meanings in British company law.[10] According to the famous definition in *Höfner and Elser*, the concept of undertaking means this:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> [T]he concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed[.][11]

This definition ties the notion of undertaking to an *activity*; and this *functional* definition broadens the personal scope of the EU competition rules to include entities that may not—formally—be regarded as companies. It indeed catches natural persons,[12] and includes 'professionals'—like barristers.[13] Even the 'State', and its p. 722 ↵ public bodies, may sometimes be regarded as an undertaking, where they engage in an economic activity.[14] The advantage of this broad functional definition is its flexibility; its disadvantage is its uncertainty. For depending on the context, an entity may or may not be an 'undertaking' within the meaning of EU competition law![15]

What, then, are economic activities? The Court has consistently found that 'any activity consisting in offering goods or services on a given market is an economic activity'.[16] This comprehensive definition will nevertheless find a limit when public functions are exercised. In *Poucet & Pistre*,[17] the Court thus refused to consider organizations managing a public social security system as 'undertakings' because their activities were 'based on the principle of national solidarity' and 'entirely non-profit-making'.[18] A private body will thus not count as an undertaking where it is engaged in 'a task in the public interest which forms part of the essential functions of the State'.[19] What counts as an essential public function is not, however, always easy to tell. The Court has refused to be bound by a 'historical' or 'traditional' understanding of public services. In *Höfner & Elser*, it consequently found that '[t]he fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities', since '[e]mployment procurement has not always been, and is not necessarily, carried out by public entities'.[20]

In conclusion, then, the Court has so far not found a convincing definition of what counts as an economic activity; and this is particularly true for the question when a public authority is engaged in an economic activity.

b. The 'Single Economic Unit' Doctrine

Article 101 covers collusions *between* undertakings. It requires the combined (and evil) effort of a number of undertakings. The prohibited action under Article 101 p. 723 ↵ must be *bilateral* or *multilateral*—and not 'within' a single undertaking. The Court has consequently held that Article 101 does not apply to the 'internal' relationships within an undertaking. This is called the 'single economic unit' doctrine.

This 'single economic unit' doctrine is not confined to relationships within one legal entity.[21] It can cover relationships between—legally—independent undertakings if they form part of a corporate group. A 'group' or 'concern' is a collection of 'parent' and 'subsidiary' companies that operate as a single economic unit (see Figure 17.1). The contours of the single-economic-unit doctrine were determined in *Centrafarm and de Peijper*.[22] The Court here held:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> [Article 101] is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, *if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market*, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.[23]

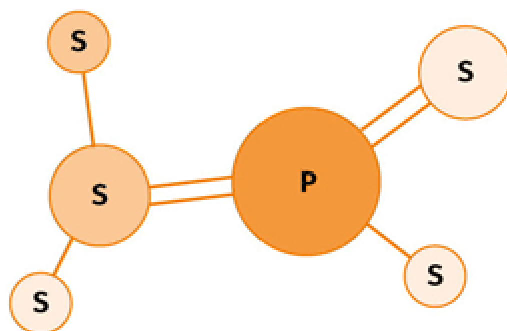

Figure 17.1 Economic group with parent (P) and subsidiaries (S)

The case clarified that Article 101 could not apply to relationships within groups of undertakings, and underlined that the key for the provisions' non-application was the *economic* dependence of two (or more)—legally independent—undertakings. Economic dependence here exists when 'the *subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them*'.[24]

The key element within the single-economic-unit doctrine is consequently the question of 'control'. Where a 'parent' company does control its subsidiary 'child', economic dependence exists, and their behaviour falls *outside* the scope of Article 101. Control is a matter of fact to be decided in each individual case; p. 724 ↵ and the Court will here particularly look to 'the economic, organisational and legal links' between two companies.[25]

c. Forms of Collusion: Agreements and Beyond

What types of collusions are covered by Article 101? The provision refers to three types of collusions: 'agreements between undertakings, decisions by associations of undertakings and concerted practices'. Agreements are the most straightforward category. The Union concept of 'agreement' has thereby an extremely wide scope.[26] The Union is here not interested in whether the agreement formally constitutes a 'contract' under national law. What counts is 'a concurrence of wills' between economic operators.[27] But Article 101 also catches 'concerted practices'. This third category of collusion is the most mysterious one. It is designed to capture practices falling short of an agreement. In between the first and the third category lie 'decisions of associations of undertakings'. This second category of collusion catches institutionalized cartels.[28]

Let us explore the notions of 'agreement' and 'concerted practice' in more detail.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

aa. Agreements I: Horizontal and Vertical Agreements

One of the big concerns within the early Union legal order was the question whether Article 101 only covered 'horizontal' agreements. Horizontal agreements are agreements between undertakings that are competing against each other; that is, companies placed at the same commercial level. Vertical agreements, by contrast, are agreements between undertakings at different levels of the commercial chain; that is, agreements between companies not competing against each other (see Figure 17.2).

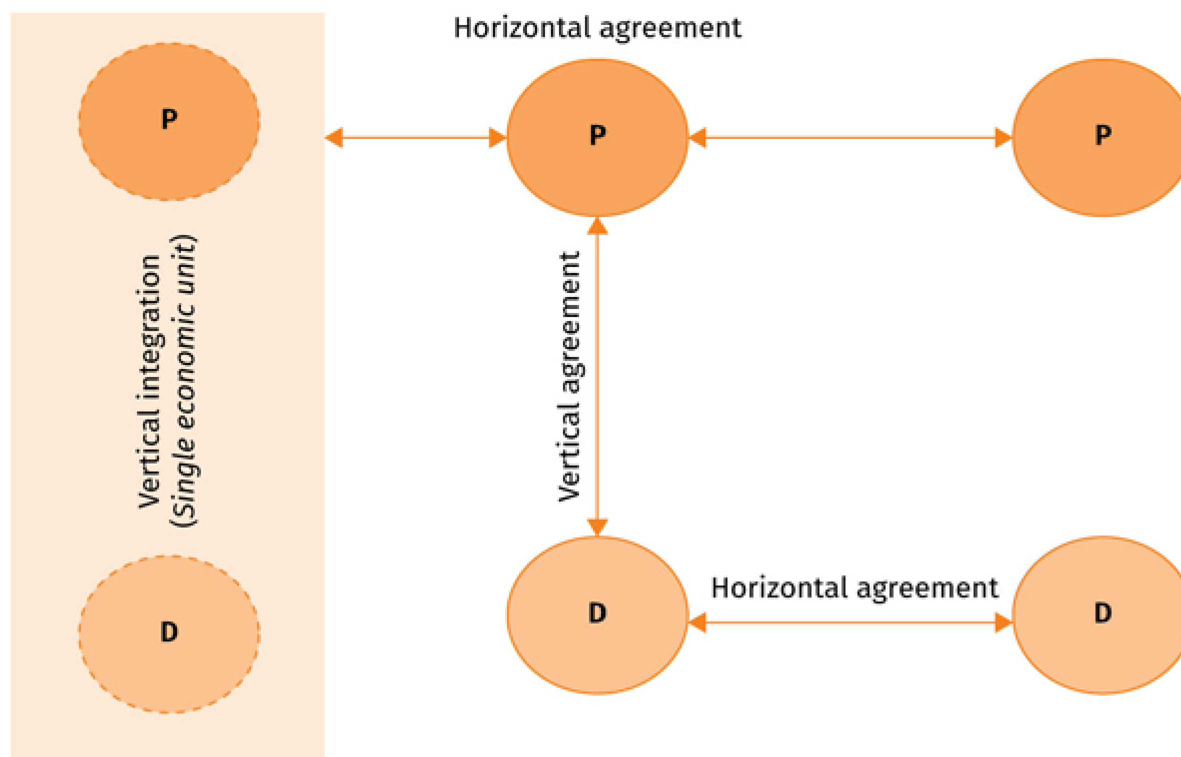

Figure 17.2 Horizontal and vertical agreements

Since Article 101 prohibits anticompetitive agreements, would it not follow that only 'horizontal' agreements between *competitors* are covered? This logic is not without its problems. For while vertical agreements between a producer (P) and a distributor (D) may increase economic efficiency through a division of labour, they can also significantly harm the consumer through a restriction of competition at the distribution level.

p. 725 ↵ Would such vertical agreements fall within the jurisdictional scope of Article 101? The European Court has—famously and positively—answered this question in *Consten and Grundig v Commission*.[29] The German producer Grundig had concluded a distribution agreement for the French market with Consten. The Commission claimed that the agreement breached European competition law. The applicants counterclaimed that the Union lacked jurisdiction under Article 101 as 'distributorship contracts do not constitute "agreements between undertakings" within the meaning of that provision, since the parties are not on a footing of equality'.[30] The Court disagreed:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> Article [101] refers in a general way to all agreements which distort competition within the common market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the Treaty does not make any distinction.
>
> Furthermore, the possible application of Article [101] to a sole distributorship contract cannot be excluded merely because the grantor and the concessionaire are not competitors *inter se* and not on a footing of equality. Competition may be distorted within the meaning of Article [101(1)] not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy. This applies all the more, since, by such an agreement, the p. 726 parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the consumer or user, contrary to the general aims of Article [101].[31]

The arguments in favour of including vertical agreements here were textual and teleological. Within its text, Article 101 indeed did not make a distinction between horizontal and vertical agreements, and it thus seemed to cover both types. Teleologically, moreover, Article 101 was said to also protect third parties—such as competitors—and since vertical agreements could create unjustified disadvantages for these third parties, they would have to be within the jurisdiction of European competition law.[32]

bb. Agreements II: 'Tacit Acquiescence' versus 'Unilateral Conduct'

Every agreement—whether horizontal or vertical—must be concluded by consent between the parties. It must be formed by a concurrence of *two* wills. The idea of an 'agreement' will thus find a limit where one party *unilaterally* imposes its will on the other. Yet there is sometimes a fine line between tacit *acceptance* and unilateral *imposition*; and the European Courts have struggled to draw this line for the Union legal order.[33]

The reason for this struggle lies in what the Courts call 'apparently unilateral' behaviour in continuous contractual relations between two parties. A good illustration of such 'apparently unilateral behaviour' can be found in *Ford v Commission*.[34] The US car manufacturer had established a selective distribution system in Europe, especially in Britain and Germany, through a 'main dealer agreement'. That agreement originally allowed German distributors to order right-hand as well as left-hand drive cars. However, as the prices for Ford cars on the British market had increased significantly, British customers began buying cars from German dealers; and afraid that its British distributor would suffer the consequences, Ford notified its German dealers that it would no longer accept their orders for right-hand drive cars. These would now be exclusively reserved for the British market.

Was the decision to discontinue supplies to the German dealers an agreement? Ford claimed that the discontinuance decision was of a *unilateral* nature; and since p. 727 'a unilateral act cannot be included among agreements', it would fall outside the scope of Article 101.[35] The Court held otherwise:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> Such a decision on the part of the manufacturer does not constitute, on the part of the undertaking, a unilateral act which, as the applicants claim, would be exempt from the prohibition contained in Article [101(1)] of the Treaty. On the contrary, *it forms part of the contractual relations between the undertaking and its dealers*.[36]

This extremely broad interpretation of 'consent' has nevertheless encountered some limits. In *Bayer v Commission*,[37] a German pharmaceutical company used its distribution system to market Adalat—a medical product designed to treat cardiovascular diseases. The price of the product differed significantly as it was indirectly fixed by the respective national health authorities. The prices fixed by the Spanish and French health services were on average 40 per cent lower than prices in the United Kingdom; and following commercial logic, Spanish and French wholesalers began exporting to the British market. With its British dealer registering an enormous loss of turnover, Bayer decided to stop delivering large orders to Spanish and French wholesalers. Instead, it provided them with the quantities that it thought would saturate their national markets.

Was this indirect export restriction based on a consensual agreement? The General Court rejected this view. While accepting that 'apparently unilateral conduct' can qualify as an agreement, the latter required—as a conceptual minimum—the '*existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer*'.[38] And, in the present case, tacit acquiescence was missing.[39] For the mere continuation of the business relationship could not as such be tacit acquiescence. The judgment was confirmed on appeal,[40] where the European Court concisely clarified the situation as follows:

> The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision.[41]

p. 728 ↵ Put the other way around, for an 'apparently unilateral' measure to become part of a continuous contractual relationship, the other party must—at the very least—tacitly acquiesce. And this tacit acquiescence must be shown through actual compliance.

cc. Concerted Practices and Parallel Conduct

An agreement between the parties is the primary form of collusion between undertakings. A second—less concrete—form mentioned in Article 101(1) is 'concerted practices'.[42] The concept was designed as a safety net to catch all forms of collusive behaviour falling short of an agreement. The European Court indeed identifies the aim behind the concept as follows:

> [T]he object is to bring within the prohibition of that Article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risk of competition.[43]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

The heart of a concerted practice is thus the practical 'coordination' between undertakings. Unlike agreements, this coordination is not consensually 'agreed':

> By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.[44]

The concept of a concerted practice is thus wider and vaguer than that of an agreement; yet the two concepts are not mutually exclusive.[45]

Tacit collusion or coordination will often be the result of a transparent market structure. Mainly due to the existence of very few undertakings in the market, the strategic behaviour of each market player is here 'known' to the others. And knowing that a price increase by a single undertaking would shift its market share to its competitors, all undertakings may here 'tacitly' decide to raise prices in parallel.

p. 729 ↵ While the Court has held that such 'parallel behaviour may not itself be identified with a concerted practice, *it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market*'.[46] The Court has therefore found:

> Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.[47]

The Court, however, keeps insisting that not all 'parallel behaviour' between undertakings will be identified with a concerted practice. Parallel behaviour that directly follows from market forces would be beyond reproach. Article 101 would 'not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors'.[48] Behaviour in line with a competitor's interests will not therefore, as such, constitute sufficient proof of a concerted practice. Absent any 'direct or indirect contact',[49] undertakings are allowed to align their commercial behaviour to the 'logic' of the market.[50]

d. (Potential) Effect on Trade Between Member States

Not all agreements will fall within the jurisdictional scope of Article 101.[51] Article 101 only catches agreements that may 'affect trade between Member States'.

What is the point behind this jurisdictional limitation? The answer lies—partly—in the principle of conferral.[52] The *European* Union should only concern itself with agreements that have a *European* dimension. This European dimension shows itself p. 730 ↵ through a (potential) effect on trade *between* Member States. In the words of the European Court:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> The concept of an agreement 'which may affect trade between Member States' is intended to define, in the law governing cartels, the boundary between the areas respectively covered by [European] law and national law. It is only to the extent to which the agreement may affect trade between Member States that the deterioration in competition caused by the agreement falls under the prohibition of [European] law contained in Article [101]; otherwise it escapes that prohibition.[53]

Agreements must thus have an *interstate* dimension—otherwise they will be outside the sphere of EU competition law. But what is this 'European' sphere of competition law? The jurisdictional scope of Article 101 has been—very—expansively interpreted. What is important here is whether:

> the agreement is capable of constituting a *threat, either direct or indirect, actual or potential, to freedom of trade between Member States* in a manner which might harm the attainment of the objectives of a single market between States.[54]

This formula originates in *Société Technique Minière*, where the Court held that Article 101 requires proof 'that the agreement in question may have an influence, direct or indirect, actual or potential, on the *pattern of trade between Member States*'.[55] This 'pattern-of-trade' test is extremely broad as it captures both *quantitative* as well as *qualitative* changes to trade.

The fact that an agreement relates to a single Member State will thereby not necessarily mean that Article 101 is not applicable.[56] Nonetheless, not all effects on interstate trade will trigger Article 101. For the effects 'must not be insignificant';[57] and the Commission indeed only polices agreements that *appreciably* affect intra-Union trade.[58] According to its 'non-appreciably-affecting-trade' (NAAT) rule,[59] p. 731 ↵ agreements will generally not fall within the jurisdictional scope of Article 101 if two cumulative conditions are met. First, '[t]he aggregate market share of the parties on any relevant market within the [Union] affected by the agreement does not exceed 5%'; and, second, 'the aggregate annual [Union] turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro'.[60] However, the Commission has recalled that '[t]he assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned'.[61] And it equally agrees that all agreements will need to 'be considered in the economic and legal context in which they occur', and that it will thus 'be necessary to have regard to any *cumulative* effects of parallel networks of similar agreements'.[62]

2. Cartels II: Substantive Aspects

a. Restrictions of Competition: Anticompetitive Object or Effect

In order for an agreement to violate Article 101(1), it must be anticompetitive; that is, it must be a 'prevention, restriction or distortion of competition'.[63]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

The meaning of ‘restriction of competition’ in this context has been very controversial. If it simply referred to a restriction of the *individual* freedom to trade, then all binding agreements would be anticompetitive, for ‘[t]o bind, to restrain, is of their very essence’.[64] This individualist definition of restriction has, however, never been dominant in the Union legal order. A second view has therefore argued that Article 101 protects the *structural* freedom offered by the market to—actual or potential—competitors. This view emphasizes the exclusionary effects p. 732 of restrictions of competition and corresponds to the ‘Harvard School’.[65] A third view, finally, corresponds to the ‘Chicago School’. It argues that Article 101 should exclusively outlaw ‘exploitative effects’ in the form of allocative inefficiencies to consumer welfare.[66] The case law of the European Courts has been closest to the second view—even if the European Commission had at one time tried hard to move towards the third view.[67]

This section analyses four aspects of what constitutes a restriction of competition. Let us start by looking at the various dimensions of competition first, before examining the two modes of violating Article 101(1)—that is, restrictions by ‘object or effect’.

aa. Two Dimensions: Inter-Brand and Intra-Brand Competition

A restriction of competition is primarily a restriction between competitors. Early on, however, the European Court confirmed that competition could be restricted by horizontal as well as vertical agreements.[68] But was this solely an admission that vertical agreements could restrict competition between producers of different brands (inter-brand competition)? Or did the inclusion of vertical agreements into the scope of Article 101(1) signal that competition between distributors of the same brand (intra-brand competition) was independently protected?

The European Court has preferred the second reading. The Union legal order consequently recognizes two independent dimensions of competition: inter-brand and intra-brand competition. In *Consten and Grundig*,[69] the Court thus rejected the plaintiffs’ argument that there could be no restriction of competition through vertical agreements:

> The principle of freedom of competition concerns the various stages and manifestations of competition. Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition p. 733 should escape the prohibition of Article [101(1)] merely because it might increase the former.[70]

Would every restriction of competition through vertical agreements violate Article 101(1)? In another decision, the Court recognized that a pro-competitive effect in inter-brand competition might come at the price of a restriction of intra-brand competition. This holistic approach can be seen in *Société Technique Minière*,[71] where the Court found a distribution agreement *not* to violate Article 101 on the following ground:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking. Therefore, in order to decide whether an agreement containing a clause 'granting an exclusive right of sale' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, [and] *the position and importance of the grantor and the concessionaire on the market for the products concerned …*[72]

Whether there exists a restriction of competition will thus have to be evaluated alongside both 'brand' dimensions.

bb. Restrictions by Object: European 'per se Rules'

An agreement may fall within Article 101(1) if it is anticompetitive by 'object or effect'. These are alternative conditions.[73] The fulfilment of one will fulfil Article 101(1).

The possibility of violating EU competition law 'by object' does not mean that purely imaginary restrictions 'intended' in the future are covered. The reference to the object of an agreement must not be misunderstood as referring to the subjective intentions of the parties. On the contrary, it refers to the *objective content* of the agreement. It is designed to identify certain 'hardcore restrictions' within an agreement. These hardcore restrictions can simply be presumed to be 'sufficiently p. 734 ↵ deleterious' to competition.[74] In this sense, restrictions by object operate as 'per se rules'; that is, rules whose existence 'as such' constitutes a breach of EU competition law. The advantage of such 'per se rules' is judicial economy. Instead of a substantive analysis of the anticompetitive effects of an agreement, the Court saves time by concentrating on the 'form' of certain contractual clauses.

What are the hardcore restrictions that the Union legal order considers restrictions by object? Various contractual clauses have been given this status—in both horizontal and vertical agreements. With regard to horizontal agreements, they include price-fixing clauses,[75] output-limiting clauses,[76] and market-sharing clauses.[77] With regard to vertical agreements, restrictions by object will be presumed to exist when the agreement contains a clause that imposed a fixed (minimum) resale price,[78] or grants absolute territorial protection to a distributor.[79]

The last restriction by object has been the most contentious one. And the classic case here is—once more—*Consten and Grundig*.[80] Grundig had appointed Consten its exclusive distributor in France. Consten had thereby promised to market and service the German products in France—a potentially costly commitment. In exchange, Grundig agreed not to deliver its goods to other traders on the French market, and it also agreed to contractually prohibit its German wholesalers from exporting goods into France. This level of territorial protection was *relative*, since it solely applied to Grundig's own distribution system. Yet in order to prevent 'parallel traders'—that is, third parties trading in parallel to the official distribution channels—from selling their products in France, Grundig had granted an intellectual property right to Consten. This intellectual property right established *absolute* territorial protection for Consten. For not a single trader within France could legally sell Grundig products without the official distributor's consent. In the eyes of

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

p. 735 the European Court, such an agreement establishing absolute territorial protection ↵ betrayed a clear wish of the parties 'to eliminate any possibility of competition at the wholesale level',[81] and thus constituted an agreement that had as its *object* the restriction of competition.[82] It was per se prohibited.

cc. Restrictions by Effect: A European 'Rule of Reason'?

Where agreements do not contain clauses that are 'per se' restrictions, Article 101(1) requires proof of the agreement's anticompetitive *effect*.[83]

The central question here is: will the prohibition be triggered as soon as an agreement contains clauses that have *some* anticompetitive effects; or, will it only apply to agreements that are *overall* anticompetitive? Put differently, should Article 101(1) catch agreements that limit—in absolute terms—production, yet which nevertheless enhance—in relative terms—competition, say, through the development of a new product? The wording of Article 101(1) suggests an absolute test. The view has, however, been voiced that an absolute test is overinclusive and should be replaced by a relative test that weighs the anticompetitive effects of an agreement against its pro-competitive effects.

This debate on whether Article 101(1) follows an absolute or a relative test has been associated with the US doctrine of a 'rule of reason'. According to the latter, the general prohibition of anticompetitive agreements will not apply to reasonable restrictions of trade. Should such an implied limitation also apply to Article 101(1)—even though the article already recognizes an express justification in Article 101(3)? The existence of such a rule of reason has been hotly debated in European law circles.[84] And the debate is not just theoretical; for the constitutional choice concerning whether there exists a rule of reason in Article 101(1) may have significant practical consequences.[85]

What have the European Courts said? They have given ambivalent signals. For while the Courts—in theory —deny the existence of a rule of reason under p. 736 ↵ Article 101(1),[86] there are some jurisprudential lines that come very close to a practical application of the doctrine. For example, did the European Court not insist that a restriction of competition was not anticompetitive if '*necessary* for the penetration of a new area by an undertaking'?[87] Was this balancing of anticompetitive effects against pro-competitive effects not a rule of reason in disguise? The European Courts have denied this by reference to alternative doctrines to explain their reasoning.

The most famous doctrine in this respect is the doctrine of ancillary restraints. Three cases may explain this doctrine in more detail. In *Remia and Nutricia*,[88] the Court had to deal with the legality of a 'non-compete clause'. These clauses prevent the seller of a business from competing with the buyer within a period of time after the sale. This is undoubtedly a restriction of competition on the part of the seller; yet very few undertakings would be willing to purchase a business without a guarantee that its previous owner will temporarily stay out of the market. Finding that transfer agreements generally 'contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market', the Court recognized that without the non-compete clause, 'the agreement for the transfer of the undertaking could not be given effect'.[89] Such ancillary restrictions within an overall pro-competitive agreement would fall outside the scope of Article 101(1).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

This ancillary restraints doctrine received its most elaborate form in *Métropole Télévision*.[90] The General Court here held:

> In [EU] competition law the concept of an 'ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation … The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it. As regards the objective necessity of a restriction, it must be observed that inasmuch as … the existence of a rule of reason in [European] competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro- and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article [101(3)] of the [TFEU].[91]

p. 737 ↵ The (European) doctrine of ancillary restraints here differs from the (US) rule of reason in that it will not involve a concrete balancing of the pro-competitive and anticompetitive effects of the agreement. The operation of the doctrine is, according to the Court, 'relatively abstract'.[92] It only tolerates contractual clauses restricting competition without which 'the main agreement is *difficult or even impossible to implement*'.[93] Thus, only *objectively necessary restrictions* of competition within an overall pro-competitive agreement will be accepted. These objectively necessary restrictions must moreover be 'ancillary'; that is, 'subordinate' to the main object of the agreement.

dd. Non-Appreciable Restrictions: The de minimis Rule

According to the legal principle *de minimis non curat lex*, the law should not concern itself with trifles. Translated into the present context, the European Court has declared that it will not use Article 101 to establish 'perfect competition'.[94] Minor market imperfections will be tolerated. Restrictions of competition will thus only fall within Article 101(1) where they do so 'to an appreciable extent'.[95] This is called the *de minimis* rule.

According to the Court, *de minimis* is measured not in quantitative or qualitative trade terms, but depends on the relevant market share. This view is supported by the Commission, which has offered guidance in its 'De Minimis Notice'.[96] With the exception of hardcore restrictions,[97] the Commission here considers that a 10 per cent aggregate market share for the parties to horizontal agreements or a 15 per cent aggregate market share for parties to vertical agreements will not appreciably restrict competition within the meaning of Article 101(1).[98] Importantly, the Commission and the Courts thereby always investigate an *individual* agreement's economic context. And where it finds that the agreement forms part of a network of agreements, these cumulative effects p. 738 ↵ will be taken into account and the market share threshold is reduced to 5 per cent both for agreements between competitors and for agreements between non-competitors.[99]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

b. Article 101(3): Exemptions Through Pro-Competitive Effects

Where an agreement has been found to be anticompetitive under Article 101(1), it will be void under Article 101(2)—unless it is justified under Article 101(3).

Article 101(3) is designed to exempt anticompetitive agreements that have—overall—pro-competitive effects. Within the Union legal order, it is meant to be the sole place where pro- and anticompetitive effects are balanced. In its Guidelines on the application of Article 101(3),[100] the Commission has summarized the function of the provision as follows:

> Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the [EU] competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This analytical framework is reflected in Article [101(1)] and Article [101(3)]. *The latter provision expressly acknowledges that restrictive agreements may generate objective economic benefi ts so as to outweigh the negative effects of the restriction of competition*.[101]

According to the Commission, Article 101(3) consequently constitutes the exclusive medium for weighing the anticompetitive against the pro-competitive effects of an agreement. This view has been confirmed in *Métropole*:

> It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed. Article [101(3)] of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article [101(1)] of the Treaty.[102]

p. 739 ↵ Importantly, Article 101(3) potentially applies to *all* agreements that violate Article 101(1)—and it thus covers even restrictions per object.[103] It has direct effect and can therefore be invoked as a direct exemption by any undertaking.

aa. Direct Exemptions under Article 101(3)

Article 101(3) makes an individual exemption conditional on four cumulative criteria. The first two criteria are positive, the other two negative in nature.[104]

Positively, Article 101(3) stipulates that the agreement must 'contribute … to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.[105] Where the agreement thus generates *productive* or *dynamic* efficiencies,[106] these efficiency gains might outweigh the economic inefficiencies identified in Article 101(1).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

Second, these pro-competitive gains may only outweigh any anticompetitive effects where consumers get a fair share in the resulting overall benefit. What is a 'fair share'? According to the Commission, '[t]he concept of "*fair share*" implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article [101(1)]'. 'If such consumers are worse off following the agreement, the second condition of Article [101(3)] is not fulfilled.'[107]

Third, Article 101(3) will not allow anticompetitive restrictions that are 'not indispensable' for the pro-competitive effects of the agreement. Nor will it, fourth, allow agreements which 'eliminat[e] competition in respect of a substantial part of p. 740 ↵ the products in question'.[108] A violation of either one of these two negative conditions will mean that an agreement cannot benefit from an exemption.

With regard to the indispensability of a restriction, the Commission has developed a twofold test:

> First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.[109]

The first test thereby requires 'that the efficiencies be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies'.[110] Once this global test has been passed, the Commission will then analyse the indispensability of each individual restriction of competition. Here, it will assess 'whether individual restrictions are reasonably necessary in order to produce the efficiencies'.[111]

Finally, a specific restriction—even if indispensable for the pro-competitive effects of the agreement—must not substantially eliminate competition. This absolute limit on the exemptability of an agreement will be a function of the structure of the market.[112]

bb. Exemptions by Category: Block Exemption Regulations

In order to enhance legal certainty, Article 101(3) envisages that an entire 'category of agreements' can be exempted. Article 103 thereby allows the Council to 'lay down detailed rules for the application of Article 101(3)'.[113] This legal base was used early on, and in a way that delegated the power to exempt agreements 'en bloc' to the Commission.[114] The Commission has indeed adopted a variety of so-called 'block exemption regulations'. A selection of these can be found in Table 17.2.

Table 17.2 Block exemption regulations (selection)

(Commission) Block exemptions	
Regulation 330/2010	Categories of Vertical (Distribution) Agreements
Regulation 461/2010	Categories of Vertical Agreements in the Motor Vehicle Sector
Regulation 1217/2010	Categories of Research and Development Agreements

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

(Commission) Block exemptions	
Regulation 1218/2010	Categories of Specialisation Agreements
Regulation 316/2014	Categories of Technology Transfer Agreements

p. 741 ↵ Many block exemption regulations here originally followed a vertical ‘category’ approach. They would contain a ‘white list’ of desirable clauses and a ‘blacklist’ of hardcore restrictions for each type of agreement. This formal approach towards block exemptions has today been overtaken by a more flexible and economic approach. Absent any hardcore restrictions, modern block exemptions will thus generally make the exemption dependent on a market-share threshold. Importantly, even in the presence of a block exemption, the Commission always retains the power to withdraw the benefit of a block exemption from an individual agreement.[115]

A summary flowchart of the detailed elements of Article 101 can be found in Figure 17.3.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

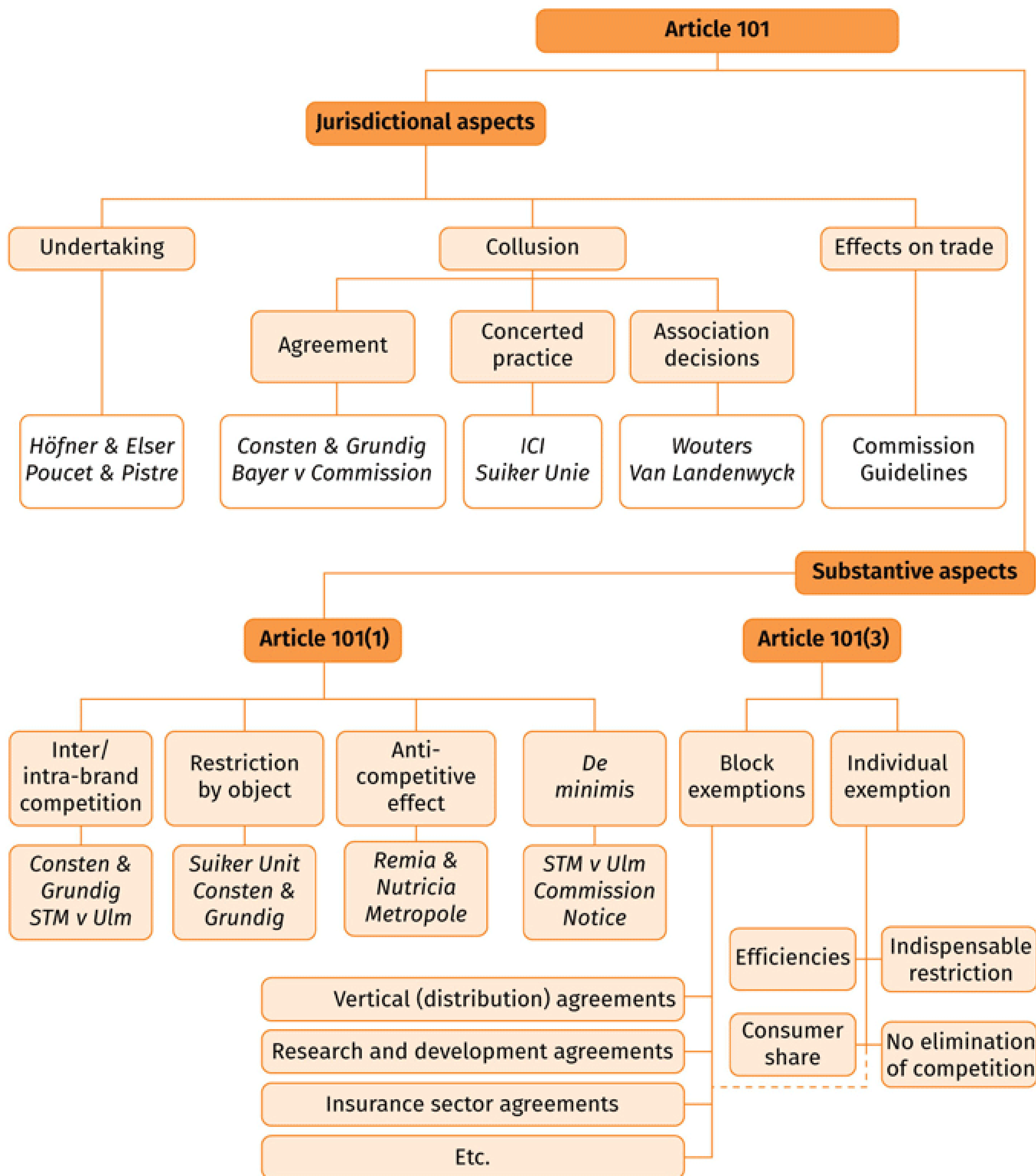

Figure 17.3 Elements of Article 101: summary flowchart

c. In Particular: (Horizontal) Cooperation Agreements

Agreements between competitors that fix prices or limit production are the most dangerous collusions under Article 101.[116] There are nonetheless situations where horizontal 'cooperation'—a much nicer word than 'collusion'—is seen as potentially pro-competitive:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.[117]

p. 742 ↵ These 'joint ventures' are subject to Article 101,[118] unless the joint venture constitutes a new economic entity. In the latter case, the Merger Regulation (and not Art. 101) may apply (see Figure 17.4).[119]

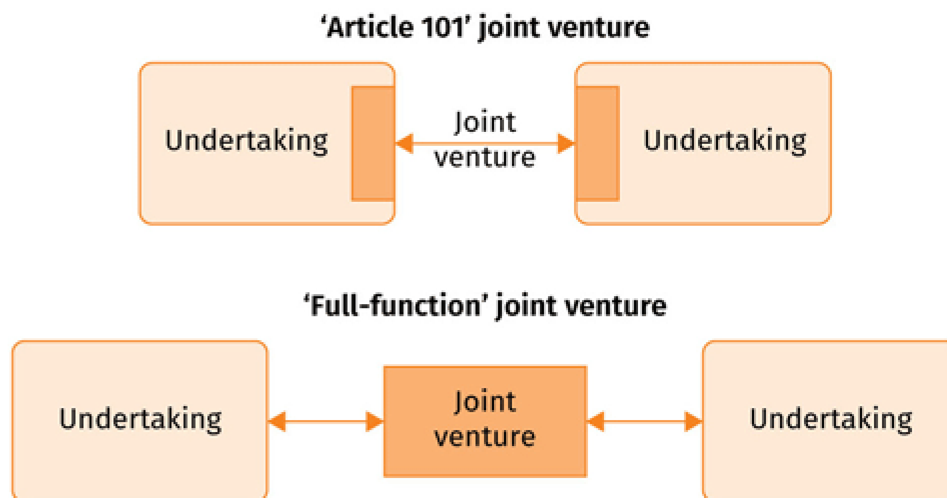

Figure 17.4 Forms of joint ventures

The best-known category of cooperation agreements is 'research and development' (R&D) agreements; that is, agreements through which various p. 743 ↵ undertakings join forces to share, say, the investment costs for the development of a new medical vaccine. Such agreements may restrict competition; and, where they do, they can still be justified under Article 101(3) when they 'contribute … to improving the production or distribution of goods or to promoting technical or economic progress'. With regard to R&D agreements, the Commission has adopted a specific block exemption where the market share between competing undertakings does not exceed 25 per cent of the relevant product and technology market.[120]

d. In Particular: (Vertical) Distribution Agreements

The success story of modern economies is a story of specialization and the division of labour.[121] Specialization might take place within one undertaking or between various undertakings. An undertaking that has specialized in the *production* of a particular product may prefer not to *distribute* its products itself. It might, rather, hire an independent undertaking that is specialized in the—wholesale or retail—distribution business.[122]

Such agreements concluded between producers and distributors are called 'distribution agreements'. They are 'vertical' agreements concluded between non-competitors and, as such, less dangerous to competition than horizontal agreements. This final section will briefly look at the two principal types of distribution agreements: exclusive and selective distribution agreements.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

p. 744

aa. Exclusive and Selective Distribution Agreements

Exclusive distribution agreements are agreements that guarantee a distributor the exclusive right to distribute a producer's goods within a certain territory. Depending on whether or not that territorial exclusivity is granted only vis-à-vis other distributors, Union law distinguishes between relative and absolute territorial protection. Absolute territorial protection is traditionally regarded as a per se hardcore restriction.[123] For the exclusion of parallel trade—that is, trade that is conducted outside the official distribution channels—entails the danger that barriers to trade are reconstructed along national lines. By contrast, exclusive distribution agreements with relative territorial protection will not automatically infringe Article 101(1);[124] yet they may still be found to restrict competition—for example, where they contain a direct or indirect export ban imposed on the distributor.[125]

Selective distribution agreements do not grant a distributor territorial exclusivity but limit the distribution channels to 'selected' official distributors. Third parties who are not part of the official distribution system can thus be prevented from selling goods. The commercial reason for establishing a selective distribution system may lie in the need for complex after-sales services or may stem from the wish to maintain a particular luxury image.

The Court has, in general, been very understanding when it comes to assessing selective distribution agreements. In *Metro v Saba*,[126] it thus held that the producer of high-quality and technically complex goods can indeed prevent a low-cost 'cash and carry' wholesaler from distributing its goods. The Court nevertheless clarified that certain selective distribution systems would violate Article 101(1):

> [R]esellers [must be] chosen on the basis of *objective criteria of a qualitative nature* relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such *conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion*.[127]

Selective distribution agreements consequently do not violate the EU competition rules where the dealers are selected on the basis of objective and qualitative criteria. This principle has become known as the 'Metro doctrine'.[128]

p. 745

bb. The 'Vertical' Block Exemption Regulation

The (latest) block exemption regulation for vertical agreements was adopted in 2010.[129] It exempts all vertical agreements, provided that neither the producer nor the distributor enjoys a market share above 30 per cent.[130] The Regulation is based on the liberal principle that all is allowed that is not prohibited. Prohibited contractual clauses are enumerated in two 'blacklists' that distinguish between 'hardcore restrictions' and 'excluded restrictions'. Hardcore restrictions are restrictions that prevent the *entire* agreement from being exempted. They are found in Article 4 of the Regulation and cover, inter alia, any 'restriction of the territory into which, or of the customers to whom, the [distributor] may sell the contract goods or services'. However, not all exclusive or selective distribution agreements that fall within the scope of Article 101(1) are blacklisted. The Regulation indeed exempts a number of restrictions, namely:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> i. the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
>
> ii. the restriction of sales to end users by a buyer operating at the wholesale level of trade,
>
> iii. the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system,[131] and
>
> iv. the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier ...[132]

p. 746 ↵ 'Excluded restrictions' are restrictions that do not prevent the exemption of the entire agreement but that deny a specific clause from being individually exempted. These specific clauses are listed in Article 5 and concern, in particular, non-compete obligations that are imposed on the distributor.

3. Dominant Undertaking(s): Market Abuse

The second pillar of EU competition law focuses on the—bad—behaviour of a single undertaking. Article 102 thus does not require the collusive behaviour of two or more economic actors. It sanctions the *unilateral* behaviour of a dominant undertaking where this behaviour amounts to 'market abuse'. The provision states:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 here makes a number of fundamental choices with regard to the Union's *economic* constitution. First, by concentrating on a '*dominant* position within the internal market' it goes beyond pure monopolies and is thus wider than its US counterpart.[133] But by insisting on market *abuse*, it is also narrower than the US prohibition. For unlike the latter, Article 102 will not directly outlaw the creation of market dominance as such:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> [A] finding that an undertaking has such a dominant position is not in itself a ground of criticism of the undertaking concerned. It is in no way the purpose of Article [102] to prevent an undertaking from acquiring, on its own merits, the dominant position p. 747 on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[134]

Dominance is thus not itself prohibited—only the *abuse* of a dominant position. And, like Article 101, the prohibition of market abuse will only apply where the abusive behaviour 'may affect trade between Member States'.[135] Yet when this abuse is shown to have Union-wide effects, it appears to be prohibited as such, for Article 102 has—unlike Article 101—no 'third paragraph' exempting abusive behaviour on the grounds of its pro-competitive effects.

A violation of Article 102 thus seems to require the fulfilment of three criteria. First, we must establish what the 'market' is in which the undertaking operates. Second, the undertaking must be 'dominant' within that market. And, third, the undertaking must have 'abused' its dominance.[136] All three aspects will be discussed below in Sections a–c. A final Section d will explore whether the Union legal order has—despite the absence of express exemptions—nonetheless allowed for 'objective justifications' of abusive conduct.

a. The 'Market': Product and Geographic Dimensions

Dominance is a relational concept: it is the power to master *something*; and under Article 102 this 'something' is the 'market'. However, there is simply not just one market in which all undertakings compete. Undertakings compete in different products and in different areas. The market concept is thus a concept with two dimensions: a *product* dimension and a *geographic* dimension. The first dimension concerns the question as to what goods or services compete with each other. Where two products do not compete, they are not in the same market. Accordingly, there is not one market but many 'product' markets. Two competing goods must, however, p. 748 also 'physically' meet in the same area. This aspect of the market concept is called its geographic dimension.

How has the Union legal order defined both dimensions? In relation to the product market, it concentrates on the 'interchangeability' of two products. In the words of the European Court in *Hoffmann-La Roche*:

> The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a *sufficient degree of interchangeability between all the products* forming part of the same market in so far as a specific use of such products is concerned.[137]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

The interchangeability or 'substitutability' of a product typically expresses itself in *demand* substitution. Demand substitution analyses whether consumers regard two products as interchangeable 'by reason of the products' characteristics, their prices and their intended use'.[138] The principal test here is that of cross-price elasticity. Cross-price elasticity analyses whether a 'small but significant non-transitory increase in price' (SSNIP) in one product incentivizes consumers to switch to another product.[139] Where this is the case, two goods are—unsurprisingly—in the same product market.

But apart from purely quantitative criteria, the European Court uses additional *qualitative* criteria.[140] And it may even analyse the degree of potential competition by future market entrants. This aspect is called *supply* substitution; that is, the extent to which an undertaking could switch from a non-competing to a competing product.[141]

If two products are (theoretically) found to be competing, they must still be offered in the same geographic market. In the words of the Court:

p. 749

> ↵ The opportunities for competition under Article [102] of the Treaty must be considered having regard to the particular features of the product in question *and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous* ...[142]

Two competing products might not be offered in the same (national) market for legal reasons;[143] and even if two products are competing in a similar legal context, transportation costs might limit the geographic market considerably. The question thus is this: when are competitive conditions 'sufficiently homogeneous' so as to 'be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'?[144] That is a question of fact that the Courts will have to answer.

If they have answered it positively, the geographic market for a product so identified must also represent a 'substantial part' of the internal market. What is a 'substantial part' of the European market? The European Courts have established a presumption that the territory of a Member State constitutes a substantial part of the internal market.[145] However, they have equally found this requirement to be satisfied for part of a Member State,[146] and even a port within a city.[147]

b. Market Dominance

aa. General Considerations

There exists an inverse relationship between the identified 'market' and the potential 'dominance' of an undertaking within that market. The greater the market, the smaller will be the likelihood of dominance; and, alternatively, the smaller the market, the greater will be the chance of dominance. Put colloquially, a big fish in a big pond is different from a big fish in a small pond. And sometimes the pond might be so small that there is only room for one fish.[148]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

p. 750 ↵ What, then, is market dominance? Dominance is wider than monopoly. Whereas monopoly technically refers to a situation in which *one* single undertaking dominates the market, Article 102 is not confined to that situation. But as to when an undertaking is dominant, the provision does not tell. The European Courts have tried to define dominance by distinguishing it from related phenomena (Figure 17.5) such as monopoly. In *Hoffmann-La Roche*,[149] the European Court thus held:

> The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent the effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. *Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly*, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment. *A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies* in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally.[150]

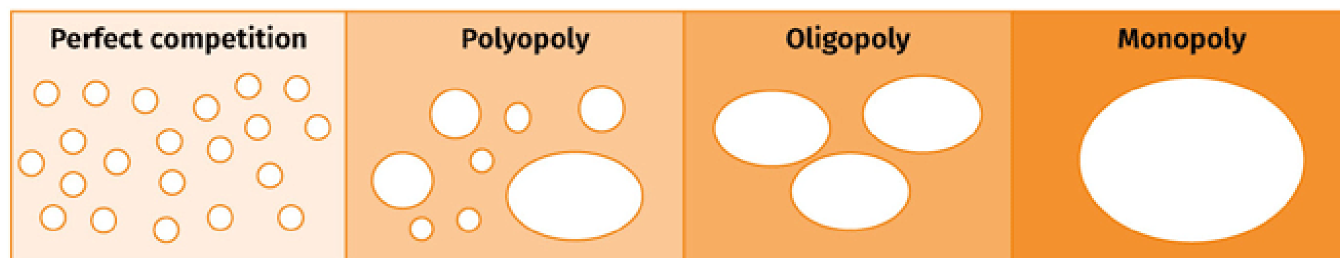

Figure 17.5 Market structures

A dominant position is thus distinct from a monopolistic position as well as from an oligopolistic position. While the former excludes all competition, oligopolies are market structures in which a 'few' undertakings —and not one—dominate the market.[151]

But what characterizes market dominance specifically? The Court admitted that the answer to that question was determined by several factors, yet nonetheless found that 'among these factors a highly important one is the existence of very large market shares'.[152] Thus, the higher the market share, the higher the probability of dominance. The Court has indeed held that a market share above 50 per cent was p. 751 ↵ a clear indication of market dominance.[153] But even below 50 per cent, the Court may find market dominance. However, a finding of dominance here involves a number of determinants, in particular the structure of the relevant market.[154] This second factor compares the market share of the accused undertaking with those of its biggest competitors.[155] And although an undertaking may not have 'absolute' dominance over the market, it might still enjoy a 'relative' dominance over its competitors. The Court has nonetheless found that if an undertaking has a market share below 40 per cent of the relevant market, a finding of dominance is unlikely.[156]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

bb. Collective Dominance

A dominant position appears to be fundamentally different from an oligopoly. The latter involves a situation in which a small number of undertakings are—more or less—equally strong within the market, and it would thus seem that none of them could *individually* dominate the market.

But could Article 102 capture these oligopolistic undertakings *collectively*? The concept of collective dominance is suggested by the very wording of the provision. After all, Article 102 refers to an 'abuse of one *or more undertakings of a dominant position*'.[157] And, teleologically, it would be logical to capture such situations. For a collective *abuse* would have the same consequences as that of a single dominant undertaking.[158]

p. 752 ↵ The European Courts have indeed—albeit belatedly—accepted the idea of collective dominance. In *Vetro et al. v Commission*,[159] three Italian producers of flat glass challenged a Commission decision that had found them guilty of violating Article 102. Their joint market share was 95 per cent, and the Commission claimed that the undertakings would 'present themselves on the market as a single entity and not as individuals'.[160] To cement this argument, the Commission pointed to the existence of collusive behaviour under Article 101. Intervening in the proceedings, the United Kingdom objected that it was 'only in very special circumstances that two or more undertakings may jointly hold a dominant position within the meaning of Article [102], namely, when the undertakings concerned fall to be treated as a single economic unit in which the individual undertakings do not enjoy a genuine autonomy in determining their conduct on the market and are not to be treated as economically independent of one another'.[161]

The General Court—rightly—rejected that argument, since it implied that the notion of 'undertaking' in Article 102 was different from that in Article 101.[162] And moving from text to teleology, the Court continued:

> There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, *united by such economic links* that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market … However, it should be pointed out that for the purposes of establishing an infringement of Article [102] of the Treaty, it is not sufficient … to 'recycle' the facts constituting an infringement of Article [101], deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position.[163]

The simple existence of contractual or collusive relations between the three undertakings was thus not sufficient to establish collective dominance. But what did the requirement that the firms be united by 'economic links' then mean?

p. 753 ↵ Some clarification was given in *CEWAL*,[164] where the European Court confirmed that 'a dominant position may be held by several undertakings'.[165] Collective dominance thereby required that legally independent undertakings 'present themselves or act together on a particular market as a collective

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

entity'.[166] And '[i]n order to establish the existence of a collective entity as defined above, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned'.[167]

The mere existence of collusion within the meaning of Article 101 was inconclusive; yet, such collusion could 'undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers'.[168] All depends on the 'nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings'.[169]

While an agreement between undertakings may thus indicate collective dominance, the European Courts have found that this is not the only way. And in *Piau*,[170] the General Court provided the following abstract criteria for a finding of collective dominance:

> Three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.[171]

c. Abuse of Market Dominance

If dominance is a relational concept, abuse is a contextual concept. Contextual concepts are like semantic chameleons: their meaning depends on the context in which they are used. What counts as 'abuse' in Article 102 indeed depends not so much on the type of behaviour as such as on its 'context'; namely, that this is the behaviour of a *dominant* undertaking. Thus, where a non-dominant undertaking refuses to supply a distributor, this behaviour is a perfectly legitimate offspring of p. 754 ↵ the freedom of contract. However, were a dominant undertaking to do the same, this might constitute an illegitimate abuse. The abusive character of the behaviour is here added from 'outside'. It is the market structure that 'colours' the behaviour. And since that market structure is—like physical space around big stellar masses—distorted by the very presence of a dominant firm, the latter's action may have an anticompetitive effect, even if the same action of a non-dominant undertaking would not.

The European Court has tried to express this link between the concept of 'abuse' and market dominance as follows:

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

> The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[172]

What we see as examples of abusive behaviour, mentioned in Article 102, must be understood in this light. The actions listed in the provision are not illegal as such; they become illegal because of the standing of the undertaking within the market. For within that market a dominant undertaking has 'a special responsibility'.[173] And because of that special responsibility, there are special duties imposed on a dominant undertaking. The 'maintenance of effective competition on the relevant market' is the central aim behind Article 102.[174]

What will 'relevant' market here mean? A restrictive reading would insist that the special duties imposed on a dominant undertaking are confined to the market that it dominates. But the Union legal order has preferred a—slightly—wider reading. It has extended the prohibition of abuse to 'downstream' or 'adjacent' markets in which the undertaking is *not* dominant.[175] The application of Article 102 in 'distinct, but associated' markets is thus possible. However, in *Tetra Pak*[176] the European Court insisted on 'a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market'.[177] p. 755 Article 102 ↵ would thus only apply in 'special circumstances' to conduct found in the associated market, in which the undertaking was not dominant.[178]

What types of abusive behaviour are covered by Article 102? The provision covers both exploitative as well as exclusionary abuses: it 'is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure'.[179] The following sections will now look at four common forms of abusive behaviour from the (non-exhaustive) list in Article 102.

aa. Article 102[2](a) and 'Predatory Pricing'

The first illustration of abusive behaviour given by Article 102 consists of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.[180]

This wide category includes 'excessive pricing', as well as 'predatory pricing'. The former exploits the consumer, while the latter is designed to exclude a competitor. Excessive pricing is hard to establish.[181] For predatory pricing, on the other hand, the European Courts have developed a detector test that indicates when abusive conduct is, or is likely to be, present.

In *AKZO*,[182] the European Court had to deal with two undertakings producing organic peroxides. Peroxides are used in the plastics industry, but can equally be used as bleaching agents for flour. AKZO had traditionally been active with regard to both markets, whereas a second company—ECS—had only

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

recently extended its activities from the flour to the plastics market. In order to secure ECS's withdrawal from the plastics market, AKZO attacked its competitor on the flour market by systematically offering 'unreasonably low prices designed to damage ECS's business viability, compelling ECS either to abandon the customer to AKZO or to match a loss-making price in order to retain the customer'.[183] This was a commercially clever strategy, since AKZO used price reductions in a sector which was vital for its competitor but of limited importance to itself.[184] But was this a commercially legitimate strategy? The Court found that AKZO held a dominant position and that therefore 'not all competition by means of price can be regarded as legitimate'.[185]

What then was the distinction between legitimate and illegitimate price competition? In the opinion of the Court it was this:

p. 756

> ↵ Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced. Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.[186]

The Court here established a rule and a presumption for illegitimate predatory pricing.[187] Where the price of the product was below average variable costs, the pricing policy of an undertaking was abusive per se. It thereby would not matter whether there existed a possibility of recuperating the losses in the long term.[188]

By contrast, where the price was between average variable costs and average total costs, there was still a possibility that this could be an abuse of dominance. However, an abusive behaviour would here only be established where the pricing policy could be shown to be part of a strategic plan to eliminate a competitor. This 'subjective' element within the definition of predatory pricing undermines, to some extent, the Court's idea that the concept of abuse is an 'objective' concept.[189] The General Court has tried to gloss over this development by asserting that an anticompetitive intent and an anticompetitive effect may—occasionally—'be one and the same thing'.[190]

p. 757

bb. Article 102[2](b) and 'Refusal to Supply'

The Treaties define a second form of abuse as 'limiting production, markets or technical development to the prejudice of consumers'.[191] One can consider the 'refusal to supply' as a generic expression of that category. This potentially abusive type of conduct best illustrates the 'special responsibilities' of a

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

dominant undertaking. For the general principle of freedom of contract would normally allow any contracting party to reject an offer for a contract. But this freedom cannot be granted where the market structure is such that there is no alternative supply.

In *Commercial Solvents*,[192] the Court had to deal with a refusal by the dominant producer of a raw material. The producer had decided to expand its production to the manufacture of the finished product; and in pursuit of this vertical integration strategy, it had chosen to cut off the supply of raw materials 'to certain parties in order to facilitate its own access to the market for the derivatives'.[193] In unequivocal terms, the Court found that this was not a legitimate commercial strategy for a dominant undertaking:

> [A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the common market.[194]

This reasoning was confirmed in *Magill*.[195] In the absence of a comprehensive weekly television guide in Ireland, each television station had published its own guide, while licensing daily newspapers to produce daily listings free of charge. Magill saw a commercial opportunity and tried to use it. Yet it was prevented from publishing a comprehensive weekly guide by the Irish television stations (as well as the BBC). Was this an abuse of a dominant position? The European Courts thought this was a clear violation of Article 102[2](b), as the refusal to supply the information 'prevented the appearance of a new product' that the dominant undertakings 'did not offer and for which there was a potential consumer demand'.[196]

p. 758 ↵ Did *Magill* here endorse a US-inspired 'essential facilities' doctrine?[197] The question was raised in *Bronner*.[198] The applicant was a producer of a small Austrian newspaper, who wished to use the—integrated—home-delivery distribution network of a dominant competitor 'against payment of reasonable remuneration'.[199] Bronner argued that the normal postal delivery service would not constitute an alternative delivery option, as it would not take place until the late morning; and the establishment of its own home-delivery service was 'entirely unprofitable'.[200] Could he therefore demand to use his competitor's distributional infrastructure? The Court disagreed, and gave an extremely restrictive reading of its prior jurisprudence. Only when the service was 'indispensable' for carrying on the business in question, because it was 'impossible' to develop a new product without the service, would the Union—in 'exceptional circumstances'—require a competitor to make available its facilities.[201] And this was not the case here. Other methods of distribution were available and it was furthermore not impossible for any publisher of daily newspapers to establish—alone or in cooperation with other publishers—a second home-delivery scheme.[202]

cc. Article 102[2](c) and 'Discretionary Pricing'

A third category of abusive behaviour is defined as 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.[203] The emblematic expression of this type of abuse is discriminatory pricing. Price discrimination may thereby

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

take place directly or indirectly. Direct discrimination might be found where an undertaking charges different prices depending on the nationality or location of its customers.[204] The best-known commercial techniques of indirect price discrimination are discounts or rebates. They have been subject to an extensive European jurisprudence.[205]

In *Hoffmann-La Roche*,[206] the Court was asked to analyse the commercial lure of a loyalty rebate offered by a dominant undertaking. Loyalty or fidelity rebates are discounts that are conditional—regardless of the quantity bought—on the customer's promise to buy exclusively from one undertaking. According to the Commission, this had a discriminatory effect since Roche 'offer[ed] two purchasers two p. 759 different prices for an identical quantity of the same product depending on whether these two buyers agree or not to forego obtaining their supplies from Roche's competitors'.[207] The Court agreed:

> The *fidelity* rebate, unlike *quantity* rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.[208]

The Court here distinguished between *legitimate* 'quantity rebates' and *illegitimate* 'fidelity rebates'. However, the dividing line between the two has never been easy to draw. This is illustrated by *Michelin I*.[209] Is a 'target discount'—that is, a discount that is given once the seller has achieved a given sales target—a quantity or a loyalty discount? The Court found that the discount system operated by Michelin did 'not amount to a mere quantity discount linked solely to the volume of goods purchased', as it 'depended primarily on the dealer's turnover in Michelin tyres without distinction of category and not on the number'.[210] However, neither was the rebate a clear loyalty rebate, as the Commission had not succeeded in demonstrating that the discount system was discriminatory.[211]

The evolution of the subsequent case law has further blurred the traditional dichotomy between (per se legal) quantity discounts and (per se illegal) loyalty discounts;[212] and it seemed that the introduction of a more economic approach to Article 102 might ultimately lead the Court to abandon the idea of per se rules altogether. Yet this development has received a major qualification.[213] The best view on Article 102 might therefore be that the provision—like Article 101—distinguishes between practices that are by their very nature anticompetitive and practices that will only violate Article 102 in the light of their anticompetitive effects.[214]

p. 760

dd. Article 102[2](d) and 'Tying or Bundling'

The fourth illustration of an abusive behaviour in Article 102 outlaws the commercial practice of 'making the conclusion of contracts subject to acceptance by the other parties of *supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*'.[215] This

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

mouthful is often simply referred to as 'tying' or 'bundling'. While there is a subtle distinction between both commercial techniques,[216] both express themselves in 'connecting' the sale of one product to the sale of another.

We find a good illustration of this sales technique in *Tetra Pak II*.[217] The case involved a dominant manufacturer of cartons and carton-filling machines. Tetra Pak had tied the sale of the former to the sale of the latter—claiming that the machinery for packaging was indivisible from the cartons. The General Court rejected that claim. Finding that there were independent manufacturers specializing in cartons for machines from different manufacturers,[218] and that Tetra Pak's own cartons could be used on different machines,[219] cartons and carton-filling machines were considered products that could be separately sold. And since their tying was not in line with commercial usage,[220] the dominant undertaking had abused its market power.[221]

This form of analysis was refined in *Microsoft*—one of the longest judgments of European law.[222] The case examined the choice of the software giant to tie a media player to its operating system. The General Court here had recourse to four analytical elements in showing an abuse of dominance. In addition to the existence of two separate products,[223] the Union competition authorities would need p. 761 ↵ to demonstrate that the dominant undertaking 'coerced' customers to buy the tied product by not giving them a choice whether or not to obtain the product.[224] And even though Windows Media Player was a media functionality that did not require consumers to pay extra, the Court found:

> [I]n consequence of the impugned conduct, consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied.[225]

The third element of the test then examined whether this technique foreclosed competition for the bundled product,[226] while the fourth element analysed the absence of an objective justification for the seemingly abusive conduct. This last element theoretically applies to all types of abuse and will be considered in the final section.

d. Objective Justification: Apparently Abusive Behaviour?

Article 102 contains—unlike Article 101—no separate paragraph dealing with possible justifications for abuses of a dominant position.[227] Article 102 thus appears to be an 'absolute' prohibition. However, the European Courts have come to examine whether there exists an 'objective justification' of the apparently abusive behaviour of a market leader.[228] The existence of unwritten grounds of justification is not uncommon and can be seen in other areas of European law. And yet, the idea of objective justifications has remained 'one of the most vague concepts associated with the application of Article [102]'.[229]

In order to explain the European jurisprudence on the concept of objective justification, two jurisprudential lines are traditionally distinguished. According to a first line, the behaviour of a dominant firm is not considered abusive due to a special context. Thus, where a crisis within an industry leads to

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

general supply shortages, the refusal to supply non-traditional customers has not been seen as abusive behaviour.[230] However, the European Courts insist that the special context must p. 762 be 'beyond the control of the dominant undertaking and which it cannot overcome by any means other than by adopting the conduct which is prima facie abusive'.[231] Moreover, the special context justification has generally not been extended to public policy considerations. For example, the fact that an undertaking may deal with products that are potentially dangerous for the health of consumers was not deemed an objective justification for abusive conduct towards a competitor. The undertaking will here need to explain why the special context was not addressed by the relevant public authorities.[232]

A second jurisprudential line concerns the 'efficiency defence'. In *British Airways*,[233] the European Court thus found that certain exclusionary effects 'may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer'.[234] However, other judgments have expressly pointed in the opposite direction.[235] The most elaborate discussion of the efficiency defence took place in *Microsoft*.[236] Here, the General Court appeared to accept the existence of an objective justification on the grounds of productive or dynamic efficiencies. However, with regard to the application of the defence in this case it held that Microsoft had not shown 'that the integration of Windows Media Player in Windows creates technical efficiencies or, in other words, that it "lead[s] to superior technical product performance"'.[237]

In sum, while the Commission has shown a positive attitude towards the efficiency defence under Article 102,[238] the legal parameters for this second objective justification have remained very vague indeed.

4. EU Merger Control

In order better to compete in the market, a firm may decide to merge with another firm. Mergers are an external form of expansion. They aim to create economies of scale and scope.[239]

Mergers may take place in two directions. They can take place between two previously competing undertakings (horizontal merger); or, they may take place between two firms on different levels of the commercial chain (vertical merger). p. 763 Either type of merger may raise specific competition concerns under Articles 101 and 102: horizontal mergers restrict competition between competitors, whereas vertical mergers may lead to harmful restrictions (foreclosures) on the distribution level. However, merger control pursues a more abstract—higher—goal. It is that part of competition law that aims to prevent the creation of markets that *as such* facilitate anticompetitive conduct. Merger control here fundamentally differs from the prohibitions under Articles 101 and 102. It does not punish illegal behaviour that has already taken place; rather, it follows an '*ex ante*' approach that aims to *prevent* illegal behaviour altogether.

Where do we find the EU merger provisions? The EU Treaties were originally silent about merger control.[240] The Union, however, gradually developed it as a third pillar of EU competition law. This development culminated in the adoption of the EU Merger Regulation (EUMR), which constitutes the Union's legislative tool to control dangerous 'concentrations' within the internal market. Before we analyse it in detail, we must quickly look at the legal situation before its adoption.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

a. Judicial Origins: Merger Control 'By Other Means'

In the absence of an express constitutional base within the EU Treaties, the Union originally based its merger control on Article 102 TFEU.

Its expansive use of Article 102 can be seen in *Continental Can*.[241] The Commission had prohibited the acquisition of the leading Dutch manufacturer of packaging materials by a US company on the grounds that the latter was already dominant in the German market. This was challenged by the applicant. It argued that the Commission decision was 'based on an erroneous interpretation of Article [102] of the [TFEU]', which was 'trying to introduce a control of mergers'; whereas 'structural measures of undertakings—such as strengthening of a dominant position by way of merger—[did] not amount to abuse of this position within the meaning of Article [102] of the Treaty'.[242] Put differently, Article 102 should only outlaw (behavioural) abuses of dominance, and it could not cover (structural) changes in the market following a merger.

The question the Court here had to answer was therefore this: could the acquisition of an undertaking *itself* constitute an abuse of a dominant position? Analysing p. 764 the spirit and general scheme of the EU competition rules, the Court famously found as follows:

> In the absence of explicit provisions one cannot assume that the Treaty, which prohibits in Article [101] certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Article [102] that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible. *Such a diverse legal treatment would make a breach in the entire competition law which could jeopardize the proper functioning of the common market. If, in order to avoid the prohibitions in Article [101], it sufficed to establish such close connections between the undertakings that they escaped the prohibition of Article [101] without coming within the scope of that of Article [102], then, in contradiction to the basic principles of the common market, the partitioning of a substantial part of this market would be allowed …*
>
> *It is in the light of these considerations that the condition imposed by Article [102] is to be interpreted whereby in order to come within the prohibition a dominant position must have been abused*. The provision states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) of Article [102(2)], the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure … *Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition …*[243]

While honouring the textual insistence of an 'abuse' of market dominance in Article 102, the Court here nonetheless—and ingeniously—found that the mere *strengthening* of a dominant position could amount to such an *abuse*. This exceptionally wide teleological interpretation of Article 102 opened the behavioural provision to a structural phenomenon: mergers that *reinforced* dominance could henceforth be prohibited,

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

where they 'substantially fetter[ed] competition'. Yet due to the scope of Article 102, this indirect form of merger control could not capture mergers by non-dominant undertakings—even if the merger would create a dominant position on the market.[244]

In *British American Tobacco*,[245] the ECJ thus opened a second indirect route of merger control—this time by means of Article 101. The case concerned an p. 765 agreement between two cigarette manufacturers, Philip Morris and Rothmans, by which the former acquired a 31 per cent shareholding in the latter. While this horizontal agreement contained several safeguards to prevent collusion,[246] two other tobacco companies —in particular, British American Tobacco—challenged the legality of the acquisition agreement. The question thus arose of whether Article 101 could extend to 'merger and acquisition' agreements; and the answer of the Court was a resounding 'yes'. It ruled:

> It should be recalled that the agreements prohibited by Article [101] are those which have as their object or effect the prevention, restriction or distortion of competition within the common market. *Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.* That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan. That will be true in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, *the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation.*[247]

The case opened Article 101 as a second—and wider—avenue to pursue a Union merger policy 'by other means'. For unlike Article 102, the use of Article 101 to control mergers and acquisitions would go far beyond mergers of *dominant* undertakings.

Fearful of a merger policy developed exclusively by the European Courts, the Member States suddenly agreed—after 20 years of protracted negotiations—to establish the legislative foundations for a Union merger policy: the EU Merger Regulation.

b. Legislative Foundations: The EU Merger Regulation

The Union's first merger regulation was adopted in 1989.[248] Having undergone substantial reform, it was subsequently replaced by a second regime in 2004. It can p. 766 today be found in Regulation 139/2004 on the control of concentrations between undertakings (the EUMR), whose structure can be seen in Table 17.3.[249]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

Table 17.3 EU Merger Regulation: structure

EU Merger Regulation 139/2004	
Article 1: Scope	Article 14: Fines
Article 2: Appraisal of concentrations	Article 15: Periodic penalty payments
Article 3: Definition of concentration	Article 16: Review by the Court of Justice
Article 4: Prior notification and pre-notification referral	Article 17: Professional secrecy
Article 5: Calculation of turnover	Article 18: Hearing of the parties and of third persons
Article 6: Examination of the notification and initiation of proceedings	Article 19: Liaison with the authorities of the Member States
Article 7: Suspension of concentrations	Article 20: Publication of decisions
Article 8: Powers of decision of the Commission	Article 21: Application of the Regulation and jurisdiction
Article 9: Referral to the competent authorities of the Member States	Article 22: Referral to the Commission
Article 10: Time limits for initiating proceedings and for decisions	Article 23: Implementing provisions
Article 11: Requests for information	Article 24: Relations with third countries
Article 12: Inspections by the authorities of the Member States	Article 25: Repeal
Article 13: The Commission's powers of inspection	Article 26: Entry into force and transitional provisions
Implementing Regulation 802/2004	

The EUMR represents the central control mechanism for mergers within the European Union. It describes its rationale as follows:

> Articles [101] and [102], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty.[250]

The EUMR targets '*significant structural changes*, the impact of which on the market goes *beyond the national borders of any one Member State*'; and it holds that p. 767 '[s]uch concentrations should, as a general rule, be reviewed exclusively at [Union] level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity'.[251]

The scope of the EUMR is thereby determined by a jurisdictional and a substantive criterion. Jurisdictionally, only those mergers that have a 'Union' dimension fall within its scope (see Section aa). Substantially, the Regulation will only control significant structural changes within the internal market (see Section bb). A question that the EUMR does not expressly answer is whether there exist 'objective justifications' to a merger (see Section cc); yet it does recognize the possibility of national public policy justifications (see Section dd).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

Let us explore all four aspects in turn.

aa. Jurisdictional Scope: The 'Union' Dimension

The EUMR is based on a clear jurisdictional division of powers. The Union is exclusively charged to control 'mergers' that have a 'Union dimension', while the Member States remain exclusively competent for mergers falling outside the scope of the Regulation.[252]

The EUMR thereby provides a broad definition of what constitutes a 'merger'. In order to capture legal operations that go beyond a complete fusion of two undertakings, the Regulation adopts the concept of 'concentration'. Article 3 defines such concentrations as follows:

> A concentration shall be deemed to arise where a change of control on a lasting basis results from:
>
> (a) the *merger* of two or more previously independent undertakings or parts of undertakings, or
>
> (b) the *acquisition*, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings …

The creation of a *joint venture* performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1 (b).[253]

The provision here distinguishes between three types of 'mergers' broadly conceived: mergers, acquisitions, and (certain) joint ventures (see Figure 17.6). p. 768 ↵

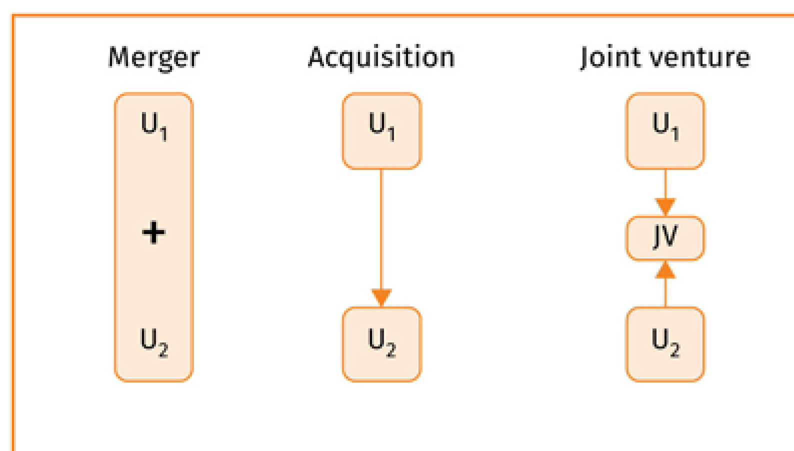

Figure 17.6 EUMR: three forms of concentrations

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

The EUMR thereby first and foremost captures ‘legal’ mergers; that is, a fusion of previously independent undertakings into one undertaking.[254] However, it also captures—second—‘takeovers’ in the form of ‘acquisitions’ of control. In this scenario, one undertaking does not formally merge with another but acquires substantive control over it.[255] The idea of ‘control’ is here broadly defined:

> Control shall be constituted by rights, contracts or any other means which, either *separately or in combination* and having regard to the *considerations of fact or law* involved, confer the *possibility of exercising decisive influence* on an undertaking, in particular by:
>
> (a) ownership or the right to use all or part of the assets of an undertaking;
>
> (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.[256]

This definition covers *sole* or *joint* control by another undertaking(s) or persons(s);[257] and the acquisition of such control may result from a change of assets or government of the undertaking. The crucial criterion for a finding of control is the *possibility* of exercising *decisive* influence over an undertaking. Decisive influence means the power to determine the strategic behaviour of the undertaking.[258] Yet by insisting on the mere possibility of such decisive influence, it is ‘not necessary to show that the decisive influence is or will be actually exercised’.[259] Decisive p. 769 ↵ influence may stem from *legal* or *factual* power. A minority shareholder, while not legally entitled to control a company, may still be in factual control of its management; yet the General Court has found that the mere acquisition of a minority share within a company will not fall within the EUMR.[260]

Third, and finally, the Merger Regulation also applies to ‘joint ventures’. In the light of its purpose, the EUMR however clarifies that it only extends to those joint ventures that perform ‘on a lasting basis all the functions of an autonomous economic entity’: so-called ‘full-function joint ventures’. (All other forms of horizontal cooperation may, however, be subject to Article 101.)[261]

When will mergers (in a broad sense of the term) have a Union dimension? The Regulation defines this jurisdictional criterion in Article 1 as follows:

> A concentration has a [Union] dimension where:
>
> (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
>
> (b) the aggregate [Union]-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
>
> unless each of the undertakings concerned achieves more than two-thirds of its aggregate [Union]-wide turnover within one and the same Member State.[262]

The application of the EUMR is here made conditional on the aggregate turnover of the undertakings involved. The absolute criterion of turnover was preferred over the relative criterion of market shares, since the former promises a brighter jurisdictional boundary than the latter.[263] The turnover thresholds

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

themselves have been set very high—a legislative decision that limits Union control to the very 'biggest' mergers within Europe. (These high thresholds have, however, been lowered in the case of a merger that affects at least three Member States.[264]) The Member States have nevertheless insisted on retaining their powers where the 'two-thirds rule' applies; that is, where more than two-thirds of the aggregate turnover is effected within one Member State.

bb. Substantive Compatibility: Dominance and SIEC Tests

Once a merger falls within the jurisdictional scope of the EUMR, the Union will need to 'appraise' whether p. 770 the merger is substantively compatible with the internal ↵ market. This appraisal will involve a whole range of factors;[265] yet, the EUMR has subjected mergers to a general compatibility test. This test has changed over time.

The *old* Merger Regulation had determined the compatibility of a merger with the internal market as follows:

> A concentration which *creates or strengthens a dominate position* as a result of which effective competition would be significantly impeded in the [internal] market or in a substantial part of it shall be declared incompatible with the [internal] market.[266]

The provision identified two things for a merger to be prohibited. First, the merger would create or strengthen a dominant position (dominance test); and, second, that dominant position would significantly impede effective competition (SIEC test). The 1989 EUMR thus insisted—like the Court in *Continental Can* —on the presence of a dominant position; yet unlike Continental Can, it not only captured the strengthening of a dominant position but also extended to the creation of such a dominant position. And while subsequent jurisprudence clarified that the Regulation also covered situations of collective dominance,[267] the dominance test under the 1989 EUMR nevertheless seemed incapable of applying to oligopolistic situations that could not be classified as collective dominance. For example, if the p. 771 ↵ second and the third biggest undertakings within an oligopolistic market were to merge without gaining dominance, this situation could not—despite a serious effect on the competitive structure of the market—fall within the scope of the old Merger Regulation (see Figure 17.7).

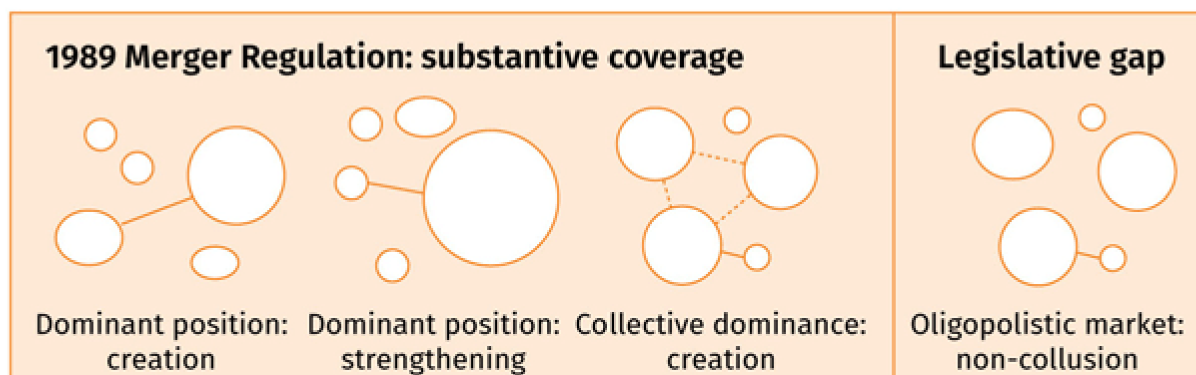

Figure 17.7 Scope of the 1989 Merger Regulation

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

It was this legislative gap that led to a radical reform of the compatibility test in the 2004 Merger Regulation. This new test now states as follows:

> A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.[268]

This new formulation liberates the SIEC test from the dominance test. The existence of a dominant position is here no longer a *precondition* for the prohibition of a merger. The new Merger Regulation thus broadens the compatibility test to the control of mergers that create oligopolistic situations in which no collective dominance can be shown (see Figure 17.8).[269]

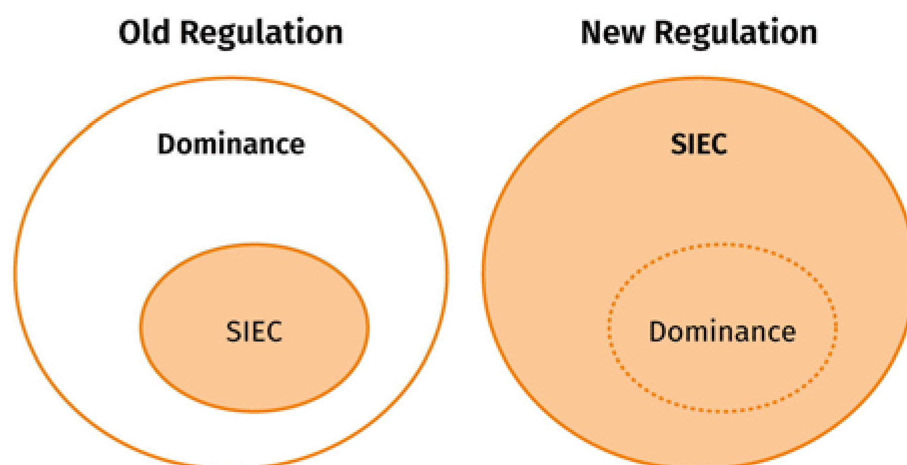

Figure 17.8 Merger tests: old and new

The *widened* scope of the 2004 Regulation has made EU merger control more flexible and has also granted the Commission a wider discretion to scrutinize the anticompetitive effects of mergers.[270] The Commission's administrative discretion has nonetheless been structured by a number of informal Commission Guidelines. The Commission has indeed extensively explained its appraisal methodology for p. 772 ↵ horizontal and non-horizontal mergers, respectively.[271] However, the Court has in the past demonstrated—especially in the *annus terribilus* of 2002—that it will strike down Commission appraisals where the Union executive has not convincingly proved that the merger violated the EUMR.[272]

cc. Merger Defences: Objective Justifications?

A merger between undertakings will typically be designed to achieve economies of scale and scope. Can these efficiency gains constitute a 'defence' or 'justification' for an otherwise illegal merger?

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

The EUMR is silent on this point; yet its Article 2 ambivalently requires the Commission, when making its appraisal, to take into account ‘the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition’.[273] The Horizontal Merger Guidelines are slightly more explicit and expressly refer to an ‘Efficiency Defence’ in the following way:

> The Commission considers any substantiated efficiency claim *in the overall assessment of the merger*. It may decide that, as a consequence of the efficiencies that the merger brings about, *there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation*. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.[274]

The Commission here appears to acknowledge efficiency gains as an objective justification. These gains will be taken into account in the overall assessment of the merger. Importantly, however, the Commission insists that the consumer benefits must be ‘substantial’, ‘merger specific’, and ‘verifiable’.[275] The General Court p. 773 ↵ confirmed these conditions in *Ryanair v Commission*, in which the Court offered an extensive interpretation of the efficiency defence.[276]

The Guidelines also acknowledge a second defence: the ‘failing firm’ defence.[277] This situation covers ‘rescue mergers’. Rescue mergers are mergers where one undertaking merges with another that is failing in the market. The defence is defined as follows:

> The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger *cannot be said to be caused by the merger*. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger. *The Commission considers the following three criteria to be especially relevant for the application of a ‘failing firm defence’. First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anticompetitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.*[278]

The Commission, as well as the Court,[279] have thereby approached the ‘failing firm’ defence through the question of causality. A merger will not fulfil the SIEC p. 774 ↵ test where the change in the market structure would have come about even in the absence of the merger. Such a ‘rescue’ merger would consequently be objectively justified under the EUMR.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

dd. National Derogations: Public Policy Justifications

Can a merger that has been cleared by the Union still be prohibited by a Member State? While the Member States are generally excluded from assessing mergers with a Union dimension, the EUMR indeed recognizes this possibility in Article 21. The fourth paragraph of this provision states:

> Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of [Union] law. *Public security, plurality of the media and prudential rules shall be regarded as legitimate interests* … Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of [Union] law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.[280]

The provision allows Member States to object to a merger within their territory in order to protect legitimate interests not taken into account in the Regulation. These national objections may relate to one of the public policy concerns expressly mentioned in Article 21 or to any other public interest that the Commission considers worthy of protection.[281] However, the last word rests with the European Court of Justice. It is for the Court to ultimately rule on the proportionality of the national interest invoked.[282]

Conclusion

EU competition law is embedded within the Union's internal market. The Union is here entitled to 'regulate' and 'police' the internal market to ensure undistorted competition. The two sections within the EU Treaties' competition chapter thereby correspond to the two principal forms of market distortions. Section 1 regulates p. 775 ↵ private undertakings, whereas Section 2 establishes a Union regime governing State aid. This chapter looked at the various rules that police private undertakings; and three legal pillars of EU competition law were here identified: Article 101, Article 102, and the EU Merger Regulation.

Article 101 prohibits anticompetitive collusions between undertakings that distort competition within the internal market. We saw previously that the Union has given a wide jurisdictional scope to the EU competition rules: any agreement that directly or indirectly, actually or potentially affects the patterns of trade between Member States will be caught—although the Court has generally insisted on a *de minimis* threshold. Once an agreement falls within the jurisdictional scope of European Union law, its pro- and anticompetitive elements will be analysed. The Court here splits its analysis into two parts: it will analyse an agreement's anticompetitive effects within Article 101(1), while exploring its pro-competitive effects under Article 101(3). Due to the Union's historic task of creating an internal market, vertical agreements have been of particular importance to the Union; and distribution agreements indeed continue to occupy a prominent place within the case law of the Courts.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

Article 102 reviews the unilateral behaviour of dominant undertakings. Importantly, the provision does not outlaw dominance per se but only the *abuse* of market dominance. The idea that a dominant undertaking is subject to special rules and responsibilities results from its dominating the market. Various forms of abuse were analysed in Section 3 of this chapter.

Finally, Section 4 explored the Union's legislative response to market structures being 'distorted' by market dominance. The EU Merger Regulation here aims to control 'concentrations' that might 'significantly impede effective competition' within the internal market. Importantly, the Union's merger policy is a 'structural' policy: it does not aim to *punish* illegal market behaviour but rather tries to *prevent* the creation of market structures facilitating such illegal behaviour.

What about the EU competition rules applying to the Member States? With the rise of 'mixed economies', modern States have become major players within their national markets. States may thereby interfere with market forces in a number of ways.[283] The EU Treaties expressly address two types of such State interference. In Article 106 we find a first—casual—reference to public undertakings (and undertakings endowed with public functions). The entire Section 2 of the competition chapter is, however, dedicated to a second type of market interference: State aid. State aid is financial assistance paid out of State resources that assists specific p. 776 ↵ undertakings to fight the forces of competition. These 'public' interferences into the internal market are discussed on the author's website in Chapter 17B, whose contents can be seen in Table 17.4.

Table 17.4 Chapter 17B: summary contents

Introduction
1. Public Undertakings and Public Services a. *Public Undertakings (and Undertakings with Special Rights)* b. *Services of General Economic Interest*
2. State Aid I: Jurisdictional Aspects a. *The Concept of 'State Aid'* b. *Selectivity of the Aid*
3. State Aid II: Substantive Aspects a. *Automatic Justifications: Article 107(2)* b. *Discretionary Justifications: Article 107(3)* c. *In Particular: Regional Aid*
4. Enforcing EU Competition Law a. *Enforcement through the States: Articles 101 and 102* b. *Enforcement against the States: State Aid*
Conclusion

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

Further Reading

Further Reading

Books

P. Akman, *The Concept of Abuse in EU Competition Law* (Hart, 2012)

G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart, 1997)

D. Bailey and L. E. John (eds), *Bellamy & Child: European Union Law of Competition* (Oxford University Press, 2018)

A. Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (Hart, 2018)

P. Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press, 2018)

A. Jones et al., *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 2019)

I. Kokkoris and H. Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press, 2014)

R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011)

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

E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010)

R. Wish and D. Bailey, *Competition Law* (Oxford University Press, 2018)

p. 777

Articles (and Chapters)

A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44 *CML Rev.* 1727

J. Faull, 'Effect on Trade Between Member States' (1999) 26 *Fordham Corporate Law Institute* 481

B. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *CML Rev.* 973

P. Ibáñez Colomo, 'Exclusionary Discrimination Under Article 102 TFEU' (2014) 51 *CML Rev.* 141

A. Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8 *European Competition Journal* 301

I. Lianos, 'Collusion in Vertical Relations under Article 81 EC' (2008) 45 *CML Rev.* 1027

G. Monti, 'The Scope of Collective Dominance under Article 82 EC' (2001) 38 *CML Rev.* 131

O. Odudu and D. Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 *CML Rev.* 1721

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

J. Schmidt, 'The New ECMR: "Significant Impediment" or "Significant Improvement"?' (2004) 41 *CML Rev.* 1555

A. Weitbrecht, 'From Freiburg to Chicago and Beyond: The First 50 Years of European Competition Law' (2008) 29 *ECLR* 81

R. Wish and D. Bailey, 'Regulation 330/2010: The Commission's New Block Exemption for Vertical Agreements' (2010) 47 *CML Rev.* 1757

R. Wish and B. Sufrin, 'Article 85 and the Rule of Reason' (1987) 7 *YEL* 1

A. Witt, 'The Enforcement of Article 101 TFEU: What has Happened to Effects Analysis?' (2018) 55 *CML Rev.* 417

Cases on the Author's Website

Joined Cases 56 and 58/64, *Consten and Grundig*; Case 56/65, *Société Technique Minière*; Case 6/72, *Continental Can*; Joined Cases 6–7/73, *Commercial Solvents*; Case 15/74, *Centrafarm*; Case 26/76, *Metro v Saba*; Case 85/76, *Hoffmann-La Roche*; Case 322/81, *Michelin I*; Joined Cases 25–6/84, *Ford v Commission*; Case 42/84, *Remia and Nutricia*; Case 161/84, *Pronuptia*; Joined Cases 142 and 156/84, *British American Tobacco*; Case 62/86, *AKZO*; Joined Cases T-68 and 77–8/89, *Vetro v Commission*; Case 234/89, *Delimitis*; Case C-41/90, *Höfner and Elser*; Case T-83/91, *Tetra Pak II*; Joined Cases C-159–60/91, *Poucet and Pistre*; Joined Cases C-241–2/91 P, *Magill*; Case C-333/94 P, *Tetra Pak*; Case T-41/96, *Bayer v Commission*; Joined Cases C-395–6/96 P, *CEWAL*; Case C-7/97, *Bronner*; Case T-112/99, *Métropole Television*; Case T-203/01 *Michelin II*; Case T-193/02, *Piau*; Case C-95/04 P, *British Airways*; Case T-201/04, *Microsoft*; Case T-342/07, *Ryanair*; Case C-209/10, *Post Danmark* ↵

p. 778

Notes

[1] G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart, 1997), 8.

[2] The Act was named after Senator John Sherman, who proposed it. Section 1 here states: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]' And section 2, by contrast, states: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]'

[3] For a presentation of the two schools, see G. Monti, *EC Competition Law* (Cambridge University Press, 2007), 57–68.

[4] On the direct influence of US law and its indirect influence via German law, see D. Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford University Press, 2001), 343.

[5] Joined Cases 56 and 58/64, *Consten and Grundig v Commission* [1964] ECR 299 at 340.

[6] This link between the internal market and EU competition law continues to be textually anchored in the Treaties. According to Art. 3(3) TEU (emphasis added): 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, [and] a highly *competitive* social market economy, aiming at full employment and social progress'. The meaning of the provision is clarified in

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

Protocol No. 27 On the Internal Market and Competition, according to which 'the internal market as set out in Art. 3 of the Treaty on European Union *includes a system ensuring that competition is not distorted*' (emphasis added). And within the Treaty on the Functioning of the European Union, Art. 3(1)(b) grants the Union an exclusive competence for 'the establishing of the competition rules necessary for the functioning of the *internal market*' (emphasis added).

[7] This is not the sole consequence of a violation of Art. 101 TFEU. The Union has typically used its powers to impose significant fines on undertakings violating the provision. On the enforcement of European competition law generally, see W. Wils, *Principles of European Antitrust Enforcement* (Hart, 2005).

[8] In this sense, see O. Odudu, *The Boundaries of EC Competition Law* (Oxford University Press, 2006), 58.

[9] In its sinister and saddest form, the word refers to the preparations for a funeral service. For the notion of undertaking in that context, see Case 30/87, *Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 2479.

[10] R. Lane, *EC Competition Law* (Longman, 2001), 33.

[11] Case C-41/90, *Höfner and Elser v Macrotron* [1991] ECR I-1979, para. 21.

[12] See Case 170/83, *Hydrotherm v Compact* [1984] ECR 2999, para. 11.

[13] See Case C-309/99, *Wouters et al. v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para. 49.

[14] See Case 118/85, *Commission v Italy* [1987] ECR 2599, esp. para. 7: '[T]he State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong.'

[15] Advocate General F. Jacobs, Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, para. 72: '[T]he notion of undertaking is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest falls outside the competition rules.'

[16] Case C-180/98, *Pavlov and others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para. 75.

[17] Joined Cases C-159–60/91, *Poucet & Pistre* [1993] ECR I-637.

[18] Ibid., paras 18–19.

[19] Case C-343/95, *Calì & Figli Srl v Servizi ecologici porto di Genova* [1997] ECR I-1547.

[20] Case C-41/90, *Höfner and Elser v Macrotron*. See also Case C-205/03 P, *FENIN* [2005] ECR I-6295. For an extensive discussion of the latter—very controversial—case, see M. Krajewski and M. Farley, 'Non-Economic Activities in Upstream and Downstream Markets and the Scope of Competition Law after *FENIN*' (2007) 32 *EL Rev.* 111.

[21] For an overview of the doctrine, see O. Odudu and D. Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 *CML Rev.* 1721.

[22] Case 15/74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug* [1974] ECR 1147.

[23] Ibid., para. 41 (emphasis added). See Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949.

[24] Case C-73/95 P, *Viho v Commission* [1996] ECR I-5457, para. 16.

[25] Case C-97/08 P, *Akzo Nobel NV and others v Commission* [2009] ECR I-8237, para. 58.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[26] For an analysis of the concept of 'agreement', see J. Shaw, 'The Concept of Agreement in Article 85 EEC' (1991) 16 *EL Rev.* 262.

[27] See Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, para. 69; Joined Cases C-2 and 3/01 P, *Bundesverband der Arzneimittel-Importeure and Commission v Bayer* [2004] ECR I-23, para. 97.

[28] This second category clarified that undertakings cannot escape the scope of Art. 101 by substituting *multilateral* collusion between them by establishing an association that would adopt *unilateral* decisions on their behalf. This may include professional bodies, such as the Bar Council. See Case C-309/99, *Wouters et al. v Algemene Raad van de Nederlandse Orde van Advocaten*. For a more recent judgment here, see Case T-111/08, *MasterCard and others v Commission* [2009] ECR I-5655.

[29] Joined Cases 56 and 58/64, *Consten and Grundig v Commission* [1964] ECR 299.

[30] Ibid., 339.

[31] Ibid.

[32] This second argument was an important one: vertical agreements would need to be within the scope of Art. 101 TFEU because they could have an anticompetitive effect both with regard to intra-brand competition—i.e. price competition between distributors—but also inter-brand competition between different producers. On the distinction between inter-brand and intra-brand competition, see Section 2a/aa.

[33] See Case 107/82, *AEG v Commission* [1983] ECR 3151; Joined Cases 25–6/84, *Ford-Werke AG and Ford of Europe Inc. v Commission* [1985] ECR 2725; Case C-70/93, *BMW v ALD Auto-Leasing* [1995] ECR I-3439.

[34] Joined Cases 25–6/84, *Ford-Werke AG and Ford of Europe Inc. v Commission*.

[35] Ibid., para. 15.

[36] Ibid., para. 21 (emphasis added).

[37] Case T-41/96, *Bayer AG v Commission*.

[38] Ibid., para. 72 (emphasis added).

[39] Ibid., paras 151ff: 'Examination of the attitude and actual conduct of the wholesalers shows that the Commission has no foundation for claiming that they aligned themselves on the applicant's policy designed to reduce parallel imports … [T]he wholesalers continued to try to obtain packets of Adalat for export and persisted in that line of activity, even if, for that purpose, they considered it more productive to use different systems to obtain supplies, namely the system of distributing orders intended for export among the various agencies on the one hand, and that of placing orders indirectly through small wholesalers on the other.'

[40] Joined Cases C-2 and 3/01 P, *Bundesverband der Arzneimittel-Importeure and Commission v Bayer*.

[41] Ibid., para. 141.

[42] For academic analysis of this concept, see V. Korah, 'Concerted Practices' (1973) 36 *MLR* 220; A. Jones, '*Woodpulp*: Concerted Practice and/or Conscious Parallelism' (1993) 6 *ECLR* 273.

[43] Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, para. 64; Case C-49/92 P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, para. 115.

[44] Case 48/69, *Imperial Chemical Industries v Commission*, para. 65.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[45] See Case C-49/92 P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, para. 132:'[W]hilst the concepts of an agreement and of a concerted practice have particularly different elements, they are not mutually incompatible.' For a more recent case exploring the boundaries of 'concerted practices', see Case C-74/14, *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42.

[46] Case 48/69, *Imperial Chemical Industries*, para. 66 (emphasis added).

[47] Ibid., para. 118.

[48] Joined Cases 40–8, 50, 54–6, 111, and 113–14/73, *Coöperatieve Vereniging* '*Suiker Unie*' *UA and others v Commission* [1975] ECR 1663, para. 174.

[49] Ibid., paras 27 and 174.

[50] The evidentiary burden on the Commission is very high; see Joined Cases C-89, 104, 114, 116–17, and 125–9/85, *Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307, para. 71: '[P]arallel conduct cannot be regarded as furnishing proof of concertation unless concertation is the only plausible explanation for such conduct.'

[51] The following sections refer to 'agreements', but the analysis applies, *mutatis mutandis*, to decisions of associations of undertakings, and concerted practices.

[52] The principle was discussed in Part II of the book, and states that the Union must always act within the sphere of competences given to it by the EU Treaties.

[53] Joined Cases 56 and 58/64, *Consten and Grundig v Commission*, 341.

[54] Ibid., 341 (emphasis added).

[55] Case 56/65, *Société Technique Minière v Maschinenbau Ulm* [1965] ECR 235 at 249 (emphasis added).

[56] See Case 246/86, *Belasco and others v Commission* [1989] ECR 2117, para. 38: 'Accordingly, although the contested agreement relates only to the marketing of products in a single Member State, it must be held to be capable of influencing intra-[Union] trade.'

[57] Case C-306/96, *Javico International and Javico AG v Yves Saint Laurent Parfums SA* (*YSLP*) [1998] ECR I-1983, para. 16 (with reference to Case 5/69, *Völk v Vervaecke* [1969] ECR 295).

[58] The Commission makes a clear distinction between an appreciable effect on inter-State *trade* on the one hand, and appreciable restrictions on *competition* on the other. The former will be discussed here, while the latter will be discussed in Section 2a/dd.

[59] Commission, 'Guidelines on the Effect on Trade Concept Contained in Articles [101 and 102] of the Treaty' [2004] OJ C101/81, para. 50.

[60] Ibid., para. 52.

[61] Ibid., para. 45.

[62] Ibid., para. 49 (emphasis added). When examining the effect on trade between Member States, the Court will take into account whether or not the agreement forms part of a broader network of agreements. This 'contextual' view of agreements was further developed in *Delimitis* (Case C-234/89, *Delimitis v Henninger Bräu* [1991] ECR I-935). The case arose out of a dispute between the plaintiff publican and the brewery Henninger and turned on the legality of a beer-supply agreement. Could a single agreement concluded by a local pub with a local brewery have an effect on intra-Union trade? On the surface, this seemed unlikely; yet the Court placed the agreement within the network of

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

agreements to which it belonged and held that 'the *cumulative effect of several similar agreements* constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected' (ibid., para. 14 (emphasis added)). It was consequently necessary to analyse the effects of all beer-supply agreements within the network to see if the single agreement contributed to a cumulative effect that had an interstate dimension.

[63] This formulation covers hypothetical, quantitative, and qualitative limitations of competition. In this section, 'restriction' of competition will be employed as a generic term.

[64] See *Chicago Board of Trade v United States*, 246 US 231, 238 (1918).

[65] The 'European' equivalent of the 'Harvard School' is the 'Freiberg School', which has become famous for its 'ordo-liberalism'. For a concise overview of the philosophical positions of that school, see D. Gerber, 'Constitutionalizing the Economy: German Neoliberalism, Competition Law and the "New Europe"' (1994) 42 *American Journal of Comparative Law* 25.

[66] Odudu, *Boundaries of EC Competition Law* (n. 8), 102.

[67] See Commission, 'Guidelines on the Application of Article [101(3)] of the Treaty' [2004] OJ C101/97. However, see also Joined Cases C-501, 513, 515, and 519/06 P, *GlaxoSmithKline and others v Commission* [2009] ECR I-9291, where the Court rejected the 'Chicagoisation' of European competition law.

[68] For a discussion of this point, see Section 1c/aa.

[69] Joined Cases 56 and 58/64, *Consten and Grundig v Commission*.

[70] Ibid., 342. And in a later part of the judgment (ibid., 343), the Court provided the rationale for this choice: 'Because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated. The efforts of the dealer are stimulated by competition between distributors of products of the same make.'

[71] Case 56/65, *Société Technique Minière v Maschinenbau Ulm*.

[72] Ibid., 250 (emphasis added).

[73] Ibid., 249.

[74] Ibid., 249; and Joined Cases 56 and 58/64, *Consten and Grundig v Commission*, 342. For an analysis of the case law here, see D. Bailey, 'Restrictions of Competition by Object Under Article 101 TFEU' (2012) 49 *CML Rev.* 559. In the light of some recent case law, it has been argued that the Court has taken a wrong turn, see C. I. Nagy, 'The New Concept of Anti-Competitive Object: A Loose Cannon in EU Competition Law' (2015) 36 *ECLR* 154.

[75] See Art. 101(1)(a): 'directly or indirectly fix purchase or selling prices or any other trading conditions'; and see in particular Case 48/69, *Imperial Chemical Industries v Commission*.

[76] See Art. 101(1)(b): 'limit or control production, markets, technical development, or investment', and see in particular Case 41/69, *Chemiefarma v Commission*.

[77] See Art. 101(1)(c): 'share markets or sources of supply'; and see in particular Joined Cases 40–8, 50, 54–6, 111, and 113–14/73, '*Suiker Unie*' *v Commission*.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[78] See Case 243/83, *Binon & Cie v Agence et messageries de la presse* [1985] ECR 2015; Art. 4(a) of (Commission) Regulation 330/2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

[79] See Joined Cases 56 and 58/64, *Consten and Grundig*; Art. 4(b) of (Commission) Regulation 330/2010.

[80] Joined Cases 56 and 58/64, *Consten and Grundig*.

[81] Ibid., 343.

[82] For a confirmation of this 'tough' view on restrictions of parallel trade as a restriction by object, see Joined Cases C-501, 513, 515, and 519/06 P, *GlaxoSmithKline and others v Commission—*which overruled the General Court's attempt to soften that principle of European competition law in Case T-168/01, *GlaxoSmithKline Services v Commission* [2006] ECR II-2969. For an analysis of the case, see C. Petrucci, 'Parallel Trade of Pharmaceutical Products: The ECJ Finally Speaks—Comment on *GlaxoSmithKline*' (2010) 35 *EL Rev.* 275.

[83] In order to assess the effect of an individual agreement *on* the market, the Court will analyse the agreement's position *within* the market. It thereby applies a contextual approach that places an individual agreement within its economic context. Where an agreement forms part of a network of agreements, the Courts may thus look at the 'cumulative' effects within the market. On this 'economic' contextualism, see in particular Case C-234/89, *Delimitis v Henninger Bräu*.

[84] See R. Nazzini, 'Article 81 EC Between Time Present and Time Past: A Normative Critique of "Restrictions of Competition" in EU Law' (2006) 43 *CML Rev.* 497.

[85] It will be seen later that Art. 101(3) is not a 'neutral' exemption for pro-competitive agreements, since it makes the exemption dependent on the fulfilment of four conditions.

[86] See Case T-112/99, *Métropole Télévision (M6) and others v Commission* [2001] ECR II-2459; Case T-328/03, *O2 (Germany) v Commission* [2006] ECR II-1231. For an extended discussion of the second case, see M. Marquis, '*O2 (Germany)* v. *Commission* and the Exotic Mysteries of Article 81(1) EC' (2007) 32 *EL Rev.* 29.

[87] See Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, 250 (emphasis added).

[88] Case 42/84, *Remia and others v Commission* [1985] ECR 2545.

[89] Ibid., para. 19.

[90] Case T-112/99, *Métropole Télévision (M6) v Commission*.

[91] Ibid., para. 104 (references omitted).

[92] Ibid., para. 109.

[93] Ibid. (emphasis added). For a confirmation of these principles, see Case C-382/12 P, *MasterCard and others v Commission*, EU:C:2014:2201.

[94] Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para. 20; and confirmed in Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1986] ECR 3021, para. 65.

[95] Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, 249.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[96] The exact title of the Notice is 'Commission Notice on Agreements of Minor Importance which Do Not Appreciably Restrict Competition under Article 101(1) of the Treaty Establishing the European Union (De Minimis)' [2014] OJ C291/1.

[97] Ibid., para. 13. In Case C-226/11, *Expedia v Autorité de la concurrence and others*, EU:C:2012:795, the Court clarified that 'an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition' (ibid., para. 37).

[98] 'Commission Notice on Agreements of Minor Importance' (n. 96), para. 8.

[99] Ibid., para. 10. On this contextual examination of a single agreement, see n. 62.

[100] Commission, 'Guidelines on Article [101(3)]' (n. 67).

[101] Ibid., para. 33 (emphasis added). For an early analysis of the guidelines, see L. Kjolbye, 'The New Guidelines on the Application of Article 81(3): An Economic Approach to Article 81' (2004) 25 *ECLR* 566.

[102] Case T-112/99, *Métropole Télévision (M6) v Commission*.

[103] See Case T-17/93, *Matra Hachette SA v Commission* [1994] ECR II-595, para. 85: '[T]he Court considers that, in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [101(3)] of the Treaty are satisfied and the practice in question has been properly notified to the Commission.'

[104] There has been a spirited debate on whether these criteria—all of which are 'economic' in nature—are exhaustive or not. The Commission considers them exhaustive (see Commission, 'Guidelines on Article [101(3)]' (n. 67), para. 42): 'The four conditions of Article [101(3)] are also exhaustive. When they are met the exception is applicable and may not be made dependent on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101(3)].' Nonetheless, it is important to note that the Treaties' competition rules cannot be completely isolated from other policies; and this is particularly true for those policies—like environmental policy—that contain an express horizontal clause (see Art. 11 TFEU (emphasis added): 'Environmental protection requirements must be integrated *into the definition and implementation of the Union's policies and activities*, in particular with a view to promoting sustainable development').

[105] Art. 101(3) TFEU.

[106] The typical example of an agreement enhancing 'productive efficiency' is a 'specialization agreement'. A 'research and development' agreement is an example of an agreement that may enhance dynamic efficiency. For a brief analysis of such a horizontal cooperation agreement, see Section 2c.

[107] Commission, 'Guidelines on Article [101](3)' (n. 67), para. 85.

[108] Art. 101(3) TFEU.

[109] Commission, 'Guidelines on Article [101](3)' (n. 67), para. 73.

[110] Ibid., para. 75.

[111] Ibid., para. 78.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[112] Ibid., para. 107: ‘Whether competition is being eliminated within the meaning of the last condition of Article [101(3)] depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about. The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning of Article [101(3)].’

[113] Art. 103(2)(b) TFEU.

[114] Council Regulation 19/65 on application of [ex-]Article 85(3) of the [EEC] Treaty to certain categories of agreements and concerted practices [1965] OJ L36/533; and Council Regulation 2821/71 on application of [ex-]Article 85(3) of the [EEC] Treaty to categories of agreements, decisions and concerted practices [1971] OJ L285/46. However, the Council may, of course, also directly adopt block exemptions. See e.g. Council Regulation 487/2009 on the application of [ex-]Article 81(3) of the [EC] Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1.

[115] See Art. 29 of Regulation 1/2003 (Withdrawal in individual cases) [2003] OJ L1/1.

[116] For an analysis of these ‘cartel agreements’, see A. Jones et al., *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 2019), chs 9 and 19. The Commission has also offered its Guidelines on these agreements, see Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements’ (‘Horizontal Guidelines’) [2011] OJ C11/1.

[117] Horizontal Guidelines, para. 2.

[118] See Joined Cases T-374–5, 384, and 388/94, *European Night Services and others v Commission* [1998] ECR II-3141; Joined Cases T-185, 216, 299, and 300/00, *Métropole télévision and others v Commission* [2002] ECR II-3805; Case T-328/03, *O2 (Germany) v Commission* [2006] ECR II-1231.

[119] On this point, see Section 4b/aa. For an analysis of the complex overlap between Art. 101 and the Merger Regulation with regard to joint ventures, see N. Tyson, ‘Joint Venture Regulation under European Competition Laws: An Update’ (2007) 13 *ELJ* 408.

[120] Regulation 1217/2010, Arts 2 and 4(2). The Regulation, however, also includes a list of ‘hardcore restrictions’ in Art. 5 and ‘excluded restrictions’ in Art. 6.

[121] For the sociological account of this success story, see E. Durkheim, *The Division of Labour in Society* (Free Press, 1984).

[122] For a path-breaking analysis of these issues from an economic perspective, see R. Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; and O. E. Williamson, ‘The Vertical Integration of Production: Market Failure Considerations’ (1971) 61 *American Economic Review* 112.

[123] See Joined Cases 56 and 58/64, *Consten and Grundig v Commission*.

[124] Case 56/65, *Société Technique Minière v Maschinenbau Ulm*.

[125] For this point, see also the discussion on the Vertical Block Exemption Regulation in the next section.

[126] Case 26/76, *Metro SB-Großmärkte v Commission* [1977] ECR 1875.

[127] Ibid., para. 20 (emphasis added).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[128] The Court has confirmed and developed the doctrine in subsequent jurisprudence: see Case 75/84, *Metro v Commission* (*II*) [1986] ECR 3021; and much more recently, Case C-230/16, *Coty v Parfümerie Akzente*, EU:C:2017:941, para. 24: '[T]he organisation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary.'

[129] See (Commission) Regulation 330/2010 (n. 78). For a discussion of this regulation, see R. Wish and D. Bailey, 'Regulation 330/2010: The Commission's New Block Exemption for Vertical Agreements' (2010) 47 *CML Rev.* 1757; M. Mesch, 'Exclusive Dealing Agreements Within the Scope of the Block Exemption Regulation' (2017) 38 *ECLR* 366.

[130] Commission Regulation 330/2010 (n. 78), Arts 2 and 3(1).

[131] The provision must be read together with Art. 4(c), which blacklists the following contractual clause: 'the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.'

[132] Commission Regulation 330/2010 (n. 78), Art. 4(b).

[133] Section 2 of the US Sherman Act states: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]'

[134] Case C-209/10, *Post Danmark v Konkurrencerådet*, EU:C:2012:172, paras 21–2.

[135] On this criterion in the context of Art. 101, see Section 1d.

[136] Art. 102 TFEU does not mention a 'restriction of competition' as part of this provision. However, the Court has found that this element is an implied requirement; see Case T-203/01, *Michelin v Commission* (*Michelin II*) [2003] ECR II-4071, para. 237: 'Unlike Article [101(1) TFEU], Article [102 TFEU] contains no reference to the anti-competitive aim or anticompetitive effect of the practice referred to. However, in the light of the context of Article [102 TFEU], conduct will be regarded as abusive only if it restricts competition.' By contrast, the Court has expressly held that a violation of Art. 102 is not subject to a *de minimis* threshold (Case C-23/14, *Post Danmark*, para. 73: 'It follows that fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified').

[137] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para. 28 (emphasis added).

[138] Commission, 'Notice on the Definition of Relevant Market for the Purposes of [Union] Competition Law' [1997] OJ C372/5, para. 7.

[139] Ibid., para. 15: 'The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.' The problem with this—relational—

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

test is that it cannot measure whether the price of the examined product is—in absolute terms—already inflated. This fallacy of the SSNIP test has become known as the 'Cellophane Fallacy' after the US Supreme Court's decision in *US v Du Pont*, 351 US 377 (1956).

[140] See Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, where the Court found that in the light of its distinct qualities, the 'banana market is a market which is sufficiently distinct from other fresh fruit markets' (ibid., para. 35).

[141] See Case 322/81, *Michelin v Commission* (*Michelin I*) [1983] ECR 3461, esp. para. 41.

[142] Case 27/76, *United Brands v Commission*, para. 11 (emphasis added).

[143] The primary 'culprit' here is often (national) intellectual property rights. For a brief discussion of these rights in the internal market, see Chapter 13, Section 4d.

[144] Commission, 'Notice on the Definition of Relevant Market' (n. 138), para. 8.

[145] See Case 127/73, *Belgische Radio en Televisie (BRT) and others v SABAM and others* [1974] ECR 313; Case 322/81, *Michelin I*; Joined Cases C-241-2/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (TTP) v Commission* [1995] EU:C:1995:98.

[146] See Joined Cases 40–8, 50, 54–6, 111, and 113–14/73, '*Suiker Unie*' *v Commission*.

[147] See Case C-179/90, *Merci convenzionali porto di Genova v Siderurgica Gabrielli* [1991] ECR I-5889.

[148] In Case 22/78, *Hugin v Commission* [1979] ECR 1869, the Court defined the relevant market in such narrow terms that only one undertaking—the plaintiff—was found to inhabit the 'pond' of spare parts for Hugin's cash registers.

[149] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*.

[150] Ibid., paras 38–9 (emphasis added).

[151] *Oligo* means 'few' in Greek.

[152] Case 85/76, *Hoffmann-La Roche*, para. 39.

[153] Case C-62/86, *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 60: 'With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50% such as that found to exist in this case.'

[154] Case 85/76, *Hoffmann-La Roche*, para. 40: 'A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned.'

[155] See Case 27/76, *United Brands*, esp. paras 110ff. The Court is likely to infer dominance where the market share of an undertaking is twice as big as those of all of its competitors combined (Case T-219/99, *British Airways v Commission* [2003] ECR II-5917).

[156] See Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article [102] of the [TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7, para. 14.

[157] Art. 102 TFEU (emphasis added).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[158] Suffice to say here that once the Union has found collective dominance to exist, the abuse of this dominant position may be collective or individual; see Case T-228/97, *Irish Sugar plc v Commission* [1999] ECR II-2969, para. 66: 'Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market.'

[159] Joined Cases T-68 and 77–8/89, *Vetro, Pisana and Vernante Pennitalia v Commission* [1992] ECR II-1403. The Commission claimed that this was the first case on collective dominance and for that reason suggested not imposing any fines (ibid., para. 33). For an overview of the case law, see R. Wish, 'Collective Dominance' in D. O'Keeffe et al. (eds), *Judicial Review in European Union Law: Liber amicorum in Honour of Lord Slynn of Hadley* (Kluwer, 2000), 581; R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011), ch. 11.

[160] Joined Cases T-68 and 77–8/89, *Vetro*, para. 31.

[161] Ibid., para. 342.

[162] Ibid., para. 358. On the notion of 'undertaking', see Section 1a.

[163] Ibid., paras 358 and 360 (emphasis added).

[164] Joined Cases C-395–6/96 P, *Compagnie maritime belge transports SA, Compagnie maritime belge and Dafra-Lines v Commission* [2000] ECR I-1365.

[165] Ibid., para. 35.

[166] Ibid., para. 36.

[167] Ibid., para. 41.

[168] Ibid., para. 44.

[169] Ibid., para. 45.

[170] Case T-193/02, *Piau v Commission* [2005] ECR II-209.

[171] Ibid., paras 110–11.

[172] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, para. 91.

[173] Case 322/81, *Michelin v Commission*, para. 57; Case C-209/10, *Post Danmark*, para. 23.

[174] Case 322/81, *Michelin v Commission*, para. 30.

[175] See Cases 6–7/73, *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v Commission* [1974] ECR 223.

[176] Case C-333/94 P, *Tetra Pak International v Commission* [1996] ECR I-5961.

[177] Ibid., para. 27.

[178] Ibid.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[179] Case 6/72, *Europemballage Corporation and Continental Can Company v Commission*, para. 26.

[180] Art. 102[2](a) TFEU.

[181] See Case 27/76, *United Brands v Commission*, paras 235ff. However, see also Case 26/75, *General Motors Continental NV v Commission* [1975] ECR 1367.

[182] Case C-62/86, *AKZO Chemie BV v Commission*.

[183] Ibid., para. 9.

[184] Ibid., para. 42.

[185] Ibid., para. 70.

[186] Ibid., paras 71–2.

[187] According to 'Guidance on Article [102]' (n. 156), the Commission will apply a slightly different test (ibid., para. 26): 'The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market.'

[188] See Case C-202/07 P, *France Télécom v Commission* [2009] ECR I-2369, esp. para. 110.

[189] See Case 85/76, *Hoffmann-La Roche v Commission*, para. 91.

[190] Case T-340/03, *France Télécom v Commission* [2007] ECR II-107, para. 195.

[191] Art. 102[2](b) TFEU. For an overview of exclusionary discrimination under Art. 102 in general, see P. Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 *CML Rev.* 141.

[192] See Joined Cases 6–7/73, *Istituto Chemioterapico Italiano v Commission*.

[193] Ibid., para. 24.

[194] Ibid., para. 25.

[195] Joined Cases C-241–2/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (TTP) v Commission*.

[196] Ibid., paras 54ff.

[197] For critical overviews of the US doctrine, see B. Doherty, 'Just What Are Essential Facilities?' (2001) 38 *CML Rev.* 397; A. Rodenhausen, 'The Rise and Fall of the Essential Facilities Doctrine' (2008) 29 *ECLR* 310.

[198] Case C-7/97, *Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag and others* [1998] ECR I-7791.

[199] Ibid., para. 8.

[200] Ibid.

[201] Ibid., paras 38–41.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[202] Ibid. para. 44.

[203] Art. 102[2](c) TFEU.

[204] Case 27/76, *United Brands v Commission*, paras 204ff.

[205] For an overview, see A. Jones et al., *EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 2019), ch. 7.

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

[207] Ibid., para. 80.

[208] Ibid., para. 90 (emphasis added).

[209] Case 322/81, *Michelin v Commission*.

[210] Ibid., paras 72 and 89.

[211] Ibid., para. 91.

[212] See Case T-203/01, *Michelin v Commission*; Case C-95/04 P, *British Airways v Commission* [2007] ECR I-2331, paras 67–8.

[213] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651 has confirmed the older jurisprudence on per se rules; and it has now also expressly acknowledged the existence of a middle category in between (pure) quantity and (pure) loyalty rebates. This third category will be subjected to a detailed economic analysis of 'all the circumstances' (ibid., paras 27–9). For an analysis of the case, see K. Rokita, 'Exclusionary Rebates: Where Are We after *Post Danmark II* and How Did We Get There?' (2016) 41 *EL Rev.* 885.

[214] For this view, see P. Ibáñez Colombo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) 53 *CML Rev.* 709. Whether this is still the case after Case C-413/14 P, *Intel v Commission*, EU:C:2017:632 remains to be seen.

[215] Art. 102[2](d) TFEU (emphasis added).

[216] E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010), 219: 'The distinction between bundling and tying is technical. In the case of tying, one of the products, that is the tied product, can be purchased independently. In the case of bundling, no distinction is made between the purchases of the products involved. Either none of the products can be purchased independently of the other (pure bundling) or both products can be purchased independently but their joint sale gives customers a discount (mixed bundling).'

[217] Case T-83/91, *Tetra Pak v Commission* [1994] ECR II-755. But see also Case T-30/89, *Hilti v Commission*.

[218] Case T-83/91, *Tetra Pak v Commission*, para. 82.

[219] Ibid., para. 132.

[220] Ibid., para. 137.

[221] Ibid., para. 140. The judgment was confirmed on appeal; see Case C-333/94 P, *Tetra Pak v Commission*, where the Court even pointed out that (ibid., para. 37) '[i]t must, moreover, be stressed that the list of abusive practices set out in the second paragraph of Article [102] of the Treaty is not exhaustive … Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article [102] unless they are objectively justified.'

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[222] Case T-201/04, *Microsoft v Commission*. The judgment contains 1,373 paragraphs of factual and legal arguments.

[223] Ibid., paras 872ff.

[224] Ibid., paras 945ff.

[225] Ibid., para. 961.

[226] Ibid., paras 976ff.

[227] See Joined Cases T-191 and 212–14/98, *Atlantic Container Line and others v Commission* [2003] ECR II-3275, para. 1109: 'Before considering those grounds for justification, it must be noted at the outset that there is no exception to the principle in [European] competition law prohibiting abuse of a dominant position. Unlike Article [101] of the Treaty, Article [102] of the Treaty does not allow undertakings in a dominant position to seek to obtain exemption for their abusive practices.'

[228] For an analysis of the case law, see Rousseva, *Rethinking Exclusionary Abuses* (n. 216), ch. 7.

[229] Ibid., 259.

[230] Case 77/77, *Benzine en Petroleum Handelsmaatschappij and others v Commission* [1978] ECR 1513, esp. paras 33–4.

[231] Rousseva, *Rethinking Exclusionary Abuses* (n. 216), 265.

[232] See Case T-83/91, *Tetra Pak v Commission*, para. 84.

[233] Case C-95/04 P, *British Airways v Commission*.

[234] Ibid., para. 86.

[235] Case T-340/03, *France Télécom v Commission*, esp. para. 217.

[236] Case T-201/04, *Microsoft v Commission*.

[237] Ibid., para. 1159.

[238] For an attempt to provide such guidelines, see now Commission, 'Guidance on Article [102]' (n. 156), para. 30. The Commission here suggests four criteria that parallel the four conditions under Art. 101(3).

[239] On the general relation between market structure and economic growth, see F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 1990).

[240] This omission appears to have stemmed from a lack of political consensus among the Member States about a general Union merger policy. For an analysis of the historical origins of Union merger control, see S. Bulmer, 'Institutions and Policy Change: The Case of Merger Control' (1994) 72 *Public Administration* 423.

[241] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215.

[242] Ibid., para. 19.

[243] Ibid., paras 25–6 (emphasis added).

[244] See Case T-102/96, *Gencor v Commission* [1997] ECR II-879, para. 155 (with reference to *Continental Can*): '[O]nly the strengthening of dominant positions and not their creation can be controlled under Article [102] of the Treaty[.]'

[245] Joined Cases 142 and 156/84, *British American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[246] Ibid., para. 9.

[247] Ibid., paras 36–9 (emphasis added).

[248] Regulation 4064/89 on the control of concentrations between undertakings [1989] OJ L395/1. For an early analysis of the (old) regulation, see J. S. Venit, 'The "Merger" Control Regulation: Europe Comes of Age … or Caliban's Dinner' (1990) 27 *CML Rev.* 7.

[249] Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1. In the absence of an express EU competence on mergers, the Regulation was primarily based on Art. 352 TFEU.

[250] Ibid., recital 7.

[251] Ibid., recital 8 (emphasis added).

[252] Ibid., Art. 21(3), which states: 'No Member State shall apply its national legislation on competition to any concentration that has a [Union] dimension.' However, Art. 21 recognizes an exception to this rule in Art. 21(4) which will be discussed later.

[253] Ibid., Art. 3(1) and (4).

[254] Famous examples of (legal) mergers are the merger of Ernst & Whinney and Young & Co. in 1989 to form Ernst & Young; and the merger between Glaxo Welcome and SmithKline Beecham to form GlaxoSmithKline in 2000.

[255] Famous illustrations here are the acquisition of Mannesmann by Vodaphone (following a hostile takeover bid); and see also the *British American Tobacco* case discussed earlier.

[256] EUMR, Art. 3(2) (emphasis added).

[257] On the concept of control, see M. Broberg, 'The Concept of Control in the Merger Control Regulation' (2004) 25 *ECLR* 741.

[258] Commission, 'Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the Control of Concentrations between Undertakings' [2008] OJ C95/1, para. 18.

[259] Ibid., para. 16.

[260] Case T-411/07, *Aer Lingus v Commission* [2010] ECR II-3691, esp. para. 64.

[261] On the concept of 'joint venture' in general, see Section 2c.

[262] EUMR, Art. 1(2).

[263] On the calculation of turnover, see ibid., Art. 5. This calculation may still be devilishly complex—especially in groups; see 'Consolidated Jurisdictional Notice' (n. 258), paras 157–218.

[264] EUMR, Art. 1(3).

[265] Ibid., Art. 2. The provision details the factors that the Commission must take into account: 'In making this appraisal, the Commission shall take into account: (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or out with the [Union]; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users,

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.'

[266] Regulation 4046/89, Art. 2(3).

[267] See Joined Cases C-68/94 and C-30/95, *France and others v Commission* [1998] ECR I-1375, esp. para. 178: '[C]ollective dominant positions do not fall outside the scope of the Regulation[.]' The Court has, however, subjected a finding of collective dominance to a heavy burden of proof that requires the fulfilment of three conditions; see Case T-342/99, *Airtours v Commission* [2002] ECR II-2585, esp. para. 62.

[268] EUMR, Art. 2(3).

[269] Ibid., recital 25: 'In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.'

[270] J. Schmidt, 'The New ECMR: "Significant Impediment" or "Significant Improvement"?' (2004) 41 *CML Rev.* 1555 at 1564.

[271] Commission, 'Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings' [2004] OJ C31/5; Commission, 'Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings' [2008] OJ C265/6.

[272] In 2002, the General Court annulled three major Commission decisions on mergers, including Case T-342/99, *Airtours v Commission*. On the burden of proof in merger cases generally, see R. Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) 40 *CML Rev.* 84.

[273] EUMR, Art. 2(1)(b).

[274] Horizontal Guidelines (n. 116), para. 77 (emphasis added). On the efficiency defence under the EUMR, see D. Gerard, 'Merger Control Policy: How to Give Meaningful Consideration to Efficiency Claims' (2006) 40 *CML Rev* 1367; H. Iversen, 'The Efficiency Defence in EC Merger Control' (2010) 31 *ECLR* 370.

[275] Horizontal Guidelines (n. 116), paras 79–86.

[276] Case T-342/07, *Ryanair v Commission*, [2010] ECR II-3457, paras 386–443. For an analysis of the efficiency defence, see P. Kuoppamäki and S. Torstila, 'Is There a Future for an Efficiency Defence in EU Merger Control?' (2016) 41 *EL Rev.* 687.

[277] For academic discussions, see G. Monti and E. Rousseva, 'Failing Firms in the Framework of the EC Merger Regulation' (1999) 24 *EL Rev.* 38; I. Kokkoris, 'Failing Firm Defence in the European Union: A Panacea for Mergers?' (2006) 27 *ECLR* 494.

[278] Horizontal Guidelines (n. 116), paras 89–90 (emphasis added).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024

[279] Joined Cases C-68/94 and 30/95, *France and others v Commission*, esp. paras 112–14: ‘It must be observed, first of all, that the fact that the conditions set by the Commission for concluding that there was no causal link between the concentration and the deterioration of the competitive structure do not entirely coincide with the conditions applied in connection with the United States “failing company defence” is not in itself a ground of invalidity of the contested decision. Solely the fact that the conditions set by the Commission were not capable of excluding the possibility that a concentration might be the cause of the deterioration in the competitive structure of the market could constitute a ground of invalidity of the decision. In the present case, the French Government disputes the relevance of the criterion that it must be verified that the acquiring undertaking would in any event obtain the acquired undertaking’s share of the market if the latter were to be forced out of the market. However, in the absence of that criterion, a concentration could, provided the other criteria were satisfied, be considered as not being the cause of the deterioration of the competitive structure of the market even though it appeared that, in the event of the concentration not proceeding, the acquiring undertaking would not gain the entire market share of the acquired undertaking. Thus, it would be possible to deny the existence of a causal link between the concentration and the deterioration of the competitive structure of the market even though the competitive structure of the market would deteriorate to a lesser extent if the concentration did not proceed.’

[280] EUMR, Art. 21(4) (emphasis added). For an analysis of the provision, see D. Gerard, ‘Protectionist Threats against Cross-Border Mergers: Unexplored Avenues to Strengthen the Effectiveness of Article 21 ECMR’ (2008) 45 *CML Rev.* 987.

[281] For an application of Art. 21(4) EUMR, see Case M.567, *Lyonnaise des Eaux/Northumbrian Water* [1996] OJ C11/3.

[282] See Case C-42/01, *Portugal v Commission* [2004] ECR I-6079.

[283] For excellent general analyses of the various ways in which a State could interfere with the competition rules, see T. Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press, 2005); E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart, 2007); W. Sauter and H. Schepel, *State and Market in European Union Law* (Cambridge University Press, 2009).

© Robert Schütze 2021

Related Books

View the Essential Cases in EU law

Related Links

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198864660>*

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: LUISS Guido Carli; date: 05 March 2024