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## **EU and German Competition Law I (Basics, Cartels, Sanctions)**

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Room III, Alte Universität

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## A. Basics

### I. Introduction

#### 1. Important texts

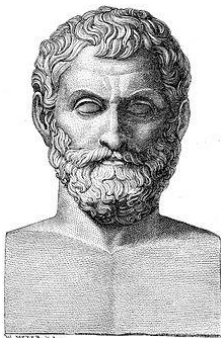
##### *a) Court of Justice, Judgment of 6 January 2004, Joined Cases C-2/01 P and C-3/01 P - Bundesverband der Arzneimittel-Importeure and Commission of the European Communities v Bayer AG*

The leading German Pharmaceutical Company Bayer manufactures Adalat, a medicinal drug for the treatment of cardio-vascular disease. In most Member States, the competent national authorities fix the price of medicinal products. Between 1989 and 1993, the price of Adalat in France and Spain was much lower than in the United Kingdom there was an average difference of about 40 percent. Those price differences led Spanish and French wholesalers to export a large quantity of Adalat to the United Kingdom, resulting in a so-called “parallel import” into the UK. That practice led to an important loss of turnover for the British subsidiary of Bayer.

Alternative 1: To restrict the parallel imports Bayer changed its supply policy and no longer met all the orders placed by Spanish and French wholesalers.

Alternative 2: Bayer and the French and Spanish wholesalers formulate an agreement according to which the latter refrain from accommodating parallel imports into the UK.

##### *b) Aristotle (384 - 322 BC), Politics, Book 1, Chapter 11 (Section 1259a)*



Thales [of Miletus, c. 624 – c. 546 BC], so the story goes, because of his poverty was taunted with the uselessness of philosophy; but from his knowledge of astronomy he had observed while it was still winter that there was going to be a large crop of olives, so he raised a small sum of money and paid round deposits for the whole of the olive-presses in Miletus and Chios, which he hired at a low rent as nobody was running him up; and when the season arrived, there was a sudden demand for a number of presses at the same time, and by letting them out on what terms he liked he realized a large sum of money, so proving that it is easy for philosophers to be rich if they choose, but this is not what they care about. Thales then is reported to have thus displayed his wisdom, but as a matter of fact this device of taking an opportunity to secure a monopoly is a universal principle of business; [...]  
(<http://data.perseus.org/citations/urn:cts:greekLit:tlg0086.tlg035.perseus-eng1:1.1259a>)

### *c) Constitution of the Emperor Zeno (Codex Iustinianus, 4, 59, 2)*

#### **Imperator Zeno.**

***Iubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad uictum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicto aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus coniuraret aut pacisceretur, ut species diversorum corporum negotiationis non minoris, quam inter se statuerint, venumdentur.***

1. *Aedificiorum quoque artifices vel ergolabi aliorumque diversorum operum professores et balneatores penitus arceantur pacta inter se componere, ut ne quis quod alteri commissum sit opus impleat aut iniunctam alteri sollicitudinem alter intercapiat : data licentia unicuique ab altero inchoatum et derelictum opus per alterum sine aliquo timore dispendii implere omnique huiusmodi facinora denunciandi sine ulla formidine et sine iudiciariis sumptibus.*

2. *Si quis autem monopolium ausus fuerit exercere, bonis propriis spoliatus perpetuitate damnetur exilii.*

3. *Ceterarum praeterea professionum primates si in posterum aut super taxandis rerum pretiis aut super quibuslibet illicitis placitis ausi fuerint convenientes huiusmodi sese pactis constringere, quinquaginta librarum auri solutione percelli decernimus : officio tuae sedis quadraginta librarum auri condemnatione multando, si in prohibitis monopoliis et interdictis corporum pactionibus commissas forte, si hoc evenerit, saluberrimae nostrae dispositionis condemnationes venalitate interdum aut dissimulatione vel quolibet vitio minus fuerit exsecutum.*

*\* ZENO A. CONSTANTINO PU. \* <A 483 D. XVII K. IAN. POST CONSULATUM TROCONDAE.>*

#### **Emperors Zeno to Constantinus, City Prefect.**

**We order that no one shall have a monopoly, acquired either on his own initiative or by the authority of an imperial rescript heretofore or hereafter elicited, or by the authority of a pragmatic sanction, or by an imperial notation, of any kind of cloth, fish, shell-fish, sea-urchin, or of any other article used for food or for any other purpose; nor shall anyone swear or agree in any unlawful meeting not to sell the various articles of commerce for less than the price agreed on.**

1. Building artificers also and contractors, persons of the other trades and bath-keepers, are **entirely forbidden to agree among themselves not to complete any work let to someone else, or not to interfere in any undertaking put in charge of another;** and every person has permission, without injurious results to him, to complete any work commenced but left unfinished by another, and to denounce every such offense without fear and without any court expense.

2. And if anyone shall dare to carry on any monopoly, **his goods shall be confiscated and he shall be sent into perpetual exile.**

3. If the chiefs, moreover, of the various trades hereafter dare to make agreements as to fixing prices of things, or if they enter into and bind themselves by any other illegal contracts, we

decree that they shall be punished by a **fine** of fifty pounds of gold. **Your official staff** will be punished by a fine of forty pounds of gold, if condemnations pursuant to our salutary order for prohibited monopolies and forbidden agreements of guilds are not, perchance, inflicted by reason of any venality, dissimulation, or some other disobedience of duty.

Given December 16 (483).

#### *d) Treaty on the Functioning of the European Union (TFEU)*

##### **Article 101 TFEU**

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

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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

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

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– any agreement or category of agreements between undertakings,

– any decision or category of decisions by associations of undertakings,

– any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

##### **Article 102 TFEU**

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 7 - Finding and termination of infringement**

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. [...]

## **Article 9 – Commitments**

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. [...]

## **Article 23 – Fines**

[...]

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

[...]

## **2. Important terms**

Different levels of the production or distribution process, e.g. Producers of raw materials – manufacturers – wholesalers – retailers – final consumers

Cartel = Arrangement between competing firms designed to limit or eliminate competition between them e.g. by fixing prices, limiting output, sharing markets, allocating customers or territories, bid rigging

Concerted practice = Coordination of competitive behaviour between undertakings not having reached the stage of concluding a formal agreement.

Abuse of a dominant position

Dominant position = Having a dominant position on the relevant market allows a firm to behave (to a certain degree) independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would, for instance, have the ability to set prices above the competitive level.

Treaty on the Functioning of the European Union (TFEU)

Control of concentration between undertakings

Vertical agreement = Arrangement between undertakings of different levels of the production or distribution chain

Horizontal agreement = Arrangement between actual or potential competitors

Different levels of the production or distribution chain

Downstream market = Market at the next stage of the production/distribution chain

Parallel trade = Trade in products, which takes place outside the official distribution system set up by a particular firm

European Merger Control Regulation

German Act against Restrictions of Competition

Antitrust authority, e.g. the European Commission with its Directorate General Competition, the German Bundeskartellamt (Federal Cartel Office), the French Autorité de la concurrence, the Swiss Wettbewerbskommission, the British Competition and Markets Authority and the Irish Competition and Consumer Protection Commission.

Unilateral conduct (synonymous: Single firm conduct) = market behaviour of an undertaking. Some kinds of behaviour may be considered restrictive if the undertaking holds a monopoly or has substantial market power.

## II. Extraterritorial reach and enforcement of EU competition law

### 1. Important texts

#### *a) Judgment of the Court of First Instance of 25.3.1999 in Case T-102/96, Gencor Ltd v Commission [1999] ECR, p. II-0753, at paragraphs 89–92.)*

“[The application of the merger regulation to a merger between companies located outside EU territory] is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”

#### *b) General Court of the European Union, PRESS RELEASE No. 82/14 of 12 June 2009 on its Judgment in Case T-286/09 (Intel Corp. v Commission)*

“In so far as concerns the question whether the Commission had jurisdiction under international law to punish Intel for its anti-competitive conduct, the General Court observes that such jurisdiction can be established on the basis of both the **implementation and the effects of the anti-competitive conduct in the European Union**. In that regard, the General Court finds that the conduct of Intel to which the Commission refers in the contested decision was capable of having a substantial, immediate and foreseeable effect within the EEA. Accordingly, the Commission had jurisdiction to punish that conduct.”

## 2. Three examples

### *a) LCD-Cartel (Judgment of the Court of 9 July 2015 (Case C-231/14 P) InnoLux Corp. v. Commission)*

Cartel of six Korean and Taiwanese producers of liquid crystal display panels (LCD panels) which are the main component of flat screens used in televisions and computers

Three different ways of distributing the cartelized panels:

- direct sales into the EU (to European manufacturers of televisions and computers)
- direct sales into the EU of the final products (televisions, computers) manufactured by subsidiaries of members of the cartel
- sales into the EU of the final products (televisions, computers) manufactured by third parties outside the EU

### *b) Abuse of a dominant position by INTEL Corp. (Commission decision of 13 May 2009), see also the Press Release above*

Abuse of a dominant position by

- granting rebates to PC manufacturers such as Dell, HP and Lenovo subject to them obtaining all or almost all of their processors from Intel Corp.,
- making direct payments to an important downstream computer retailer (“Media Markt”) on the condition it only sells PCs with Intel processors.

### *c) Merger of Boeing and McDonnell-Douglas*

The proposed merger was

- cleared by the FTC (US) on 1 July 1997,
- cleared, but subject to conditions and requirements, by the European Commission on 31 July 1997

## 3. Important terms

Extraterritorial jurisdiction = the ability of a court or an authority to exercise power beyond its territorial limits



Foreign-to-foreign merger = all parties to the merger are located outside the European Union.

Effects doctrine - allows for jurisdiction over foreign offenders and foreign conduct, so long as the economic effects of the anticompetitive conduct are experienced on the domestic market

Implementation test – test used by the European Courts measuring the impact of a anticompetitive behaviour originating from outside the EU in the EU

(International) Comity = principle that one jurisdiction will extend certain courtesies to other nations and its jurisdictions, especially by recognizing the validity and effect of their executive, legislative, and judicial acts.

### III. The relationship between national and EU competition law

#### 1. Important texts

*a) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003)*

#### **Article 3 – Relationship between Articles 81 and 82 of the Treaty and national competition laws**

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

*b) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 024 , 29/01/2004 P. 0001 - 0022*

Whereas:

[...]

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed **exclusively at Community level**, in application of a **"one-stop shop" system** and in compliance with the principle of **subsidiarity**. Concentrations not covered by this Regulation come, in principle, within the **jurisdiction of the Member States**.

[...]

### Article 1 Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-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 Community-wide turnover within one and the same Member State.

### 2. Important terms

Recitals – the part of the act (esp. regulations and directives), which contains the statement of reasons for its adoption. The statement of reasons begins with the word 'whereas' (=considering the fact that).

one-stop shop principle in merger control proceedings – principle according to which each merger should be handled exclusively by one jurisdiction so that companies can request clearance for their mergers and acquisitions in the whole of the EU from only one authority applying only one merger control regime.

## IV. Article 101 TFEU – Introduction

### 1. Important texts

*a) Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal 2011 C-11/1*

(2) 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.

(3) On the other hand, horizontal co-operation agreements may lead to competition problems. This is, for example, the case if the parties agree to fix prices or output or to share markets, or if the co-operation enables the parties to maintain, gain or increase market power and thereby is likely to give rise to negative market effects with respect to prices, output, product quality, product variety or innovation.

***b) Commission, Guidelines on Vertical Restraints, Official Journal 2011 C 130/1.***

(98) **Vertical restraints are generally less harmful than horizontal restraints.** The main reason for the greater focus on horizontal restraints is that such restraints may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships, the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anticompetitively. In vertical relationships, the product of the one is the input for the other-, in other words, the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.

[...]

(100) The **negative effects** on the market that may result from vertical restraints which EU competition law aims at preventing are the following:

- (a) anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;
- (b) softening of competition between the supplier and its competitors and/or facilitation of collusion amongst these suppliers, often referred to as reduction of inter-brand competition;
- (c) softening of competition between the buyer and its competitors and/or facilitation of collusion amongst these competitors, often referred to as reduction of intra-brand competition if it concerns distributors' competition on the basis of the brand or product of the same supplier;
- (d) the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose.

[...]

(103) It is important to recognise that vertical restraints may have **positive effects** by, in particular, promoting non-price competition and improved quality of services. [...]

- (a) To solve a 'free-rider' problem. One distributor may free-ride on the promotion efforts of another distributor. That type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. [...]
- (b) To 'open up or enter new markets'. Where a manufacturer wants to enter a new geographic market, for instance by exporting to another country for the first time, this may involve special 'first time investments' by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection to the distributor so that it can recoup these investments by temporarily charging a higher price. Distributors based in other markets should then be restrained for a limited period from selling on the new market. [...]
- (c) [...]
- (d) The so-called 'hold-up problem'. Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular requirement of one of its customers. The investor may not commit the necessary investments before particular supply arrangements are fixed.
- (e) [...]

## 2. Important terms

Horizontal Agreements = arrangement between actual or potential competitors of the same level of the production or distribution chain.

Competition parameters = parameters possibly covered by the arrangement, e.g. prices, market sharing (allocation of sales areas, customers, bid-rigging), quality, innovation,

product development and diversification, capacity adjustment, production quantities (agreements on quotas), warranty.

Market Entry Barriers = Natural Barriers (transportation costs, high investment costs) / State originated Barriers (state taxes and tariffs, custom duties, standards)

Vertical Agreements = Agreements for the sale and purchase of goods or services, which are entered into between companies operating at different levels of the production or distribution chain.

Price recommendation or resale price maintenance = e.g. for the resale to the consumer

Single branding = agreement which causes the buyer not to purchase, sell or resell the major part of his requirements of a product from one brand. (often combined with an exclusive purchase agreement)

Exclusive purchase agreement = obligation of the retailer to purchase a certain type of product exclusively from one supplier.

Exclusive supply agreement = obligation of the supplier to sell a specific product exclusively to one retailer.

Exclusive distribution agreements = obligation of the supplier to sell his products only to one retailer in a specific territory.

Selective distribution agreements = restriction of the number of authorised distributors in the same geographic area (e.g. depending on characteristics like sales space or a certain way of presenting the product) and the prohibition of sales to non-authorised distributors. (Def. Art. 1 I lit. e VBER (EU) Nr.330/2010)

Franchising = one undertaking (franchiser) grants to the other (franchisee) the right to exploit a package of industrial and/or intellectual property rights.

Tied selling = commercial practice of conducting the sale of one product on the purchase of another.

Inter-brand competition = competition between firms that have developed brands or labels for their products in order to distinguish them from other brands sold in the same market segment (Coca-Cola vs. Pepsi or Mercedes v. BMW)

Intra-brand competition = competition among distributors or retailers of the same branded product.

## V. The prohibition of anticompetitive agreements in Art. 101 TFEU

### 1. Important texts

#### ***a) Court of Justice, Judgment of 9 July 1969, Case 6/69 – Völk v. Vervaecke, ECR 295, 302***

*AN AGREEMENT FALLS OUTSIDE THE PROHIBITION IN ARTICLE 85 WHEN IT HAS ONLY AN INSIGNIFICANT EFFECT ON THE MARKETS, TAKING INTO ACCOUNT THE WEAK POSITION WHICH THE PERSONS CONCERNED HAVE ON THE MARKET OF THE PRODUCT IN QUESTION, THUS AN EXCLUSIVE DEALING AGREEMENT, EVEN WITH ABSOLUTE TERRITORIAL PROTECTION, MAY, HAVING REGARD TO THE WEAK POSITION OF THE PERSONS CONCERNED ON THE MARKET IN THE PRODUCTS IN QUESTION IN THE AREA COVERED BY THE ABSOLUTE PROTECTION, ESCAPE THE PROHIBITION LAID DOWN IN ARTICLE 85(1) [now Art. 101(1) TFEU].*

*(about an agreement conferring the exclusive right to sell washing machines of a German producer up on a Belgian company, whilst market shares of that producer ranged from 0,08 to 0,6 per cent of the market for the production of washing machines in the EU resp. in Belgium and Luxembourg in the present case)*

#### ***b) Commission notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)***

18. It follows from the wording of Articles 81 and 82 and the case law of the Community Courts that in the application of the effect on trade criterion three elements in particular must be addressed:

- (a) The concept of ‘trade between Member States’,
- (b) The notion of ‘may affect’, and
- (c) The concept of ‘appreciability’.

19. The concept of ‘trade’ is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity including establishment. [...]

24. The ‘pattern of trade’-test developed by the Court of Justice contains the following main elements, which are dealt with in the following sections:

- (a) ‘A sufficient degree of probability on the basis of a set of objective factors of law or fact’,
- (b) An influence on the ‘pattern of trade between Member States’,
- (c) ‘A direct or indirect, actual or potential influence’ on the pattern of trade. [...]

52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:

(a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and

(b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro.

***c) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (2001/C 368/07)***

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):

(a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); or

(b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).  
[...]

## 2. Important terms

**Undertaking** = For the purpose of EU antitrust law, any entity engaged in an economic activity, that is, an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded.

**Agreement** = Contract or Gentleman's agreement

**Concerted practice** = a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.

**Effect on trade between Member States** = A necessary condition for the application of EU antitrust rules.

**NAAT-Rule** = no appreciable affection of trade (cf. Commission notice 2004/C 101/07 para. 52).  
Differentiate between NAAT-Rule and "De minimis" notice!

**"De minimis" notice** = Communication from the Commission clarifying under what conditions the impact of an agreement or practice on competition within the common market can, in its view, be considered to be of minor importance and are thus not examined by the Commission under EU competition law. The notice is not binding for national competition authorities (NCAs) and the Courts.

**Hard-core restrictions** = Restrictions of competition by agreements, which are considered as being particularly harmful. Examples of hard-core restrictions in horizontal relationships are price fixing agreements, the allocation of markets or the

restriction of the quantities of goods or services to be produced, bought or supplied. Examples of hard-core restrictions in vertical relationships are resale price maintenance and certain territorial restrictions.

## VI. The application of Article 101 (3) TFEU providing exemption for agreements and categories of agreements

### 1. Important texts

*a) Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [Official Journal No C 101 of 27.4.2004].*

#### Summery

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (ex-Article 81(1) of the Treaty Establishing the European Community (TEC)) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between European Union (EU) countries and which have as their object or effect the prevention, restriction or distortion of competition. As an exception to this rule, Article 101(3) TFEU (ex-Article 81(3) TEC) provides that the prohibition contained in Article 101(1) TFEU may be declared inapplicable in case of agreements which 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 benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

The assessment under Article 101 TFEU thus consists of two parts. The first step is to assess whether an agreement between undertakings that is capable of affecting trade between EU countries has an anti-competitive object or actual or potential anti-competitive effects. Article 101(3) TFEU becomes relevant only when an agreement between undertakings restricts competition within the meaning of Article 101(1) TFEU. In the case of non-restrictive agreements, there is no need to examine any benefits resulting from the agreement. [...]

The second step, which becomes relevant only when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects. The balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) TFEU. The present guidelines examine the four conditions of Article 101(3) TFEU:

- efficiency gains;
- fair share for consumers;
- indispensability of the restrictions;
- no elimination of competition.

Given that these four conditions are cumulative, it is unnecessary to examine any remaining conditions once it is found that one of them is not fulfilled. In individual cases, it may therefore be appropriate to consider the four conditions in a different order. For the purposes of these guidelines, it is considered appropriate to invert the order of the second and the third condition and thus deal with the issue of indispensability before the issue of pass-on to consumers. The analysis of pass-on requires a balancing of the negative and positive effects of an agreement on consumers. It should not include the effects of any restrictions that already fail the indispensability test and are, for that reason, prohibited by Article 101 TFEU.

Article 101(3) TFEU does not exclude a priori certain types of agreement from its scope. As a matter of principle, all restrictive agreements that fulfil the four conditions of Article 101(3) TFEU are covered by the exception rule. However, severe restrictions of competition are unlikely to fulfil the conditions of Article 101(3) TFEU. Such restrictions are usually blacklisted in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the first two conditions of Article 101(3) TFEU. They neither create objective economic benefits nor benefit consumers.

The present guidelines are non-binding and without prejudice to the case law of the Court of Justice and the Court of First Instance, concerning the interpretation of Article 101(1) and 101(3) TFEU or to the interpretation that the EU courts place on those provisions in the future.

***b) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Block exemption for vertical agreements).***

**SUMMARY**

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (ex-Article 81(1) of the Treaty Establishing the European Community (TEC)) prohibits agreements that may affect trade between European Union (EU) countries and which prevent, restrict or distort competition. **Agreements which create sufficient benefits to outweigh the anti-competitive effects** are exempt from this prohibition under Article 101(3) TFEU (ex-Article 81(3) TEC).

Vertical agreements are agreements for the sale and purchase of goods or services, which are entered into between companies operating at different levels of the production or distribution chain. Distribution agreements between manufacturers and wholesalers or retailers are typical examples of vertical agreements. [...] [A] restriction of competition may occur if the agreement contains restraints on the supplier or the buyer, for instance an obligation on the buyer not to purchase competing brands. These vertical restraints may not only have negative effects, but also positive effects. They may, for instance, help a manufacturer to enter a new market [...]

[T]he Commission has adopted this Regulation (EU) No 330/2010, the Block Exemption Regulation (the BER), which provides a **safe harbour** for most vertical agreements. The BER renders, by block exemption, the prohibition of Article 101(1) TFEU inapplicable to vertical agreements which fulfil certain requirements. [...]

The BER contains certain requirements that must be fulfilled before a particular vertical agreement is exempt from the prohibition of Article 101(1) TFEU. The first requirement is that the agreement does not contain any of the hardcore restrictions set out in the BER. The second requirement concerns a **market share cap of 30 %** for both suppliers and buyers. Thirdly, the BER contains conditions relating to three specific restrictions.

***Hardcore restrictions***

This BER contains five hardcore restrictions that lead to the exclusion of the whole agreement from the benefit of the BER, even if the market shares of the supplier and buyer are below 30 %. Hardcore restrictions are considered severe restrictions of competition because of the likely harm they cause to consumers. In most cases, they will be prohibited and it is considered unlikely that vertical agreements containing such hardcore restrictions fulfil the conditions of Article 101(3) TFEU.

The first hardcore restriction concerns **resale price maintenance**: suppliers are not allowed to fix the (minimum) price at which distributors can resell their products.

The second hardcore restriction concerns restrictions concerning the territory into which or the customers to whom the buyer may sell. This hardcore restriction relates to market partitioning by



territory or by customer. Distributors must remain free to decide where and to whom they sell. The BER contains exceptions to this rule, which, for instance, enable companies to operate an exclusive distribution system or a selective distribution system.

[...]

### ***The 30% market share cap***

A vertical agreement is covered by this BER if both the supplier and the buyer of the goods or services do not have a market share exceeding 30 %. [...]

[...]

### **Article 2 Exemption**

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

This exemption shall apply to the extent that such agreements contain vertical restraints. [...]

### **Article 3 Market share threshold**

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

### **Article 4 Restrictions that remove the benefit of the block exemption — hardcore restrictions**

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

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except: [...]

### **Article 5 Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:

- (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
- (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers. [...]

## 2. Important terms

Block exemption (regulation) = Regulation issued by the Commission (rarely by the Council) pursuant to Article 101 (3) of the TFEU, specifying the conditions under which certain types of agreements are exempted from the prohibition on restrictive agreements laid down in Article 101(1) of the TFEU. Block exemption regulations exist, for instance, for vertical agreements, R & D agreements, specialisation agreements, and technology transfer agreements.

R & D agreements (Research and Development Agreement) = Agreement on cooperation between competitors on research and development

Application of Article 101 (3) in individual cases

Market share cap of 30 % (synonymous: 30 % market share threshold) = maximum market share both the supplier and the buyer of the goods or services in question may not exceed if they want to benefit from the block exemption

Hardcore restrictions = severe restrictions of competition because of the likely harm they cause to consumers, e. g. resale price maintenance (“black-listed restrictions”)

Resale price maintenance = fixing of the (minimum) price at which distributors can resell certain products

Market partitioning by territory or customer (by vertical agreements) = allocating territories or customers into which, or the customers to whom, the bounded party may sell

Safe harbor = a provision that specifies that certain conduct (agreement) will be deemed not to violate a given rule

Economies of scale = declining cost per unit of output as output increases (*Skaleneffekt*).

Economies of scope = achieving cost savings by producing different products based on the same input (*Verbundvorteil*).

Principle of proportionality = Principle according to which no action should go beyond what is necessary to achieve the objectives of the law.

## **VII. Enforcement of competition law by the Commission I (prohibition and commitment decisions)**

### 1. Important texts

*a) Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*

**Art. 7 of regulation No 1/2003 Finding and termination of infringement – Prohibition decisions**

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

#### **Article 8 of Regulation No 1/2003 Interim measures**

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

#### **Article 9 of Regulation No 1/2003 Commitments – Commitment decisions**

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

#### **Article 29 of Regulation No 1/2003 Withdrawal in individual cases – Decisions withdrawing the benefit of a block exemption regulation**

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

*b) Commission, Antitrust Manual of Procedures Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012*

**16 – Commitment Decisions**

(7) Commitment decisions are not based on full investigations and do not reach definitive conclusions on the facts of a case or the application of the law. In addition, commitment decisions involve less procedural steps (and therefore less resources) than a final decision under Article 7 (e.g. Preliminary Assessment instead Statement of Objections; no access to the file is expressly foreseen, no hearing; usually a shorter decision). As a result, the "commitment path" can bring a swifter change to the market, without necessarily being less effective.

(8) The fact that the commitments are not imposed by the Commission but voluntarily submitted and implemented only after discussions with the parties as well as a market test may also facilitate the later implementation of the commitments.

(9) From a company's perspective, faster proceedings and the absence of a finding of an infringement may be important reasons to offer commitments<sup>2</sup>. Also the fact that the remedies are not imposed and that the procedure can give faster legal certainty may be taken into account by companies.

*c) Commission Press Release IP/04/382 of 24th March 2004 (Microsoft I - Media Player)*

The European Commission **has concluded**, after a five-year investigation, that Microsoft Corporation **broke European Union competition law** by leveraging its near monopoly in the market for PC operating systems (OS) onto the markets for work group server operating systems and for media players. [...] Microsoft **is also required**, within 90 days, to offer a version of its Windows OS without Windows Media Player to PC manufacturers (or when selling directly to end users). In addition, Microsoft is **fined € 497 million** for abusing its market power in the EU.  
[...]

Microsoft abused its market power [...] by tying its Windows Media Player (WMP), a product where it faced competition, with its ubiquitous Windows operating system.

[...] Microsoft's conduct has significantly weakened competition on the media player market. [...]

**Remedies**

In order to restore the conditions of fair competition, the Commission has imposed the following remedies:

As regards tying, Microsoft is required, within 90 days, to offer to PC manufacturers a version of its Windows client PC operating system without WMP. The un-tying remedy does not mean that consumers will obtain PCs and operating systems without media players. Most consumers purchase a PC from a PC manufacturer which has already put together on their behalf a bundle of an operating system and a media player. As a result of the Commission's remedy, the configuration of such bundles will reflect what consumers want, and not what Microsoft imposes.

Microsoft retains the right to offer a version of its Windows client PC operating system product with WMP. However, Microsoft must refrain from using any commercial, technological or contractual terms that would have the effect of rendering the unbundled version of Windows less attractive or performing. In particular, it must not give PC manufacturers a discount conditional on their buying Windows together with WMP. [...]

*d) Commission, Press Release IP/09/1941 of 16th December 2009 (Microsoft II - Internet Explorer)*

The European Commission has adopted a **decision that renders legally binding commitments** offered by Microsoft to boost competition on the web browser market. The commitments address Commission

concerns that Microsoft **may have tied** its web browser Internet Explorer to the Windows PC operating system in breach of EU rules on abuse of a dominant market position (Article 102 of the Treaty on the Functioning of the European Union -TFEU). Microsoft commits to offer European users of Windows choice among different web browsers and to allow computer manufacturers and users the possibility to turn Internet Explorer off. [...]

Under the commitments approved by the Commission, Microsoft will make available for five years in the European Economic Area (through the Windows Update mechanism) a "Choice Screen" enabling users of Windows XP, Windows Vista and Windows 7 to choose which web browser(s) they want to install in addition to, or instead of, Microsoft's browser Internet Explorer.

The commitments also provide that computer manufacturers will be able to install competing web browsers, set those as default and turn Internet Explorer off.

Today's decision follows a **Statement of Objections** sent to Microsoft by the Commission on 15 January 2009 (see MEMO/09/15). The Statement of Objections outlined the Commission's **preliminary view** that Microsoft may have infringed Article 82 of the EC Treaty (now Article 102 of the Treaty on the Functioning of the European Union) by abusing its dominant position in the market for client PC operating systems through the tying of Internet Explorer to Windows.

[...] The Commission's decision is based on **Article 9 of Regulation 1/2003** on the implementation of EU antitrust rules. It takes into account the results of the **market test** launched in October 2009 (see MEMO/09/439). This decision, which does not conclude whether there is an infringement, legally binds Microsoft to the commitments it has offered and ends the Commission's investigation. If Microsoft were to break its commitments, the Commission could impose a fine of up to 10% of Microsoft's total annual turnover without having to prove any violation of EU antitrust rules. [...]

## 2. Important terms

Statement of objections = Written communication which the Commission has to address to persons or undertakings before adopting a decision that negatively affects their rights. This obligation of the Commission flows from the addressee's rights of defense, which require that they be given the opportunity to make their point of view known on any objection the Commission, may wish to make in a decision. The SO must contain all objections on which the Commission intends to rely upon in its final decision. The SO is an important procedural step foreseen in all competition procedures in which the Commission has the right to adopt negative decisions.

Preliminary Assessment = Commission's summery assessment of the behaviour of one or more undertakings. The assessment does not contain definitive conclusions on the facts of a case or the application of the law.

Clearance decision subject to conditions and obligations (Merger control) = Decision by the Commission permitting a merger under certain conditions

## VIII. Enforcement of competition law by the Commission II (fines)

### 1. Important texts

*a) Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*

**Article 23 of Regulation No 1/2003 Fines – Decisions imposing fines**

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);

(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;

... [other procedural infringements]

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed **10 % of its total turnover** in the preceding business year.

[...]

3. In fixing the amount of the fine, regard shall be had both to the **gravity** and to the **duration** of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

[...]

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

#### **Article 25 of Regulation No 1/2003 - Limitation periods for the imposition of penalties**

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases. [...]

#### **Article 31 of Regulation No 1/2003 - Review by the Court of Justice**

The Court of Justice shall have **unlimited jurisdiction** to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

*b) Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, Official Journal C 210 of 1.9.2006*

**SUMMARY**

The level of a must be sufficiently high both to **punish** the firms involved and to **deter** others from practices that infringe the competition rules.

[...]

**Basic amount of the fine**

The basic amount is calculated as a **percentage of the value of the sales connected with the infringement**, multiplied by the number of **years** the infringement has been taking place.

The percentage of the value of sales is determined according to the **gravity** of the infringement (nature, combined market share of all the parties concerned, geographic scope, etc.) and may be as much as 30 %.

The Commission then adds to this initial calculation a further amount [...]. This will be between 15 and 25 % of the value of annual sales, irrespective of the duration of the infringement. This is intended to deter firms from engaging in illegal practices in the first place.

**Adjustments to the basic amount**

The basic amount, calculated according to the method described above, may then be adjusted by the Commission, downwards if it finds that there are **mitigating circumstances**, or upwards in the event of **aggravating circumstances**.

Firms that commit similar infringements again will now be fined more heavily. The Commission will penalise **re-offending**, taking into account not only its own earlier decisions but also rulings by national authorities. Firms that re-offend could now face a 100 % increase in their fine for each subsequent infringement.

[...]

*c) Commission Notice on Immunity from fines and reduction of fines in cartel cases, Official Journal 2006 No C 298, p. 17 et seq.*

**SUMMARY**

The policy of **leniency** rewards firms who denounce cartels in which they have participated by granting them **total immunity** or a **reduction of the fines** which would otherwise be imposed on them.

It has been particularly effective in helping to uncover, destabilise and eliminate cartels, particularly secret ones. By their very nature, secret cartels are extremely difficult to detect and investigate without the cooperation of one of their participants.

[...]

**Immunity from fines**

A firm participating in a cartel which it wishes to denounce may request total immunity from fines if it is the **first firm** to provide evidence of a cartel hitherto unknown to the European Commission or, if the Commission is aware of the cartel, if the firm is the first to provide it with crucial information enabling it to establish its existence.

[...]

The Commission is also able to accept a request for immunity on the basis of limited information. The Commission may therefore grant a **marker** protecting an immunity applicant's place in the queue in order to allow for the gathering of the necessary information and evidence.

It is still the case that a firm that forced other firms to participate or remain in a cartel can be refused total immunity from fines.

### **Reduction of fines**

A firm which cannot claim total immunity may nevertheless request a reduction of fines if it supplies evidence which represents **significant added value** with respect to the evidence already in the Commission's possession.

[...]

The first firm meeting these conditions will be granted a 30-50 % reduction in the fine which would otherwise have been imposed, the second 20-30 % and the others up to 20 %. The amount of the reduction within these bands depends on when the evidence was supplied and the extent to which it represents added value.

Moreover, evidence which enables additional facts increasing the gravity or the duration of the infringement to be established will in future be rewarded by being excluded from the calculation of the fine to be imposed on the firm which provided it.

Conditions entitling firms to immunity or a reduction of fines

Immunity or a reduction of fines remain conditional on the firm cooperating fully, on a continuous basis and quickly throughout the procedure. Moreover, the firm's cooperation must henceforth also be genuine. The firm is required to supply information which is accurate, not misleading and complete.

It must also have withdrawn immediately from the cartel. However, the Commission can apply flexibility regarding this requirement if it considers that it might otherwise be unable to carry out its inspections in full.

In addition, the firm must in future not have destroyed, falsified or concealed evidence of the cartel during the period in which it was planning to request leniency.

## **2. Important terms**

Fines (Article 23 Reg. 1/2003) = monetary penalty imposed by the Commission to be paid by enterprises to the European Union as a punishment either for an infringement of substantive competition law or for an infringement of procedural law.

Periodic Penalty Payments = designed to compel undertakings to do what the Commission requires by penalizing defiance according to Article 24 Reg. 1/2003

Decision imposing fines or periodic penalty payments



Limitation period = stated period of time after an event when legal proceedings may be initiated. When the period of time specified in a statute of limitations passes, a claim can no longer be filed.

Leniency program = a program rewarding firms which denounce cartels in which they have participated by granting them total immunity or a reduction of the fines

Intentional or negligent infringement of (competition) law

Compliance program = program intended to prevent infractions of the law

## IX. Private enforcement of competition law

### 1. Important texts

*a) DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1*

Whereas:

[...]

(13) The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — **irrespective of the existence of a direct contractual relationship with the infringing undertaking** [...]. This Directive should not require Member States to introduce **collective redress mechanisms** for the enforcement of Articles 101 and 102 TFEU.

(14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

[...]

(26) [...] as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programs are also important for the effectiveness of actions for damages in cartel cases. [...] Such disclosure [of leniency statements] would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability [...]. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. [...]

### Article 1 – Subject matter and scope

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an **undertaking** or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.

### Article 5 – Disclosure of evidence

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control [...]

### Article 6 – Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

- (a) Leniency statements; and
- (b) Settlement submissions

### Article 8 - Penalties

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:

- (c) their failure or refusal to comply with the disclosure order of any national court;
- (d) their destruction of relevant evidence;
- (e) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
- (f) their breach of the limits on the use of evidence provided for in this Chapter.

### Article 9 - Effect of national decisions

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is **deemed to be irrefutably established** for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as **at least prima facie evidence** that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

### Article 10 - Limitation periods

2. Limitation periods shall not begin to run before the infringement of competition law **has ceased** and the claimant knows, or can reasonably be expected to know:

- (a) **of the behaviour and the fact that it constitutes an infringement of competition law;**
- (b) of the fact that the infringement of competition law caused harm to it; and
- (c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are **at least five years**.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. **The suspension shall end at the earliest one year after** the infringement decision has become final or after the proceedings are otherwise terminated.

### Article 11 – Joint and several liability

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are **jointly and severally liable** for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:

- (a) to its direct or indirect purchasers or providers; and
- (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

#### **Article 13 - Passing-on defence**

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

#### **Article 14 - Indirect purchasers**

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an **overcharge was passed on to the claimant**, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

### ***b) 15 U.S. Code Chapter 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE***

#### **§ 15 - Suits by persons injured**

(a) *Amount of recovery; prejudgment interest.* Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [...]

#### **§ 16 - Judgements**

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: [...]

### ***c) Federal Rules of Civil Procedure***

#### **Rule 23 (a) [Class actions]**

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

### **Rule 26 (b) (1) [Discovery]**

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense [...].

### **Rule 26 (b) (5)**

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

### **Rule 54 (d) [American Rule]**

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. [...]

### ***d) American Bar Association Model Rules of Professional Conduct (2004)***

#### **Rule 1.5: Fees**

[...]

(c) A **fee may be contingent** on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; [...]

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

### ***e) Joseph Angland, Joint and Several Liability, Contribution, and Claim Reduction, in 3 ISSUES IN COMPETITION LAW AND POLICY 2369 (ABA Section of Antitrust Law 2008)***

A simple example will illustrate the interplay of these three rules—joint and several liability, no contribution, and pro tanto reduction of judgment. Firms A, B, and C, with market shares of 50 percent, 40 percent, and 10 percent, respectively, are alleged to have fixed prices, leading to \$10 million of overcharges, with each firm collecting overcharges in proportion to its market share—i.e., \$5 million, \$4 million, and \$1 million. Firm A settles before trial for \$2 million. The jury finds the remaining defendants liable and total damages equal to \$10 million.

In entering judgment, the court first trebles the \$10 million in damages found by the jury and then subtracts the \$2 million paid by A to settle. Thus, a judgment in the amount of \$28 million is entered for the plaintiff, on which the two nonsettling defendants are jointly and severally liable. The plaintiff may then (1) enforce the entire \$28 million judgment against either of the nonsettling defendants or (2) collect some of the \$28 million from one nonsettler and the remainder of the \$28 million from the other. If, for example, the plaintiff elected to enforce the entire \$28 million judgment against the smaller nonsettler—which received only \$1 million of the overpayments—it could do so. The plaintiff's allocation of liability between the nonsettling defendants is final because no right of contribution lies through which the nonsettler that has "overpaid" can recover its overpayment from its codefendant.

## 2. Important terms

Joint and several liability = each infringer is independently liable for the full extent of the injuries stemming from a tortious act. The injured party has the right to require full compensation from any of the infringers until he has been fully compensated. The party that has compensated the loss may then seek contribution from the other infringers (cf. „gesamtschuldnerische Haftung“, „Ausgleichspflicht“)

tortfeasor (synonymous: wrongdoer) = person who commits a wrongful act that injures another and for which the law provides a legal right to seek relief.

No contribution rule (US law) = The jointly and severally liable tortfeasor that has been chosen by the claimant as target of its damages claim cannot recover the overpayment from its codefendants. Therefore the plaintiff's allocation of liability between the different tortfeasor is final.

Pro tanto reduction (US law) = In case of a settlement the judgment is reduced (only) pro tanto — i.e., the settlement payment is subtracted from the trebled amount of the damages found at trial rather than reducing the plaintiff's pre-trebled damages.

Injured party = a person that has suffered harm (caused by an infringement of competition law)

Immunity recipient = undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency program.

Overcharge = difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

Direct purchaser = natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law.

Indirect purchaser = natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

Severable = capable of being separated of the rest (e. g. an anticompetitive clause of a contract)

Prima facie [ˌpraɪməˈfeɪʃɪ] evidence = not needing proof unless evidence to the contrary is shown.

Irrebuttable (US American) or irrefutable (BE) presumption = presumption not able to be rebutted (refuted). A certain fact is considered as proven/true.

Contingent fee (USA) or conditional fee (BE) = fee charged for a lawyer's services only if the lawyer is successful. The fee is usually calculated as a percentage of the client's net recovery.