Article 101 TFEU

Objectives: each economic operator must determine independently the policy, which he intends to adopt on the market
must (appreciably) affect trade between Member States
Basic structure of Article 101 (I) TFEU
- Undertakings
- Agreement
- Restriction of competition
  - Object
  - Effect
“Affect inter-State Trade”

- **Trade between Member States**
  - includes services and all cross border economic activity
  - national markets
- **May affect**
  - Direct or indirect, actual or potential
  - Sufficient degree of probability
- **Appreciability**

**Undertakings**

- **Undertakings:**
  - Every entity, for example:
    - Natural people
    - Legal persons, companies; co-operatives
    - States, Höfner (*Federal Employment Office*)
  - Engaged in economic activity, for example:
    - Look at specific activity at issue
  - Regardless of the way that its financed
- **Single economic entity doctrine**
Agreements, decisions and concerted practices:
- Overlap with each other
- The Commission with ECJ’s approval not strict in the categorisation
- Defined as Community law concepts which allow a distinction between the unilateral conduct of an undertaking and co-ordination of behaviour or collusion between undertakings
- Co-ordination of behaviour or collusion where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced

Agreements
- Concurrence of wills, form unimportant – faithful expression of the parties’ intention (Bayer judgments)
- Vertical and horizontal agreements (Consten and Grunding judgment)
- Examples:
  - Contracts
  - Gentleman’s agreements
  - Oral
  - Understandings even if no enforcement mechanisms
  - Even if not in the interest of all the undertakings concerned
- No defence that:
  - Parties never intended to implement
  - One was forced by other
- Limited exceptions, e.g. collective bargaining agreements between workers and employers to improve working conditions (*Albany*)
Decisions by associations of undertakings

- Agreements within the framework of collective or representative bodies (trade associations)
  - Examples:
    - Cement dealers’ association
    - National Bar association
    - The international Olympic Committee (Meca-Medina judgment)

Concerted Practices

- Definition
  - A form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded knowingly substitutes practical for the risks of competition (Dyestuffs ECJ judgment). E.g. directly or indirectly:
    - Disclosing their own future course of conduct on the market
    - Influencing another's course of conduct on the market
  - Reciprocity (low threshold)
    - Object or effect of contact was to create conditions of competition, which do not reflect the normal market conditions
      - Objective test
      - Presumption
- No need for:
  - Any effects on the market
  - Working out of an actual plan
• Does not include intelligent adaptation to existing and anticipated conduct of competitors without any direct or indirect contact (Sukier Unie judgment)

• Exchange of information:
  o Unilateral or reciprocal exchange of individualised commercially sensitive information amongst undertakings – a rebuttable presumption of a concerted practice
  o Exchange of info pro statistical or benchmarking purpose allowed under conditions set out in COM Guidelines on horizontal co-op agreements

• Difficult to prove: concerted practice as the only plausible explanation of the conduct – Woodpulp judgment

• (agreements between undertakings, decisions by associations of undertakings and concerted practices as of now collectively referred to as "agreements")

• Agreements need to be likely to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation.

• Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties (point 16 Guidelines on the Application of Art. 101(3))
• All agreements - made between competitors operating at the same level in the economic process (horizontal agreements), or
• between non-competing persons operating at different levels (vertical agreements)

Restriction of Competition

• assessment within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions
• likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand) must be taken into account
Object or effect

- Art. 101 (1) distinguishes between agreements that have a restriction of competition as their **object (by object)** and agreements that have a restriction of competition as their **effect (by effect)**
- Object and effect are alternatives
- For Article 101(3) object/ effect is not relevant

Article 101(3) guidelines, para 21

- *Restrictions of competition by object* are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101] (1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardize the objectives pursued by the Community competition rules".
Agreements by object

- Concerns the aims pursued by the agreement
- By their very nature have the potential of restricting competition – agreements which in itself reveal a sufficient degree of harm to competition
- In light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) to demonstrate any actual effects on the market

By object

- assessment based on a number of factors:
  - the content of the agreement
  - the objective aims pursued,
  - legal and economic context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market
- examination of the facts and the specific circumstances in which the agreement operates,
- subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition
by object

- Non-exhaustive guidance in Commission block exemption regulations, guidelines and notices
- Black-listed or hardcore restrictions in guidelines and notices are generally by object
- Horizontal agreements e.g.: price fixing, output limitation and sharing of markets and customers
- Vertical agreements e.g.: fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales

Anticompetitive agreements - Cartels

**Undertakings** join together to fix prices/ limit production/share markets or customers

- Instead of competing - rely on agreed course of action
- **Reduces incentives** to provide new/better products and services at competitive prices
- Result: consumers end up **paying more** for less quality
- **Illegal** and highly secretive
- **(Heavy fines)** [single company - over €896 million; all members of cartel - over €1.3 billion]
- **Leniency policy** for fine reduction – “whistle-blowers”
Crisis cartels

- Crisis cartels / industrial restructuring agreements
  - Typically agreements between undertakings in an industry facing common difficulties to reduce “overcapacity” or to reduce competition e.g. to avoid bankruptcy
  - Case C-209/07, Beef Industry Development Society (BIDS)
  - Agreements between the ten principal Irish beef and veal producers e.g. to reduce production capacity by 25%
  - “even supposing it to be established that the parties (...) acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying [Article 101(1)]. Indeed an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives”. (para 21)
  - Article 101 (3) TFEU – potentially applicable, but strict conditions

Third party "information central"

- Organic peroxides: AC Treuhand (Switzerland) as "secretariat"
  - €1000 fine (first time offence)
- Commission press release
  - “the message is clear: organisers or facilitators of cartels, not just the cartel members, must fear that they will be found and heavy sanctions imposed from now on.”
- Upheld by General Court in Case T-99/04
  - The notion of «agreement» «implies that an undertaking may infringe [Article 101] where the purpose of its conduct (...) is to restrict competition on a specific relevant market (...) and that does not mean that the undertaking may be active on the relevant market itself.» (para 122)
- on appeal
Effect

- relevant market analysis
- Actual or potential effect (must have likely anti-competitive effects, no presumption)
- Effects appreciable (check the degree of market power), de minimis rule unless hard-core restriction
- Define the relevant market (nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers)
- legal and economic context

So called inherent restrictions

- Does the agreement restrict actual or potential competition that would have existed without the agreement?
- Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)?
Restraints objectively necessary for the existence of an agreement

- certain restraints may escape Article 101(1)
- when they are objectively necessary for the existence of an agreement of that type or that nature (see Societe Technique Miniere, Nungesser)
  - When Objective factors external to the parties themselves
  - The question is whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting
  - E.g. territorial restraints in an agreement between a supplier and a distributor for a certain period of time, when objectively necessary in order for the distributor to penetrate a new market.
  - E.g. prohibition imposed on all distributors not to sell to certain categories of end users when objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.

Ancillary restraints

- any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it
- Directly related if subordinate to the implementation of the transaction and inseparably linked to it
- If an agreement in its main parts does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 101(1)
• different from the application of Article 101(3)
• The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article 101(3)
• E.g. if the main object of a franchise agreement does not restrict competition, then restrictions, which are necessary for the proper functioning of the agreement, such as obligations aimed at protecting the uniformity and reputation of the franchise system, also fall outside Article 101(1) (Metropole TV paras 118 et seq.)

**Horizontal agreements**

• Between undertakings on the same level of the market (actual or potential competitors)
• assessment of such agreements to be made in comparison to the actual legal and economic context in which competition would occur **in the absence** of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment
horizontal co-op agreements may lead to competition problems (fixing prices or output or sharing markets)
horizontal co-op agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets
similarity with the analysis of horizontal mergers
see Guidelines on the assessment of horizontal co-op agreements
Vertical restraints

- an agreement or concerted practice between two or more **undertakings** each of which operates at a **different level of the production or distribution chain**
- competition concerns arise if there is insufficient competition at one or more levels of trade, i.e. some degree of market power at the level of the supplier or the buyer or at both levels
- Vertical restraints are generally less harmful than horizontal restraints

Positive effects of vertical restraints

- to solve a "free-rider" problem
- to "open up or enter new markets“
- so-called "hold-up problem“
- "Economies of scale in distribution“
- "Uniformity and quality standardisation"
Vertical restraints

- Negative effects:
  - (a) anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;
  - (b) reduction of inter-brand competition;
  - (c) reduction of intra-brand competition;
  - (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.

Vertical agreements which generally fall outside Art. 101(1)

- Vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15% (see also conditions of de minimis Notice)
- Agency agreements: the agent does not bear any, or bears only insignificant, risks in relation to the:
  - contracts concluded and/or negotiated on behalf of the principal,
  - in relation to market-specific investments for that field of activity, and
  - in relation to other activities required by the principal to be undertaken on the same product market.
Examples of vertical restraints

- "single branding": the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier
- exclusive distribution agreement: the supplier agrees to sell its products to only one distributor for resale in a particular territory
- exclusive customer allocation agreement: the supplier agrees to sell its products to only one distributor for resale to a particular group of customers
- Selective distribution agreements: restrict the number of authorised distributors on the one hand and the possibilities of resale on the other
- Franchise agreements: licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services
- exclusive supply: the supplier is obliged or induced to sell the contract products only or mainly to one buyer, in general or for a particular use

Two types of exemptions

- Individual exemptions: Art. 101(3)
- Block exemptions: in the form of regulations for certain groups of agreements
Article 101(3)

- assessment under Article 101 consists of two steps:
  - 1) under Article 101(1),
  - 2) under Article 101(3),
    - only relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1),
    - Applied in order to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition
- Individual exemption check only if the block exemption does not apply
- Article 101(3)’s four cumulative conditions

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Article 101(3)’s Four Conditions

- Anything is exemptable in theory
- Two ways to do this:
  - individual and
  - block exemption
- Article 101(3)’s four cumulative tests:
  - Improving production/ distribution of goods or technical/ economic progress
  - Fair share to consumers
  - Indispensable
  - Elimination of competition
- The burden of proof: acc. To Article 2 of Reg. 1/2003 rests on the undertaking(s) invoking the benefit of the exception rule
Improving production/distribution of goods or technical/economic progress

- Objective benefits (not to the parties)
- Balance benefits:
  - against the detriments under Article 101(1)
  - Relevant markets
- Balance at time of assessment, not when agreement made (Commission 101(3) guidelines)
- No need to focus on the specific wording

Fair share to consumers

- What are consumers
  - All direct or indirect users of the products covered by the agreement
    - Including producers that use the products as an input, wholesalers, retailers
    - Final consumers
  - Sometimes Commission examined society’s benefits
- What is a fair share?
  - must compensate for restriction of competition (Commission 101(3) guidelines)
  - The net effect of the agreement must at least be neutral from the point of view of consumers affected
Restrictions must be indispensable

- A two stage test:
  - Is restrictive arrangement reasonably necessary to achieve the benefits?
  - Are the individual restrictions that flow from the arrangement all reasonably necessary to attain its benefits?
- Many agreements fall at this hurdle

No elimination of competition

- Assess relevant market
- Consider actual and potential competition
### Block exemptions – general pattern

- Declaration that prohibition under Art. 101(1) does not apply to the relevant type of agreement
- Market shares: typically application when a certain threshold is of the market shares of the parties is not exceeded
- Other conditions provided for in block exemptions
- Application of Art. 101(3) still possible

### Block exemptions

- Regulation 330/2010 (Vertical restraints)
  - Normally apply this first, then Article 101(3)
  - Apply it with the Commission vertical guidelines
- Regulation 330/2010 and legal certainty
- Regulation 330/2010 creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer
Structure of Regulation 330/2010

- Article 1 – definition
- Article 2 – Exemption
  - Vertical agreements to extent vertical restraints
  - Includes IPRs, as long as not primary object of agreements
  - Can be non-reciprocal agreements between competitors
  - Do not use this block exemption if subject falls into others
- Articles 3 and 7 – Market share threshold
  - Supplier’s market share must be less than 30%
  - Buyer’s market share must be less than 30%
- Article 4 – Hardcore restrictions
- Article 5 – Excluded restrictions
- Other:
  - Article 6 – Network effects
  - Articles 10 – Validity (1 June 2010 to 31 May 2022)

Article 4 – Hardcore restrictions

- Article 2 exemption does not apply to vertical agreements which directly or indirectly, in isolation or combination with other factors, have as their object:
  - Restriction of buyer’s ability to determine its sale price, BUT:
    - Can have maximum or recommended sale price as long as they do not amount to fixed or minimum sale price
  - Restriction of territory or customers to whom buyer can sell, BUT:
    - Can restrict its place of establishment
    - Can limit active sales to territory or customer group
    - Can restrict sales to end users for buyers acting at wholesale level...
Article 5 – Excluded restrictions

- Article 2 exemption does not apply to the following obligations contained in vertical agreements:
  - Any direct or indirect non-compete obligation if indefinite or more than five years, UNLESS
    - Goods sold by buyer from premises/land owned by the supplier
  - Any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, AS LONG AS:
    - The obligation relates to goods or services which compete with the contract goods or services
    - The obligation is limited to the premises and land from which the buyer has operated during the contract period
    - The obligation is indispensable to protect know-how transferred by the supplier to the buyer
    - The duration of the obligation is limited to a period of one year after termination of the agreement
  
  Can prohibit use and disclosure of know-how for unlimited time if not in public domain...

Consequences Art 101(2)

- If 101(1) breach proven, 101(3) can be invoked as a defence
- If conditions of Article 101(3) are not satisfied the agreement is null and void, cf. Article 101(2)
- Automatic nullity applies only to those parts of the agreement that are incompatible with Article 101, provided that such parts are severable from the agreement as a whole
- If only part of the agreement is null and void, for the applicable national law to determine the consequences thereof for the remaining part of the agreement