PART ONE: EU COMPETITION LAW

I. Charts: EU Competition Law (Arts. 102 - 109 TFEU) [C-Charts]

1 Introduction and overview

Free competition and distortion of competition in EU law
The EU is based on the principle of an open market economy with free competition. EU competition law aims to ensure that competition in the internal market is not distorted.

EU competition law: an overview
EU competition law addresses the conduct of undertakings and also of the Member States. Together, Arts. 101, 102 and 106 TFEU and the Merger Regulation form a comprehensive system of competition rules for undertakings. Art. 107 TFEU prohibits state aid. Other competition rules exist for specific areas.

2 Conduct of undertakings

What is an undertaking?
For the purposes of EU competition law, the term “undertaking” is very broad. It encompasses any and every entity that performs an economic activity.

The relevant market
In the examination of the conduct of undertakings under EU competition law, the relevant market plays an important role.

Comparison of Arts. 101 and 102 TFEU
Even though they regulate different situations, Arts. 101 and 102 TFEU may apply simultaneously.

2.1 Art. 101 TFEU: collusive conduct

Decision tree: collusive conduct of undertakings (Art. 101 TFEU)

Art. 101 TFEU: an overview
Art. 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, if these may affect trade between Member States and if they have as their object or effect the prevention, restriction or distortion of competition.

2.1.1 Art. 101(1) TFEU

Undertakings’ conduct under Art. 101(1) TFEU
The conduct prohibited by Art. 101(1) TFEU includes three forms of coordinated action between two or more undertakings (“collusive conduct”).

Effect on trade between the Member States
Conduct prohibited by Art. 101(1) TFEU must have an actual or potential effect on inter-state trade within the EU.

Appreciability of the effect on trade
Art. 101(1) TFEU does not cover conduct which has an insignificant effect on inter-state trade.

Object or effect in relation to competition
The conduct prohibited by Art. 101(1) TFEU must have as its object or effect the prevention, restriction or distortion of competition within the internal market.
### 2. Conduct of undertakings

#### Topic:
Even though they regulate different situations, Arts. 101 and 102 TFEU may apply simultaneously.

#### Arts. 101 and 102 TFEU

Two distinct prohibitions...

Arts. 101 and 102 TFEU seek to achieve the same aim (namely the maintenance of effective competition within the internal market) on different levels; *Continental Can* (1973).

<table>
<thead>
<tr>
<th>Content</th>
<th>Art. 101(1) TFEU</th>
<th>Art. 102 TFEU</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prohibition of collusive conduct</strong> between two or more independent undertakings, which may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition</td>
<td><strong>Prohibition of the abuse of a dominant position</strong> of one undertaking (or of two or more connected undertakings), which may affect trade between Member States</td>
<td></td>
</tr>
<tr>
<td>See Chart C6</td>
<td>See Chart C28</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of undertakings involved</th>
<th>Conduct must be bi- or multi-lateral, so-called &quot;collusive conduct&quot;.</th>
<th>Conduct may be strictly unilateral (conduct of one single undertaking). Alternatively: collective dominance.</th>
</tr>
</thead>
<tbody>
<tr>
<td>See Chart C7</td>
<td>See Chart C29</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Nature of the prohibition</th>
<th>Prohibited in principle; exemptions may apply:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Individual exemptions under Art. 101(3) TFEU;</td>
</tr>
<tr>
<td></td>
<td>• Block exemptions for certain types of cases (regulations).</td>
</tr>
<tr>
<td>See Chart C16</td>
<td>Absolute prohibition:</td>
</tr>
<tr>
<td></td>
<td>• No exemptions or derogations under Art. 102 TFEU;</td>
</tr>
<tr>
<td></td>
<td>• However, objective justification may prevent the conduct from being defined as abusive.</td>
</tr>
<tr>
<td>See Chart C32</td>
<td></td>
</tr>
</tbody>
</table>

... which may, however, apply simultaneously

E.g. participation in a collusive practice may involve the abuse of a dominant position; *Hoffmann-La Roche* (1979); compare also *Piau* (2005).
2.1 Art. 101 TFEU: collusive conduct

**Topic:**
Art. 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, if these may affect trade between Member States and if they have as their object or effect the prevention, restriction or distortion of competition.

---

**Art. 101(1) TFEU: prohibition of certain conduct between undertakings as incompatible with the internal market**

Directly effective prohibition; *BRT v SABAM* (1974)

---

**Collusive conduct**

The action must involve two or more independent undertakings; single economic entities are excluded.

Examples of joint action that does not fall under Art. 101(1) TFEU:
- Parent company and subsidiary, if the subsidiary has no real freedom to determine its course of action in the market, and if the conduct is concerned merely with the internal allocation of tasks; *Centrafarm* (1974), *Viho* (1996);
- Principle and agent relationships where the agent is not an independent economic operator; *CEEES* (2006), *CEPSA* (2008); see *Chart C23*;

---

**Three decisive elements as mentioned in Art. 101(1) TFEU**

- Agreements between undertakings;
- Decisions by associations of undertakings;
- Concerted practices ...

... which may affect trade between Member States ...

... and which have as their object or effect the prevention, restriction or distortion of competition.

See *Chart C8*

See *Chart C9*

See *Chart C11*

---

**Consequence**

Conduct meeting the above conditions is contrary to EU law ("prohibited as incompatible with the internal market", Art. 101(1) TFEU; in the case of agreements and decisions: automatically void, Art. 101(2) TFEU) ... 

... unless a block exemption or an individual exemption under Art. 101(3) TFEU applies (see *Chart C16*) or the case is covered by Art. 106(2) TFEU (see *Chart C45*).

Note: the finding of an infringement must be limited only to those parts of a contract which constitute the infringement as long as they are severable from the rest of the agreement; *Consten and Grundig* (1966).
2.1.1 Art. 101 (1) TFEU

**Topic:**
The conduct prohibited by Art. 101(1) TFEU includes three forms of coordinated action between two or more undertakings ("collusive conduct").

### Forms of coordinated or collusive conduct

Three forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves; *T-Mobile* (2009):

- **Agreements between undertakings**
- **Decisions by associations of undertakings**
- **Concerted practices**

**CFI in Bayer** (2000), confirmed in *Bayer* (2004):

"A concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention."

Thus: any type of agreement, whether concluded formally, orally or even by tacit acquiescence.

**ECJ in Consten and Grundig** (1966): the concept of "agreements" includes:

- Agreements within the framework of collective or representative bodies, such as trade associations.
  - E.g.: Cement Dealers’ Association; *Vereeniging van Cementhandelaren* (1972);
  - National association of water supplies; *IAZ International Belgium* (1983);
  - National Bar Association; *Wouters* (2002);

**ECJ in Dyestuffs** (1972):

"A form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition."

- Does not include intelligent adaption to existing and anticipated conduct of competitors, without any direct or indirect contact; *Suiker Unie* (1975).
- Exchange of information: The mere unilateral or reciprocal exchange of individualised commercially sensitive information (e.g., pricing) amongst undertakings leads to the rebuttable presumption of a concerted practice; *Anic* (1999); the exchange of information for statistical or benchmarking purposes is allowed under the conditions set out in the Commission Guidelines on horizontal co-operation agreements (2010), e.g., aggregated information collected by a third party such as a market intelligence firm.

**Vertical agreements**

Agreements between "two or more undertakings each of which operates [...] at a different level of the production or distribution chain"; e.g. between a producer and a wholesale trader; see *Chart C18*

- E.g. producer
- E.g. wholesaler
- E.g. retailer

**Horizontal agreements**

Agreements between companies operating at the same level(s) in the market, i.e. actual or potential competitors; e.g. between wholesalers; Commission Guidelines on horizontal co-operation agreements (2010)

**Note:** Concerted practices are difficult to prove, in particular in situations where a concerted practice is not the only plausible explanation for parallel conduct; *Woodpulp* (1993).
2.1.1 Art. 101 (1) TFEU

The *de minimis* rule regarding effect on competition

**Topic:**
Art. 101(1) TFEU does not cover conduct which has an insignificant effect on competition.

---

**De minimis:** appreciable effect on competition

Art. 101(1) TFEU applies only where conduct has (or is intended to have) an appreciable effect on competition.

Guidance from the Commission through the Commission Notice on agreements of minor importance (2001):
Art. 101(1) TFEU does not apply where certain market share thresholds are not exceeded and where there are no hardcore restrictions.

Thresholds:

- **Horizontal agreements:** ≤10%
  - I.e. agreements between competitors; see Chart C8
  - Threshold of 10% aggregate market share in any of the relevant markets.

- **Vertical agreements:** ≤15%
  - I.e. agreements between non-competitors; see Chart C8
  - Threshold of 15% aggregate market share in any of the relevant markets.

In the case of unclear definition: ≤10%

In the case of a cumulative foreclosure effect of parallel networks of similar agreements having similar effects on the market: ≤5%.

In all cases:
Threshold may be exceeded by 2% within two successive calendar years.

---

**Practical consequence**

In the case of undertakings with market shares below the relevant thresholds, the Commission will not institute proceedings (see Chart C35), unless the agreement contains a hardcore restriction; see Chart C13.
2.1.2 Exemptions from Art. 101 (1) TFEU

Exemptions from Art. 101(1) TFEU

**Topic:**
In certain situations and under certain conditions, the prohibition of Art. 101(1) TFEU does not apply. EU law provides for two types of so-called “exemptions from Art. 101(1) TFEU”, namely for individual exemptions and for block exemptions.

**Individual exemptions**
The conditions for an exemption under Art. 101(3) TFEU must be assessed on a case-by-case basis.
See Chart C22

**Block exemptions**
Block exemptions are in the form of regulations (either from the Council (of Ministers) or the Commission) for certain groups of agreements.

**Block exemption regulations (BERs)**
- Vertical restraints: Regulation 330/2010/EU, with Commission Guidelines on Vertical Restraints (2010); see Chart C18;
- Specialisation agreements: Regulation 1218/2010/EU, with Commission Guidelines on horizontal co-operation agreements (2010); see Chart C19;
- Research and development: Regulation 1217/2010/EU, with Commission Guidelines on horizontal co-operation agreements (2010); see Chart C20;
- Technology transfer: Regulation 772/2004/EC, with Commission Guidelines on technology transfer agreements (2004); see Chart C21;
- Motor vehicle distribution: Regulation 461/2010/EU;
- Insurance: Regulation 267/2010/EU, with a Commission Communication on the insurance sector (2010);
- Liner shipping: Regulation 906/2009/EC;
- Air passenger tariffs and slot allocation: Regulation 1459/2006/EC (transitional regime).

**Other regulations containing general exemptions**
- Agriculture: Regulation 1184/2006/EC;

**Note:**
There is also a block exemption in the field of state aid; see Chart C52.
Topic:
The block exemption regulation on specialisation agreements concerns horizontal agreements (i.e. agreements between companies active on the same product market) under which undertakings agree to specialise in the production of certain products and to refrain from producing those products and to purchase them from the other party. A specialisation agreement is exempt if it complies with the terms of Regulation 1218/2010/EU.

Block exemption: categories of specialisation agreements, Regulation 1218/2010/EU

"Specialisation agreement", Art. 1(1)
- Unilateral specialisation agreement: an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;
- Reciprocal specialisation agreement: an agreement between two parties which are active on the same product market by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties who agree to produce and supply them;
- Joint production agreement: an agreement by virtue of which two or more parties agree to produce certain products jointly.

Terms of the Regulation, Arts. 2-5
In principle, all arrangements that do not contain hardcore restrictions are allowed, if the combined market share of all parties is ≤20% (in the case of a subsequent rise, the exemption continues to apply for a limited period of time).

To the following type of agreement further conditions apply, Art. 2(2): Specialisation agreements relating to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation (primary object: see Chart C21).

Allowed restrictions
- Exclusive purchase or exclusive supply obligations or both for the products concerned, Art. 2(3)(a);
- Joint distribution of the products manufactured under the specialisation agreement, Art. 2(3)(b);
- Fixing of prices charged to immediate customers in the context of joint distribution; Art. 4(a);
- Provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of capacity and production volume in the context of a joint production agreement, Art. 4(b)(i);
- Setting of sales targets in the context of joint distribution, Art. 4(b)(ii).

Prohibited restrictions
Hardcore restrictions as listed in Art. 4:
- Fixing of prices;
- Limitation of output or sales outside a joint production agreement and joint distribution;
- Allocation of markets or customers.

Note:
Art. 6 establishes a transitional regime until 31 December 2012 for agreements already in force on 31 December 2010 and complying with the former block exemption regulation on specialisation agreements (Regulation 2658/2000/EC).
2.1.2 Exemptions from Art. 101 (1) TFEU

**Individual exemption under Art. 101(3) TFEU**

**Topic:**
In order to benefit from an individual exemption under Art. 101(3) TFEU, the conduct of undertakings needs to fulfil the conditions laid down in Art. 101(3) TFEU.

**Individual exemption under Art. 101(3) TFEU: a test with four cumulative elements**


Starting point:
- Conduct is in principle prohibited under Art. 101(1) TFEU

Conduct does not fall under a block exemption

Need for an individual exemption, based on the following test:

- Is there an improvement in the production or distribution of goods or a promotion of technical or economic progress?
  - Yes
  - No

- Do consumers receive a fair share of the resulting benefit?
  - Yes
  - No

- Are the restrictions indispensable?
  - Yes
  - No

- Does some level of competition remain (i.e. no substantial elimination of competition)?
  - Yes
  - No

No exemption, prohibited under Art. 101(1) TFEU ("incompatible with the internal market")

Acceptable: compatible with the internal market

**Application in practice**

Under Regulation 1/2003/EC, individual exemptions are based on self-assessment, which is, however, subject to control by the national competition authorities (NCAs), the national courts and arbitrators, and is subject to control by the Commission, the General Court and the Court of Justice; see Chart C33.
2.1.3 Selected issues within the scope of Art. 101 TFEU

Joint venture agreements

**Topic:**
Joint venture (“JV”) agreements may fall under Art. 101(1) TFEU. In the case of JV agreements on a full-function JV with a Union dimension, the Merger Regulation applies. In the latter case, supplementary clauses may fall under Art. 101(1) TFEU.

### Joint ventures (JV) under EU competition law

**Applicability of Art. 101(1) TFEU (or the Merger Regulation or both)**

Depending on their nature, JVs fall under different provisions of EU competition law. There is a decisive distinction between full-function JVs and other JVs.
- Full-function JVs constitute concentrations under Regulation 139/2004/EC (Merger Regulation). The Regulation applies if the JV has a Union dimension. Supplementary clauses in the JV agreement that restrict competition may fall under Art. 101(1) TFEU;
- Other JVs may fall under Art. 101(1) TFEU.

**“Full-function joint venture”**

The JV performs as an autonomous economic entity (i.e. a full function JV) if:
- It has sufficient resources (finance, staff, other assets) to operate independently;
- Its activities are not auxiliary to its parents’ activities (e.g. R&D activities for the parents);
- It has its own access to and presence on the market and it is not a mere sales agency of its parents, except for an initial start-up period;
- It operates on a lasting basis and not for a short finite duration (e.g. not on a project basis).

Commission Consolidated Jurisdictional Notice (2008), B.IV.

Is it a full-function JV with a Union dimension?

<table>
<thead>
<tr>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>JV: Art. 101(1) TFEU may apply</strong></td>
<td><strong>JV: Regulation 139/2004/EC applies</strong></td>
</tr>
</tbody>
</table>

- JV between competitors: there is a high risk of falling foul of Art. 101(1) TFEU.
  - A block exemption may apply if all conditions are met: e.g. the block exemption on R&D activities in the case of JVs developing R&D activities for their parents; see Chart C20; or the block exemption on specialisation agreements in the case of JVs for joint production; see Chart C19;
  - Otherwise, an individual exemption under Art. 101 (3) TFEU may be possible; see Chart C22.

- Art. 3(4) of Regulation 139/2004/EC
- Notification is required; *Cementbouw* (2006); see Chart C40

Supplementary clauses

- Art. 101(1) TFEU may apply to non-ancillary restraints; see Chart C44
2.2 Art. 102 TFEU: abuse of a dominant position

Decision tree: abuse of a dominant position (Art. 102 TFEU)
The existence of dominance is determined by the undertaking’s power in the relevant market, which in turn is defined in terms of products, geography and time.

The first element in a finding of dominance: the relevant market

The ECJ in Volkswagen (2000):
“For the purposes of Article [102], the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.”

Commission Notice on the definition of the relevant market (1997)

The product market

The product(s) as defined in terms of cross-elasticity of demand (demand substitutability) and cross-elasticity of supply (supply substitutability).

See Chart C4

E.g.:
- Cans for different sectors of the market, rather than only cans for fish and meat; Continental Can (1973);
- The raw material (aminobutarol) for a drug, rather than the end product; Commercial Solvents (1974);
- Only bananas, rather than bananas and other table fruit; United Brands (1978);
- Only replacement tyres for heavy vehicles (e.g. lorries, and buses), rather than also for cars and vans; Michelin (1983).

The geographic market

A clearly defined geographic area “within the internal market or in a substantial part of it” (Art. 102 TFEU),
- in which the products are marketed, and;
- where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking to be evaluated.

See Chart C4

E.g.:
- Southern Germany, in relation to the sugar market and the sales territory of one of the applicants; Suiker Unie (1975);
- The Netherlands, in relation to replacement tyres for heavy vehicles; Michelin (1983);
- Ireland and Northern Ireland, in relation to television guides; Magill (1991, 1995);
- The Netherlands and Western Germany in relation to live pigs for slaughtering; NVV (2009).

The temporal market

The time period that underlies the market analysis.
For certain products, there may be limited production times.

E.g.:
- The whole agricultural year in relation to bananas, since these are ripened throughout the year; United Brands (1983);
- The selling time of tickets for the World Cup football matches held in France in 1998; Commission Decision 1998 Football World Cup (2000).
2.3 Enforcement of Arts. 101 and 102 TFEU

**Topic:**
According to Art. 105 TFEU, the Commission is the main body in charge of ensuring the application of Arts. 101 and 102 TFEU. To some extent, Regulation 1/2003/EC has brought about decentralisation.

---

**Enforcement of Arts. 101 and 102 TFEU: the system foreseen by Art. 105 TFEU**

- Art. 104 TFEU: Until the entry into force of secondary law on enforcement, the authorities in the Member States could rule on the compatibility of actions by undertakings within the meaning of Arts. 101 and 102 TFEU.

**First generation of secondary legislation on enforcement: A strong role for the Commission**

- "Regulation 17" (Regulation 17/62/EEC, no longer in force):
  - Watch-dog role for the Commission: investigations, decisions;
  - Commission monopoly regarding the granting of individual exemptions under what used to be Art. 81(3) EC (later Art. 101(3) TFEU); national courts could apply Art. 81(1) and (2) EC (later Art. 101(2) and (2) TFEU) as well as Art. 82 EC (later Art. 102 TFEU), but not Art. 81(3) EC (later Art. 101(3) TFEU); Delimitis (1991); NCAs could not apply Arts. 81 and 82 TFEU.

**As of 1 May 2004: decentralisation**

**Second generation of secondary legislation on enforcement: The European Competition Network**

- Regulation 1/2003/EC (in force since 1 May 2004):
  - Chapter IV: close cooperation between the Commission and the NCAs, which together make up the European Competition Network; see Commission Notice on cooperation with the Network of Competition Authorities (2004);
  - Arts. 5 and 6: NCAs and national courts have the power to apply Art. 101 TFEU in full as well as Art. 102 TFEU.
2.4 Merger control

Phase 1: examination of the notification

**Topic:**
In the first phase of merger control proceedings, the Commission examines whether the notified concentration falls under the Merger Regulation and whether it raises serious doubts as to its compatibility with the internal market.

### Phase 1: preliminary examination of the notification by the Commission

#### Test

Art. 6 of Regulation 139/2004/EC:
- Does the notified concentration fall under the Merger Regulation?
- Does it raise serious doubts as to its compatibility with the internal market?

<table>
<thead>
<tr>
<th>Time frame: Art. 10(1) and (6) of Regulation 139/2004/EC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No Commission Decision within 25 working days (in principle)</strong></td>
</tr>
<tr>
<td><strong>Commission Decision within 25 working days (in principle)</strong></td>
</tr>
</tbody>
</table>

The concentration is deemed to have been declared compatible with the internal market.

### Finding

The concentration ....

- ... is outside the scope of application of the Merger Regulation
  - Art. 6(1)(a) of Regulation 139/2004/EC
  - E.g. Commission Decision 3i/Consors/100 World (2001), decided under Regulation 4064/89/EEC

- ... does not raise serious doubts
  - The notified concentration is within the scope of the Merger Regulation but does not raise serious doubts as to its compatibility with the internal market.
  - It is compatible with the internal market.
  - Art. 6(1)(b) of Regulation 139/2004/EC

- ... raises serious doubts
  - The notified concentration is within the scope of the Merger Regulation and it raises serious doubts as to its compatibility with the internal market.
  - The Commission decides to initiate proceedings.
  - Art. 6(1)(c) of Regulation 139/2004/EC
  - See Chart C43
Under Art. 107 TFEU, state aid in any form whatsoever which distorts or threatens to distort competition is incompatible with the internal market in so far as it affects trade between Member States.

Consequence

Conduct meeting the above conditions is contrary to EU law ("incompatible with the internal market", Art. 107(1) TFEU) ...

... unless a derogation under Art. 107(2) or (3) TFEU, under Art. 106(2) TFEU or under Art. 93 TFEU applies; see Chart C52.

Notes:

• Even though Art. 107(1) TFEU does not use the term "prohibition", the ECJ in fact treats it as such; e.g. Commission v France (1969), Holland Malt (2009).
• The Commission has published a number of Guidelines on the application of Art. 107 TFEU in certain, specific contexts; e.g.:
  • Commission Guidelines on State aid for rescuing and restructuring firms in difficulty (2004);
  • Commission Guidelines on State aid to promote risk capital investments in SMEs (2006);
**Topic:**
Compensation for public service obligations does not fall under Art. 107(1) TFEU provided that the conditions defined by the ECJ in the important *Altmark* (2003) decision are met.

### Compensation for public service obligations

**The ECJ's decision in the *Altmark* (2003) case**
Compensation for public service obligations does not amount to state aid (i.e. it is not caught by Art. 107(1) TFEU) and does not have to be notified (see *Chart C54*) to the Commission if the following conditions are met:

<table>
<thead>
<tr>
<th><strong>Genuine public service</strong></th>
<th><strong>Parameters for the compensation</strong></th>
<th><strong>Amount of compensation</strong></th>
<th><strong>Cost analysis</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined. E.g. <em>BUPA</em> (2008), <em>TV 2</em> (2008)</td>
<td>The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner. E.g. <em>Traghetti</em> (2010)</td>
<td>The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. E.g. <em>BUPA</em> (2008), <em>Deutsche Post</em> (2008, 2010), <em>TF1</em> (2009)</td>
<td>Where the undertaking has not been chosen in a public procurement procedure, the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the necessary means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. E.g. <em>BUPA</em> (2008)</td>
</tr>
</tbody>
</table>

### Cases where the *Altmark* conditions are not fulfilled
- Art. 107(1) TFEU applies;
- An exemption may be possible based on Art. 106(2) TFEU; see *Chart C45*.

### Follow up on *Altmark* (2003)
- For certain types of public service obligations that do not meet the *Altmark* conditions: Commission Decision 2005/642/EC on State aid in the form of public service compensation (Art. 107(1) TFEU applies but there is an exemption under Art. 106(2) TFEU; no notification is required);
- For other cases, with the exception of transport and broadcasting: Commission Framework for State aid in the form of public service compensation (2005) (notification is required);
II. Explanatory text: EU Competition Law (Arts. 101 – 109 TFEU)

1. INTRODUCTION AND OVERVIEW

The present text deals with EU competition law, i.e. the competition law of the European Union. The EU is a complex international organisation whose legal order was recently fundamentally revised through the so-called Lisbon revision. In order to understand the EU legal system, it is helpful to know that an important part of what is today EU law – including competition law – used to be the law of the European Community (EC; originally called the “European Economic Community”, or EEC), an international organisation older than, and separate from, the EU.

For those readers who are not familiar with this history, the development from the (original three) European Communities to the present EU is briefly described in the second part of this work.¹ Again for the benefit of readers not already familiar with EU law, the second part of this work further explains the place of EU competition law in the legal system of today’s EU and describes briefly some particularly important elements of the general system concerning the enforcement of EU law that are also relevant in the context of competition law.

¹ See below pp. ...<##to be inserted later>.

2. CONDUCT OF UNDERTAKINGS

2.1 General remarks

2.2 Collusive conduct: Art. 101 TFEU...

2.2.1 The prohibition: the relevant conduct

2.2.1.1 Three forms of relevant conduct...

2.2.1.2 The inter-state element...

2.2.1.3 The competition element...

2.2.1.4 Examples of prohibited conduct...

2.2.2 The legal consequences...

2.2.3 Exemptions...

2.2.3.1 Block exemptions...

2.2.3.2 Individual exemptions...

2.2.4 Selected types of agreements that may come within the scope of Art. 101(1) TFEU...

2.3 Abuse of a dominant position: Art. 102 TFEU...

2.3.1 The prohibition: the relevant conduct

2.3.1.1 Abuse of dominance...

2.3.1.2 The inter-state element...

2.3.2 The legal consequences...

2.4 Enforcement of Arts. 101 and 102 TFEU...

2.5 Merger control under Regulation 139/2004/EC...

2.6 Undertakings with a special position under national law: Art. 106 TFEU...

3. STATE CONDUCT

3.1 Art. 4(3) TEU, Protocol No 27 and Arts. 101 or 102 TFEU...

3.2 State aid control under Arts. 107 TFEU et seq...

3.2.1 The prohibition: the relevant state conduct...

3.2.1.1 The concept of “aid”...

3.2.1.2 The inter-state and competition elements...

3.2.2 Derogations...

3.2.3 The legal consequences...

3.2.4 Enforcement of Art. 107 TFEU...

4. EXERCISES AND LEGAL ANALYSIS
EU competition law to apply, the conduct in question must have a (potential) effect on trade between Member States. According to Art. 3(1)(b) TFEU, the EU has exclusive competence to set up the competition rules that are necessary for the functioning of the internal market. Conversely, their application and enforcement is a task of both EU and national authorities and courts.

Within this framework, the TFEU contains a number of substantive and directly effective provisions on competition (Arts. 101 TFEU et seq.) [Chart C2]. In addition, there is important secondary law on competition matters, based on what used to be Art. 83 EC (post-Lisbon: Art. 103 TFEU) or on what used to be Art. 89 EC (post-Lisbon: Art. 109 TFEU).

The Treaty chapter on competition distinguishes between two main categories of rules, namely rules on the conduct of so-called undertakings (Arts. 101 and 102 TFEU) and rules on State conduct (Arts. 107 TFEU et seq.). In between both is Art. 106 TFEU, which concerns undertakings with a special position under national law. On the level of secondary law, there are special rules on mergers (i.e. the Merger Regulation), which provides that concentrations with a Union dimension must be approved by the Commission as well as on various specific economic sectors (e.g. on energy, postal services and transport). The sector-specific legislation is not discussed further in these materials.

2. CONDUCT OF UNDERTAKINGS

2.1 General remarks

The term “undertaking” is not defined in the TFEU. According to the ECJ, it must be interpreted broadly, so as to include all independent economic operators, regardless of their legal form and of whether they are publicly or privately financed [Chart C3]. It should be noted that, as distinct from free movement law, the conduct of undertakings from outside the EU is covered by EU competition law in so far as it may affect trade between Member States [Chart C3]. In the case of agreements, this is true even if the agreement was concluded outside the EU. Otherwise, it would be easy to circumvent the prohibition.

In the context of undertakings, the relevant market may be an important element for the examination of competition issues [Chart C4]. In its “Notice on the definition of the relevant market” of 1997, the Commission has explained the relevance and the meaning of both the product market and the geographical market.

The product market is based on the economic test of substitutability. It comprises all products (i.e. the goods or services offered by the undertakings in question) that are, from the perspective of consumers or producers, interchangeable with the product produced by the undertaking in question (demand-side substitutability and supply-side substitutability, respectively).

The geographical market concerns a clearly defined geographic area in which the products are marketed and where the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

The Treaty addresses two types of conduct of undertakings that may distort competition, namely the interplay between undertakings, such as cartels (so-called collusive conduct, Art. 101 TFEU), and the abuse of a dominant position (Art. 102 TFEU) [Chart C5]. Whilst the former necessarily involves more than one undertaking, the latter may involve only a single undertaking (so-called unilateral conduct). Alternatively, there may also be collective dominance of two or more undertakings, which form an economic entity.

2.2 Collusive conduct: Art. 101 TFEU

Art. 101 TFEU addresses collusive conduct of two or more undertakings [Chart C6, Chart C7]. The provision consists of three parts: Section 1 describes the prohibited conduct of the companies, Section 2 (read together with Section 1) states the legal consequence(s) of such conduct and Section 3 provides that certain types of conduct will not fall under Section 1 (in other words, that this conduct is not prohibited under EU law).

2.2.1 The prohibition: the relevant conduct

Art. 101(1) TFEU states the conditions necessary for undertakings’ conduct to be prohibited [Chart C7]. Its starting point is that it concerns the interplay between more than one undertaking (“collusive conduct”). Further, there are three decisive elements for a finding that these companies’ conduct infringes Art. 101(1) TFEU.

2.2.1.1 Three forms of relevant conduct

Under Art. 101(1) TFEU, there are three forms of relevant action, namely agreements by undertakings, decisions by associations of undertakings and so-called concerted practices (i.e. parallel conduct that is based on coordination without reaching the stage of an agreement) [Chart C8]. The three forms of collusion are distinguishable from each other by their intensity and the forms in which they manifest themselves.

In practice, the dividing line between agreements by undertakings and decisions by associations of undertakings, on the one hand, and concerted practices, on the other hand, may be difficult to identify.

For an agreement to exist there must be a “meeting of minds” that leads to a contract (written or unwritten). This is often described using the term “cartel”. Agreements may be of a horizontal (i.e. concluded by undertakings on the same level of production; e.g. producers) or of a vertical nature (i.e. concluded by undertakings on different levels of production; e.g. producers and wholesale traders). Art. 101(1) TFEU covers both types of agreements. As for deci-
Background: 1. From the European Communities to the European Union

The Lisbon revision

**Chart B3**

**Topic:**
In order to revise the existing Community and EU Treaties, the Member States signed the Lisbon Treaty in 2007. It entered into force on 1 December 2009. The Lisbon Treaty does away with the European Union's traditional pillar structure.

---

### The effect of the Lisbon Treaty on the structure of the EU

**The EU before the Lisbon Treaty:**

Three Treaties (Nice versions):
- The EU Treaty (overall structure);
- The EC Treaty (first pillar);
- The Euratom Treaty (first pillar).

**The Lisbon Treaty (Reform Treaty) contains the changes to the present Treaties.**

The Lisbon Treaty does away with the EU's traditional pillar structure. The Union is no longer based on the European Communities. The EC is replaced and succeeded by the EU. Euratom exists outside the framework of the EU Treaty.

**The EU and Euratom following the Lisbon Treaty:**

Three Treaties (Lisbon versions):
- Two Treaties on the EU: the EU Treaty (TEU) and the Treaty on the Functioning of the European Union (TFEU; former EC Treaty);

See **Chart B4, Chart B6**
**Background:** The nature of the EU as being based on the rule of law; *Les Verts* (1986).

**Purpose:** Testing the legality of (certain) acts by EU institutions, bodies, offices and agencies; asking the EU Courts to rule on the validity of a given measure.

## Action for annulment, Arts. 263 TFEU et seq.

<table>
<thead>
<tr>
<th>Admissibility of the action</th>
<th>Reviewable act under the terms of Art. 263 TFEU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standing:</td>
<td>Depends on the nature of the applicants. Under Art. 263 TFEU, there is a distinction between privileged applicants (Member States and institutions) and non-privileged applicants (any natural or legal person).</td>
</tr>
<tr>
<td></td>
<td>In relation to certain acts, non-privileged applicants may only bring an action for annulment if they are directly concerned or directly and individually concerned (<em>Plaumann</em> (1963)) by the particular measure at issue.</td>
</tr>
<tr>
<td>Time-limits:</td>
<td>Two months, Art. 263 TFEU</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Substance of the action: grounds</th>
<th>In order to be successful, the request for annulment must be based on one or more of several ground(s) listed in Art. 263 TFEU:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Lack of competence;</td>
</tr>
<tr>
<td></td>
<td>• Infringement of an essential procedural requirement;</td>
</tr>
<tr>
<td></td>
<td>• Infringement of the Treaties or of any rule of law relating to their application;</td>
</tr>
<tr>
<td></td>
<td>• Misuse of powers.</td>
</tr>
</tbody>
</table>

| Content and effect of judgment  | Declaration of nullity *ex tunc*, obligation of the institutions to comply, Arts. 264 and 266 TFEU. |

**Note:** Only the ECJ is entitled to annul EU secondary measures, not the national courts; *Foto-Frost* (1987), *IATA* (2006).
**Topic:**
Preliminary rulings by the ECJ are intended to help national courts in resolving cases before them.

**Preliminary ruling procedure, Art. 267 TFEU**

**Purpose:**
The preliminary ruling procedure is an instrument of cooperation between the ECJ and the national courts. National courts ask questions which arise out of a case before them regarding the correct interpretation of EU law and the validity of EU secondary measures; e.g. *Kempter* (2008).

**Indirect procedure:**
The procedure is indirect because it is not the parties in the national case that turn to the ECJ, but rather the national court. Nevertheless, the parties may appear before the ECJ.