

EU Internal Market Law

Dr Prof Gaetano Vitellino

gvitellino@liuc.it

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Session No 14 "Cartels and anti-competitive agreements"

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Summary

The problem

Restricted competition resulting from collusion between market participants over their business decisions

The rule

Art 101 TFEU basically prohibits anti-competitive agreements (para. 1) subject to the possibility of justification where, on balance, they are judged to be economically beneficial (para. 3)

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Art 101(1) TFEU

"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 ..."

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The cooperative or collusive market behaviour between undertakings

- Two or more 'undertakings' (independent market operators) necessarily involved → economic unit doctrine (groups of companies) →
 - (1) agreements between companies belonging to the same group are not covered;
 - (2) the parent company is liable and may be fined for its subsidiaries having entered into a prohibited anti-competitive agreement

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Three forms of cooperation

- 1) Agreements between undertakings
- 2) Decisions by associations of undertakings
- 3) Concerted practices

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Agreement between undertakings

- It is sufficient for the undertakings concerned to have expressed their joint intention to conduct themselves in the market in a particular way:
Case T-141/89, *Tréfileurope*
- Apparently unilateral conduct by an undertaking, adopted in the context of its contractual relations with its commercial partners, may form the basis of an agreement under Art 101 if the acquiescence of those partners, express or implied, with the attitude adopted by the undertaking is established
- No need for the arrangement to be legally binding (ex. a 'gentlemen's agreement')

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Concerted practice

- It implies
 - 1) undertakings' concerting together, +
 - 2) conduct on the market pursuant to those collusive practices, and
 - 3) a relationship of cause and effect between the two
- Concept underlying Art 101 → each economic operator must determine independently the policy which he intends to adopt on the market

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Criteria of co-ordination and co-operation

- "a form of **coordination between undertakings** which, without having been taken to a stage where an agreement properly so called has been concluded, **knowingly substitutes** for the risks of competition **practical cooperation between them**"
- Any **direct or indirect contact** between economic operators the object or effect whereof is
 - either to influence the conduct on the market of an actual or potential competitor
 - or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market

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Decision of associations of undertakings

- **Association of undertakings** → ex. trade or professional association
 - Professional organisation: when laying down rules of professional conduct (ex. minimum fee), it acts as the regulatory body of a profession = as an association of undertakings
- **Decision** → no need for it to be legally binding

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Anti-competitive practices

- Agreements and other collusive practices are prohibited under Art 101(1) only where they have
 - a. either as their **object**
 - b. or **effect**
- the prevention, restriction or distortion of competition within the internal market

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Art 101 covers both

- **horizontal agreements**: between actual or potential competitors operating at the same level of the supply chain, and
- **vertical agreements**: between firms operating at different levels of the supply chain → i.e. agreement between a manufacturer and its distributor

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Art 101(1): ex. of anti-competitive practices

- 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.

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'By object' restrictions

- '**Hard-core**' restrictions → those that by their very nature have the potential to restrict competition within the meaning of Art 101(1) → no need to examine the actual or potential anti-competitive effects of the agreement on the market
- Horizontal agreements: ex. price-fixing, sharing of markets or customers
- Vertical agreements: ex. resale price maintenance, agreements prohibiting or limiting parallel trade

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'By effect' restrictions

- "the agreement must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability"
- examination of conditions of competition based not only on existing competition between undertakings already present on the relevant market but also on potential competition
- **Market-based analysis** → the anti-competitive effect is assessed in the light of the structure of the market and the economic and legal context within which it functions

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Legal exception under Art 101(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".

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