

# Documentation



## ESSENTIAL EU COMPETITION LAW

SEMINAR FOR MALTESE AND IRISH JUDGES\*

\*open for participation of eligible judges from other EU Member States



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Valletta, 7-8 April 2022



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## SEMINAR FOR MALTESE AND IRISH JUDGES\*

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### Speakers' Contributions

<b>- Daniel Gravino</b>	
	<ul style="list-style-type: none"><li>• <b>PPT Competition policy objectives. Overview of Articles 101-102 TFEU</b></li><li>• <b>PPT Market definition and market power</b></li></ul>
<b>- Alexandra von Westernhagen</b>	
	<ul style="list-style-type: none"><li>• <b>PPT Agreements, decisions and concerted practices</b><ul style="list-style-type: none"><li>- Main elements of art. 101 TFEU</li><li>- Horizontal and vertical agreements</li><li>- Exemptions</li></ul></li><li>• <b>PPT Using the search tools of the online databases</b><ul style="list-style-type: none"><li>- EUR-Lex</li><li>- CURIA</li><li>- DG COMP Case Search</li></ul></li></ul>
<b>- Simonetta Vezzoso</b>	
	<ul style="list-style-type: none"><li>• <b>PPT Abuse of dominance under Art. 102 TFEU</b></li><li>• <b>WORKSHOP ON ART. 101 AND ART. 102 TFEU</b></li></ul>
<b>- Fabio Filpo</b>	
	<ul style="list-style-type: none"><li>• <b>PPT EU framework</b><ul style="list-style-type: none"><li>- Case law of the CJEU on the right to claim damages for antitrust infringements</li><li>- Damages Directive</li></ul></li></ul>
<b>- Alan McCarthy</b>	
	<ul style="list-style-type: none"><li>• <b>PPT National legislation transposing the Damages Directive (session on Irish legislation)</b><ul style="list-style-type: none"><li>- Disclosure of evidence</li><li>- Effect of national infringement decisions</li><li>- Limitation periods</li></ul></li></ul>
<b>- Sylvann Aquilina Zahra and Clement Mifsud-Bonnici</b>	
	<ul style="list-style-type: none"><li>• <b>PPT National legislation transposing the Damages Directive (session on Maltese legislation)</b><ul style="list-style-type: none"><li>- Disclosure of evidence</li><li>- Effect of national infringement decisions</li><li>- Limitation periods</li></ul></li></ul>
<b>- Leonardo Armati</b>	
	<ul style="list-style-type: none"><li>• <b>PPT Introduction to EU State aid law</b><ul style="list-style-type: none"><li>- Overview of EU State aid rules</li></ul></li></ul>

	<ul style="list-style-type: none"><li>- The notion of aid</li><li>- Exemption regulations</li><li>• <b>PPT The role of national courts in the enforcement of State aid rules and decisions. Cooperation with the European Commission</b></li><li>• <b>CASE STUDY ON STATE AID</b></li></ul>
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# Market Definition and Market Power

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## Outline

- What is market power?
- What is the relevant market?
- How is the relevant market defined in practice?
- How do we measure market power in practice?

2



## What is Market Power?

- Main objective of Competition Policy is provide conditions in which consumers can enjoy low prices, high quality and innovation.
- To do so, competition enforcement aims to prevent the creation or exploitation of **market power**.
- Informally, the term is loosely used in relation to firms with large market shares.
- In theory, market power is the ability of a firm to raise prices above its marginal cost.

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## What is market power?

- The **price-cost margin** is determined by the market share and elasticity of demand facing the firm:

$$L_i = \frac{P_i - c_i}{P_i} = \frac{s_i}{\varepsilon}$$

- A firm may have a large market share but limited market power if the price elasticity of demand is very high.
- Highly elastic demand means that customers can easily switch away from the product in question to alternative products.
- Presence and closeness of competitors affects the range of alternatives available to the consumer.

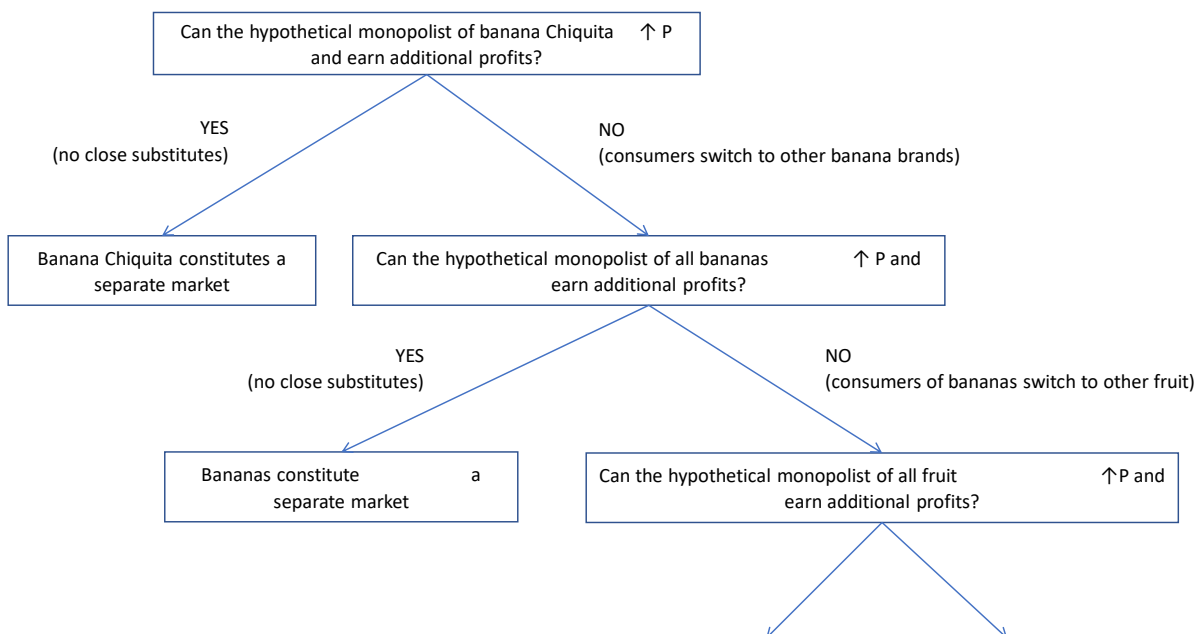
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## What is the relevant market?

- The **relevant market** is a set of suppliers and products that exercise some competitive constraint on each other.
- We identify the relevant market using the hypothetical monopolist test – a thought experiment that asks whether a hypothetical monopolist of a particular group of goods would be able to profitably implement a small but significant non-transitory increase in price.
- If not, then the product must face an important competitive constraint from alternative goods.
- Such competition should be taken into account, i.e. the relevant market should be widened to encompass those constraints.

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## What is the relevant market?



6

## What is the relevant market?

- Besides demand-side substitution, a candidate market may fail the hypothetical monopolist test because of supply-side substitution, i.e. entry of firms not currently active in the candidate market.
- In practice, we focus on demand-side substitution. How do we do it?
  - Own-price or cross-price elasticity of demand;
  - Price correlations tests;
  - Consumer surveys;
  - Etc.

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## How is the market defined in practice?

- In many cases, **qualitative evidence** is held to be sufficient:
  - Review of company documents and operating practices;
  - Review of product characteristics to predict whether consumers would be willing to switch.
- To be included in the relevant market, it is not enough for products to be functional substitutes; they need to be good enough substitutes to actually constrain each other's price.

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## How is the market defined in practice?

Example 1 (adapted from Davis and Garces, 2010)

- Consider two different seafoods: smoked salmon and caviar.
- Caviar is potentially a functional substitute for smoked salmon in that it could be served as part of a salad. So should we include smoked salmon into a broader market that includes caviar?
- Suppose the retail price of 100g of smoked salmon is around €1.50–2.00 while the price of 100g of caviar runs into hundreds of euros.
- Salmon would be considered a market in itself despite it being a functional substitute for current customers of salmon.

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## How is the market defined in practice?

- Example 2: EC investigation of the proposed merger between Ryanair and Aer Lingus.

Airports	Distance to centre of city <sup>107</sup>	Private car <sup>108</sup>	Public transport <sup>109</sup>	Airport denomination on Ryanair website, Bus service to city promoted on Ryanair website <sup>110</sup>
Stansted	59 km	85 min	bus: 75 min rail: 45 min	London (Stansted) Ryanair bus service
Heathrow	28 km	65 min	bus: 65 min <sup>111</sup> rail: 55 min	Not served by Ryanair
Gatwick	46 km	85 min	bus: 90 min <sup>112</sup> rail: 60 min	London (Gatwick)
Luton	54 km	44 min	bus: 60 min rail: 25 min	London (Luton) Ryanair bus service
London City	14 km	20 min	rail: 22 min	Not served by Ryanair

Source: Case no. COMP/M.4439, p. 33.

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## How is the market defined in practice?

- Ryanair argued that the London airports were not demand substitutes for time-sensitive passengers.
- The Commission noted that the U.K. Civil Aviation Authority considers that a “2-hour surface access time” is the relevant benchmark for airport catchment areas for leisure passengers.
- The Commission concluded that scheduled point-to-point passenger air transport services between Dublin and above mentioned airports belong to the same market.

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## How is the market defined in practice?

- A survey also asked passengers at Dublin airport:

“Would you ever consider a flight to/from Belfast as an alternative to using Dublin airport?”

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	445	16,6	16,6	16,6
	No	1751	65,5	65,5	82,1
	Don't Know	388	14,5	14,5	96,6
	No answer	90	3,4	3,4	100,0
Total		2674	100,0	100,0	

Source: Case no. COMP/M.4439, page 367.

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## What is the relevant market?

- While we have used the hypothetical monopolist test to define the product market, the same reasoning applies when defining the **geographic market**.
- E.g. Consider a case involving the production of furniture in Malta.

*Would a hypothetical monopoly seller of all Maltese furniture find it profitable to increase the price by 5-10%?*

- If yes, then the geographic market is defined as Malta.
- If no because, say, imports from neighbouring Sicily would render such a price rise unprofitable, then the test should be repeated on a hypothetical monopolist of Maltese and Sicilian furniture.

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## How do we measure market power in practice?

- Once the relevant market has been defined, we may assess firms' market power using their **market share**.
- The Commission suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market.
- If it were above 50% there might be the presumption that a firm is dominant, and the burden of proving that dominance does not exist falls on the defendant.
- But the market share is only one of the variables that we look at to determine market power.

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## How do we measure market power in practice?

- Ease and likelihood of entry by potential competitors might also constrain a firm's ability to raise prices.
- We therefore consider the existence of switching costs, lock-in effects, network externalities, etc.
- Buyer power – which typically depends on the number of consumers in a given market – also determines market power.
- A large number of buyers will have coordination problems.

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## References

- EC (2007, June 27) *Commission Decision declaring a concentration to be incompatible with the common market and the EEA Agreement*. Case No [COMP/M.4439](#).
- Davis, P. and Garces, E. (2010) *Quantitative Techniques for Competition and Antitrust Analysis*. Princeton University Press.
- EC (1997) *Commission Notice on the definition of relevant market for the purposes of Community competition law*. 97/C 372/03.
- Gore, D., Lewis, S., Lofaro, A. and Dethmers, F. (2013) *The Economic Assessment of Mergers under European Competition Law*. Cambridge University Press, UK.
- Motta, M. (2004) *Competition Policy: Theory and Practice*. Cambridge University Press, UK.

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# Competition Policy Objectives

## Overview of Articles 101-102 TFEU

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1

## Outline

- What is Competition?
- What is Competition Policy?
- What is the legal basis for Competition Policy?
- Does it matter for business?
- Who is in charge? What are the tools?
- What's next for EU Competition Policy?

2



## What is Competition?

- OECD defines **competition** as a situation in a market in which firms or sellers independently strive to attract buyers in order to achieve a particular business objective (e.g. profits).
- Competition = rivalry between firms.
- This rivalry may take place in terms of price, quality or service.
- Competition encourages companies to offer consumers goods and services at the most favourable terms.

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## What is Competition Policy ?

- Margrethe Vestager, European Commissioner for Competition (2014-present):  
*“I think it is one of the fundamentals, not only of the European Union but also of free trade, that competition is fair”.*
- The primary objective of competition policy and competition law is to enhance consumer welfare by promoting competition and controlling practices that could restrict it.

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## What is Competition Policy ?

1. It prohibits agreements or practices that restrict competition between business entities (e.g. cartels);
2. It regulates or bans abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position (e.g. excessive pricing);
3. It supervises mergers and acquisitions of large corporations such that transactions that threaten the competitive process are prohibited or approved subject to remedies;
4. It controls state aid (in the EU) to limit distortions to intra-EU competition and trade resulting from national subsidies.

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## What is the legal basis for Competition Policy?

- *(1) Competition policy prohibits agreements or practices that restrict competition between business entities.*
- This is implemented through rules set out in **Article 101** of the Treaty on the Functioning of the European Union (TFEU) (ex Article 81).
- It concerns:
  - Horizontal agreements: between firms competing in the same market (e.g. cartels, collusion);
  - Vertical agreements: between a manufacturer and its distributor.

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## What is the legal basis for Competition Policy?

- It prohibits practices which:
  - directly or indirectly fix prices;
  - limit or control production;
  - share markets or sources of supply;
  - apply dissimilar conditions to equivalent transactions with other trading parties;
  - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

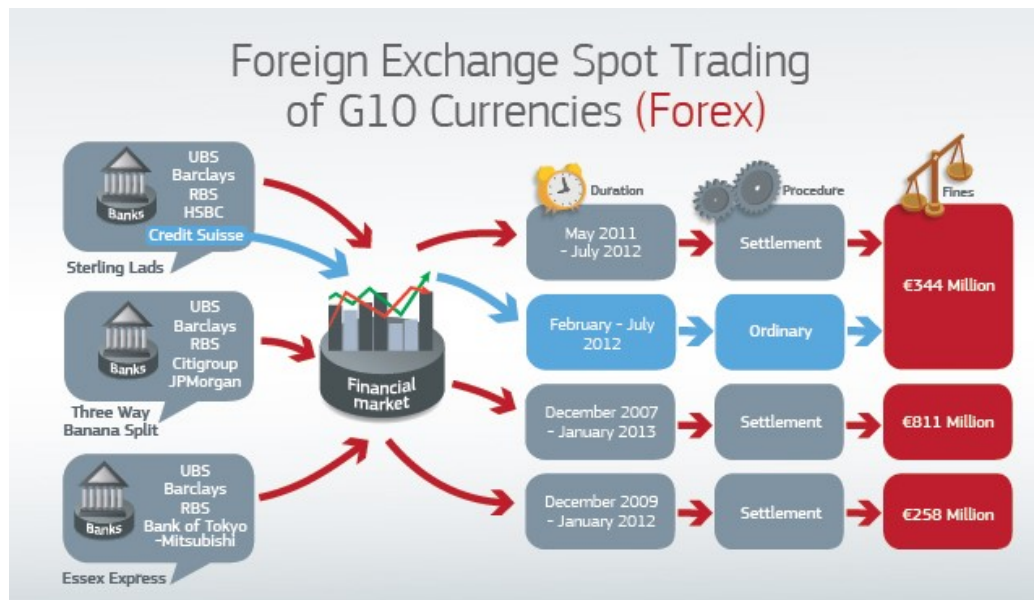
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## What is the legal basis for Competition Policy?

- Only limited exceptions to these prohibitions.
- The most flagrant example is the creation of a **cartel** between competitors, which may involve price-fixing and/or market sharing.
- In December 2021, the European Commission fined UBS, Barclays, RBS, HSBC and Credit Suisse €344m for participating in a Forex spot trading cartel.

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## What is the legal basis for Competition Policy?



Source: European Commission Press Release of 2 December 2021.

9

## What is the legal basis for Competition Policy?

- Traders exchanged sensitive information and coordinated their trading strategies through an online chatroom called Sterling Lads.
- This enabled them to:
  - make informed decisions on whether and when to sell or buy the currencies;
  - identify opportunities for coordination, whereby some of them would temporarily refrain from trading to avoid interfering with another trader.

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## What is the legal basis for Competition Policy?

- (2) *Competition Policy bans abusive behaviour by a dominant firm.*
- This is implemented through rules set out in **Article 102** of the TFEU (ex Article 82) which prohibits:
  - imposing unfair prices;
  - limiting production or technical development;
  - apply dissimilar conditions to equivalent transactions with other parties;
  - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

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## What is the legal basis for Competition Policy?



Source: European Commission Press Release of 18 July 2018.

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## What is the legal basis for Competition Policy?

- These three types of abuse form part of an overall strategy by Google to cement its dominance in general internet search.
- In 2018, the Commission issued a fine of €4.3 billion and requires Google to bring its illegal conduct to an end within 90 days.

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## What is the legal basis for Competition Policy?

- *(3) Competition Policy supervises mergers and acquisitions.*
- This is implemented through Merger Council Regulation (EC) No 139/2004. In a sense, it is the child of Articles 101 and 102 TFEU.
- *(4) Competition Policy controls state aid (in the EU).*
- This is implemented through rules set out in Article 107 of the TFEU.

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## Does Competition Policy matter for business?

- Competition Policy can hurt companies by:
  - Blocking mergers and acquisitions
  - Imposing fines
  - Ordering the repayment of subsidies
  - Negatively affecting the valuation of companies
  - Involve companies in long and expensive battles
  - Cause reputational damage

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## Who is in charge? What are the tools?

- In the EU there are two different levels of jurisdiction.
- EU Commission deals with larger and cross-border cases
- National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully within their territory.
- National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty.

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## Who is in charge? What are the tools?

- The Commission and NCAs have **investigative powers**:
  - Inspections at business and non-business premises;
  - Written requests for information,
  - Etc.
- The Commission may also impose fines on undertakings which violate the EU antitrust rules.

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## What's next for EU Competition Policy?

- Competition policy is under a major review as we speak.
- Policies need to adapt to the rapidly-changing digital, green and global economic landscape.
- Should we use antitrust to tackle social and economic issues that go beyond consumer welfare? How far should we go?
- COVID-19 gave rise to calls for the introduction of comfort letters to address legal uncertainty; updating investigation tools (e.g. remote solutions).
- Does the growing use of AI throughout the economy turn the concept of market power on its head?

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## References

- EC (2022, February 3) *Taking Competition Policy into the Future Young Experts* [[Conference Report](#)]
- EC (2021, December 2) *Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse € 344 million for participating in a Foreign Exchange spot trading cartel Brussels* [[Press Release](#)]
- EC (2018, July 18) *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine* [[Press Release](#)]
- Mosso, C.E. (2016, February 1) *The contribution of merger control to the definition of harm to competition* given [[Speech](#) published by EC]

# Agreements, decisions and concerted practices



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What will we  
learn in this  
session?

Main elements of Article 101 TFEU

Horizontal agreements

Vertical agreements

Exemptions

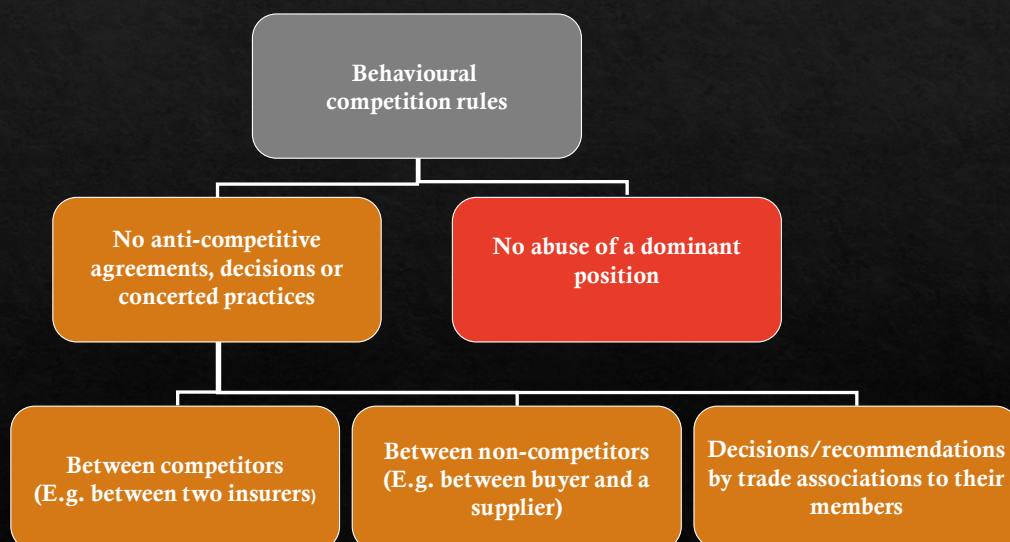
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## Main elements of Article 101 TFEU - Overview

- ◇ EU competition law policy is developed from two central rules set out in the Treaty on the Functioning of the European Union:
  - ◇ Article 101 TFEU prohibits agreements between two or more independent market operators which restrict competition
    - ◇ This provision 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, i.e. agreement between a manufacturer and its distributor)
    - ◇ Only limited exceptions are provided for in the general prohibition
    - ◇ The most flagrant example of illegal conduct infringing Article 101 is the creation of a [cartel](#) between competitors, which may involve price-fixing and/or market sharing
  - ◇ Article 102 TFEU prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers

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## Main elements of Article 101 TFEU - Overview



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## Main elements of Article 101 TFEU – Text

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**.

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## Main elements of Article 101 TFEU

- (1) Agreements, concerted practices etc. This will include:
  - ❖ Agreements between competitors; AND
  - ❖ Agreements between non-competitors
- (2) Between (at least two) **undertakings**
- (3) **Object** or **effect** of the agreement is the (appreciable) restriction of competition
- (4) There is an (appreciable) effect on trade between EU member states



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## Main elements of Article 101 TFEU – Undertakings

- ◆ Any natural or legal person can be an undertaking provided it is engaged in economic or commercial activity (whether or not profit-making and regardless of its legal status, or the way in which it is financed (*Case C-41/90 Hofner and Elser [1991] ECR I-1979*))
- ◆ Companies, partnerships, sole traders and trade associations can all be undertakings, whether they supply goods or services
- ◆ **Individuals** can be undertakings if they are carrying on a commercial activity, for example, as a sole trader, consultant or licensor of intellectual property rights. However, an employee acting in the course of their employment will not constitute an undertaking.

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## Main elements of Article 101 TFEU – Undertakings

- ◆ **State-owned companies, Member states and regional and local authorities** may also be undertakings if they are engaged in commercial activities
- ◆ However, an entity such as a state undertaking is not an undertaking when purchasing goods or services for non-economic purposes (*Case C-205/03 FENIN [2006] ECR I-6295*)
- ◆ **Undertakings based outside the EU** may be subject to Article 101(1) TFEU if they are party to an agreement that has effects within the EU

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## Main elements of Article 101 TFEU – Undertakings

- ◆ Article 101(1) TFEU only applies to an agreement between two or more **independent** undertakings
- ◆ It will, therefore, generally **not** apply to:
  - ◆ An **agency agreement** if the principal and agent are so closely integrated that they are to be regarded as part of the same economic unit (*European Commission Guidelines on Vertical Restraints (OJ 2010 C) at paragraph 18*)
  - ◆ Agreements between **employers and employees**
  - ◆ **Intra-group arrangements** (i.e. between a parent and subsidiary, or between two sister companies)

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## Main elements of Article 101 TFEU – Agreements

- ◆ The same conduct can be both an agreement and a concerted practice (*Case T-7/89 Hercules v Commission [1991] ECR 1711*)
- ◆ An agreement does not have to be in writing and does not have to be legally binding
- ◆ It is sufficient if there has been an expression of a joint intention to behave in a particular way
- ◆ A continuing trading relationship can amount to an agreement (*Konica OJ 1988 L78/34*)

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## Main elements of Article 101 TFEU – Effect on trade between member states

- ◆ Jurisdictional requirement that distinguishes between agreements caught by the EU competition rules and those that are regulated by the national competition laws
- ◆ Only agreements that are capable of affecting trade between EU countries to an appreciable extent are subject to Article 101 TFEU
- ◆ An agreement concerning exports or imports between member states is an obvious example of an agreement that is likely to affect trade between member states

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## Main elements of Article 101 TFEU – Effect on trade between member states

- ◆ An effect on trade between member states can be found even if all the parties to the agreement are located in one member state
- ◆ It is not necessary to show that each restrictive clause has an effect on trade between member states; it is sufficient if the agreement, viewed as a whole, has or is likely to have that effect
- ◆ The *Commission's Notice on guidelines on the effect on trade concept (OJ 2004 C101/81)* (Guidelines on the effect of trade) sets out the methodology to be applied and principles developed by the EU courts
- ◆ Guidelines are designed to ensure consistency throughout the EU

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## Main elements of Article 101 TFEU – Appreciable effect on trade between member states

- ◆ In its Guidelines on the effect on trade concept the Commission has indicated that agreements are unlikely appreciably to affect trade between member states if:
  - ◆ The aggregate market share of the parties on any relevant market in the EU does not exceed 5%; and
  - ◆ In the case of horizontal agreements, the aggregate annual EU turnover of the parties in the products concerned does not exceed EUR40 million or, in the case of vertical agreements, the annual EU turnover of the supplier in the product concerned does not exceed EUR40 million

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## Main elements of Article 101 TFEU – Prevention, restriction or distortion of competition within the EU

- ◆ Article 101(1) contains a non-exhaustive list of examples of anti-competitive agreements (see slide 5)
- ◆ The restriction of competition can arise from a horizontal restriction (a restriction between parties at the same level of supply) or a vertical restriction (a restriction between parties at different levels of supply)
- ◆ Horizontal restrictions are generally regarded as more serious breaches of Article 101(1) TFEU
- ◆ They involve co-ordination between competitors and are therefore more likely to have a significant adverse impact on competition

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## Main elements of Article 101 TFEU – Prevention, restriction or distortion of competition within the EU

- ◆ An agreement can have as its *object* or *effect* to restrict competition
- ◆ In its Guidelines 2004/C 101/08 on the application of Article 101(3) TFEU, the Commission defines restrictions by object as those:

*“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) TFEU] to demonstrate any actual effects on the market” as they have by their very nature the potential of restricting competition.”*

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## Main elements of Article 101 TFEU – Prevention, restriction or distortion of competition within the EU

- ◆ Examples of horizontal restrictions:
- ◆ Price-fixing, customer- or market-sharing, production quotas, or joint selling or purchasing arrangements
- ◆ Examples of vertical restrictions:
- ◆ Exclusive supply and purchase obligations, non-compete clauses, export bans, cross-border restrictions including on digital markets, and resale price maintenance

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## Main elements of Article 101 TFEU – Appreciable effect on competition

- ◊ An agreement will only infringe Article 101(1) if its effect both on trade between member states and on competition within the EU is likely to be **appreciable**
- ◊ *Commission 2014 Notice on agreements of minor importance:*
- ◊ **Market share thresholds:** an agreement will not normally be regarded as infringing Article 101(1) if the market share of the parties on the relevant market does not exceed:
  - ◊ 10% for horizontal agreements (combined); and
  - ◊ 15% (each) for vertical agreements
- **Object restrictions:** the Commission will not apply the safe harbour to agreements which have as their object the prevention, restriction or distortion of competition within the internal market

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## Main elements of Article 101 TFEU - Summary

The consequences can be severe, depending on:

1. Whether the agreement is “horizontal” or “vertical”
  - ◊ Vertical agreements are more benign
  - ◊ Vertical agreements benefit more easily from block exemptions
2. Whether the agreement has an “object” or “effect” restriction
  - ◊ If “object” restriction, no further inquiry needed
  - ◊ Usually also hardcore restrictions which do not benefit from block exemptions
  - ◊ Exemption under Article 101(3) unlikely

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# Horizontal agreements - Overview

## Anti-competitive agreements/concerted practices

In particular, those which:

- ✦ Fix prices (directly or indirectly), or any other trading conditions
- ✦ Joint set out selling or purchasing arrangements
- ✦ Limit/control production, markets, technical development, investment
- ✦ Share markets or sources of supply (customer allocation, bid-rigging etc)
- ✦ Jointly discriminate against third parties
- ✦ Jointly impose unjustifiable obligations on third parties

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## Horizontal agreements - Overview



### Contacts with competitors (horizontal)



Biggest risk: the price-fixing cartel



But sharing information also risky, if competitors can predict each other's commercial intentions



Sales teams: must not swap internal confidential information with others



Industry groups and associations: beware venues for exchanging illicit information



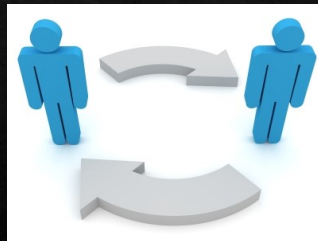
The golden rule: "decision-taking independence" on the market

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## Horizontal agreements - Case Study (1)

Two competing suppliers of HR software attend an industry meeting in October 2021. They decide to provide each other with strategic information, including expected pricing uplifts for some of their software products for 2022.



**Q:** Is this a good idea?

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## Horizontal agreements - Case Study (2)

During the coffee break, the CEO of Can Beer Group Intl tells James Lannister, the CEO of the Lannister Beverage Group, that he “is under a lot of commercial pressure” and that he “will have to increase our prices for canned lager beer by 5%”.



**Q:** Is this advisable? What does it depend on? What if the CEO of Can Beer Group just spoke about his current prices?

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## Horizontal agreements – Information exchanges

- ◇ Information exchange will be anti-competitive if:
  - 1) There is an agreement; AND
  - 2) The agreement has an anti-competitive object; OR
  - 3) An anti-competitive effect
- ◇ Information exchange can be caught by competition legislation even if there is no explicit agreement
- ◇ Competition authorities **assume** that undertakings will act on receiving certain sensitive information, unless they **immediately** and **clearly** reject it
- ◇ Anti-competitive information exchange can be facilitated by a third party or intermediary (“ABC-conspiracy”)
  - For instance *via* a trade association
  - NB trade association has separate obligations under competition law

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## Horizontal agreements – Information exchanges

- ◇ Wide interpretation of “agreement”
  - ◇ No explicit agreement is necessary and “concerted practices” are included (meeting of the minds)
  - ◇ Sufficient if information sharing reduces **“strategic uncertainty”**
  - ◇ Includes unilateral announcement or **passive receipt** of information
- ◇ **BUT** When does an exchange of information reduce “strategic uncertainty”?



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24

## Horizontal agreements – Information exchanges

- WHAT** “Strategic uncertainty” depends on:
- (1) the market conditions; **AND**
  - (2) the type/quality of the information exchanged

- WHEN**
1. Market conditions: a collusive outcome is more likely if the market is:
    - ◇ Transparent
    - ◇ Concentrated/oligopolistic
    - ◇ Stable
    - ◇ Symmetric
    - ◇ Capable of punishing deviance
  2. Type/quality of information exchanged:
    - ◇ Not one decisive factor!
    - ◇ **Key Q**: Can undertakings now behave in a parallel manner?

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## Horizontal agreements – Information exchanges

Feature/issue	Likely <b>permitted</b>	Likely <b>not permitted</b>
Commercial value	Non-strategic	Strategic (e.g. prices, quantities, sales, marketing plans)
Detail	<ul style="list-style-type: none"> <li>▪ Aggregated data</li> <li>▪ Difficult to identify individual companies</li> </ul>	<ul style="list-style-type: none"> <li>▪ Individualised data</li> <li>▪ Each market player can be easily identified</li> </ul>
Age	Depends on average duration of contract, generally if >1 year old	≤1 year or future
Availability	Genuinely public	Private
Frequency	Depends on market stability- single passive receipt may be enough!	

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# Vertical agreements - Overview

## Contacts with suppliers and retailers (vertical)

- ✦ Less risky. In particular, benefit more easily from Block Exemption Regulations. But:
- ✦ Beware resale price maintenance (setting minimum sale price of retailer)  
(Recommended sale price? Maximum sale price?)
- ✦ Beware **indirect** exchanges of commercial information with competitors via a third party (e.g. retailer)
- ✦ Beware of e.g. exclusive arrangements, allocations of territories

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# Vertical agreements - Examples

- ◇ Common examples of vertical restraints are:
- ◇ **Exclusivity clauses** – Provisions that restrict the ability of the buyer or seller to buy or sell to anyone other than the contracting partner
- ◇ **Selective distribution** – Distribution systems that limit the number of authorised distributors of a certain product

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## Vertical agreements – Examples

- ◊ Certain restraints per se not in compliance with Article 101 TFEU
  - ◊ Facilitation of vertical price-fixing
  - ◊ Imposition of certain territorial or customer resale restrictions
  - ◊ Prohibition or limitation of parallel trade
  - ◊ Prohibition or limitation of passive sales (most notably in relation to online marketing and sales)
- ◊ Most of these also considered 'hardcore' under the Block Exemption Regulation

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## Vertical agreements – Examples

- ◊ More flexibility exists in relation to other vertical agreements:
  - ◊ Agreements containing recommended or maximum resale price provisions
  - ◊ Agreements conferring territorial and/or customer exclusivity
  - ◊ Agreements containing non-compete stipulations (under certain conditions)
  - ◊ Exclusive supply agreements
  - ◊ Agreements containing discount schemes
  - ◊ Agreements with tying and/or bundling provisions

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## Exemptions – Text of Article 101 (3) TFEU

*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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## Exemptions - Overview

- ◊ An agreement that is caught by Article 101(1) may nevertheless escape prohibition (and therefore voidness) under Article 101(3)
- ◊ Two kinds of exemption:
  - ◊ Individual exemption
  - ◊ Block exemption

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## Exemptions – Individual exemptions

- ◊ With entry into force of *Regulation 1/2003 in 2004*, the system of advance notification and approval of agreements was abolished
- ◊ In contrast to the old position, agreements caught by Article 101(1) are void and unenforceable only to the extent that Article 101(3) is found not to apply (*Articles 1 and 2, Regulation 1/2003*)
- ◊ The Commission, national courts and national competition authorities all have the right to apply the criteria set out in Article 101(3) when determining whether an agreement is prohibited under Article 101
- ◊ The Commission has published *Guidelines on the application of [Article 101(3) of the TFEU]* (OJ 2004 C101/78)

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## Exemptions – Block exemptions – Overview

- ◊ "Block exemptions" are contained in regulations issued by the Commission (in certain cases by the Council)
- ◊ If an agreement meets the conditions set out in the relevant block exemption regulation, it is automatically exempt from Article 101(1) TFEU

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## Exemptions – Vertical agreements

The Commission Regulation No 330/2010, or VBER

- ◆ Provides conditions for exemption from Article 101 where there is sufficient certainty that the agreements satisfy the conditions of Article 101(3) - Articles 2 and 3
- ◆ The VBER also lists vertical agreements that are considered 'hardcore' infringements and thereby do not benefit from the VBER – Article 4 (and 5)
- ◆ Expires 31 May 2022
- ◆ Both the VBER and the accompanying guidelines currently under review

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## Exemptions – Vehicle agreements in the motor vehicle sector

- ◆ Regulation 461/2010 (OJ 2010 L129/52) and Regulation 330/2010 (OJ 2010 L102/1)
- ◆ Regulation 461/2010 will expire on 31 May 2023
- ◆ Regulation 330/2010 is due to expire on 31 May 2022

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## Exemptions – Technology transfer agreements

- ◆ Regulation 316/2014 of 21 March 2014

- ◆ Expires 30 April 2026

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## Exemptions – Specialisation agreements

- ◆ Regulation 1218/2010, (OJ 2010 L335/43)

- ◆ Expires 31 December 2022

- ◆ Currently under review (together with guidelines on horizontal cooperation)

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## Exemptions – Joint research and development agreements

- ◆ Regulation 1217/2010, (OJ 2010 L335/36)
- ◆ Expires 31 December 2022
- ◆ Currently under review (together with guidelines on horizontal cooperation)

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Any Questions?

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# Using search tools of online case law databases



Funded by the European Union  
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Dr Alexandra von Westernhagen  
Partner, Keystone Law

1

EUR-Lex

<https://eur-lex.europa.eu/>

2

DG Comp Case Search

<https://ec.europa.eu/competition/elojade/isef/>

3

E-Curia  
InfoCuria

<https://curia.europa.eu/>

EUR-Lex

1

## What is EUR-Lex?

- EUR-Lex is an online database for legal documents pertaining to European Union Law
- EUR-Lex is available in **all 24 official languages** of the European Union
- Legal Documents available on EUR-Lex:
  - Treaties
  - Legal acts from EU institutions
  - Preparatory documents related to EU legislation
  - EU case-law
  - International agreements
  - EFTA (European Free Trade Association) documents
  - References to texts of national transposition measures
  - References to national case law related to EU law

About EUR-Lex - EUR-Lex. (n.d.). Europa. <https://eur-lex.europa.eu/content/welcome/about.html>

## What is EUR-Lex?

- Documents available on EUR-Lex also contain **supplemental information** that may be helpful in the search for case-law related details
- Examples of supplemental information include:
  - Relations with other legal documents
  - Case law interpretations
  - Key dates related to adoption/entry into force/applicability/legal basis/amending acts etc.
- EUR-Lex also helps to understand EU law by providing:
  - The main stages of the procedures leading to the adoption of legal acts
  - Consolidated texts which combine the initial legal acts with all of their amendments into a single document
  - Over 2000 summaries of EU legislation that explain such documents in a plain, easy-to-understand and concise way
- EUR-Lex offers multiple methods to search its various collections
  - You can search via free text, combining different search terms and search criteria
  - You can also view three different linguistic versions of the same document at once

About EUR-Lex - EUR-Lex. (n.d.). Europa. <https://eur-lex.europa.eu/content/welcome/about.html>

## How to use EUR-Lex

### QUICK SEARCH:

Use quotation marks to search for an "exact phrase". Append an asterisk ( \* ) to a search term to find variations of it (transp \* , 32019R \* ). Use a question mark ( ? ) instead of a single character in your search term to find variations of it (ca ? e finds case, cane, care).

Q QUICK SEARCH

Search tips Need more search options? Use the [Advanced search](#)

- Free text search via key words such as "Consumer, 2016/649, protection"
- This search goes through texts, titles and other information (tags, document type, etc.)
- **Language of search term should be in the currently utilised language (English terms for English version, etc.)**
- Multiple word phrases should be in quotes: Ex: "Consumer Protection" etc.
- Use filters to narrow down the result list:

By type of act

- Written question (109926)
- Provisional data (69304)
- Consolidated text (17217)
- Decision (9720)
- Regulation (7852)
- See more...

By year of document

- 2023 (2)
- 2022 (884)
- 2021 (6402)
- 2020 (5230)
- 2019 (5562)
- See more...

Sort by Relevance

Refine query

By keyword

☒ In title ☒ In text

Using the EUR-Lex Quick Search (2019). (2019, February 13). Publications Office of the European Union.

## How to use EUR-Lex

### ADVANCED SEARCH:

#### Advanced search

Collection All documents

Choose multiple collections

Text search

Search Find results containing:

☒ In title ☒ In text

AND OR NOT Add/remove results containing:

☒ In title ☒ In text

Search hints:

- implementing regulation + implementing AND regulation
- " exact phrase search
- \* replace 0 to n characters
- ? replace a single character

Document reference

Year Number

Type

☒ All

☐ Regulation ☐ Directive

☐ EU court case ☐ COM and JOIN documents

☐ Other ☐ Decision ☐ SEC or SWD documents

Search by Cexlex number

CELEX number

Author of the document

Author

All

Other

...And more!

Advanced search on EUR-Lex (2019). (2019, March 27). Publications Office of the European Union.



## DG Comp Case Search

2

### What is DG Comp Case Search?

- DG Comp Case Search is an online search tool used for finding specific competition cases of the European Union
- The interface for the DG Competition Case Search is simple to use, and at its surface provides several fields where related information can be entered to assist you in your search
- Firstly, choose a policy area, ranging from all policy areas to specifically:
  - Antitrust / Cartels
  - Cartels
  - Merger
  - State Aid
- Besides that, numerous other criteria can be entered such as:
  - Case numbers
  - Case titles or related keywords
  - Decision dates
  - Economic sectors
  - Web publication date

## How to use DG Comp Case Search

Policy Area	Case Number ▲	Member State	Last Decision Date	Title	
Antitrust	<a href="#">AT.35587</a>		30.10.2002	Video games	<input type="button" value="Show details"/>
Antitrust	<a href="#">AT.35706</a>		30.10.2002	PO / Nintendo distribution	<input type="button" value="Show details"/>
Antitrust	<a href="#">AT.36321</a>		30.10.2002	Omega/Nintendo+1	<input type="button" value="Show details"/>
Antitrust	<a href="#">AT.38044</a>		25.06.2009	National Data Corporation/IMS Global Services	<input type="button" value="Show details"/>
Cartel	<a href="#">AT.39639</a>		21.10.2015	Optical Disc Drives	<input type="button" value="Show details"/>

- On the results page, a list of the relevant cases should now be displayed. These results are automatically sorted via "Policy Area", "case number", "Member state", "last decision date" and "case title"
- By clicking on one of these headers, you are able to sort by the specific criteria

- You can also refine the search (utilises original search criteria)
- OR make a new search entirely (which clears the form entirely)

- Display "Show Detail" to obtain accessible information on a selected case (or cases)
- Select "Hide detail" to return to the original list of cases

European Commission - Competition. (n.d.). DG Competition Case Search.

**Search competition cases (all policy areas)**

Policy Area: ☒ All ☐ Antitrust / Cartels ☐ Cartels ☐ Merger ☐ State Aid

Case Number:  ?

Case Title or Company Name:  (word(s) that the title contains) ?

Decision Date: From  to  ?

Economic sector (NACE CODE):  ?

Web Publication Date: From  to

### Searching by case number:

- In many situations the specific case number is unknown when making a search. In case of a partially known case number, this can be overcome by **utilising the parameter "%"**

35% (Searches for all cases starting with 35)  
 %35 (Searches for all cases ending in 35)  
 %35% (Searches for all cases containing 35)

European Commission - Competition. (n.d.). DG Competition Case Search.

**Search competition cases (all policy areas)**

Policy Area: ☒ All ☐ Antitrust / Cartels ☐ Cartels ☐ Merger ☐ State Aid

Case Number:

Case Title or Company Name:  (word(s) that the title contains) ?

Decision Date: From  to  ?

Economic sector (NACE CODE):  ?

Web Publication Date: From  to

### Searching by case title or company title:

- This search tool looks for words or part of words that are contained in the title of the case or the company/organisation name
  - The more complete you type the name in, the more the search will be accurate, especially for composed names
  - If you type more than one word, the search engine will retrieve cases that contain all words in the title

### Decision Date:

- This is the date when the Commission adopted its last published decision on the case
- The database contains cases object of a decision from:
  - Antitrust/Cartels: 1 January 1999
  - Mergers: the entry into force of the Merger Regulation on 21 September 1990
  - State aid: 1 January 2000

European Commission - Competition. (n.d.). DG Competition Case Search.

**Search competition cases (all policy areas)**

Policy Area: ☒ All ☐ Antitrust / Cartels ☐ Cartels ☐ Merger ☐ State Aid

Case Number:

Case Title or Company Name:  (word(s) that the title contains) ?

Decision Date: From  to  ?

Economic sector (NACE CODE):  ?

Web Publication Date: From  to

### Economic sector:

- Requires inputting of NACE code
  - NACE Rev 2 is the Statistical classification of economic activities in the European Community

### Web publication date:

- This is the date where the information was posted to the database

European Commission - Competition. (n.d.). DG Competition Case Search.

# How to Use DG Comp Case Search

- By selecting a specific Policy Area, an advanced search form can be viewed for manual input of various specific parameters
  - Similarly to EUR-Lex, this puts the direct tools for filtering results **directly into your hand**

## Search competition cases (all policy areas)

Policy Area: ☐ All ☒ Antitrust / Cartels ☐ Cartels ☐ Merger ☐ State Aid

### Antitrust Advanced Search

Case by Area | Cases by document | Filter cases |

Document Type: Administrative closure  
Art 27(4) notice  
Art. 106(3) decision (ex 86(3))  
Art. 17 decision

Document Title: ?

Legal Basis: Art 101 TFEU (Ex 81 EC)  
Art 102 TFEU (Ex 82 EC)  
Art 105 TFEU (Ex 85 EC)  
Art 106 TFEU (Ex 86 EC)

Antitrust: ☒ Cartels: ☒

Cases range: From ? to ?

Document Date: From ? to ?

### Antitrust Advanced Search

Document Type: Administrative closure  
Art 27(4) notice  
Art. 106(3) decision (ex 86(3))  
Art. 17 decision

Document Title: ?

Legal Basis: Art 101 TFEU (Ex 81 EC)  
Art 102 TFEU (Ex 82 EC)  
Art 105 TFEU (Ex 85 EC)  
Art 106 TFEU (Ex 86 EC)

Cases range: From ? to ?

Document Date: From ? to ?

### Merger Advanced Search

Case notified Under: Council Regulation 139/2004 Council Regulation 4086/89

Decision Type: [ Council Regulation 139/2004 - 2/3 rule  
[ Council Regulation 139/2004 - Abolished / withdrawn  
[ Council Regulation 139/2004 - Art. 10(3)  
[ Council Regulation 139/2004 - Art. 14  
[ Council Regulation 139/2004 - Art. 15  
[ Council Regulation 139/2004 - Art. 18 (Statement of Objections)  
[ Council Regulation 139/2004 - Art. 19 (Advisory Committee)  
[ Council Regulation 139/2004 - Art. 21(4)]

Simplified Procedure: ☒ Yes ☒ No

Publication in the OJ date: From ? to ?

Notification Date: From ? to ?

Deadline Changed: From ? to ?

- Note: to make multiple selections from a drop-down menu whilst making an advanced search, hold the "CTRL" key

E-Curia / InfoCuria

## What is E-Curia?

- E-Curia is an application provided by the Court of Justice of the European Union
  - This enables the representatives of parties in cases brought before the European Court of Justice and the General Court (as well as national courts) to exchange procedural documents by exclusively electronic means
- E-Curia has attached to it a digital search form that can be used to search for procedural documents related to both pending and closed cases before the Court of Justice of the European Union
  - This form is called **InfoCuria**
- The InfoCuria database contains all the publicly available information concerning the cases brought before the European Court of Justice, the General Court and the Civil Service Tribunal
  - InfoCuria gives access, primarily, to the documents of the Institution (principally the judgments, Opinions, orders and notices in the Official Journal of the European Union), by means of a text search or a data search




InfoCuria  
Case-law

## How to use InfoCuria

Case status	<input checked="" type="radio"/> All cases <input type="radio"/> Cases closed <input type="radio"/> Cases pending
Court	<input checked="" type="checkbox"/> All <input checked="" type="checkbox"/> Court of Justice <input checked="" type="checkbox"/> General Court <input checked="" type="checkbox"/> Civil Service Tribunal
Case number	<input type="text"/> (ex: C-17/05; 17/05)
Name of the parties	<input type="text"/>
Documents	<input type="text"/> All <input type="button" value="⋮"/>
Provisions of national law referred to	<input type="text"/>
Provisions of international law referred to	<input type="text"/>
ECLI	<input type="text"/> ECLI:EU:
Text	<input type="text"/>
Period or date	<input type="text"/> Date of delivery <input type="button" value="⌵"/>
	<input checked="" type="radio"/> from <input type="text"/> to <input type="text"/> (dd/mm/yyyy)
	<input type="radio"/> last 8 days <input type="radio"/> last month <input type="radio"/> last year <input type="radio"/> last 5 years
	<input type="radio"/> on <input type="text"/> (dd/mm/yyyy)

Subject-matter	<input type="text"/> <input type="button" value="⋮"/>
Procedure and result	<input type="text"/> <input type="button" value="⋮"/>
References to case-law or legislation	<input checked="" type="checkbox"/> Search in <input checked="" type="checkbox"/> Grounds of judgment <input type="checkbox"/> Operative part <input type="checkbox"/> Opinion
	Category <input type="text"/>
Systematic classification scheme	<input type="text"/> <input type="button" value="⋮"/>
	<input checked="" type="checkbox"/> Include earlier/new scheme
Formation of the Court	<input type="text"/> <input type="button" value="⋮"/>
Judge-Rapporteur	<input type="text"/> <input type="button" value="⋮"/>
Advocate General	<input type="text"/> <input type="button" value="⋮"/>
Source of a question referred for a preliminary ruling	<input type="text"/> <input type="button" value="⋮"/>
Authentic language	<input checked="" type="checkbox"/> Language of the case <input type="checkbox"/> Language of the Opinion

## How to use InfoCuria

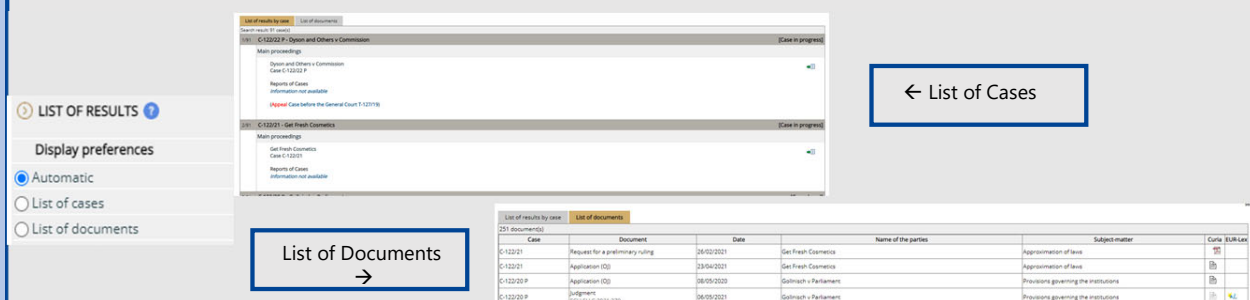
- Similar to other databases, there is a variety of criteria that can be used to filter and narrow down search results
- These criteria range from general parameters such as "Period or Date" to more specific parameters such as ECLI which stands for "European Case Law Identifier"
- Next to each search option on the database form is a  which links the user to a wider and more specific .pdf guide on using the database
- Many search fields present on the database form require unique formatting to aid in general search
  - An example of this is the "Case Number" field
  - A case number-based search is still possible even without full knowledge of the number itself
  - The formatting usage of this search field is NUM/YR. (Case Number / Year )
    - Completing a search with (122/07) entered will find case number 122 of the year 2007
    - Completing a search with (122/ ) entered will find case number 122 of any year
    - Completing a search with ( /07) entered will find every case of the year 2007

[Link to Usage .PDF](#)









CURIA - Search form. (n.d.). InfoCuria.

## How to use InfoCuria

- On the left side of the webpage is the "Display preferences" menu
- Upon first visit, the display preference is set to "Automatic"
  - "Automatic" means that search results will either be displayed on either a case-by-case basis, or a specific document basis depending on the search criteria used
    - (Searching for a specific case will bring up the first view, searching for a specific document will bring up the latter etc.)
  - "List of Cases" means that regardless of any search criterion used, the results will still be shown as a list of specific cases
  - "List of Documents" means that regardless of any search criterion used, the results will still be shown as a list of specific documents



The screenshot shows the InfoCuria search interface. On the left, there is a 'Display preferences' menu with three options: 'Automatic' (selected), 'List of cases', and 'List of documents'. The main area displays two search results. The top result, 'C-122/21 P - Spain and Others v Commission', is shown in a 'List of Cases' view, which displays case details. The bottom result, 'C-122/21 P - Get Fresh Cosmetics', is shown in a 'List of Documents' view, which displays a table of documents.

Case	Document	Date	Name of the parties	Subject matter	Curia	EUR-Lex
C-122/21	Request for a preliminary ruling	26/02/2021	Get Fresh Cosmetics	Approximation of laws		
C-122/21	Application (OJ)	23/04/2021	Get Fresh Cosmetics	Approximation of laws		
C-122/21 P	Application (OJ)	26/05/2022	Get Fresh v Parliament	Provisions governing the institutions		
C-122/21 P	Judgment	26/05/2021	Get Fresh v Parliament	Provisions governing the institutions		

CURIA - Search form. (n.d.). InfoCuria.

## How to use InfoCuria

➤ Also, on the left side is “Listing Preferences”

➤ These preferences help determine the order in which results are shown

- The four listing preferences available are:
- Case Numbers (Descending)
- Case Numbers (Ascending)
- Dates (Descending)
- Dates (Ascending)

Listing preferences	
<input checked="" type="radio"/>	Case numbers in descending order
<input type="radio"/>	Case numbers in ascending order
<input type="radio"/>	Dates in descending order
<input type="radio"/>	Dates in ascending order

➤ Despite searches or filters, some info may not be available

➤ In this case, there are a variety of reasons this may be:

- **The document it is not relevant to the case**
  - (for example, the source of a question referred for a preliminary ruling in an action for annulment)
- **It is not yet available at this stage of the procedure**
  - (for example: the publication reference for the Official Journal of the European Union before publication)
- **it is not yet publicly available at this stage of the procedure**
  - (for example: the name of the Judge-Rapporteur in pending cases)

## Questions?



## ESSENTIAL EU COMPETITION LAW

Seminar for Irish and Maltese Judges

- Articles 101 and 102 TFEU
- Private enforcement of EU competition law
- State Aid Law

Valletta, 7 – 8 April 2022



**UP  
GRADE**  
YOUR LEGAL  
EXPERTISE  
Competition  
Law



Service Contract DG COMP/2017/015 - SI2.778715  
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European Commission.  
However, it reflects the views only of the authors,  
and the Commission cannot be held responsible  
for any use which may be made of the information  
contained therein.

# Abuse of dominance under Art. 102 TFEU

*Simonetta Vezzoso*

*PRELIMINARY VERSION*: the link to the final version will be provided at the beginning of the live session

1

4 PARTS

Competition policy: *rapid* **evolution**

Art. 102 TFEU: fit for **our era**

The **Google Search (Shopping)** case

Introducing the **case study**

2



# Competition policy: *rapid* evolution

3

Competition  
policy:  
evolution in  
the EU

---



4



5

## REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) (Text with EEA relevance) 2020/0374(COD)

### Competition policy for the digital era

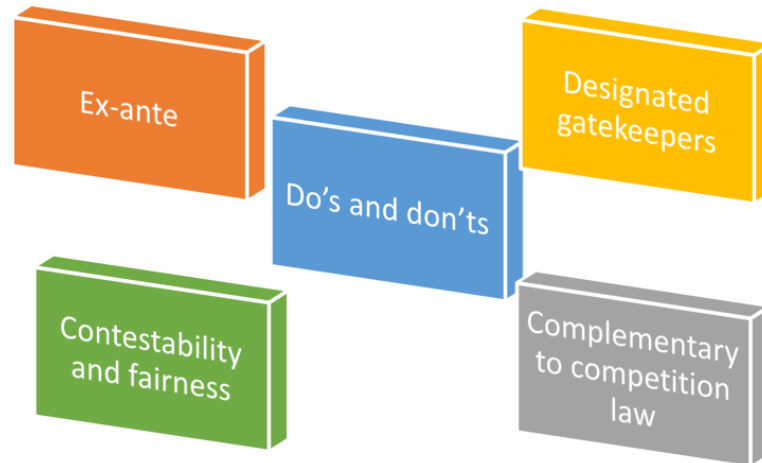
A report by Jacques Cr mer, Yves-Alexandre de Montjoye, Heike Schweitzer

“Things have become too complex...the DMA is [also] about it”

Marc van der Woude  
President of the General Court

6

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL on contestable and fair markets in the digital sector (Digital Markets  
Act) (Text with EEA relevance)  
2020/0374(COD)**



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Enforcers Summit – April 4, 2022

Powered by  
Zoom



Competition policy:  
evolution in the US

8

## Competition policy: evolution beyond the EU/US



### A new pro-competition regime for digital markets

Advice of the Digital Markets Taskforce



9

## PART 1: Takeaways



Increased  
complementarity  
with regulation



More technological  
approach



Renewed discussion  
on goals



Policy  
experimentation

10



11

Art. 102 TFEU:  
*(making it)* fit for our era

---

12



MARGRETHE VESTAGER (COMMISSAIRE EUROPÉENNE)

## «La prochaine étape de la digitalisation arrive»

Écrit par Benoît Theunissen et Thierry Labro

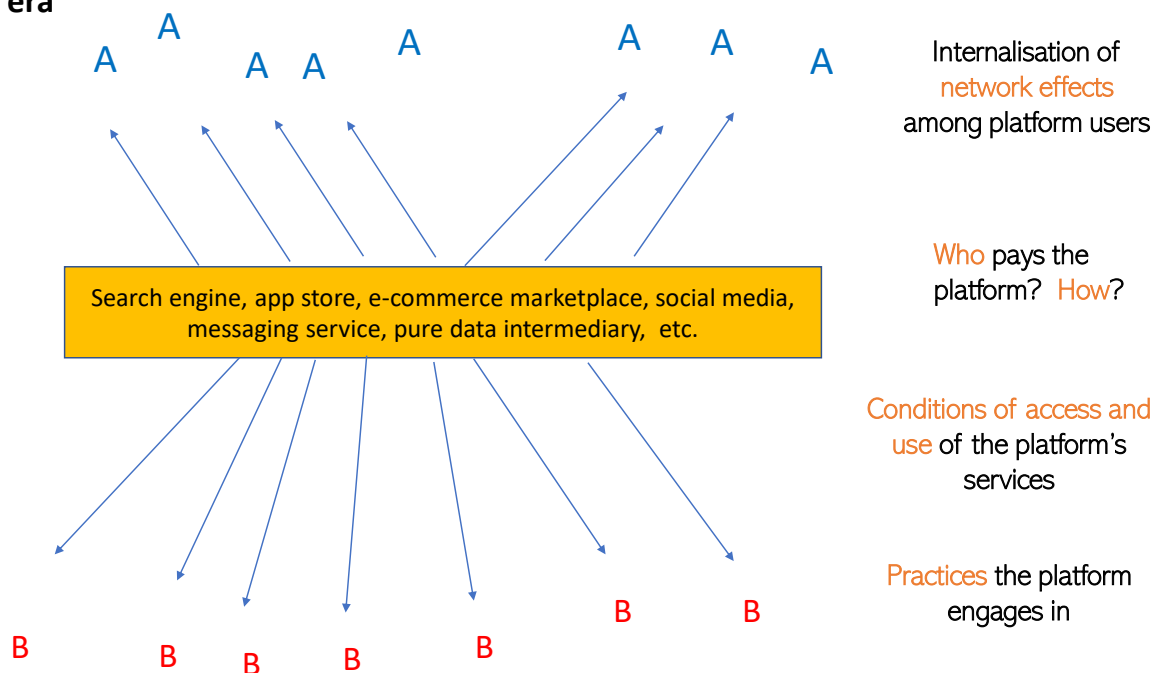
Publié The 05.04.2022 • Édité The 05.04.2022



“I don't think the problem is not to have a European Google or a European Facebook, because the next stage of digitalisation is coming, which is much more industrial. Industry, agriculture, mobility, energy, everything is becoming digital. The public sector, health”

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### Two-sided platforms in the digital era



14

## Art. 102 TFEU

Relevant market(s)

Dominant position

Abusive conduct

Objective justification

Penalties, Remedies

15

Peculiarities of competition in the digital age	Art. 102 TFEU: Up to the task?
New theories of harm	YES/NO
Relevance of network effects	YES (but challenges)
Importance of data	YES (but challenges)
Non-price effects	YES/NO
Tipping markets	NO
Issues with the business model itself	YES, if effective remedies imposed
Anticompetitive behaviour: cost of doing business	NO/YES
Complexity of market relations (beyond horizontal/vertical , e.g. <i>cross-market</i> )	NO/YES
Unfair practices by platform operators	NO/YES

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## Relevant market(s)

- **Product market – geographic market**
- **Digital-era markets:** search engines, e-commerce marketplaces, application marketplaces, data intermediaries, attention markets, etc.)
- **B2B** (business-to-business); **B2C** (business-to-consumer)
- **Analysis of demand and offer** (e.g., reasons why retailers and customers increasingly use digital marketplaces)
  - **SSNIP Test** can at times be useful (e.g., asking retailers how they would react to a 5- 10% increase in total fees charged by a hypothetical monopolist in the provision of marketplace intermediation services)
- **Substitutable v. Complementary** (e.g., multi-homing)
- **Market delimitation** increasingly blurry in some instances (*still*: important to delineate the relevant competitive dynamics to frame the case)

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## Dominant position

***A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers***

- **Market share** (e.g., revenues, by volume of
- **Other factors**
  - barriers to the entry or to the growth of existing competitors)
  - - network externalities
  - - economies of scale
  - - overall size (e.g., complete ecosystem, increasing popularity and loyalty – even stickiness)
  - level of multi-homing
  - countervailing buyer power , etc.

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## Abusive conduct

- **Exclusionary, exploitative**
- **Special responsibility** to ensure that the conduct does not hinder effective competition in the market
- **Not only** when entry is made impossible, but made more difficult
- **Objective** concept (but intent can be taken into account)
- Competition **on the merits**
- Strengthen position in the already 'dominated' market, as well as in **other** markets
- **Direct impact on consumers - distorting the competitive process**
- **Price** and **non-price** related
- **Non-exhaustive list of examples** in Art. 102 TFEU

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# The *Google Search (Shopping)* case

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Brussels, 27.6.2017  
C(2017) 4444 final

## **COMMISSION DECISION**

**of 27.6.2017**

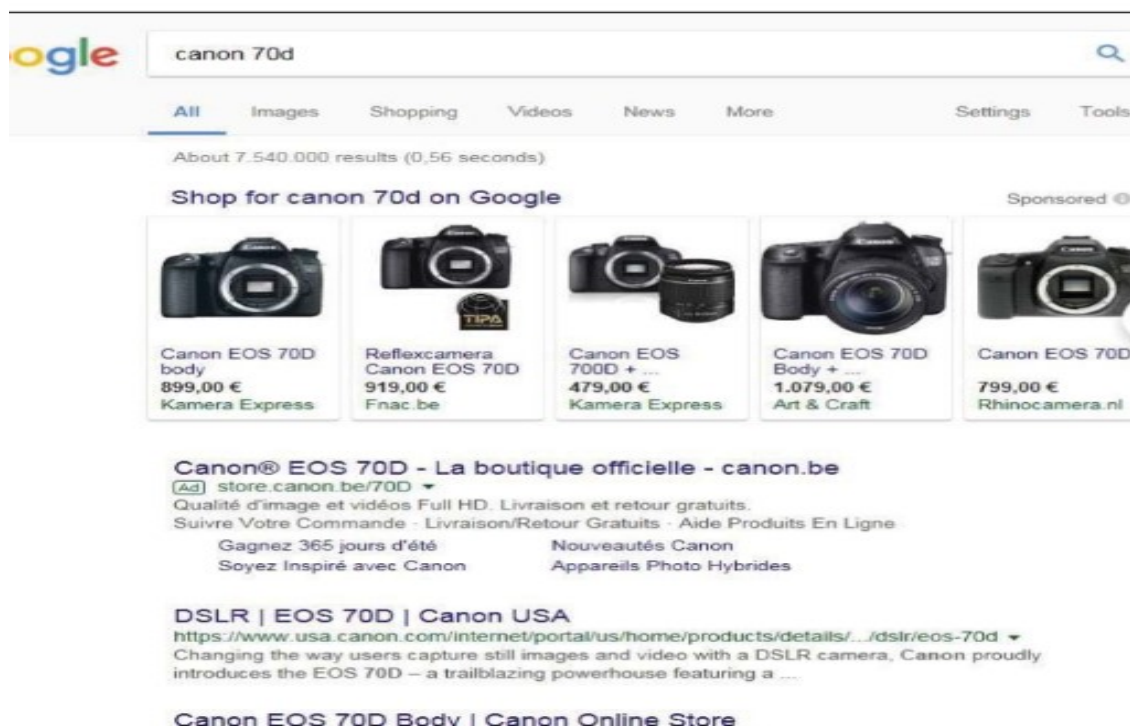
**relating to proceedings under Article 102 of the Treaty on the Functioning of the  
European Union and Article 54 of the Agreement on the European Economic Area**

**(AT.39740 - Google Search (Shopping))**

(Only the English text is authentic)

2.4 billion fine

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#### Theory of harm in a nutshell

- Google was positioning and promoting its comparison shopping service on its general results pages **more favourably** than competing comparison shopping services
- significant traffic, in other words, a high number of visits, was **essential** for comparison shopping services
- Google's conduct increased traffic to its comparison shopping service and **decreased** traffic to competing comparison shopping services
- that traffic from Google's general results pages accounted for a **large proportion** of the traffic of those competing comparison services and could not be effectively replaced by other sources of traffic
- the conduct at issue could result in Google's dominant position being **extended** to markets other than the market on which that position was already held, namely the markets for specialised comparison shopping search services
- that conduct also **protected** Google's dominant position on the markets for general search services
- No objective **justification**

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Much debated, much criticized...

*Why?*

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**My Take...**

- New markets, new business models, new dynamics (e.g., biased consumer behaviour)
- Non-price related abuse
- Precedents – evolution
- Standard of proof (e.g., counterfactual analysis)
- Focus on neighbouring markets
- Length of the proceedings
- Ineffective remedies
- Value of precedent beyond the EU

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## JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

10 November 2021 \*

In Case T-612/17,

**Google LLC**, formerly Google Inc., established in Mountain View, California (United States),

**Alphabet, Inc.**, established in Mountain View,

v

**European Commission**, represented by T. Christoforou, N. Khan, A. Dawes, H. Leupold  
and C. Urraca Caviedes, acting as Agents,

defendant,

**The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services**

*The General Court upholds the fine of €2.42 billion imposed on Google*

C-48/22 P - Google and Alphabet v Commission (Google Shopping)

Main proceedings

Google and Alphabet v Commission (Google Shopping)  
Case C-48/22 P

Reports of Cases  
[Information not available](#)

(Appeal Case before the General Court T-612/17)

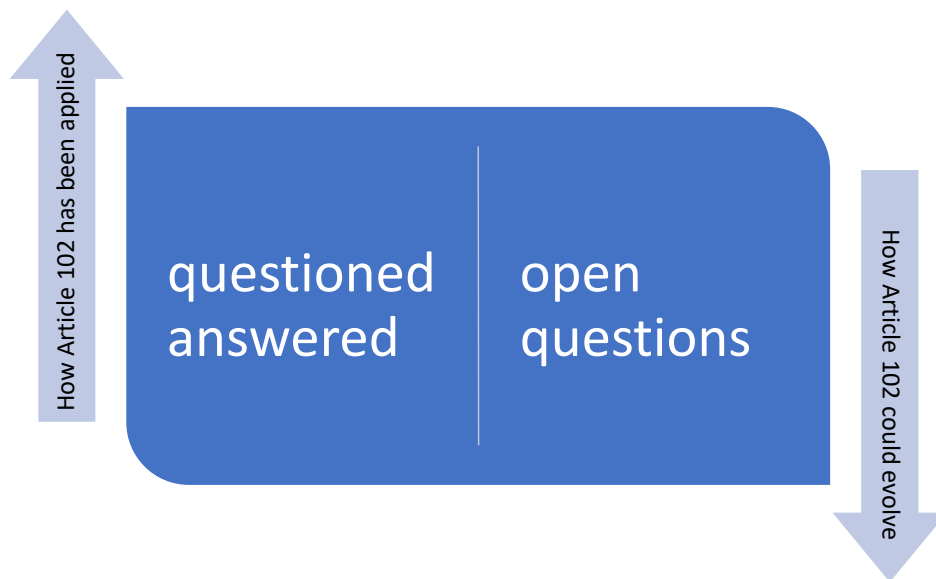
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## Abusive conduct

- Not every exclusionary effect is necessarily detrimental to competition (also on another market)
- Recourse to methods different from those governing normal competition
  - self-preferencing as denoting some abnormality (limiting scope of its results to its own entails an element of risk and is not rational unless it can afford it)
  - change of conduct
- Leveraging abuse
  - open infrastructure (i.e., different from those consisting of intellectual property rights)
- No refusal to deal, ecc. Unjustified difference in treatment between Google's own service and competing services (dissimilar conditions for equivalent services)
  - EU legislator made choice of legal obligation of non-discrimination for internet service providers on the upstream market (net neutrality)
  - traffic diverted cannot be effectively replaced (*infrastructure*) - superdominance - («quasi-essential facility doctrine»?)

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### SOME OPEN QUESTIONS

- Difference in treatment between own service and competing services that might be **less** than equally efficient
- More complex forms of self-preferencing (adjacent markets, complex ecosystems)
- Self-preferencing and access to data
- Self-preferencing as refusal to deal (e.g., not yet in the downstream market; protect business somewhere else?), tying (e.g., element of coercion?)
- Self-preferencing and exploitative abuses
- Interaction with the Digital Markets Act
- Etc.

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Introducing the case study

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“Every case is different...”

Marc van der Woude  
President of the General Court



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## The broader context

Other Google cases

Ongoing investigations/cases involving *other* Big Tech companies

Other *self-preferencing* cases, in the EU and elsewhere

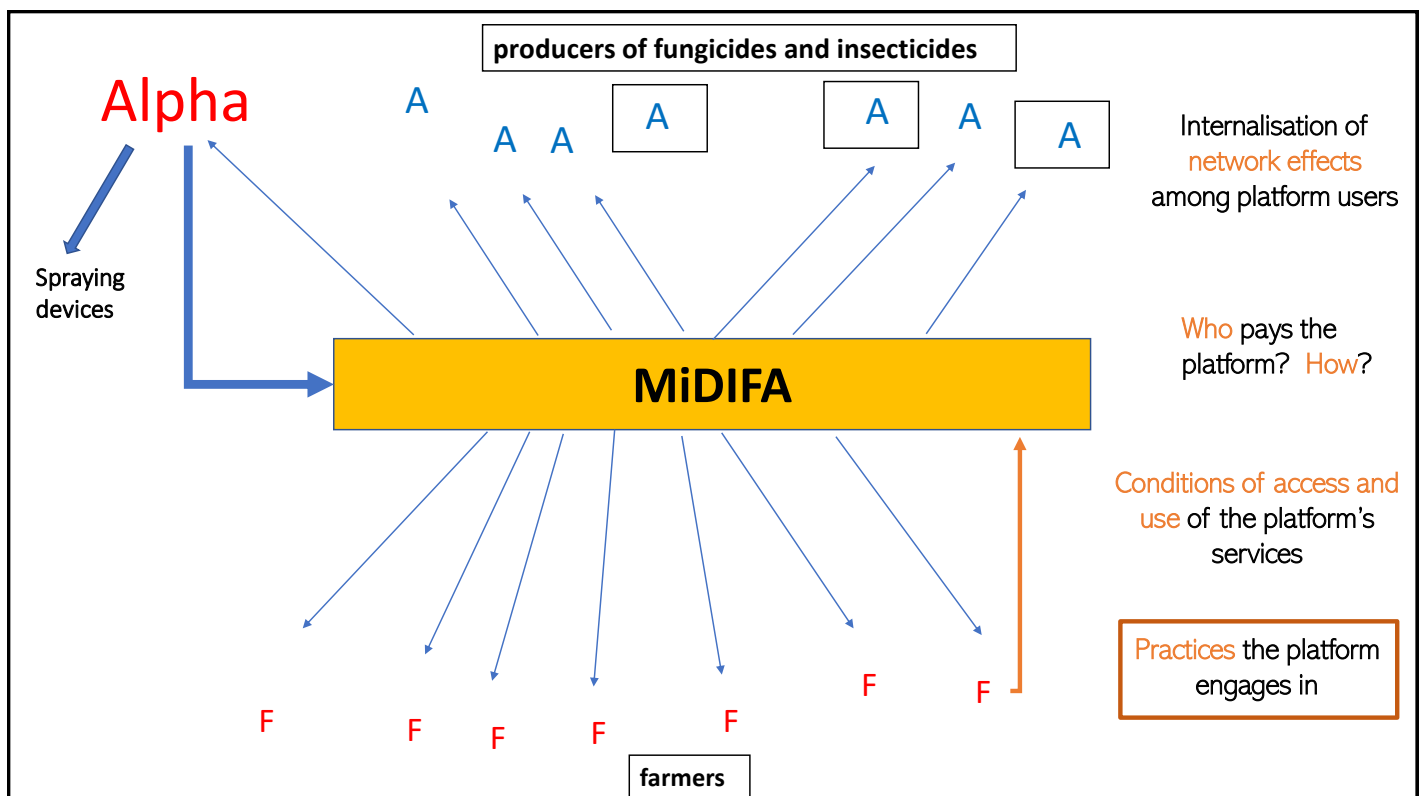
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MiDIFA is a business-to-business, digital farming platform that targets companies from the agricultural sector. On the one side of the platform, there are producers of fungicides and insecticides. On the other side of the platform, there are farmers seeking convenient new ways to improve crop production and enhance sustainability. Agricultural data inputs directly provided by the farmers themselves (e.g., via sensors), as well as agronomic information, in-season risks, weather data and satellite-based images, etc. are fed to the platform's algorithm. Based on the data analysis, the algorithm ranks the most suitable fungicides and insecticides; besides, MiDIFA provides the farmers with targeted information aimed at crop optimization (e.g., zone specific dosing of products). Following a two-month free trial, farmers can continue using the platform for ongoing crop optimization by paying a subscription fee (*farmer-pays*).

Besides operating the platform, as well as producing fungicides and insecticides, Alpha also sells own spraying devices.

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- a) if the fungicides and insecticides offered by Alpha's competitors on the platform are marketed as "optimized for the use of Alpha's spraying devices", the platform algorithm advantages them in the ranking of the results presented to farmers;
- b) data provided by the farmers to the MiDIFA platform is used by Alpha to better target farmers with marketing actions (both *on-* and *off-*platform), while the same data is not made available to other producers of fungicides and insecticides;
- c) MiDIFA's algorithm favours Alpha's own fungicides and insecticides in the display of the algorithm's results;
- d) Alpha has excluded from the platform Gamma, namely a producer of insecticides which had started offering a competing 'smart farming' solution;
- e) only recently, the MiDIFA's terms and conditions were changed, establishing that the data inputs provided by the farmers' themselves, besides being used to optimize the platform's algorithm, can also be made available to third parties for specific commercial purposes in the form of aggregated and (allegedly) anonymized data.

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## QUESTIONS

1. *Is Alpha in a dominant position in the market for digital farming intermediation services within the meaning of Article 102 TFEU?*
2. *Do any of the Practices [(a) to (e)] above amount to an infringement of Article 102 TFEU by way of an exclusionary and/or exploitative conduct?*

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## INSTRUCTIONS TO GROUPS

**ALL** groups to consider and discuss Question 1, identifying further information, if any, they require to be sure of their answer.

Irrespective of the conclusion on Question 1, Question 2 is to be discussed by the Groups as follows:

**Group I** to consider Question 2 in respect of Practice (a)

**Group II** to consider Question 2 in respect of Practice (b)

**Group III** to consider Question 2 in respect of Practice (c)

**Group IV** to consider Question 2 in respect of Practice (d)

**Group V** to consider Question 2 in respect of Practice (e)

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## Case Study: MiDIFA's practices in the digital farming sector

### *Essential competition law: Art. 102 TFEU*

7 - 8.4.2022, Valletta

MiDIFA is a digital agriculture platform operated by Alpha, a company established in Germany which, among other things, is one of the top-six producers of fungicides and insecticides in the EU.

MiDIFA is a business-to-business, digital farming platform that targets companies from the agricultural sector. On the one side of the platform, there are producers of fungicides and insecticides. On the other side of the platform, there are farmers seeking convenient new ways to improve crop production and enhance sustainability. Agricultural data inputs directly provided by the farmers themselves (e.g., via sensors), as well as agronomic information, in-season risks, weather data and satellite-based images, etc. are fed to the platform's algorithm. Based on the data analysis, the algorithm ranks the most suitable fungicides and insecticides; besides, MiDIFA provides the farmers with targeted information aimed at crop optimization (e.g., zone specific dosing of products). Following a two-month free trial, farmers can continue using the platform for ongoing crop optimization by paying a subscription fee (*farmer-pays*).

Besides operating the platform, as well as producing fungicides and insecticides, Alpha also sells own spraying devices.

Alpha's share of the market for digital farming intermediation services is 65%.

Alpha has engaged in (at least one!) of the following practices:

- a) if the fungicides and insecticides offered by Alpha's competitors on the platform are marketed as "optimized for the use of Alpha's spraying devices", the platform algorithm advantages them in the ranking of the results presented to farmers;
- b) data provided by the farmers to the MiDIFA platform is used by Alpha to better target farmers with marketing actions (both *on-* and *off-*platform), while the same data is not made available to other producers of fungicides and insecticides;
- c) MiDIFA's algorithm favours Alpha's own fungicides and insecticides in the display of the algorithm's results;
- d) Alpha has excluded from the platform Gamma, namely a producer of insecticides which had started offering a competing 'smart farming' solution;

e) only recently, the MiDIFA's terms and conditions were changed, establishing that the data inputs provided by the farmers' themselves, besides being used to optimize the platform's algorithm, can also be made available to third parties for specific commercial purposes in the form of aggregated and (allegedly) anonymized data.

## **QUESTIONS**

1. Is Alpha in a dominant position in the market for digital farming intermediation services within the meaning of Article 102 TFEU?
2. Do any of the Practices [(a) to (e)] above amount to an infringement of Article 102 TFEU by way of an exclusionary and/or exploitative conduct?

## **INSTRUCTIONS TO GROUPS**

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- Group V** to consider Question 2 in respect of Practice (e)

## II. Private Enforcement of EU Antitrust Law

### The EU framework:

- CJEU Case law on Private Enforcement
- Damages Directive

ERA, La Valletta, 8 April 2022

Fabio Filpo

Legal Secretary (Référéndarie), Court of Justice of the EU  
Cabinet of Advocate General Athanasios Rantos

(personal opinions)



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However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

## Summary

### Foreword

- ❑ National judges and competition law: *public* and *private enforcement*

### The origins of private enforcement in the CJEU case law

- ❑ No primary EU law provision
- ❑ Direct effect of competition law, principle of full compensation, broad legal standing

### The Damages Directive

- ❑ The genesis of the directive
- ❑ Principles and main provisions
- ❑ Shortcomings

### The CJEU case law following the Damages Directive

- ❑ Precisions and complement to the directive



### National judges and competition law

- ❑ Public enforcement ⇒ antitrust authority decision
  - ✓ *Application* ⇒ (administrative) judge
    - Parties concerned vs. negative decisions, other interested parties vs. positive decisions
  - ✓ *Judicial review* : illegality of the conduct & consequences (sanctions)
- ❑ Private enforcement ⇒ damage action
  - ✓ *Application* ⇒ (civil) judge
    - Competitor/purchaser/supplier vs. cartel, dominant undertaking, etc.
  - ✓ *Judicial review*: illegality of the conduct (antitrust decision or new appreciation), damage & causal link
- ❑ Integration public/private enforcement
  - ✓ *Complementary finality* ⇒ deterrence, compliance, compensation
    - Public enforcement (public interest) ⇒ facilitates private enforcement in follow-on actions (findings and evidence)
    - Private enforcement (private interests) ⇒ complement to public enforcement: increases deterrence and incentives towards leniency programmes

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## The origins of private enforcement in the CJEU case law

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## The case law origins of private enforcement

Starting point: absence of any provision on private enforcement in the treaties (EEC, EC, TFEU)

- ❑ Article 101(2) TFEU<sup>(\*)</sup> as the only 'reference' to private law
  - ✓ *Any agreements or decisions prohibited pursuant to this Article shall be automatically void*

Sabam (1974): preliminary step towards private enforcement (direct effect of EU competition law)

- ❑ Request for a preliminary ruling from Belgium
  - ✓ *Question: whether a copyright management association, through its statutes or contracts, is abusing its dominant position (de facto monopoly) in the exploitation of works, the protection of which has been entrusted to it*
- ❑ **Direct effect of EU competition law**
  - ✓ *§ 16: As the prohibitions of [Articles 101 (1) and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard*

<sup>(\*)</sup> For convenience, all references to the (old) EEC/EC competition law provisions will be made to (current) Articles 101 and 102 TFEU

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## The case law origins of private enforcement

Courage (2001): establishment of the right to compensation

- ❑ Reference for a preliminary ruling from the UK
  - ✓ *Question: whether a party to a contract liable to restrict or distort competition within the meaning of [Article 101 TFEU] can rely on the breach of that provision before a national court to obtain relief from the other contracting party*
- ❑ **Right to claim compensation** for harm caused by infringement of EU antitrust rules and broad concept of **legal standing** (partners to an anticompetitive contract)
  - ✓ *§ 24: Any individual can rely on a breach of [Article 101(1) TFEU] before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision*
  - ✓ *§ 26: The full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*
- ❑ Importance of private actions for the **effective enforcement** of the competition rules
  - ✓ *§ 27: Indeed, the existence of such a right strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU]*
- ❑ **Procedural autonomy & principles of equivalence and effectiveness**
  - ✓ *§ 29: (Absent EU rules) it is for the Member States lay down detailed procedural rules, provided that such rules are not less favourable than those governing similar domestic actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU law]*

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## The case law origins of private enforcement

### Manfredi (2006): reinforcing the right to full compensation

- ❑ Reference for a preliminary ruling from Italy
  - ✓ *NCA decision against insurance companies having participated in an arrangement for the purpose of, inter alia, exchange of information between competing undertakings → unusual and sustained increase in the cost of premiums for compulsory civil liability auto insurance in Italy*
  - ✓ *Follow-on action by consumers against their respective insurance companies*
- ❑ Widening the concept of **legal standing** (downstream)
  - ✓ *§ 60: Downstream commercial partners and consumers*
- ❑ Causal relationship
  - ✓ *§ 61: Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under [Article 101 TFEU]*
- ❑ Principles of judicial autonomy, equivalence and effectiveness (§ 62: → Courage)
- ❑ **Quantification** of damage
  - ✓ *§ 95: Injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest*
  - ✓ *§ 92: punitive damages → national legal system*

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## The case law origins of private enforcement

### Pfleiderer (2011): third-party access to leniency documents

- ❑ Reference for a preliminary ruling from Germany
  - ✓ *Question: whether parties affected by a cartel may, for the purpose of private enforcement, be given access to leniency applications or to information/documents voluntarily submitted in that connection, pursuant to a national leniency programme*
- ❑ On the one hand: risks of disclosure → discouraging leniency
  - ✓ *§ 25: Leniency programmes as useful tools for effective application of Articles 101 TFEU and 102 TFEU*
  - ✓ *§ 26-27: Effectiveness of leniency programmes compromised if leniency documents were disclosed (deterrence effect)*
- ❑ On the other hand: importance of private enforcement
  - ✓ *§ 28-29: Right to claim damages contributes to effective competition law enforcement*
- ❑ Solution: procedural autonomy, equivalence and effectiveness → case-by-case 'weighing exercise'
  - ✓ *§ 30-31: Necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency*

### Donau Chemie (2013): possibility of disclosure cannot be precluded in principle

- ❑ Third-party access to documents (including leniency documents) cannot be subject to the consent of all the parties → national courts shall have the possibility of weighing up the interests involved

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## The case law origins of private enforcement

### EU vs. elevators cartel (2012): legal standing of the EU/European Commission

- ❑ Reference for a preliminary ruling from Belgium
  - ✓ *Cartels involving the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands → the European Commission imposed a fine of EUR 992 million (in 2007)*
  - ✓ *Action by the European Commission before a national judge in respect of the loss sustained by the EU as a result of the anti-competitive practices established in its own decision: the EU had concluded with the defendants in the main proceedings several contracts for the installation, maintenance and renewal of elevators and escalators in various buildings, located in Belgium and Luxembourg, of EU institutions*
  - ✓ *Question: whether the Commission is empowered to represent the EU before a national court in a private enforcement action and has a legal standing in that respect*
- ❑ **Representation of the EU**
  - ✓ *§ 36: The Commission is not precluded from representing the EU before a national court hearing a civil action for damages in respect of loss caused to the EU by an agreement or practice prohibited by Article 101 TFEU which may have affected certain public contracts awarded by various institutions and bodies of the EU, there being no need for the Commission to have authorisation for that purpose from those institutions and bodies*
- ❑ **Legal standing of the European Commission**
  - ✓ *§ 77: Article 47 of the Charter does not preclude the Commission from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU*

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## The case law origins of private enforcement

### Kone (2014): enlarging legal standing ('umbrella effect')

- ❑ Reference for a preliminary ruling from Austria
  - ✓ *Elevators' cartel (same as in previous case)*
  - ✓ *Action for compensation as a result of buying from third undertakings not party to the cartel elevators and escalators at a higher price, on the ground that those third undertakings benefited from the existence of the cartel in adapting their prices to the higher level*
  - ✓ *'Umbrella effect': loss resulting from the higher price charged by an undertaking as a result of a prohibited cartel to which it is not a party*
- ❑ **Causal link**
  - ✓ *§ 33: The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy is a result of the cartel that contributed to the distortion of price formation mechanisms*
- ❑ **Legal standing** (contractual link not necessary)
  - ✓ *§ 34: Possibility of compensation for the loss caused by the members of a cartel, even in the absence of contractual links with them, where it is established that the cartel at issue was liable to have the effect of 'umbrella pricing' being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel*

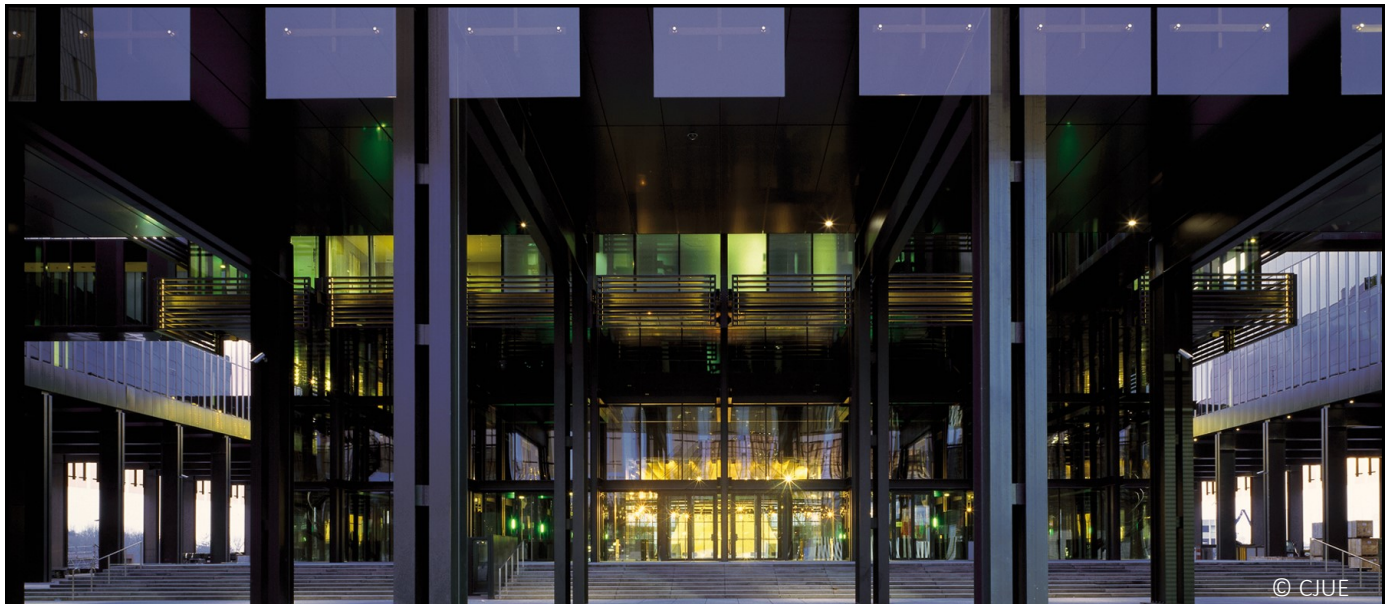
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## The case law origins of private enforcement

### Case law outcome

- ❑ Right to claim damage as a general principle of EU competition law → principle of full effectiveness of EU competition law
- ❑ Right to full compensation: actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest
- ❑ Wide interpretation of legal standing and causal link
  - ✓ *Legal standing* → ‘any individual’ can claim damage
  - ✓ *Causal link* → ... even without contractual links with cartels members (‘umbrella effect’)
- ❑ Specific/detailed rules → Member States: principles of procedural autonomy, equivalence and effectiveness
  - ✓ *(In particular) effectiveness* → evidence (leniency documents) & causal link (see above)

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## The Damages Directive

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## The long way to the Damages Directive

### Regulation 1/2003: 'procedural regulation' (EU competition law)

- ❑ No specific provision but private enforcement 'in the background'
- ❑ Application of Article 101(3) TFEU by national courts

### 2005: COM Green Book and EC Commission Staff Working Paper

- ❑ Identifies the main obstacles to a more efficient system for bringing damages claims for infringement of EU antitrust law, and proposes measures encouraging the right to compensation by victims of infringements of the EU antitrust rules
- ❑ Aims at fostering an open debate about the issue of private enforcement of EU competition law and damages actions

### 2008: COM White Book, Working Document and Impact Assessment Report

- ❑ Suggests specific policy measures so that all victims of EU antitrust infringements could effectively access redress mechanisms in order to be fully compensated for the harm they had suffered

### 2009: 1<sup>st</sup> proposal for a Directive → failed

- ❑ Raised many critical comments: e.g. US-style (opt-out) class action

### 2013: New proposal for a Directive → Directive 2014/104/UE (the 'Damages Directive')

- ❑ Entry in to force on 26/12/2014 – To be transposed by 27/12/2016 – Transposed in all Member States by half 2018

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## The content of the Damages Directive

### Subject matter and scope (Article 1)

- ❑ The 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
- ❑ It aims at ensuring equivalent protection throughout the Union for anyone who has suffered such harm

### Complementary nature of private enforcement (recital 5)

- ❑ Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation

### Need for uniformity (e.g. recital 9)

- ❑ Large-scale infringements of competition law often have a cross-border element
- ❑ Necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market
- ❑ Appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law

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## The content of the Damages Directive

### ‘Acquis communautaire’ based on the CJEU case law (recital 12)

- ❑ The directive reaffirms the acquis communautaire on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof

### Focus on full compensation (Article 3)

- ❑ Full compensation (≠ deterrence)
  - ✓ *Actual loss (damnum emergens), loss of profit (lucrum cessans), plus interest*
  - ✓ *Not overcompensation under the directive (by means of punitive, multiple or other types of damages)*

### Principles of effectiveness and equivalence (Article 4)

- ❑ In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law
- ❑ In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law

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## The content of the Damages Directive

### Disclosure of evidence (Articles 5 to 8)

- ❑ Evidence often not available to the claimant (information asymmetry) → need to balance the effectiveness of the right to compensation and the right of defence
- ❑ Principle of disclosure
  - ✓ *Article 5(1): 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 (subject to conditions)*
- ❑ Proportionality
  - ✓ *Article 5(3): National courts shall consider the legitimate interests of all parties and third parties concerned and, in particular: (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; (b) the scope and cost of disclosure, especially for any third parties concerned (preventing non-specific searches for information which is unlikely to be of relevance); (c) the existence of confidential information (especially concerning any third parties) and the arrangements for protecting such information – Article 5(7): Right to be heard*
- ❑ Wider disclosure of evidence possible under national law (Article 5(8))

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## The content of the Damages Directive

### Disclosure of evidence (Articles 5 to 8)

- ❑ Disclosure of evidence included in the file of a competition authority
  - ✓ Article 6(5): Evidence to be disclosed only after proceedings are closed: (a) information prepared specifically for the proceedings; (b) information that the competition authority has drawn up and sent in the course of its proceedings; and (c) settlement submissions that have been withdrawn (**grey list**)
  - ✓ Article 6(6): Evidence not to be disclosed: (a) leniency statements; and (b) settlement submissions (**black list**) [compatible with case law? – e.g. Donau Chemie § 35]
  - ✓ Article 6(9): Other evidence can be disclosed at any time (**white list**)
- ❑ Limits on the use of evidence obtained solely through access to the file of a competition authority
  - ✓ Article 7(3): Evidence obtained by a natural or legal person through access to the NCA file (and which does not fall under the categories of evidence not/yet to be disclosed) can be used in an action for damages only by that person (or by a legal successor)
- ❑ Penalties
  - ✓ Article 8(1): Imposed in the event of (a) failure or refusal to comply with the disclosure order; (b) destruction of relevant evidence; (c) failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; (d) breach of the limits on the use of evidence
  - ✓ Article 8(2): Effective, proportionate and dissuasive, including the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs
- ❑ COM confidentiality communication

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## The content of the Damages Directive

### Effect of national decisions on follow-on actions (Article 9)

- ❑ Infringement of competition law found by a final decision (NCA or review court) → 'irrefutably established' for the purposes of follow-up actions for damages
- ❑ Infringement of competition law found by a final decision taken in another Member State, → (at least) prima facie evidence that an infringement of competition law has occurred (assessed along with any other evidence)
- ❑ No prejudice to the rights and obligations of national courts under Article 267 TFEU (preliminary ruling)

### Limitation periods (Article 10)

- ❑ Procedural autonomy → Member States shall lay down the relevant rules (dies a quo, duration, interruptions or suspension)
- ❑ Effectiveness (3 conditions) → the limitation period shall not begin to run before the infringement has ceased and the claimant can be aware of all relevant circumstances (behaviour and infringement; harm and identity of the infringer); is at least five years and is suspended or interrupted if a competition authority takes action

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## The content of the Damages Directive

### Joint and several liability (Article 11)

- ❑ Principle
  - ✓ *Undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law*
  - ✓ *The injured party has the right to require full compensation from any of them until he has been fully compensated*
- ❑ Derogations [compatible with case law?]
  - ✓ *SMEs liable only to its own direct and indirect purchasers (under certain conditions)*
  - ✓ *Immunity recipients jointly and severally liable (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*
- ❑ Recovery between infringers determined in the light of their relative responsibility for the harm
  - ✓ *The contribution of a 'leniency infringer' shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers or, for harm to others shall be determined in the light of its relative responsibility for that harm*
- ❑ Relevant criteria
  - ✓ *Recital 37: turnover, market share or role in the cartel (→ national law)*

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## The content of the Damages Directive

### Passing-on of overcharges and the right to full compensation (Articles 12-16)

- ❑ Article 2(20) ('Overcharge'): difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law
- ❑ Article 12: Compensation can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer ('offensive' passing-on or passing-on as a 'sword')
  - ✓ *Article 14: burden of proof → claimant (possibility of disclosure)*
- ❑ Article 13: passing-on defence (passing-on as a 'shield')
  - ✓ *Burden of proof → defendant (possibility of disclosure)*
- ❑ Article 15: over/under compensation to be avoided
- ❑ Article 16: Passing-on guidelines (2019)

### Quantification of harm (Article 17)

- ❑ Burden and standard of proof: national courts empowered to estimate the amount of harm if the burden of quantifying the harm is practical impossible or excessively difficult on the basis of the evidence available
  - ✓ *Rebuttable presumption: cartel infringements cause harm*
  - ✓ *Possible intervention of the NCA as amicus curiae*

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## The content of the Damages Directive

### Effects of consensual dispute resolution (Articles 18-19)

- ❑ Article 18(1)(2): suspensive effects on limitation period and judicial proceedings for the parties concerned
- ❑ Article 18(3): compensation as a mitigating factor in respect to the NCA fine
- ❑ Article 19: effect of consensual settlements on subsequent actions for damages
  - ✓ *Claim of the settling injured party reduced*
  - ✓ *Remaining claim of the settling injured party exercised only against non-settling co-infringers*
  - ✓ *Non-settling co-infringers not permitted to recover contribution for the remaining claim from the settling co-infringer (except where non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party)*
  - ✓ *Due account of any settled damages in the amount of contribution that a co-infringer may recover from any other co-infringer*

### Temporal application of the directive

- ❑ Substantive provisions do not apply retroactively
- ❑ Other provisions do not apply to actions for damages introduced prior to 26/12/2014

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## The shortcomings of the Damages Directive

### Open questions

- ❑ Full harmonisation vs (mere) transposition of case law
- ❑ Notions of 'undertaking' and legal standing ('any' person who can bring an action for damages) unspecified
- ❑ Subjective element and causal link
  - ✓ *e.g. recital 11: Reference to CJEU case-law (any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law), procedural autonomy (in particular as to the notion of causal relationship between the infringement and the harm, imputability, adequacy and culpability) and principles of equivalence and effectiveness*
- ❑ Collective redress (class actions) third-parties financing of damage actions excluded → enforcement vacuum
  - ✓ *e.g. recital 13: The directive should not require Member States to introduce collective redress mechanisms*
- ❑ Lack of uniformity in Member States implementation
  - ✓ *Joint responsibility; limitation periods; effects of foreign NCA decisions*
- ❑ Temporal application of the directive
  - ✓ *Difficult distinction between substantive and 'other' provisions → see (ongoing) cases C-267/20, Volvo and DAF Trucks (AG opinion 2021) and C-312/21, Traficos Manuel Ferrer*
- ❑ Problems of compatibility with primary law?
  - ✓ *Disclosure of leniency material (article 6), protection of leniency applicants and SMEs (article 11)*
  - ✓ *The role of the ECJ vs the scope of appreciation under Articles 103(2) and 114 TFUE*

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## Measures implementing/completing the Damages Directive

Communication and Practical Guide quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU (2013)

- Insights into the harm caused by anticompetitive practices and information on the main methods and techniques available to quantify such harm

EC Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019)

- Practical guidance on how to estimate the passing-on of overcharges: economic principles, methods and terminology concerning passing-on, sources of relevant evidence, proportionality of disclosure requests, assessment of parties statements on passing-on and economic expert opinions

EC Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (2020)

- The communication identifies measures that may be considered by national courts when dealing with disclosure of confidential information in private enforcement actions

EC Report on the implementation of the Damages Directive (2020)

- As foreseen by Article 20 of the directive:
- No sufficient evidence to carry out a meaningful evaluation of the directive; focus on Member States' implementation and Commission's action

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The CJEU case law following the Damages Directive

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## After the Damages Directive

### Concept of 'undertaking' liable to provide compensation

- ❑ Judgment of 14 March 2019, **Skanska Industrial Solutions** e.a., C-724/17, EU:C:2019:204
  - ✓ *Damages actions against successors of the legal entities that took part in the cartel*
  - ✓ *All the shares in the companies which participated in a cartel were acquired by other companies which have dissolved the former companies and continued their commercial activities*
  - ✓ *The acquiring companies could be held liable for the damage caused by the cartel in question (§§ 47-51)*
- ❑ Judgment of 6 October 2021, **Sumal**, C-882/19, EU:C:2021:800
  - ✓ *The victim of an anticompetitive practice may bring an action for damages, without distinction, either against the parent company who has been sanctioned for that practice in a Commission decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit (§§ 44-51)*
  - ✓ *The subsidiary company concerned must be able effectively to rely on its rights of the defence in order to show that it does not belong to that undertaking and, absent a decision under Article 101 TFEU, it is also entitled to dispute the very existence of the anticompetitive conduct*
  - ✓ *Article 101(1) TFEU must be interpreted as precluding a national law which provides for the possibility of imputing liability for one company's conduct to another company only in circumstances where the second company controls the first company*

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## After the Damages Directive

### Limitation periods

- ❑ Judgment of 28 March 2019, **Cogeco Communications**, C-637/17, EU:C:2019:263
  - ✓ *Private enforcement dispute brought before the expiry of the deadline to transpose the Damages Directive (not yet transposed in Portugal) – limitation period of three years under national law on non-contractual liability*
  - ✓ *Damage Directive not applicable, but Article 102 TFEU and the principle of effectiveness interpreted as precluding national legislation which (i) provides a three years limitation period in respect of actions for damages, which starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and (ii) does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority (§§ 47-51)*

### Legal standing

- ❑ Judgment of 12 December 2019, **Otis Gesellschaft e.a.**, C-435/18, EU:C:2019:1069
  - ✓ *Damage action lodged against members of the elevators and escalators cartel by a public body which had granted loans at a discounted interest rate to construction companies that bought cartelized elevators and escalators*
  - ✓ *Persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market, may seek an order that the undertakings which participated in that cartel pay compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel, those persons were unable to use that difference more profitably (§ 32)*

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## After the Damages Directive

### Jurisdiction

- ❑ Judgment of 24 October 2018, **Apple Sales International** e.a., C-595/17, EU:C:2018:854
  - ✓ *Interpretation of Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*
  - ✓ *The application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law*
  - ✓ *It is not a prerequisite for the application of a jurisdiction clause, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, that there be a finding of an infringement of competition law by a national or European authority*
- ❑ Judgment of 29 July 2019, **Tibor-Trans**, C-451/18, EU:C:2019:635
  - ✓ *Interpretation of Article 7(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*
  - ✓ *In an action for damage (due to collusive arrangements on pricing and gross price increases for trucks), ‘the place where the harmful event occurred’ covers the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations*

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## After the Damages Directive

### Actions for damages against the European Commission (article 340 TFEU)

- ❑ EC merger decision (2013) declaring incompatible with the internal market a concentration between UPS and TNT Express
  - ✓ *Found to be unlawful on appeal before the General Court (T-194/13) and the Court of Justice (C-265/17 P)*
  - ✓ *(Later) EC decision (2016) approving a concentration between TNT and FedEx (competitor of UPS)*
- ❑ Actions for damages brought by UPS (2017) and ASL (2018)
  - ✓ *As a result of the unlawfulness of the contested decision and of the commercial agreements with TNT (to be implemented following clearance of the concentration)*
- ❑ General Court judgment of 23 February 2022, **United Parcel Service/Commission**, T-834/17, EU:T:2022:84
  - ✓ *No infringement of its procedural rights during the administrative procedure*
  - ✓ *Inadequacy in the statement of reasons does not in principle give rise to EU liability*
  - ✓ *Errors in the substantive assessment of the concentration do not constitute sufficiently serious breaches of EU law*
- ❑ General Court judgment of 23 February 2022, **ASL Aviation Holdings et ASL Airlines (Ireland)/Commission**, T-540/18, EU:T:2022:85
  - ✓ *No sufficiently serious breaches of EU law, as they are not entitled to rely on a breach of UPS’ rights of defence in the merger procedure*
  - ✓ *The applicants could not rely on alleged violations of Charter rights in a merger procedure they had not participated in*

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Thank you for your attention!

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# Irish legislation transposing the Damages Directive

ERA - Training on EU competition law for Maltese and Irish judges on 7- 8 April 2022, Valletta

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## What we'll cover regarding the Damages Regulations

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Disclosure of evidence

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Effect of national decisions

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Limitations of actions for damages

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Joint and several liability

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Passing-on of overcharge and quantification of harm

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# General Comments

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## Background to the Damages Directive

1. Infringements of Articles 101 and 102 TFEU can take various forms (e.g. price-fixing/excessive pricing).
2. They can cause harm to direct and indirect customers and end-consumers by higher prices and/or loss of profits.
3. In 1973, the Court of Justice of the EU (“COJ”) found that the EU competition law rules:  
“create direct rights in respect of the individuals concerned which the national courts must safeguard” (Case C-127/73, BRT v SABAM)).
4. In (e.g.):
  - > *Courage and Crehan* (Case C-453/99 (e.g. at para 26)),
  - > *Manfredi* (Joined Cases C-295/04 to 298/04 (e.g. at para 90)),
  - > *Pfleiderer* (Case C-360/09 (e.g. at para 28)), and
  - > *Otis and others* (Case C-199/11 (e.g. at para 41))the COJ established the right of any individual or business to claim **full compensation** for the harm caused by an infringement of EU competition law rules.
5. Exercise of right to compensation under EU law depended on legal frameworks of Member States.
6. In 2013, the Commission proposed a Directive to remove obstacles to obtain effective compensation in the EU.
7. Following its adoption, Directive 2014/104/EU entered into force on 26 December 2014.
8. Member States implemented the Directive into their legal systems by 2018.
9. National law prescribes rules on ‘causal relationship’ (equivalence and effectiveness (e.g. *Manfredi* (para 64), *Otis* (para 65))).
10. Damages Directive does not require Member States to introduce collective redress mechanisms.

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## General comments regarding the Damages Regulations

1. EU (Actions for Damages for Infringements of Competition Law) Regulations 2017 ("**Regulations**").
2. The Regulations give effect to the Damages Directive.
3. The Regulations do not apply to infringements of competition law that occurred before 27 December 2016.
4. The Regulations apply to damages actions for infringements of EU and Irish competition law.
5. "**Competition Authority**" = Commission, national competition authority ("**NCA**") or foreign competition authority.
6. An NCA is a body designated under Irish law implementing Regulation 1/2003 (SIs 195/2004 and 525/2007).
7. Courts are NCAs designated to apply Articles 101 and 102 TFEU in individual cases for the purposes of Art. 5 of Regulation 1/2003 (*i.e. requiring an infringement to be ended, interim measures, accepting commitments, imposing fines, periodic penalty payments or any other penalty under Irish law*).
8. CCPC, DPP and ComReg = NCAs for other purposes under Regulation 1/2003 (e.g. powers of investigation).
9. Courts enforce Irish competition law (*Competition Act 2002* and *Competition and Consumer Protection Act 2014*).
10. The Competition (Amendment) Bill 2022 would give the CCPC (and ComReg) a material new role in the enforcement of EU (and Irish) competition law by giving effect to Directive 2019/1 (*i.e. ECN+*).

## Right to full compensation (Article 1 Damages Directive)

- **Damages Directive** - victims are entitled to **full compensation** for the harm suffered due to an infringement of competition law, which covers compensation for **actual loss** and for **loss of profit**, in addition to the payment of **interest** from the time the harm occurred until compensation is paid.
- Generally, (i) *actual loss* is a reduction in a person's assets and (ii) *loss of profit* is an increase in those assets which would have occurred if the harmful act had not taken place (*Opinion of AG Capotorti in Case 238/78 (Ireks-Arkady v Council and Commission)* at para 9).

**Regulation 2** - "**Infringement of competition law**" = infringement of Article 101/102 TFEU or S.4/5 of the Competition Act.

**Regulation 4(1)** - A person who has suffered harm caused by an infringement of competition law can claim and obtain, in any action for damages under Section 14 of the Competition Act, full compensation for that harm (in Circuit or High Court).

**(2)** Full compensation places a person who has suffered harm caused by an infringement of competition law in the position in which that person would have been had the infringement not been committed.

It covers the right to compensation for

- > actual loss (*damnum emergens*),
- > loss of profit (*lucrum cessans*), and
- > payment of interest.

**(3)** Full compensation should not lead to overcompensation (whether punitive, multiple or other damages).



# Disclosure of evidence

# 1

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## Disclosure of evidence (Article 5 Damages Directive)

- **Damages Directive** - Parties are to have **easier access to evidence** in damages actions. If a party needs documents that are in the hands of other parties or third parties to prove a claim or a defence, it may obtain a court order for disclosure.
- Disclosure of **categories of evidence** (described precisely and narrowly), is possible. Disclosure orders must be proportionate and national courts are required to protect confidential information.
- **Communication from the Commission** on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law - 2020/C 242/01 (non-binding, non-exclusive guidance to national courts in selecting the most effective measure to protect confidentiality (e.g. nature of confidential information, confidentiality rings, redactions, appointment of experts, etc.) when deciding on disclosure requests)
- **"Evidence"** = all types of means of proof admissible before the court seized and, in particular, documents and all other objects containing information, irrespective of the medium on which the information is stored.
- **Article 5(1)** (ability of Courts to order disclosure evidence) and **Article 5(2)** (disclosure of specified items/categories of evidence) already in RSC Order 32 and **Article 5(6)** (re legal professional privilege) covered by Fyffes and RSC Order 32 – **NOT TRANSPOSED**

**Regulation 5(1)** A Court is required to limit disclosure to that which is **proportionate**.

A Court must consider the legitimate interests of all parties and 3rd parties concerned, in particular:

- (a) the extent to which the claim or defence is supported by **available facts and evidence justifying the request**,
- (b) **the scope and cost of disclosure**, especially for any third parties, including preventing non-specific searches for information unlikely to be relevant for the parties, and
- (c) **if the evidence**, the disclosure of which is sought, **contains confidential information**, especially about 3<sup>rd</sup> parties, and any arrangements in place to protect such information.

**(2)** A Court can order disclosure of confidential information where relevant to an action for damages.

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## Disclosure of evidence in the file of a competition authority (*Article 6 Damages Directive*)

**Regulation 6(1)** - This applies, in addition to **Regulation 5**, where a Court orders the disclosure of evidence included in the file of a competition authority (w/o prejudice to S.25 of Competition and Consumer Protection Act (*i.e. a prohibition on unauthorised disclosure of confidential information by the CCPC*)).

**(2) When assessing the proportionality of an order to disclose information**, a court must consider:

- (a) if the request has been formulated with regard to the (i) nature, (ii) subject matter, (iii) contents of documents submitted to a competition authority or held in its file (rather than a non-specific application);
- (b) whether a party requesting disclosure is doing so in relation to an action for damages before a Court;
- (c) the need to safeguard the effectiveness of the public enforcement of an infringement of competition law (in relation to **Regulations 6(3)** [*i.e. categories of evidence*] and **6(8)** [*i.e. where no party is reasonably able to provide file evidence*], or upon request of a competition authority pursuant to paragraph **6(9)** [*i.e. where it gives observations to the Court*].

**(3)** A Court may (only after a competition authority has closed its proceedings) order the disclosure of:

- (a) information prepared by a person specifically for the proceedings of a competition authority,
- (b) information that the competition authority has drawn-up and sent to the parties in the course of its proceedings, and
- (c) settlement submissions that have been withdrawn.

- Disclosure of internal documents of, or correspondence between, competition authorities is not covered by the Damages Directive (**Recital 21**).

## Disclosure of evidence (incl. leniency statements/settlement submissions)

- “**Leniency statement**” = an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority, describing the knowledge of that undertaking or natural person of **a cartel** and describing its role and drawn up for submission to a competition authority to obtain immunity or a reduction of fines under a leniency programme;
- “**Settlement submission**” = a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking’s acknowledgement of, or its renunciation to dispute, its participation in **an infringement of competition law** and its responsibility for that infringement of competition law, which was drawn up specifically to enable a competition authority to apply a simplified or expedited procedure

**Regulation 6(4)** - A Court cannot at any time order a party or a third party, involved in a damages action, to disclose:

- (a) *leniency statements*, and
- (b) *settlement submissions* (see now e.g. *S.15L of the Competition (Amendment) Bill*).

**(5)** A claimant may present a reasoned request that a Court access the evidence referred to in **(4)(a)** or **(b)** above to ensure that their contents correspond to the definitions of “*leniency statement*” and “*settlement submission*”.

- > A Court may request assistance only from the competition authority concerned.
- > The authors of the evidence in question may be heard.
- > The Court will not permit other parties or third parties to have access to that evidence.

**(6)** If only parts of the evidence requested are covered by **(4)** above, the remaining parts shall, depending on the category under which they fall, be released.

## **Disclosure of evidence – General (e.g. re competition authority file and compliance obligations)**

**Regulation 6(7)** - The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in **Regulation 6** may be ordered.

**(8)** A Court shall request the disclosure from a competition authority of evidence in its file only where no party or third party is reasonably able to provide it.

**(9)** If willing to state its views on the proportionality of disclosure requests, a competition authority can submit observations to a Court on a disclosure order.

**(10)** Where a Court orders disclosure, a party or third party to whom the order applies and their legal representatives shall

- (a)** comply with the disclosure order,
- (b)** not destroy any relevant information,
- (c)** comply with any obligation imposed by the Court protecting confidential information, and
- (d)** not breach the limits of the use of evidence under Part 2 of the Damages Regulations (i.e. disclosure).

## **Limits on use of evidence obtained through access to file of a competition authority (Article 7 Damages Directive)**

**Regulation 7(1)** - Leniency statement/settlement submission evidence obtained through access to the file of a competition authority is inadmissible in a damages action.

**(2)** Until a competition authority has closed its proceedings by adopting a decision or otherwise, the other categories of evidence obtained through access to the file of a competition authority (i.e. in **Regulation 6(3)**) are inadmissible in a damages action.

**(3)** Evidence obtained by a person through access to the file of a competition authority and not under **(1)** or **(2)** above, may be used in an action for damages only by that person (or by a person that succeeded to that person's rights).

# Effect of national decisions

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### Effect of national decisions (Article 9 Damages Directive)

- **Damages Directive** - similar to the effects of a final infringement decision of the Commission, a **final infringement decision of a national competition authority** is **proof** of the infringement **before the civil courts in the same Member State**.
- Before courts of other Member States, it constitutes **at least prima facie evidence of the infringement**.
- **"Final decision"** = a decision which cannot, or that can no longer, be appealed.

**Regulation 8 (1)** - 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 a court for an infringement of competition law**.

**(2)** Where such a final decision is taken in another Member State, that final decision may be presented before a court 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.

Without prejudice to rights and obligations of national courts under Article 267 TFEU (i.e. preliminary ruling procedure).

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# Limitation of actions for damages

## 3

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### Limitation of actions for damages for infringements of competition law (Article 10 Damages Directive)

The Damages Directive establishes a **limitation period** so that victims have sufficient time to bring an action.

At least 5 years to bring claims, starting from when they had the possibility to discover that they suffered harm from an infringement.

**This period is suspended/interrupted** if a competition authority starts infringement proceedings, so victims can decide to wait until public proceedings are over. Once a competition authority's infringement decision is final, victims have at least 1 year to bring damages actions.

**Regulation 9** - The Regulations amend the Statute of Limitations 1957:

**Section 11A(1)** An action for damages under Section 14(1) of the Competition Act shall not be brought after the expiration of 6 years from the latest of the following dates on which:

- (a) the infringement of competition law to which the cause of action relates **ceased**,
- (b) the person in whom the cause of action vests **came to know or could reasonably be expected to have come to know of the acts or omissions that constituted such infringement**,
- (c) that person **came to know or could reasonably be expected to have come to know that those acts or omissions constituted such an infringement**,
- (d) that person **came to know or could reasonably be expected to have come to know that the infringement caused harm [i.e. actual loss, loss of profit and interest]** to that person,
- (e) that person **came to know or could reasonably be expected to have come to know the identity of the infringer** concerned.

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## Limitation of actions - Exclusions

**Section 11A(2)** Any period during which—

(a) an investigation under—

(i) Section 10(1)(c) of the Competition and Consumer Protection Act (*i.e.* CCPC), or

(ii) Part 4A of the Competition Act 2002 (*i.e.* ComReg),

in relation to an infringement of competition law, or

(b) an investigation by the EU Commission or a foreign competition authority in relation to an infringement of competition law,

*is being conducted is not included in determining the 6-year period for a cause of action for that infringement.*

(3) Any period during which—

(a) proceedings for an offence consisting of an infringement of competition law,

(b) an action before the High Court by the CCPC or ComReg under the Competition Act re an infringement of competition law, or

(c) any other proceedings, in relation to an infringement of competition law to which the CCPC or ComReg is a party,

*is pending is not included in determining the 6-year period.*

(4) Any period during which—

(a) proceedings before the General Court or the COJ in relation to an infringement of competition law,

(b) proceedings for an offence under the law of a Member State (other than Ireland) in relation to an infringement of competition law, or

(c) any other proceedings in such a Member State in relation to an infringement of competition law to which a foreign competition authority is a party,

*is pending is not included in determining the 6-year period.*

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## Limitation of actions - Exclusions

**Section 11A(5)** Any period during which a consensual dispute resolution process relating to an infringement of competition law *is being conducted is not included in determining the 6-year period* (if the parties are those in whom the cause of action vests and against whom the cause of action lies).

(6) A period of one year from the—

(a) conclusion or discontinuance of an investigation referred to in **Section 11(2)**,

(b) giving of final judgment in, or the discontinuance of, proceedings referred to in **Sections 11(3) or (4)**,

(c) giving of final judgment in, or the discontinuance of, the action referred to in **Section 11(3)(b)**,

*is not included in determining the 6-year period regarding a cause of action relating to that infringement.*

(7) This does not apply to an infringement of competition law that occurred before 27 December 2016.

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## *Joint and several liability*

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### **Joint and several liability (Article 11 Damages Directive)**

- **Damages Directive - Infringers are responsible vis-à-vis victims for the whole harm caused by the infringement (joint and several liability)**, with the possibility of obtaining a contribution from other infringers for their share of responsibility.
- **To safeguard the effectiveness of leniency programmes**, infringers who obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation are treated differently.
- Immunity recipients normally obliged to compensate only their (direct and indirect) customers - not those of other infringers.
- A narrow exception from joint and several liability is provided for SMEs that (in effect) would otherwise go bankrupt.

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## Joint and several liability – The Damages Regulations

**Regulation 10(1)** - Undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement.

Each such undertaking must compensate for the harm in full, and the injured party has the right to require full compensation from any of them until fully compensated.

**(2)** Where an SME engages in joint behaviour referred to in **(1)** above to infringe competition law, the SME is liable **only** to its own direct and indirect purchasers or providers where—

- (a) its market share was below 5% at any time during the infringement of competition law, and
- (b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

**(3)** Para **(2)** does not apply where the SME has—

- (a) led the infringement of competition law or has coerced other undertakings to participate, or
- (b) previously been found to have infringed competition law.

**(4)** Where an immunity recipient engages in joint behaviour to infringe competition law in **(1)** above the immunity recipient is jointly and severally liable as follows to—

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

- “SME” = an enterprise which employs less than 250 and turnover of up to €50 million.

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## Joint and several liability - Contributions

**Regulation 10(5)** - In an action for damages, an infringer may recover a contribution from any other infringer, the amount of which is determined in the light of their relative responsibility for the harm caused by the infringement of competition law.

- The amount of contribution of an infringer who has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

**(6)** In an action for damages, to the extent that the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

**(8)** Regulation 10 is in addition to the Civil Liability Act 1961 regarding concurrent wrongdoers.

- “**Immunity recipient**” = a person who, has been granted immunity from fines by a competition authority under a “leniency programme”
- “**Leniency programme**” = the Cartel Immunity Programme, concerning the application of Article 101 TFEU on the basis of which a participant in a secret cartel, independently of the other undertakings involved, cooperates with an investigation of a competition authority, by voluntarily providing presentations regarding that participant’s knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel.
- **Currently**, the only Irish competition law immunity programme is the “Cartel Immunity Programme”. Section 15AH of the Competition (Amendment) Bill sets-out the criteria for immunity from and reductions in administrative financial sanctions - the CCPC has issued a proposed Administrative Leniency Policy (both full immunity from and reductions in administrative financial sanctions for cartels).

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# Passing-on of overcharge

# 5<sub>a</sub>

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## Passing-on of overcharge and right to full compensation (Articles 12-16 Damages Directive)

- **Damages Directive** - Direct customers of an infringer may offset the artificially increased price they paid by raising the prices they charge to their own customers (indirect customers).
- A **rebuttable presumption that cartels cause harm** - facilitates compensation.
- Subject to the commercial practices in a particular industry, **indirect customers** may suffer from the artificial price increase.
- It may be difficult for indirect customers to prove that they suffered harm due to the passing-on.
- The Damages Directive establishes a **rebuttable presumption** that indirect customers suffered harm (provided certain criteria apply).
- National courts can estimate the effects of passing-on - the Damages Directive contains provisions to avoid that claims by both direct and indirect purchasers lead to overcompensation.
- Rules on the passing-on of overcharges are founded in the compensatory principle – a person entitled to claim compensation for the harm suffered must be placed in the position in which that person would have been had the infringement not been committed.

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## Passing-on of overcharges and the right to full compensation (Guidelines)

### Guidelines for national courts on how to estimate the overcharge as passed on to the indirect purchaser (2019/C 267/07)

- Scenarios in which national courts may face passing-on issues
- Firstly, an infringer may invoke the passing-on of overcharges in its defence against damages claims, i.e. arguing that the direct or indirect purchaser has passed on the overcharge, entirely or in part, to its own purchasers.
  - > The passing-on defence may also be invoked against claims of indirect purchasers further down the supply chain.
  - > The defendant needs to prove that the claimant has passed on the overcharge (Article 13 Damages Directive). This burden of proof relates to the existence and extent of the passing-on of the overcharge.
  - > If the passing-on defence is fully or partially successful, the claimant may still claim compensation for loss of profit (Article 12(3) Damages Directive). In this case, the burden of proving such passing-on is on the claimant.
- Secondly, indirect purchasers may base their damages actions on the argument that the direct purchasers of the infringers have passed on (parts of) the overcharge to them and that they have therefore suffered harm.
  - > The burden of proving the existence and scope of such passing-on rests with the indirect purchaser.
  - > Article 14(1) Damages Directive and Recital 41 Damages Directive mention it can be a commercial practice to pass on price increases down the supply chain.
  - > Article 14(2) Damages Directive - a rebuttable presumption pursuant to which an indirect purchaser is deemed to have proved that a passing-on from the direct purchaser to the indirect purchaser occurred, provided that the claimant can show certain conditions.
- When the direct purchaser passes on the overcharge to the indirect purchaser, the latter will face a price effect which may lead to a reduction in demand, so that the direct purchaser sells less. The value of sales lost is the volume effect of passing-on.
- Price effect = overcharge as an increase in price that a direct/indirect purchaser paid for a product/service due to the infringement.
- Volume effect = harm caused by fewer products/services purchased due to overcharge (i.e. profit loss due to reduced sales).

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## Passing-on defence – The Damages Regulations

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

**Regulation 11(1)** - To ensure full protection of Regulation 4 [i.e. right to full compensation], compensation of harm can be claimed by anyone who suffered it, whether or not they are direct or indirect purchasers from an infringer.

(2) Compensation of harm can not exceed that caused by the infringement to the claimant.

(4) To avoid overcompensation, compensation for actual loss at any level of the supply chain can't exceed the overcharge harm suffered at that specific level.

(5) This is without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

(6) This also applies where the infringement of competition law relates to supply to the infringer.

(7) A Court decides the share of any overcharge that was passed-on.

**Regulation 12(1)** - A 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.

(2) Burden of proving that any overcharge was passed-on? – On the defendant.

(3) The defendant can reasonably require disclosure from the claimant (or from third parties).

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## Indirect purchasers

**Regulation 13(1)** - Where the existence of a claim or amount of compensation from a damages action depends on if, or to what degree, an overcharge was passed-on to a claimant, the burden of proof is on the claimant.

(2) Such claimant may reasonably require disclosure from the defendant or from third parties.

(3) Such a claim for damages or the amount of compensation to be awarded shall take into account commercial practices of price increases being passed-on down the supply chain.

(4) The indirect purchaser is deemed to have proven that a passing-on occurred where it shows that—

(a) the defendant has committed an infringement of competition law,

(b) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant, and

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

(5) – Para (4) above does not apply where the defendant can demonstrate credibly to the satisfaction of a Court that the overcharge was not, or was not entirely, passed on to the claimant.

## Actions for damages by claimants from different levels in the supply chain

**Regulation 14(1)** - An action for damages by claimants from different levels of the supply chain shall not lead to—

(a) a multiple liability, or

(b) an absence of liability of the infringer.

(2) When assessing if the burden of proof resulting from the application of **Regulations 12** (passing-on) and **13** (indirect purchasers) is satisfied, a Court seized of an action for damages may take account of:

(a) *actions for damages* related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain,

(b) *judgments* resulting from actions for damages as referred to in subparagraph (a),

(c) *relevant information* in the public domain resulting from the public enforcement of an infringement of competition law.

## Quantification of harm

5<sub>b</sub>

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### Quantification of harm (Article 17 Damages Directive)

- An injured party who has proven harm still needs to prove the extent of the harm to obtain damages.
- Quantifying harm in competition law cases is fact-intensive and may require the application of economic models.
- This can be costly, and claimants may encounter challenges in obtaining data to substantiate their claims.
- Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [C(2013) 3440].
- Domestic legal system of each Member State lays down detailed rules on the exercise of the right to compensation guaranteed by EU law.
- Such rules should not make it excessively difficult or practically impossible the exercise rights conferred by EU law (effectiveness) and not be less favourable than those governing damages actions for breaches of similar rights under domestic law (equivalence).
- 2009 Report on quantifying damages.

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## Quantification of harm – 2013 Guidelines

- In competition law damages quantification, determine what is likely to have happened **without the infringement**.
- The hypothetical situation is not observed directly - **some form of estimation is necessary to construct a reference scenario with which the actual situation can be compared** (the '**non-infringement scenario**' or '**counterfactual scenario**').
- The type of harm for which the claimant seeks compensation determines which kind of economic variables (such as prices, sales volumes, profits, costs or market shares) need to be considered.
- E.g., **in a cartel** leading to higher prices for customers of the cartelists, a non-infringement price may need to be estimated to establish a reference point for comparing it with the price actually paid by these customers.
- In **an abuse of dominance** case leading to the market foreclosure of competitors, profits lost by these competitors may be measured by comparing their actual turnover and profit margins with the turnover and profit margins they were likely to have generated absent the infringement.
- **Comparison over time on the same market** = comparing the actual situation during the period when the infringement produced effects with the situation on the same market before the infringement produced effects or after they ceased.
- **Comparison with data from other geographic markets** or **Comparison with data from other product markets**
- Implementing the method in practice: techniques to estimate price or other economic variable in the non-infringement scenario (e.g. **simple data comparisons** or **a regression analysis** (i.e. a statistical technique which helps to investigate patterns in the relationship between economic variables and to measure to what extent a certain variable of interest (e.g., price) is influenced by the infringement as well as by other variables not affected by the infringement (e.g. product characteristics/market concentration)).
- Ireland? Standard of proof required, rules regarding causality etc.

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## Quantification of harm – The Damages Regulations

**Regulation 15(1)** - A claimant's right to damages resulting from an action for damages should *not be made practically impossible or excessively difficult* due to the [national] burden or standard of proof required for the quantification of harm.

**(2)** Where it is established that a claimant in an action for damages suffered harm but *it is practically impossible or excessively difficult* precisely to quantify the harm suffered on the basis of the evidence available, a court may estimate the amount of such harm.

**(3)** It is presumed that cartel infringements cause harm - an infringer can rebut that.

**(4)** An NCA may, on request of a Court, assist that Court to determine the quantum of damages.

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# Irish legislation transposing the Damages Directive

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ERA - Training on EU competition  
law for Maltese and Irish judges on  
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Alan McCarthy, Partner

8 April 2022

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# Malta : The Implementation of the Damages Directive

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**ESSENTIAL EU COMPETITION LAW: Seminar for**

**Irish**

**and Maltese Judges, 8 April 2022**

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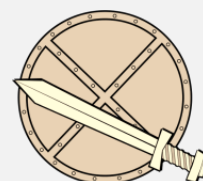
## Overview

1. Introduction
2. Jurisdiction / Applicable law
3. Right to Compensation
4. Disclosure of evidence
5. Effect of competition authorities' infringement decisions
6. Prescription / Limitation periods
7. Joint and several liability
8. Quantification of harm
9. Passing on of overcharges
10. Consensual Dispute Resolution
11. Cooperation with Competition Authorities
12. Legal Costs

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## Introduction

- Competition Act – substantive provisions (Articles 5 & 9) modelled on Articles 101 and 102 TFEU
- Public Enforcement & the roles played by the Office for Competition and the Civil Court (Commercial Section)
- The Impact of Public Enforcement on Private Enforcement
- When can competition law issues arise in court?
- The legal basis for seeking antitrust damages overtime:



1995

### General provisions

- Tort
- Contractual Liability

2011

### Ad hoc damages action

- Original Article 27A of the Competition Act

2012

### Collective Proceedings Act

2017

### Transposition of Antitrust Damages Directive

- *The Competition Law Infringements (Actions for Damages) Regulations* (found in the Schedule to the Competition Act)
- Applicable not only to cases involving an effect on trade but also to those purely of a national dimension
- Transitory Provision (new Art. 27A of the Competition Act)
  - C-637/17 Cogeco, C-267/20 Volvo (pending)

## Jurisdiction

- Framework
  - Brussels Recast Regulation (EU Regulation 1215/2012)
  - Default rule for EU domiciled defendants = “*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*”
  - Non-EU domiciled defendants: “*If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall [...] be determined by the law of that Member State*” = Articles 741 et seq in Code of Organisation and Civil Procedure ...
    - exceptions: Article 18 (Consumer), Article 21 (Employment), Article 24 (Exclusive Jurisdiction), Article 25 (Jurisdiction Agreement)
  - Mutually exclusive

## Jurisdiction

- Brussels Recast Regulation (EU Regulation 1215/2012)
  - Special rules - Article 7 (2): A person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur ... Article 7 (1)
  - At claimant's option: (1) place of the event giving rise to the damage OR (2) place where the damage occurred
    - place where market affected by infringement is located
    - place where the victim purchased the goods affected by those arrangements
    - place of victim's registered office, if victim purchased from multiple places
  - C-30/20 Volvo (15/07/2021) / C-434/19 Volkswagen (09/07/2020) / C-451/18 Tibor-Trans (29/07/2019) / C-27/17 flyLAL (05/07/2018) / C-352/13 CDC Hydrogen Peroxide (21/05/2015) ... C-559/17 Apple (24/10/2018)

## Exclusive Competence

- Competence (Subject-Matter / Territorial) separate from Jurisdiction
- A centralisation of jurisdiction before a single specialised court may be justified in the interests of the sound administration of justice (C-400/13 & C-408/13 Sanders and Hubers para 44)
- The technical complexity of the rules applicable to actions for damages for infringements of competition law provisions may also militate in favour of a centralisation of jurisdiction (C-30/20 Volvo para 37)
- Civil Court (Commercial Section)
- *"To the Civil Court (Commercial Section) shall be assigned applications falling within the competence of the Civil Court and which relate to matters regulated by [...] the **Competition Act and any regulations made thereunder** [...] and by the Malta Competition and Consumer Affairs Authority Act"* (Article 5A of the Civil Courts (Establishment of Sections) SL 12.19)

## Applicable Law

- Rome II Regulations (EU Regulation 864/2007) ... Rome I Regulation (EU Regulation 593/2008)?
  - General Rule (Article 4(1)): *"the law of the country in which the damage occurs"*
  - Special Rules (Article 6(3)):
    - *"The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected"*
    - *"When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, **may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises**; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court"*
  - Choice of Law clauses are inapplicable

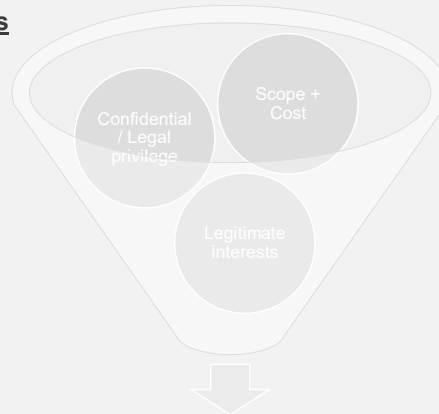
## Right to full compensation (Regulation 4)

- Any natural or legal person who has suffered damage as a result of an infringement of competition law is entitled to file an action claiming full compensation for the harm suffered
- Causal relationship between harm and the anti-competitive conduct
- Full compensation = actual loss + loss of profit + payment of interest (from the time the damage occurred until the compensation determined by the court is paid)
- Overcompensation (eg punitive or multiple damages) is explicitly excluded
- Who can claim damages?
  - C-557/12 Kone, C-435/18 Otis
- Who is liable to pay damages?
  - C-724/17 Skanska, C-882/19 Sumal

## Disclosure of Evidence (Regulation 5)



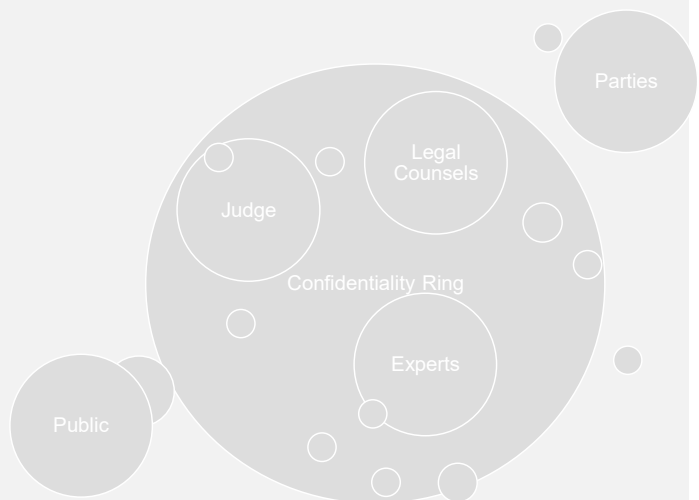
- Burden of proof is on the claimant, but ... court may order disclosure FROM defendant (also from plaintiff / third parties) **OVER AND ABOVE COCP provisions**



Proportionality Test

## Protection of Confidential Information (Regulation 5(4))

- Effective measures to protect confidential information
- Confidentiality rings? *Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law the private enforcement of EU competition law (2020/C 242/01)*
- Penalty (Regulation 8)
- Analogy: *OFC vs Enemalta*, Civil Court (Commercial Section) (Ref. 1/2011) decrees dated 24 April 2017 + 12 July 2017 :
  - Public enforcement
  - Sealed in court file
  - Accessible to legal counsel and expert witnesses only - Not available to parties or to the public





## Disclosure of Evidence found in a Competition Authority's File (Regulation 6)

- Aim: to balance protection of public enforcement with promotion of private enforcement
- Applies in tandem with Regulation 5 on disclosure of evidence in general
- Applies without prejudice to Regulation (EC) No. 1049/2001 and rules on protection of internal documents of competition authorities
- Court to assess proportionality of an order to disclose such information – no fishing expeditions
- Disclosure possible only where no party/3rd party can provide such evidence
- Limits on the use of evidence obtained by a person solely through access to the file of a competition authority (Regulation 7)

### Black List

#### Disclosure may never be ordered by court

- Leniency statements
- Settlement submissions

### Grey List

#### Disclosure can be ordered by court only after competition authority has closed its proceedings

- information prepared by a person specifically for the competition authority's proceedings
- information drawn up by the competition authority and sent to the parties during its proceedings
- withdrawn settlement submissions.

### White List

#### Disclosure may be ordered at any time

- Other evidence not being grey or black list documents

## Effect of Competition Authorities' Final Infringement Decisions in Antitrust Damages Actions (Regulation 9)

### Final Infringement Decisions resulting from Maltese public enforcement action

Binding on national courts  
(see also 1<sup>st</sup> proviso of Art. 27(1) of the Competition Act)

### European Commission Final Infringement Decisions

Binding on national courts

### Final Infringement Decisions of Competition Authorities of other EU MS

Not Binding on national courts - Prima facie evidence of an infringement

## Prescription / Limitation Period (Regulation 10)

- 5 years
- Start: (i) infringement ceased + (ii) claimant aware/reasonably aware of:
  - conduct
  - caused harm and
  - identity of perpetrator
- Interruption / suspension ... are Civil Code provisions a fallback?
- Special rule on suspension: claim suspended until after 1 year when infringement decision by European Commission or NCA has become res judicata or such proceedings are otherwise terminated
- Consensual dispute resolution



## Joint and Several Liability (Regulation 11)

- Main principle: undertakings, which through their joint conduct have infringed competition law, are jointly and severally liable for the damage caused by the infringement.
  - Therefore, each undertaking is bound to pay for the harm caused in full and the injured party can claim full compensation from any one of them.
- BUT some limited exceptions to the joint and several liability rule in favour of:
  - SMEs
  - Immunity applicants
  - Settling Infringers
- The infringer paying for the damage may recover a contribution from the co-infringers by a separate action.

## Joint and Several Liability cont.

Limited exceptions to the joint and several liability rule:

1. Where the infringer is an SME, it is liable only to its own direct and indirect purchasers or suppliers if:

- its market share in the relevant market was below 5% at any time during the infringement; and
- the application of the joint and several liability rules would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

- Non application of exception if:

- the right to full compensation is prejudiced
- if the SME led the infringement / acted as a coercer / is a recidivist

2. an immunity recipient is jointly and severally liable to:

- its direct and indirect purchasers or providers; and
- other injured parties only where full compensation cannot be obtained from the co-infringers.

3. Settling Infringers (slide 18)

## Quantification of Harm (Regulation 16)

- Claimant burdened with proving claims regarding the extent of the harm
- Rebuttable presumption of harm in case of cartel infringements ... for the infringer to rebut
- Evidence on quantification of damages:
  - Appointment of court experts / "referees" (Article 644 et seq. COCP)
  - Production of *ex parte* experts
  - Court may estimate amount of harm *arbitrio boni viri* where impossible/excessively difficult to get to precise quantum
  - NCA assistance
- Counterfactual
- Commission Communication on Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07)
- Commission Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07)
- Commission Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (SWD(2013) 205)

## Passing-on of Overcharges (Regulations 12-14)

- Overcharge – difference between actual price paid and the price that would have been paid absent the infringement
- Direct/Indirect Purchaser's claim (sword) - overcharge harm (Compensation for actual loss must not exceed overcharge harm)
  - ➡ Defendant's defence (shield) – claimant passed on totally / partially the overcharge (onus on defendant)
- Rebuttable presumption of pass-on in favour of indirect purchaser where indirect purchaser demonstrates:
  - The defendant committed the infringement;
  - The infringement resulted in an overcharge for the direct purchaser; and
  - The indirect purchaser purchased goods/services affected by the infringement
  - ➡ Defendant's defence – overcharge was not/not entirely passed on to indirect purchaser (onus on defendant)
- Plaintiff may claim compensation for loss of profits due to a full/partial pass-on of overcharge
- Situation where several actions for damages are filed by claimants from different levels in the supply chain – court must take precautions to avoid multiple liability or absence of liability (Regulation 15)

## Consensual Settlements (Regulation 18)



- Suspension of period of prescription only for parties engaged in CDR
- Court may suspend proceedings for up to 2 years
- Consensual settlement
  - Settlement of co-infringer's share of harm only
  - Remaining claim stands
  - Non-settling co-infringer cannot recover contribution from settling co-infringer
  - Claimant may seek remaining claim from settling co-infringer if it cannot be recovered from non-settling co-infringers, unless opted-out
- Arbitration?

## Cooperation with Competition Authorities

- Under the Regulations, a competition authority may assist the national courts:
  - in quantifying harm (Regulation 16(3))
  - in determining whether the evidence amounts to a leniency statement or settlement submissions (Regulation 6(6))
  - by submitting its views on the proportionality of a disclosure request relating to evidence in its file (Regulation 6(10))
- Article 15(1) and (3) of Council Regulation (EC) No. 1/2003
- Article 27 of the Competition Act
- Intervention *in statu et terminis* (Article 960 COCP)

## Legal Costs

- Tariff A – Registry Costs
  - “Notwithstanding the provisions of paragraphs 3 and 4 and in addition to the fees mentioned in paragraph 2, for the cases instituted pursuant to the Competition Act and the Control of Concentrations Regulations, the taxed fee shall be that of €650.”
- Tariff E – Legal Fees
  - Same
- Tariff G – Accountants / Referees Fees
  - Same

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## Thank You

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# Introduction to State Aid

**ERA Seminar for Irish and Maltese Judges**

**Valletta, 8 April 2022**

**Leonardo Armati**

DG COMP. Unit H4. State Aid - Enforcement and Monitoring



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## State Aid Rules in the EU Treaty

- Art. 107(1) TFEU: notion of aid and general prohibition
  - *"Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market".*
- Arts. 107(2-3), 106(2), 93 TFEU: derogations

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# SUBSTANCE

## "Secondary Legislation"

- Notice on the Notion of aid (NoA)
- De minimis Regulation
- General Block Exemption Regulation (GBER)
- SGEI Decision
- Guidelines/Frameworks for the compatibility assessment
  - for specific sectors: e.g. broadband, air transport
  - horizontal rules: e.g. rescue and restructuring aid, environmental aid

# Notion of Aid

## Basic Principles

- **objective** notion
- measured in relation to its **effects**
- legal/administrative form not relevant
- cause or objective not relevant

## Basic Principles

Art. 107(1) TFEU:

- undertaking
- granted through State resources
- imputability
- advantage
- selectivity
- effect on trade between Member States
- distortion or risk of distortion of competition

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Competition

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## Undertaking

- undertaking = every entity engaged in **economic activity**, regardless of legal status, way in which it is financed, non profit purpose
- economic activity: offering goods and services in the market
- not economic activity: regulatory tasks, supervisory tasks, activities based on solidarity, basic functions of the State (state education, customs, police, air safety ...)

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Competition

8

## State Resources & imputability

- transfer: as soon as there is enforceable act; payment not required
- state resources: positive transfer (grant), foregone revenues (tax waiver), exposure of state funds (guarantees)
- imputable to state: involvement of state-owned undertaking; question of control (if money is under State control, source is irrelevant)

9

Competition

9

## Advantage (Favouring)

- state intervention improves financial situation of company or prevents it from getting worse
- state aid vs genuine commercial transaction - test: **M**arket **E**conomy **O**perator **P**rinciple (MEOP)
  - different applications: investor, creditor, vendor
  - no state aid if MS acts like normal buyer / seller / investor
- **S**ervice of **G**eneral **E**conomic **I**nterest compensation: no aid if certain criteria are met (entrustment act, objective pre-set parameters, no overcompensation, tender/benchmark costs)

10

Competition

10

## Selectivity

- not selective: general measures (apply to all companies in all sectors of a MS, no discretionary power)
- sectoral selectivity
- regional selectivity
- *de facto* selectivity

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Competition

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## Effect on Trade and (Risk of) Distortion

- closely linked
- broad interpretation on both
- enough that product or service is subject to trade between MS
- exceptions: e.g. local services; *de minimis* aid

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Competition

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# Compatibility

Competition

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Compatibility

## Legal Bases

- Art. 107(2): automatic compatibility
- Art. 107(3): margin of discretion to define criteria
  - Frameworks and Guidelines
  - General Block Exemption Regulation
- Art. 106(2): Services of General Economic Interest (SGEI)
- Art. 93: transport

Competition

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## Assessment of a Measure

1. under secondary legislation
2. directly on the basis of the Treaty:
  - if the measure is not covered by the scope of application of the existing secondary legislation

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Competition

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## Basic Principles of Compatibility

- general goal: positive effects of aid should outweigh negative effects
- common assessment principles
- used for assessment directly under the Treaty
- incorporated directly into secondary legislation

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Competition

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## Common Principles

1. contribution to well-defined objective of common interest
2. need for state intervention
3. appropriateness of state aid as policy instrument
4. incentive effect
5. proportionality of the aid amount (aid limited to minimum necessary)
6. avoidance of undue negative effects on competition and trade
7. transparency

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Competition

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# PROCEDURE

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Competition

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# Rules

- Article 108 TFEU
- Procedural Regulation 2015/1589
- Implementing Regulation 794/2004
- Recovery Notice (OJ C 247, 23.7.2019, p. 1–23)
- Jurisprudence

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Competition

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# Core concepts / Definitions

- new aid (includes alteration to existing aid) vs. existing aid
- aid scheme vs. individual aid
- notified aid vs. unlawful aid = illegal = non-notified aid

Completely different: compatible vs. incompatible aid

Competition

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## Procedure: Notified Aid

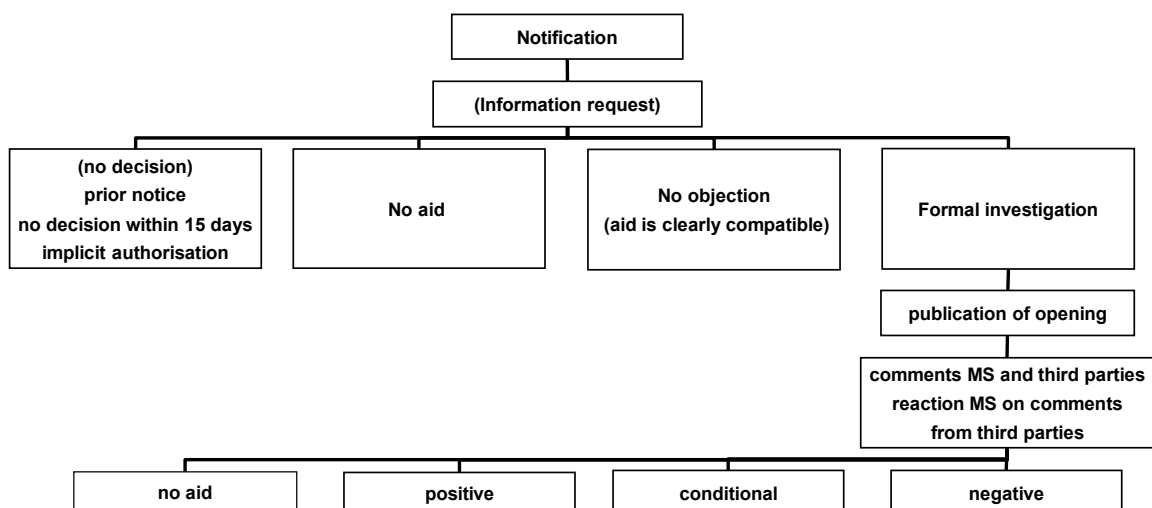
- basic process: notification before granting, standstill obligation
- Prenotification, notification
- COMM investigation in 2 phases

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Competition

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## Procedure: Notified Aid



Competition

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## Recovery of Unlawful and Incompatible Aid (Negative Decisions)

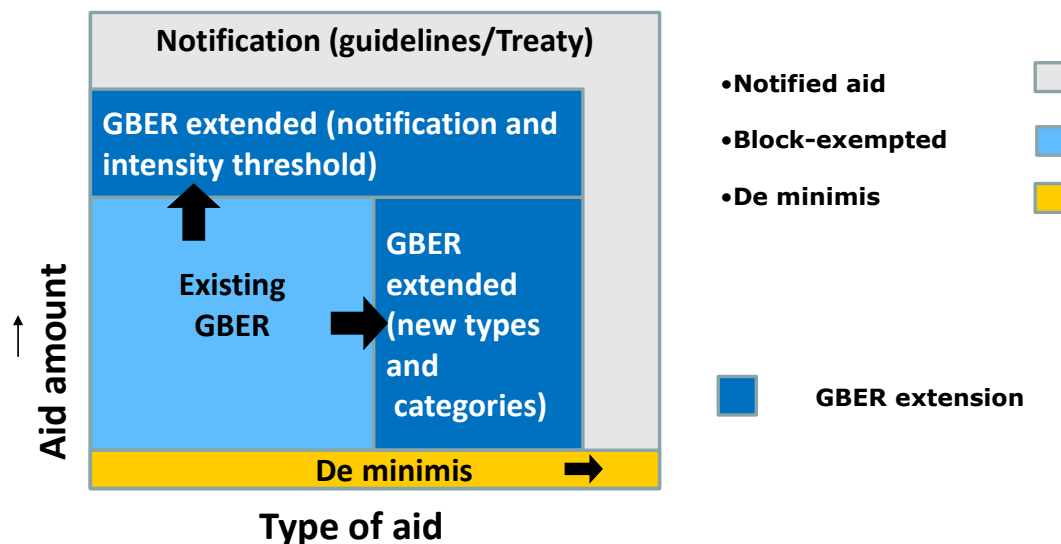
- purpose: to re-establish situation that existed on market prior to granting of the aid (not penalty)
- amount: aid plus recovery interest
- process: subject to national law, but must be immediate (recovery deadline) and effective (cannot hinder recovery)
- Exception: general principles-absolute impossibility
- failure to recover: infringement action (referral to court)

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Competition

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## Block exemptions – from ex ante to ex-post and ex-officio control



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Competition

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## De Minimis

- Reg. No 1407/2013: de minimis aid is not aid within meaning of Art. 107(1) TFEU; it is deemed not to affect cross-border competition
- Requirements: €200,000 over 3 years /per 'single undertaking'/ per MS; 'transparent' aid only; for road freight transport the threshold is €100,000
- Separate de minimis rules for SGEI (Reg.No 360/2012; threshold €500,000); separate rules for primary agriculture production (€15,000) and for fisheries (€30,000)

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Competition

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## General Block Exemption Regulation

- GBER covers vast majority of all aid measures:
  - regional aid; SMEs; access to finance for SMEs; research and development and innovation; training; aid disadvantaged workers and workers with disabilities; environmental protection; natural disasters; transport for residents in remote regions; broadband infrastructure; culture and heritage conservation; sport and multifunctional recreational infrastructures; local infrastructures; ports; airports
  - standard measures considered not very harmful → do not need to be notified to the Commission, only ex post information obligation
  - Specific block exemptions exists for agriculture (ABER) and fisheries (FIBER), public transport, SGEI

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Competition

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**Thank you for your attention!**

**Questions?**





# Enforcement of State Aid Rules by National Courts

**ERA Seminar for Irish and Maltese Judges**

**Valletta, 8 April 2022**

**Leonardo Armati**

DG COMP. Unit H4. State aid – Enforcement and monitoring



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## Legal bases

- Articles 107(1) and 108 (3) TFEU
- Notice on cooperation with national judges (OJ C 305, 30.7.2021, p. 1–28)

2



2

# Background of the Enforcement Notice

2009

Notice on the enforcement of State aid rules by national courts

- 12 years of EU case law developments

2012

State aid Modernisation

- Significant extension of the scope of the block exemption regulation (GBER): 96% of State aid is now exempt from notification
- The role of national courts has become even more prominent, as they must detect all potential breaches of exemption conditions

2015

New Procedural Regulation 2015/1589

- Article 29 codified the cooperation tools between national courts and the Commission from 2009 Notice and added the *amicus curiae* intervention

2019

Study on the Enforcement of State aid rules by national courts

- Findings on the application of State aid rules by national courts in 750 cases: limited award of remedies
- Cooperation tools under-used

2021

**New notice on the enforcement of State aid rules by national courts**

3



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# Purpose and Scope of the new 2021 Notice

Concrete guidance on the enforcement of State aid rules at national level focusing on cases where private parties seek remedies for the unlawful implementation of aid ("private enforcement")

Clarifications on general principles applicable based on updated case law

Clarifications on the respective roles of the Commission and of the national courts (NCs)



Reinforcement of the cooperation between NCs and the Commission - mutual assistance

4



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# The System of State aid Enforcement

Competences	National Courts 	Commission 
107(1) TFEU Objective notion of aid	✓	✓
108(3) TFEU Breach of the standstill obligation (no aid shall be granted until its compatibility with the internal market was assessed): for new aid, block-exempted aid and existing aid	✓	✓
Compatibility / review of existing aid	X	✓
Remedies	Recovery, suspension, termination, interim relief, damages	Incompatible new aid: Recovery decision, injunctions Incompatible existing aid: appropriate measures

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## The Role of National Courts

Assessing a potential breach of the standstill obligation (Section 4 of the Notice)

<b>Existence of aid</b>	Objective notion of aid Reference to Commission guidance (2016 Notice on the notion of State aid)
<b>Existing Aid</b>	An existing aid is not subject to the standstill obligation Definitions of Existing Aid under the Procedural Regulation do not bind NCs (C-387/17 <i>Fallimento Traghetti Mediterraneo</i> )
<b>Block exemptions</b>	Duty to verify compliance with all GBER conditions (strictly interpreted) No legitimate expectations (C-349/17 <i>Eesti Pagar</i> , C-654/17 P <i>BMW</i> ) (see next slide)
<b>New Unlawful Aid</b>	Remedies

6

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# Block exemptions conditions

(Section 4)

**C-349/17  
Eesti Pagar**

Strict interpretation of GBER conditions by NCs (no compliance with the condition relating to the incentive effect, as the aid application was submitted after the a binding order was issued to start works on the project).

Non-compliance with GBER conditions amounts to an infringement of Article 108(3) from which NCs must draw all the consequences.

Assurances by national authorities do not create legitimate expectation as to the lawfulness of State aid.

**C-654/17 P  
BMW**

When State aid exceeds the relevant individual value threshold set in the GBER, all the aid falls outside the scope of that regulation and cannot benefit from the exemption.

The GBER does not transfer competences to Member States.

Aid covered by the GBER does not constitute 'existing aid' and does not enjoy special protection.

Aid exempt from notification under the GBER enjoys at most a presumption of compatibility with the internal market and its lawfulness can therefore be challenged.

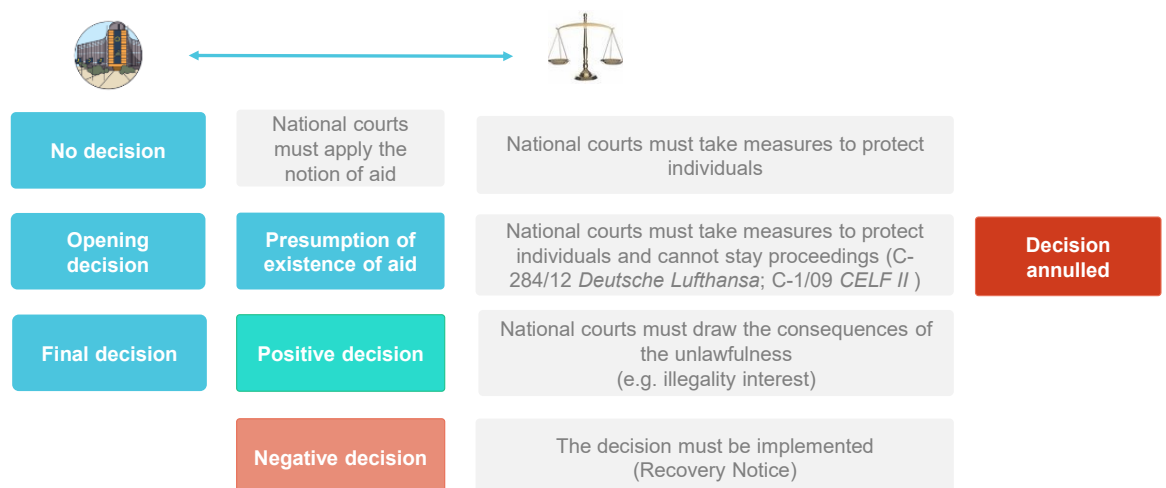
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# Interplay between NC/Commission decisions

(Section 4)



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# Remedies

(Section 4)

## Duty to address the consequences of illegality of the aid

### Suspension/termination

EU law does not impose any conclusion that NC must necessarily draw on the validity of the acts implementing unlawful aid, in so far as the objective of restoring the status quo ante is achieved (C-275/10 *Residex Capital IV*)

### Recovery of aid and illegality interest

Full advantage to be removed by recovering aid principal plus 'illegality interest', i.e. interest that the undertaking would have paid had it had to borrow the amount of the aid on the market during the period of the unlawfulness (C-349/17 *Eesti Pagar*)

Implementing Regulation not applicable for the quantification of illegality interest (≠ recovery interest) (C-349/17 *Eesti Pagar*)

### Interim measures pending EC investigation

An ongoing Commission investigation does not release the national court from its obligation to impose remedies (C-39/94 *SFEI*)

Provisional recovery on a blocked account; interim measure preventing the disbursement of presumably unlawful aid (C-590/14 P *DEI*)

### Damage compensation

Based on *Francovich* and *Brasserie du Pêcheur* case-law, MS required to compensate individuals for damage as a result of breaches of EU law  
Damages against beneficiaries not directly based on EU law

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# Action for damages

(Section 4)

## An effective tool for third parties to whom damage was caused by unlawful State aid (*SNCM*, French Council of State, September 2021)...



In exchange for operating the ferry service between Marseille and Corsica, the regional authorities granted shipping operator SNCM aid that was found unlawful and incompatible by the Commission.

Competitor Corsica Ferries filed a claim for damages, submitting an economic expert report that quantified the loss of profit caused by the aid received by SNCM.

Quantum of damages to be paid to Corsica Ferries amounted to approx. €86 million.

→ Need for economic and financial evidence translating the theory of harm into a credible quantitative assessment.

### ... with limitations...

#### Actions brought by (potential) beneficiaries

When ruling on the compensation to third parties for the costs incurred as a direct result of an unlawful aid, NCs must be careful not to adopt decisions having the effect of granting an aid or enlarging the circle of beneficiaries (C-106 to 120/87, *Asteris*, C-164/15 P and C-165/15 P, *Aer Lingus*).

No legitimate expectations for the beneficiary vis a vis the Member State (C-672/13 *OTP Bank*).



In general, NCs should be careful not to breach the standstill obligation (Art. 108(3) TFEU) by granting aid without prior approval (for instance by extending an aid, *DEI* C-590/14 P).



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# General Principles

## (Section 2)

- Sincere cooperation (Article 4(3) TEU)
- Procedural Autonomy, Equivalence and Effectiveness of national procedural rules



Legal standing: claimants are mostly competitors but not only; not only economic interests



Jurisdiction: each Member State designates the courts that have jurisdiction (specialised vs general courts)



Statute of limitations: national courts are not bound by the Procedural Regulation (C-387/17 *Fallimento Traghetti Mediterraneo*, C-349/17 *Eesti Pagar*)



*Res judicata*: recognized by EU law, with exceptions for State aid:

Cannot limit Commission's exclusive competence (C-119/05 *Lucchini*, C-586/18 P *Buonotourist*)

Cannot undermine full effectiveness of Article 108(3) (C-505/14 *Klausner*)

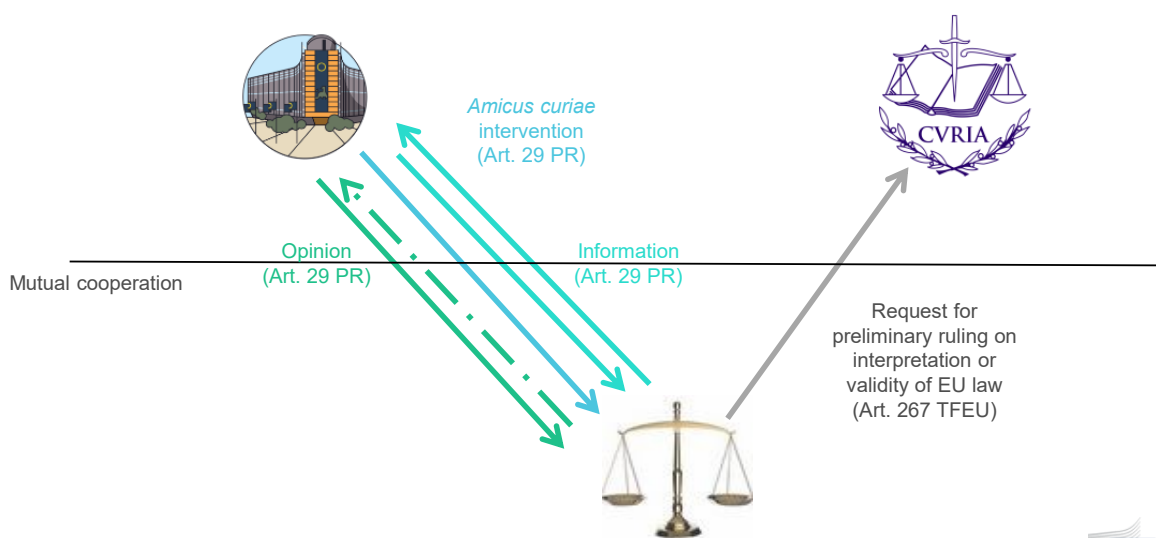
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# Cooperation with the Commission

## (Section 5)



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# Cooperation with the Commission

(Section 5)



- ✓ Request for **information** (about the existence of a State aid procedure or investigation; about whether a Member State has duly notified an aid measure; about whether the Commission has already adopted a decision...) or for **documents** (copies of decisions, factual data, statistic, market studies, economic analyses)
- ✓ Covered: information protected by **professional secrecy**, provided it will be protected by the national court
- ✓ Usually transmitted within **1 month** from the date of the request

## Information (Art. 29 PR)



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# Cooperation with the Commission

(Section 5)



## Opinion (Art. 29 PR)

- ✓ When **not enough guidance provided by case law and Commission notices and guidelines**
- ✓ About: quantification and calculation of **aid amount** and recovery interest; application of **GBER** conditions; application of **scheme** to individual measure; **exceptional circumstances** preventing recovery...
- ✓ Usually transmitted within **4 months** from the date of the request



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- ✓ **Not binding on NCs**



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# Cooperation with the Commission

(Section 5)



## Amicus curiae intervention (Art. 29 PR)

- ✓ Written or oral **observations** to NCs applying State aid rules
- ✓ Decision to intervene as *amicus curiae* is the **Commission's exclusive prerogative**, depending on **case's significance**, contribution to the **effectiveness of the enforcement of State aid rules**, existence of a **novel question of substance**
- ✓ **Not binding on NCs**



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# Cooperation with the Commission

(Section 5)



Mutual cooperation

## National courts' assistance to the Commission



- ✓ Communication by NCs of a copy of any written judgment issued following the provision by the Commission of information, opinion or *amicus curiae* observations
- ✓ Member States can set up coordination points for national judges dealing with State aid issues, for a more effective and consistent application of State aid rules

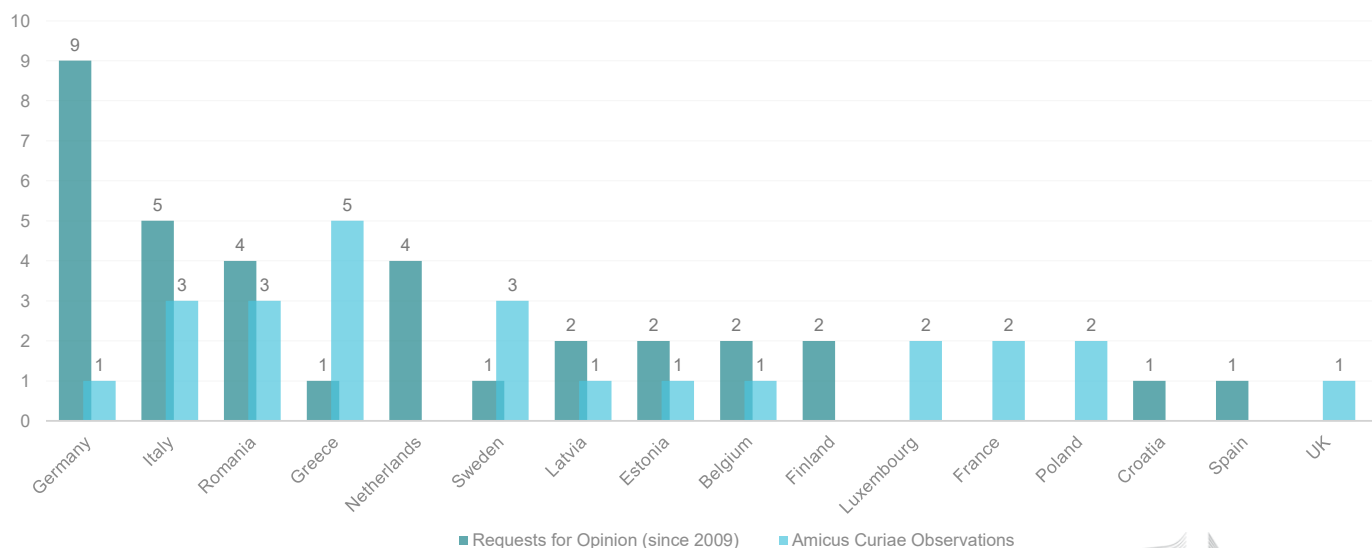


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## The use of cooperation tools by Member States



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# Thank you

For more information, you can find the notice here: [EUR-Lex - 52021XC0730\(01\) - EN - EUR-Lex \(europa.eu\)](#)



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## ESSENTIAL EU COMPETITION LAW – STATE AID - APRIL 2022

### CASE STUDY

#### Background

1. On 15 February 2015 the company Wood Corporation (**Wood**) and the Forest Management Board of Region A (**FMB**) concluded a timber supply contract. Under that contract, FMB committed to supply Wood specific quantities of wood for a fixed price for the period from 15 February 2015 to 31 December 2020. In addition, FMB made a commitment not to sell to other buyers for less than the price fixed in the contract.
2. In 2015 and 2016, FMB supplied Wood with timber, but did not deliver the agreed quantities of it. In 2016, Wood faced financial difficulties that lead to delayed payments to FMB. In August 2017, FMB terminated the supply contract of 15 February 2015, and from the second half of the year ceased to supply timber to Wood under the terms of the contract.
3. After FMB's alleged termination of the contract, the financial difficulties of Wood increased, and as a result, it was unable to satisfy its creditors. In September 2019, the company Wood was subject to a judicial decision in a resolution procedure to settle its debts.
4. Meanwhile, Wood had brought FMB before the competent civil court, seeking a declaratory decision ascertaining that, despite its termination by FMB, the contract of 15 February 2015 remained in force (**1<sup>st</sup> Case**). The court of first instance deemed well-founded Wood's claim and, by judgment of 24 April 2019, declared that the contract at issue was still in force.
5. On the other hand, following a complaint by a competitor of Wood that was damaged by FMB's commitment not to charge to other clients less than the price charged to Wood, by decision of 5 July 2019, the Commission expressed doubts as to the compatibility of the preferential tariff charged by FMB to Wood with State aid rules and opened a formal investigation into the contract of 15 February 2015.
6. The judgment at first instance that had found that the contract at issue had not been validly terminated by FMB was upheld also by the appellate court, by means of a final declaratory judgment of 3 December 2020.
7. Consequently, in January 2021, Wood brought a second action against FMB before the competent civil court, seeking, on the basis of the final declaratory judgment in the 1<sup>st</sup> Case, firstly, the award of damages amounting to approximately EUR 14 million due to FMB's failure to supply timber in 2012, and, secondly, the order for FMB to supply around 1,5 million cubic metres of wood in execution of the disputed contract between 2017 and December 2020 (**2<sup>nd</sup> Case**).

8. In the context of that second action, FMB defended itself by arguing that the execution of the contract in question was contrary to the law of the European Union. It argued that that contract constituted State aid within the meaning of Article 107(1) TFEU and that it had been carried out in breach of the third subparagraph of Article 108(3) TFEU.
9. In its reply, Wood argued that FMB allegation had not been raised in the proceedings concerning the 1<sup>st</sup> Case and, thus, the legality of the contract could not be called into question anymore, as *res judicata* had formed.
10. The trial in the 2<sup>nd</sup> Case has not been completed.

**Topics for discussion:**

- A. In principle, which elements of EU State aid law can be interpreted and applied by the national court?
- B. What does the fact that the Commission had opened a formal investigation entail for national courts?
- C. If the contract did entail illegal State aid, what consequences would the national court need to draw in relation to the 2<sup>nd</sup> Case?
- D. Does the assessment change if, in the meantime, the Commission had closed the formal investigation finding that the Member State A had unlawfully granted incompatible State aid to Wood through the contract with FMB of 15 February 2015?

The Commission's negative decision and the obligation to recover for Member State A

11. By decision of 20 December 2020 closing the investigation procedure, the Commission considered that the Member State A had unlawfully granted incompatible State aid amounting to EUR 8 million to Wood through the application of a preferential tariff for the period from 15 February 2015 to December 2017 and obliged A to recover it from the beneficiary within 4 months.
12. At the time of the Commission's decision, the company Wood entered into insolvency. The private creditors agreed to limit their claims at a rate of 60 %. Member State A did not agree and registered within the deadline, under national insolvency law, the full State Aid claim including recovery interest in the insolvency register.
13. In June 2021 the insolvency procedure of Wood was closed, with the payment of all creditors in respect of 60 % of their claims.
14. Member State A informed the European Commission that it believes it has complied with its obligation to implement the recovery decision.

**Topics for discussion:**

- E. Can the Member State A claim that the partial recovery of 60 % of the total amount to be recovered constitutes the full and effective implementation of the Commission's decision?

- F. Discussion by group of arguments in favour of and against the immediate and effective implementation by Member State A of the recovery obligation under EU law.

\* \* \*

