

Anti-competitive Agreements + Concerted Practices.

18.1 Introduction

This chapter is concerned with **Art 101 TFEU**. The aim of this provision is to prohibit undertakings from working together to restrict competition. Such conduct by undertakings could be in the form of an agreement, or in the form of informal collusion. The idea here is that competitors should be competing freely against each other. If they work together to reduce the risks of competition, it undermines the whole purpose of having a market based on competition. It is likely to mean that the benefits to customers and consumers of a competitive market are compromised. For example, objectives such as enhanced efficiency and low prices may be compromised. However, some agreements that do restrict competition may enhance efficiency and be beneficial to customers and consumers. For this reason, **Art 101(3)** allows certain agreements to be lawful where the restrictive effect on competition is outweighed by the benefits of the agreement. Where there is a breach, the agreement will be rendered void (**Art 101(2)**).

There are various requirements that must be satisfied in order for there to be a breach of **Art 101** and these are addressed in turn. The starting point is **Art 101(1)**, which is summarised below.

Art 101(1) TFEU prohibits:

- agreements and concerted practices between undertakings;
- decisions by associations of undertakings;
- which have the aim or effect of restricting competition;
- which may have an effect on trade between Member States.

It then states a non-exhaustive list of examples, such as:

- the fixing of prices;
- unfair trading conditions; and
- sharing (dividing) the market or sources of supply.

18.2 Agreement

Agreements are usually in the form of a signed contract. However, such a formal agreement is not required for **Art 101 TFEU**; even an informal "gentleman's" agreement is sufficient (Case 45/69, **Quinine Cartel [1970]**). It is not necessary to develop a wide definition of agreement because collusion that falls short of an agreement will be within the concept of a concerted practice.

18.3 Decisions by associations of undertakings

"Associations of undertakings" is defined widely. It covers trade associations, unions (Case T-14/93, **UIC [1995]**); professional associations such as the Netherlands Bar (Case C-309/99, **Wouters [2002]**) and even the International Olympic Committee (Case C-519/04P, **Meca-Medina [2006]**). The idea is that such associations can make decisions or have rules that have the same impact on their members as an agreement between undertakings. For example, a trade association could decide that its members should reduce the amount they supply to the market. This decision would have the same effect as if the members had agreed to reduce supply themselves. Interestingly, the decisions by associations do not need to be legally binding on the members in order to be within **Art 101 (Re Application of the Publishers Association [1989])**. The reason for this is that even a non-binding decision or rule of an association can still influence the members to work in the same way to distort competition.

18.4 Concerted practice

A concerted practice is a form of collusion between undertakings that falls short of an agreement. It is where undertakings "*knowingly substitute practical co-operation between them for the risks of competition*" (Case 48/69, **ICI v Commission (Dyestuffs) [1972]**). This collusion commonly results in price fixing, and is more often referred to as cartel behaviour. A recent example is the concerted practice between Procter & Gamble, Unilever and Henkel (Commission Press release IP/11/473, 13 April 2011). Here, the companies co-ordinated the prices of the leading washing powders in eight Member States for three years.

Undertakings usually do what they can to hide evidence of such collusion. For example, there may have been meetings, but no expenses claimed for hotels or services. There could be phone calls between the undertakings, but on pre-paid mobile phones. Often, it is the conduct on the market that gives rise to a suspicion of a concerted practice: for example, where the prices between competing products are similar, and increase at the same time. Such parallel behaviour is unusual between undertakings that are supposed to be competing against each other.

18.4.1 Concerted practice or an oligopoly?

One difficulty is that in an oligopolistic market, parallel behaviour between competitors is normal rather than a result of collusion. An oligopoly is a market condition in between perfect competition and a monopoly. In theory, there are a few firms in the market all providing the same product. Because

these firms are so large, in theory, each can cater for the entire market. In addition, the behaviour of each firm can influence the market. These qualities combine to create a unique characteristic of an oligopoly in the form of natural interdependence on the behaviour of other firms. For example, if a firm reduces its prices, it will price its competitors out of the market unless they, in turn, reduce their prices. This then means that they all operate with less profit than before the initial fall in price. If a firm needs to increase its prices, it will only do so if it knows its competitors are feeling the same pressure to increase their prices. This level of interdependence means that there is often no real price competition in an oligopoly. Instead, there is non-price competition such as promotional free gifts. In practice, there are no perfect or full oligopolies. In the UK, the market for branded petrol and the market for unbranded (supermarket) petrol can be described as being oligopolistic. The same can be said for high street banks, covered by the big five banks, and UK supermarkets, covered by Morrisons, Tesco, Sainsbury's and ASDA. So, when there is parallel behaviour in such markets, it may not be the result of collusion. Instead, it could simply be a result of oligopolistic market pressure.

A leading case is **Dyestuffs**. Here, there were three parallel price increases among the leading producers of dyes. Such uniform behaviour is suspicious among competitors and so the Commission alleged there was a concerted practice. The producers responded by claiming that they were in an oligopolistic market. They argued that their parallel behaviour was simply an intelligent response to oligopolistic market pressure. The CJ agreed and stated that in such circumstances, further evidence of a concerted practice is required. Such evidence in the case was in the form of pricing policy announcements between the producers to facilitate the price increases. The CJ stated that the announcements of future prices could hardly reflect sharp business practice between competitors unless there was collusion. In addition, the price announcements adopted similar language to suggest a common source.

Following **Dyestuffs**, parallel behaviour will give rise to suspicion of a concerted practice but more evidence is required. In Cases C-89, 104, 114, 116-17, 125-9/85, **Wood Pulp [1993]**, even the pricing policy announcements were objectively justified and not evidence of a concerted practice. Here, the Commission held that there was a concerted practice among the world's leading producers of wood pulp that had two-thirds of the wood pulp market. They were based in the USA, Canada and Finland but operated within the internal market. The CJ stated that there must be a detailed analysis of the market. There was parallel price behaviour and a system of quarterly price announcements. However, the CJ accepted that the market was one which involved buyers and sellers making long-term plans and so there was a need for them to reduce the commercial risk. The CJ then stated: "*The parallelism of the prices and price trends may be explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods.*" As a result, the CJ held that there was no concerted practice. The case is a clear reminder that the Commission needs to produce evidence of a concerted practice to substantiate its claim. Often, the evidence required comes from a participant of a concerted practice in return for a reduced fine (see **19.9**). The standard of proof is based on the balance of probabilities (Case C-199/92, **Hüls v Commission [1999]**), and this aspect is explored further at **19.8**.

The extent to which a concerted practice could exist as a result of the actions of an independent contractor was explored in C-542/14, **SIA VM Remonts [2016]**. In the case, a local council based in Latvia invited tenders to be submitted to supply school dinners. Three companies P, D and A submitted tenders. P contracted with a company to assist with the preparation of the tender. That company then sub-contracted the task to M. M received a draft tender from P which had been prepared only by P without any collusion. However, M also prepared the tenders for A and D without disclosing that fact to the parties. M used the prices by P in the preparation of the tenders for A and D so that D's tender was the lowest and most competitive. The common methods of calculation on the tenders gave rise to a suspicion of collusion. It resulted in the Latvian Competition Commission imposing a fine on all three companies that submitted tenders on the basis that they were part of a concerted practice that distorted competition. The matter was then referred to the CJ.

The CJ ruled that under **Art 101(1) TFEU** an undertaking could be held liable for a concerted practice as a result of the action by an independent service provider where one of the following conditions are met:

- the service provider was acting under the direction or control of the undertaking;
- the undertaking knew of the anti-competitive objectives of its competitors and the service provider, and had the intention to join them by its own conduct; or
- to the undertaking, the acts of its competitors were reasonably foreseeable and it was willing to accept the risks.

The case is significant because it shows the wide scope of a concerted practice within **Art 101**. It goes beyond the typical direct collusion between competitors. It is possible to be liable for the conduct of an independent contractor. The focus here is the protection of the market from the effects of anti-competitive conduct. However, the conditions for liability require a level of culpability on the part of the undertaking.

18.5 Distortion of competition

For a breach of **Art 101**, the conduct of the undertakings must have the aim or effect of preventing, restricting or distorting competition. Examples of such an effect can be found in the non-exhaustive list in **Art 101(1)**. These examples are the effects that can result from horizontal co-operation or horizontal agreements. An agreement between competitors is a **horizontal agreement** because the parties are on the same level in the supply chain (i.e. they are retailers or they are producers). It is this kind of agreement or level of co-operation that has always been seen as something that can distort competition. This is because such an agreement immediately reduces the level of competition between competitors. It means that such agreements restrict **inter-brand** competition, which is a reference to competition between brands.

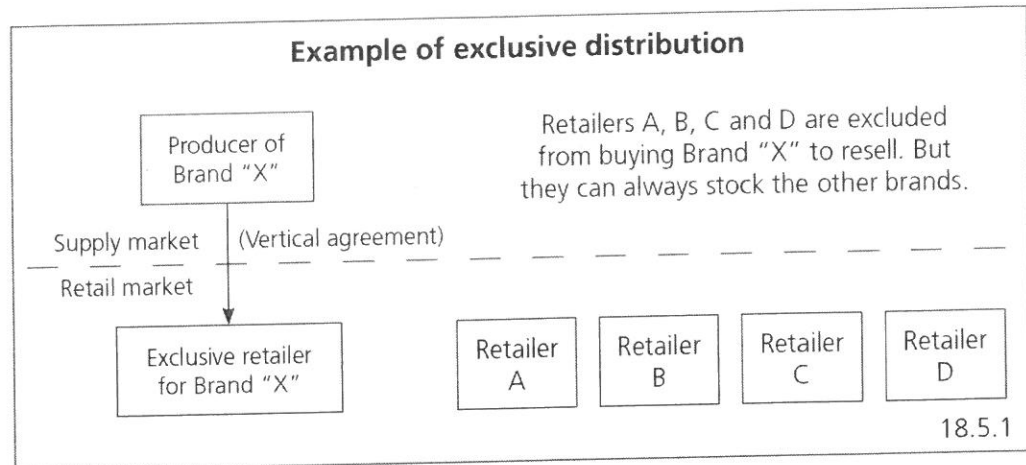
Recently, in Case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa [2013]*, the CJ ruled that an agreement to exclude a competitor remains a breach of competition rules where the excluded competitor is operating unlawfully on the market.

The case concerned three major Slovak banks that colluded to terminate the contracts they had with a Czech financial company, Akcenta. Akcenta was in the business of cashless foreign exchange transactions and to do this, it needed accounts in a range of banks. The Slovakian Competition Authority imposed significant fines on the three banks for their conduct. It was of the view that the banks saw Akcenta as a competitor that had reduced their profits because Akcenta was providing its services in Slovakia. One of the banks sought to defend its anti-competitive conduct on the ground that Akcenta did not have a licence to carry out its business in Slovakia as required by Slovakian legislation. This led to a reference to the CJ on whether the illegal conduct of an excluded competitor was relevant to the assessment of a restrictive agreement. The CJ observed that there would be a breach just from the fact that an agreement has as its object the prevention, restriction or distortion of competition. Furthermore, it was observed that the competition rules are not just intended to protect the interests of competitors and consumers but also to protect the structure of the market and competition itself. Clearly, such an objective is undermined by any co-ordinated effort to restrict competition. Finally, the CJ pointed out that it is for public authorities to ensure compliance with competition rules rather than private undertakings.

It makes sense to discourage any anti-competitive co-ordination and leave the task of enforcement to the relevant competition authority. However, is it legitimate to regard the co-ordination in the case as having the object of distorting competition? After all, the excluded competitor such as Akcenta should not have been operating on the market in the first place. Arguably, the co-ordination did not have the object or effect of distorting any lawful competition. That said, perhaps in theory, Akcenta could have been harmed to a level whereby it did not have a strong enough business to seek a licence to operate lawfully.

18.5.1 Vertical agreements within Art 101(1)

An agreement between undertakings on different levels of the supply chain is a **vertical agreement** (i.e. between a producer and a retailer). Such agreements are commonly in the form of an **exclusive distribution** arrangement. This is where producers sell to only one wholesaler or retailer which then creates specialist outlets for a producer's particular brand.



Having such an exclusive retailer means that there is specialist advice and better after-sales care for consumers. Such arrangements are common in relation to electrical goods such as state-of-the-art televisions and music systems. However, such vertical agreements mean that the brand itself cannot be stocked by other retailers. They are excluded from buying the brand and so they cannot offer it to their consumers. Technically, an agreement that excludes an undertaking from buying certain goods is a restriction on competition. More specifically, it is a restriction on **intra-brand** competition, which is a reference to competition in a particular brand.

An alternative, common form of vertical agreement is a **selective distribution** arrangement. This is where a producer ensures that only retailers that meet certain requirements can stock and sell the producer's products. It is common in relation to the supply of luxury perfumes. Producers want to maintain the luxury image of their perfume because it is the luxury image that makes it attractive to consumers. On this basis, the producers have agreements with their wholesalers where the wholesalers promise to resell only to retailers that meet certain requirements. Typically, these requirements demand that the retailer has a separate area for perfumes so that other ordinary goods do not harm the luxury image of the perfume. Also, the retailers must be able to display the perfumes behind a shop window or glass cabinet. In addition, there should be specialist advice available. These requirements set by the producer are aimed at maintaining the luxury image of the product. In fact, it is these requirements that explain what you see when you enter the fragrance area of a department store such as Debenhams or John Lewis. Again, retailers that do not meet the requirements of the producer will be excluded from accessing the relevant brand. This is because the wholesalers would be under a contractual obligation (in the vertical agreement with the producer) to sell only to retailers that meet the essential requirements. So, again, this is another example of a vertical agreement (as between producer and wholesaler) that restricts intra-brand competition.

The approach towards vertical agreements has developed over the years. At first, it was not clear what approach would be adopted towards such agreements since all they did was restrict intra-brand competition (competition in a single brand). The first major case on the matter was Cases 56/64 and 58/64, **Consten and Grundig v Commission [1966]**. Here, Grundig, a German producer of electrical goods such as televisions and radios, appointed the French distributor Consten as its exclusive distributor in France. Under the exclusive distribution

agreement, Consten agreed not to sell other goods that would compete with Grundig's products, and not to re-export the goods out of France to another Member State. In return, Grundig only sold the relevant goods in France to Consten. Also, Grundig gave Consten exclusive use of its trade mark in France and had similar agreements with distributors in other Member States. A competitor of Consten, UNEF, purchased Grundig's products in Germany and sold them in France. When challenged, UNEF argued that the exclusive arrangement between Consten and Grundig was a breach of (what is now) **Art 101 TFEU**. The Commission agreed and the matter was brought before the CJ. The CJ held that vertical agreements are within the scope of (what is now) **Art 101** because the Treaty made no distinction between the types of agreement covered. Second, the CJ held that a restriction of competition in a particular brand (intra-brand competition) can be a breach. Third, there was a clear breach in the case because the agreement provided territorial protection for Consten and the other distributors with which Grundig had such contracts. By ensuring that distributors could not resell to other Member States, the agreement partitioned the market, contrary to the policy of market integration.

Putting aside the territorial protection issue in **Consten**, the common criticism of the case is that a very formal approach was adopted to the restriction on intra-brand competition. Of course, various competitors of Consten were excluded from that particular brand, but did it really matter? After all, there were many other brands to stock and resell. In contrast, the United States adopts a more economic approach (**Continental TV Inc v GTE Sylvannia [1977]**). There, vertical agreements are only a restriction on competition if the relevant brand has market power (i.e. where there is not much inter-brand competition). Such market power could be the result of being a leading brand with a large market share. If this is the case, being excluded from that brand would certainly restrict competition in the general market for such products. But in the absence of market power, such vertical agreements can serve to enhance economic efficiency and keep costs and therefore prices down. There is also the benefit of specialised advice and after-sales care.

Over the years, the Commission has developed its approach towards vertical agreements. First, it allowed agreements that were a breach to be exempt under **Art 101(3)** (addressed at **18.6**). Such exemption is permitted when the restrictive effects on competition are outweighed by the benefits of the agreement. Second, certain selective distribution agreements were held to be outside **Art 101(1)** because the restrictive requirements based on qualities were deemed to be necessary and not a distortion of competition. For example, in Case 26/16, **Metro v Commission [1977]**, the technical qualifications of the reseller and staff, along with the suitability of the premises, did not breach **Art 101(1)**. However, clauses requiring resellers to stock a certain amount and promote the producer's brand were seen as beyond what is necessary and therefore a breach. The same approach was adopted for franchise agreements in Case 161/84, **Pronuptia [1986]**, which concerned the wedding dress franchise. Also, the clauses cannot be discriminatory. In Case T-19/92, **Leclerc v Commission (Yves St Laurent) [1996]**, a requirement for a retailer to have a shop window and sell only luxury cosmetics was seen as discriminatory against department stores. On this basis, it was stated that if the goods are in a defined area and behind an internal window or cabinet, the requirements are satisfied.

Vertical agreements are now covered by **Regulation 330/2010** (see **18.7.1**). The case law remains relevant, particularly for agreements that fall outside of the Regulation.

18.5.2 The *de minimis* principle

Building on the case law of the CJ, the Commission has adopted a *de minimis* principle. Where the potential effect of an agreement is not sufficiently serious, there will not be a breach of **Art 101 TFEU**. The most recent version of this principle is from **Commission Notice on agreements of minor importance [2014]** (the ***De minimis* Notice [2014]**). According to this, agreements will not be a breach in the following circumstances:

- where the parties to a **horizontal agreement** have a combined market share not exceeding 10 per cent. These undertakings will be part of the same relevant market;
- where each party to a **vertical agreement** has a market share not exceeding 15 per cent. Each party will be on a different level in the supply chain and so each will operate on a different relevant market.

The notice also refers to the **Guidelines on the Effect on Trade Concept [2004]** (addressed above at **16.4.6**) in the context of SMEs. Under the current version of the 2004 guidance, agreements between parties with an aggregate market share not exceeding 5 per cent and an annual turnover not exceeding €40m will have no effect on trade between Member States. As a result, it is still possible for a restriction by object to be outside **Art 101 TFEU** on the basis that it has no effect on trade. Of course, falling outside **Art 101** does not mean that the agreement is safe. Instead, the agreement will be subject to the (domestic) competition law of a Member State.

With a view to the market share thresholds and the rule for SMEs, the Commission has taken the view that agreements within these boundaries will not be a sufficient restriction on EU competition. For example, a vertical agreement with each party having a market share of no more than 15 per cent still provides plenty of scope for other undertakings to operate, even though they may be excluded from a particular brand. The point is that the market is not closed off (foreclosed) to such undertakings since there are other brands available that make up at least 85 per cent of the market. However, the market could be foreclosed if there are many vertical agreements (parallel networks) even if each one only covers up to 15 per cent of the market. For this reason there is a special rule for parallel networks:

- if vertical agreements (parallel networks) cover 30 per cent or more of a market, the parties to each vertical agreement must not have a market share exceeding 5 per cent in order to be *de minimis*.

Once 30 per cent or more of a market is covered by vertical agreements, the market is deemed to be foreclosed to those outside these agreements. On this basis, a vertical agreement is only classed as *de minimis* if the market share of each party does not exceed 5 per cent.

To benefit from the **De minimis Notice [2014]**, irrespective of market share, the agreement cannot have any hardcore restrictions such as:

- the fixing of prices;
- the limitation of output or sales;
- the allocation of markets or customers.

The **2014 notice** adds that an agreement with any hardcore restrictions listed in a current or future block exemption will also not be capable of being *de minimis*. This requirement could be criticised on the basis that such hardcore restrictions should not be a problem to the market if the parties have such a small market share anyway. However, as a matter of policy, such conduct is discouraged.

A key feature of the **2014 notice** is that an anti-competitive object will be an appreciable restriction on competition. So, even if there is no concrete effect on competition, an agreement with an anti-competitive object will not be *de minimis* even though the market share of the parties falls within the relevant market share threshold. This was added to take into account the recent decision of the CJ in Case C-226/11, **Expedia [2013]**. The case addressed the status and effect of the (previous) 2001 *de minimis* notice. It was confirmed that the notice was binding on the Commission and serves to provide useful guidance and transparency for undertakings in meeting their EU competition law obligations. However, the notice is not binding on national competition authorities (NCAs) or national courts. Instead, it is useful guidance for NCAs and national courts in their overall assessment of whether the relevant agreement can have an appreciable effect on competition. So an NCA or national court can find such an appreciable effect even where an undertaking is below the threshold from the *de minimis* notice. Likewise, it could be decided that there is no chance of an appreciable effect even though the threshold has been exceeded.

The CJ also addressed the issue of agreements (and collusion) that have an anti-competitive objective. It will be recalled that for a breach, the relevant arrangement between undertakings must have as its "object or effect" the restriction of competition. It was confirmed that where the objective is to restrict competition, there is no need to find any actual anti-competitive impact. More importantly, the ECJ referred to arrangements that have the object of restricting competition and that are capable of affecting trade between Member States. It then indicated that such "objects" arrangements will be presumed to have the required appreciable effect on competition. So, for example, a concerted practice to fix prices by its very nature aims to restrict competition and it has the potential to have an appreciable effect. Such an approach to agreements and collusion with an anti-competitive object is a strict one. It reflects the seriousness of such conduct and aims to prevent it.

18.6 Art 101(3) exemption

Certain agreements may restrict competition in a strict sense but, at the same time, they may have efficiency-enhancing benefits. This is acknowledged by **Art 101(3)**. It allows an agreement to be exempt if its restrictive effect on

competition is outweighed by its positive effects on the market. It states that an agreement or concerted practice can be exempt from **Art 101(1)** if it satisfies the following requirements:

- it must improve production or distribution of goods or promote technical or economic progress;
- while allowing consumers a fair share of the resulting benefit;
- it must not impose restrictions which are disproportionate to its objectives;
- it must not give undertakings the power to eliminate competitors.

The first two requirements are positive and the other two are negative. Originally, it was for undertakings to apply to the Commission for this individual exemption. Under **Regulation 1/2003**, it is now the national competition authorities and national courts that grant this exemption based on the previous case law of the Commission and CJ. One material difference is that undertakings no longer apply for individual exemption. Instead, they have to fit their agreement within the rules. If there is a dispute later, the national competition authorities will either find a breach or they will grant the individual exemption.

18.6.1 The Commission guidelines on horizontal co-operation agreements [2011]

In order for undertakings to determine if their agreements can benefit from the exemption, undertakings should be familiar with the case law of the Commission and the courts. To provide more clarity and business certainty the Commission has issued guidance. The most recent is the **Commission guidelines on horizontal co-operation agreements [2011]** (**Horizontal Guidelines [2011]**).

Essentially (just like the previous guidelines from 2001), the **Horizontal Guidelines [2011]** acknowledge the efficiency and innovation gains from certain agreements between competitors. They state that they could be exempt as long as the agreement does not enhance the market power of an undertaking or alter the shape of the market by driving out competitors. On this basis, the **Horizontal Guidelines [2011]** consist of 75 pages of detailed methods and examples to assist undertakings in the assessment of their agreements.

The **Horizontal Guidelines [2011]** address types of common co-operation agreement such as those in the area of research and development, production purchasing, commercialisation, standardisation and information exchange. They then provide various requirements that such agreements should satisfy in order to be compatible with the exemption in **Art 101(3)**. For example information exchange can allow for the collection of market data to enhance efficiency and better serve customers. However, information exchange can lead to undertakings having the means to adopt similar pricing policies which, of course, is harmful to competition. The **Horizontal Guidelines [2011]** introduce guidance on how to ensure that the agreement on information exchange is consistent with the exemption in **Art 101(3)**.

Standardisation is another type of horizontal agreement. Often, this is an agreement to produce some sort of industry standard on the technical requirements of a product. Here, the competition issue relates to the creation of barriers to entry and closing off the market to third parties. The **Horizontal Guidelines [2011]** introduce guidance on the procedure for setting standards. This requires an open approach, with all affected competitors having the opportunity to be involved. One significant issue is that a standard agreement may require the use of technology, the rights to which are owned by one of the undertakings. If the undertaking wants its technology used, it must provide access to it on fair, reasonable and non-discriminatory terms. When competing undertakings do enter into an agreement, they should consult this guidance to ensure that the agreement does not breach **Art 101(1)**.

18.7 Block exemptions

Under **Regulation 19/65**, the Commission has introduced block exemptions to apply to certain types of agreement. These provide various conditions and if they are satisfied, the agreement will meet the requirements of **Art 101(3)** and will be exempt automatically from **Art 101(1)**. The idea is that undertakings need to assess their own agreements in the light of the relevant block exemption. In practice, the contracts are usually drafted to meet the requirements of the relevant block exemption. The following are the main block exemption Regulations:

- **Regulation 330/2010** on vertical agreements and concerted practices;
- **Regulation 1217/2010** on research and development agreements;
- **Regulation 1218/2010** on specialisation agreements;
- **Regulation 772/2004** on technology transfer agreements;
- **Regulation 1400/2002** on vertical agreements in the car sector.

Following a complaint, the Commission or an NCA will investigate to ensure that the agreement does, in fact, meet the requirements of the relevant block exemption Regulation. If the agreement does not meet the requirements, the Commission or NCA can withdraw the benefit of the block exemption. The general power for such a withdrawal is from **Art 29 Regulation 1/2003**. Once the benefit of the block exemption is withdrawn, it means that the agreement is in breach unless the undertakings can prove that the requirements of **Art 101(3)** for individual exemption are satisfied.

Regulations 330/2010 and **1217/2010** are particularly significant block exemptions and so they are explained in detail at **18.7.1** and **18.7.2**.

18.7.1 Regulation 330/2010 on vertical agreements and concerted practices

The rationale for **Regulation 330/2010** is to encourage a more economic approach based on market power. The idea is that vertical agreements are only harmful if the parties have market power. This will be the case when there are not many brands on the market so there is a low level of inter-brand competition (competition between brands).

Regulation 330/2010 has a number of requirements that must be satisfied for an agreement to be within the exemption. The main requirements are as follows.

- (1) The market share of each party to the agreement (i.e. supplier and the buyer) cannot exceed 30 per cent (**Art 3**).
- (2) The agreement cannot contain hardcore restrictions such as price fixing (**Art 4**). In addition, it cannot restrict the territories in which the goods can be sold, though there are some limited exceptions to this (**Art 4**).

18.7.1.1 Market share threshold

There is a presumption of market power if a party (i.e. supplier or buyer) exceeds the 30 per cent market share threshold. At this level, the market is foreclosed to those outside the agreement. It means that they cannot stock the brand that covers 30 per cent of a market, and such exclusion is harmful to competition. In addition, case law has shown that where vertical agreements are within this threshold, then (in the absence of hardcore restrictions) the restrictive effects on competition are outweighed by the benefits to the market. If the parties have a market share that is beyond the 30 per cent threshold, it does not mean that the agreement is automatically unlawful. Instead, it will require a detailed analysis to see if the benefits outweigh the restrictive effect on competition. The detailed 46-page **Guidelines on Vertical Restraints [2010]** explain how this assessment is to be carried out. The **Guidelines** require the buyer's market share not to exceed 30 per cent. This is intended to reflect the fact that even buyers can have market power, such as large retail chains.

18.7.1.2 Hardcore restrictions

If the agreement contains any hardcore restrictions, it will be outside the block exemption. One main hardcore restriction is where a term limits the freedom for a buyer (i.e. a retailer or distributor) to determine the resale price of the goods to customers. Traditionally, in previous block exemption Regulations, price fixing of any kind was regarded as a hardcore restriction. The **Guidelines on Vertical Restraints [2010]** do allow for a limited level of resale price restrictions (para 225). For example, where a producer is expecting distributors to launch a new product or enter a new market, short-term maximum prices will assist in the success of the campaign. This is seen as a more economic approach. The idea is that it reflects the economic reality that some resale price restrictions can be efficiency-enhancing and have benefits to consumers in the form of new products. Whilst price fixing is generally regarded as a hardcore restriction, **Art 4 Regulation 330/2010** acknowledges that a supplier can impose a maximum sale price. A supplier can also recommend a sale price. However, the supplier cannot impose a minimum sale price and this includes doing so indirectly using pressure or incentives offered by the supplier or any other party.

Another hardcore restriction would be a term that completely stops a buyer (i.e. a retailer or distributor) from reselling the goods into another Member State. Such a restriction is contrary to market integration. In exclusive distribution agreements and selective distribution agreements, **Regulation 330/2010** does allow for some territorial restrictions on resale. For example, with exclusive

distribution, a supplier can require its exclusive buyers not to actively resell outside their own territory. It means the buyer cannot take steps to actively approach customers to get orders outside its territory. Such action would undermine others that have an exclusive distribution agreement with the same supplier, but in relation to a different territory. Such a restriction protects buyers from other buyers in a different area. It means that a buyer can invest in the customer base of the specified area and simply compete with suppliers of other brands. The Regulation does not permit limits on passive sales. These are sales that arise because a buyer has been approached by a customer from a different territory. Such a restriction is seen as being contrary to market integration.

With regard to selective distribution agreements, there are some permitted limits on resale. For example, **Regulation 330/2010** allows for producers to choose their distributors or retailers based on objective criteria. In addition, producers can prohibit the resale of the goods to unauthorised resellers. It is a hardcore restriction to stop any party within the network from actively or passively reselling to other authorised resellers or end consumers.

The **Guidelines on Vertical Restraints [2010]** also introduce new rules relating to internet sales (paras 52–54). It will be a hardcore restriction to limit passive online sales. The following restrictions are addressed as examples:

- any obligations to re-route customers from outside the territory to a website within their own territory;
- obligations to end a transaction if credit card details reveal a customer from another territory;
- obligations that discourage internet sales such as limits on the quantity that a buyer can resell online or higher prices for goods to be sold online.

In a selective distribution agreement, the producer can require that the internet sites of its buyers satisfy certain quality standards. In an exclusive distribution agreement, the producer can require that its buyers do not target online customers in different territories (active sales). Such active selling would be in the form of advertising banners on a third-party website of a different territory. However, it is not active selling for a buyer to have language options on its own website.

Case C-439/09, **Pierre Fabre Dermo-Cosmétique [2011]** concerned a selective distribution agreement that had the effect of banning internet sales. In the case, a French cosmetic company required its distributors to sell its goods in a physical space in the presence of a qualified pharmacist. The CJ made it clear that such a requirement would act as a ban on internet sales. Such a ban would restrict competition because it limits to whom the goods can be sold. The objective justification put forward by the company related to the need to protect the image of the brand and the need to provide advice for the consumer. This justification was rejected by the CJ, which also observed that the ban on internet sales (both passive and active sales) meant that **Regulation 330/2010** could not apply. Whilst there was an insufficient amount of information available for the CJ to provide guidance on individual exemption under **Art 101(3)**, it is difficult to see how the requirements would be satisfied.

Regulation 330/2010 also addresses the use of non-compete clauses. These clauses are defined as any (direct or indirect) obligation on a buyer not to make, sell or buy goods (or services) that compete with the contract goods (or services). Likewise, an obligation (on the buyer) to buy more than 80 per cent of its total purchases from the supplier or another undertaking will be classed as a non-compete clause. **Art 5** indicates that non-compete clauses are not exempt if the duration of the obligation is for more than five years or if the duration is indefinite. In addition, it states that if the obligation is tacitly renewable beyond five years, the duration will be classed as indefinite.

18.7.2 Regulation 1217/2010 on research and development agreements

Agreements between competitors to collaborate in research and development (R&D) will be exempt from a breach of **Art 101(1)** if the requirements of the block exemption are satisfied. It is important to provide an exemption for this type of co-operation because it encourages innovation and new products and enhances efficiency.

18.7.2.1 Scope of the Regulation

Regulation 1217/2010 applies to agreements for joint R&D and joint exploitation of the results of R&D. Joint exploitation relates to the production, distribution or even the licensing of the products resulting from the R&D. **Regulation 1217/2010** also covers agreements to fund R&D to reflect the reality that, sometimes, undertakings only contribute financially to the R&D rather than carry it out jointly.

18.7.2.2 Requirements of the Regulation

To benefit from the block exemption, the undertakings (if they are competitors) cannot have a collective market share that exceeds 25 per cent at the time of the agreement. This applies to all the undertakings involved, even if they are just funding the R&D. In addition, the agreement must allow all the parties to have access to the results of the R&D for the purposes of further R&D. Also, if the agreement is for R&D only (i.e. not for commercial exploitation), it means that after the R&D, each party will try to make money from it (i.e. commercially exploit it). To do so, the agreement must allow parties to have access to the pre-existing know-how of the other parties if that know-how is required for the commercial exploitation of the R&D.

18.7.2.3 Hardcore restrictions

Regulation 1217/2010 has a list of hardcore restrictions and if the agreement contains any of these, it will fall outside of the Regulation. The following is a list of the main hardcore restrictions:

- restrictions on the freedom to carry out (unrelated) R&D with third parties;
- restrictions on passive sales of the resulting products;

- restrictions of output or sales. There are some exceptions to this. For example, if the agreement includes joint distribution of the product that results from the R&D, the agreement can have sales targets. Also, if the agreement includes joint production, there can be production targets;
- the fixing of prices when selling to third parties.

In addition, **Regulation 1217/2010** has introduced a "grey list" of restrictions. These are no longer serious enough to be classed as hardcore restrictions. So, unlike hardcore restrictions, the inclusion of such "grey list" restrictions will not take the entire agreement outside the block exemption. Instead, the use of such terms will not gain automatic exemption. The "grey list" consists of two main restrictions:

- obligations not to challenge the validity of a party's intellectual property rights that result from the completion of the R&D;
- obligations not to license third parties to produce the products resulting from the R&D.

As with block exemptions generally, it is important for undertakings to draft their contracts in a manner that is consistent with the block exemption. In doing so, there will be certainty over the validity of the agreement.

18.7.3 Regulation 316/2014 on technology transfer

Regulation 316/2014 is known as the **Technology Transfer Block Exemption Regulation (TTBER)**. It provides rules on technology transfer agreements and so such agreements can be seen as another type of permitted collaboration. Common agreements are those where a licensor contracts to allow a licensee to commercially exploit intellectual property such as patents, know-how or software used in the production of goods and services. Typically, these agreements are between two parties (bilateral agreement) but over the years there have been an increase in agreements between several parties (known as patent pools).

TTBER serves an important role in balancing the free competition with the need to encourage innovation which results in commercial activity and economic growth. Such innovation requires research and investment which is often very expensive and risky. If successful, it results in new goods or services and these will be protected by domestic and EU intellectual property rights like those relating to patents. The aim of such intellectual property rights has always been to allow the owner to make enough money to justify the financial risks of such investment in research and innovation. One way of generating that money is through the use of licences under which other companies use the innovation but have to pay a lot of money to do so. By definition, such licences can be seen as an anti-competitive agreement because they are often on an exclusive or selective basis just like exclusive and selective distribution agreements. They will often exclude others from the products as well as having terms that can restrict competition further.

TTBER recognises that most licences are pro-competitive and so it allows for certain restrictions on competition to improve the incentives for research and innovation. It balances this with the importance of free competition and market integration by having a black list to exclude certain clauses (the hardcore restrictions). Like the other block exemption regulations, **TTBER** provides a framework for agreements to fit within and benefit from being outside of **Art 101 TFEU**. It applies to agreements between businesses with a limited level of market power and that is based on market share thresholds (**Art 3**). So, for agreements between competitors, their combined market share must not exceed 20 per cent. For non-competitors, the market share of each party must not exceed 30 per cent. The hardcore restrictions are listed in **Art 4** and the main ones relate to restrictions on resale price: territorial protection and limits on the level of output. It also lists certain terms that would be assessed on a case by case basis.



Discussion Point

In view of the range of guidance notices and block exemptions, do you think that the Commission has done enough to show that it now adopts a more (economic) effects-based approach to **Art 101**?

18.8 Summary

- (1) **Art 101 TFEU** prohibits agreements, decisions by associations and concerted practices that restrict or distort competition and that may affect trade between Member States.
- (2) Parallel conduct may be the result of collusion or an oligopolistic market (**Dyestuffs** and **Wood Pulp**).
- (3) Vertical agreements can restrict **intra-brand** competition and be a breach of **Art 101(1)** (**Consten and Grundig v Commission**).
- (4) There are *de minimis* rules from the **Notice on agreements of minor importance [2001]**.
- (5) **Art 101(3)** provides four conditions for agreements to be exempt from being in breach. The **Guidelines on Horizontal Co-operation Agreements [2011]** provide guidance on assessing whether a horizontal agreement should qualify for the individual exemption.
- (6) There are block exemption Regulations for certain types of agreement. If the requirements are satisfied, the agreement will be exempt.
- (7) **Regulation 330/2010** is an important block exemption that has specific rules on vertical agreements, including when internet sales can be restricted.