Art. 101/1 of TFEU

References

- Faull & Nikpay: The EC Law of Competition. 2nd Ed. Oxford University Press, 2007
- Bellamy, C., Child, G. European Community Law of Competition. 6th Ed. London: Sweet & Maxwell, 2008.
- European Commission > Competition http://ec.europa.eu/competition/index_en.html
- **Legislation**
  - The Treaty on the functioning of the European Union
  - Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)
  - Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)
  - Commission Notice on Immunity from fines and reduction of fines in cartel cases

The scope of Art. 101

- The European Union shall have exclusive competence in *the establishing of the competition rules necessary for the functioning of the internal market (Art. 3/1 b) TFEU)*
  - There is a system ensuring that the competition in the internal market is not distorted. → Art. 101 is a part of the system.
- Art. 101 applies to all sectors of the economy except those where the EU legislation grant exemptions.
- Art. 101 deals with the impact on competition of contractual (and other consensual arrangements) between undertakings.
  - Both agreements between actual or potential competitors and agreements between non-competitors may be of interest to competition authorities.
- The main goal of Art. 101 is to **protect competition** on the market as a means of **enhancing consumer welfare** and of ensuring an **efficient allocation of resources.**

Prohibited agreements („cartels“)

- **Cartel** = a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them
- Cartels are likely to have an appreciable adverse impact on the parameters of competition on the market, such as **price**, **output**, **product quality**, **product variety** and **innovation**. → This effect may be caused by appreciably **reducing rivalry** between the parties to the agreement or between them and third parties.
- Members of an prohibited agreement rely on each others' agreed course of action. As a result:
  - their incentives to provide new or better products and services at competitive prices are reduced,
  - their clients (consumers or other businesses) end up paying more for less quality.

The constituent elements of the cartel under Art. 101/1 TFEU

A. **Agreement**, **decision** or **concerted practice („agreements“)** made between or observed by undertakings.

B. **Trade between Member States <u>may</u>** thereby be **affected.**

C. **<u>The object</u>** or **<u>the effect</u>** is to **prevent, restrict or distort competition within the internal market.**

A. Agreements

- The prohibition under the Art. 101/1 covers:
  1. **agreements between undertakings,**
  2. **decisions by associations of undertakings,**
  3. **concerted practices**

→ these 3 concepts are generally called „agreements“ or „cartels“

- These 3 concepts overlap
  - *„The list in Article [81(1)] of the Treaty is intended to apply to all collusion between undertakings, whatever form it takes… The only essential thing is the **distinction between independent conduct**, which is allowed, and **collusion**, which is not, regardless of any distinction between the types of collusion.“*

Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125

Kinds of prohibited behavior under Art. 101/1

- directly or indirectly **fix purchase or selling prices** or any other trading conditions;
- **limit or control** production, markets, technical development, or investment;
- **share markets or sources of supply**;
- apply **dissimilar conditions** to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage („discrimination“);
- 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.

1. Agreements between undertakings

- The existence of an „agreement“ requires **a concurrence of wills** between **at least two parties**
- **The form** of the agreement **is irrelevant**
  - May be informal → it *„is sufficient if the undertakings **expressed their join intention** to conduct themselves on the relevant market in a specific way“. (Hercules Chemical NV v Commission, 1991)*
  - An agreement exists merely *„if the parties reach a consensus on a plan which limits or is likely **to limit their commercial freedom** by determining the lines of their mutual action or abstention from action in the market.“ (Polypropylene [1986] OJ L230/1)*
  - Written or oral
  - Understanding between undertaking – tacit or express
- **Horizontal agreements** → agreements between two or more suppliers or acquirers inter se
- **Vertical agreements** → agreements between a supplier and one to whom he supplies**.**

Unilateral action

- **Unilateral action** of an undertaking (without any agreement or concert with another undertaking) **does not infringe Art. 101/1**

  → at least two parties are required

- But it is necessary to consider whether the particular conduct is **truly „unilateral“**.

  → E.g. If a supplier operates a restricted system of distribution, the apparently unilateral exclusion of a particular dealer may infringe Art. 101/1 if it results from **understanding, tacit or express, between the supplier and his existing dealers, to exclude certain dealers form the distribution network.** *(AEG v Commission, 1983)*

  - *„unilateral conduct by an undertaking, adopted in the context of its contractual relations with its commercial partners, may in reality form the basis of an agreement between undertakings, within the meaning of Article 85(1) [now Art. 101/1]of the Treaty, if* ***the acquiescence of those partners, express or implied, with the attitude adopted by the undertaking is established****“ (Case ADALAT, 1996)*

Agreements between undertakings

- **The mere attendance** by an undertaking at meetings involving anticompetitive activities **can suffice** for the liability under Art. 101/1 *(Theyssen Stahl AG v Commission,1999)*
  - In order to avoid this finding, the undertaking must show that its act was not influenced by the information it had received at meeting or it have publicly distanced itself from the position of other participants.
- An agreement **is reached even if one or more parties intend to ignore its provision**
  - The Commission concluded that two undertakings were the parties of the cartel regardless of their allegation that they joined the cartel only for the fear of retaliation and that they did not observe the agreement in practice. *(Roofing Felt Cartel, 1986)*
- **Formal termination of agreements may not be sufficient** to end the infringement of Art. 101/1
  - *„It is sufficient that such agreements continue to produce their effects after they have formally ceased to be in force.“*

    (EMI Records Limited v CBS United Kingdom Limited, 1976)

Agreements which does not fall within the Art. 101/1 (1)

- **Government measures**
  - National legislative measures may restrict competition but they do not constitute an agreement in the meaning of Art. 101/1.
- **Infringement action**
  - The mere exercise of a legal right (e.g. by bringing an infringement action under a patent) does not fall within Art. 101/1.
  - But if the action is brought pursuant to a continuing agreement and has effect of restricting competition, it may violates Art. 101/1.
- **Collective labour relation agreements**
  - The agreements which are concluded in the context of collective negotiation between management and labour in pursuit of improvement of conditions of work and employment should fall outside Art. 101/1.

Agreements which does not fall within the Art. 101/1 (2)

- **Judicial settlement**
  - It is still undecided whether a settlement reached before national courts which constitutes a judicial act is an agreement which can be invalid for breach of Art. 101/1.
  - European Court of Justice held that in its

    „prohibition of certain agreements between undertakings, Article 85(1) [now Article 101(1)] makes no distinction between agreements whose purpose is to put an end to litigation and those concluded with other aims in mind.“

    (Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz Süllhöfer, 1988)
  - But the agreements between undertakings to settle actual or potential litigation may fall within Art. 101/1.
- Agreements between parent company and a subsidiary → **the Single Economic Unit Doctrine**
  - Agreements between parent company and a subsidiary should fall outside Art. 101/1

Single Economic Unit

- **Single economic unit →** Two or more legally separate economic entities may be treated as a single undertaking if it is justified by their relationship.
  - The European Court of Justice held that Art. 101/1 could not apply where a subsidiary **did not freely determine its conduct on the market**, but instead carried out the instruction given to it directly or indirectly by the parent company (Case *Viho Europe BV v Commission (1996)*)
- „Council Regulation (EEC) No 139/2004 on the control of concentrations between undertakings“ provides guidelines whether related firms are independent in their decision making
  - Where **a subsidiary is wholly owned, or where a parent company has a majority share holding in a subsidiary** → there is a presumption that the subsidiary is **controlled by its parent**.
  - It also means that parent company may be held liable under Art. 101/1 for the behavior of its subsidiaries.

2. Decisions by associations of undertaking

- Collusion under Art. 101/1 can take place through association.
- The term **„association“** is defined broadly

  → It includes:

  - Trade associations; agricultural cooperatives; professional regulatory bodies; association without a legal personality; non-profit making associations; association entrusted with statutory functions; associations of associations; associations outside the Community, …

Decisions of association of undertaking

- **„Decision“** = anything which accurately reflects the association´s desire to coordinate its member´s conduct in accordance with its statutes.
- Decisions need not to be binding on the members, it is sufficient that the Members comply with them.
- Examples of „decisions“:
  - regulation of the association, decisions binding upon the members and recommendation, codes of conduct,..
  - E.g. The recommendation to the members of association of German insurers to raise premiums, issued by a committee which was not competent to adopt decisions binding on the association and on its members, was held as a „decision“ under Art. 101/1 by the European Court of Justice as it reflected the association´s resolve to co-ordinate the conduct of its members.

    (Verband der Sachversicherer e V v Commission (1987)

3. Concerted practices

- Concerted practice → coordinated course of action among competitors
  - *„… a form of co-ordination between undertaking which, without having reached the stage where an agreement properly so called has been concluded,* ***knowingly substitutes practical co-operation between them for the risk of competition****.“* (*ICI v. Commission, 1972)*
- Example:
  - *Dyestuffs (1969):* Nearly all undertakings that produced aniline dyestuffs in Italy and Benelux made a series of simultaneous and uniform price increases. The Court of Justice affirmed the Commission´s decision holding that the parties engaged in concerted practice. The court stated that although parallel behavior by itself does not constitute a concerted practice, it may amount to strong evidence of such a practice if it leads to **conditions of competition which do not correspond to the normal conditions of the market.**

Concerted practices

- The law did not deprive economic operators of the right to adapt themselves intelligently to the conduct of their competitors.

  × But each economic operator has **to determine independently the policy which he intends to adopt on the common market** (including the choice of the person or undertakings to which he offers or sells).

- Concerted practice is proved when:
  1. **the parallel behavior** in the market is established

     → *Wood Pulp II* , 1993 - The Court of Justice concluded that parallel conduct cannot be regarded as furnishing proof of the concentration unless it is the only plausible explanation.

  2. **the contact between the parties** is proved.
     - The exchange of confidential information or other close contact

The exchange of information

- **Disclosure of policy to competitors**
  - *„direct or indirect contact between economic operators, the object or effect of thereof is either* ***to influence the conduct on the market of an actual or potential competitors*** *or* ***to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adoption on the market****“ (Suiker Unie, 1975).*
- **Unilateral disclosure of information**
  - The concerted practice may arise also if only one of the participants in the meeting reveals its intentions → if the disclosed information **is not otherwise readily accessible market data** and the meeting allows the participants to obtain that information *„more simply, rapidly and directly, than they would be able to via the market“. (British Sugar v Commission, 2004)*

Concerted practices - Requisite elements

- Requisite elements:
  1) **Positive contacts between undertakings** (meetings, discussions, disclosure of information, soundings out,…)
  2) Such contact involves **cooperation that is contrary to the normal competitive processes** (→ removing or substantially reducing uncertainty as to the future competitive conduct of an undertaking)
  3) The conduct has the effect, or may have the effect, of **maintaining or altering the commercial conduct of the undertaking concerned.**

B. Trade between Member States may be affected

- Only the „potential“ influence is sufficient for liability under Art. 101
- *„It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States“*

  (European Court of Justice - Zuchner, 1981)

  - The influence must be **appreciable**
  - There must be a **sufficient degree of probability** (it is sufficient that the agreement is capable of having such an effect).

C. The object or the effect is to prevent, restrict or distort competition within the internal market

- Anti-competitive **object**
  - Agreements that by their very nature have the potential of restricting competition
    - E.g. fixing and market sharing → they reduce output and raise prices and thereby cause a reduction in consumer welfare.
  - „Hard-core“ restriction
- Anti-competitive **effect** – actual or potential
  - An agreement must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a **reasonable degree of probability**
  - negative effects must be **appreciable**

a. The Restrictive Object

- An agreement has an anticompetitive object if the **obvious consequence of the agreement** is **to restrict or distort competition**
- **subjective intent** of the parties is a relevant factor but it is not necessary for the determining of the restrictive object
- *"there is **no need to take account of the concrete effect** of an agreement once it appears that it has its object the prevention, restriction or distortion of competition" (Costen and Grunding, 1966)*
- **Hard-core restriction** = its object is restrictive "per se", they include:
  - Agreements between competitors which have as their object: the fixing of prices when selling the products to third parties; the limitation of output or sales; the allocation of markets or customers;
  - Agreement between non-competitors which have as their object: the restriction of the buyer's ability to determine its sale price; the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services.

    (De minimis notice)

b. The restrictive effect

- If the anticompetitive object of an agreement is not obvious, it is necessary to consider the effect of the agreement.
- **The potential** effect is relevant as well as **the actual** effect
- It is important to consider the **whole economic context** when the effect of agreement is examined → Case *Société Technique Miniere (1966)*
  - the Court of Justice refused to adopt formalistic interpretation of "restriction of competition" under Art. 81/1 → The court rejected "per se" approach and decided in favor of "rule of reason" approach
  - Relevant factors for the consideration of the whole economic context of an agreement:
    - *„**the nature and quantity**, limited or otherwise, **of the products covered by the agreement**,*
    - ***the position and importance of the [parties]** on the market for the product concerned,*
    - *the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements."*

The Effect of an agreement

- The Effect on **potential competition**
  - It is important to consider whether the parties of agreement are at least **potential competitors** → if they are not potential competitors, the article 81/1 is not infringed to that extent.
  - Assessment of potential competition must be made in **an economically realistic fashion.**
- The Effect on **third parties** → Art. 101/1 may be infringed if third parties are adversely affected by the agreement, for example:
  - an agreement prevents parallel imports,
  - an agreement restricts third parties´ access to supplies or technology,
  - an agreement reduces the number of independent suppliers,
  - an agreement discriminates against third parties,
  - an agreement makes it more difficult for third parties to compete with the parties of the agreement,
  - an agreements deprives third parties of competitive opportunities

Appreciable Effect (1)

- An agreement must have an appreciable effect on competition in order to infringe Art. 101/1.
- **The possible reasons for lack of appreciable effect:**
  - a) **Weakness of the parties → De Minimis principle**
    - There is the presumption that an undertaking with **5 % share** of the market is of sufficient importance for its agreements to fall within the scope of Art. 101 (Miller v Commission, 1978)
      - There are exemptions:
      - An undertaking with a market share of less than 5% may be caught by Art. 101/1 if a sufficient appreciable effect can be demonstrated in the light of competitive structure of the market. (Pioneer, 1983)
      - *„the mere fact that the 5 per cent threshold may be reached and even exceeded does not make it possible to conclude with certainty that an agreement is caught by Art 81(1)“ (ENS v Commission, 1998)*

Appreciable Effect (2)

- **De Minimis Notice** („Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)“)
  - issued in 2001
- An agreement does not appreciably affect competition if **the share** held by the parties does not exceed
  - **10 %** on relevant market in case of agreements between competitors
  - **15%** in case of agreement between non-competitors (in doubt whether they are competitors or not, the 10% threshold will be applied)
- Agreements including **hard-core restrictions** is excluded from the application of „de minimis“ principle.

Appreciable Effect (3)

b) **The nature of the product or the trade restrained**

E.g. Case *Pavlov (2000)* - Competition between medical specialists, as regards purchasing of supplementary pensions, was not restricted by the decision of their professional organization that obliged them to contribute to a particular pension fund because the restriction had only a marginal influence on the final costs of the doctors´ services (the restriction was not appreciable).

c) **Market structure**

Where the market is concentrated, the effect on competition of restrictive agreement involving major competitors is enhanced.

c) **Relevance of parallel networks of agreements**

It must be examine whether the existence of similar contracts entered into by other suppliers on the relevant market have the cumulative effect of denying access to that market to new national and foreign competitors („foreclosure“ effect). If the networks of agreements cause market foreclosure, it must be assess whether the contribution of the particular network to cumulative foreclosure is significant – if so, the network should fall within the prohibition under Art. 101/1.

The treatment with the cartel members

- Secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them.
  - For this reason most of the competition authorities adopted „leniency“ program as an effective tool in the fight against cartel agreements.
- *Commission Notice on Immunity from fines and reduction of fines in cartel cases*
  - The purpose of Leniency program is to reward undertaking (that is the party of an agreement prohibited under Art. 101/1) which report the existence of cartel.
  - The Commissions **grant immunity** from any fine to an undertaking disclosing its participation in an alleged cartel if that undertaking is **the first to submit information and evidence** about the existence of the cartel.
  - The Commission reduces a fine to an undertaking **disclosing their participation in an alleged cartel**.