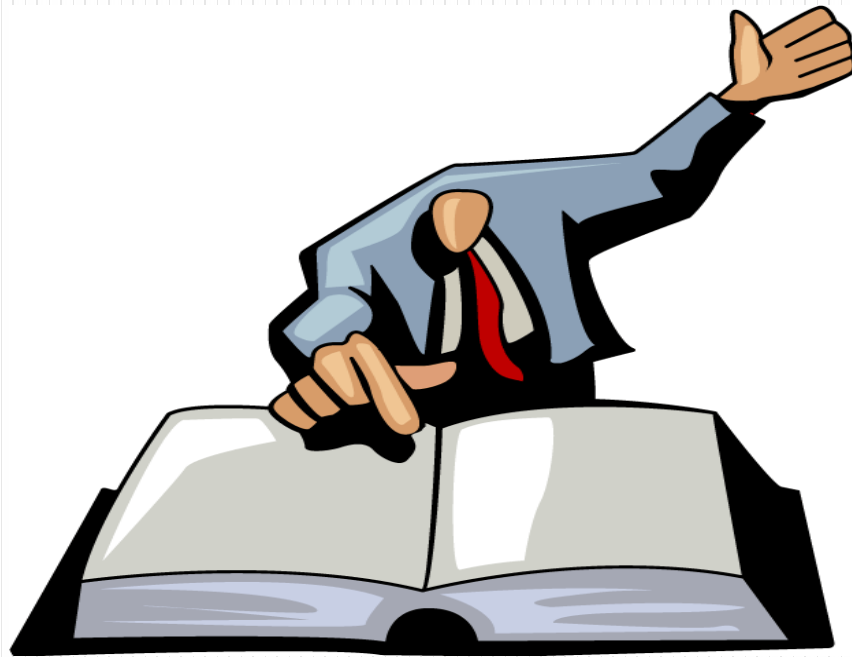


Art. 101/3 of the Treaty, block exemptions



References

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- 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
 - Block exemption regulations

The exemptions from the prohibition of cartels

- The prohibition contained in Art. 101/1 is not absolute
- The exception rule in Art. 101/3 provides a defense to undertakings against a finding of an infringement of Article 101/1 of the Treaty.
- **The relationship between Art. 101/1 and Art. 101/3**
 - **Art. 101/1** identifies and prohibits agreements that harm competition on the market and thereby consumers × **Art. 101/3** exempts certain agreements from the prohibition
 - The both Art. 101/1 and 101/3 must be analyzed in order to conclude whether the agreement is anti-competitive.
 - It is important to maintain a balance between the two paragraphs → it is necessary to ensure that **the prohibition effectively catches anti-competitive agreements while leaving untouched innocuous and pro-competitive agreements.**

The assessment under Art. 101

- There are several questions which need to be answered:
 - Has an agreement between undertakings, which is capable of affecting trade between Member States, an **anti-competitive object / actual or potential anti-competitive effects?**
 - Are there any **pro-competitive benefits** of the agreement?
 - Do these pro-competitive effects outweigh the anti-competitive effects?
 - Does the agreement contain any **hard-core restriction?**
 - The agreements containing hard-core restrictions are not able to fulfill conditions under Art. 101/3
(anticompetitive object of these agreement is presumed)

Current regime of Exemptions from prohibition of cartels

- **Regulation 1/2003**, in force from 2004, replaced the former regime under **Regulation 17**
- **Art. 1/1 of the Regulation 1/2003:**
 - „*Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.*“
 - **direct application of Art. 101/3** (unlike under the former regime)
 - The agreements which satisfy conditions of Art. 101/3 are **fully valid and unenforceable**.
 - Art. 101/3 can be applied not only by the European Commission but also by the competition authorities of the Member States and by national courts.

The former regime under Regulation 17

- Art. 81/3 could only be applied by the European Commission + only if the agreement was notified to the Commission for this purpose.
- The assessment of pro-competitive benefits was conducted prospectively → the Commission considered whether the conditions were likely to be satisfied in future.

(× Now, the question of whether the conditions of Article 101/3 are satisfied arises only when the legality of the operation of the agreement in the past is challenged.)

- **Continued effect of extant Commission exemption decision** → individual exemptions granted by the Commission under the former regime and its equivalent regulations in the transport sector have not been repealed by the Regulation 1/2003 – they remained binding until the expiry of their time limits.

Art. 101/3 of TFEU

- Art. 101/3 provides a structural framework for assessing the economic benefits generated by restrictive agreements and balancing them against the anti-competitive effects
- It follows the aim of competition law which is the protection of economic welfare in general and consumer welfare in particular.
- Art. 101/3 does not exclude a priori certain type of agreements – all agreements that fulfill the condition of Art. 101/3 are covered by the exemption rule.

Art. 101/3 can be applied:

A. in **individual cases**

- The guidance on how to will apply Article 101 in individual cases is provided by **Guidelines on the application of Article 81(3) of the Treaty that** are based on the economic approach.
- Thu rules set froth in the Guidelines must be applied in light of the circumstances specific to each case.

B. to categories of agreements and concerted practices by way of **block exemption** regulation

- When an agreement falls within a bloc exemption adopted by the Council or the Commission, the prohibition in Art. 101/1 is automatically disappplied.
- Block exemptions are presumed to satisfy conditions of Art. 101/3.

A) Art. 101/3 – individual cases

- An agreement needs to fulfill 4 substantive conditions for escaping the prohibition in Art. 101/1:
 - 1) it contributes to improving the production or distribution of goods or to promoting technical or economic progress
(economic and other benefits),
 - 2) it allows consumers a fair share of the resulting benefits
(fair share of benefits for consumers) ,
 - 3) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,
(indispensability of restrictions),
 - 4) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question
(no elimination of competition).
- The four conditions are cumulative → all of them must be satisfied.
- The undertaking bears the burden of proving that the four conditions are fulfilled.

1) Economic and other benefits (efficiency gains)

- The „improvement“ of the production or distribution of goods must show **appreciable objective advantages** of such a character as **to compensate for the disadvantages caused by the agreement in the field of competition.**
- The Case of *GlaxoSmithKline* (Court of the First Instance)
 - The efficiency gains are assessed as weighing up the advantages expected from implementation of the agreement and the disadvantages which the agreement entails for the final consumer owing to its impact on competition.
 - The assessment needs to be made in the light of the general interest appraised at Community level.
- The potential positive effect of an agreement may be demonstrated not only for the relevant market but also for various market.

An efficiency claim should contain:

- a) the **nature** of the claimed efficiencies,
 - the claimed efficiencies need to be objective in nature
- b) the **link** between the agreement and the efficiencies,
 - the efficiencies must result from the economic activity that forms the object of the agreement
 - the causal link must be direct
- c) the **likelihood** and **magnitude** of each claimed efficiency,
 - the claim must be substantiated
- d) **how** and **when** each claimed efficiency would be achieved
 - the parties must describe the methods by which the efficiencies have been or will be achieved

Kinds of procompetitive effects by way of efficiency gains:

- a) lowering the cost of producing an output (**cost efficiencies / cost savings**),
- b) improving the quality of the product (**quality efficiencies**),
- c) **improvement to market dynamics**,
- d) **general public benefits**



a) Cost efficiencies

- Typical cost efficiencies:
 - **development of new production technologies and methods**
 - **an integration of existing assets** (the combination of two existing technologies that have complementary strengths)
 - **economies of scale** (declining cost per unit of output as output increases)
 - **economies of scope** (cost savings by producing different products on the basis of the same input)
 - Such efficiencies may arise from the fact that it is possible to use the same components and the same facilities and personnel to produce a variety of products.
- Cost reduction may arise from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilization.

b) Qualitative efficiencies

- Typical qualitative efficiencies:
 - **technical and technological advances**
 - research and development agreements → new or improved goods/ services/processes
 - **combinations of assets**
 - e.g. the combination of production assets may lead to the production of higher quality products or products with novel features (e.g. license agreements)
 - **Improved distribution**
 - e.g. specialized distributors may be able to provide services that are better tailored to customer needs or to provide quicker delivery or better quality assurance throughout the distribution chain
 - **Creation of infrastructure**
 - e.g. establishment of trade fairs, telecommunications, improvements to the generation and distribution of electricity, ...
 - **Satisfaction of subjective consumer desires**

c) Improvement to market dynamics

- **Promotion of market competition**
 - The Commission viewed the promotion of competition on the market as justifying the exemption of agreement that it had held to be restrictive for competition on another market (*Case TPS, 1999*)
- **Price transparency + Price stability**
 - In Commission's opinion, the enhancement of consumer awareness as to the range of products available on the market is an objective benefit.
- **Profitability of investments**
 - Profitability is relevant only to the extent that it may affect the materialization of the benefits claimed for the agreement.

d) General public benefits

- **Environmental protection**
 - e.g. The Commission has approved cooperation in the insurance sector which was expected to lead to the development of industrial production techniques less hazardous to the environment (*Assurpol, 1993*).
- **Provision of employment**
 - e.g. The provision of employment that improves the general conditions of production.
- **Sport**
 - e.g. The Court of Justice held that anti-doping rules would fall outside Art. 81/1, because they were a proportionate measure containing only the restrictions which were inherent in achieving the legitimate objective of ensuring that competitive sport is conducted fairly (*Mecca-Medina, 2006*).
- **General public interest**
 - e.g. The Commission has stated that the cultural benefit may justify exemption. The Commission has exempted an agreement which would prevent damage to the image of institutions participating in the administration of justice.
- **General Community interest**
 - e.g. The promotion of the harmonious development of the Community and the reduction of regional disparities were regarded as the general Community interest by the Commission (*Ford/Volkswagen, 1993*).

Absence of benefits

- No benefits justifying the application of the exemption arisen from:
 - **Hard-core restrictions**
 - e.g. The Court of Justice ruled that an agreement which has as its sole purpose the prevention of sales of certain products in a Member State does not fulfill the conditions laid down in Art. 81/3 (*Tepea v. Commission, 1978*)
 - **Duplication of action by public authorities**
 - e.g. A scheme set up by private agreements may not add sufficient value to fulfill the criteria in Art. 81(3). → It is task of public authorities (not of private bodies) to ensure that statutory requirements are complied with. (*SCK and FNK v Commission, 1997*)
 - **Counteracting unfavorable market regulation**
 - e.g. It is unacceptable for suppliers to counteract legislation which they consider excessively favorable to users by entering into restrictive arrangements intended to offset the advantages granted to users (*SPO v. Commission, 1995*).

2) Fair share of benefits for consumers

- Pro-competitive benefits of an agreement must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition under Article 101/1.
- If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits.



Benefits for consumers

- The term „**consumers**“ include **all users**
 - It is not limited to private individuals in the sense of consumer protection legislation. →It includes all user of the good or services concerned, whether private individuals or undertakings.
- Carrying out the assessment:
 - 1) The net effect of the agreement must be neutral for those consumers directly or most likely to be affected by the agreement.
 - 2) The value of benefits for consumers in the future has less value than a present gain for consumers (→ the rate of inflation and lost interest should be reflected).
 - 3) A gain from the agreement must pass on to the consumers.

If the restrictive effect of an agreement are relatively limited and the efficiencies are substantial, it is likely that a fair share of cost savings will be passed on to consumers (detailed analysis is not necessary). × If the agreement has both substantial anticompetitive and substantial procompetitive effect – a careful analysis is necessary.

Kinds of consumers' benefits

- **Cost efficiencies**

- The benefits for the parties of the agreement must be **passed on to consumers** in the form of **lower prices**. → The level of pass-on depends on the structure of the market, elasticity of demands, the nature of the efficiency gains, ...
 - The Commission refused the possibility that the economies of scale would be passed on where the supplier concerned has a dominant position or where competition is limited by parallel agreements.

- **Qualitative benefits and other benefits**

- new or improved products, expanded ranges of products and services, improved frequency of services, stability and flexibility of supply, environmental protection, ...

3) Indispensability of restrictions

- The parties of agreements must show that the benefits claimed **cannot be attained by other less restrictive way**.
- The restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement.
- The indispensability of restriction can be applied only for a limited period of time (e.g. during a start-up phase).
- **Market share** of the parties of agreement may be relevant for the analysis of indispensability of restriction.
 - E.g. The cooperative cheese producers that enjoyed a near monopoly of the relevant market, could not justify the imposition of an obligation on its members to purchase 100% benefits of their product requirements by invoking the undoubted benefits generated by the cooperative.

(Cooperatieve Stremselen Kleurselafabriek v Commission, 1981)

4) No elimination of competition

- The purpose of this requirement is **to maintain in the market real or potential competition** even in case in which restraints on competition are permitted.
- **The market share** of the parties of an agreement is important
 - E.g. When the parties together held 95 % of the relevant market, their agreement is not acceptable (*Van Landewyck v Commission, 1980*).
- It is necessary to consider and analyze **external competition** (competition from rivals) – **actual and potential competition**
 - The degree of concentration of the market is important for the consideration if the agreement affects the structure of competition on the relevant market.
- The Court of Justice has concluded that **price competition** is so important that it **should never be limited**.
 - It refers to the elimination of price competition within the relevant market. × Price competition between the parties of the agreement may be limited .

B) Block exemptions

- Agreements covered by block exemption regulations are **legally valid and enforceable** even if they restrict competition within the meaning of Article 101/1.
 - Such agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority. (*Guidelines on the application of Article 81(3) of the Treaty*)
- Block exempted agreements cannot be held invalid by national courts in the context of private litigation.
- An agreement must satisfy **all the conditions** provided for by an exemption regulation in order to be exempted from the prohibition under Art. 101/1.
 - Block exemptions need to be interpreted „**strictly**“ or „**narrowly**“ – they cannot be construed in such a way as to extend the effect of the regulation beyond what is necessary to protect the interest which they are intended to safeguard.

Block exemption regulations

- Block exemption regulations usually contained:
 - **The description of the agreement which shall be exempted from the prohibition under Art. 101 /1**
 - **The limit of market share** of the parties of the agreement
 - **„Hard-core“ restrictions** which presence in an agreement causes the exemption inapplicable.

Current block exemption regulations (1)

- **Exemptions for horizontal agreements**
 - Regulation No 1217/2010 on the application of Article 101(3) of the TFEU to certain categories of **research and development agreements**
 - Regulation No 1218/2010 on the application of Article 101(3) of the TFEU to certain categories of **specialisation agreements**
- **Exemptions for vertical agreements and concerted practices**
 - Regulation No 330/2010 on the application of Article 101(3) of the TFEU to categories of **vertical agreements and concerted practices**
 - Regulation No 461/2010 on the application of Article 101(3) of the TFEU to categories of **vertical agreements and concerted practices in the motor vehicle sector**
- Regulation No 772/2004 on the application of Article 81(3) of the Treaty to categories of **technology transfer agreements**

Current block exemption regulation (2)

- **Agriculture**

- "Single Common Market Organization (CMO) Regulation,, :
 - Council Regulation (EC) No 1184/2006 applying certain rules of competition to **the production of, and trade in, agricultural products**
 - Council Regulation (EC) No 1234/2007 establishing a **common organisation of agricultural markets and on specific provisions for certain agricultural products**

- **Insurance**

- Regulation No 267/2010 on the application of Article 101(3) of the TFEU to certain categories of agreements, decisions and concerted practices **in the insurance sector**

- **Transport**

- Regulation No 487/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in **the air transport sector**
- Regulation (EC) No 246/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between **liner shipping companies**
- Regulation (EC) No 169/2009 applying rules of competition to **transport by rail, road and inland waterway**

Horizontal agreements exemption

- **Research and development agreements - Regulation No 1217/2010**
 - Research and development agreements include e.g. joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development; joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties; ...
 - The market share of the parties should not exceed **25 %** of the relevant market
- **Specialization agreements – Regulation No 1218/2010**
 - specialisation agreement = an unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement
 - the combined market share of the parties does not exceed **20 %** on any relevant market
- European Commission issued **Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011)**

Vertical agreements exemption

- **Regulation No 330/2010** - the exemption shall be applied to:
 - vertical agreements between an association of undertakings and its members, or between such an association and its suppliers → if individual member of the association, together with its connected undertakings, has a total annual turnover does **not exceed EUR 50 million**.
 - vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers
 - The market share of buyer and supplier cannot exceed **30%**.
 - Examples of hard-core restrictions:
 - the restriction of the buyer's ability to determine its sale price, the restriction of sales to end users by a buyer operating at the wholesale level of trade, ...

Technology transfer agreements

- **Regulation No 772/2004** exempts patent, know-how and software copyright licensing agreements entered between two undertakings permitting the production of contract product.
- Market share:
 - the parties – competitors – cannot exceed 20% on the affected relevant technology and product market
 - The parties – non-competitors – cannot exceed 30%
- The examples of the hard-core restrictions:
 - the restriction of a party's ability to determine its prices when selling products to third parties; the limitation of output; the restriction of the licensee's ability to exploit its own technology or of the ability of any of the parties to the agreement to carry out research and development (unless the restriction is indispensable to prevent the disclosure of the licensed know-how to third parties);....