CHAPTER 14A

EU Competition Law

Pieter Van Cleynenbreugel

14.1 Introduction

The European Union's ambition to establish a single market always extended beyond the abolition of State rules restricting the free movement of persons and commodities. Convinced that restrictive agreements between or unilateral practices of private businesses as well as State measures subsidising particular enterprises could be equally harmful to the smooth functioning of an internal market, the Treaties have always incorporated competition law provisions.[1] Current Articles 101–109 TFEU[2] prohibit cartel agreements (2.), unilateral abusive behaviour (3.) as well as certain forms of State aid (4.)[3] and contain legal bases for the setup of a supranational enforcement mechanism (5.).

14.2 Article 101 TFEU: prohibited collusion

Article 101 TFEU states that "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. More particularly,

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1 Contrary to s3 of the East African Community Competition Act (see previous chapter), which outlines the objectives of EAC Competition law, the EU Treaties remain silent about the exact objectives of EU competition law; the only thing they seem to hint at—in Protocol No. 26—is that competition law constitutes an inherent part of the EU internal market.

2 Those provisions can be found in Chapter I, Title VII, Part III (Union policies and internal actions) of the Treaty on the Functioning of the European Union.

3 In addition, Article 106 also states that competition law applies, in principle, without exception to undertakings entrusted with services of general economic interest. In some situations, however, exceptions to the full-fledged application of those rules could obstruct the performance, in law or in fact, of the particular tasks assigned to them; in that situation, exceptions to the full application of competition law rules can be proposed.

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the provision adds a few examples of such agreements, decisions or practices. Those include, yet are not limited to:[4]

(a) directly or indirectly fixing purchase or selling prices or any other trading conditions;
(b) limiting or controlling production, markets, technical development, or investment;
(c) sharing markets or sources of supply;
(d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) making 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.

In order for Article 101(1) to apply, the behaviour concerned has to produce effects within the internal market[5] and, similar to s4(1) EAC Competition Act, affect trade between Member States. Within that territorial context, the provision prohibits all agreements fixing prices, quantities or territorial areas between different businesses, or which would otherwise restrict the normal processes of competition on a market. The Treaty did not define the notions of agreement between undertakings, decision of an association of undertakings, concerted practice, and restriction of competition. It has fallen upon the European Commission and the Court of Justice of the European Union to explain the scope of those notions following the entry into force of the Treaties. In doing so, both institutions continuously opted for a functional approach, seeking to capture as many varieties of cartel-like behaviour within the scope of the prohibition.

In order for Article 101 TFEU to apply, the behaviour of at least two undertakings has to be at stake. According to consistent case law, an undertaking comprises any entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[6] The entity definition looks beyond the

4 As confirmed in Case C-49/92 P, *Commission of the European Communities v Anic Partecipazioni SpA*, ECLI:EU:C:1999:356, para 108.

5 On that notion, see Joined Cases 89, 104, 114, 116, 117 & 125–129/85, *A. Ahlström Osakeyhtio and Others v Commission* (*Woodpulp-I*), ECLI:EU:C:1988:447, para 11–18 and Case T-102/96, *Gencor Ltd v Commission*, ECLI:EU:T:1999:65, para 90–100.

6 Case C-41/90, *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH.*, ECLI:EU:C:1991:161, para 21.

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legal corporate or association law categories determined across the different national legal orders, identifying economic realities over legal form. As a result, a parent company and its fully-owned subsidiary will be considered a single undertaking; intra-enterprise contracts are thus excluded from the scope of Article 101 TFEU.[7] Economic activity is defined as any offering of goods or services that can take place in a market environment.[8] As such, marketable activities engaged in by public entities also qualify as economic, bringing those entities within the undertaking definition.[9] The Court of Justice consistently maintains a similar non-formal approach when identifying an agreement. From its early case law onwards, it confirmed that any concurrence of wills, regardless its form or scope, could be considered an agreement.[10] In the seminal *Consten and Grundig* judgment, the Court added that both horizontal (concluded at the same level of production/distribution chain) and vertical agreements (concluded between operators on different levels of that chain) are covered by the prohibition.[11]

An association of undertakings comprises any grouping of economic operators which could potentially be used as an intermediary, a shield or an alternative means to maintain, monitor and develop prohibited collusive practices.[12] Trade associations or other professional associations acknowledged as such by national law and created to protect and promote the interests of particular economic operators are the most obvious examples of such groupings.[13] EU competition law nevertheless goes beyond those formal distinctions. Recently, the Court of Justice even argued that, in assembling banks in one of its committees deciding on fees applied across the payment card network, a credit card company—itself an undertaking—acted as an association of banks, thus qualifying as an association of undertakings. Any calculated decision,

7 Case C-73/95 P, *Viho Europe BV* v. *Commission*, ECLI:EU:C:1996:405, paras. 6 and 16.

8 See M. Szydlo, 'Leeway of Member States in Shaping the Notion of an 'Undertaking' in Competition Law', 33 *World Competition* (2010), 549–568.

9 See e.g. Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*, ECLI:EU:C:2001:577, para 20.

10 Joined Cases C-2 & 3/01 P, *Bundesverband der Arzneimittel-Importeure eV & Commission* v. *Bayer*, ECLI:EU:C:2004:2, para 69.

11 Joined Cases 56 & 58/64, *Consten and Grundig* v. *Commission*, ECLI:EU:C:1966:41, p. 339.

12 Case T-39/92, *Groupement des Cartes Bancaires CB v Commission of the European Communities*, ECLI:EU:T:1994:20, para 77.

13 Case 246/86, *Societé Cooperative des Asphalteurs Belges* (*Belasco SC*) *v Commission of the European Communities*, ECLI:EU:C:1989:301 or Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98.

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recommendation or advisory practice in the interest of its members, it will be considered to represent the "private interests" of participating undertakings.[14]

In order to avoid situations where parties refrain from concluding an agreement or reverting to their trade association in order to adopt potentially anticompetitive behaviour, the Treaty also prohibits concerted practices. According to the Court, a concerted practice refers to any form of coordination between undertakings, by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.[15] The mere proof of contact followed by prima facie coordinated behaviour suffices for the European Commission to prove the existence of such practice.[16] A case in point is *T-Mobile*, in which the Court held that the coordinated price increase of Dutch telecom operators following known contacts between representatives of the different undertakings gave rise to the existence of such practice.[17]

The notion of restriction of competition has never been defined in an exhaustive manner. The European Commission and the EU Courts have rather analysed, in each individual case, to what extent a restriction can be deemed in place, inter alia relying on the examples listed in the Treaty.[18] An important distinction is made between restrictions by object and by effect in that regard. Object restrictions are practices deemed quasi-always to restrict competition, without the need for an in-depth analysis of the actual effects the behaviour concerned produces on the relevant market.[19] Price-fixing, market segmentation and output restrictions, also listed in Article 101(1) TFEU, are the most obvious examples in this regard. Effect restrictions require a more in-depth economic "counterfactual" analysis. The European Commission in those cases has to prove that competition has been harmed in a way that would not have

14 Case C-382/12 P, *MasterCard v Commission*, ECLI:EU:C:2014:2201, para 71–73.

15 Joined Cases 40–48, 50, 54–56, 111, 113 & 114/73, *Suiker Unie and Others* v. *Commission*, ECLI:EU:C:1975:174, para 26.

16 Joined Cases C-89, 104, 114, 116, 117, 125–129/85, *Ahlström Osakeyhtiö and Others* v. *Commission* (*Woodpulp* II), ECLI:EU:C:1993:120, para 126–127.

17 Case C-8/08, *T-Mobile*, ECLI:EU:C:2009:343.

18 See for a more elaborate analysis, P. Van CleynenbrEUgel, 'Article 101 TFEU and the EU Courts: adapting legal form to the realities of modernization?', 51 *Common Market Law Review* (2014), 1409.

19 Case C-209/07, *Competition Authority* v. *Beef Industry Development Society Ltd and Barry Brothers* (*Carrigmore*) *Meats Ltd.*, ECLI:EU:C:2008:643, para 17.

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been the case had the restrictive behaviour not been engaged in.[20] In addition, such restrictions have to be appreciably affecting interstate trade within the internal market. To the extent that undertakings have a market share below 10% (horizontal agreements) or 15% (vertical and mixed agreements), the Commission will not take enforcement action.[21] Object restrictions nevertheless never benefit from *de minimis*.[22]

In addition to the prohibition, Article 101(2) TFEU contains a specific civil law sanction, stating that any agreements or decisions prohibited pursuant to this Article shall be automatically void. The sanction outlined in this provision complements the administrative enforcement framework set up by the Commission from the early 1960s onwards. By virtue of the direct effect of that provision, the voidness of anticompetitive agreements can be invoked directly before and by national jurisdictions.[23]

The prohibition outlined in Article 101(1) is not absolute. Article 101(3) TFEU confirms that agreements, decisions or practices which contribute 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 do neither impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question, can be justified. It results from this provision that any restrictive agreement, decision or practice can—at least in theory—be justified. Prior to 2004, only the European Commission could decide on the existence of such justification, called an exemption decision. Since 2004, undertakings will have to self-assess whether their agreement can be deemed justified.[24]

In order to render this assessment more predictable, the European Commission adopted, after having been granted those powers by the Council in accordance with Article 103 TFEU, so-called block-exemption regulations, excluding categories of agreements from the Article 101(1) TFEU prohibition.

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20 2004 *Commission Guidelines on the application of Article 81(3) of the Treaty*, [2004] O.J. C101/97, para 24.

21 See 2014 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (de minimis Notice), [2014] O.J. C291/1 .

22 Case C-226/11, *Expedia Inc.* v. *Autorité de la concurrence and Others,* ECLI:EU:C:2012:795, para 38.

23 Case C-127/73, *BRT v Sabam*, ECLI:EU:C:1974:25.

24 Case C-68/12, *Protimonopolný úrad Slovenskej republiky* v. *Slovenská sporiteľňa a.s.,* ECLI:EU:C:2013:71, para 36.

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By way of example, all vertical agreements between undertakings having a market share of less than 30% are thus excluded, except for agreements containing so-called "hardcore restrictions".[25] Hardcore restrictions can only very rarely be justified on the basis of Article 101(3) TFEU.

14.3 Article 102 TFEU: Prohibited Unilateral Market Behaviour

Article 102 TFEU states that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. The Treaty again provides a non-exhaustive list of examples,[26] referring to:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making 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.

Prohibiting above all the unilateral behaviour of one undertaking or of a group of undertakings presenting itself on the market as a single economic operator,[27] Article 102 TFEU contains additional non-defined concepts, which have been clarified early on in the Commission's decision-making practice and the Court of Justice's case law. More specifically, the notions of dominance and abuse are particularly relevant in that respect.

25 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] O.J. L102/1.

26 Compare with s8 EAC Competition Act, which defines and classifies, in a more direct way, different types of abuses.

27 See Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports and Others* v *Commission*, ECLI:EU:C:2000:132, para 36.

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Dominance is a precondition in order for the Article 102 TFEU prohibition to be applicable. Indeed, a non-dominant undertaking engaging in behaviour deemed as abusive under that provision will not be subject to competition law scrutiny. An undertaking is said to have a dominant position if it can prevent effective competition from being maintained on the relevant market by virtue of it having the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.[28] In order to determine the existence of such position, the EU Courts accepted that the Commission established, on a case-by-case way, the existence of dominance on a relevant product and geographical market.[29]

Once the market determined, the finding of dominance is above all premised on market shares. The Court established that an undertaking maintaining a market share of 50% or more is presumed to be dominant while a share between 40% and 50% may indicate dominance depending on other factors. An undertaking with a market share below 40% can still be dominant but only in exceptional circumstances in light of other market features.[30] In addition, the market structure may have to be looked at, even when market shares do not permit to derive that the undertaking concerned is dominant.[31]

In its early *Hoffmann LaRoche* judgment, the Court has defined abuse as an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[32]

From that definition, two types of abuses have been identified. On the one hand, it captures exploitative abuses, e.g. the charging of monopolist prices to

28 Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 38.

29 Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] O.J. C372/5.

30 Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] O.J. C45/7, recital μ&'.(hereinafter 2009 enforcement priorities notice).

31 2009 enforcement priorities notice, recital 15.

32 Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, para 91.

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consumers or clients,[33] On the other hand, it also encompasses exclusionary abuses targeting (potential) competitors.[34] Examples that have been identified throughout the case law include predatory pricing,[35] loyalty discounts,[36] exclusivity agreements, and refusal of access to essential facilities necessary to the creation of a new product or service.[37]

Contrary to Article 101 TFEU, Article 102 does not contain a specific civil law sanction or possibilities for exception. In practice, the administrative enforcement regime will nevertheless apply and the EU Courts have accepted—at least in theory—that abusive behaviour can be justified objectively, for example if it contributes to a more efficient functioning of the market in which the undertaking concerned is active.[38]

14.4 State Aid

Article 107(1) TFEU considers 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, in so far as it affects trade between Member States, to be incompatible with the internal market.[39] Again, the Treaty did not define the notions of aid and of 'certain' undertakings. The other notions—undertaking, internal market and affectation of trade—are interpreted in coherence with the interpretations of those concepts in Articles 101 and 102 TFEU.

According to consistent case law, any advantage granted by or attributed to a public authority to one or more selected undertakings will be considered as incompatible aid. As such, direct subsidies, but also interest-free loans, interest reductions or tax breaks are considered advantages.[40] Applied in this regard,

33 2009 enforcement priorities notice, recital 7.

34 2009 enforcement priorities notice, recital 6.

35 See Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, ECLI:EU:C:1991:286.

36 Case C-95/04, *British Airways plc v Commission of the European Communities*, ECLI:EU:C:2007:166.

37 Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, ECLI:EU:C:2004:257.

38 Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83.

39 S14 et seq. of the EAC Competition Act rather refer to subsidies, which potentially are more limited in scope than advantages envisaged by EU law.

40 For more detailed examples of what constitutes aid, see Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] O.J. C262/1.

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the existence or not of aid is dependent on the so-called "private investor" test. To the extent that a private undertaking would have made the same investment or transcation as a public authority, the measure at hand is not considered aid.[41]

In order to be prohibited, an aid measure also necessarily has to be selective. Selectivity means that the advantage will only be granted to an individual undertaking or to a particular group of undertakings active within a Member State's territory. A measure targeting a specific sector of the economy or a certain region within a Member State is also deemed selective.[42]

The general prohibition outlined in Article 107(1) TFEU is again not absolute. Articles 107(2) and (3) TFEU contain a list of exceptions excluding measures from the prohibition. The second paragraph contains per se exceptions, i.e. exceptions that do not leave any discretion for the Commission to judge their compatibility (e.g. aid relating to natural disasters), whereas the third allows the Commission some discretion whether or not to accept them. This has given rise to the emergence of soft law instruments outlining how the Commission will use its discretion.[43] In addition, block exemption regulations excluding certain categories of aid up to a certain quantified amount have excluded specific categories of aid from the prohibition.[44]

14.5 Enforcement

The mere inscription of rules in the Treaty framework has not as such given rise in itself to the creation of a competition law culture across the EU internal market. A dedicated enforcement system was necessary in that respect, coupled with a supranational court—the Court of Justice—willing to review and interpret vague notions included in the Treaty. It deserves to be mentioned that the enforcement system gradually grew from being a strong *ex ante* authorisation-focused to a more *ex post* enforcement regime.

41 The Court often refers to the 'market economy investor principle', see e.g. Case C482/99, *France v Commission,* ECLI:EU:C:2002:294.

42 Among others Case C-88/03, *Portugal* v *Commission,* ECLI:EU:C:2006:511, para 54.

43 For an overview, see http://ec.europa.eu/competition/state_aid/legislation/legislation.html.

44 Most notably, Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, [2014] O.J. L187/1.

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14.5.1 Ex ante *Authorisation as Enforcement Starting Point*

Upon its entry into force in 1958, the EEC Treaty did not envisage one singularly structured enforcement regime for EU competition law.

On the one hand, in relation to State aid, Article 108 TFEU determines that the Commission is to keep under review existing aid schemes, yet, above all, mustbe informed of any plans by Member States to grant or alter aid. Informed in this context actually implies that the advantage to be granted has to be notified to it, following which an approval or rejection decision will be adopted. As such, absent a Commission approval decision, Member States can not proceed in granting aid to the undertakings concerned.[45]

On the other hand, in relation to restrictive agreements and abusive behaviour, Article 103 provides a legal basis for the Council to adopt measures aimed at ensuring compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments and delineating the role of Commission and Court of Justice in this regard. In 1962, the Commission was entrusted with the task, by virtue of Regulation 17/62, directly to grant exemptions in accordance with Article 101(3) TFEU. As a result, every agreement which was potentially anticompetitive had to be notified to the Commission, which by virtue of a decision could exempt it from the Article 101(1) TFEU prohibition.[46] Only the Commission was competent to apply Article 101(3) TFEU, which did not have direct effect.[47] The notification obligation allowed the Commission to establish a more or less consistent line of decisions, in which it interpreted Article 101 TFEU. The Court of Justice, in reviewing those decisions, further confirmed or modified the Commission's interpretation of those provisions. The lack of clear time limits for taking a decision and, the continuous increase of notifications nevertheless triggered a reform towards a more ex post enforcement system in 2004.

Article 102 TFEU practices were not subject to a similar notification obligation. In practice, however, the European Commission, from the early days onwards, actively used its freshly conferred enforcement powers also to target dominant undertakings and to penalise their abusive practices. Being allowed to impose fines of up to 10% of the annual turnover of each undertaking, the

45 Confirmed in Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, [2015] O.J. L248/9.

46 Article 9 Council Regulation 17 implementing Articles 85 and 86 of the Treaty, [1962] O.J. L 13/204 (English Special Edition, Chapter 1959–1962, 87) (Hereafter referred to as Regulation 17/62).

47 Article 4 Regulation 17/62.

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Commission succeeded in interpreting and enforcing this provision at the same time.[48] Along the way, it shaped the notions of dominance and abuse that are still being applied today.

In addition, Regulation 17/62 set up an elaborate administrative enforcement regime, allowing the Commission to inspect undertakings' premises, to seize documents and to impose fines and periodic penalty payments on those undertakings for having infringed Articles 101 and 102 TFEU. Those fines could be as high as 10% of the undertaking's global annual turnover, a rule that remains in force until today.[49]

14.5.2 *Moving Towards More* ex post *Enforcement*

The focus on ex ante enforcement and the accompanying notification/authorisation obligations imposed on the Commission services became increasingly burdensome, as more and more notifications were made and the Commission's resources were not extended at a comparable pace. Anticipating the accession of ten new Member States in 2004 and the most likely unmanageable increase in Article 101(3) TFEU authorisation requests, the European Commission decided that a reform of the Article 101 TFEU enforcement system was necessary.[50] Emphasising how the basic competition law provisions had become well-established throughout the Union, it proposed to decentralise the application and enforcement of Articles 101 and 102 TFEU, by giving national competition authorities and courts direct powers under Article 101(3) TFEU.

Regulation 1/2003 effectively made this happen from 1 May 2004 onwards. It since obliges national competition authorities and courts to apply Articles 101 and 102 TFEU in full and to ensure that those provisions are interpreted in accordance with the established case law of the Court of Justice and decision-making practice of the Commission.[51] In addition, national competition authorities have been conferred specifically circumscribed powers as regards the types of EU competition law decisions they can/have to adopt.[52]

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48 Article 3 Regulation 17/62; see on that development, P. Ibanez Colomo, The Law on Abuses of Dominance and the System of Judicial Remedies, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270099.

49 Article 15(2)b Regulation 17/62.

50 For the proposal and its background, again see Commission White Paper on the Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty.

51 Article 3 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L 1/1.

52 Article 5 Regulation 1/2003.

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Although Member States' authorities apply those rules autonomously, the Commission provides for tools to take away a case from national authorities and take over the investigation or to intervene in pending litigation before Member States' courts.[53] Although the Commission now no longer authorises agreements in the realm of Article 101(3) TFEU, the increased adoption of soft law instruments and Commission "help lines" allow it to keep an eye on whether or not the application of EU competition law develops in a coherent way across different Member States' jurisdictions.[54] To that extent, the Commission also assembles all national authorities in a European Competition Network (ECN), within which decisions on case allocation are made in an informal way. Following the allocation decision, the designated authority will initiate or proceed its infringement proceedings, whereas other authorities will refrain from continuing their actions. As such, the Commission seeks to control who deals with a specific case at what time.[55]

Regulation 1/2003 also confirms and extends the Commission's investigative and sanctioning powers, inviting Member States' to streamline theirs in line with the Commission's.[56]

14.6 Concentrations

The Treaty did not mention anything on those concentrations, including acquisitions and certain joint ventures. Their assessment under the Article 101(3) TFEU exemption mechanism or, *ex post* under Article 102 TFEU, was not conducive to legal certainty. For that reason, and responding directly to the limits enounced in the Court's case law,[57] the EU adopted Concentration Control Regulation 4064/89, which has been modified into Regulation 139/2004.[58] The

53 Article 11(6) Regulation 1/2003.

54 For an introductory overview of those help lines, P. Van Cleynenbreugel, 'National courts and EU competition law: lost in multilevel confusion?' in N. Bodiroga-Vukobrat, S. Rodin and G. Sander, *New Europe, Old Values? Reform and Perseverance* (Heidelberg, Springer, 2016), 181–198.

55 On the operations of the European Competition Network, see Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf.

56 See Articles 17–24 Regulation 1/2003.

57 E.g. Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, ECLI:EU:C:1973:22.

58 Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] O.J. L395/1, replaced by Council Regulation (EC) No. 139/

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notion of concentration captures any change in control or ownership over an undertaking, through mergers and other forms of control through acquisitions and certain joint ventures.[59]

Turnover thresholds are used to determine whether or not the concentration has a so-called "Union dimension".[60] All intended concentrations with a Union dimension now have to be notified to the European Commission, which is called upon to authorise or prohibit them by means of a decision, to be adopted within strict time limits.[61] Concentrations which do not have a Union dimension, have to be notified to Member State competition authorities, which almost all adopted a similar notification procedure at national level. The test applied in this regard originally focused on whether or not the envisaged concentration would result in a dominant position on the relevant market.[62] The 2004 Regulation explicitly broadened that test, asking the Commission to assess whether the envisaged concentration does not result in a significant impediment of effective competition on a relevant market.[63]

2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] O.J. L24/1.

59 Article 3 Regulation 139/2004.

60 Articles 1(2) and (3) Regulation 139/2004.

61 Articles 4 and 10 Regulation 139/2004.

62 Article 2 Regulation 4064/89.

63 Article 2 Regulation 139/2004.

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