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EU COMPETITION LAW AND ITS TERRITORIAL REACH

1. Introduction

European Union law of competition. This work is concerned with the competition rules of the European Union ('EU') which are in part contained in the Treaty on the Functioning of the European Union ('TFEU') and in part in legislation adopted pursuant to various articles of the TFEU. The Court of Justice has recognised that the EU rules on competition are 'fundamental provisions' which are essential for the accomplishment of the tasks entrusted to the EU and, in particular, for the functioning of a single, internal market.[1] **1.001**

[1] Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, [2000] 5 CMLR 816, para 36; Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, [2001] 5 CMLR 1058, para 20; Cases C-295/04, etc, *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, [2006] 5 CMLR 17, para 31; Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, [2009] 5 CMLR 11, para 49.

1.002 Plan of this Chapter. This Chapter provides an introduction to EU competition law and the institutions which are responsible for its enforcement; it also describes the 'boundary between the areas respectively covered by [EU] law and the law of the Member States',[2] in particular in the light of the Treaty concept of effect on trade between Member States. Section 2 provides an overview of the Treaty on European Union ('TEU') and the TFEU.[3] Section 3 places the Treaty rules on competition in the context of other provisions of the EU Treaties and considers the proper approach to interpreting those rules in light of both the objectives pursued by the Treaties and current economic thinking. It also discusses other Treaty provisions which reinforce and complement the competition rules, including the provisions on the free movement of goods, the duty of sincere cooperation between the Union and the Member States and the principle of subsidiarity. Section 4 describes the shared competence of the European Commission and the national competition authorities and courts of the Member States in the application of EU competition law. Section 5 describes the gradual enlargement of the EU from the original six to the current 27 Member States[4] and explains the geographic coverage of the competition rules in relation to the overseas territories of the Member States. It also describes the operation of the EEA Agreement and the EU's bilateral arrangements with third countries for cooperation on competition matters. Section 6 considers issues concerning the application of EU competition law to economic activity outside the EU and in respect of undertakings established outside the EU. Finally, Section 7 considers the element in Articles 101 and 102 TFEU of effect on trade between Member States of the EU.

2. The EU Treaties

1.003 The ECSC Treaty. The Treaty establishing the European Coal and Steel Community came into force on 23 July 1952 and expired 50 years later on 22 July 2002. It created a competition regime for certain steel and coal products and operated separately from the regime later established under the Treaty of Rome. The expressions 'coal' and 'steel' were defined in Article 81 ECSC and Annex I to the ECSC Treaty. Article 4 ECSC provided that certain measures or practices were incompatible with the common market for coal and steel and were prohibited and abolished. Article 65(1) ECSC specifically prohibited anti-competitive agreements, its terms broadly corresponding to what is now Article 101 TFEU, except that there was no requirement of an effect on trade between Member States.[5] The EU Courts have interpreted the concepts in Articles 65(1) and 66(7) ECSC consistently with equivalent concepts in Articles 101 and 102 TFEU.[6] The ECSC Treaty

[2] Case 22/78 *Hugin Kassaregister v Commission* [1979] ECR 1869, 1899, [1979] 3 CMLR 345, 373.

[3] For general works on EU law see, eg Hartley, *The Foundations of European Union Law* (7th edn, 2010); Weatherill, *Cases and Materials on EU Law* (9th edn, 2010); Craig and de Búrca, *EU Law: Text, Cases and Materials* (5th edn, 2011).

[4] Croatia signed the Treaty of Accession on 9 December 2011 and is expected to join the EU on 1 July 2013.

[5] Note also that Art 80 ECSC expressly defined the term 'undertaking' for the purposes of the ECSC competition rules as 'any undertaking engaged in production in the coal or steel industry within the common market'.

[6] See, eg Case 13/60 *Geitling Ruhrkohlen-Verkaufsgesellschaft v High Authority of the ECSC* [1962] ECR 83, [1962] CMLR 113; Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, [1999] 4 CMLR 810, paras 262 and 266 (referring to the concepts of 'agreement' and 'concerted practice').

also gave the Commission exclusive jurisdiction over all concentrations involving coal and steel undertakings[7] and over State aid to the coal and steel industries.[8]

Expiry of the ECSC Treaty. The consequences of the expiry of the ECSC Treaty were set out in a Protocol to the Treaty of Nice signed in February 2001. The European Commission issued a Communication[9] clarifying how competition cases would be treated following the expiry. Neither the ECSC nor the EC Treaty contained transitional provisions as to the expiry of the former Treaty. Where, after the expiry of the ECSC Treaty, the Commission proceeds against conduct which took place before the expiry of the ECSC Treaty, the substantive rules to be applied are the provisions of the expired Treaty, if the conduct would have been covered by that Treaty at the time. However, the procedural rules to be applied are those in operation at the time of the proceedings, now Regulation 1/2003. The Court of Justice so held in two appeals against readopted decisions relating to the *Steel Beams*[10] and *Alloy Surcharge* cartels.[11] Furthermore, since the expiry of the ECSC Treaty, the Commission's exclusive competence to apply Article 4(b) ECSC prohibiting discriminatory behaviour is now shared with the national courts of the Member States because that provision has direct effect as regards behaviour that pre-dates the expiry of the Treaty.[12] The Court of Justice still has jurisdiction to rule on preliminary references on the interpretation of the ECSC Treaty after its expiry.[13] **1.004**

The Euratom Treaty. At the same time as they signed the Treaty of Rome, the original Member States signed the Treaty establishing the European Atomic Energy Community ('the Euratom Treaty')[14] to coordinate the development of the nuclear industries of the Member States. The Euratom Treaty is of indefinite duration. **1.005**

From the EC Treaty to the TFEU. Building upon the experience of the ECSC Treaty, and 'determined to lay the foundations of an ever closer union among the peoples of **1.006**

[7] Art 66 ECSC. On mergers generally see Chap 8.

[8] Commission decn 2496/96/ECSC establishing [EU] rules for State aid to the steel industry, OJ 1996 L338/42 and Commission decn 3632/93/ECSC establishing [EU] rules for State aid to the coal industry, OJ 1993 L329/12.

[9] Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ 2002 C152/5.

[10] COMP/38907 *Steel beams*, decn of 8 November 2006, upheld in Case T-405/06 *ArcelorMittal* [2009] ECR II-771, [2010] 4 CMLR 787, upheld in Cases C-201&216/09P *ArcelorMittal* [2011] 4 CMLR 1097. See also COMP/37956 *Concrete reinforcing bars*, decn of 17 December 2002, annulled on appeal Cases T-27/03 *SP* [2007] ECR II-4331, [2008] 4 CMLR 176. The Commission subsequently readopted the decn using Reg 1/2003 as the legal base: decn of 30 September 2009 (on appeal Cases T-472, 489 &490/09 and T-69, 70, 83, 85, 90, 91&92/10 *SP v Commission*, not yet decided).

[11] COMP/39234 *Alloy surcharge – readoption*, decn of 20 December 2006, upheld in Case T-24/07 *ThyssenKrupp Stainless* [2009] ECR II-2309, [2009] 5 CMLR 1773 upheld in Case C-352/09P *ThyssenKrupp Nirosta*, judgment of 29 March 2011. As to the application of the State aid rules to the sectors previously covered by the ECSC Treaty see Case T-25/04 *González y Díez v Commission* [2007] ECR II-3121.

[12] Case T-320/07 *Daphne Jones, Glen Jones and Fforch-Y-Garon Coal v Commission,* judgment of 23 November 2011, paras 82–90. Before the expiry of the ECSC Treaty the CJ had held that Art 4(b) ECSC did not have direct effect since that article had to be applied in conjunction with former Art 63(1) ECSC: Case C-18/94 *Hopkins* [1996] ECR I-2281, paras 26–27.

[13] Case C-119/05 *Lucchini Siderurgia* [2007] ECR I-6199.

[14] A consolidated version of the Euratom Treaty incorporating the amendments made by the Treaty of Lisbon is published at OJ 2010 C84/1. For a discussion of the scope of the Euratom Treaty, see Case C-61/03 *Commission v United Kingdom* [2005] ECR I-2477, [2005] 2 CMLR 1209, where the CJ declined to follow the Opinion of AG Geelhoed and held that the Treaty did not extend to the military nuclear installations.

Europe',[15] the original Member States—France, Germany, Italy, Belgium, the Netherlands and Luxembourg—signed a Treaty at Rome on 25 March 1957 to establish what was then called the 'European Economic Community'.[16] Subject to transitional arrangements,[17] that Treaty came into force on 1 January 1958. The Treaty of Rome sought to create a common market based on an economic union between the Member States, an objective which received a major boost from the creation of the single market with effect from 1 January 1993.[18] It has since been substantially amended, in particular by the Treaty on European Union signed at Maastricht,[19] which replaced the term 'European Economic Community' with 'European Community'; by the Treaty of Amsterdam,[20] which (amongst other changes) renumbered the Articles of the amended EC Treaty; and by the Treaty of Nice,[21] which enacted institutional reforms in anticipation of further accessions to the EU. The 'European Community' was subsumed into the 'European Union' by the Treaty of Lisbon[22] with effect from 1 December 2009. The Treaty of Lisbon also renamed the EC Treaty as the Treaty on the Functioning of the European Union ('TFEU')[23] and effected a renumbering of the Treaties. The Treaty of Lisbon has an annex containing a table of equivalences between the old and new Treaties. Article 3(1)(b) TFEU provides that the EU has exclusive competence in 'the establishing of the competition rules necessary for the functioning of the internal market'. Article 4 TFEU lists those areas where the Union shares competence with the Member States, including the internal market, consumer protection, transport, and energy.

1.007 **The TEU.** The Treaty on European Union[24] was signed at Maastricht and entered into force on 1 November 1993. The TEU marked a further substantial stage in the integration of the Member States by establishing a European Union that embraces a wide range of additional areas of cooperation between the Member States, for example on defence and in the area of justice and home affairs. The TEU was also amended by the Treaty of Lisbon. Some of the provisions that were previously in the early articles of the old EC Treaty have been replaced by provisions in the new TEU.[25] Of particular relevance to competition law is Article 3(3) TEU which establishes that the 'Union shall establish an internal market'.

[15] EC Treaty, first preamble.

[16] The EC Treaty (Cmnd 4864) was not published in the Official Journal but the text of that Treaty and all the Treaties referred to here is available on the www at Eur-Lex Home/Treaties.

[17] Pursuant to Art 8 of the original Treaty of Rome, the transitional period expired on 31 December 1969. The rules on competition came fully into effect with the adoption of Reg 17, the first main implementing Reg, on 13 March 1962, OJ 1962 13/204; OJ Sp Ed 1959–62, 81: Vol II, App B1, see para 1.066, below.

[18] Introduced by the internal market programme following the amendments to the EC Treaty, as it was called at that time, made by the Single European Act signed in Luxembourg in February 1986.

[19] Maastricht Treaty (signed on 7 February 1992 and coming into force on 1 November 1993), Cmnd 1934, OJ 1992 C191.

[20] Treaty of Amsterdam (signed on 2 October 1997 and coming into force on 1 May 1999), Cm 3780, OJ 1997 C340.

[21] Treaty of Nice (signed on 26 February 2001 and coming into force on 1 February 2003) OJ 2001 C80/1.

[22] Treaty of Lisbon (signed on 13 December 2007 and coming into force on 1 December 2009) OJ 2007 C306/1.

[23] TFEU, OJ 2010 C83/47.

[24] Maastricht Treaty (n 19, above). The Union did not replace the EC at this stage although the TEU made extensive changes to the EC Treaty.

[25] Treaty on European Union, OJ 2010 C83/13.

Protocol 27 to the TEU and TFEU states that that internal market includes a 'system ensuring that competition in the internal market is not distorted'.[26]

The Charter of Fundamental Rights. On 7 December 2000 the European Parliament, the Council of Ministers and the Commission 'solemnly proclaim[ed]' the Charter of Fundamental Rights of the European Union.[27] It incorporates many of the principles found in the European Convention on Human Rights and Fundamental Freedoms (below) but also enunciates further rights, for example in the field of employment and social benefits. Article 6 TEU, as amended by the Treaty of Lisbon, provides that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, as adapted on 12 December 2007, which have the same legal value as the Treaties.[28] The Charter rights include matters of privacy, a fair trial, and the rights of defence and may already be protected as fundamental principles of EU law.[29] Insofar as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as (or provide more extensive protection than) those laid down in the Convention.[30] The Court of Justice has relied on Article 47 of the Charter, conferring the right to an effective remedy and of access to an impartial tribunal, in determining the scope of an undertaking's rights of defence[31] and the effectiveness of judicial review.[32] **1.008**

The European Convention of Human Rights. The original European Community Treaties made no reference to human rights. Article 6(3) of the TEU gives expression to the case law of the Court of Justice that fundamental rights, as derived from the constitutional traditions of the Member States and as set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), constitute general principles of EU law.[33] Article 6(2) of the TEU provides that the Union shall accede to **1.009**

[26] See para 1.012, below. For discussion of the interpretation of Protocol 27 by the EU Courts see Van Rompuy 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' CPI Antitrust Chronicle (2011) 12(1).

[27] Charter of Fundamental Rights, OJ 2007 C303/1. In Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, [2001] 5 CMLR 54, the GC rejected an application to re-open the oral hearing to receive submissions concerning the Charter, on the grounds that it could be of no relevance to the contested decision taken before the date of the Charter (para 76).

[28] The Charter cannot be invoked against the United Kingdom or Poland: see Protocol 30 to the TFEU, published at OJ 2010 C83/313.

[29] Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, [2006] 4 CMLR 686, para 725; Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, [2008] 5 CMLR 962, para 138. On the application of human rights in competition enforcement more generally, see paras 13.006 et seq, below.

[30] Art 52(3) of the Charter of Fundamental Rights.

[31] Case C-407/08P *Knauf Gips v Commission* [2010] ECR I-6375, [2010] 5 CMLR 708, paras 91–93.

[32] Cases C-272/09P and C-386&389/10P *KME v Commission*, judgments of 8 December 2011, paras 91 et seq.

[33] See Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, [1976] 1 CMLR 140, paras 31–32; Case C-260/89 *ERT* [1991] ECR I-2925, [1994] 4 CMLR 540, paras 41 et seq (national courts applying provisions of the Treaty must have regard to all the rules of EU law including the fundamental right to freedom of speech as enshrined in Art 10 ECHR). For consideration of fundamental rights in the field of competition law, see *Mannesmannröhren-Werke v Commission* (n 27, above); Case T-69/04 *Schunk v Commission* [2008] ECR II-2567, [2009] 4 CMLR 2, paras 28–50 (considering the Commission's discretion to impose fines in the light of Art 7 ECHR).

the ECHR.[34] Such accession shall not affect the Union's competences as defined in the Treaties.[35] The European Court of Human Rights has established a presumption that a Member State is complying with the ECHR when it does no more than implement legal obligations flowing from its membership of the EU.[36]

1.010 **Economic and monetary union.** Article 3(4) TEU provides that the Union shall establish an economic and monetary union whose currency is the euro. The euro was originally introduced on 1 January 1999. Since 1 January 1999, the turnover figures that apply under EU competition law (for example, jurisdictional thresholds under the Merger Regulation and the turnover of companies for determining the maximum for fines) are calculated in euros and all fines are imposed in euros.[37] The euro was initially adopted by 11 Member States, namely Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. Subsequently, Greece joined the 'Euro Zone' on 1 January 2001, and Slovenia on 1 January 2007. Cyprus and Malta adopted the euro on 1 January 2008.[38] Slovakia and Estonia adopted the euro on 1 January 2009 and 1 January 2011 respectively.[39] In 2010 the European Financial Stability Facility and the European Financial Stability Mechanism were created in order to provide financial assistance to members of the Euro area in financial difficulty. Discussion of EMU, and its possible reform, is beyond the scope of this work.[40]

3. EU Competition Law

(a) The aims of the EU

1.011 **Aims of the EU and competition law.** The EU competition rules reinforce and complement the other provisions of the TEU and TFEU ('the Treaties'). The Court of Justice has

[34] The Council of Europe has adopted Protocol No 14, which entered into force on 1 June 2010, amending Art 59 ECHR so that the EU may accede to it: see Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union dated 24 January 2011.

[35] Art 218(8) TFEU provides that the EU accession to the ECHR shall be concluded unanimously by the Council of Ministers; it shall also be approved by all 47 existing contracting parties to the ECHR. See generally Commission MEMO/10/84, 17 March 2010. The CJ had previously held that the EU did not have power to accede to the ECHR under the EC Treaty: see the Opinion 2/94 *Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, [1996] 2 CMLR 265.

[36] See App 45036/98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland* (2006) 42 EHRR 1. The case was heard by the Grand Chamber of the ECHR Ct with the European Commission, amongst others, participating in the oral hearing. The case was distinguished by the Grand Chamber of the Court in App 71412/01 *Behrami v France* (2007) 45 EHRR SE 85, para 145.

[37] Previously, the EU institutions used European Currency Units ('ECU'), the value of which was published regularly in the C-series of the Official Journal. References to ECUs in legal instruments are treated as replaced with effect from 1 January 1999 by a reference to euros, ie at a conversion of one-to-one: Art 2(1) of Reg 1103/97, OJ 1997 L162/1.

[38] Monaco adopted the euro (OJ 2002 L142/59), as did San Marino (OJ 2001 C209/1) and Vatican City (OJ 2001 C299/1).

[39] All of the Member States of the EU were expected to participate in the EMU in due course, except for the United Kingdom and Denmark which opted out (see Protocol 15 (United Kingdom) and Protocol 16 (Denmark) to the TEU and TFEU, published at OJ 2010 C83/284 and 287 respectively). At the time of writing, the euro is undergoing a period of turbulence, the outcome of which is uncertain.

[40] See generally Arts 136–144 TFEU; for a helpful introduction in a general work, see Beaumont and Walker (eds), *The Legal Framework of the Single European Currency* (1999); and Craig and de Búrca, *EU Law: Text, Cases and Materials* (5th edn, 2011), Chap 20.

observed that the competition rules are 'so essential that without [them] numerous provisions of the Treaty would be pointless'.[41] The competition rules should therefore be considered in the wider context of the Treaties and in particular their aims and objectives.[42]

Article 3 TEU: aims of the EU. Article 3 TEU contains a list of socio-economic objectives which it is said to be the task of the Union to achieve. Article 3(1) provides that 'the Union's aim is to promote peace, its values and the well-being of its peoples'. Article 3(2) continues that 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'. Of particular importance for the interpretation and application of EU competition law is the objective set out in Article 3(3) TEU which provides (amongst other things): **1.012**

> 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

Protocol 27 on the internal market and competition, annexed to the TEU and the TFEU, further provides that the internal market referred to in Article 3(3) is to include 'a system ensuring that competition is not distorted'. Protocols have the same force as the main provisions of the Treaty to which they are annexed.[43] The Court of Justice has referred to Protocol 27 in an Article 102 case[44] and a State aid case.[45]

(b) The aims of the EU competition rules

In general. The Court of Justice has stated that the function of the EU competition rules is 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union'.[46] Although not articulated in the Treaties, EU competition law has two basic and complementary aims: protection of competition on the market and prevention of barriers to integration of the single market. **1.013**

Protection of competition. The Court of Justice has stated that Article 101 (and 102) of the TFEU 'aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such'.[47] As with other systems **1.014**

[41] Case 6/72 *Continental Can v Commission* [1973] ECR 215, 244, [1973] CMLR 199, 223. For an overview of competition policy over the last 40 years see Report on Competition Policy (2010) paras 4–33 and Staff Working Paper on Annual Report (2011), pp 11–15.

[42] For the correct approach to the interpretation of provisions of the Treaties, see paras 1.018 et seq, below.

[43] Art 51 TEU provides that Protocols and Annexes to the TEU and TFEU form an integral part of the Treaties.

[44] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige*, judgment of 17 February 2011, [2011] 4 CMLR 482, para 20.

[45] Case C-496/09 *Commission v Italy*, judgment of 17 November 2011, para 60.

[46] *TeliaSonera Sverige* (n 44, above), para 22. See also Case C-94/00 *Roquette Frères* [2002] ECR I-9011, [2003] 4 CMLR 46, para 42.

[47] Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, [2009] 5 CMLR 11, para 38; Cases C-501/06P, etc, *GlaxoSmithKline Services v Commission* [2009] ECR I-9291, [2010] 4 CMLR 50, para 63; see also the GC's judgment in Case T-461/07 *Visa Europe v Commission*, judgment of 14 April 2011, [2011] 5 CMLR 74, para 126.

of competition law, the EU rules on competition are founded on the principle that effective competition in a market, rather than state control or private monopoly, is the best mechanism for an efficient allocation of resources. In a market economy, the competitive activities of undertakings, driven by self-interest,[48] can improve the welfare of consumers and, by increasing productivity, increase the total welfare of society. Economics provides an explanation of the relative merits of the competitive process and demerits of measures that distort that process with the aim of serving the public interest.[49] A detailed discussion of the economic theories that are most relevant when considering competition law issues lies outside the scope of this work.[50]

1.015 Integration of national markets into a single market. The TFEU is designed to create and maintain a single internal market in which the conditions prevailing in a national market are reproduced on a Union scale and where there are to be no impediments to the free movement of goods, services, workers or capital. The EU competition rules must be understood in that context. If such a market is working effectively, it becomes impossible to maintain artificially different prices in different parts of the market because the consumer should be able to buy goods from the cheapest source anywhere in the Union. Goods should freely flow from the low-price areas into the high-price areas, in particular by 'parallel trading' by intermediaries who buy from the manufacturer in one Member State to sell on to consumers in another Member State, undercutting the higher prices in that latter State. The result should be that prices settle down at broadly the same level so that, subject to transport costs, the price of a given brand of (say) computer equipment eventually becomes the same whether it is purchased in Manchester, Madrid or Munich.[51] The rules on free movement seek to prevent barriers to trade being maintained by Member States.[52] The competition rules may be seen as complementing those provisions by preventing such barriers being re-erected by private agreements, for example by a manufacturer prohibiting its distributors from supplying customers outside a defined territory.[53] Thus, parallel exports and imports enjoy a certain degree of protection in EU law because they encourage trade and help reinforce competition. The Court of Justice has stated that an

[48] cf Adam Smith: 'Although an individual undertaking striving to maximise profits intends only his own gain… he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention … By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it'. *The Wealth of Nations* (Cannan, ed, 1977), 477.

[49] See, eg Tirole, *The Theory of Industrial Organization* (1988); Scherer and Ross, *Industrial Market Structure and Economic Performance* (3rd edn, 1990); Motta, *Competition Policy: Theory and Practice* (2004); Carlton and Perloff, *Modern Industrial Organisation* (4th edn, 2005); Lipsey and Chrystal, *Principles of Economics* (12th edn, 2011).

[50] See generally, Bergh and Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edn, 2006); Bishop and Walker, *The Economics of EC Competition Law* (3rd edn, 2010); Niels, Jenkins and Kavanagh, *Economics for Competition Lawyers* (2011). For a historical perspective, see Gerber, *Law and Competition in Twentieth Century Europe* (2003).

[51] cf Cases 100/80, etc, *Musique Diffusion Française v Commission* ('the *Pioneer* case') [1983] ECR 1825, [1983] 3 CMLR 221.

[52] See para 1.036, below and in relation to intellectual property rights, Chap 9.

[53] See, eg Cases C-403&429/08 *Football Association Premier League v QC Leisure*, judgment of 4 October 2011, [2012] 1 CMLR 769, para 139; see similarly Cases 56&58/64 *Consten and Grundig v Commission* [1966] ECR 299, 340, [1966] CMLR 418, 471; Cases 96/82, etc, *IAZ International Belgium v Commission* [1983] ECR 3369, [1984] 3 CMLR 276, paras 23–27; Case C-306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983, [1998] 5 CMLR 172, paras 13–14; Case C-551/03P *General Motors v Commission* [2006] ECR I-3173, [2006] 5 CMLR 1, paras 67–69.

undertaking abuses its dominant position, contrary to Article 102 TFEU, if it engages in conduct which has the effect of limiting parallel trade.[54] Similarly, achievement of a truly integrated market would be hampered if a Member State were to subsidise its industries, and thereby hinder imports from other Member States or artificially stimulate exports to other Member States. The State aid rules, which are a particular feature of EU competition law, therefore play an essential role in furtherance of this fundamental objective.[55]

Competition policy and productivity. In 2000 the European Council adopted the so-called Lisbon Strategy in order to 'make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world'. This was followed by a second ten-year strategy, known as Europe 2020, which seeks to revive the economy of the EU. Europe 2020 aims in particular at 'smart, sustainable, inclusive growth'.[56] Competitive markets contribute to international competitiveness and economic growth. Competition places pressure on undertakings to increase their own efficiency and ensures that more efficient undertakings increase their market share at the expense of the less efficient. The European Commission has sought to pursue a pro-active competition policy[57] as a means of enhancing productivity and reversing the slowdown in the economic growth of the EU. **1.016**

Competition policy and the liberalisation of markets. The Commission has stressed the importance of liberalising markets, that is to say opening up to competition markets in which goods or services were previously supplied exclusively by a single, often State-owned, undertaking.[58] Electronic communications, the energy industries, transport and postal services have all been the subject of various EU legislative initiatives in this regard.[59] The Commission (and the national competition authorities) sees the enforcement of the EU competition rules, notably Article 102 TFEU, as essential in newly liberalised sectors to prevent former state monopolies from foreclosing access to the market.[60] The application of Article 106 TFEU is also important in this regard since it seeks to reconcile the EU objectives of competition and internal market freedoms on the one hand, with ensuring the provision of services of general economic interest on the other hand. The interpretation and application of Article 106 is discussed in Chapter 11. **1.017**

[54] See, eg Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367, [1976] 1 CMLR 95, para 12; Case 226/84 *British Leyland v Commission* [1986] ECR 3263, [1987] 1 CMLR 185, para 24; Cases C-468/06, etc, *Sot. Lélos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, [2008] 5 CMLR 1382, paras 65–66.

[55] See Chap 17 on State aids.

[56] Europe 2020, <http://ec.europa.eu/europe2020/index_en.htm>.

[57] See, eg Communication from the Commission on A Proactive Competition Policy for a Competitive Europe, COM(2004) 293 final, 20 April 2004; see also speech by Commissioner Kroes 'Competition Policy's Contribution to Growth and Jobs', 31 January 2006; speech by Commissioner Almunia, 'Competition, competitiveness, growth: a new impetus for the European Union', 9 April 2010, available on the DG Comp website.

[58] See XXth Report on Competition Policy (1990), point 53, and more recently, XXXIInd Report on Competition Policy (2002), points 74 et seq; XXXIIIrd Report on Competition Policy (2003), points 86 et seq; Report on Competition Policy 2005, points 36 et seq.

[59] See Chap 12 on the liberalisation of these sectors.

[60] For an eg of the interrelation of EU liberalising legislation and the application of the competition rules see *Deutsche Telekom*, OJ 2003 L263/9, [2004] 4 CMLR 790 (upheld on appeal, Case T-271/03 *Deutsche Telekom* [2008] ECR II-477, [2008] 5 CMLR 631 and on further appeal, Case C-280/08P *Deutsche Telekom* [2010] ECR I-9555, [2010] 5 CMLR 27).

(c) The interpretation of the EU competition rules

1.018 **A purposive interpretation.** When interpreting a provision of the Treaties or secondary EU legislation, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part.[61] The EU Courts' approach to the interpretation of the Treaties is to give effect to what they understand to be the Treaties' task or purpose, without, of course, placing an intolerable strain on language. This is sometimes referred to as adopting a 'teleological' or purposive interpretation.[62] For example, in *France v Commission*[63] the Court of Justice had regard to the purpose and general structure of the original EU Merger Regulation in support of its conclusion that it was capable of application to mergers that lead to several undertakings holding a collective dominant position. In *AC Treuhand v Commission*[64]—one of the appeals against the *Organic Peroxides* cartel decision—the General Court considered first the 'literal' interpretation of Article 101(1) TFEU and then the 'contextual and teleological' interpretation of that provision in holding that an undertaking could infringe the prohibition even if it was not itself active on the market affected. Any other 'interpretation might restrict the scope of the prohibition laid down in Article [101(1) TFEU] to an extent incompatible with its useful effect and its main objective'. Judge Kutscher, a former member of the Court of Justice, has summarised the correct approach to the interpretation of EU law as follows:

> 'You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connection with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration.'[65]

There is also a principle of construction, sometimes referred to as the *Marleasing* principle, according to which the national courts of the Member States should, when applying domestic legislation which is designed to implement EU legislation, interpret that legislation, so far as possible, in the light of the wording and purpose of a directive in order to comply with the obligations imposed by that EU legislation directive.[66]

[61] See Cases T-22&23/02 *Sumitomo v Commission* [2005] ECR II-4065, [2006] 4 CMLR 42, paras 41 et seq (in the case of divergence between the different language versions of a regulation, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part: para 46). *Sumitomo* also confirms that the same principles apply to interpreting EU secondary legislation: ibid, para 77, on which see also Case T-251/00 *Lagardère and Canal+ v Commission* [2002] ECR II-4825, [2003] 4 CMLR 20, paras 72 et seq. For a similar exercise in interpreting the corresponding provisions of the EEA Agreement, see Case E-8/00 *LO and NKF v KS* [2002] Rep EFTA Ct 114, [2002] 5 CMLR 160.

[62] See Schermers and Waelbroeck, *Judicial Protection in the European Union* (6th edn, 2001), paras 40 et seq. For an eg of purposive interpretation in a non-competition case, see Opinion 2/94 (n 35, above) para 29.

[63] Cases C-68/94&C-30/95 *France v Commission (Kali+Salz)* [1998] ECR I-1375, [1998] 4 CMLR 829, paras 152 et seq.

[64] Case T-99/04 *AC Treuhand v Commission* [2008] ECR II-1501, [2008] 5 CMLR 962, paras 115 et seq.

[65] Cross, *Statutory Interpretation* (3rd edn, 1995), 105–112, cited by Lord Steyn in *Shanning International v Lloyds TSB Bank* [2001] UKHL 31, [2001] 1 WLR 1462, para 24.

[66] Case C-106/89 *Marleasing v La Comercial* [1990] ECR I-4135, [1992] 1 CMLR 305, para 8; Cases C-397/01, etc, *Pfeiffer Deutsches Rotes Kreuz* [2004] ECR I-8835, [2005] 1 CMLR 1123. For discussion in the UK of the EU and domestic authorities on the correct approach to construing EU legislation, see *HM Revenue and Customs v Axa UK* [2011] EWCA Civ 1607 and the cases cited therein; the UK CAT in *T-Mobile*

Economics concepts and terms of art. Competition law is concerned with economic phenomena such as market structures and the behaviour of firms in a market. The interpretation and application of competition law often therefore requires consideration of economic learning and familiarity with economic concepts and terms of art, such as counterfactuals, foreclosure[67] and the use of economic models to predict behaviour in certain scenarios. The European Commission has published a guide to *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases*, describing the preferred content and presentation of economic and econometric data.[68] Further, mainstream economic thinking may inform the legal standard to be applied to the behaviour of firms and suggest why, for example, conduct that always, or almost always, tends to restrict competition should be unlawful or, alternatively, presumed unlawful.[69] **1.019**

The effectiveness of the competition rules. The EU Courts have been concerned to ensure that the competition rules are not interpreted in a manner that would deprive them of their effectiveness. For example, the Court of Justice relied on the principle of effectiveness to find that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101(1) TFEU.[70] The principle of effectiveness has also played an important role in the way in which the Court of Justice has interpreted and applied Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.[71] **1.020**

(d) The EU competition rules

Generally. Articles 101–109 TFEU constitute Chapter 1 of Title VII of the TFEU and set out rules which implement Article 3(3) TEU and Article 3(1)(b) TFEU.[72] They comprise two main sections, namely 'rules applying to undertakings' (Articles 101–106) and 'aids granted by States' (Articles 107–109). The full text is at Appendix A.2. **1.021**

v Office of Communications [2008] CAT 15, paras 80–86 (appeal dismissed, [2008] EWCA Civ 1373, [2009] 1 WLR 1565); *Office of Communications v Floe Telecom* [2009] EWCA Civ 47, [2009] UKCLR 659, paras 83–114: the *Marleasing* principle did not apply to the construction of a public mobile operator licence.

[67] eg when considering the effect on competition of vertical agreements or of a concentration between two undertakings in a vertical relationship.

[68] Best Practices: economic evidence, Vol II, App B17; also available on the DG Competition website and linked to Press Release IP/10/02 (6 January 2010).

[69] eg where a dominant undertaking sells at prices below cost, that is presumed to be unlawful in certain circumstances, in particular when it excludes competitors as efficient (or more efficient) than the dominant firm: see para 10.070, below.

[70] See, eg Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, [2001] 5 CMLR 1058, para 26; Cases C-295/04, etc, *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, [2006] 5 CMLR 17, paras 60–61; Case C-360/09 *Pfleiderer v Bundeskartellamt*, judgment of 14 June 2011, [2011] 5 CMLR 7, paras 29–32. On the enforcement of the competition rules in the national courts see generally Chap 16.

[71] See, eg Case C-429/07 *Inspecteur van de Bleastingdienst v X* [2009] ECR I-4833, [2009] 5 CMLR 12, paras 36–39 (powers of the Commission to submit written observations to a national court); Case C-439/08 *VEBIC* [2010] ECR I-12471, [2011] 4 CMLR 12, para 61 (ability of a national competition authority to participate in appeals against its decisions).

[72] See para 1.012, above.

1.022 **Article 101.** The first paragraph of Article 101 prohibits 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. The essential feature of Article 101(1) is that its application in any given case depends upon the economic object or effect of collusive behaviour by two or more undertakings. Article 101(2) provides that any agreements or decisions prohibited by Article 101(1) shall be automatically void. This has been interpreted by the Court of Justice to mean that only those provisions of the agreement which restrict competition contrary to Article 101(1) are void.[73] The doctrine of direct effect means that provisions of an agreement which are void by reason of Article 101(2) are unenforceable in the national courts of the Member States.[74] Article 101(3) provides that the prohibition may be declared to be inapplicable to agreements, decisions or concerted practices, or categories thereof, which contribute to improving the production or distribution of goods, or to promoting technical or economic progress, provided that they also allow consumers a fair share of the resulting benefit, only impose restrictions indispensable to achieving those objectives and do not permit the elimination of competition. Under the original system of enforcement of Article 101, under Regulation 17,[75] the European Commission had exclusive competence to apply Article 101(3) either by individual decision on particular agreements or by adopting regulations which applied Article 101(3) to categories of agreements satisfying the conditions set out in that provision. Individual decisions of the Commission applying Article 101(3) under that regime were commonly referred to as 'exemptions', although this word does not appear in the Treaty itself. The regulations exempting categories of agreements are known as 'block exemptions'. Since the regime under Regulation 1/2003[76] came into force on 1 May 2004, however, the Commission shares the competence to apply the whole of Article 101 (and 102) with the national competition authorities and national courts.[77] The term 'individual exemption' is therefore no longer apposite for the application of Article 101(3) under Regulation 1/2003. Instead, agreements or practices which are caught by Article 101(1), but which fulfil the conditions of Article 101(3) are lawful as from the time they were concluded, without the need for any prior decision.

1.023 **Article 102.** Article 102 provides that an abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited insofar as it may affect trade between Member States.[78] Whereas Article 101 prohibits various forms of illicit cooperation between undertakings, Article 102 prohibits abusive conduct by a single undertaking[79] (or occasionally several undertakings) with substantial market power. Articles 101 and 102 seek to achieve the same overarching aim, the maintenance of

[73] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, 250, [1966] CMLR 357, 376; Case 319/82 *Soc de Vente de Ciments et Bétons v Kerpen & Kerpen* [1983] ECR 4173, 4184–4185, [1985] 1 CMLR 511, 526–527.

[74] See Chap 16, below.

[75] Under Reg 17/62, OJ 1962 13/204; OJ Sp Ed 1959–62, 81: Vol II, App B1.

[76] Reg 1/2003, OJ 2003 L1/1: Vol II, App B2. See paras 1.067 et seq and Chap 13, below.

[77] Reg 1/2003, above, Art 3(1).

[78] See generally Chap 10, below.

[79] Note that an abuse may be committed through an agreement, such as an exclusive purchasing agreement, but the principal focus is upon the behaviour of the dominant firm in such cases.

effective competition within the internal market.[80] There is no equivalent to Article 101(3) providing an exception to the prohibition under Article 102.[81] The case law provides, however, dominant undertakings with the possibility of demonstrating an objective justification for their conduct, even if it appears, *prima facie*, to be an abuse.[82]

1.024 **Article 103.** Article 103 imposes upon the Council, acting on a proposal from the Commission and after consulting the European Parliament, the duty to adopt appropriate regulations[83] or directives[84] to give effect to the principles set out in Articles 101 and 102. Such regulations and directives may be designed in particular: (a) to ensure compliance with the prohibitions of Article 101(1) and Article 102 by making provision for fines and other penalty payments; (b) to lay down detailed rules for the application of Article 101(3); (c) to define the scope of Articles 101 and 102 'in various branches of the economy'; (d) to define the respective functions of the Commission and the Court of Justice of the European Union; and (e) to determine the relationship between national laws and EU competition law.

1.025 **Regulations and directives under Article 103.** The Council has exercised its power under Article 103 to make the five principal regulations establishing the current competition regime: Regulation 1/2003[85] sets out the general implementing provisions; Regulations 19/65, 2821/71, 1534/91, 169/2009, 246/2009 and 487/2009 enable the Commission to adopt block exemption regulations covering categories of agreements in various fields;[86] and Regulation 139/2004 sets out the regime for merger control.[87] These Regulations empower the Commission to make subordinate regulations. No directives have yet been adopted under Article 103.

1.026 **Articles 104 and 105.** Article 104 provided transitional provisions relating to the enforcement of Articles 101 and 102 pending the entry into force of measures taken under Article 103. Since all areas of the economy are now covered by the procedural rules laid

[80] Case 6/72 *Continental Can* (n 41, above) para 25; Case 66/86 *Ahmed Saeed* [1989] ECR 803, [1990] 4 CMLR 102; Case T-51/89 *Tetra Pak v Commission (Tetra Pak I)* [1990] ECR II-309, [1991] 4 CMLR 334.

[81] For the relationship between Arts 101(3) and 102, see *Tetra Pak I* (n 80, above) and paras 3.019 and 3.020, below.

[82] See, eg Case 311/84 *Centre Belge d'Etudes de Marche-Télémarketing v CLT* [1985] ECR 3261, [1986] 2 CMLR 558, para 27; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846, para 688.

[83] Regs made by the Council or the Commission have immediate legal effect. According to Art 288 TFEU, they are binding in their entirety and directly applicable in all Member States. By contrast, directives are addressed to, and binding upon, Member States as to the result to be achieved, but leave to the national authorities the choice of form and methods of achieving that objective.

[84] A national court is under a duty to construe its national law, so far as possible, to achieve the result pursued by a directive which that national law is intended to implement: see cases in n 66, above. Under the doctrine of 'vertical direct effect', certain directives can become binding on bodies that constitute 'emanations of the State' and thereby confer rights on private individuals and other non-State undertakings, but they cannot impose obligations on private undertakings until incorporated into national law: see Case 152/84 *Marshall* [1986] ECR 723, [1986] 1 CMLR 688; Cases C-6&9/90 *Francovich v Italian Republic* [1991] ECR I-5357, [1993] 2 CMLR 66; and in England, *R v Durham County Council, ex p Huddleston* [2000] 1 WLR 1484. See further Prechal, *Directives in EC Law* (2nd edn, 2005).

[85] Replacing Reg 17/62. See paras 1.067 et seq, below.

[86] See Chap 3, below.

[87] Reg 139/2004, OJ 2004 L24/1: Vol II, App D1, replacing Reg 4064/89, OJ 1989 L395/1. For EU merger control generally see Chap 8, below.

down in Regulation 1/2003, Article 104 has become otiose.[88] Article 105 provides that the Commission 'shall ensure the application of the principles laid down in Articles 101 and 102'. It also set up some machinery for the Commission to investigate infringements in the absence of implementing legislation that empowers the Commission directly to enforce the competition rules.

1.027 **Article 106.** The purpose of Article 106 is to ensure that Member States do not adopt measures which favour undertakings in the public sector of the economy or on whom the State has conferred special rights. It differs from Articles 101 and 102 in being addressed to Member States rather than to undertakings, although a breach of the rules contained in the Treaties (the TEU and/or the TFEU) by an undertaking is an essential component in any breach of Article 106. Article 106(2) provides that undertakings entrusted with the operation of services 'of general economic interest' or 'having the character of a revenue-producing monopoly' are subject to the competition rules only insofar as the application of those rules 'does not obstruct the performance in law or fact of the particular tasks assigned to them'. Article 106(3) requires the Commission to ensure the application of the provisions of Article 106 and, where necessary, to address appropriate directives or decisions to Member States. The application of Article 106 is discussed in Chapter 11, below.

1.028 **Articles 107–109.** Since 'State aid generally means a conflict of interests between the recipient economic agents and their competitors in other Member States',[89] Article 107(1) declares incompatible with the internal market, insofar as it affects trade between Member States, 'any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods'. Article 109 empowers the Council to make regulations for the application of the State aid provisions in Articles 107 and 108. Under this provision, the Council adopted Regulation 994/98 which enables the Commission to adopt block exemption regulations for State aids, and Regulation 659/99 which sets out general procedural rules for State aid notifications.[90] Article 107, and the ancillary provisions in Articles 108 and 109, are considered in Chapter 17, below.

(e) Other provisions of the TEU and TFEU

1.029 **Article 4(3) TEU: the duty of sincere cooperation.** The signatories to the Treaties are, of course, the Member States and they have each taken appropriate steps to incorporate the provisions of the Treaty into national law. In addition to the various specific requirements of the Treaties, Article 4(3) TEU provides:

> 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

[88] Air transport between EU and third country airports was brought within the general regime by an amendment to Reg 1/2003 in Reg 411/2004, OJ 2004 L68/1; international tramp vessels and intra-Member State maritime transport were brought within Reg 1/2003 by Reg 1419/2006, OJ 2006 L269/1.

[89] 1st Report on Competition Policy (1971), point 133.

[90] Reg 994/98, OJ 1998 L142/1: Vol II, App G9; Reg 659/1999, OJ 1999 L83/1, as amended by Act of accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ 2003 L236/345: Vol II, App G1, both discussed in Chap 17, below.

> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'[91]

The Court of Justice has invoked the principle of sincere cooperation on many occasions.[92] In *Deutsche Grammophon v Metro-SB-Grossmärkte*[93] the Court recognised the provision as laying down 'a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme'.[94] In the context of competition law, Article 4(3) TEU is relevant to, amongst other matters, the exercise by the Member States of their parallel jurisdiction to enforce competition law under Regulation 1/2003; the way in which they observe the 'one-stop shop' principle enshrined in the EU Merger Regulation 139/2004;[95] whether they may enforce laws which detract from the principle of the free movement of goods or which distort competition within the internal market;[96] the remedies available in national law for breach of EU law;[97] and their cooperation with the Commission in the implementation of a State aid decision.[98] Although Article 101 is addressed only to undertakings and not to Member States, the Court of Justice has applied Article 4(3) TEU in conjunction with Article 101 to place on Member States an obligation not to give legislative effect to anti-competitive agreements concluded by undertakings in breach of that Article.[99] This is considered further in Chapter 11, below.

Article 5 TEU: principle of conferral. Article 5(1) TEU provides that the Union competences are governed by the principle of conferral. Article 5(2) defines this concept as follows: **1.030**

> 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

[91] Art 4(3) TEU contains much of what was formerly in Art 10 EC though the new article refers expressly to the principle. For the significance of this principle in competition law see, eg *Ahmed Saeed* (n 80, above); Case C-185/91 *Reiff* [1993] ECR I-5801, [1995] 5 CMLR 145; Case C-153/93 *Delta Schiffarts und Speditionsgesellschaft* [1994] ECR I-2517, [1996] 4 CMLR 21; Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, [2004] 4 CMLR 14 (upheld on appeal, Case C-552/03P *Unilever Bestfoods v Commission* [2006] ECR I-9091, [2006] 5 CMLR 1460); Case C-209/00 *Commission v Germany* [2002] ECR I-11695 (recovery of State aid); Case C-429/07 *Inspecteur van de Bleastingdienst v X* [2009] ECR I-4833, [2009] 5 CMLR 12, paras 20 and 21 (tax-deductibility of fines for infringement).

[92] See, eg Case 68/88 *Commission v Greece* [1989] ECR 2965, [1991] 1 CMLR 31, paras 22–28; Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255, [1983] 2 CMLR 726, para 37; Case C-2/88 *Zwartveld* [1990] ECR I-3365, [1990] 3 CMLR 457; Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935, [1992] 5 CMLR 210; Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369, [2001] 4 CMLR 449, paras 55–60.

[93] Case 78/70 *Deutsche Grammophon v Metro-SB-Grossmärkte* [1971] ECR 487, [1971] CMLR 631.

[94] *Deutsche Grammophon v Metro-SB-Grossmärkte*, above, para 5.

[95] See, eg the judgment of the UK CAT in *Ryanair Holdings v Office of Fair Trading* [2011] CAT 23, paras 46–106 (upheld on appeal [2012] EWCA Civ 643).

[96] For the enforceability of the laws of Member States see Chap 11, below.

[97] For the duty of national courts to ensure that the rights granted under EU law are fully effective, and the effect of this on civil remedies for breaches of Arts 101 and 102, see Chap 16, below.

[98] Case C-441/06 *Commission v France* [2007] ECR I-8887.

[99] See, eg Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* [2003] ECR I-8055, [2003] 5 CMLR 829, paras 45 et seq.

An important corollary of this principle is that the Union is not endowed with general law-making competence to carry out the tasks and activities identified by Articles 3 and 4 TFEU.[100] Where action by the Union is contemplated in a given field, it is normally necessary to identify a specific provision authorising the institutions to adopt measures of the kind in question. The forerunner of Article 5(2) of the TEU (ie Article 5 EC) was relied on by the Court of Justice in holding that the EU did not have competence to accede to the European Convention on Human Rights.[101] This has since been remedied by the Treaty of Lisbon and the enactment of Article 6 TEU.

1.031 **Article 5 TEU: principle of subsidiarity.** Article 5(1) of the TEU also provides that the use of Union competences is governed by the principles of subsidiarity and proportionality.[102] Article 5(3) of the TEU provides:

> 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

The institutions of the Union must apply the principles of subsidiarity in accordance with the procedural requirements of Protocol 2 to the TEU and TFEU on the application of the Principles of Subsidiarity and Proportionality.[103] This Protocol requires, in particular, that draft legislative acts should be accompanied by a detailed statement explaining why the draft complies with the principle of subsidiarity and should be sent to national Parliaments. The European Parliament, the Council and the Commission must take account of the reasoned opinions issued by national Parliaments on compliance with the principle of subsidiarity.

1.032 **The principle of subsidiarity in EU competition law.** As the EU competition rules concern a matter within the Union's exclusive competence, it is arguable that subsidiarity in the strict sense has no application to EU competition law at all. However, subsidiarity has come to embrace a broader concept, indicated in the preamble to the TEU, that expresses the resolution of the Member States that 'decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.[104] In *GlaxoSmithKline v Commission*[105] the General Court stated that, in the context of Article 101(1), the principle

[100] For an example of an EU measure annulled for lack of legal base see Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 (Directive banning cigarette advertising).

[101] Opinion 2/94 (n 35, above).

[102] See Craig, *EU Administrative Law* (2006), 419–428. For application of the principles, see, eg Case C–491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments)* [2002] ECR I-11453, [2003] 1 CMLR 395, paras 177–185; Case T-253/02 *Ayadi v Council* [2006] ECR II-2139, paras 105 et seq, on appeal, Cases C-399&403/06P *Hassan v Council* [2009] ECR I-11393, [2010] 2 CMLR 493.

[103] Art 5(3) TEU. The Protocol is published at OJ 2010 C83/206.

[104] See also Case C-58/08 *Vodafone v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999 (finding that Reg 717/2007, on roaming on public mobile telephone networks within the EU, did not infringe the principle of subsidiarity).

[105] Case T–168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, [2006] 5 CMLR 1589, paras 201 et seq (appeal on other grounds dismissed, Cases C-501/06P, etc, *GlaxoSmithKline Services* [2009] ECR I-9291, [2010] 4 CMLR 50); Cases T–259/02, etc, *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169, [2007] 5 CMLR 1142, para 162 (appeal dismissed, Cases C-125/07P, etc, *Erste Bank der Österreichischen Sparkassen* [2009] ECR I-8681, [2010] 5 CMLR 443). In Case T-65/98 *Van den Bergh Foods* (n 91, above) paras 197–198, the GC rejected an argument that the Commission's proceedings commenced in parallel with a case pending in the Irish High Court offended against the principle of subsidiarity

of subsidiarity 'is given concrete form' by the limitation of the prohibition to agreements which may affect trade between Member States. If this Treaty requirement is satisfied then it is appropriate for the Union to take action and where that action takes the form of a Commission decision, the Commission complies with the principle of subsidiarity if it establishes to the requisite legal standard that trade between Member States is capable of being affected by the conduct it is examining. Recital 34 in the preamble to Regulation 1/2003 refers to Article 5 TEU in describing the enhanced role of national competition authorities in the enforcement of EU competition law.

Article 5 TEU: principle of proportionality. Article 5(1) TEU states that the use of Union competences is governed by the principle of proportionality.[106] According to Article 5(4) TEU, under the principle of proportionality 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The Court has consistently held that the principle of proportionality is one of the general principles of EU law.[107] The Court of Justice summarised the relevant law in relation to proportionality as follows: **1.033**

> 'the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.'[108]

This formulation of the principle is expressed in terms of a limit on legislation, but it is equally applicable to administrative action.[109] The principle requires that measures implemented through EU action must be appropriate for attaining the objective pursued and not go beyond what is necessary to achieve it. Article 7 of Regulation 1/2003 expressly states that the Commission may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement of Articles 101 and 102 TFEU effectively to an end.

Article 3 TFEU: areas of Union competence. Article 3 TFEU lists the areas in which the Union has exclusive competence, including the 'establishing of the competition rules necessary for the functioning of the internal market'. It follows that only the Union may **1.034**

holding that the direct effect of Arts 101 and 102 'does not mean that the Commission has no right to adopt a position in a case, even though an identical or similar case is pending before one or more national courts, provided in particular that trade between Member States is capable of being affected'. Various aspects of the case indicated, in the GC's view, that the issues dealt with had a wider EU importance.

[106] The institutions of the Union must apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality: Art 5(4) TEU.

[107] See, eg Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments)* [2002] ECR I-11453, [2003] 1 CMLR 395, para 122; Case C-479/04 *Laserdisken v Kulturministeriet* [2006] ECR I-8089, [2007] 1 CMLR 187, para 53; and in the context of judicial control of an inspection by the Commission, *Roquette Frères* (n 46, above) paras 71–80.

[108] Case C-331/88 *R v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p Fedesa* [1990] ECR I-4023, [1991] 1 CMLR 507, para 13.

[109] See, eg Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 144 (administrative provisions concerning the advertising and sponsorship of tobacco products); and in the context of competition law, Case C-202/06P *Cementbouw v Commission* [2007] ECR I-12129, [2008] 4 CMLR 17, para 52 (merger control proceedings); Case C-441/07P *Commission v Alrosa* [2010] ECR I-5949, [2010] 5 CMLR 11, paras 36–37 (commitments decn under Art 9 of Reg 1/2003).

legislate and adopt legally binding acts in relation to the competition rules, unless the Union empowers the Member States to do so.[110]

1.035 Article 18 TFEU: non-discrimination. Article 18 of the TFEU provides:

> 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

The general principle of non-discrimination on grounds of nationality does not apply to disparities in treatment which result solely from divergences existing between the laws of Member States.[111] Article 18 prevents Member States from applying their national laws (for example, national competition laws) differently according to the nationality of the parties concerned.[112]

1.036 Articles 34–36 TFEU: free movement of goods. At the heart of the EU is a customs union.[113] Articles 28–32 TFEU require the abolition between Member States of all customs duties and charges having equivalent effect and the creation of a common external tariff to be uniformly applied in trade between Member States and third countries.[114] However, the abolition of customs barriers within the Union is not sufficient in itself to create a true internal market because Member States could still limit imports or exports by establishing quotas or by adopting a multitude of other measures. Accordingly, Articles 34 and 35 TFEU prohibit, subject to Article 36, all 'quantitative restrictions and measures having equivalent effect' on imports and exports between Member States. There is no need to show an appreciable effect on trade under Article 34,[115] unlike Article 101.[116] Article 36 safeguards, amongst other things, intellectual property rights, which, owing to their territorial nature, inevitably create obstacles to the free movement of goods.[117] In order to be excluded from the prohibition in Article 34, a restriction must be 'justified' within the meaning of Article 36 and must not constitute a 'means of arbitrary discrimination or a disguised restriction on trade between Member States'. Articles 34–36 TFEU have 'direct effect', that is to say, these provisions can be relied on by individuals (and companies) before national courts in order to challenge the compatibility of national laws with

[110] Art 2(1) TFEU.

[111] Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 1, [1969] CMLR 100, para 13. See also *GlaxoSmithKline Services* (n 105, above) para 174 (national disparities in regulation of the pharmaceuticals market meant that sales to distributors in different Member States were not equivalent transactions for the purposes of Art 101(1)(d) TFEU); Cases C-468/06, etc, *Sot. Lélos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, [2008] 5 CMLR 1382, (the circumstances in which a dominant undertaking can lawfully refuse to fulfil orders by a wholesaler who engages in parallel trading under Art 102).

[112] *Wilhelm*, above.

[113] See generally Oliver (ed), *Free Movement of Goods in the European Union* (5th edn, 2010); Craig and de Búrca, *EU Law: Text, Cases and Materials* (5th edn, 2011), Chap 19. See also *Free movement of goods: Guide to the application of Treaty provisions governing the free movement of goods* (2010) available on the DG Enterprise website.

[114] But note also the extension of these provisions under the EEA Agreement to cover the European Economic Area: para 1.091, below.

[115] Case 16/83 *Prantl* [1984] ECR 1299, [1985] 2 CMLR 238, para 20; Cases 177&178/82 *Van de Haar* [1984] ECR 1797, [1985] 2 CMLR 566. See also Case C-67/97 *Bluhme* [1998] ECR I-8033 (restriction covering only a small and remote Danish island fell within Art 34).

[116] For the *de minimis* doctrine under Art 101(1), see paras 2.156 et seq, below.

[117] See, eg Case 144/81 *Keurkoop v Nancy Kean Gifts* [1982] ECR 2853, 2873, [1983] 2 CMLR 47, 83. The effect of Arts 34–36 TFEU on the exercise of patent, trade mark and similar rights is discussed in Chap 9, below.

EU law.[118] It is often the case that private actions may simultaneously invoke alleged infringements of the free movement rules and the competition rules, although the limits of EU law are different under each set of rules.[119]

Article 37 TFEU: State monopolies. Article 37 TFEU complements Articles 34–36 by requiring the adjustment of certain state monopolies of a commercial character so as to eliminate discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed. Article 37 is discussed in Chapter 11, below. **1.037**

Other relevant Treaty provisions. Other substantive provisions of the TFEU which may be relevant to the application of the competition rules include those establishing the common agricultural and fisheries policy (Articles 38–44) and the common transport policy (Articles 90–100), discussed briefly in Chapter 12, below; and the provisions concerning the promotion of pan-European networks in the fields of transport, electronic communications and energy, also referred to in Chapter 12, below. Article 167(4) TFEU (formerly Article 151 EC) provides that in its action under other provisions of the Treaties, the Union shall take cultural aspects into account, 'in particular in order to respect and to promote the diversity of its cultures'. In *CISAC*[120] the Commission rejected a submission that its decision, condemning territorial restrictions in licences granted by collecting societies, was likely to harm cultural diversity. Article 191 TFEU (formerly Article 174 EC) sets out the objectives of Union policy on the environment which, although that provision does not contain an equivalent exhortation to Article 167(4), are now taken into account in dealing with environmental agreements under the competition rules.[121] Article 346 TFEU (formerly Article 296 EC) allows a Member State to derogate from other provisions of the Treaties on matters affecting its essential interests of national security, including weapons production; that provision is of particular relevance in merger control.[122] Application of this derogation is strictly construed and is subject to review by the Court of Justice.[123] Also relevant on occasion are the taxation provisions (Articles 110–113) which prohibit discriminatory taxation[124] and provide for the harmonisation of VAT and other taxes. Article 207, **1.038**

[118] The question whether Arts 34–36 may be invoked against private acts of individuals unconnected with State measures seems to have been answered in the negative in Case 65/86 *Bayer v Süllhöfer* [1988] ECR 5249, [1990] 4 CMLR 182; see also Case 311/85 *VVR v Sociale Dienst* [1987] ECR 3801, [1989] 4 CMLR 213, para 30.

[119] See, eg Case C-519/04P *Meca-Medina v Commission* [2006] ECR I-6991, [2006] 5 CMLR 1023, para 33; *Football Association Premier League* (n 53, above).

[120] COMP/38698 *CISAC*, decn of 16 July 2008, [2009] 4 CMLR 577, para 95 (on appeal Cases T-398, 410, 411, 413–422, 425, 432, 434, 442, 451/08, etc, *Stowarzyszenie Autorów ZAiKS v Commission*, not yet decided). On the application of Art 167(4) TFEU see also *Laserdisken* (n 107, above) (Dir 2001/29 took into account the cultural aspects specific to the Member States and the right to education); Case C-531/07 *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft* [2009] ECR I-3717, [2009] 3 CMLR 972 (protection of books as cultural objects may be an 'overriding requirement' in the public interest capable of justifying measures restricting the free movement of goods).

[121] Note also Art 3(3) TEU and Art 4(2)(e) TFEU. See *CECED*, OJ 2000 L187/47, [2000] 5 CMLR 635, where the Commission decided that the conditions of Art 101(3) were fulfilled largely because of the environmental benefits expected from the agreement. See also the Commission's Horizontal Cooperation Guidelines, OJ 2011 C11/1: Vol II, App C17, paras 12, 329, 331 and 332.

[122] See paras 8.105 and 11.061, below.

[123] On reference by the Commission or another Member State under Art 348 TFEU. Note also Art 347 TFEU re serious internal civil disturbance within a Member State.

[124] See, eg Case 170/78 *Commission v United Kingdom (the 'beer and wine' case)* [1980] ECR 417, [1980] 1 CMLR 716; and [1983] ECR 2265, [1983] 3 CMLR 512.

which is part of the common commercial policy established under Title II, provides the legal basis for the control of dumping into the Union.[125] Treaties with third countries are made under Articles 207(3) and 218. The social policy of the Union, which may also be relevant in certain competition cases, is governed principally by Articles 151–161, which should be read in conjunction with the provisions on free movement of workers in Articles 45–48.[126]

1.039 **International agreements.** A further source of law or guidance is provided by certain international conventions to which the Member States and the Union itself are parties. These include the Convention on the World Intellectual Property Organisation,[127] the EU Patent Convention,[128] and the World Trade Organisation ('WTO') Agreement.[129] Where a Member State, but not the Union itself, is party to an agreement with one or more third countries, the provisions of the Treaties shall not affect that State's obligations under the agreement if the agreement was concluded before 1 January 1958 (the date on which the Rome Treaty entered into force) or that State's accession to the Union.[130] However, Member States cannot rely on the terms of an international convention to justify restrictions between themselves that are contrary to the Treaties.[131] Similarly, Member States cannot set aside the provisions of the Treaties by entering into international agreements or conventions which contain terms in conflict with their Union obligations.[132] Although an international agreement does not prevail over primary EU law, the Court of Justice has stated that measures of secondary EU legislation must be interpreted in the light of binding international agreements concluded by the Union.[133]

4. The Institutional Structure of the EU

(a) The EU institutions

1.040 **The institutions of the EU.** Article 13(1) TEU states that the Union's institutions shall be: (a) the European Parliament; (b) the European Council; (c) the Council; (d) the European

[125] Dumping is outside the scope of this work: see, eg Van Bael and Bellis, *EU Anti-Dumping and other Defence Trade Instruments* (5th edn, 2011).

[126] The social provisions were relied on by the CJ to conclude that collective labour agreements concerning conditions of work and employment fall outside the scope of Art 101(1): see para 2.051, below. Employment consequences may also be relevant, eg to the application of Art 101(3): Case 26/76 *Metro v Commission* [1977] ECR 1875, [1978] 2 CMLR 1, para 43; Case 42/84 *Remia v Commission* [1985] ECR 2545, [1987] 1 CMLR 1, para 42. See also the Irish Supreme Court in *Competition Authority v Beef Industry Developments Society* [2009] IESC 72.

[127] See, eg in the field of intellectual property: see para 9.001, below.

[128] Art 118(1) TFEU envisages the creation of uniform patent protection throughout the EU and the establishment of centralised EU-wide authorisation, coordination and supervision arrangements. For details of the proposed legislation on implementing enhanced cooperation in the area of the creation of unitary patent protection see the DG Markt website.

[129] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846, paras 798–802 (rejecting the argument that Art 102 must be interpreted consistently with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994).

[130] Art 351 TFEU. The Art goes on to provide that the Member State must 'take all appropriate steps to eliminate the incompatibilities established'.

[131] Case 121/85 *Conegate v HM Customs & Excise* [1986] ECR 1007, [1986] 1 CMLR 739; Cases C-241&242/91P *RTE and ITP v Commission* ('*Magill*') [1995] ECR I-743, [1995] 4 CMLR 718, paras 72 et seq.

[132] *Magill,* above; see also Case T-201/04 *Microsoft* (n 129, above) para 798.

[133] Case C-61/94 *Commission v Germany* [1996] ECR I-3989, [1997] 1 CMLR 281, para 52.

Commission; (e) the Court of Justice of the European Union; (f) the European Central Bank; and (g) the Court of Auditors.[134] The activities of the Union are financed from the Union budget which is in turn financed by a variety of sources including a percentage of the VAT collected by Member States. Fines paid for infringements of the competition rules also contribute to the Union budget.

The official languages of the EU. When the European Economic Community (as it was then known) came into being in 1958, there were four official languages and 15 staff interpreters employed. At 31 December 2011 there were 23 official languages[135] and a staff of 500 permanent interpreters and 300–400 freelance interpreters used each day. A meeting conducted in 23 official languages requires 60 interpreters to achieve 'total symmetry', that is translation into and out of each language. The translation of written material is carried out by a permanent staff of some 1650 linguists based in Brussels and Luxembourg.[136] Provisions of EU law are not binding on the citizens of a Member State until they have been published in that State's official language in the *Official Journal*, even if versions in that language were available earlier on the internet.[137] **1.041**

The European Parliament. The Members of the European Parliament ('MEPs') are directly elected in elections held throughout the Union every five years.[138] There are currently 736 MEPs,[139] who sit in party political groups and not as national delegations. The Parliament sits in three cities: its official seat is in Strasbourg; the Secretariat of the Parliament is located in Luxembourg; and its committee meetings take place in Brussels. The importance of the European Parliament has been considerably enhanced by successive amendments to the Treaties. In particular, through the so-called 'co-decision' procedure, the Parliament has a substantive role alongside the Council of Ministers in adoption of legislation in certain areas. The relevant provisions of the TFEU are complex and beyond the scope of this work, but the areas of co-decision include the internal market and consumer affairs.[140] The European Parliament is also empowered to appoint an Ombudsman able to investigate suspected maladministration in the activities of the EU institutions.[141] The **1.042**

[134] The TFEU also establishes a European Investment Bank: Arts 308–309 TFEU. For further discussion of the European Central Bank and the European Investment Bank, see, Lenaerts, Van Nuffel, Bray and Cambien, *European Union Law* (3rd edn, 2011). For a 'who's who' of the Union institutions, see *European Union & Public Affairs Directory 2012* (Dods, 2011).

[135] The official languages are: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

[136] For the relevance of the language skills of the Commission's services handling a particular case file see, eg Case C-328/05P *SGL Carbon v Commission* [2007] ECR I-3921, [2007] 5 CMLR 16, paras 70–74. See also Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, [1970] CMLR 43, paras 49–50; Case T-151/05 *Nederlandse Vakbond Varkenshouders v Commission* [2009] ECR II-1219, [2009] 5 CMLR 1613, para 211 (the fact that an administrative meeting was not conducted in the parties' preferred language does not breach the parties' rights of the defence unless the party can show that they were prejudiced by this).

[137] Case C-161/06 *Skoma-Lux v Celní Editelství Olomouc* [2007] ECR I-10841, [2008] 1 CMLR 1336 (however, legal certainty required that this should not affect the validity of national decisions taken pursuant to those EU provisions, with the exception of decisions which were the subject of administrative or judicial proceedings at the date of the CJ's judgment).

[138] See, generally Arts 14 TEU and Arts 223–234 TFEU.

[139] The maximum number is limited to 750 and each Member State will have between six and 96 members.

[140] See Art 294 TFEU and Hartley, *The Foundations of European Union Law* (7th edn, 2010), 43–47.

[141] Art 228 TFEU.

nomination for appointment as the President of the Commission and of the Commissioners as a body must be approved by vote of the Parliament[142] and the Commissioners as a body must resign if the Parliament passes a vote of censure by a two-thirds majority.[143] The Council and the Commission have a duty to give oral or written answers to questions put by MEPs.[144] Parliamentary Committees (principally the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs) examine draft European legislative acts proposals, as do national Parliaments.[145] National Parliaments have a specific role for reviewing the compatibility of draft legislative acts with the principles of subsidiarity and proportionality, as laid down in Article 5 TEU.[146]

1.043 **The European Council.** The European Council comprises the Heads of State or Government of the Member States, its President and the President of the Commission. Article 15(1) TEU states that the European Council shall define 'the general political directions and priorities' of the Union. The European Council meetings (sometimes referred to as 'Summits'), take place twice every six months, convened and chaired by its President. The permanent office of the President of the European Council was created by the Treaty of Lisbon. The President is required to 'drive forward' the work of the European Council, which generally takes decisions by consensus. The President is also responsible for the external representation of the Union on issues concerning its common foreign and security policy.[147] The European Council, acting by a qualified majority, with the agreement of the President of the Commission, appoints the High Representative of the Union for Foreign Affairs and Security Policy.[148] The High Representative is responsible for conducting the Union's common foreign and security policy.[149]

1.044 **The Council of the European Union.** The Council of the European Union ('the Council'), more commonly known as the Council of Ministers, consists of one representative of each Member State at ministerial level.[150] The Presidency of the Council can carry considerable political influence, in particular since the President sets the agenda of Council meetings. The Presidency rotates every six months among the Member States in alphabetical order.[151] The Council is variously 'configured' depending on the subjects under discussion and may at any one time consist of, for example, foreign, agricultural or finance ministers.

[142] Arts 17(3) and 17(7) TEU.

[143] Art 17(8) TEU and Art 234 TFEU. The threat of such a vote prompted the resignation of the Santer Commission in 1999. For the effect of this mass resignation on the Commission's decision-making power in a competition case, see Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, para 55 (appeal on other grounds dismissed, Case C-95/04P *British Airways* [2007] ECR I-2331, [2007] 4 CMLR 982).

[144] Art 197 TFEU.

[145] Protocol 1 on the Role of National Parliaments in the European Union which can be found at OJ 2010 C83/203.

[146] Protocol 2 on the application of the Principles of Subsidiarity and Proportionality.

[147] Art 15(6) TEU.

[148] Art 18(1) TEU.

[149] Art 18(2) TEU.

[150] See Art 16 TEU and Arts 290–291 TFEU. The Council of the European Union is not to be confused with the Council of Europe, an organisation of European States founded on 5 May 1949 through which was established the European Convention for the Protection of Human Rights and Fundamental Freedoms: para 1.009, above; nor with the European Council, which consists of Heads of Government of the Member States: para 1.043, above.

[151] See Council Decn of 1 January 2007 determining the order in which the office of President of the Council shall be held, OJ 2007 L1/11.

Functions of the Council. The Council is the primary legislative body of the Union and carries out policymaking and coordinating functions as laid down in the Treaties. The Council has a duty to exercise, jointly with the European Parliament, legislative and budgetary functions.[152] The Council typically acts on a proposal from the European Commission and in association with the European Parliament, either through the consultation procedure (as in the areas of agriculture, judicial and police cooperation, and taxation) or through co-decision (as in relation to the internal market). The Council acts either unanimously or by a qualified majority, depending on the Treaty provision in question.[153] Under Article 103 TFEU,[154] the Council is charged with the duty, acting by a qualified majority on a proposal from the Commission, and after consulting the European Parliament, to adopt appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. **1.045**

The European Commission. The Commission is the executive of the EU. The Commission consists of 27 members (one Commissioner per Member State) until 31 October 2014.[155] From 1 November 2014 the Commission shall consist of a number of members corresponding to two-thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.[156] The Commission is led by its President, who is proposed by the European Council and elected by the European Parliament. The remaining Commissioners are chosen by the Council, by common accord with the President of the Commission, and then the Commission, as a body, is subject to a 'vote of consent' by the European Parliament.[157] The Commission, as a body, is responsible to the European Parliament.[158] **1.046**

The functions of the Commission. The Commission is responsible for promoting the general interest of the Union and taking appropriate initiatives to that end.[159] The Commission's legislative functions include making proposals for measures to be enacted by the Council and by the European Parliament and exercising the powers conferred on it by the Council to implement Council regulations.[160] Article 17(1) TEU provides that the Commission is charged with ensuring the application of the TEU and TFEU and of measures adopted by the Union institutions pursuant to them. That duty applies in the field of competition as in other fields, as is made clear by Article 105 TFEU.[161] The Commission oversees the application of Union law, in particular by taking its own decisions, subject to review by the Court of Justice of the European Union. The taking of decisions by the **1.047**

[152] Art 16(1) TEU.
[153] Art 16(3) TEU states that the Council shall act by a qualified majority 'except where the Treaties provide otherwise'. For the definition of a qualified majority, see Art 16(4) TEU.
[154] See para 1.024, above.
[155] Art 17(4) TEU.
[156] Art 17(5) TEU.
[157] Art 17(7) TEU.
[158] Art 17(8) TEU; on a European Parliament motion of censure of the Commission see n 143, above.
[159] Art 17(1) TEU.
[160] Art 17(1) TEU. The Commission also has powers to enact directives under Art 106(3): see paras 11.024 et seq, below.
[161] See, eg *Delimitis* (n 92, above) para 44; Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369, [2001] 4 CMLR 449, para 46.

Commission is governed by its own Rules of Procedure.[162] The Commission acts 'as a college' when taking decisions. All members of the Commission bear collective responsibility at the political level for all decisions and actions taken. That principle of collegiality must be reconciled with the Commission's duty to ensure that its work is carried out in a timely manner. Given the large number of decisions that the Commission must consider, the power to adopt binding administrative acts in the name of the Commission may be delegated to a Commissioner.[163] The Commission is of central importance to the enforcement of EU competition law and the Directorate-General of Competition, its services responsible for competition policy, is discussed further below.

1.048 **The services of the Commission.** The Commission is supported by the services of the Commission, a permanent staff of about 23,000. The Commission includes a Secretariat-General and a Legal Service, which are both responsible directly to the President of the Commission. The Legal Service advises the Commission, checks on the legality of its decisions and represents the Commission before the Court of Justice of the European Union. The work of the Commission is carried out by Directorates-General and specialised services, for each of which a particular Commissioner has responsibility. At the time of writing, the Commissioner responsible for Competition is Vice-President Joaquín Almunia.

(b) The EU legislative process

1.049 **Procedure for adopting EU legislation.** The Commission, the Council and the European Parliament play an important role in the formulation and enactment of secondary legislation giving effect to Articles 101 and 102 TFEU. The process required for adopting a given piece of legislation will depend on the nature of what is being proposed and the particular field of EU law. It can, however, be usefully illustrated by considering the steps that culminated in the adoption of Council Regulation 1/2003.[164] The process began informally with the publication by the Commission, on 28 April 1999 of a White Paper on modernisation of the rules implementing Articles 101 and 102.[165] The Commission's proposals in that White Paper included the abolition of the system of notification of agreements for exemption and an enhanced role for national competition authorities and courts in the enforcement of EU competition law. The Commission received responses from companies, trade associations, law firms, academics, and from the institutions of the EU and of the Member States. The Commission sought the views of the European Parliament[166] and

[162] Art 249 TFEU. See, eg Case C-137/92P *BASF v Commission* [1994] ECR I-2555 (failure to authenticate the *PVC* cartel decision, in accordance with the Commission's Rules of Procedure, led to annulment of the decision for infringement of an essential procedural requirement). For the current Rules see Commission decn of 24 February 2010, OJ 2011 L55/60.

[163] See, eg Cases 43&63/82 *VBVB and VBBB v Commission* [1984] ECR 19, [1985] 1 CMLR 27; Case 5/85 *Akzo v Commission* [1986] ECR 2585, [1987] 3 CMLR 716 (the fact that a decn ordering an investigation was adopted by the Commissioner for Competition alone did not contravene the principle of collegiate responsibility as there had been valid delegation of authority to the Commissioner and it had been exercised properly).

[164] See para 1.067, below.

[165] White Paper, OJ 1999 C132/1, [1999] 5 CMLR 208; see the Commission's XXXth Report on Competition Policy (2000), points 37–67.

[166] Report on the Commission White Paper on modernisation of the rules implementing Articles [101 and 102 of the TFEU], Final A5–0069/1999 available as a Plenary Report from the archive section of the European Parliament's website 1999–2004 session and in part at OJ 2000 C304/66.

the European Economic and Social Committee,[167] which published opinions supporting the Commission's proposals. The Commission then prepared a Proposal for a Council Regulation to replace Regulation 17, published in September 2000.[168] The legal base for the proposed regulation was Article 83 EC (now Article 103 TFEU). This provides that regulations shall be laid down by the Council on a proposal from the Commission and after consulting the Parliament.[169] The Council then referred the matter to the European Parliament and the European Parliament in turn sought reports from three standing committees of the Parliament. The Parliament debated the reports of those committees and adopted a text setting out various proposed amendments to the Commission's draft.[170] The European Economic and Social Committee also published a further report on the draft regulation.[171] The Council debated the proposals on a number of occasions.[172] Finally, on 16 December 2002 the Council of Ministers adopted Regulation 1/2003 which entered into force on 1 May 2004.

(c) The EU and EFTA Courts

The Court of Justice of the European Union. The Court of Justice of the European Union[173] comprises the Court of Justice, the General Court (together 'the EU Courts') and specialised courts,[174] all of which sit in Luxembourg. It is the duty of the Court of Justice of the European Union, under Article 19 TEU, to ensure that 'the law is observed' when interpreting and applying the Treaties. The Court of Justice of the European Union has three functions.[175] The first is to rule on actions brought by a Member State, an institution of the EU or a natural or legal person. The second function is to give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of EU law or the validity of acts adopted by the Union institutions. The third function is to rule in other cases provided for in the Treaties. Cases brought before the Court of Justice are numbered 'C-' and those brought before the General Court are numbered 'T-'.[176] The working language of the EU Courts is French, and nearly all judgments are drafted in French. However, cases may be pleaded in any of the 23 official languages of the Union.[177] The language used in the application will be the language in which the proceedings will be conducted. Judgments of the Court of Justice and of the General Court are **1.050**

[167] COM(2000)582 final. For the constitution and advisory functions of this Committee see Arts 304 et seq TFEU.

[168] ie comprising a draft text of the proposed regulation: OJ 2000 C365E/28, [2000] 5 CMLR 1148.

[169] This is a 'special legislative procedure' according to Art 289(2) TFEU, the 'ordinary legislative procedure' being the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission: Art 292(1) TFEU.

[170] Opinion of European Parliament, OJ 2002 C72E/305 (6 September 2001).

[171] The Opinion was adopted on 29 March 2001: ECOSOC Opinion, OJ 2001 C155/73.

[172] See, eg the orientation debate on 14/15 May 2001: Press release PRES/01/181 (14 May 2001).

[173] Art 19(1) TEU.

[174] See Art 257 TFEU. An example of a specialised court is the Civil Service Tribunal which was established to hear EU civil service cases, and constituted with effect from December 2005: Council decn 2004/752, OJ 2004 L333/7.

[175] Art 19(3) TEU.

[176] The 'C' stands for *Cour de Justice* (CJ) and the 'T' stands for *Tribunal de premier instance* (GC). Cases in the CJ which are on appeal from the GC are distinguished by an additional letter 'P' after the case number, which stands for *pourvoi* (appeal).

[177] The language of the case in references for a preliminary ruling under Art 267 TFEU is that of the national court which made the reference to the Court of Justice.

reported officially in the European Court Reports, which are published in all 23 official languages.[178] The judgments of the EU Courts are binding in matters of EU law in all the Member States.[179]

1.051 **Composition and procedure of the General Court.** The General Court was originally known as the Court of First Instance and was attached to the Court of Justice by a decision of the Council on 24 October 1988.[180] The purpose of the Court of First Instance was to improve judicial protection of individual interests with respect to actions requiring close examination of complex facts, and to lighten the workload of the Court of Justice. The General Court was given its current name by the Treaty of Lisbon and is now directly constituted by Article 19 TEU. The General Court consists of at least one judge from each Member State. The appointment of judges to the General Court is by the same process as the one used for the Court of Justice (discussed below). The members of the Court are divided into Chambers of three or five judges, the competition cases normally being assigned to Chambers of three judges, and State aids and dumping cases being heard by five judges. Certain cases (but not competition cases) may be heard by a single judge[181] and cases of particular legal difficulty or factual complexity may be heard by the Grand Chamber.[182] One of the judges of the General Court may be appointed to sit as Advocate General, but this is rarely done.[183] The General Court therefore differs from the Court of Justice in that it normally operates without the assistance of an Advocate General. The procedure of the General Court is governed by the Statute of the Court of Justice annexed as a Protocol to the Treaties[184] and by the Rules of Procedure.[185] The General Court may adjudicate under an 'expedited procedure'[186] which may involve the imposition of a limit on the number of pleas and compression of the timetable for the proceedings. The General Court has dealt with several competition cases under the expedited procedure.[187]

1.052 **Jurisdiction of the General Court.** The jurisdiction initially conferred on the General Court was much narrower than it is today, but included competition cases from the

[178] There are effectively two series of Reports; those where the page number is preceded by 'I' are reports of judgments of the Court of Justice and those where the page number is preceded by 'II' are reports of judgments of the General Court.

[179] See, eg s 3(1) of the European Communities Act 1972, incorporating this obligation into domestic law of the United Kingdom.

[180] Council decn 88/591, OJ 1988 L319/1. For further reading on the General Court see 'From 20 to 2020 – Building the CFI of tomorrow on solid foundations', 25 September 2009, available on the GC's section of the EU Courts' website, *Curia*.

[181] Council decn of 26 April 1999, OJ 1999 L114/52.

[182] See, eg the Grand Chamber of the GC sat in Case T-201/04 *Microsoft* (n 129, above). For the composition of the Grand Chamber of the GC see, OJ 2010 C288/4.

[183] See, eg Opinion of Judge Vesterdorf, acting as AG, in Cases T-1/89, etc, *Rhône-Poulenc v Commission* [1991] ECR II-867.

[184] Protocol 3 on the Statute of the Court of Justice of the European Union. A consolidated text of the Statute is available on the Court website.

[185] Rules of Procedure, OJ 1991 L136/1 (as amended); a consolidated text of the Rules of Procedure of the GC is available on the Court website. See also Chap 13, below.

[186] Art 76a of the Rules of Procedure of the GC, as inserted by OJ 2000 L322/4.

[187] See, eg Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, [2003] 4 CMLR 768; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, [2002] 5 CMLR 1182; Case T-464/04 *Independent Music Publishers and Labels Association v Commission* [2006] ECR II-2289, [2006] 5 CMLR 1049 (appeal against a merger clearance decision); Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601, [2007] 5 CMLR 494 (appeal against a decision accepting commitments under Art 9 of Reg 1/2003).

outset.[188] The General Court hears, among other matters, applications for the annulment of Commission decisions relating to the application of Articles 101 and 102 TFEU.[189] Decisions produce legal effects until such time as they are withdrawn or annulled in an action for annulment.[190] While pending before the Court, actions for annulment have no suspensory effect on any orders made by the Commission.[191] The Court may, however, order that the contested decision be suspended 'if it considers that circumstances so require'.[192] The Commission will suspend the obligation to pay a penalty pending an appeal, provided that a bank guarantee for the amount of the fine is provided by the appellant.[193] The President of the Court is competent, sitting alone, to hear applications for interim measures.[194] The General Court also has unlimited jurisdiction to review the decisions of the Commission imposing penalties or periodic penalty payments.[195] The General Court does not presently hear references for preliminary rulings, but the TFEU enables that development to take place in specific areas by a future amendment of the Statute of the Court of Justice of the European Union.[196]

Composition and procedure of the Court of Justice. The Court of Justice consists of one judge from each Member State and eight Advocates General.[197] Article 19 TEU provides that the judges and Advocates General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 TFEU.[198] They are appointed by common accord of the Member States for six years. Retiring judges and Advocates General may be reappointed. The procedure of the Court is governed by the Statute of the Court of Justice annexed as a Protocol to the Treaties and by its Rules of Procedure.[199] There are no court fees for proceedings before the Court of Justice. The Court of Justice has introduced an IT application known as 'e-Curia' for lodging and notifying documents electronically.[200] **1.053**

Jurisdiction of the Court of Justice. The jurisdiction of the Court of Justice is prescribed by the Treaties. It is therefore not a court of general jurisdiction. The Court has two main **1.054**

188 Council Decn 88/591 (n 180, above) Art 3(1).

189 Art 263 TFEU. The grounds of annulment are lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to its application, or misuse of powers: see paras 13.128 et seq, below.

190 Art 278 TFEU.

191 Art 278 TFEU.

192 Art 278 TFEU.

193 See para 14.107, below. For the circumstances in which the GC will dispense with the requirement to provide a bank guarantee see para 13.166, below.

194 Statute of the Court of Justice (n 184, above) Art 39 and Rules of Procedure of the GC, Arts 104–110.

195 Art 261 TFEU and Art 31 of Reg 1/2003. On judicial review of fines see Chap 14, below.

196 Art 256(3) TFEU. On possible reform of the judicial architecture of the EU see House of Lords European Union Committee, 'The Workload of the Court of Justice of the European Union', 14th Report, Session 2010–11.

197 Art 252 TFEU. For general works on the CJ, see n 700 to para 13.121, below.

198 On the appointment of judges following the Lisbon Treaty see the speech by Lord Mance 'The composition of the European Court of Justice', 19 October 2011, available on the UK Association for European Law website.

199 Rules of Procedure, OJ 2012 L265/1 (as from 1 November 2012); a consolidated text of the Rules of Procedure of the CJ is available on the Court website.

200 Decn of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia, OJ 2011 C289/7.

functions relevant here.[201] The first is to hear appeals on points of law against judgments and orders of the General Court.[202] An appeal to the Court of Justice lies on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant and the infringement of EU law by the General Court.[203] The General Court's assessment of the facts does not, save where there may have been distortion of the evidence, constitute an appealable point of law.[204] If an appeal is upheld, the Court of Justice sets aside the judgment of the General Court and may either refer the case back to the General Court or, as it has done in some competition cases, it may give final judgment in the matter.[205] The second jurisdiction of the Court, under Article 267 TFEU, is to give preliminary rulings (below), at the request of a court or tribunal of a Member State, concerning the interpretation or validity of an act of EU law. The ruling of the Court of Justice is binding upon the national court or tribunal, which must apply that ruling when giving judgment in the proceedings before it.

1.055 **Judicial review by the EU Courts.** As a general rule the EU Courts undertake a comprehensive review of the question as to whether the conditions for the application of Articles 101 and 102 of the TFEU are met.[206] One of the exceptions to this rule is when the Courts are asked to review 'complex technical or economic assessments' made by the Commission or another EU institution. In such cases the EU Courts typically focus on verifying whether the relevant rules on procedure have been complied with and whether adequate reasoning has been set out; whether the facts have been accurately stated; whether there has been any manifest error of assessment; and whether there has been a misuse of powers.[207] The EU Courts have adopted the same approach under Articles 101[208] and 102 of the TFEU.[209]

1.056 **Judgments of the EU Courts.** The Judges of the EU Courts typically deliberate on the basis of a draft judgment prepared by the Judge-Rapporteur.[210] Judgments of the EU Courts are unanimous, that is to say, no record is made public of any concurring or dissenting opinions. Judgments are made available on the Court website on the day they are handed down. The judgments of the Court of Justice and the General Court have had a major influence on the development of EU competition law, for example establishing the principle that Articles 101 and 102 TFEU are about not only 'competition' in the

[201] Other jurisdictions of the CJ in which competition issues may arise include infraction proceedings against Member States under Art 258 TFEU; actions for failure to act under Art 265 TFEU; and actions for damages against the EU under Art 340 TFEU.

[202] Art 256(1) TFEU; Statute of the Court of Justice, Art 51.

[203] Statute of the Court of Justice, Art 51, first para. On the meaning of a 'point of law' see the Opinion of AG Jacobs in Case C-53/92P *Hilti v Commission* [1994] ECR I-667, [1994] 4 CMLR 614.

[204] See, eg Case C-95/04P *British Airways v Commission* [2007] ECR I-2331, [2007] 4 CMLR 982, para 78 and the case law cited.

[205] Statute of the Court of Justice Art 61. See, eg Case C-441/07P *Commission v Alrosa* [2010] ECR I-5949, [2010] 5 CMLR 1, paras 98 et seq.

[206] See, eg Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, [2001] 4 CMLR 4, para 62.

[207] Case 42/84 *Remia v Commission* [1985] ECR 2545, [1987] 1 CMLR 1, para 34; Joined Cases 142/84&156/84 *BAT and Reynolds v Commission* [1986] ECR 1899, [1987] 2 CMLR 551, para 62. See paras 13.145 et seq, below.

[208] See, eg Case T-168/01 *GlaxoSmithKline Services* (n 105, above) para 242 and on appeal paras 84–87.

[209] See, eg Case T-201/04 *Microsoft* (n 129, above) para 89.

[210] The Judge-Rapporteur is a judge who is a member of the Chamber to which the case is allocated and who has been designated to perform certain functions during the course of the appeal: see Rules of Procedure Art 13(2) for GC (n 185, above) and Art 15 for CJ (n 199, above).

normal sense of that term, but are also concerned with the integration of Member States markets into a single internal market.[211] As a matter of safeguarding a fair administrative process, the Court of Justice has established various methods for respecting the 'rights of defence', in particular that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement.[212] The EU Courts have also made a considerable contribution to the development and protection of certain fundamental rights, both in competition cases and more generally.[213]

Preliminary rulings. Any national court or tribunal which is called upon to decide a dispute involving the application of EU law may, and a national court of final resort normally must, submit questions to the Court of Justice for a preliminary ruling under Article 267 TFEU. The Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretations of acts of the institutions of the Union. The Court has stated that '[t]he system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary'.[214] A reference from a national court may be refused only if it is obvious that the interpretation of EU law sought bears no relation to the actual facts of the domestic proceeding or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred to it.[215] Save for such cases, the Court must give a preliminary ruling on questions of EU law, or domestic law based on EU law,[216] that have arisen in the course of litigation within a Member State.[217] The national court may ask the Court of Justice to adopt an 'accelerated procedure' in very urgent cases.[218] Although it is for the national court to make the final assessment of questions of fact, the Court of Justice can, in preliminary ruling proceedings, provide the national court with all the guidance it needs to facilitate its judgment.[219] The Court of Justice has delivered a number of wide-ranging rulings which have done much to develop and shed light on the rules on competition. **1.057**

[211] See paras 1.013 et seq, above on the aims of EU competition law.

[212] See, eg Cases 43&63/82 *VBVB and VBBB v Commission* [1984] ECR 19, [1985] 1 CMLR 27, para 25.

[213] On fundamental rights, see paras 1.008 and 1.009, above.

[214] Case C-2/06 *Kempter v Haupzollamt Hamburg-Jonas* [2008] ECR I-411, [2008] 2 CMLR 586, para 42.

[215] See, eg Case C-415/93 *Bosman* [1995] ECR I-4921, paras 59–61; Case C-105/94 *Celestini* [1997] ECR I-2971, para 22; Case C-355/97 *Beckand Bergdorf* [1999] ECR I-4977, para 22.

[216] See, eg Case C-7/97 *Bronner v Mediaprint* [1998] ECR I-7791, [1999] 4 CMLR 112, paras 17–20; Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, [2007] 4 CMLR 224, paras 12–25.

[217] The CJ has introduced a simplified procedure for dealing with a question referred for a preliminary ruling which is identical to a question on which the Court has already been called on to rule, or where the answer to the question admits of no reasonable doubt or may be clearly deduced from existing case law: Art 99 of the Court of Justice Rules of Procedure (n 199, above). For an account of Art 267 proceedings, see Chap 16, below.

[218] Art 105 of the Court of Justice Rules of Procedure (n 199, above).

[219] See, eg Case C-237/04 *Enirisorse* [2006] ECR I-2843, para 30; Cases C-295/04, etc, *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, [2006] 5 CMLR 980, paras 47 et seq; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA* [2006] ECR I-11987, [2007] 4 CMLR 181, para 50.

1.058 **Opinions of the Advocates General.** The Advocate General summarises the arguments of the parties and provides an advisory opinion as to how they believe the Court of Justice should dispose of the particular case.[220] Such opinions often contain useful analyses of the relevant principles and case law. The Advocates General rank equally in precedence with the Judges of the Court. Their opinions are authoritative. If an Advocate General is not followed by the Court of Justice, the opinion is similar to a dissenting judgment.[221] Under the Statute of the Court of Justice, the Court of Justice has the power to determine a case without a submission from the Advocate General if the case involves no new point of law.[222]

1.059 **The EFTA Court.** The competition provisions of the EEA and the EFTA institutions are discussed below.[223] The EFTA Surveillance Authority, applying the analogous competition provisions of the EEA regime, takes decisions of an equivalent nature to those of the Commission under the TFEU.[224] The EFTA Court, similarly, has a jurisdiction analogous to that of the EU Courts, and determines both references from national courts of the three participating EFTA States[225] and challenges to decisions of the Surveillance Authority.[226] Although the EFTA Court has so far given few judgments as regards competition law,[227] its decisions have strong persuasive authority within the Union.

(d) The Directorate-General for Competition

(i) Generally

1.060 **The Directorate-General for Competition ('DG Competition').** The 'mission' of DG Competition is to 'enable the Commission to make markets deliver more benefits to consumers, businesses and the society as a whole, by protecting competition on the market and fostering a competition culture'.[228] DG Competition's work includes enforcement of Articles 101 and 102; control of State aids; merger control; the formulation of competition policy; and international cooperation. In 2010 DG Competition estimated that the customer benefits from its cartel decisions were in the range of €7.2 billion to €10.8 billion, and the estimated benefits derived from its decisions on horizontal mergers were in the range of €4.2 to €6.3 billion.[229]

[220] Art 252 TFEU. For the position in the GC, see para 1.051, above.

[221] Schermers and Waelbroeck (n 62, above) para 1347.

[222] Art 20, 5th para, of the Statute of the Court of Justice (n 199, above).

[223] See paras 1.090 et seq, below.

[224] The text of the Agreement and the EFTA Court's Rules of Procedure are available on the EFTA Court's website under 'legal texts'. Protocol 5 to the Agreement is the Statute of the EFTA Court, setting out its constitution.

[225] Under Art 34 of the EFTA Surveillance and Court Agreement. Such references are referred to as requests for an Advisory Opinion. See the discussion of the 'homogeneity objective' at para 1.093, below.

[226] Under Arts 35–36 of the EFTA Surveillance and Court Agreement.

[227] See, eg Case E-8/00 *Norwegian Federation of Trade Unions v Norwegian Association of Local and Regional Authorities* [2002] Rep EFTA Ct 114, [2002] 5 CMLR 160 (collective bargaining).

[228] DG Competition Annual Management Plan for 2011, 2, available on DG Comp website. The Commission has now published a brochure on 'Compliance with Competition Rules' (23 November 2011) available on its website.

[229] DG Competition Annual Activity Report 2010, 5; the methodology is explained in DG Competition's Management Plan for 2011, both documents are available on DG Comp website.

(ii) Structure

DG Competition. DG Competition is headed by a Director-General and three Deputy Directors-General (for antitrust, mergers and State aids). DG Competition's day-to-day operational activities are carried out by nine directorates, each headed by a Director: **1.061**

— Directorate R: Registry and resources
— Directorate A: Policy and strategy (including the European Competition Network and International Relations)
— Directorate B: Market and cases I: energy and environment
— Directorate C: Market and cases II: information, communication and media
— Directorate D: Market and cases III: financial services (including the financial crisis task force)
— Directorate E: Markets and cases IV: basic industries, manufacturing and agriculture (including pharmaceuticals and health services)
— Directorate F: Markets and cases V: transport, post and other services
— Directorate G: Cartels[230]
— Directorate H: State aid: cohesion, R&D&I, and enforcement

Directorate A is the unit that deals with competition policy and strategy generally. Sectoral directorates B–F are responsible for the handling of antitrust, State aid and merger cases. Their sector-specific organisation is intended to apply sectoral knowledge of markets across instruments and to ensure effective use of DG Competition's resources. Directorate H is dedicated to non-sector specific State aid enforcement.[231]

The Chief Economist. The Chief Economist (also referred to as the Chief Competition Economist) reports directly to the Director-General of Competition.[232] The role of the Chief Economist is to provide guidance on methodological issues of economics and econometrics in the application of EU competition rules and to assist in the development of general policy instruments with an economic context. The opinions of the Chief Economist are not made public as they form part of DG Competition's internal deliberations. The Chief Economist is supported by a team of 20 specialised economists ('the CET'). The team provides general guidance in individual competition cases from their early stages and on occasion more detailed guidance in the most important competition cases involving complex economic issues. In more complex cases, a member of the CET may be seconded to work on the DG Competition case team although the CET member retains his or her independent status and reports directly to the Chief Competition Economist. The Chief Competition Economist is also responsible for maintaining contact with the academic world and organises and chairs meetings of the Economic Advisory Group for Competition Policy. **1.062**

The Economic Advisory Group for Competition Policy ('EAGCP'). The EAGCP is a group of leading academics from different fields of research and academic centres in Europe all **1.063**

[230] This was formed in 2005.

[231] There is an organogram of DG Competition, giving contact details for staff in the different units within the Directorates, available on DG Comp website.

[232] See Röller and Buigues, 'The Office of the Chief Competition Economist at the European Commission' (2005), available on DG Comp website.

of whom specialise in industrial organisation. The Group is a forum for the discussion of competition policy matters, its main purpose being to support DG Competition by improving the quality of economic reasoning in competition policy. Within the framework of the EAGCP, three sub-groups have been set up to work on issues related to antitrust, mergers and State aid. On request by the Commissioner for Competition or the Director-General, members may also be asked on an ad hoc basis to provide economic advice on issues of relevance.[233]

1.064 **Consumer Liaison Office.** The Consumer Liaison Office was established in December 2003[234] in order to ensure a permanent dialogue with European consumers who are intended to be the beneficiaries of the Union's competition policy. The Office also provides a focus for contact between DG Competition and other Directorates-General within the Commission, for example that for Health and Consumer Protection. The Consumer Liaison Office acts as primary contact point for consumer organisations and for individual consumers, and alerts consumer groups to competition cases when their input might be useful, advising them on the way they can provide input and express their views. The Office also maintains contacts with national competition authorities regarding consumer protection matters.

1.065 **The Hearing Officer.** The Commission created the function of Hearing Officer in 1982 in order to provide a 'check and balance' in the Commission's decision-making process and to ensure that the rights of the defence are protected.[235] The Hearing Officers report directly to the Commissioner for Competition. The role of the Hearing Officer was strengthened by the adoption of new mandates in 2001[236] and again in 2011.[237]

(iii) Enforcement through investigation and decision

1.066 **Regulation 17.** Council Regulation 17[238] was the first regulation implementing the EU competition rules and came into force in the then Member States on 13 March 1962. Article 1 of that Regulation provided that the prohibitions of what are now Articles 101 and 102 take effect without any prior decision being required. However, the application of Article 101(3) was reserved exclusively for the Commission.[239] The Regulation established a procedure whereby parties could notify an agreement to the Commission with a request for a declaration that it did not fall within the scope of Article 101 (known as a 'negative clearance') or for an 'individual exemption' under Article 101(3). Regulation 17 also dealt with the making of complaints by aggrieved parties; and with the Commission's powers of enforcement, which include powers to require information, to order the termination of infringements, and to impose fines. The notification procedure gave rise to substantial delays in determining the legality of agreements and led to the creation of the 'comfort letter', an informal indication from the Commission to the parties of its

[233] See, eg the EAGCP report on 'An economic approach to Article 82' (July 2005), available on the DG Comp website.

[234] See XXIIIrd Report on Competition Policy (2003), p 16.

[235] See Durande and Williams, 'The practical impact of the exercise of the right to be heard: A special focus on the effect on Oral Hearing and the role of the Hearing Officers' (2005) 2 Competition Policy Newsletter 22; Albers and Williams, 'Oral Hearings – Neither a Trial nor a State of Play Meeting' (2010) The CPI Antitrust Journal.

[236] Commission decn 2001/462, OJ 2001 L162/21. See further para 13.083, below.

[237] Hearing Officers Decn 2011/695/EU, OJ 2011 L275/29: Vol II, App B4; this decn entered into force on 20 October 2011.

[238] Reg 17/62, OJ 1962 13/204: Vol II, App B1.

[239] Reg 17/62, Art 4.

views on the agreement. The legal status of these letters was unclear,[240] and the inability of national courts, before which Article 101 disputes were increasingly litigated, to apply Article 101(3) further stultified the enforcement process at the time.[241]

Regulation 1/2003. Regulation 1/2003[242] came into force on 1 May 2004 and modernised the procedures for the enforcement of the competition rules. It abolished the centralised system of notification under Regulation 17 and created a decentralised system based on the direct application of Articles 101 and 102. The Commission, national competition authorities and national courts have the power to apply Articles 101 and 102 in full. Undertakings are expected to carry out a self-assessment to ensure that their conduct complies with the Treaty requirements. In April 2009 the Commission published a Communication entitled 'Report on the functioning of Regulation 1/2003', which concluded that 'the change from a system of notification and administrative authorisation to one of direct application has been remarkably smooth in practice'.[243] The Regulation also deals with, among other matters, the burden of proof,[244] the relationship between national competition law and Articles 101 and 102,[245] cooperation between the Commission and national competition authorities, and the Commission's powers and procedures. **1.067**

Enforcement by the Commission. Chapter III of Regulation 1/2003 empowers the Commission to adopt decisions concerning the finding and termination of an infringement of Articles 101 and 102, interim measures, commitments and a finding that Articles 101 and 102 are not applicable to certain conduct.[246] The Commission has adopted numerous infringement decisions in accordance with Article 7 of the Regulation. The Commission has also made extensive use of the power conferred by Article 9 of the Regulation to adopt decisions making 'commitments', proposed by the parties and considered appropriate by the Commission, binding in order to address the Commission's concerns.[247] As at 31 December 2011 the Commission has not exercised its power to make a finding of inapplicability under Article 10 of the Regulation. Chapter V of the Regulation deals with the Commission's wide-ranging powers of enforcement.[248] These include powers to require information, to carry out unannounced inspections in business premises and, subject to **1.068**

[240] See earlier editions of this work; eg 5th edn (2001), para 11–017.

[241] For the problems caused by the exclusive competence of the Commission, see, eg the procedural history of the analysis of ice cream freezer exclusivity clauses described in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, [2004] 4 CMLR 14 (appeal dismissed Case C-552/03P *Unilever Bestfoods v Commission* [2006] ECR I-9091, [2006] 5 CMLR 1460).

[242] Reg 1/2003, OJ 2003 L1/1: Vol II, App B2. See, generally Wils in Cahill (ed), *The Modernisation of EU Competition Law Enforcement in the EU* (2004) 661–736; and Gippini-Fournier in Koeck and Karollus (eds), *The Modernisation of European Competition Law – Initial Experiences with Regulation 1/2003* (2008). Reg 1/2003 is considered in detail in Chaps 13, 14 and 15, below.

[243] Report on the Functioning of Regulation 1/2003, COM(2009) 206 final, para 12. See also Sinclair, Jukneviciute and Breit 'Regulation 1/2003: How has this landmark reform worked in practice?' (2009) 2 Competition Policy Newsletter 23.

[244] Reg 1/2003 (n 242, above) Art 2.

[245] Reg 1/2003 (n 242, above) Art 3; see Chap 15, below.

[246] Reg 1/2003 (n 242, above) Arts 7–10.

[247] Case C-441/07P *Commission v Alrosa* [2010] ECR I-5949, [2010] 5 CMLR 1, para 35. On commitment procedures see, the Best Practices: conduct of proceedings, OJ 2011 C308/6: Vol II, App B18, paras 115–133.

[248] Commission Reg 773/2004 OJ 2004 L123/18: Vol II, App B3 sets out further detailed provision of the enforcement procedure to be adopted by the Commission, concerning the handling of complaints, the exercise of the right to be heard and access to the file.

obtaining a court order, non-business premises, and to impose penalties and periodic penalty payments. All these aspects of Regulation 1/2003, except for penalties, are discussed in more detail in Chapter 13, below; fines are discussed in Chapter 14, below.

1.069 **Sectoral inquiries.** Under Article 17 of Regulation 1/2003, the Commission may initiate general inquiries into those sectors of the economy where it believes competition might be restricted or distorted. The aim of this provision is to allow the Commission to investigate suspicious pricing structures or other practices indicating a possible anti-competitive situation across a whole industry.[249] Following the sectoral inquiries in the energy[250] and pharmaceutical sectors,[251] the Commission opened a number of investigations under Article 102 TFEU in those sectors.[252] These investigations have culminated in the adoption of several decisions accepting commitments, including structural remedies in some cases, under Article 9 of Regulation 1/2003.[253]

1.070 **Enforcement by national competition authorities ('NCAs').** A principal purpose of Regulation 1/2003 was to share the responsibility for enforcing Articles 101 and 102 between the Commission and the NCAs.[254] Article 35 of Regulation 1/2003 requires Member States to designate the NCA or NCAs responsible for the application of Articles 101 and 102. Article 3(1) of the Regulation obliges NCAs (and national courts) to apply those Articles in cases where they apply national competition law[255] to agreements or conduct affecting trade between Member States. According to the Commission, this obligation has led to a substantial increase in the level of enforcement of the EU competition rules at the Member State level since the entry into force of Regulation 1/2003.[256] Article 5 of Regulation 1/2003 lists the types of decisions that NCAs can make in individual cases: finding an infringement of Articles 101 and 102 TFEU, ordering interim measures, accepting commitments and imposing fines and other penalties. NCAs are responsible for ensuring, among other matters, that Article 101 TFEU is observed and must not apply national legislation which contravenes the Member State's duty, under Article 4(3) TEU, to refrain from introducing measures contrary to the EU competition rules.[257] NCAs do not have the power to decide that there has been no infringement of Article 102.[258]

1.071 **The European Competition Network.** The system of EU competition law enforcement rests on a duty of wholehearted cooperation owed by Member States to the EU and each

[249] For a description of the Commission's policy regarding use of this power, see the speech by Commissioner Kroes 'Five years of sector and antitrust inquiries', 3 December 2009.

[250] Energy Sector Inquiry COM(2006)851 final, 10 January 2007.

[251] Pharmaceutical Sector Inquiry Report, 8 July 2009.

[252] See Report on Competition Policy (2010), point 116.

[253] Report on Competition Policy (2010), points 87–91.

[254] Reg 1/2003 (n 242, above) recitals 2, 3 and 4.

[255] For discussion of the meaning of 'national competition law' under Art 3 of Reg 1/2003 see the English Court of Appeal in *IB v R* [2009] EWCA Crim 2575, paras 28–38.

[256] By the end of March 2009, more than 1,000 cases have been pursued on the basis of the EU competition rules: the Commission's Report on the functioning of Regulation 1/2003, COM(2009) 206 final, para 29.

[257] Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, [2003] 5 CMLR 829. For the principle of sincere cooperation see para 1.029, above.

[258] Case C-375/09 *Tele2 Polska*, judgment of 3 May 2011, [2011] 5 CMLR 2, paras 19–30. The NCA does have power to close proceedings on the basis that there is insufficient information to proceed with an investigation, even if the domestic legislation does not so provide: ibid.

other.[259] The practical importance of this duty is reflected in the formation of the European Competition Network ('the ECN'), consisting of the European Commission and the NCAs. The ECN is dedicated to the effective enforcement of EU competition rules throughout the EU.[260] The ways in which the members of the ECN are expected to cooperate, and the manner in which cases are allocated among them, are set out in the Commission's Notice on cooperation within the network of competition authorities.[261] Representatives from the members of the ECN meet together to discuss areas of competition policy to help ensure a consistent approach to difficult issues which arise across all Member States.[262] Although Regulation 1/2003 does not harmonise the procedures or sanctions for enforcing Articles 101 and 102 in the Member States,[263] cooperation within the ECN has facilitated voluntary convergence of national laws and practice to a certain extent, in particular in relation to leniency applications in secret cartel cases.[264] The European Commission, the NCAs of the EU and of the EEA have established a 'Merger Working Group' under the aegis of the ECN in order to foster increased consistency, convergence and cooperation among EU merger jurisdictions.[265] The ECN publishes the *ECN Brief* five times a year, describing the activities of the ECN and its members.[266]

1.072 **Enforcement by national courts.** Articles 101(1) and 102 have direct effect, which means that they create rights for individuals (and companies) which must be enforced by the national courts.[267] National courts may be called upon to apply Articles 101 and 102 in proceedings between private parties, such as actions for damages, and also in appeals brought against decisions of the NCAs applying the competition rules. The Commission has published a Notice on cooperation with courts of the EU Member States[268] describing a number of mechanisms designed to ensure coherent application of the competition rules by national courts. For example, national courts can ask the Commission for information or its opinion on questions concerning the application of Articles 101 and 102.[269] The Commission also has the power, under Article 15(3) of Regulation 1/2003, to make observations as *amicus curiae* and has exercised that power on several occasions.[270] An additional, important way in which national courts contribute to the development and coherence of EU competition law is by referring questions for preliminary rulings under

[259] See para 1.029, above.

[260] See the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, 10 December 2002, Doc 15435/02 ADD1: Vol II, App B5.

[261] The Network Notice, OJ 2004 C101/43: Vol II, App B6.

[262] See, eg Report on Competition Policy (2008), points 111 et seq; Report on Competition Policy (2009), points 159 et seq; Report on Competition Policy (2010), points 145 et seq.

[263] NCAs apply the procedures and powers provided by national law when applying Arts 101 and 102 TFEU, subject to the EU principles of equivalence and effectiveness: see further paras 16.009 et seq, below.

[264] See, eg the ECN Model Leniency Programme, 29 September 2006, available on the DG Comp website.

[265] See, eg Best Practice for cooperation among NCAs in Merger Review, available at DG Comp's website: and see Vol II, App D17.

[266] Available on the DG Comp website.

[267] See para 16.005, below. For the direct effect of the provisions relating to State aids, see paras 17.114 et seq, below.

[268] See National Courts Notice, OJ 2004 C101/54: Vol II, App B7.

[269] Reg 1/2003 (n 242, above) Art 15(1): see the Commission's Staff working paper accompanying the Commission's Report on the functioning of Regulation 1/2003, SEC/2009/0574 final, para 277.

[270] See, eg Case C-429/07 *Inspecteur van de Bleastingdienst v X* [2009] ECR I-4833, [2009] 5 CMLR 12.

Article 267 TFEU.[271] The non-confidential versions of some judgments of the national courts are available on the DG Competition website[272] and are included in the *ECN Brief*. It is apparent that national courts have applied Articles 101 and 102 TFEU in a variety of contexts and, where appropriate, reference will be made to national court judgments in this work. As a matter of EU law, a judgment of a national court of one jurisdiction is not binding in another, save where the same parties are seeking to re-litigate a dispute which has been judicially determined elsewhere.[273]

(iv) Legislative powers

1.073 **The Commission's legislative powers.** The Commission is empowered to adopt legislation by a number of Council Regulations. Council Regulations 19/65 (as amended by 1215/1999), 2821/71 and 1534/91 empower the Commission to exempt *en bloc* under Article 101(3) certain categories of agreements, such as agreements relating to industrial property rights, 'vertical' agreements between undertakings at different levels of the production or distribution chain, certain categories of standardisation, research and development and specialisation agreements, and certain agreements in the insurance industry. The Commission has over time adopted a series of block exemption regulations covering various sectors and kinds of agreement. These regulations are discussed in Chapter 3, below.[274]

(v) Guidelines and guidance

1.074 **Purpose of Commission notices and guidelines.** The Commission has published various notices and guidelines on a wide range of matters relating to the application of the EU competition rules.[275] These documents usually perform one (or more) of three functions. The first is to provide non-binding guidance to undertakings, NCAs, and national courts on how the Commission intends to apply Articles 101 and 102 in individual cases. To this end, the Commission often sets out an analytical framework for the application of the competition rules. The Commission may also explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation.[276] The second function of notices and guidelines is to use the Commission's experience to establish rules of thumb or 'safe harbours'. Typically, safe harbours provide a presumption that an agreement, in the Commission's view, is not caught by Article 101.[277] They are intended to confine detailed analysis to cases that are likely to present serious competition concerns.[278] The third function is to provide practical guidance on administrative processes, such as the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.[279]

[271] See para 1.057, above and para 16.003, below on preliminary rulings.

[272] <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts>; this database is based on the judgments transmitted to the Commission pursuant to Art 15(2) of Reg 1/2003.

[273] In which case the judgment of the court of another Member State on a competition matter receives recognition under Reg 44/2001, OJ 2001 L12/1, see para 16.014, below.

[274] Council Reg 994/98, OJ 1998 L142/1 empowers the Commission to adopt block exemption regulations in relation to State aids: for the exercise of this power see Chap 17, below.

[275] See, eg Article 101(3) Guidelines, OJ 2004 C101/97: Vol II, App C13; Technology Transfer Guidelines, OJ 2004 C101/2: Vol II, App C11; Vertical Restraints Guidelines, OJ 2010 C130/1: Vol II, App C15; Horizontal Cooperation Guidelines, OJ 2011 C11/1: Vol II, App C17.

[276] See, eg Article 101(3) Guidelines, above, para 7.

[277] Article 101(3) Guidelines (n 275, above) para 7.

[278] Technology Transfer Guidelines (n 275, above) para 131.

[279] Best Practices: conduct of proceedings, OJ 2011 C308/6: Vol II, App B18.

1.075 **Procedure for adopting Commission notices and guidelines.** When the Commission proposes to promulgate new guidelines or revise an existing notice, it normally invites comments from interested persons. DG Competition may prepare an initial draft version of a notice and guideline which is circulated for discussion with the members of the ECN and the Advisory Committee for Restrictive Agreements and Dominant Position.[280] Thereafter there is usually a formal consultation following publication of drafts on the DG Competition website. For example, the Commission published draft revised guidelines on vertical restraints, together with a draft block exemption regulation, on its website on 28 July 2009, and asked for comments to be lodged within two months.[281] Non-confidential versions of the comments submitted to the Commission were published on DG Competition's website. The Commission subsequently adopted block exemption Regulation 330/2010 on 20 April 2010. The Vertical Restraints Guidelines were finalised on 10 May 2010 and were published in the *Official Journal* on 19 May 2010.[282] Public consultations on draft notices and guidelines provide a valuable opportunity for practitioners to comment on the functioning of existing guidance in light of practical experience or to influence the content and scope of future guidance.

1.076 **Legal status of Commission notices and guidelines.** Notices and guidelines set out the Commission's view on various matters relating to the application of the competition rules. They are not binding on the NCAs or the national courts.[283] They are also not binding on the EU Courts; all of the notices and guidelines issued by the Commission acknowledge that they are without prejudice to the case law of the Court of Justice and the General Court concerning the interpretation and application of Articles 101 and 102. So far as the Commission itself is concerned, the Commission may not depart from rules which it has imposed on itself.[284] Thus, to the extent that a notice establishes, in mandatory terms, the method by which the Commission should analyse a competition matter, the Commission must indeed take account of the provisions of the notice. This is particularly true of the Commission's guidelines on the method of setting fines imposed for infringements of Articles 101 and 102. The Court of Justice has held that:

> 'In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be excluded that, on certain

[280] For the Advisory Committee see Reg 1/2003, Art 14 and para 13.088, below.

[281] Commission Press Release IP/09/1197 (28 July 2009).

[282] Legal instruments such as regulations are published in the 'L' series of the Official Journal and Notices or Guidance are published in the 'C' series.

[283] cf each of the NCAs has signed a statement to abide by the principles set out in the Network Notice, see Annex to OJ 2004 C101/43: Vol II, App B6.

[284] Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, para 53 and the case law cited there (upheld on appeal, Case C-51/92P *Hercules Chemicals v Commission* [1999] ECR I-4235); Cases T-67/00, etc, *JFE Engineering v Commission* [2004] ECR II-2501, [2005] 4 CMLR 2, para 537 (point not considered on appeal, Cases C-403&405/04P *Sumitomo Metal Industries* [2007] ECR I-729, [2007] 4 CMLR 650); Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279, [2004] 5 CMLR 1, para 143 (Notice on remedies); Case T-282/06 *Sun Chemical Group v Commission* [2007] ECR II-2149; [2007] 5 CMLR 6, paras 55–57 (Guidelines on the assessment of horizontal mergers).

conditions and depending on their conduct, such rules of conduct, which are of general application, may produce legal effects.' [285]

Where, however, the Commission expresses itself in a notice in terms which allow it to choose from a range of approaches, it retains 'great freedom of action' to choose the most appropriate approach in the circumstances of a given case.[286] In such cases the Commission enjoys a discretion enabling it to take account, or not to take account, of factors mentioned in its guidelines. The discretion enjoyed by the Commission and any limits which it has imposed in that regard do not in any event prejudge the exercise by the EU Courts of their jurisdiction.

1.077 **Guidance on the Commission's enforcement activities.** In some areas the Commission has published guidance on how it intends to decide which cases will be a priority for the exercise of its investigatory powers. An example is the Commission's Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings.[287] This document explains that it is not a statement of the law but is 'intended to provide greater clarity and predictability as regards the general framework of analysis' used by the Commission to justify its intervention under Article 102. A further example of guidance on the Commission's enforcement activities is the *De Minimis* Notice.[288] The Commission will not institute proceedings either upon application or on its own initiative in relation to agreements covered by the *De Minimis* Notice.[289] Where undertakings assume in good faith that an agreement is covered by the *De Minimis* Notice, the Commission will not impose fines if it does nonetheless find an infringement.

1.078 **Commission individual guidance letters.** The Commission has published a Notice explaining when it will provide parties with informal guidance relating to a novel question concerning Articles 101 and 102, on which neither the Commission nor the EU Courts have taken a position.[290] Guidance letters are reserved for individual cases which involve novel or unresolved questions that give rise to genuine uncertainty. The Commission will only provide informal guidance to undertakings insofar as this is compatible with its enforcement priorities. The conditions for obtaining a guidance letter are described in Chapter 13, below.

1.079 **Other pronouncements by the Commission.** Guidance as to the Commission's views on particular matters can be obtained from a number of other official and semi-official pronouncements. Most important are the Commission's Reports on Competition Policy,

[285] Cases C-189/02P, etc, *Dansk Rørindustri v Commission* [2005] ECR I-5425, [2005] 5 CMLR 796, para 211. The CJ found that there had been no breach of the principle of non-retroactivity on the facts of the case. See also Case C-226/11 *Expedia Inc*, not yet decided (legal effect of Commission's *De Minimis* Notice on NCAs and national courts).

[286] See Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, [2006] 4 CMLR 686, para 519 and the case law cited.

[287] Art 102 Enforcement Priorities Guidance, OJ 2009 C45/7: Vol II, App C14. On the Commission's guidance on enforcement priorities see, para 10.004.

[288] *De Minimis* Notice, OJ 2001 C368/13: Vol II, App C10.

[289] *De Minimis* Notice, above, para 4.

[290] See Informal Guidance Notice, OJ 2004 C101/78: Vol II, App B9; see also Reg 1/2003 (n 242, above) recital 38.

published annually in conjunction with its General Report on the Activities of the Union.[291] The Reports on Competition Policy review the Commission's activity in this field during the year and provide helpful indications as to the Commission's approach to policy issues. The Commissioner's written answers to questions put to it by Members of the European Parliament and speeches given by the Commissioner also give a valuable insight into the Commission's current and proposed thinking on case work and policy matters.

(vi) DG Competition documents and website

DG Competition documents. DG Competition often publishes staff working papers or its own discussion papers on various matters, such as staff reflections on issues of competition law and policy or best practices on the conduct of competition cases. DG Competition publishes the Competition Policy Newsletter three times a year. This helpful newsletter contains short articles by its officials discussing significant developments, including cases settled without a formal decision following the Commission's intervention.[292] **1.080**

DG Competition website. The DG Competition website at <http://ec.europa.eu/competition/index_En.html> provides a rich and extremely useful source of information enabling the practitioner to keep up-to-date with developments in the competition law field. The website provides information about the Commissioner for competition policy, DG Competition, the Hearing Officers and the European Competition Network. It has pages dedicated to six 'policy areas':[293] antitrust (Articles 101 and 102), mergers, State aid, cartels, liberalisation, and international cooperation. Each policy area includes an 'Overview' section; a 'What's new?' section; a list of documents recently published in the *Official Journal*; existing and draft legislation relating to that policy area; and details about existing and previous decisions.[294] There is a dedicated 'case search tool' which enables the user to search by case number,[295] case title or company name, decision date, economic sector and/or date of electronic publication. In addition the website provides details of the Commission's activities in particular sectors such as agriculture and food, consumer goods, energy, financial services, information and communication technologies, media, and pharmaceuticals. The DG Competition website also includes press releases,[296] gives details of 'current issues' in competition policy, public consultations and reproduces the text of speeches given by the Commissioner for competition policy and leading officials of **1.081**

[291] Note Cases C-319/93, etc, *Dijkstra* [1995] ECR I-4471, [1996] 5 CMLR 178, para 32, where the CJ stated that the practice of the Commission is to be discerned not only from its decisions but also from its annual Reports on Competition Policy and its communications. The EFTA Surveillance Authority also publishes an annual report that contains a section on competition policy and enforcement.

[292] The Newsletters can be found at <http://ec.europa.eu/competition/publications/cpn>.

[293] The website also has a page entitled 'Consumer's corner' which explains competition policy, its relevance to consumers, and how the law is enforced in the EU. DG Comp also organises a 'European Competition Day' to present EU competition policy to non-specialists, see, eg speech by Commissioner Almunia, 'Competition and consumers: the future of EU competition policy', 12 May 2010, available on the DG Competition website. Details of the Competition Days are given in DG Comp's Competition Policy Newsletters.

[294] The policy areas of mergers and cartels also contain tables of up-to-date statistics.

[295] The case numbers used to comprise five digits with a point after the first two. More recently the point has been omitted and the current search engine on the website depends on the five digits being entered without the point, regardless of the date of the case.

[296] Some of the more important press releases are published in the CMLR and CCH reports and referred to in the Commission's annual Reports on Competition Policy.

DG Competition. It contains electronic versions of the annual Reports on Competition Policy, the Competition Policy Newsletter, the ECN Brief and the e-Newsletter containing a weekly summary of key developments in EU competition law and policy.

5. Territorial Ambit of EU Competition Rules

(a) The Member States: enlargement

1.082 **The Member States.** The TEU and the TFEU apply to the territories of the Member States of the EU,[297] subject to express provisions of the Treaties to the contrary.[298]Article 355(3) TFEU specifies that the Treaties apply in their entirety to the European territories for whose external relations a Member State is responsible. The Member States were originally six, namely Belgium,[299] Germany,[300] France, Italy, Luxembourg and the Netherlands.

1.083 **Accessions before 2000.** In the second half of the twentieth century the expansion of the European Economic Community, as it was known from 1958 to 1993, was a gradual process. With effect from 1 January 1973, the United Kingdom, Denmark and Ireland acceded to the EC Treaty, subject to certain transitional arrangements.[301] Greece acceded with effect from 1 January 1981;[302] Spain and Portugal with effect from 1 January 1986;[303] and Austria, Finland and Sweden with effect from 1 January 1995.[304] In each case, the accession was subject to transitional arrangements.

1.084 **Enlargement into Eastern Europe.** After the collapse of the Soviet Union, the EC, as it was called at that time, quickly established diplomatic relations with the countries of Central and Eastern Europe and supported those countries' efforts to reform and rebuild their economies.

[297] Art 52 TEU.

[298] eg Art 355(5) TFEU.

[299] In Cases 43&63/82 *VBVB and VBBB v Commission* [1984] ECR 19, [1982] 1 CMLR 27, paras 47–48, the CJ rejected an argument that, for the purpose of assessing an effect on trade between Member States, the Flemish-speaking part of Belgium could linguistically be regarded as forming a single entity with the Dutch-speaking Netherlands.

[300] Following the reunification of Germany under Art 23 of the Constitution of the Federal Republic, the territory of the former German Democratic Republic became part of the territory of the Union, but various transitional arrangements were necessary: see XXth Report on Competition Policy (1990), points 33–40.

[301] Accession Treaty Cmnd 7463. The rules on competition took effect on 1 January 1973, subject to transitional rules for the notification of existing agreements under Art 25 of Reg 17; see the 5th edn of this work (2001), paras 11–030 et seq.

[302] The Treaty concerning the Accession of Greece was signed at Athens on 28 May 1979: Cmnd 7650. The rules on competition took effect on 1 January 1981, subject to transitional rules for the notification of existing agreements under Art 25 of Reg 17.

[303] The Treaty concerning the Accession of Spain and Portugal was signed in Madrid and Lisbon on 12 June 1985: Cmnd 9634. The transitional arrangements relating to the accession of Spain and Portugal were complex, but in principle the transitional period continued until 1 January 1993, subject to certain exceptions, including special arrangements regarding pharmaceutical products operating until 7 October 1995: see Case C-191/90 *Generics and Harris Pharmaceuticals* [1992] ECR I-5335, [1993] 1 CMLR 89, arising from the fact that patents were not permitted for such products prior to October 1992. The rules on competition took effect on 1 January 1986, subject to transitional rules for the notification of existing agreements under Art 25 of Reg 17.

[304] The Treaty of Accession was signed at Corfu on 24 June 1994: Cmnd 2887. Norway was also a State party to the Treaty but the subsequent Norwegian referendum voted against accession. The Treaty provided that the annexed Act of Accession could be amended in such circumstances by unanimous decision of the Council of the EU, which duly took place so as to remove those aspects relating to Norway.

In 1993, at a meeting in Copenhagen, the European Council agreed that 'the associated countries in Central and Eastern Europe that so desire shall become members of the European Union'.[305] At the same time it defined the membership criteria, which are often referred to as the 'Copenhagen criteria'. The criteria laid down that a candidate country must have achieved (a) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (b) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and (c) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. The membership criteria also require that the candidate country must have created the conditions for its integration through the adjustment of its administrative structures, as underlined by the Madrid European Council in December 1995.[306]

The competition law dimension of accession negotiations. Accession negotiations are divided into a number of topical chapters, one of which concerns competition policy. Candidate countries are regarded as ready for accession only if their companies and public authorities have become accustomed, well before the date of accession, to a competition discipline similar to that of the EU. In translating these principles into concrete requirements, there are three elements that must be in place in a candidate country before the competition chapter negotiations can be closed. First, the necessary legislative framework with respect to antitrust and State aid must be in place; secondly, the State must demonstrate an adequate administrative capacity, in particular a properly functioning competition authority; and thirdly, it must have a credible enforcement record of the *acquis* in all areas of competition policy. To evaluate whether these conditions are met, the Commission carries out a detailed assessment, including the examination of cases which the competition authorities of the country have handled. **1.085**

Becoming 27 Member States. A single Treaty of Accession for 10 new Member States was signed in Athens on 16 April 2003 and came into force on 1 May 2004. By this Treaty, the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia became Members of the European Union, bringing the total number of Member States to 25. Annexed to the Treaty and forming an integral part of it is an Act setting out the conditions for Accession of each new Member.[307] The Protocols to the Accession Agreement cover a wide range of issues from the restructuring of the Czech and Polish steel industries to the acquisition of secondary residences in Malta.[308] Protocol 10 covers the position of Cyprus in the light of the failure of the unification talks prior to accession. Bulgaria and Romania signed Accession Treaties in Luxembourg on 25 April 2005 and became Member States on 1 January 2007.[309] The Union now comprises 27 Member States with a total population of almost 500 million people. **1.086**

[305] Conclusions of the Presidency of the European Council Meeting in Copenhagen, 21–22 June 1993, doc SN 180/1/93 REV 1.

[306] Conclusions of the Presidency of the Madrid European Council Meeting, 15–16 December 1995.

[307] The Treaty, Act of Accession, 18 Annexes and 10 Protocols are printed in OJ 2003 L236 (with the Appendices to the Annexes printed in OJ 2003 C227 E).

[308] See Case T-273&297/06 *ISD Polska v Commission* [2009] ECR II-2185. For the transitional arrangements in place relating to the application of competition law to each of the new Member States, see XXIIIrd Report on Competition Policy (2003), point 659. These mostly relate to the phasing out of fiscal aids.

[309] For texts, see <http://eur-lex.europa.eu/en/index.htm>.

1.087 **Candidate countries.** Turkey, Croatia, Iceland, Montenegro, and the former Yugoslav Republic of Macedonia are candidate countries.[310] Turkey was accepted as a candidate country in 1999 but negotiations on membership commenced only in October 2005. In October 2010 the Turkish Parliament adopted a State aid law, which is one of the steps towards accession negotiations on the competition chapter. Accession negotiations with Croatia were commenced in October 2005 and completed in June 2011. Croatia is expected to accede to the EU on 1 July 2013. Accession negotiations with Montenegro and the former Yugoslav Republic of Macedonia have not started. Iceland is already a member of the European Free Trade Association and has been party to a bilateral free trade agreement with the EU since 1972. Iceland applied to join the EU in July 2009 and negotiations on accession were opened in June 2010.

1.088 **Potential candidate countries.** Albania, Bosnia and Herzegovina, Serbia, and Kosovo[311] under United Nations Security Council Resolution 1244 of 1999 are potential candidates for membership of the EU. Each of these countries has agreed with the EU to have duty-free access to the Union's market for practically all goods. These trade measures, together with economic and financial assistance, are part of the so-called Stabilisation and Association Agreements[312] which have as their objective the development of regional cooperation in the Western Balkan countries and the possibility of eventual membership of the EU.

(b) The Member States: current geographic scope

1.089 **The current Member States: overseas territories, etc.** Several of the Member States have overseas territories for which special arrangements are in place governing which aspects of the Treaties, if any, apply to them. These arrangements are to be found in Articles 204 (in the case of Greenland), 349 and 355 of the TFEU and in the Accession Treaties. The scope of the Union customs territory is set out in Council Regulation 2913/92.[313] Generally, the customs territory of the EU includes the territorial waters, the inland maritime waters and the airspace of those parts of the Member States which are included in the Union. The current position is as follows:

[310] Reg 1085/2006, OJ 2006 L210/82 (providing targeted pre-accession assistance to candidate and potential candidate countries). See further para 1.088, below.

[311] Kosovo has been recognised as independent by 85 UN Member States, including 22 EU Member States. See further Advisory Opinion of 22 July 2010 of the International Court of Justice on accordance with international law of the unilateral declaration of independence in respect of Kosovo, available on the ICJ website.

[312] Council decn of 18 February OJ 2008 L80/18 (Bosnia and Herzegovina); Council decn of 18 February OJ 2008 L80/46 (Serbia including Kosovo as defined by UNSCR 1244/99); Stabilisation and Association Agreement OJ 2009 L107/166 (Albania).

[313] Reg 2913/92, OJ 1992 L302/1. A consolidated text is available on the website of the Commission's Taxation and Customs Directorate-General. The European Parliament and the Council have adopted a 'Modernised Customs Code', Reg 450/2008, OJ 2008 L145/1, but it will be applicable only from the date of its implementing provisions; these must be adopted no later than 24 June 2013.

State	Territory	Status
Cyprus	Northern Cyprus	Although Cyprus as a whole is a member of the EU, application of EU law is suspended in those areas in which the government of the Republic of Cyprus is not in control[314]
Denmark	Greenland	EU law not in force and not part of the customs territory but there are special arrangements for association with the EU[315]
	Faroe Islands	EU law not in force[316]
Finland	Åland Islands	EU law in force with some exceptions[317]
France	Guadeloupe	EU law in force[318]
	French Guiana	EU law not in force and not part of the customs territory but there are special arrangements for association with the EU[319]
	Martinique	
	Réunion	
	Saint Barthélemy	
	Saint Martin	
	New Caledonia and Dependencies	
	French Polynesia	
	French Southern and Antarctic Territories	
	Wallis and Fortuna Islands	
	Mayotte	
	Saint-Pierre and Miquelon	
Germany	Büsingen	Excluded from the customs union[320]
	Island of Heligoland	
Italy	Communes of Livigno and Campione d'Italia and the national waters of Lake Lugano	Excluded from the customs union[321]
The Netherlands	Aruba Netherlands Antilles	EU law not in force but there are special arrangements for association with the EU[322]

(*Continued*)

[314] Protocol 10 to the Act of Accession 2003 (n 307, above) Art 1. See Reg 886/2004, OJ 2004 L161/128 (as last amended by Reg 587/2008, OJ 2008 L163/1) for a regime under Art 2 of Protocol 10 dealing with free movement of persons, goods and services across the divided island. See, eg *Orams v Apostolides* [2006] EWCH 2226, [2007] 1 WLR 241: English High Court held that Brussels Regulation on recognition of judgments does not apply in respect of land in Northern Cyprus.

[315] Art 204 TFEU and Ann II TFEU, and Protocol 34 on special arrangements for Greenland. See also Art 3(1) of Reg 2913/92 (n 313, above).

[316] Art 355(5)(a) TFEU.

[317] Art 355(4) TFEU and Protocol 2 to the Treaty of Accession of Austria, Finland and Sweden.

[318] Art 355(1) TFEU; subject to the Council's right to adopt specific measures in relation to them in the interests of their development: Art 349 TFEU.

[319] Art 355(2) TFEU and Ann II TFEU; Art 3(1) Reg 2913/92.

[320] Art 3(1) of Reg 2913/92, OJ 1992 L302/1. These areas are subject to Treaty provisions between Germany and Switzerland.

[321] Art 3 of Reg 2913/92.

[322] Art 355(2) TFEU and Ann II TFEU; Art 3 of Reg 2913/92.

(*Continued*)

State	Territory	Status
Portugal	Azores	EU law in force[323]
	Madeira	
Spain	Ceuta	Excluded from the customs union but EU law otherwise applies[324]
	Melilla	
	Canary Islands	EU law in force[325]
United Kingdom	Gibraltar	EU law in force with some exceptions[326]
	Channel Islands	Part of the customs union. EU law not in force but some chapters apply[327]
	Isle of Man	
	UK Sovereign Base Areas of Akrotiri and Dhekelia on the island of Cyprus	Part of the customs union. EU law applies to some extent[328]
	Anguilla	EU law not in force but there are special arrangements for association with the EU[329]
	Bermuda	
	British Antarctic Territory	
	British Indian Ocean Territory	
	British Virgin Islands	
	Cayman Islands	
	Falkland Islands	
	Montserrat	
	Pitcairn	
	Saint Helena and Dependencies	
	South Georgia and the South Sandwich Islands	
	Turks and Caicos Islands	

(*Continued*)

[323] Art 355(1) TFEU; subject to the Council's right to adopt specific measures in relation to them in the interests of their development: Art 349 TFEU.

[324] See Art 3(1) of Reg 2913/92 and Art 25 of the Act of Accession of Spain and Portugal (n 303, above) subject to the derogations stated therein.

[325] Subject to the Council's right to adopt specific measures in relation to them in the interests of their development: Art 349 TFEU.

[326] Art 355(2) TFEU and Ann II TFEU. Gibraltar is *prima facie* covered by Art 355(3) but is outside the common customs territory under Reg 2913/92 and certain other Treaty rules by virtue of Art 28 of the Act of Accession (n 301, above): see Case C-30/01 *Commission v United Kingdom* [2003] ECR I-9481. See also Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917, [2007] 1 CMLR 87.

[327] The Isle of Man and the Channel Islands are part of the common customs territory under Reg 2913/92 so the rules on free movement of goods apply to them but it seems that the competition rules of the Treaty do not apply: Art 355(5)(c) TFEU and Protocol 3 to the Treaty of Accession (n 301, above). See Case C-171/96 *Pereira Roque v Lieutenant Governor of Jersey* [1998] ECR I-4607, [1998] 3 CMLR 143, Opinion of AG La Pergola, para 8. See also Case C-293/02 *Jersey Produce Marketing Organisation* [2005] ECR I-9543, [2006] 1 CMLR 738: Jersey and the United Kingdom were to be regarded as the same Member State but a law affecting only exports of new potatoes between Jersey and the United Kingdom was still caught by Art 35 TFEU because the potatoes might then be exported from the United Kingdom to other Member States.

[328] Art 355(5)(b) TFEU.

[329] Arts 355(2) TFEU and Ann II TFEU.

(*Continued*)

State	Territory	Status
Other European states[330]	Monaco	Included in the customs union[331]
	The Vatican	Outside the EU
	San Marino	Subject to a special agreement[332]
	Andorra	Subject to a special agreement[333]

(c) EFTA and the EEA

EFTA. The European Free Trade Association ('EFTA') was established in 1960 under the EFTA Convention signed in Stockholm. That Convention mainly covered trade in industrial goods but was updated by the Vaduz Convention which entered into force in June 2002. The Convention covers many other areas of trade, such as the free movement of goods and persons, and allows undertakings in the EFTA countries to benefit from most of the rights provided for in the EEA Agreement. It now comprises Switzerland, Iceland, Norway and Liechtenstein. **1.090**

The EEA Agreement. In 1992, the European Community,[334] as it was called at that time, the Member States and the EFTA countries signed an Agreement on the European Economic Area ('the EEA Agreement')[335] which came into force on 1 January 1994. Article 128 of the EEA Agreement states that a country that becomes a Member State of the EU shall also apply to become party to the EEA Agreement. Accordingly, EEA enlargement agreements were entered into at the same time as countries acceded to the EU. The EEA Agreement aims at ensuring free movement of goods, persons, services and capital among the Contracting Parties[336] and at setting up a system of undistorted competition. The Agreement also provides for closer cooperation in other fields such as research and development, the environment, education and social policy. Although Switzerland **1.091**

[330] Information about the EU's relations with these and other States is available on the website of the Commission's Directorate-General of External Relations.

[331] Art 3(2) of Reg 2913/92 (as last amended by Reg 587/2008, OJ 2008 L163/1). It is unclear whether it should be treated as part of France for the purposes of the competition rules by virtue of Art 355(3) TFEU. See para 12 of the AG Opinion in Case C-220/98 *Estée Lauder Cosmetics v Lancaster Group* [2000] ECR I-117, [2000] 1 CMLR 515, approving the submissions of France and the Commission that Monaco is a third country for EU law purposes. This issue was not addressed in the judgment of the CJ.

[332] San Marino's trade relations with the EU have been governed by an Agreement on Cooperation and Customs Union, OJ 2002 L84/43. It is uncertain how far it may be treated as part of Italy for the purposes of the competition rules by virtue of Art 355(3) TFEU.

[333] See OJ 1990 L374/16. An additional cooperation agreement with Andorra came into force in July 2005, OJ 2005 L135/14.

[334] Following the entry into force of the Treaty of Lisbon on 1 December 2009, the EU has been given legal personality by Art 47 TEU and has taken over all the Community's rights and obligations, including the EEA Agreement.

[335] The EEA Agreement, Cmnd 2073. The EEA Agreement was signed at Oporto on 2 May 1992. See the Opinions of the CJ: Opinion 1/91 [1991] ECR I-6079, [1992] 1 CMLR 245 and Opinion 1/92 [1992] ECR I-2821, [1992] 2 CMLR 217. For the text of the EEA Agreement as amended see the 'legal texts' section of the EFTA website. See also [1993] 1 ECLR Supp for the parts of the Agreement and the Protocols relating to competition.

[336] See Information Note *The Four Freedoms and the EEA* prepared by DG External Relations for the European Parliament, 27 October 2004.

signed the EEA Agreement, it subsequently withdrew from the EEA after the Swiss electorate voted against the Agreement in a referendum. The accession of Austria, Finland and Sweden to the European Community on 1 January 1995 reduced the number of non-EU signatory States to two: Iceland and Norway. However, Iceland applied to join the EU in July 2009 and negotiations for membership began a year later. Liechtenstein, which had withdrawn from the EEA along with Switzerland, joined the EEA after the Agreement had been suitably amended, on 1 May 1995. The non-EU signatory States are currently Iceland, Liechtenstein and Norway.

1.092 **The EFTA institutions.** Article 108 of the EEA Agreement provides for the establishment of an independent EFTA surveillance authority, with a role analogous to that of the European Commission, and an EFTA Court of Justice. This provision was implemented by the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ('the EFTA Surveillance and Court Agreement').[337] Protocol 5 to the EFTA Surveillance and Court Agreement constitutes the Statute of the EFTA Court.[338]

1.093 **Uniform application of competition policy in the EEA.** Article 1 of the EEA Agreement provides that the aim of the Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with a view to creating a homogeneous European Economic Area. Article 6 of the EEA Agreement provides that, without prejudice to future developments of case law, the provisions of the Agreement, insofar as they are identical in substance to corresponding rules of the TFEU and to acts adopted pursuant to that Treaty, shall be implemented and interpreted in accordance with the case law of the Court of Justice given prior to the date of the Agreement. Moreover, Article 3(2) of the EFTA Surveillance and Court Agreement provides that the Surveillance Authority and the Court shall take 'due account' of the relevant rulings of the Court of Justice given after the date of the EEA Agreement. On that basis, the EFTA Court has referred to the 'homogeneity objective' and applies the case law of the EU Courts when ruling on competition law.[339] The European Commission as well as the EFTA Surveillance Authority has a right to be heard in proceedings before the EFTA Court.[340]

1.094 **The competition provisions of the EEA Agreement.** The competition provisions in Articles 53, 54 and 59 of the EEA Agreement mirror Articles 101, 102 and 106 of the TFEU, and Article 57 of the EEA Agreement incorporates control of concentrations. The State aids provisions in Article 107 TFEU are similarly mirrored in Article 61 of the EEA Agreement and provisions for notification of proposed aid analogous to Article 108

[337] The EFTA Surveillance and Court Agreement, OJ 1994 L344/3. The text of the Agreement and the EFTA Court's Rules of Procedure are available on the EFTA Court's website under 'legal texts.'

[338] For a discussion of the role of the CJ under the EEA Agreement see Opinion 1/92 of the CJ (n 335, above).

[339] See, eg Case E-1/94 *Restamark* [1994–5] Rep EFTA Ct 15, [1995] 1 CMLR 161, paras 32–35; Case E-2/94 *Scottish Salmon Growers Association v EFTA Surveillance Authority* [1994–5] Rep EFTA Ct 59, [1995] 1 CMLR 851, paras 11–13; Case E-8/00 *LO and NKF v KS* [2002] Rep EFTA Ct 114, [2002] 5 CMLR 160, para 39; Case E-8/00 *Norwegian Federation of Trade Unions v Norwegian Association of Local and Regional Authorities* [2002] Rep EFTA Ct 114, [2002] 5 CMLR 160, paras 35–39. For a survey of the case law, see Baudenbacher (President of the EFTA Court), *EFTA Court: Legal Framework and Case Law* (3rd edn, 2008), available on the EFTA Court website.

[340] Protocol 5 EEA, Arts 17, 20.

TFEU are found in the EFTA Surveillance and Court Agreement.[341] Relevant EU legislative instruments are incorporated into the EEA Agreement by decision of the EEA Joint Committee.[342] Thus, pursuant to Article 60 and under Annex XIV of the EEA Agreement, most of the competition law regulations enacted by the Council of the European Union and by the European Commission have been adopted, subject to necessary amendments so that they apply to the EFTA States.[343] The EFTA Surveillance Authority also promulgates notices and guidance which mirror those issued by the Commission.[344] By an amendment to Protocol 4 to the EFTA Surveillance and Court Agreement, the EFTA States adopted a package of measures seeking to align the enforcement of the EEA competition rules with the legal exception system introduced by EU Regulation 1/2003[345] with effect from 20 May 2005.[346] However, since only the contracting EFTA States are parties to that Agreement, the national competition authorities of only those States[347] are required to enforce the EEA competition rules; the national competition authorities of the Member States of the EU have not been given such power. This does not affect the jurisdiction of either the EFTA Surveillance Authority or the Commission. Furthermore, the competition rules of the EEA Agreement form an integral part of the Union's legal order and have direct effect in the Member States of the EU and are therefore enforceable in the national courts of the EU Member States.[348] By contrast with EU law, there is no general principle of direct effect under the EEA Agreement; however, Norway and Iceland adopted domestic legislation incorporating Articles 53 and 54 EEA into their national legal order, and Liechtenstein follows the monist tradition whereby the State's international obligations are part of its domestic law. It follows that the courts of the three contracting EFTA States have power to apply the EEA competition rules.[349]

Allocation of jurisdiction under the EEA Agreement. Article 55(1) of the EEA Agreement imposes a duty on the EU Commission and the EFTA Surveillance Authority to ensure the application of the competition rules set out in Articles 53 and 54 of the EEA Agreement. The basis on which cases are allocated between the EU Commission and the EFTA Surveillance Authority is set out in Article 56 of the EEA Agreement. If the conduct **1.095**

[341] Protocol 3 to the EFTA Surveillance and Court Agreement (n 337, above). See also Art 62 EEA.

[342] These Decns are reported in the *Official Journal* and also, in Norwegian and Icelandic, in the EEA Supplement to the OJ. The EEA Supp also reports other matters of relevance only to the EFTA Contracting States.

[343] See, eg the block exemptions discussed at para 3.096, below.

[344] The texts of these Notices are published in English and German in the *Official Journal*, eg the Notice on Cooperation between the EFTA Surveillance Authority and the courts of the EFTA States, OJ 2006 C305/19. The Notices are also available on the EFTA Surveillance Authority's website: <http://www.eftasurv.int>.

[345] For the revision of the enforcement of the EEA competition rules, see the EFTA Surveillance Authority Annual Report 2005, pp 38–39.

[346] Agreement between the EFTA States of 24 September 2004 (replacing Protocol 4, Part I, Chap II to the EFTA Surveillance and Court Agreement): see OJ 2005 C304/24. A consolidated version of Protocol 4 is on the EFTA Surveillance Authority website.

[347] However, there is a special reservation for Liechtenstein, which does not have a competition authority, absolving it from this requirement: Art 41 of Part I, Chapter II of Protocol 4 to the Surveillance and Court Agreement.

[348] See by analogy Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, [1997] 1 CMLR 733, para 102 (concerning the prohibition of customs duties).

[349] Further, Art 6 of the amended Protocol 4 to the Surveillance and Court Agreement requires the national courts of the EFTA States to have power to apply the competition rules.

under investigation affects only trade between Member States of the Union the Commission has competence and applies the competition provisions of the TFEU.[350] If the conduct affects only trade between EFTA or EEA states, then the EFTA Surveillance Authority alone is competent and applies the EEA competition rules. Where, however, the effect on trade is mixed, the Commission is the competent authority. It may apply both the TFEU and the EEA Agreement where either (a) the conduct in question has an appreciable effect on trade between Member States and on competition within the EU;[351] or (b) the combined turnover of the undertakings concerned in the territory of the EFTA states is less than 33 per cent of their turnover in the EEA.[352] Protocol 22 to the EEA Agreement defines an 'undertaking' and 'turnover' for the purpose of applying Article 56. Cases under Article 54 EEA concerning abuse of a dominant position are allocated to the authority in the territory in which a dominant position is found to exist. If a dominant position exists in the territories of both the authorities, the Commission has jurisdiction where the tests in (a) or (b) above are satisfied. Thus, in *Prokent-Tomra* the Commission had jurisdiction to apply Article 102 TFEU and Article 54 EEA where an undertaking whose parent company was Norwegian was held to be dominant in national markets in the EU and in the EEA.[353]

1.096 **Powers of the Commission and the EFTA Surveillance Authority.** Where cases under the EEA Agreement are allocated to the EU Commission, the same rules as to procedure and as to the Commission's powers of investigation and enforcement apply as for cases under the TFEU alone.[354] The EFTA Surveillance Authority has equivalent powers and functions in relation to investigation and enforcement to those granted to the Commission by Regulation 1/2003. These powers are set out in Chapter II of Protocol 4 to the EFTA Surveillance and Court Agreement.[355] Further provisions in Chapters III (as amended) and V set out rules as to the conduct of proceedings and as to limitation periods that are materially identical to the equivalent EU rules. Article 11(1) of Protocol 23 to the EEA Agreement provides that a complainant may address a complaint to either authority. If it is, or becomes, apparent that the complaint was addressed to the wrong authority, the authority that received the complaint must transfer the case to the other.[356]

[350] For examples of the application of these principles see, eg COMP/37857 *Organic Peroxide*, decn of 10 December 2003, [2005] 5 CMLR 579, paras 287–293 and para 368 (appeals dismissed on other grounds); *Video games Nintendo Distribution*, OJ 2003 L255/33, [2004] CMLR 421, para 241 (point not considered on appeal).

[351] See, eg COMP/38698 *CISAC*, decn of 16 July 2008, [2009] 4 CMLR 577, paras 84–86 (on appeal, Cases T-398, 410, 411, 413–422, 425, 432, 434, 442, &451/08, not yet decided).

[352] See, eg Cases T-67/00, etc, *JFE Engineering v Commission* [2004] ECR II-2501, [2005] 4 CMLR 27, paras 484 et seq (point not considered on appeal, Cases C-403&405/04P *Sumitomo Metal Industries v Commission* [2007] ECR I-729, [2007] 4 CMLR 650); COMP/38337 *PO/Thread*, decn of 14 September 2005, paras 246, 295–298, 331, upheld on appeal, Cases T-456&T-457/05 *Gütermann and Zwicky v Commission* [2010] ECR II-1443, [2010] 5 CMLR 930, paras 39 et seq (the Commission had only treated the cartel in the EEA countries as an infringement from 1 January 1994, the date on which the EEA Agreement entered into force).

[353] COMP/38113 *Prokent-Tomra*, decn of 29 March 2006, [2009] 4 CMLR 101, para 330 (point not considered on appeal, Case T-155/06 *Tomra Systems* [2010] ECR II-4365, [2011] 4 CMLR 416 and Case C-549/10P, judgment of 19 April 2012, [2012] 4 CMLR 1093).

[354] *JFE Engineering* (n 352, above).

[355] EFTA Surveillance and Court Agreement (n 337, above).

[356] Art 11(2) and (3) of Protocol 23 to the EEA Agreement. Once a case has been transferred under these provisions, it may not be transferred again. A case cannot be transferred once a complaint has been definitively rejected or after a statement of objections has been issued: ibid, Art 10(4).

Cooperation in 'mixed' cases. Under Article 58 of the EEA Agreement[357] the Commission and the EFTA Surveillance Authority consult each other on matters of competition policy and on individual cases. The manner in which they cooperate is set out in Protocols 23 and 24 to the Agreement.[358] In the interests of the 'homogeneous interpretation' of the EEA and EU competition rules, the EFTA Surveillance Authority and the competent authorities of the EFTA States may participate in meetings of the European Competition Network for the discussion of general policy issues.[359] In 'mixed' cases which affect both EFTA and Member States of the EU, each authority sends to the other copies of notifications and complaints over which it has jurisdiction and informs the other about the opening of any *ex officio* procedures. The authority which is not competent to deal with the case may, at any stage of the proceedings, make observations to the authority which is dealing with the case. Each authority and the representatives of the States in its jurisdiction are entitled to attend, but not to vote at, meetings of the Advisory Committee of the other authority, and to see the relevant papers.[360] Each authority must also consult the other when it addresses a statement of objections to undertakings.[361] The other authority and the authorities of the States in the other authority's territory are entitled to attend oral hearings concerning mixed cases.[362] The rules relating to professional secrecy or the restricted use of information set out in Article 28 of Regulation 1/2003[363] do not apply to the exchange of information between the Commission and the EFTA Surveillance Authority. Each authority is nevertheless bound by equivalent obligations of confidentiality in respect of information obtained from the other.[364] **1.097**

Cooperation in investigations. Where, under Article 18 of Regulation 1/2003 (or under Article 18 of Chapter II of Protocol 4 to the EFTA Surveillance and Court Agreement), one authority addresses a request for information to (or takes a decision requiring the provision of information by) an undertaking in the other authority's territory[365] it must send a copy of that request or decision to the other authority.[366] Where an authority wishes an investigation to take place in another authority's territory under Article 20 of Regulation 1/2003,[367] it must request the other authority to undertake that investigation; the other authority must comply with that request.[368] **1.098**

Judicial review of competition decisions by the EFTA Court. The EFTA Court has, under Articles 35–37 of the EFTA Surveillance and Court Agreement, substantially the same powers of judicial review in relation to the conduct of the EFTA Surveillance **1.099**

[357] See also Art 109 which imposes a general duty to cooperate.
[358] Protocol 24 deals specifically with cooperation with regard to control of concentrations.
[359] Protocol 23, Art 1A.
[360] Protocol 23, Art 6(1).
[361] Protocol 23, Art 3.
[362] Protocol 23, Art 5.
[363] Also in Art 28 of Chapter II of Protocol 4 to the EFTA Surveillance and Court Agreement.
[364] Arts 9–10 of Protocol 23 to the EEA Agreement, and Art 122 EEA.
[365] That is to say, the EFTA States in the case of the Commission and the EU in the case of the EFTA Surveillance Authority.
[366] Art 8(1) and (2) of Protocol 23 to the EEA Agreement.
[367] Or the corresponding Art 20 of Chapter II of Protocol 4 to the EFTA Surveillance and Court Agreement.
[368] The requesting authority is entitled to be present at, and to play an active part in, the investigation, and to receive the information obtained: Art 8(3) and (4) of Protocol 23 to the EEA Agreement.

Authority as does the General Court in relation to the conduct of the Commission.[369] Its procedures are closely modelled on those of the Court of Justice.[370] The Court is composed of three judges and sits in Luxembourg. The EU Commission as well as the EFTA Surveillance Authority has the right to appear in cases before the EFTA Court.[371]

(d) Agreements between the EU and third countries

1.100 **Growing international cooperation and the ICN.** The facts that undertakings' behaviour and transactions can and do transcend national borders; that electronic commerce has created greater competition in the global economy; and that over 100 countries have adopted their own systems of competition law have meant that formal and informal cooperation between competition authorities has increased markedly in recent years.[372] The EU is a party to bilateral cooperation agreements on competition matters with several countries, including the United States, and is an active member of several multilateral international organisations, such as the Organisation for Economic Co-operation and Development ('the OECD'). These various forms of cooperation reflect a collective effort to facilitate enforcement on the one hand, and avoid or manage disputes on the other. Competition authorities have also taken steps towards international coordination on competition policy issues, in particular through the International Competition Network ('the ICN'). Since its creation in 2001 the ICN has promoted procedural and substantive convergence of competition law and policy. The ICN website is a useful source of information and material on the laws and enforcement of its members.[373]

1.101 **Competition cooperation agreements with the United States.** The first cooperation agreement on competition matters with the United States was concluded by the Commission[374] in 1991. Under the 1991 Agreement,[375] each party will provide the other with 'any significant information' that comes to its attention about anti-competitive activities that may warrant enforcement activity by the other party.[376] Each party may also request that the other initiate enforcement activities in respect of anti-competitive activities occurring substantially in the territory of the requested party but which adversely affect the interests of the requesting party.[377] The latter, 'positive comity', provision was

[369] On the EFTA Court generally, see Baudenbacher, 'The EFTA Court: An Actor in the European Judicial Dialogue' (2005) 28 Fordham Int'l LJ 353.

[370] See the Statute of the EFTA Court in Protocol 5 to the EFTA Surveillance and Court Agreement (n 337, above).

[371] Statute of the EFTA Court in Protocol 5 to the EFTA Surveillance and Court Agreement (n 337, above), Art 17; see, eg Case E-8/00 *LO and NKF v KS* [2002] Rep EFTA Ct 114, [2002] 5 CMLR 160.

[372] Zanettin, *Cooperation between Antitrust Agencies at the International Level* (2002); Papadopoulos, *The International dimension of EU competition law and policy* (2010).

[373] The ICN website is <http://www.internationalcompetitionnetwork.org>. On the work of the ICN see para 1.107, below.

[374] The Commission's *vires* to conclude the Agreement was successfully challenged: Case C-327/91 *France v Commission* [1994] ECR I-3641, [1994] 5 CMLR 517. After the litigation a decn of the Council and of the Commission of 29 May 1998, OJ 1998 L173/26 approved the Agreement from 23 September 1991 together with an exchange of interpretative letters between the EU and the USA occasioned by the litigation.

[375] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ 1995 L95/47 (including the exchange of letters) (corr. OJ 1995 L131/38), [1991] 4 CMLR 823, [1995] 4 CMLR 677.

[376] 1991 Agreement, above, Art III(3).

[377] 1991 Agreement (n 375, above) Art V.

strengthened by the 1998 Agreement[378] which defines the circumstances in which the competition authorities of the requesting party will normally suspend or defer their investigations in reliance on enforcement activities of the requested party.[379] The Commission's annual Reports on Competition Policy contain a section describing its cooperation with the US agencies.[380] An issue of particular importance for international anti-cartel enforcement is the need for protection against disclosure of information provided by leniency applicants in the context of private actions for damages. The European Commission has intervened successfully as *amicus curiae* in US proceedings to prevent the disclosure of documents gathered during its investigation.[381] In the EU, the Court of Justice had stated that it is for the national courts to balance the needs of an effective leniency programme against the rights of claimants when considering requests for disclosure.[382] Beyond cartels, the Commission and the US agencies have agreed a set of best practices on cooperation in transatlantic merger investigations.[383]

1.102 **Competition cooperation agreements with other States.** The EU has also concluded dedicated cooperation agreements on competition matters with Canada,[384] Japan[385] and the Republic of Korea.[386] The principal elements of such agreements are the coordination of enforcement investigations and the exchange of non-confidential information.[387] The agreements contain provisions for one party to request the other to take enforcement action (positive comity) and for one party to take into account the important interests of the other party in the course of enforcement activities (traditional comity). Systems of national law may contain restrictions on the extent to which sensitive and confidential information may be shared with authorities in other countries. In some cases the parties may grant waivers

[378] Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ 1998 L173/26, [1999] 4 CMLR 502. This Agreement, unlike the 1991 Agreement does not cover mergers. The GC has held that the purpose of the 1998 Agreement is not to implement a principle of *non bis in idem* but rather to enable the authorities of one of the Contracting Parties to take advantage of the practical effects of a procedure initiated by the authorities of the other: see Cases T-71/03, etc, *Tokai Carbon v Commission* [2005] ECR II-10, [2005] 5 CMLR 460, para 116 (appeal dismissed, Case C-328/05P *SGL Carbon v Commission* [2007] ECR I-3921, [2007] 5 CMLR 16). The Commission is therefore not required to set off a fine imposed by the US courts against the fine imposed in an EU decision: see, eg Case T-224/00 *Archer Daniels Midland v Commission* [2003] ECR II-2597, [2003] 5 CMLR 583, paras 96 et seq (appeal dismissed, Case C-397/03P [2006] ECR I-4429, [2006] 5 CMLR 230).

[379] See, eg Guzman, Cooperation, Comity, and Competition Policy (2010).

[380] On 31 March 1999, the Commission adopted the Administrative Arrangements on Attendance (AAA) setting out administrative arrangements between the competition authorities of the EU and the US concerning mutual attendance at certain stages of the procedures in individual cases involving the application of their respective competition rules: Bulletin EU 3–1999, Competition (18/43).

[381] See, eg *Re payment card interchange fee and merchant discount* ECN Brief 04/2010, p2.

[382] See Chap 16, below.

[383] The document was published in October 2011 and is available on DG Comp website: <http://www.ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf>.

[384] Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ 1999 L175/49.

[385] Agreement between the EU and the Government of Japan concerning cooperation on anti-competitive activities, OJ 2003 L183/12.

[386] Agreement between the EU and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, OJ 2009 L202/36.

[387] For the provisions on confidentiality and business secrecy affecting the Commission, see para 13.033, below.

so that the authorities are permitted to share information and assessments during parallel competition investigations.[388]

1.103 **Bilateral agreements with candidate countries and potential candidates.** The EU has signed a Stabilisation and Association Agreement ('SAA') with each of the former Yugoslav Republic of Macedonia,[389] Croatia,[390] Albania,[391] Montenegro,[392] Serbia,[393] and Bosnia and Herzegovina.[394] The SAA constitutes an essential element of the EU's Stabilisation and Association Process with the Western Balkan countries. The SAA is similar to the earlier 'Europe Agreements' with previous candidate countries[395] and provides a contractual framework with mutual rights and obligations between the EU and the countries until accession, including provisions on competition. Articles 70(1) and 70(2) of the Agreement with Croatia, for example, essentially mirrors similar competition provisions in the previous Europe Agreements.[396] 'Appropriate measures' may be taken in respect of practices contrary to Article 70(1) after consultation within the Stabilisation and Association Council or after 30 working days following referral for such consultation.[397] Article 69 of the Agreement provides for the approximation of laws which will extend to all elements of the Union *acquis* within six years after the entry into force of the Agreement.[398] The other candidate country for membership of the EU is Turkey. Relations between the EU and Turkey are governed by the Association Agreement of 1963 ('the Ankara Agreement').[399] Decision

[388] See, eg M.5669 *Cisco/Tanberg,* Press Release IP/10/377 (29 March 2010) and DoJ Press Release, 29 March 2010 (cooperation in merger control); Hammond 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades', 25 February 2010 (cooperation in the investigations of the *Air Cargo* and *Marine Hoses* cartels). Note that the OECD has published 'Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations', October 2005, available at <http://www.oecd.org>.

[389] The SAA with the former Yugoslav Republic of Macedonia entered into force on 1 May 2004: OJ 2004 L84/1.

[390] The SAA with Croatia entered into force on 1 February 2005: OJ 2005 L26/3. An Enlargement Protocol, necessary to take into account the accession of ten new Member States on 1 May 2004 was signed in December 2004: OJ 2005 L26/222. See also Council Decn 2006/145 on principles, priorities and conditions on Accession Partnership with Croatia, OJ 2006 L155/30.

[391] The SAA with Albania entered into force on 1 April 2009: OJ 2009 L107/166.

[392] The SAA with Montenegro entered into force on 1 May 2010: OJ 2010 L108/3.

[393] The SAA with Serbia was signed on 29 April 2008 but has not yet entered in force. An Interim Agreement on trade and trade-related matters between the EU and Serbia is published at OJ 2008 L28/2.

[394] The SAA with Bosnia and Herzegovina was signed on 16 June 2008 but has not yet entered into force. An Interim Agreement on trade and trade-related matters between the EU and Bosnia and Herzegovina is published at OJ 2008 L169/13.

[395] ie with Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic and Slovenia.

[396] See para 2–162 of the 5th edn of this work. Art 70(2) provides that any practices contrary to those rules are to be assessed on the basis of the criteria arising from the application of Arts 101 and 102 TFEU and the secondary legislation thereunder.

[397] Agreement with Croatia (n 390, above) Art 70(9).

[398] Agreement with Croatia (n 390, above) Art 5. None of the specific implementing rules have been adopted at the time of writing.

[399] The Ankara Agreement, OJ 3687/64 and (English text) OJ 1973 C113/1, supplemented by Additional Protocols. For a case on direct application of the Ankara Agreement, see Case C-37/98 *Savas* [2000] ECR I-2927, [2000] 3 CMLR 729, applied in, eg Case C-187/10 *Unal v Staatssecretaris van Justitie*, judgment of 29 September 2011. By an Additional Protocol of July 2005, the Agreement was extended to the 10 new Member States, including significantly Cyprus. However, Turkey attached a declaration to its signature that qualifies its position as regards relations with Cyprus. See Katselli, 'The Ankara Agreement, Turkey and the EU' (2006) 55 ICLQ 705.

1/95 of 22 December 1995 of the EU-Turkey Association Council,[400] implementing the final phase of the customs union under the Ankara Agreement, contains detailed competition provisions that mirror Articles 101 and 102 TFEU.[401] The Commission regularly monitors, and provides technical assistance to, the candidate countries (Croatia, FYR of Macedonia and Turkey) in order to help them fulfil the competition requirements of accession to the EU.[402]

Association agreements between the EU and other states. The EU has entered into other agreements with non-member countries such as Free Trade Agreements,[403] Partnership and Cooperation Agreements, or Association Agreements. Most of these agreements contain some reference to competition but in many cases the relevant provisions are of a rather general and exhortatory nature. Those which have specific competition provisions include the Agreement between the EU and the Swiss Confederation;[404] the Union for the Mediterranean forming an association with north African, Middle Eastern and Balkan countries;[405] and the EU-South Africa Agreement of 1999.[406] DG Competition maintains a list on its website, in the section relating to International: bilateral relations. This has a link to a table showing the nature and extent of the EU's relationships with countries from Albania to Zimbabwe and provides links to the competition provision extracts from the relevant agreements. **1.104**

Cooperation between the Commission and enforcement bodies in other States. In May 2004 the Commission signed detailed terms of reference for a dialogue with the Ministry of Commerce in China on competition matters. Further, a memorandum to increase cooperation between DG Competition and two other Chinese antitrust authorities was signed on 20 September 2012.[407] The cooperation covers legislation, enforcement and **1.105**

[400] Decn 1/95 of 22 December 1995, OJ 1996 L35/1; the CJ has not considered the direct effect of the competition provisions, but has ruled on the direct effect of Decn 1/80 dealing with free movement: Case C-374/03 *Gürol v Bezirksregierung Köln* [2005] ECR I-6199, [2005] 3 CMLR 44; Case C-192/89 *Sevince* [1990] ECR I-3461, [1992] 2 CMLR 57.

[401] Decn 1/95 of 22 December 1995 (n 400, above) Arts 32–33. Art 35 provides that any practices contrary to those rules are to be assessed on the basis of the criteria arising from the application of Arts 101 and 102 TFEU and the secondary legislation thereunder. No implementing rules have yet been adopted.

[402] See, eg COM(2008) 674 final (5 November 2008) Communication from the Commission to the Council and the European Parliament 'Enlargement Strategy and Main Challenges 2008–2009'. See para 1.085, above.

[403] eg the EU has concluded negotiations for Free Trade Agreements with the Andean Countries (Colombia and Peru) as well as with Central America: see Staff Working Paper on Report on Competition Policy (2010), para 155.

[404] The website of the Swiss Integration Office contains useful information about Switzerland's relationship with the EU including the current status of the various bilateral agreements: see <http://www.europa.admin.ch>. The agreement between the EU and Switzerland on civil aviation (OJ 2002 L114/73) contains specific provisions on competition: Arts 8–14. Art 10 provides that anti-competitive agreements and abuses which may only affect trade within Switzerland remain in the exclusive competence of the Swiss authorities.

[405] The EU External Action website has information on the Union for the Mediterranean (formerly known as the Barcelona Process): <http://www.eeas.europa.eu/euromed/index_en.htm>. See Lenaerts, Van Nuffel, Bray and Cambien, *European Union Law* (3rd edn, 2011), Pt 6.

[406] Agreement on Trade, Development and Co-operation between the [EU], its Member States and the Republic of South Africa, OJ 1999 L311/1.

[407] See (2004) 2 Competition Policy Newsletter 27 and Press Release IP/12/993 (20 September 2012) which contains a link to the 2004 Agreement as well as to the 2012 Memorandum.

technical cooperation regarding cartels, other restrictive agreements and abuse of dominance. Separately, DG Competition works closely with the Competition Commission of India.[408] In October 2009 DG Competition signed a Memorandum of Understanding with the Brazilian Ministry of Justice[409] setting out a framework for administrative cooperation, dialogue and exchanges of non-confidential information. DG Competition signed a similar Memorandum of Understanding with the Federal Anti-Monopoly Service of the Russian Federation in March 2011.[410]

1.106 **Multilateral international cooperation.** The Commission participates in various fora where States meet for multilateral cooperation on competition issues. International bodies,[411] such as the OECD and UNCTAD, hold roundtable discussions on a wide range of matters of competition law and policy.[412] Cooperation between the Commission and the competition authorities of other OECD member countries had led to the adoption of Recommendations on competition law, including its Recommendation of the Council concerning Effective Action Against Hard Core Cartels in March 1998 and its Recommendation on Merger Review in March 2005.[413]

1.107 **The International Competition Network.** The ICN was launched in New York in October 2001. Membership is open to national and multinational competition authorities entrusted with the enforcement of competition laws. The ICN currently has over 100 members. The ICN seeks to develop a degree of consensus on what constitutes best practice in competition law and its enforcement and, where appropriate, to foster soft harmonisation of competition policy. The ICN operates through working groups devoted to selected topics—currently mergers, cartels, unilateral conduct, advocacy, and agency effectiveness. They aim to facilitate multilateral engagement on competition policy matters and produce recommended practices and other guidance. Such matters have included recommended practices on procedural features of merger notification; a Merger Guidelines Workbook; an Anti-Cartel Enforcement Manual; and a Unilateral Conduct Workbook, among others.[414] The ICN working groups regularly hold workshops and the ICN as a whole holds an annual conference, hosted by a different member authority each year. Despite being

[408] See Commission's Staff working paper accompanying the Report on Competition Policy 2010, SEC(2011) 690 final, para 427.

[409] See Commission Press Release IP/09/1500 (9 October 2009).

[410] See Commission Press Release IP/11/278 (10 March 2011).

[411] The EU is also bound by the World Trade Organisation ('WTO') Agreement and the annexed multilateral agreements, including the General Agreement on Tariffs and Trade 1994 ('GATT') and the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS'): OJ 1994 L336/3 and Opinion 1/94 ('the WTO Case') [1994] ECR I-5267, [1995] 1 CMLR 205. But these Agreements do not have direct effect or create rights for individuals, save that exceptionally the legality of an EU measure may be reviewed in the light of the WTO Agreement where it was designed to implement a particular obligation in the context of the WTO: Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, [2007] 5 CMLR 846, paras 798–802 (rejecting the argument that Art 102 must be interpreted consistently with the TRIPS Agreement).

[412] See, in particular, Commission Staff working paper accompanying the Report on Competition Policy 2010, SEC(2011) 690 final, paras 416–417. The documents summarising the OECD roundtables are available on its website: <http://www.oecd.org>.

[413] Recommendation concerning Effective Action Against 'Hard-Core' Cartels (1998), 25 March 1998, C(98)35/Final and Recommendation concerning Effective Action Against 'Hard-Core' Cartels (1998), 23 March 2005, C(2005)34.

[414] The documents are available on the ICN website: <http://www.internationalcompetitionnetwork.org>.

non-binding (or perhaps as a result), the ICN has proved very successful in fostering cooperation between authorities around the world and in promoting convergence of ideas and practice.[415]

6. The Territorial Jurisdiction of the EU Institutions

1.108 **In general.** On the face of it, the territorial scope of the EU competition rules is very wide since it applies to any collusive or abusive conduct which has the necessary effect on competition and trade between Member States, whatever the nationality or territorial location of the undertakings concerned. Agreements which are directly or overtly concerned only with exports from or imports to the EU may nevertheless have an effect upon intra-EU trade and so fall within the scope of the competition rules. The following topics are considered here:

(a) the application of Article 101(1) to agreements affecting trade into the EU from third countries;
(b) the application of Article 101(1) to agreements affecting trade from the EU to third countries;
(c) the extent to which jurisdiction to apply Articles 101 and 102 and the Merger Regulation is asserted over undertakings outside the EU.

The scope of the territory of the EU and the effect of the EEA Agreement and other bilateral arrangements between the EU and third countries has already been considered above.[416]

(a) Trade into the EU from third countries

1.109 **Agreements on imports into the EU.** It is well established that an anti-competitive agreement between undertakings within the EU and their competitors in third countries intended to reduce the supply, within the EU, of products originating in third countries is capable of falling within Article 101(1).[417] Further, an agreement relating to imports into the EU from third countries which has as its object or effect an appreciable restriction of competition within the EU is likely to fall within Article 101(1).[418] In *Gas Insulated Switchgear*,[419] the major Japanese and European providers of GIS coordinated the allocation of GIS projects worldwide according to agreed rules under which they agreed not to bid for projects in the others' 'home markets'. Further, the European producers agreed amongst themselves to share EEA markets. The Commission found that both aspects of

[415] The activity of the ICN is summarised in the 'International activities' section of the Commission's Annual Report on Competition Policy.
[416] Paras 1.089 et seq, above.
[417] Case 51/75 *EMI Records v CBS United Kingdom* [1976] ECR 811, [1976] 2 CMLR 235, para 28; *Aluminium Imports from Eastern Europe*, OJ 1985 L92/1, [1987] 3 CMLR 813.
[418] Case 22/71 *Béguelin Import v GL Import Export* [1971] ECR 949, [1972] CMLR 81; *Franco-Japanese Ballbearings*, OJ 1974 L343/19, [1975] 1 CMLR D8; *Preserved Mushrooms*, OJ 1975 L29/26, [1975] 1 CMLR D83; Case 71/74 *Frubo v Commission* [1975] ECR 563, [1975] 2 CMLR 123; *Ansac*, OJ 1991 L152/54 (US Webb-Pomerene Act association of soda-ash producers; the Commission rejected the argument that the cartel enabled a strong market entrant from the United States, despite having condemned ICI and Solvay for sharing the EU market).
[419] COMP/38899 *Gas Insulated Switchgear*, decn of 24 January 2007 (upheld on appeal Case T-112/07 *Hitachi v Commission*, judgment of 12 July 2011).

the cartel were part of a single continuous infringement. The Commission held that it was clear that the intra-EU aspect of the illegal agreement at least potentially affected trade between Member States, so that the condition concerning the impact of the agreement as a whole on trade between Member States was satisfied.[420] Any agreement which potentially reduces competition in the EU by undertakings in third countries may fall under Article 101(1) and it is irrelevant that one or more parties are situated or domiciled outside the EU.[421] Once it is established that the agreement in question restricts competition in relation to the import of goods into the EU, it is not thereafter difficult to find that the agreement is capable of having an effect on trade between Member States of the EU.[422]

(b) Trade from the EU to third countries

1.110 **Agreements concerning exports from the EU.** In general, agreements or individual clauses in agreements relating exclusively to trade outside the EU do not fall within Article 101(1).[423] It does not necessarily follow, however, that an agreement falls outside Article 101(1) merely because it relates to trade outside the EU since the agreement itself may still have a significant effect upon competition and trade within the EU. For example, a cartel of undertakings in the EU concerning only markets outside the EU will be caught by Article 101(1) if it has the object of diverting surpluses from within the EU, or of preventing re-export to home markets.[424] A cargo-sharing agreement between carriers operating on routes from one Member State to third countries distorts competition with carriers in other Member States and also as between EU exporters.[425] An export ban on sales to third countries included in a distribution agreement for territories in the EU, even if it does not have the object of restricting competition may nonetheless have that effect, and infringe Article 101(1), if in the absence of such a restriction there would be a realistic possibility of re-import of the products into the EU, having regard, for example, to the level of customs

[420] *Gas Insulated Switchgear*, above, para 315.

[421] eg *Reuter/BASF*, OJ 1976 L254/40, [1976] 2 CMLR D44 (restrictive covenant affecting transfer of know-how to undertakings outside the EU that could become suppliers in the EU); *Siemens/Fanuc*, OJ 1985 L376/29, [1988] 4 CMLR 945 (cooperative exclusive dealing agreement between German and Japanese manufacturers); *Quantel International-Continuum/Quantel*, OJ 1992 L235/9, [1993] 5 CMLR 497 (market-sharing on de-merger by French company of its US subsidiary); *Cartonboard*, OJ 1994 L243/1, [1994] 5 CMLR 547, para 139 (cartel of which many of the members had their head offices outside the EC); *GEAE/P&W*, OJ 2000 L58/16, [2000] 5 CMLR 49 (joint venture between two major US manufacturers to develop engine for very large commercial aircraft; now would fall under Art 3(4) of the Merger Reg; see para 8.054).

[422] *Frubo v Commission* (n 418, above). Art 101(1) is not infringed if, on the facts, the relevant trade is plainly confined to trade between one Member State and a non-Member State: Case 28/77 *Tepea v Commission* [1978] ECR 1391, [1978] 3 CMLR 392, para 48 (no infringement prior to UK accession to the EU); see Case C-17/10 *Toshiba v Czech Competition Authority*, judgment of 14 February 2012.

[423] Case 174/84 *Bulk Oil v Sun International* [1986] ECR 559, [1986] 2 CMLR 732, para 44. See generally *Rieckermann*, OJ 1968 L276/25, [1968] CMLR D78; *DECA*, OJ 1964 2761, [1965] CMLR 50; *VVVF*, OJ 1969 L168/22, [1970] CMLR Dl. See also *Zinc Producer Group*, OJ 1984 L220/27, [1985] 2 CMLR 108, para 84 (Commission considered Art 101(1) did not apply to those members of an international cartel outside the EU who scarcely participated in the EU market).

[424] Cases 40/73, etc, *Suiker Unie v Commission* [1975] ECR 1663, [1976] 1 CMLR 295, paras 558 et seq; Cases T-25/95, etc, *Cimenteries v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, paras 3851 et seq (esp at paras 3920–3930); Effect on Trade Guidelines, OJ 2004 C101/81: Vol II, App C12, para 105.

[425] *French-West African Shipowners' Committee*, OJ 1992 LI34/1, [1993] 5 CMLR 446, para 43: the less favourable terms which participants in the agreement can impose on exporters places shipments from that State at a disadvantage, and thereby also distorts competition between EU ports.

duties.[426] Similar considerations apply to a licensing agreement for production in the EU that prohibits export to a third country.[427] Moreover, if an agreement relates to exports to an EEA State, the equivalent competition provisions of the EEA Agreement apply.[428] An agreement or practice which relates to imports or exports with third countries must be capable of having an appreciable influence, direct or indirect, actual or potential, on the pattern of trade between Member States of the EU. In the context of the behaviour of dominant undertakings, the Court of Justice has held that the abuse of a dominant position adversely affecting a competitor within the EU may have repercussions on the competitiveness of, and trade within, the internal market. It is irrelevant that the abusive conduct relates only to activities outside or exports from the EU.[429]

Destination and re-importation clauses. In *Javico International v Yves Saint Laurent Parfums*[430] the Court of Justice gave a preliminary ruling on the application of Article 101 to two distribution agreements between Yves St Laurent Parfums (YSLP), a producer of luxury cosmetics, and Javico, a German company specialised in distributing products to Eastern Europe. The issue arose in proceedings brought by YSLP against Javico alleging that it was in breach of its contractual obligations to sell YSLP products under one agreement, in Russia and the Ukraine and, under the other, in Slovenia[431] and not to export **1.111**

[426] *SABA (No. 1)*, OJ 1976 L28/19, [1976] 1 CMLR D61, para 35; *Junghans*, OJ 1977 L30/10, [1977] 1 CMLR D82. However, in both cases, once the free trade area came into effect with the EFTA States on 1 July 1977, a restriction on sale to those States would infringe Art 101(1) as the customs duties that made re-importation uneconomic would cease to apply. See also *Tretorn*, OJ 1994 L378/45, [1997] 4 CMLR 860, paras 65–66: although re-exportation from Switzerland was unlikely, a ban on sales to Swiss dealers was nonetheless held to infringe Art 101(1) since it prevented them from buying in one Member State and reselling in another without physically importing into Switzerland. Note that in *Chanel*, OJ 1994 C334/11, the Commission required deletion from Chanel's agreements with its selected retailers for watches of the ban on export to all countries which had concluded free trade agreements with the EU. See also *The Distillers Company*, OJ 1978 L50/16, [1978] 1 CMLR 400, paras 72–73 (appeal on other grounds dismissed, Case 30/78 *Distillers* [1980] ECR 2229, [1980] 3 CMLR 121).

[427] *Kabelmetal/Luchaire*, OJ 1975 L222/34, [1975] 2 CMLR D40 (re-importation unlikely because the products were not suitable for sale through intermediaries); *Campari*, OJ 1978 L70/69, [1978] 2 CMLR 397, para 60 (double excise duties, taxes and trade margins would preclude re-importation). See also *Schlegel/CPIO*, OJ 1983 L351/20, [1984] 2 CMLR 179 (negative clearance granted to manufacturing licence restricted to the EU but sales permitted worldwide: no grounds to suggest that it would affect competition within the EU).

[428] See paras 1.090 et seq, above. Decisions pre-1994 must be read subject to that qualification.

[429] See, eg Cases 6&7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, paras 33–34; Case 22/79 *Greenwich Film Production v SACEM* [1979] ECR 3275, [1980] 1 CMLR 629, paras 11–13.

[430] Case C-306/96 *Javico International v Yves Saint Laurent Parfums* [1998] ECR I-1983, [1998] 5 CMLR 172. Case 14967, NJ 1993/382 *Philips Information Systems and Solid International*, judgment of Dutch Supreme Court, 23 April 1993 concerned a shipment of outdated personal computers, produced in Canada, and sold by Philips to Solid International. Both Philips and Solid International were based in the Netherlands. The purchasing agreement contained an export clause stipulating that the goods be sold outside the EU in Eastern Europe. However, Solid sold the complete shipment within the Netherlands claiming the clause contravened Art 101. Philips argued that the export clause could not affect inter-State trade since the computers were produced outside the EU, were to be transported outside the EU, and were destined to be sold outside the EU. The Dutch Supreme Court decided that the Court of Appeal had not properly considered these facts and annulled the Court's judgment.

[431] At that time not a Member State.

them to the EU. Noting that the restriction covered not only the EU but all third countries other than the contractual territories, the Court held that the restrictions:

> 'must be construed as not being intended to exclude parallel imports and marketing of the contractual products within the [EU] but as being designed to enable the producer to penetrate a market outside the [EU] by supplying a sufficient quantity of contractual products to that market.'[432]

Although the agreements therefore did not have the object of restricting competition within the EU, it was necessary to consider whether they had such an effect. That would depend on the degree to which the EU market in products of that kind was already competitive and, as regards the potential for re-imports, whether there was a substantial price difference that would not be eroded by the costs involved in re-importation.[433] Although the judgment is somewhat confusing in its lack of distinction between inter-brand and intra-brand competition,[434] the Court's approach is that unless the EU market is oligopolistic (concentrated), prevention of direct, parallel imports by such a third country destination clause should not be regarded as having an anti-competitive effect, and that the test under Article 101(1) is then the same as if the distributor was itself outside the EU, that is to say, whether there is a realistic likelihood of re-imports from the country of destination.

1.112 Likelihood of re-imports. When territorial restrictions that prevent sale in the EU are included in an agreement for distribution, or a licence to manufacture, outside the EU, the application of Article 101(1) depends on the legislative and economic context of the agreement. The following situations may be distinguished:

(a) Where the distributor or licensee is situated in a third country, if importation is not a realistic commercial prospect, for example because of the nature of the product or because any price differential would be eroded by transport costs or customs duties, the agreement would be unlikely to have an effect on trade between Member States and fall outside Article 101(1).[435]

(b) Where the distributor is another EU undertaking, a third country 'destination clause' operates also to prevent direct sales between Member States. If competition for such products in the EU is limited, a clause that prevents parallel imports may have an appreciable anti-competitive effect and infringe Article 101(1).[436]

[432] *Javico v Yves Saint Laurent Parfums* (n 430, above) para 19.

[433] The judgment refers to customs duties, transport costs and the other costs resulting from export to a third country and re-importation into the EU: para 24. The reference to other costs ('*les autres couts*') is omitted from the English translation.

[434] There is also no discussion of the potential exhaustion of YSLP's trade mark rights, perhaps because that was not part of the questions referred.

[435] eg *Raymond-Nagoya*, OJ 1972 L143/39, [1972] CMLR D45 (licence to Japanese company to manufacture in Japan with exclusive territory in the Far East: technical nature of the products made it necessary to be close to the customers); *Grosfillex-Fillistorf*, OJ 1964 915, [1964] CMLR 237 (distributor in Switzerland: no material price difference between Switzerland and the EU, where there was substantial competition for such products). cf *BBC Brown Boveri*, OJ 1988 L301/68, [1989] 4 CMLR 610 (exclusive know-how licence to Japanese company for manufacture and sale of products in the Far East in the context of a joint research and development agreement: because exports of the product to the EU would have been feasible, notwithstanding the large distances involved, the licence came within Art 101(1)). See also the decisions concerning intra-EU agreements in nn 426 and 427, above.

[436] See Cases 29&30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, [1985] 1 CMLR 688: German producer supplied sheet zinc to a Belgian purchaser on condition that he resold the goods in Egypt; the vendor was the only producer in Germany and the CJ held that the clause was 'essentially designed to

Imports into the EU: *de minimis*. An agreement that restricts imports into the EU may fall outside Article 101(1) under the *de minimis* doctrine if it affects trade between Member States to an insignificant extent.[437] In *Javico v Yves Saint Laurent Parfums* the Court of Justice stated: **1.113**

> 'In that regard, intra-[EU] trade cannot be appreciably affected if the products intended for markets outside the [EU] account for only a very small percentage of the total market for those products in the territory of the [internal market].'[438]

This appears to go somewhat further than the usual *de minimis* doctrine, especially as the quantity of luxury perfume exported to the Russian/Ukrainian market was evidently not economically insignificant.[439] On the other hand, even if the conduct of an individual party to an agreement does not itself appreciably affect trade within the EU, the small scale of that party's participation in the agreement will not exculpate it if the effect on trade of the agreement as a whole is appreciable.[440]

(c) Jurisdiction over undertakings outside the EU

The issue. The question of substantive, or subject-matter, jurisdiction under EU competition law arises not only as regards Article 101 but also in connection with the application of Article 102 and the Merger Regulation. When a non-EU undertaking engages in conduct directly within the EU, such conduct is clearly subject to EU law on the basis of territorial jurisdiction. It is the application of EU competition law to activity carried on outside the EU (and the European Economic Area), especially by non-EU undertakings, that gives rise to a potential problem. How far a State may properly apply its laws to conduct carried out beyond its territory is a controversial issue under public international law.[441] On the one hand, the application by one State, or group of States, of their law to conduct on the territory of another State can be regarded as an infringement of the latter State's sovereignty. On the other hand, in an increasingly interdependent world, competition law that is based primarily on economic consequences becomes stunted and artificial if it cannot reach any conduct engaged in beyond the legislating State's territorial boundaries. **1.114**

Agreements involving undertakings located in third countries. The application of Article 101 to agreements or concerted practices involving undertakings located outside the EU was the principal issue arising in *Wood Pulp I*.[442] The Commission's decision[443] **1.115**

prevent the re-export of goods to the country of production so as to maintain a system of dual prices and restrict competition on the [internal] market' (para 28).

[437] *Tepea* (n 422, above) para 47. See para 1.130, below.

[438] *Javico v Yves Saint Laurent Parfums* (n 430, above) para 26.

[439] See the Opinion of AG Tesauro, *Javico v Yves Saint Laurent Parfums* (n 430, above) paras 14–15, noting that it was undisputed that large volumes of re-importation had in fact occurred and that as it was the policy of large groups to purchase the products throughout the European market, subsequent re-export to another Member State was almost inevitable. However, the CJ declined to make any determination on the facts.

[440] *Aluminium Imports from Eastern Europe* (n 417, above) para 13; COMP/38899 *Gas Insulated Switchgear*, decn of 24 January 2007 (upheld on appeal Case T-112/07 *Hitachi v Commission*, judgment of 12 July 2011) (market-sharing cartel with Japanese producers was part of an overall arrangement which also included intra-EU market-sharing). See further para 1.135, below.

[441] See Jennings and Watts (eds), *Oppenheim's International Law* (9th edn, 2008), Vol I, pp 472–478.

[442] Cases 89/85, etc, *Åhlström Osakeyhtiö v Commission* ('*Wood Pulp I*') [1988] ECR 5193, [1988] 4 CMLR 901. For a later example of a cartel of undertakings in non-Member States, see *Ansac*, OJ 1991 L152/54. In Case T-395/94 *Atlantic Container v Commission (TAA Agreement)* [2002] ECR II-875, [2002] 4 CMLR 1008, the GC cited and relied on *Wood Pulp I* at para 72.

[443] *Wood Pulp*, OJ 1985 L85/1, [1985] 3 CMLR 474.

concluded that 41 wood pulp producers, and two of their trade associations, all having their registered offices outside the EU, had engaged in concerted practices relating to the prices charged through subsidiaries or agents to manufacturers of paper within the EU. The decision was challenged on a number of grounds and the Court of Justice ordered that the jurisdictional issues be determined separately from the substantive issues.[444] The Court of Justice held that where producers established in third countries sell directly to purchasers established in the EU and engage in price competition in order to win orders from those customers, that constitutes competition within the internal market. It follows that where those producers coordinate the prices to be charged and put that concertation into effect by selling at prices which are coordinated, they are taking part in concertation which has the object and effect of restricting competition within the internal market. The decisive factor is not where the parties are located but where the agreement or concerted practice is implemented. The EU's jurisdiction to apply its competition rules to such conduct was, the Court stated, covered by the territoriality principle as universally recognised in public international law.[445] The Court accordingly articulated a principle based on the territorial implementation of an agreement or concerted practice within the internal market, irrespective of where the collusion originated or the parties were based.[446] More recently, in *Candle Waxes*[447] the Commission rejected a challenge by MOL, a Hungarian company, to its jurisdiction in respect of MOL's participation in cartel activity before Hungary joined the Union. The Commission stated that under the 'effects doctrine',[448] jurisdiction can be established on the basis of economic effects within the territory, and MOL, as well as the other cartel participants, had sales in several Member States.

1.116 ***Gencor*: EU law must comply with public international law.** Further consideration was given to the territorial scope of the EU competition rules by the General Court, in the context of the Merger Regulation, in *Gencor v Commission*.[449] The EU Merger Regulation applies to concentrations according to quantitative thresholds based on worldwide and EEA-wide turnover.[450] The Commission had prohibited a proposed joint venture between a South African and a British company on the grounds that this would bring under common control the platinum metals production carried on by their respective subsidiaries,

[444] Much of the decision was subsequently annulled by the CJ in its substantive judgment: Cases C-89/85, etc, *Åhlström Osakeyhtiö v Commission* ('*Wood Pulp II*') [1993] ECR I-1307, [1993] 4 CMLR 407. See further para 2.066, below.

[445] *Wood Pulp I* (n 442, above) paras 16–18.

[446] The CJ declined to follow the Opinion of AG Darmon, *Wood Pulp I* (n 442, above) paras 54–58, who urged it to adopt a criterion of 'direct, substantial and foreseeable effect', discussing the US and international law on the subject. See also *Adidas-Salomon AG v Lawn Tennis Association* [2006] EWHC 1318 (Ch) where the English High Court held that it had jurisdiction to hear a challenge to the dress code rules set by sports governing bodies as they were applied to the US and Australian Open tennis matches, citing *Wood Pulp* and *Gencor*, para 48.

[447] COMP/39181 *Candle Waxes*, decn of 1 October 2008, [2009] 5 CMLR 2441, para 190, on appeal on other grounds, Cases T-540, 541, 543, 544, 548, 550, 551, 558, 562 & 566/08 *Esso v Commission*, not yet decided.

[448] On the 'effects doctrine' see paras 1.115 and 1.116, below.

[449] Case T-102/96 *Gencor v Commission* [1999] ECR II-753, [1999] 4 CMLR 971. See Broberg, 'The European Commission's Extraterritorial Powers in Merger Control, The Court of First Instance's Judgment in Gencor v. Commission' (2000) ICLQ 172; Ezrachi, 'Limitations on the Extraterritorial Reach of the European Merger Regulation' (2001) 22 ECLR 137.

[450] See Chap 8, below.

which were located in South Africa.[451] One of the grounds on which the parties challenged the decision was that it involved an impermissible assertion of extra-territorial jurisdiction. The General Court upheld the Commission's jurisdiction under the EU Merger Regulation on the basis that the concentration would be implemented in the EU, since the parties made significant sales to purchasers in Member States. The Court here stated that it was following *Wood Pulp I*. That said, the focus of merger control is on changes to the structure of the market rather than conduct, and the structural change produced by this concentration would essentially take place outside the EU. Implicitly acknowledging that jurisdictionally sensitive issues could arise, the General Court went on to consider the compatibility of the Commission's decision with public international law.[452] In an important passage, the Court stated:[453]

> 'Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [EU].'[454]

Noting that the concentration, by creating a dominant duopoly, would give rise to a situation where effective competition would have been significantly impeded on the internal market, the General Court proceeded to find that the three criteria of 'immediate, substantial and foreseeable effect' were satisfied on the facts of the case. It follows that the judgment in *Gencor* does not enunciate an 'effects doctrine' in substitution for the implementation doctrine as the basis for applying EU law, but as placing a boundary on the jurisdiction that might otherwise result from application of the implementation doctrine. Formally,

[451] M.619 *Gencor/Lonrho*, OJ 1997 L11/30, [1999] 4 CMLR 1076. The JV amounted to a concentration and so fell within the then Merger Reg.

[452] EU law must comply with public international law: see Cases 21/72, etc, *International Fruit Co v Produktschap voor Groenten en Fruit* [1972] ECR 1219, [1975] 2 CMLR 1, para 6; Case C-286/90 *Poulsen and Diva Corp* [1992] ECR I-6019, para 9. In *Gencor* the GC referred to the parties' contention that there was such a principle of 'non-interference', but found on the facts that there was neither a conflict between what was required by the EU and by the South African Government, nor any basis for showing that the concentration would affect South Africa's vital economic or commercial interests. The GC declined to decide whether such a principle of 'non-interference' exists in public international law: *Gencor* (n 449, above) paras 103–105. In Case C-308/06 *Intertanko v Sec of State for Transport* [2008] ECR I-4057, paras 42 et seq (compatibility of EU directive on ship-source pollution with UNCLOS) the CJ stated that where the invalidity of a measure of secondary EU is pleaded before a national court, the CJ reviews the validity of that measure in the light of all the rules of international law, subject to two conditions; first that the EU must be bound by the relevant international treaty and secondly 'the Court can examine the validity of [Union] legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise': para 45; Case C-366/10 *The Air Transport Association of America v Sec of State for Energy and Climate Change*, judgment of 21 December 2011, paras 49 et seq, holding, amongst other things that the Kyoto Protocol was not sufficiently unconditional and precise to be relied on as invalidating an EU measure but that the Open Skies Agreement was.

[453] *Wood Pulp I* (n 442, above). The GC substituted 'immediate' for 'direct' but this seems to make no practical difference.

[454] *Gencor v Commission* (n 449, above) para 90. See also the comment of AG Kokott in Case C-366/10 *The Air Transport Association of America*, opinion of 6 October 2011: 'It is by no means unusual for a State or an international organisation also to take into account in the exercise of its sovereignty circumstances that occur or have occurred outside its territorial jurisdiction. … Under anti-trust law as well as in merger control it is normal worldwide practice for competition authorities to take action against agreements between undertakings even if those agreements have been concluded outside the territorial scope of their jurisdiction and may perhaps even have a substantial effect outside that scope of jurisdiction.' (para 148, citing *Gencor* and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575).

therefore, jurisdiction over undertakings outside the EU must satisfy the implementation doctrine under EU law and must also be compatible with public international law.

1.117 **International comity.** The difficulties associated with the extra-territorial application of EU competition law are minimised through international cooperation agreements whereby the EU and the other contracting State(s) agree to consult and have regard to the important interests of each other when deciding on investigations and remedies.[455] Such international agreements cannot solve the problems that may be caused by private actions in national courts.

1.118 **Application of EU competition rules prior to Accession.** The issue of the Commission's jurisdiction to apply the Treaty competition rules to the conduct of undertakings in third countries is different from the issue whether the national competition authority has power to apply those rules to conduct in its territory prior to accession. In *Toshiba v Czech Competition Authority*[456] the Court of Justice held that Article 101 and Regulation 1/2003 cannot be applied by the state's national competition authority in respect of the effects of a cartel within the territory before the date of accession to the EU. This is the case even in the context of an investigation of an international cartel constituting a single and continuous infringement capable of producing effects in the territory of the Member State concerned before and after accession. The Czech competition authority was entitled to condemn the cartel only under national competition law in relation to the period prior to the accession of the Czech Republic to the EU on 1 May 2004. However, where the Commission requests information from an undertaking in respect of an investigation into conduct after accession, that request includes information dating from before accession if that is relevant to an issue in the investigation.[457]

1.119 **The single economic entity doctrine.** A non-EU parent company of a group of companies can be held liable, under EU law, for the infringing conduct committed by an EU subsidiary within the same economic entity.[458] In *Commercial Solvents v Commission*[459] the Court of Justice dismissed an appeal by a US company and its Italian subsidiary against a decision of the Commission holding them both liable under Article 102 for the latter's refusal to sell a raw material to a competitor.[460]

[455] For the cooperation agreements entered into by the EU, see paras 1.100 et seq, above.

[456] Case C-17/10 *Toshiba v Czech Competition Authority*, judgment of 14 February 2012. In *Schneidersöhne Baltija and Libra Vitalis v Competition Council* Lithuanian Supreme Administrative Court, Case No A[502]-34/2009; 16 October 2009 the Lithuanian Supreme Administrative Court held that an exchange of information cartel the final meeting of which took place 17 days after Lithuania joined the EU had not been shown to effect trade between Member States and the part of the practice which took place before accession could not infringe Art 101.

[457] Cases T-458/09&171/10 *Slovak Telekom v Commission*, judgment of 12 March 2012.

[458] See, eg Cases 48/69, etc, *Imperial Chemical Industries v Commission* [1972] ECR 619, [1972] CMLR 557, paras 131–142.

[459] Cases 6&7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309.

[460] *Commercial Solvents v Commission*, above, paras 36–41. See also AG Warner at 262–265 (ECR) and 318–322 (CMLR). The question of when a parent company can be fined for an infringement committed by its subsidiary is discussed at paras 14.087 et seq, below. The question of when a national court has jurisdiction over an overseas entity in a claim for damages arising from infringement is discussed in paras 16.023 et seq, below.

7. Effect on Trade between Member States

(a) Generally

Rule of jurisdiction. The expression 'which may affect trade between Member States' is common to both Article 101 and Article 102[461] and defines the boundary between conduct which is subject to EU law and conduct which is governed solely by national law.[462] The concept of 'effect on trade between Member States' should be understood as a rule of jurisdiction, enabling EU law to control anti-competitive agreements and abusive conduct by dominant undertakings having appreciable cross-border effects.[463] This rule of jurisdiction also means that action taken at an EU level to apply Articles 101 and 102 complies with the principle of subsidiarity.[464] The same concept also applies as a condition of the exceptional jurisdiction of the Commission under the Merger Regulation to investigate, on request from a Member State, a concentration which does not have an 'EU dimension'.[465] However, as regards the State aids rules, the formulation in Article 107 TFEU is different in that it refers to aid which 'affects trade between Member States'. Although the omission of the word 'may' (which appears in Articles 101 and 102) has been held not to be significant, the effect on trade criterion under Article 107 has nonetheless received a slightly different interpretation and does not incorporate an inherent appreciability threshold.[466] The effect on trade criterion in the context of State aid is accordingly discussed separately in Chapter 17, below.[467] The concept of effect on trade between Member States in Articles 101 and 102 must be distinguished from the concept of whether there is a serious impediment to the proper functioning of the internal market. The latter concept is relevant to the Commission's assessment of whether there is a sufficient EU interest in investigating a complaint alleging an infringement.[468] **1.120**

Effect on trade and the obligation to apply Articles 101 and 102. Where the competition authorities of the Member States or national courts apply national competition law to agreements or practices which may affect trade between Member States, they are required by Regulation 1/2003[469] also to apply Articles 101 and 102. This obligation is intended to **1.121**

[461] See generally Faull & Nikpay, *The EC Law of Competition* (2nd edn, 2007), paras 3.337 et seq; O'Donoghue and Padilla, *The Law and Economics of Article 82 EC* (2006), Chap 14.

[462] Cases 56&58/64 *Consten and Grundig v Commission* [1966] ECR 299, 341, [1966] CMLR 418, 471; Case T–168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, [2006] 5 CMLR 1589, paras 201 et seq (appeal on other grounds dismissed, cases C-501/06P, etc, *GlaxoSmithKline Services* [2009] ECR I-9291, [2010] 4 CMLR 50). See also para 12 of the Effect on Trade Guidelines, OJ 2004 C101/81: Vol II, App C12.

[463] However, an undertaking is not entitled to refuse to supply the Commission with information on the ground that, in its view, the agreement is not capable of affecting trade: *RAI/UNITEL*, OJ 1978 L157/39, [1978] 3 CMLR 306; *Fire Insurance (D)*, OJ 1982 L80/36, [1982] 2 CMLR 159.

[464] See para 1.031, above.

[465] Art 22 of Merger Reg 139/2004, OJ 2004 L24/1: Vol II, App D1. See paras 8.098 et seq, below.

[466] Such a qualification, although not for all sectors, was therefore introduced by regulation: see now Reg 1998/2006, OJ 2006 L379/5.

[467] See paras 17.025 et seq, below.

[468] Case C-425/07P *AEPI v Commission* [2009] ECR I-3205, [2009] 5 CMLR 1337 (on appeal from Case T-229/05 *AEPI v Commission* [2007] ECR II-84, paras 42 et seq). On this point see also the Opinion of AG Mengozzi at paras 40–45.

[469] Art 3(1) of Reg 1/2003: OJ 2003 L1/1: Vol II, App B2. This obligation is discussed in Chap 13, below.

ensure that the EU competition rules are applied to all cases within their scope and are not avoided by applying only national law.[470]

1.122 **The Effect on Trade Guidelines.** In May 2004 the Commission issued guidelines ('the Effect on Trade Guidelines') explaining for the benefit of undertakings, the national courts and national competition authorities how to apply the concept in circumstances that occur frequently.[471] The Effect on Trade Guidelines also explain the Commission's approach to the requirement that the effect on trade must be appreciable, setting out for the purpose of Article 101(1) a presumption as to when agreements will not be treated as having an appreciable effect on trade between Member States.

1.123 **Trade.** The concept of 'trade' has been described by the Court of Justice as having 'a wide scope'.[472] It covers all economic activity, including not only the supply of goods but also the supply of services such as banking and money transmission,[473] insurance,[474] loss adjustment,[475] foreign exchange broking,[476] postal services,[477] the management of artistic copyrights,[478] the organisation of trade fairs,[479] employment agency services,[480] television broadcasts,[481] public services such as ambulance services,[482] the services of public utilities,

[470] Note Art 3(2) of Reg 1/2003 prohibits stricter national competition laws than Art 101 (but not Art 102). The effect on trade concept also triggers the rights and obligations of a national competition authority as regards notification of the case to the Commission and the exchange of information: ibid, Arts 11–12. See generally paras 15.055 et seq, below.

[471] Effect on Trade Guidelines, OJ 2004 C101/81: Vol II, App C12. The Guidelines do not provide guidance on the effect on trade concept contained in Art 107 on State aid: para 4. The Commission has applied the Guidelines in Art 101 cases, eg COMP/38620 *Hydrogen Peroxide and Perborate*, decn of 3 May 2006, para 346 (appeal on other grounds partly upheld and partly dismissed, Cases T-185/06 etc, *L'Air liquide*, judgments of 16 June 2011 and 16 July 2011, on appeal to the CJ, Cases C-446/11P, etc, *Commission v Edison*, not yet decided) and Art 102 cases, COMP/38113 *Prokent-Tomra*, decn of 29 March 2006, para 330 (appeals on other grounds dismissed, Case T-155/06 *Tomra Systems* [2010] ECR II-4361, [2011] 4 CMLR 416, and Case C-549/10P, judgment of 19 April 2012, [2012] 4 CMLR 1093).

[472] Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021, [1982] 1 CMLR 313, para 18. *Quaere* the position of charitable activities. *Re Dutch Banks*, OJ 1989 L253/1, [1990] 4 CMLR 768, para 59; Cases T-208&209/08 *Gosselin Group v Commission*, judgment of 16 June 2011, para 86 (on appeal Case C-440/11P *Commission v Gosselin Group*, not yet decided).

[473] eg *Züchner v Bayerische Vereinsbank*, above; *Uniform Eurocheques*, OJ 1985 L35/43, [1985] 3 CMLR 434; Cases C-215&216/96 *Bagnasco* [1999] ECR I-135, [1999] 4 CMLR 624; Cases T–259/02, etc, *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169, [2007] 5 CMLR 1142.

[474] Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, [1988] 4 CMLR 264; Cases C-295/04, etc, *Manfredi* [2006] ECR I-6619, [2006] 5 CMLR 980.

[475] Case 90/76 *Van Ameyde v UCI* [1977] ECR 1091, [1977] 2 CMLR 478.

[476] *Sarabex* [1979] 1 CMLR 262; Cases T-44/02, etc, *Dresdner Bank v Commission* [2006] ECR II-3567, [2007] 4 CMLR 467.

[477] *REIMS II*, OJ 1999 L275/17, [2000] 4 CMLR 704; Cases C-147&148/97 *Deutsche Post/GZS (Remail)* [2000] ECR I-825, [2000] 4 CMLR 838.

[478] See, eg Case 127/73 *BRT v SABAM* [1974] ECR 51 and 313, [1974] 2 CMLR 238, 269 and 282; COMP/38698 *CISAC*, decn of 16 July 2008, [2009] 4 CMLR 577 and para 9.070, below.

[479] See, eg *SMM&T Exhibition Agreement*, OJ 1983 L376/1, [1984] 1 CMLR 611, and paras 6.098 et seq, below.

[480] Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306 (a case under Arts 102 and 106).

[481] See, eg Case 155/73 *Sacchi* [1974] ECR 409, [1974] 2 CMLR 177; *Eurovision*, OJ 2000 L151/18, [2000] 5 CMLR 650, on appeal Cases T-185/00, etc, *Métropole télévision M6 v Commission* [2002] ECR II-3805, [2003] 4 CMLR 707 (further appeal dismissed, Case C-470/02P *UER v M6*, Order of 27 September 2004).

[482] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, [2002] 4 CMLR 726, paras 44 et seq.

such as gas and electricity,[483] and the economic aspects of sports, including the rules of sporting bodies governing entitlement to compete in sporting events.[484] The performance of individual artistes,[485] the provision of consulting services by an individual,[486] the supply of professional services,[487] and financial payments within a group of companies[488] have all been held to be 'trade' for the purposes of Article 101. 'Trade' covers the establishment of a presence in a Member State[489] and, in some circumstances, it seems that the flow of profits from one Member State to another may in itself constitute 'trade' between Member States.[490]

Factors relevant to establishing an effect on trade. The effect on trade may arise from a combination of several factors, none of which individually would necessarily be decisive.[491] Relevant factors include: **1.124**

(a) *The nature of the goods or services* covered by the agreement or practice can be important. An effect is more readily established where, by their nature, the products are easily traded across borders or are important for undertakings that want to enter the market in another Member State.[492] It is sufficient that the products concerned are traded, or likely to be traded, between Member States.[493]

[483] eg Case C-393/92 *Almelo* [1994] ECR I-1477 (electricity); COMP/39401 *E.ON-GDF*, decn of 8 July 2009, para 263 (gas).

[484] Case C-519/04P *Meca-Medina v Commission* [2006] ECR I-6991, [2006] 5 CMLR 1023. cf COMP/39471 *Certain joueur de tennis professional/Agence mondiale antidopage*, decn of 13 October 2009, para 44 (whether anti-doping rules are capable of affecting trade) (appeal dismissed as inadmissible Case T-508/09 *Cañas*, Order of 26 March 2012, on further appeal Case C-269/12P, not yet decided).

[485] *RAI/UNITEL*, OJ 1978 L157/39, [1978] 3 CMLR 306; XIIth Report on Competition Policy (1982), point 90 (Opera singers at La Scala).

[486] *Reuter/BASF*, OJ 1976 L254/40, [1976] 2 CMLR D44.

[487] See, eg Case T-513/93 *CNSD* [2000] ECR II-1807, [2000] 5 CMLR 614 (customs agents in Italy, classified under Italian law as a liberal profession); Cases C-180/98, etc, *Pavlov* [2000] ECR I-6451, [2001] 4 CMLR 30 (specialist medical services). For legal services, see Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 913; Cases C–94&202/04 *Cipolla* [2006] ECR I-11421, [2007] 4 CMLR 286.

[488] COMP/36700 *Industrial and medical gases*, decn of 24 July 2002, OJ 2004 L84/1, para 371 (improvements in the profitability of a Dutch subsidiary were likely to affect trade because of changes in dividend payments or investment funds needed), citing Case 45/85 *Verband der Sachversicherer* (n 474, above) para 48.

[489] Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306, para 33; Cases C-215&216/96 *Bagnasco* [1999] ECR I-135, [1999] 4 CMLR 624, para 51; Case C-55/96 *Job Centre* [1997] ECR I-7119, [1998] 4 CMLR 708, para 37; *Wouters* (n 487, above) para 95; *Ambulanz Glöckner* (n 482, above) para 49; COMP/38700 *Greek Lignite and Electricity generation*, decn of 5 March 2008, [2009] 4 CMLR 495, para 244 (decn annulled on other grounds, Case T-169/08 *DEI v Commission*, judgment of 20 September 2012.

[490] *Fire Insurance (D)* (n 463, above) paras 29–36, on appeal, *Verband der Sachversicherer v Commission* (n 474, above). Although the insurance contracts in question were written locally in respect of German risks, EU issuers outside Germany earned profits from their branch offices in Germany and bore the risk of losses. For other aspects of effect on trade in the insurance sector, see *Assurpol*, OJ 1992 L37/16, [1993] 4 CMLR 338; *Manfredi* (n 474, above).

[491] Case C-250/92 *Gøttrup-Klim v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641, [1996] 4 CMLR 191, para 54; Case C-359/01P *British Sugar v Commission* [2004] ECR I-4933, [2004] 5 CMLR 329, para 27.

[492] Effect on Trade Guidelines (n 471, above) para 30.

[493] eg *Rockwell/Iveco*, OJ 1983 L224/19, [1983] 3 CMLR 709; *BPCL/ICI*, OJ 1984 L212/1, [1985] 2 CMLR 330; *Synthetic Fibres*, OJ 1984 L207/17, [1985] 1 CMLR 787; *ENI/Montedison*, OJ 1987 L5/13, [1988] 4 CMLR 444. Trade across at least one frontier is sufficient: see, eg Cases 40/73, etc, *Suiker Unie v Commission* (n 424, above) para 193 (Belgium/Netherlands); *Amersham/Buchler*, OJ 1982 L314/34, [1983] 1 CMLR 619 (UK/Germany); *Langenscheidt/Hachette*, OJ 1982 L39/25, [1982] 1 CMLR 181 (France/UK); *Mitchell Cotts/Sofiltra*, OJ 1987 L41/31, [1988] 4 CMLR 111 (UK/Ireland).

(b) *The characteristics of the agreement or practice* are also important. There will generally be an effect on trade between Member States where an agreement or practice directly relates to international transactions,[494] especially if it restricts imports or exports, or where it applies to more than one Member State[495] or throughout the EU[496] or establishes an EU-wide distribution system.[497] It may be sufficient if the agreement applies to a branch,[498] or a subsidiary, of an undertaking based in another Member State.[499]

(c) *The legal and factual context in which the agreement or practice operates* must be considered.[500] The fact that the participants in a national arrangement include undertakings from other Member States may be a relevant, but not sufficient consideration.[501] In *Viho/Toshiba*[502] the Commission considered that the existence of price differentials led to conditions in which parallel trading would take place so that any restriction on exports affected trade to an appreciable extent.

1.125 Alteration of the pattern of trade. The Court of Justice has consistently held that in order for an agreement or conduct to affect trade between Member States:

> '… 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 it may have an influence, direct or indirect, actual or

[494] eg *Züchner v Bayerische Vereinsbank* (n 472, above). In *Greek Ferries*, OJ 1999 L109/24, [1999] 5 CMLR 47, para 143, the Commission stated that any agreement that affects demand for services between two Member States (such as an agreement between providers of that service) is likely to deflect demand both as between the parties to the agreement and with third parties, and thus alter the pattern of trade in that service between Member States. In one of the appeals from that decn, in Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349, [2005] 5 CMLR 1843, the GC rejected a challenge to the finding of an effect based on the fact that the volume of traffic and the number of operators had increased on the route in question: para 165 (further appeal dismissed, Case C-111/04P, [2006] ECR I-22). See also Cases T-24/93, etc, *Compagnie Maritime Belge v Commission* [1996] ECR II-1201, [1997] 4 CMLR 273, paras 202 et seq (competition as between different EU ports indirectly affected by the practices in question); further appeal on other grounds dismissed, Cases C-395&396/96P [2000] ECR I-1365, [2000] 4 CMLR 1076.

[495] Cases 43&63/82 *VCH and VBBB v Commission* [1984] ECR 19, [1985] 1 CMLR 27; COMP/39168 *PO/Hard Haberdashery/Fasteners*, decn of 19 September 2007, paras 377–383.

[496] eg *P&I Clubs*, OJ 1985 L376/2, [1989] 4 CMLR 178; *X/Open Group*, OJ 1987 L35/36, [1988] 4 CMLR 542; *Ford/ Volkswagen*, OJ 1993 L20/14, [1993] 5 CMLR 617. See also *Breeders rights: roses*, OJ 1985 L369/9, [1988] 4 CMLR 193 (where the EU-wide effect was established by virtue of a network of similar agreements).

[497] *SABA (No. 2)*, OJ 1983 L376/41, [1984] 1 CMLR 676; *Grohe distribution system*, OJ 1985 L19/17, [1988] 4 CMLR 612 on appeal Case 49/85; *Ideal Standard distribution system*, OJ 1985 L20/38, [1988] 4 CMLR 627 on appeal Case 55/85; *Grundig distribution system*, OJ 1985 L233/1, [1988] 4 CMLR 865; *Ivoclar*, OJ 1985 L369/1, [1988] 4 CMLR 781. But cf Case 107/82 *AEG v Commission* [1983] ECR 3151, [1984] 3 CMLR 413, paras 54–60, where the Commission conceded that it was the improper application of the AEG system and not the mere fact that it applied to more than one Member State that brought Art 101(1) into play. See also AG Reischl at 3265 (ECR), 376–77 (CMLR). In *Grohe, Ideal Standard*, above, and *Rodenstock/Metzler*, XVth Report on Competition Policy (1985), point 65, the Commission left open what the position would be if the agreement were confined to one Member State.

[498] *Verband der Sachversicherer v Commission* (n 474, above).

[499] *ABI*, OJ 1987 L43/51, [1989] 4 CMLR 238; *TEKO*, OJ 1990 L13/34, [1990] 4 CMLR 957.

[500] eg if the agreement tends to freeze for the future the competitive position that pertained before a sector was liberalised: *E.ON-GDF* (n 483, above) para 263.

[501] *Manfredi* (n 474, above), para 44; Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, [2007] 4 CMLR 224, para 36.

[502] *Viho/Toshiba*, OJ 1991 L287/39, [1992] 5 CMLR 180.

potential, on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States.'[503]

In practice, this test is satisfied if the agreement or conduct alters the normal flow or pattern of trade, or causes trade to develop differently from the way it would have developed in the absence of the agreement.[504] It is irrelevant that the agreement or conduct produces an increase in trade, even a large one,[505] since the aim of the Treaties is not to increase trade as an end in itself but rather to establish an internal market which includes a system ensuring that competition is not distorted.[506] On several occasions the General Court has stated that 'it is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable'.[507]

Agreements or conduct partitioning the single market. In *Société Technique Minière*[508] the Court of Justice stated that 'special attention' should be given to whether the agreement is capable of partitioning the internal market in certain products between Member States. The requirement of an effect on trade between Member States will be satisfied if the agreement or conduct could result in the compartmentalisation of markets on a national basis, thereby impeding the economic interpenetration and objectives of a single market which the TFEU is designed to bring about.[509] At the manufacturing level, agreements which fix prices, limit production, share markets or sources of supply, control channels of distribution or limit advertising or promotion,[510] hold up the economic interpenetration which **1.126**

[503] Case 42/84 *Remia v Commission* [1985] ECR 2545, [1987] 1 CMLR 1, para 22. The test was first stated in Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, 249 and 251, [1966] CMLR 357, 375 and 377, and has often been repeated; see, eg *Raiffeisen Zentralbank Österreich* (n 473, above) para 163; *Ambulanz Glöckner* (n 482, above) para 48.

[504] See, eg Case 71/74 *Frubo v Commission* [1975] ECR 563, [1975] 2 CMLR 123, para 38 ('liable to interfere with the natural movement of trade'); Case T-61/89 *Dansk Pelsdyravlerforening v Commission* [1992] ECR II-1931, para 143 ('liable to deflect trade flows from their natural course and thereby affect trade between Member States'); Case T-395/94 *Atlantic Container (TAA Agreement)* (n 442, above) para 81 ('capable of modifying the pattern of trade in goods'); Case T-61/99 *Adriatica di Navigazione* (n 494, above) para 163: the agreement alters the normal pattern of trade flows and thus harms intra-EU trade by causing trade to develop differently than it would in the absence of the agreement; COMP/38899 *Gas insulated switchgear,* decn of 24 January 2007, paras 314–319 (appeals mostly dismissed on other grounds, Cases T-110/7 *Siemens AG v Commission*, judgments of 3 March 2011 and 12 July 2011; on further appeal, Cases C-489&498/11P *Mitsubishi Electric*, not yet decided).

[505] *Consten and Grundig v Commission* (n 462, above) (ECR) 341, (CMLR) 429. See, eg *CSV*, OJ 1978 L242/15, [1979] 1 CMLR 11 (Art 101); *Napier Brown-British Sugar*, OJ 1988 L284/41, [1990] 4 CMLR 196 (Art 102).

[506] *Milchförderungsfonds*, OJ 1985 L35/35, [1985] 3 CMLR 101; *Eirpage*, OJ 1991 L306/22, [1993] 4 CMLR 64, para 13; *Raiffeisen Zentralbank Österreich* (n 473, above) para 164.

[507] See, eg *Raiffeisen Zentralbank Österreich* (n 473, above) para 164 (appeals dismissed, Cases C-125/07P, etc, *Erste Bank der Österreichischen Sparkassen v Commission* [2009] ECR I-8681, [2010] 5 CMLR 443, paras 36 et seq); Case T-58/01 *Solvay v Commission* [2009] ECR II-4781, [2011] 4 CMLR 101, para 209.

[508] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, 251, [1966] CMLR 357, 377.

[509] These phrases are often used: see, eg Case 126/80 *Salonia v Poidomani and Giglio* [1981] ECR 1563, [1982] 1 CMLR 64, paras 12–14; *Remia* (n 503, above); Case C-407/04P *Dalmine v Commission* [2007] ECR I-829, paras 89–91. But market partitioning is only one aspect of effect on inter-State trade: see Cases 240/82, etc, *SSI v Commission* [1985] ECR 3831, [1987] 3 CMLR 661.

[510] See, eg Case T-213/00 *CMA CGM v Commission* [2003] ECR II-913, [2003] 5 CMLR 268 (appeal on other grounds dismissed, Case C-236/03P *Commission v CMA CGM*, order of 28 October 2004), para 221 (prior definition of the relevant markets for services was not necessary since the price-fixing agreement was capable per se of affecting trade to an appreciable extent, not only in maritime transport services, but also in the other services to which the charges and surcharges in question apply). See also Effect on Trade Guidelines (n 471, above) paras 61 et seq, and paras 4.006 et seq, below. The same applies to agreements on trade exhibitions, paras 6.097 et seq, below.

the Treaty is designed to achieve and therefore affect trade between Member States.[511] At the distribution level, agreements likely to partition markets include first and foremost restrictions on imports or exports. Such measures 'of their nature' affect trade between Member States,[512] especially if they give rise to 'absolute territorial protection' or otherwise impede parallel trade.[513] So far as services are concerned, the effect on inter-State trade may arise from a partitioning of the market in a way which either prevents operators established in Member States other than the Member State in question from providing the services or hinders an undertaking in another Member State from establishing itself in the Member State in question with a view to providing services there.[514]

1.127 **Altering the structure of competition.** Trade between Member States may be affected if the agreement or conduct alters the competitive structure within the internal market to an appreciable extent. In *Commercial Solvents v Commission*[515] the conduct complained of was the elimination of a competitor within the EU, although most of the competitor's production was exported outside the EU. The Court of Justice stated that the requirement that the conduct may affect trade could not be interpreted as limiting the prohibitions contained in Articles 101(1) and 102 to economic activities supplying the Member States. The necessary effect on trade between Member States will be satisfied if an agreement or conduct has 'repercussions' for the competitive structure of the internal market.[516] This formulation of the test is often used in cases concerning Article 102[517] but may also be relevant to the

[511] Cases C-125/07P, etc, *Erste Bank der Österreichischen Sparkassen* (n 507, above) para 38. The CJ also held that there is a strong presumption that trade between Member States is affected by a price-fixing cartel extending over an entire Member State which can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary: ibid, para 39.

[512] Case 19/77 *Miller v Commission* [1978] ECR 131, [1978] 2 CMLR 334, paras 14–15. See also *Wood Pulp II* (n 444, above) para 176 (irrelevant that economic factors make cross-border trade unlikely); Case T-50/00 *Dalmine v Commission* [2001] ECR II-2395, para 157 ('an agreement the object of which is to share national markets … necessarily has the potential effect of reducing the volume of trade between Member States'), further appeal dismissed, Case C-407/04P [2007] ECR I-829, para 91.

[513] For the concept of absolute territorial protection, see paras 2.085 and 7.069, below. See also Case 161/84 *Pronuptia de Paris* [1986] ECR 353, [1986] 1 CMLR 414, para 26. This case indicates the very wide meaning the CJ has given to the concept of 'effect on trade between Member States'; on the facts, it must surely have been unlikely that a retail franchisee would have wished to open a shop in another Member State: see Venit, (1986) EL Rev 213. But this was an Art 267 reference, so the CJ did not determine the facts; and cf Cases C-215&216/96 *Bagnasco* [1999] ECR I-135, [1999] 4 CMLR 624: see para 1.139, below. For franchising agreements, see paras 7.166 et seq, below.

[514] *Ambulanz Glöckner* (n 482, above) para 49.

[515] Cases 6&7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, paras 30–35. Note that in *Soda-ash-Solvay*, OJ 1991 L152/21, [1994] 4 CMLR 645, para 66, the Commission held that the fact that Solvay's conduct was aimed principally at imports from the United States did not preclude the application of Art 102 since such imports were perceived as the main threat to Solvay's domination of Western Europe; the decision was annulled on procedural grounds, Case T-32/91 *Solvay v Commission* [1995] ECR II-1825, [1996] 5 CMLR 91, further appeal dismissed, Cases C-287&288/95P, [2000] ECR I-2391, [2000] 5 CMLR 454. The later readopted decn was also ultimately set aside on procedural grounds, Case C-110/10P *Solvay v Commission*, judgment of 25 October 2011.

[516] See also para 20 of the Effect on Trade Guidelines (n 471, above).

[517] See, eg Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429, para 201 (Art 102 applies even if the abuse does not relate to transactions directly concerning inter-State trade); Case 22/79 *Greenwich Film Production v SACEM* [1979] ECR 3275, [1980] 1 CMLR 629, para 11 (where the CJ held that *Commercial Solvents* applied equally to the provision of services such as management of copyright as to supply of goods).

application of Article 101(1).[518] The question of the competitive impact on the market can also be important in joint venture and similar cases.[519]

Potential effect. It is not necessary to establish that the agreement or conduct has actually affected trade between Member States; it is enough to show that it is capable of having an effect.[520] A sufficient degree of probability must be demonstrated[521] and the Commission must clearly set forth how it is envisaged that trade could be affected.[522] A speculative or contrived possibility is not enough,[523] but a potential effect is sufficient if it is appreciable[524] and this is the case even if the conduct being examined occurred in the past.[525] It is not necessary to calculate the actual volume of trade between Member States affected by the agreement or to estimate what would have been the level of parallel trade in the absence of **1.128**

[518] Case T-2/89 *Petrofina v Commission* [1991] ECR II-1087, para 222. Note Case T-29/92 *SPO v Commission* [1995] ECR II-295, para 238: rules on the allocation of tendering costs in the Netherlands construction industry gave Dutch undertakings an advantage in tendering for contracts outside the Netherlands and thereby affected trade between Member States; further appeal dismissed, Case C-137/95P [1996] ECR I-1611.

[519] eg, *BPCL/ICI*, OJ 1984 L212/1, [1985] 2 CMLR 330, para 32 (third party competitors confronted with different trading conditions as a result of rationalisation); *British Interactive Broadcasting/Open* ('*BiB*'), OJ 1999 L312/1, [2000] 4 CMLR 901, paras 153–157 (JV affected the competitive structure in the United Kingdom and thereby made market entry more difficult for potential competitors); *KSB/Goulds/Lowara/ITT*, OJ 1991 L19/25, [1992] 5 CMLR 55 (should consumers ultimately prefer new products being developed by JV, trade in the EU would shift in favour of the JV parents that would become the suppliers); *Asahi/St Gobain*, OJ 1994 L354/87 (similarly); *GEAE/P&W*, OJ 2000 L58/16, [2000] 5 CMLR 49 (potential customers of the JV include airlines based in the EEA and airlines carrying passengers between Member States). See also, under Art 22 of the Merger Reg (see para 8.035, below), Case T-22/97 *Kesko v Commission* [1999] ECR II-3775, [2000] 4 CMLR 335, paras 105–109 (combination of purchasing of the two parties reduces the number of distribution channels for suppliers and therefore limited the possibility of foreign suppliers gaining access to the national market). But in most JV cases falling under Art 101(1), the parents are based in different Member States or the JV itself operates in two or more Member States so that the JV of its nature affects inter-State trade: Effect on Trade Guidelines (n 471, above) paras 67–68.

[520] Case 19/77 *Miller* (n 512, above) para 15; Case 322/81 *Michelin v Commission* [1983] ECR 3461, [1985] 1 CMLR 282, para 104; Case C-219/95P *Ferriere Nord v Commission* [1997] ECR I-4411, [1997] 5 CMLR 575, para 19; Case T-86/95 *Compagnie Générale Maritime v Commission* [2002] ECR II-1011, [2002] 4 CMLR 1115, para 145; *Asnef-Equifax* (n 501, above) para 43; Cases T-217&245/03 *Fédération nationale de la coopération bétail and Coopagri Bretagne v Commission* [2006] ECR II-4987, [2008] 5 CMLR 406, paras 63–69 (appeal on other grounds dismissed, Cases C-101&110/07P [2008] ECR I-10193, [2009] 4 CMLR 743); Case T-33/05 *Compañía española de tabaco en rama v Commission*, judgment of 3 February 2011, para 118 and the case law cited (appeal on other grounds, Case C-181/11P, not yet decided).

[521] eg in *Cobelpa/VNP*, OJ 1977 L242/10, [1977] 2 CMLR D28, the Commission said it was not possible to work out the figures expressing how trade would have developed in the absence of collusion, but it was clear that normal competitive behaviour would have had a different effect on the flow of trade.

[522] Case 73/74 *Papiers Peints v Commission* [1975] ECR 1491, [1976] 1 CMLR 589 (the Commission decn went appreciably further than earlier cases without adequate reasoning). cf *Michelin v Commission* (n 520, above) where the applicant unsuccessfully accused the Commission of 'a purely abstract and theoretical analysis'.

[523] Case 22/78 *Hugin v Commission* [1979] ECR 1869, [1979] 3 CMLR 345: para 1.139, below; Effect on Trade Guidelines (n 471, above) para 43.

[524] *Miller v Commission* (n 512, above), para 15. A striking example is *Vacuum Interrupters (No. 1)*, OJ 1977 L48/32, [1977] 1 CMLR D67. At the time there was not a single manufacturer in the EU making or selling vacuum interrupters. However, the parties to the JV were potential competitors and it was reasonable to assume that manufacturers in other Member States would develop competing products and would be less able to penetrate the UK market if that market was occupied by an economically and technically strong JV. Further, exports from the UK were likely to start earlier and form a different pattern, thus affecting the flow of trade.

[525] *Raiffeisen Zentralbank Österreich* (n 473, above) para 166.

the agreement, so long as the effect is appreciable.[526] Arguments that inter-State trade is not affected because the parties were not interested in trading between Member States,[527] or were not in a position to do so,[528] will generally be rejected, not least because the situation may change from year to year. It is necessary to take account of foreseeable development of trade, including possible development of cross-border activities by reason of policy or legislative initiatives to reduce legal or technical barriers.[529] Conversely, evidence showing that the parties were concerned to prevent imports can, by itself, indicate that inter-State trade can be affected.[530]

1.129 **Indirect effects.** It is sufficient if the agreement or conduct affects a raw material for a product which is traded between Member States, even if the raw material itself is not.[531] Agreements or practices relating to transport of goods can affect both the pattern of the relevant transport market, and, indirectly, both the provision of port and auxiliary services and the pattern of trade in the goods transported.[532] Where a manufacturer limits warranties to products sold by distributors within their allocated territory, exports are indirectly affected.[533] Similarly, with regard to the supply of services, the market which is affected by an unlawful agreement or conduct may not be the same as the market for the individual services which are the subject of the unlawful price-fixing agreement or the abuse. It follows, for example, that the fixing of prices for a large range of banking services was capable of having repercussions on markets other than the markets for those services themselves.[534]

[526] Effect on Trade Guidelines (n 471, above) para 23; Case T-58/01 *Solvay v Commission* [2009] ECR II-4781, [2011] 4 CMLR 101, paras 217–219.

[527] *Miller v Commission* (n 512, above) paras 11–12; *Wood Pulp II* (n 444, above) paras 172, 176.

[528] *AEG v Commission* (n 497, above) paras 65–66. See also Case 48/69 *ICI v Commission* [1972] ECR 619, [1972] CMLR 557, paras 120–124; Case 7/82 *GVL v Commission* [1983] ECR 483, [1983] 3 CMLR 645. In *Building and construction in the Netherlands*, OJ 1992 L92/1, [1993] 5 CMLR 135, the Commission found that low penetration by foreign undertakings did not demonstrate a *de minimis* effect: 'on the contrary, the restrictive practices… are all the more harmful as they occur in a domain where interpenetration of national markets is relatively limited, thus affecting intra-EU trade in all the more appreciable a manner' (para 107); appeals dismissed, *SPO v Commission* (n 518, above). See also the finding of a potential effect on trade because of the proposed development of the interconnector despite limited current trade in electricity: *Scottish Nuclear Energy Agreement*, OJ 1991 L178/31.

[529] *Asnef-Equifax v Ausbanc* (n 501, above) para 44. See, eg *Ambulanz Glöckner* (n 482, above) (statutory restriction on operation of ambulance services in frontier region).

[530] Cases T-202/98, etc, *Tate & Lyle v Commission* [2001] ECR II-2035, [2001] 5 CMLR 859, para 81 (appeal dismissed, Case C-359/01P *British Sugar* [2004] ECR I-4933, [2004] 5 CMLR 329). See also Effect on Trade Guidelines (n 471, above) para 81, stating that the extent to which cartel members monitor prices and competitors in other Member States indicates how tradeable the goods are.

[531] Case 123/83 *BNIC v Clair* [1985] ECR 391, [1985] 2 CMLR 430; *Wood Pulp II* (n 444, above) para 142; Effect on Trade Guidelines (n 471, above) para 38.

[532] Case T-395/94 *Atlantic Container (TAA Agreement)* (n 442, above) paras 80 et seq; Case T-86/95 *Compagnie Générale Maritime v Commission* (n 520, above) para 148.

[533] Effect on Trade Guidelines (n 471, above) para 39; COMP/38238 *Raw Tobacco Spain,* decn of 20 October 2004, para 336, appeal dismissed, Case T-33/05 *Compañía española de tabaco en rama v Commission*, judgment of 3 February 2011, paras 118 et seq, appeal on other grounds, Case C-181/11P, not yet decided.

[534] *Austrian Banks (Lombard Club)*, OJ 2004 L56/1, [2004] 5 CMLR 399, paras 456–459; upheld on appeal, *Raiffeisen Zentralbank Österreich* (n 473, above) para 174. See also *Virgin/British Airways*, OJ 2000 L244/56, [2000] 4 CMLR 999, paras 112–113, where the Commission noted that the abuse in the market for the purchase of the services of UK travel agents would also affect airline transport markets which involved cross-border trade, although there was no finding of dominance on those markets (appeals on other grounds dismissed, Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, upheld on appeal, Case C-95/04P [2007] ECR I-2331, [2007] 4 CMLR 982).

But some effects on trade may be too remote from the restriction to establish EU law jurisdiction.[535]

Appreciable effect. The Court of Justice established a *de minimis* principle as regards the requirement of an effect on trade between Member States, as it did as regards the requirement of impact on competition under Article 101.[536] The jurisdictional requirement is not met unless the effect is appreciable. In those Article 101 cases with a clear element of effect on trade between Member States, the appreciability requirement as regards these two aspects generally goes together. In other cases, however, the degree of effect on inter-State trade requires separate consideration. The EU Courts have stated that the influence on trade 'must not be insignificant'.[537] The Effect on Trade Guidelines[538] apply to the issue of appreciability of an effect on inter-State trade a combination of market share and absolute turnover thresholds.[539] The Commission's *De Minimis* Notice[540] states that agreements between small- and medium-sized enterprises ('SMEs') are rarely capable of affecting trade between Member States.[541] The Effect on Trade Guidelines appear to qualify that indication by explaining it on the basis that the activities of SMEs are normally local or regional, adding that where SMEs engage in cross-border activity they may be subject to the EU competition rules.[542] **1.130**

The 'NAAT-rule' in Article 101 cases. In paragraph 52 of the Effect on Trade Guidelines, the Commission sets out, as a general principle for Article 101(1) cases, what it calls the 'NAAT-rule' (standing for 'no appreciable affectation of trade'[543]). The NAAT rule does not apply in Article 102 cases. The Commission considers that trade between Member States is normally not capable of being affected when two cumulative conditions are satisfied: **1.131**

(a) the *aggregate* market share[544] of the parties on any relevant market in the EU affected by the agreement does not exceed 5 per cent; and

[535] See the example given in para 43 of the Effect on Trade Guidelines (n 471, above).

[536] Case 5/69 *Völk v Vervaecke* [1969] ECR 295, [1969] CMLR 273, para 5; *Miller v Commission* (n 512, above) para 15; *Asnef-Equifax* (n 501, above) para 34. See further paras 2.156 et seq, below.

[537] See *Manfredi* (n 474, above) para 42, referring to Case C-306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983, [1998] 5 CMLR 172, para 16; Case T-58/01 *Solvay v Commission* [2009] ECR II-4781, [2011] 4 CMLR 101, para 210.

[538] cf the issue of appreciability of a restriction of competition for the purpose of Art 101(1) is determined primarily by considering the market shares of the parties and the economic significance of the restriction in question: see paras 2.156 et seq, below.

[539] Effect on Trade Guidelines, OJ 2004 C101/81: Vol II, App C12. See also *Schneidersöhne Baltija and Libra Vitalis v Competition Council* (n 456, above).

[540] *De Minimis* Notice, OJ 2001 C368/13: Vol II, App C10.

[541] *De Minimis* Notice, above, para 3. Such 'SMEs' are now defined as enterprises which have fewer than 250 employees and have an annual turnover of no more than €50 million and/or an annual balance sheet total not exceeding €43 million: Recommendation concerning the definition of micro, small and medium-sized enterprises, OJ 2003 L124/36, Annex, Art 1.

[542] Effect on Trade Guidelines (n 539, above) para 50.

[543] Effect on Trade Guidelines (n 539, above). The word 'affectation' in the English version of the Guidelines appears to be a mistranslation of '*incidence*' in the French text.

[544] This should be calculated, if possible, on sales or purchase value data as appropriate: Effect on Trade Guidelines (n 539, above) para 55. In the case of networks of agreements entered into by the same supplier with different distributors, sales made through the entire network are taken into account: ibid, para 56.

(b) — in the case of *horizontal agreements*, the aggregate annual EU turnover of the undertakings concerned in the products covered by the agreement does not exceed €40 million;[545] or
— in the case of *vertical agreements*, the aggregate annual EU turnover of the supplier in the products covered by the agreement does not exceed €40 million.[546]

1.132 **Application of the 'NAAT-rule'.** In order to apply the first condition, the 5 per cent market share threshold, it is first necessary to determine the relevant product and geographic market.[547] The Commission has published a Notice ('the Market Definition Notice') providing guidance on the criteria and evidence on which the Commission relies to reach a decision.[548] This topic is discussed in detail in Chapter 4, below. In order to apply the second condition, the €40 million threshold, sales between companies that form part of the same undertaking should be excluded[549] and, in some cases, turnover generated as a subcontractor also.[550]

1.133 **NAAT-rule is a rebuttable presumption.** Although described as a 'NAAT-rule', the principle is expressed as a negative, rebuttable presumption applying to all agreements, including those containing 'hardcore' restrictions.[551] In cases where the thresholds are not exceeded, the Commission will normally not institute proceedings either upon application or on its own initiative. National competition authorities and national courts are, however, not bound by Commission guidance. Where the undertakings assume in good faith that the agreement is covered, the Commission will not impose fines. Where an agreement concerns a market which does not yet exist, however, the NAAT-rule does not apply as the parties neither generate relevant turnover nor accumulate any relevant market share. Instead, the Commission will assess appreciability on the basis of the position of the parties on a related product market or their strength in technologies relating to the agreement.[552]

1.134 **Presumption of appreciable effect in relation to certain agreements.** The Effect on Trade Guidelines state that, in general, agreements which do not fall below the thresholds of the NAAT-rule are not to be regarded automatically as having an appreciable effect.[553] In the case of an agreement that by its very nature is capable of affecting trade between Member

[545] Effect on Trade Guidelines (n 539, above) para 52. Where the agreement concerns the joint buying of products, the relevant turnover is the parties' combined purchases of the products covered by the agreement.
[546] Effect on Trade Guidelines (n 539, above). In the case of a technology licence agreement, the relevant turnover is the aggregate turnover of the licensees in the products incorporating the technology and the licensor's own turnover in such products. Where the agreement is between a buyer and several suppliers, the relevant turnover is the buyer's combined purchases of the products covered by the agreement: ibid.
[547] Effect on Trade Guidelines (n 539, above) para 55.
[548] Market Definition Notice, OJ 1997 C372/5: Vol II, App C9, discussed generally in Chap 4, below.
[549] Effect on Trade Guidelines (n 539, above) para 54; on this point see Case T–199/08 *Ziegler v Commission*, judgment of 16 June 2011, paras 41–73, in particular paras 48–50, on appeal, Case C-439/11P, not yet decided.
[550] Case T–199/08 *Ziegler v Commission*, judgment of 16 June 2011, paras 58–62, on appeal, Case C-439/11P, not yet decided.
[551] There is some leeway when the turnover or market share thresholds are marginally exceeded for no more than two successive calendar years: *Ziegler v Commission*, above. On 'hardcore' restrictions, see paras 2.120 et seq, below.
[552] Effect on Trade Guidelines (n 539, above) para 52.
[553] Effect on Trade Guidelines (n 539, above) para 51.

States, however, there is a rebuttable positive presumption of an appreciable effect on trade if at least one of the market share or turnover thresholds is met.[554] In *Ziegler v Commission*[555] the General Court held that the Commission had failed to define the relevant market but, exceptionally, it had nonetheless demonstrated that the international removal services cartel in Belgium had appreciably affected inter-State trade. This positive presumption does not arise where the agreement covers only part of a Member State.

(b) Particular aspects of effect on trade

1.135 **Effect of agreement as a whole in Article 101 cases.** Article 101 TFEU does not require that each clause which restricts competition in an agreement should individually be capable of affecting trade between Member States.[556] Similarly, where the infringement arises out of the activities of a series of different committees, it is not necessary to examine whether each committee individually is capable of affecting trade.[557] The effect on inter-State trade is normally the result of a combination of factors, which considered separately may not be decisive.[558] If the agreement as a whole satisfies the test, there is jurisdiction to apply Article 101 to the entire agreement. In cases where the contractual relations between the same parties cover several activities, these activities must be directly linked and form an integral part of the same overall arrangement in order to be considered together.[559] Moreover, it is not necessary to show that the participation of a particular party to the agreement has that effect in order to establish an infringement by that party.[560]

1.136 **Effect of conduct in Article 102 cases.** Although, for the purposes of Article 101 there is no need to show a link between the effect on trade and the restriction of competition, in applying Article 102 the effect on trade must arise from the abuse. However, conduct which forms part of an overall strategy pursued by a dominant undertaking must be assessed in terms of its overall impact.[561] Generally, if an undertaking is dominant in more than one Member State and engages in abusive conduct in more than one of those States, trade between Member States is likely to be affected.[562] By the very nature of the undertaking's market position, its conduct is likely to affect the competitive structure within those States in the Union, and to do so in a manner which is appreciable. Where the conduct is an exploitative abuse, for

[554] Effect on Trade Guidelines (n 539, above) para 53; the thresholds are set out in para 52, namely a turnover of under €40 million and market shares of less than 5 per cent. Note these are cumulative conditions for the application of the negative presumption of para 52 itself.

[555] Case T–199/08 *Ziegler* (n 550, above) paras 41–73.

[556] Case 193/83 *Windsurfing International v Commission* [1986] ECR 611, [1986] 3 CMLR 489, para 96; Case T-77/94 *VGB v Commission* [1997] ECR I-759, [1997] 5 CMLR 812, para 126, appeal on other grounds dismissed, Case C-266/97P *VBA v VGB* [2000] ECR I-2135; COMP/38899 *Gas Insulated Switchgear*, decn of 24 January 2007 (upheld on appeal Case T-112/07 *Hitachi*, judgment of 12 July 2011).

[557] *Raiffeisen Zentralbank Österreich* (n 473, above) para 177.

[558] Cases C-295/04, etc, *Manfredi* [2006] ECR I-6619, [2006] 5 CMLR 980, para 43.

[559] *VGB* (n 556, above) paras 126, 142–144; *Raiffeisen Zentralbank Österreich* (n 473, above) para 168. See also Effect on Trade Guidelines (n 539, above) para 14.

[560] *Petrofina v Commission* (n 518, above) para 227; Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, para 122; Case T-17/99 *Ke KELIT v Commission* [2002] ECR II-1647, para 58; *Raiffeisen Zentralbank Österreich* (n 473, above) para 196.

[561] Effect on Trade Guidelines (n 539, above) para 17.

[562] COMP/37507 *AstraZeneca*, decn of 15 June 2005, para 868, substantially upheld on appeal, Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, [2010] 5 CMLR 1575, on further appeal, Case C-457/10P *AstraZeneca v Commission*, not yet decided.

example the imposition of excessive or discriminatory pricing, the effect on trade is likely to arise from an alteration of the trading patterns of the dominant firm's downstream trading partners.[563] Exclusionary abuses, such as predatory pricing or fidelity rebates, are likely to divert trade from the course which it would have followed in the absence of the abuse.[564]

1.137 **Barriers to entry, expansion and exit.** One of the objective factors to be taken into account in determining whether an agreement or practice may affect inter-State trade is the existence of barriers to entry, expansion and exit from a market, including in particular a network of agreements between, for example, a manufacturer and its distributors.[565] Other relevant barriers include the degree of saturation of the market, the number and size of the existing suppliers, and customer brand loyalty.[566] In the Effect on Trade Guidelines, the Commission states that if there are absolute barriers to cross-border trade, then trade is only capable of being affected if those barriers are likely to disappear in the foreseeable future,[567] and in that regard it is necessary to take account of any policy or legislative initiatives designed to reduce such barriers.[568] In cases where the barriers are not absolute, but merely render cross-border activities more difficult, an agreement or practice that further hinders such activities is likely to affect inter-State trade. Generally, arguments that inter-State trade cannot take place because of technical barriers are treated with scepticism.[569]

1.138 **Agreements or practices confined to a single Member State.** If the agreement or conduct is capable of appreciably affecting trade and competition in the internal market, it makes no difference that all the parties are situated in one Member State or that the agreement or conduct in question takes place in one Member State.[570] If the pattern of trade or the structure of competition is affected in the manner already indicated,[571] Articles 101

[563] Effect on Trade Guidelines (n 539, above) para 74.

[564] Effect on Trade Guidelines (n 539, above) para 75. See, eg Cases C-241&242/91P *RTE and ITP v Commission* ('*Magill*') [1995] ECR I-743, [1995] 4 CMLR 718, para 70: exclusion of competitor from geographical market comprising Ireland and Northern Ireland.

[565] Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935, [1992] 5 CMLR 210. See also the German ice cream cases: Case T-7/93 *Langnese-Iglo v Commission* [1995] ECR II-1533, [1995] 5 CMLR 602, appeal dismissed, Case C-279/95P [1998] ECR I-5609, [1998] 5 CMLR 933; and Case T-9/93 *Schöller v Commission* [1995] ECR II-1611, [1995] 5 CMLR 659.

[566] *Delimitis*, above, para 22.

[567] Effect on Trade Guidelines (n 539, above) para 32.

[568] *Asnef-Equifax* (n 501, above) para 44. See also Effect on Trade Guidelines (n 539, above) para 41.

[569] eg *AEG v Commission* (n 497, above) paras 62 et seq. See also Cases 209/78, etc, *Van Landewyck v Commission* ('*FEDETAB*') [1980] ECR 3125, [1981] 3 CMLR 134, para 169; and Cases 240/82, etc, *SSI v Commission* (n 509, above) (fact that technical and fiscal barriers exclude the possibility of parallel imports irrelevant if the parties to the agreement themselves sell imported products). Similarly, the fact that there is only a small volume of trade because of 'the business and legal environment' does not necessarily negative a finding of effect on inter-State trade: *Fire Insurance (D)* (n 463, above), on appeal *Verband der Sachversicherer v Commission* (n 474, above); *Assurpol*, OJ 1992 L37/16, [1993] 4 CMLR 338 (although only limited trade in certain liability insurance was possible, 'this situation is likely to change in the future'). But cf the approach where the case concerns re-importation of exports outside the EU: paras 1.110 et seq, above.

[570] See, eg *Papiers Peints* (n 522, above) para 26; *Remia* (n 503, above) para 22; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, [1998] 5 CMLR 889, para 48; *Wouters* (n 487, above) para 95; Asnef-Equifax (n 501, above) para 37; *Michelin v Commission* (n 520, above) paras 100–105 (Art 102).

[571] Para 1.127, above.

or 102 may apply. In *Cementhandelaren v Commission*[572] the Court of Justice held that an agreement extending over the whole territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis and therefore impeding the aims of the TFEU. This principle has since been reaffirmed many times.[573] In *Raiffeisen Zentralbank Österreich v Commission*[574] the EU Courts considered that a horizontal price-fixing cartel extending over the whole of the Austrian banking sector gave rise to a presumption that trade between Member States is affected, going on to say that:

> 'that presumption can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary.'[575]

It is necessary to consider, first of all, the nature of the products or services at issue to ascertain whether they are in fact tradeable across borders, and if they are, whether it is reasonably likely that there would be significant cross-border trade in the absence of the restrictive practice concerned; or alternatively whether foreign entry onto the national market is sufficiently impeded by reason of the agreement or practice. For this purpose, an effect in a frontier region may be sufficient.[576] If on the facts the agreement directly affects imports or exports[577] or hinders penetration of a national market,[578] even if the market is regulated and transport costs make imports difficult,[579] an effect on inter-State trade is readily established.

[572] Case 8/72 *Cementhandelaren v Commission* [1972] ECR 977, [1973] CMLR 7. eg Case 246/86 *Belasco v Commission* [1989] ECR 2181, [1991] 4 CMLR 96 (roofing felt cartel); Case T-66/89 *Publishers' Association v Commission* [1992] ECR II-1995, [1992] 5 CMLR 120 (net book agreement); Case 311/85 *VVR* [1987] ECR 3801, [1989] 4 CMLR 213 (national arrangements among travel agents and tour operators).

[573] *Remia* (n 503, above) paras 22–23; and see the cases cited at n 572, above. For information exchange, see *UK Agricultural Tractor Registration Exchange*, OJ 1992 L68/19, [1993] 4 CMLR 358, paras 57–58 (industry-wide arrangement including all major importers from other Member States; appeals on other grounds dismissed, Case T-34/92 *Fiatagri and New Holland Ford v Commission* [1994] ECR II-905). For rules of a professional association, see *Wouters* (n 487, above) para 96 ('That effect is all the more appreciable…because [the agreement] applies equally to visiting lawyers who are registered members of the Bar of another Member State, because economic and commercial law more and more frequently regulates transnational transactions and, lastly, because the firms of accountants looking for lawyers as partners are generally international groups present in several Member States'); Case C-35/99 *Arduino* [2002] ECR I-1529, [2002] 4 CMLR 866; Cases C–94&202/04 *Cipolla* [2006] ECR I-11421, [2007] 4 CMLR 286; *Asnef-Equifax* (n 501, above).

[574] Cases T–259/02, etc, *Raiffeisen Zentralbank Österreich v Commission* [2006] ECR II-5169, [2007] 5 CMLR 1142, upheld on appeal, cases C-125/07P, etc, *Erste Bank der Österreichischen Sparkassen* (n 507, above).

[575] *Raiffeisen Zentralbank Österreich v Commission*, above, para 181 (GC) and para 39 (CJ); cf paras 111–113 of the Opinion of AG Bot suggesting that the word 'presumption' was not appropriate since, in his view, the effect on inter-State trade of a national cartel is the consequence of the very nature of the infringement. The judgments do not refer to para 53 of the Effect on Trade Guidelines (n 539, above).

[576] *AEG v Commission* (n 497, above) paras 65–66 (demand in frontier region of France for sets manufactured to receive German broadcasting systems); Cases T-213/95&T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, [1998] 4 CMLR 259, para 177 (Dutch cranes hired in frontier region of Belgium). In *Film Purchases by German television stations*, OJ 1989 L284/36, [1990] 4 CMLR 841, the necessary effect was found because the agreement included Luxembourg and the South Tyrol region of Italy.

[577] See, eg *FEDETAB* (n 569, above); Cases 240–242/82, etc, *Stichting Sigarettenindustrie v Commission* [1985] ECR 3831, [1987] 3 CMLR 661 (irrelevant that imports were by way of supply from companies in the same corporate group); *Vimpoltu*, OJ 1983 L200/44, [1983] 3 CMLR 619; *Eirpage* (n 506, above); *Stichting Baksteen*, OJ 1994 L131/15, [1995] 4 CMLR 646.

[578] Case 61/80 *Coöperatieve Stremsel-en Kleurselfabriek v Commission* [1981] ECR 851, [1982] 1 CMLR 240 (exclusive purchasing prevented imports); *Stichting Sigarettenindustrie*, above, para 50 (limitation of distributors' margins reduced incentive to promote sales of imported products rather than other products); Case C-393/92 *Almelo* [1994] ECR I-1477. See also paras 5.065 and 7.046 et seq, below.

[579] Cases T-202/98, etc, *Tate & Lyle v Commission* [2001] ECR II-2035, [2001] 5 CMLR 859, para 80, appeal dismissed, Case C-359/01P *British Sugar v Commission* [2004] ECR I-4933, [2004] 5 CMLR 329.

1.139 Findings of no effect on trade. On several occasions the Court of Justice has concluded that an agreement or conduct did not affect trade between Member States, notably in *Hugin v Commission*[580] and *Bagnasco v BPN and Carige*.[581] These judgments show that the application of an agreement or conduct to the whole of a Member State does not necessarily establish an effect on inter-State trade: there may be a presumption of such an effect in some cases,[582] but at least some analysis of the likely effects may be necessary.[583] In *Manfredi*,[584] the Court of Justice held that the mere fact that foreign insurance companies doing business in Italy participated in a nationwide arrangement for exchange of information was insufficient in itself to establish an effect on inter-State trade; however, this indicated the potential for foreign companies to enter the Italian market and it was therefore necessary to determine whether the effects of the agreement might deter such entry.

1.140 Particular kinds of domestic agreements. In the light of the somewhat diverse jurisprudence, the Effect on Trade Guidelines devote considerable discussion to the question of when a domestic agreement or practice satisfies the effect on inter-State trade requirement under Articles 101(1) or 102.[585] The Guidelines distinguish between different forms of domestic agreements:

(a) *Cartels* which cover the whole of a Member State will in general be capable of affecting inter-State trade, if the product is tradeable.[586]
(b) *Horizontal cooperation agreements* may affect trade by foreclosing access to markets. Agreements which establish sector-wide standardisation and certification regimes, which either exclude undertakings from other Member States or which are more easily

[580] Case 22/78 *Hugin v Commission* [1979] ECR 1869, [1979] 3 CMLR 345 (servicing and repair of cash registers were essentially local in character). The CJ expressly stated that the same jurisdictional test as for Art 101 applied. In Case C-393/08 *Sbarigia v Azienda* [2010] ECR I-6337, the CJ rejected as inadmissible a challenge to national legislation relating to the opening hours of a pharmacy located in a specific municipal area of Rome, on the grounds that it could not, in itself or by its application, affect trade between Member States.

[581] Cases C-215&216/96 *Bagnasco v BPN and Carige* [1999] ECR I-135, [1999] 4 CMLR 624. The CJ accepted the arguments of the Commission and declined to follow the Opinion of AG Colomer. Note that the point was decided on the basis of an effect on inter-State trade and the CJ did not consider whether the standard guarantee condition had an effect on competition. See also *ABI*, OJ 1987 L43/51, [1989] 4 CMLR 238.

[582] See, eg *Erste Bank der Österreichischen Sparkassen* (n 507, above) paras 36 et seq.

[583] See similarly *Re Dutch Banks*, OJ 1989 L253/1, [1990] 4 CMLR 768 (certain interbank services by their very nature only performed locally; safe deposit and safe custody services, hire of safes); *Nederlandse Vereniging van Banken (1991 GSA Agreement)*, OJ 1999 L271/28, [2000] 4 CMLR 137 (Commission applied *Bagnasco* in finding that agreement between all the Dutch banks for standard interbank commissions for the processing of giro payments did not appreciably affect inter-State trade, although the agreement did appreciably affect competition and foreign banks participated). See also the English Court of Appeal in *Higgins v Marchant & Eliot Underwriting* [1996] 2 Lloyd's Rep 31 (funding arrangements between Name at Lloyd's and the managing agents of the syndicate of which he is a member).

[584] *Manfredi* (n 558, above) paras 44, 50–51. See also *Asnef-Equifax* (n 501, above) para 37.

[585] Effect on Trade Guidelines (n 539, above) paras 77–99.

[586] The dicta in the case law that agreements covering a whole Member State 'by their nature' affect inter-State trade generally concern cartels or agreements adopting national tariffs. The Commission explains this on the basis that to maintain the cartel's effectiveness the participants normally need to take action to exclude competitors from other Member States: Effect on Trade Guidelines, paras 79–80. See, eg *Belasco* (n 572, above) paras 34–35; *Erste Bank der Österreichischen* (n 507, above) para 39; Case T-58/01 *Solvay v Commission* [2009] ECR II-4781, [2011] 4 CMLR 101, para 215, appeal upheld on other grounds, Case C-110/10P, judgment of 25 October 2011.

fulfilled by undertakings from the Member State in question because of national rules or traditions, may make it more difficult for undertakings from other Member States to penetrate the market and hence have the necessary effect.

(c) *Joint venture agreements* may affect trade by preventing undertakings from another Member State from benefiting from an important channel of distribution or source of demand.[587]

(d) *Vertical agreements* establishing exclusive distribution may foreclose distribution outlets making it more difficult for undertakings from other Member States to penetrate the market.[588] Minimum resale price maintenance will have a direct effect on trade by increasing imports from and decreasing exports to other Member States.

Particular kinds of domestic abusive conduct. For the purpose of analysing the position of an undertaking whose dominant position covers only one Member State, the Effect on Trade Guidelines distinguish between exclusionary and exploitative abusive practices:[589] **1.141**

(a) *Exclusionary abuse* that involves binding customers to the dominant undertaking will generally affect inter-State trade since it impedes access to those *customers* by suppliers from other Member States. Fidelity rebates and exclusive purchasing agreements[590] are likely to meet the requirement when they foreclose foreign competitors. In *Michelin v Commission*, a case involving target rebates offered to tyre dealers in the Netherlands, the Court of Justice said:

> 'when the holder of a dominant position obstructs access to the market by competitors it makes no difference whether such conduct is confined to a single Member State as long as it is capable of affecting patterns of trade and competition on the [internal] market.'[591]

(b) *Exclusionary abuse* that seeks to eliminate, marginalise or deter a competitor of the dominant undertaking, such as predatory pricing or a refusal to supply, will affect inter-State trade if the target is a foreign competitor; but if the target is a domestic competitor that neither engages in exports or imports nor itself also operates in other Member States, there will not be an effect on inter-State trade.[592] The Guidelines state

[587] See cases cited at n 519, above.

[588] *Coöperatieve Stremsel- en Kleurselfabriek v Commission* (n 578, above). See also the decns concerning the 'Green Dot' waste packaging recycling scheme: *DSD*, OJ 2001 L319/1, [2002] 4 CMLR 405, para 131 (Germany) (appeal dismissed, Case T-289/01 *Duales System Deutschland v Commission* [2007] 5 CMLR 356); *ARA and ARGEV, ARO*, OJ 2004 L75/59, [2004] 5 CMLR 1101, paras 263–265 (Austria) (appeal dismissed, Case T-419/03 *Altstoff Recycling Austria v Commission*, judgment of 22 March 2011). Foreclosure effects normally apply to foreign suppliers as much as to domestic suppliers, but a reservation in favour of access by suppliers from other Member States will preclude an effect on inter-State trade if its terms provide a real possibility for foreign supply: *Delimitis* (n 565, above) paras 28–33.

[589] Effect on Trade Guidelines, OJ 2004 C101/81: Vol II, App C12, paras 93–96. For discussion of different kinds of abuse, see paras 10.064 et seq, below.

[590] For exclusive or tying arrangements, the same considerations apply under Art 102 as under Art 101: see, eg *Van den Bergh Foods*, OJ 1998 L246/1, [1998] 5 CMLR 530, paras 201 and 271 (appeals on other grounds dismissed: Case T-65/98 *Van den Bergh Foods* [2003] ECR II-4653, [2004] 4 CMLR 14 and Case C-552/03P *Unilever Bestfoods* [2006] ECR I-9091, [2006] 5 CMLR 1460).

[591] Case 322/81 *Michelin v Commission* [1983] ECR 3461, [1985] 1 CMLR 282, para 103; COMP/ 36041 *PO-Michelin*, decn of 20 June 2001, OJ 2002 L143/1, [2002] 5 CMLR 388, paras 344–347 (appeal on other grounds dismissed, Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923).

[592] See, eg *Hugin* (n 580, above). But the exports need not be to another Member State: see Cases 6&7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, paras 30–34, where the refusal by a US company, dominant throughout the EU, to supply a raw material to a customer in Italy was held to affect inter-State trade irrespective of the fact that this customer sold 90 per cent of its finished product outside

that an indirect effect on inter-State trade may also be found if the conduct has a dissuasive effect on potential market entrants from other Member States.[593]

(c) *Exploitative abuse*, such as excessive pricing or price discrimination, is stated by the Guidelines to present a 'more complex' situation. The Guidelines state that price discrimination between domestic customers will not normally affect trade between Member States, but that it may do so if the disadvantaged buyers are engaged in export activities.[594] Where the discrimination consists in offering lower prices to those customers most likely to import from another Member State, for example customers in a border region, an effect on trade may be readily established.[595] Presumably, analogous reasoning should apply to excessive pricing, on which the Guidelines are silent.[596]

1.142 **Appreciability of domestic abuse.** The very presence of an undertaking which is dominant in a national market is likely already to hinder penetration of that market by a smaller or new competitor. It follows that any abuse of a dominant position which increases the difficulty of entry or expansion will, probably, have an appreciable effect on inter-State trade. Even if such abuse covers only part of the territory of a Member State or affects only certain buyers, an effect on inter-State trade is likely to be appreciable or at least not insignificant.[597] If the abuse involves only an insignificant share of the dominant undertaking's sales within the State, however, there may be no appreciable effect on trade between Member States.

1.143 **Agreement in only part of a Member State.** The Effect on Trade Guidelines discuss the application of that concept where an agreement or dominant position covers only part of a Member State.[598] For an agreement, the assessment is approached in the same way as when

the EU: see para 1.127, above. In *Numeropalvelu* 115/2005, Case MAO:178–179/09; judgment of Finnish Market Court of 6 April 2009, the Court held that the NCA had not established that an abusive cessation of supply of directory data by a telecoms operator to a competitor had an appreciable effect on trade: the fact that the dominant undertaking was part of a corporate group operating across Northern Europe was not enough: the NCA had not demonstrated how inter-state could possibly have developed differently as a result of Numeropalvelu's conduct.

[593] Effect on Trade Guidelines (n 589, above) para 94; COMP/38784 *Wanadoo España vs Telefónica*, decn of 4 July 2007, para 696 ('trade between Member States is generally affected by the conditions governing access to the telecommunications infrastructure and wholesale services of the dominant network operators, in particular those of the historical operators of fixed and mobile networks, who formerly enjoyed a State monopoly in national markets', appeals dismissed Case T-336/07 *Telefónica* and Case T-398/07 *Spain*, judgments of 29 March 2012).

[594] Effect on Trade Guidelines (n 589, above) para 95. See, eg COMP/35703 *Portuguese airports*, 1999 OJ L69/31, [1999] 5 CMLR 103, para 20: Commission found no effect on inter-State trade caused by discriminatory landing fees at four airports in the Azores since the traffic was either entirely domestic or from third countries, by contrast with the position at mainland airports (appeal on other grounds dismissed, Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, [2002] 4 CMLR 1319).

[595] See, eg, Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, [1999] 5 CMLR 1300, paras 169, 185, appeal dismissed, Case C-497/99P *Irish Sugar* [2001] ECR I-5333, [2001] 5 CMLR 1082. Such conduct may equally be categorised as an exclusionary abuse.

[596] See, eg *Der Grüne Punkt – Duales System Deutschland*, OJ 2001 L166/1, [2001] 5 CMLR 609, paras 155–158: fees under trade mark agreement for use of 'Green Dot' on packaging regardless of whether the packaging was recycled under the licensor's scheme or that of a competitor; appeal dismissed, Case T-151/01 *Duales System Deutschland v Commission* [2007] ECR II-1607, [2007] 5 CMLR 300, further appeal dismissed, Case C-385/07P [2009] ECR I-6155, [2009] 5 CMLR 2215.

[597] Effect on Trade Guidelines (n 589, above) para 96.

[598] Effect on Trade Guidelines (n 589, above) paras 89–92 and 97–99. See also the Commission's observations on appreciable effect when the trade affected is in only part of a Member State; submitted to the Cour de Cassation under Art 15(3) of Reg 1/2003 in *France Telecom (Orange Caraïbe)* (dated 13 October 2011) (available on the national courts/*amicus curiae*) section of the DG Comp website.

considering an agreement covering the whole of a Member State. Where an agreement forecloses access to a regional market, the best indicator of appreciability is the share of the national market in terms of volume that is being foreclosed. In such a case, the geographic extent of the regional market, or the parties' market shares (of that regional market) are of limited weight. If the proportion of the national market affected is not significant, there is unlikely to be an appreciable effect on inter-State trade.[599] The Guidelines suggest that even in an Article 101 case, guidance can be derived from the case law under Article 102 concerning the concept of a 'substantial part of the internal market'.[600]

Dominance in only part of a Member State. Where an undertaking is dominant only in part of a Member State, the concept of effect on trade can be considered together with the other requirement of Article 102 that the dominant position must cover a 'substantial part of the internal market'. Therefore, if a port, by reason of its significance, constitutes a substantial part of the internal market and the abuse makes it more difficult for competitors from other Member States to gain access to that port, the appreciable effect on trade requirement will be satisfied.[601] However, abuse that is purely local in nature is unlikely to have an effect on inter-State trade.[602] In *Sbarigia*[603] the Court of Justice held that Articles 101–106 TFEU were 'manifestly inapplicable' to national legislation governing the opening periods of a pharmacy located in a specific municipal area of Rome. The fact that the affected region is of substantial size does not of itself establish an appreciable effect on inter-State trade. For example, in *Ambulanz Glöckner*, concerning a limitation of the right to operate ambulance services, the Court of Justice noted that the affected *Land* of Rheinland-Pfalz might by its geographic area and population be regarded as constituting a 'substantial part of the internal market' for the purpose of Article 102,[604] but the question of an appreciable effect on inter-State trade depended upon whether there was a sufficient degree of probability that operators from neighbouring States might have sought, but for the restriction, to operate ambulance services in Rheinland-Pfalz.[605] **1.144**

Restrictions arising from activities outside the EU. An agreement between undertakings all of which are outside the EU may still restrict competition within the internal market and affect trade between Member States. The jurisdiction to apply Articles 101 and 102 in such circumstances is considered in Section 6, above.[606] In the case of agreements which do not have the object of restricting competition inside the EU, it is still necessary to consider whether patterns of trade are capable of being affected, for example by considering the effect of the agreements on customers and other operators inside the EU that rely **1.145**

[599] Effect on Trade Guidelines (n 589, above) para 90. See, eg *Industrieverband Solnhofener Natursteinplatten*, OJ 1980 L318/32, [1981] 2 CMLR 308, paras 40–41 (standardised exchange arrangements between competing local producers of a particular natural stone had no effect on inter-State trade, although the stones were exported).

[600] Effect on Trade Guidelines (n 589, above) para 92. For discussion of this concept and citation of authorities, see para 10.007, below.

[601] Effect on Trade Guidelines (n 589, above) paras 97–98. See, eg Case C-179/90 *Merci convenzionale porto di Genova* [1991] ECR I-5889, [1994] 4 CMLR 422, para 15.

[602] Effect on Trade Guidelines (n 589, above) para 99.

[603] Case C-393/08 *Sbarigia v Azienda* [2010] ECR I-6337, paras 31–33.

[604] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, [2002] 4 CMLR 726, para 38.

[605] *Ambulanz Glöckner*, above, paras 48–50, and see Opinion of AG Jacobs at paras 168–173. Since this was a reference for a preliminary ruling, it was for the national court to determine these issues on the facts.

[606] See also Effect on Trade Guidelines (n 589, above) paras 100 et seq.

on the products or services of the parties to the agreement, or whether the likelihood of goods being re-imported has been altered.[607] The mere fact that conduct produces certain effects, no matter what they may be, on the internal market does not in itself constitute a sufficiently close link to be able to found EU competence.[608] Where an equipment manufacturer took steps to limit exports of spare parts from the US to Europe where the parts were more expensive, the General Court upheld the Commission's finding that there was an insufficient effect on trade.[609] Similarly, where an agreement, albeit between undertakings inside the EU, concerns only exports to a non-Member State, the question whether a restriction on re-export into the EU gives rise to an appreciable effect on inter-State trade depends on the quantity of products affected in relation to the total market for those products in the EU.[610] There is more likely to be an appreciable effect on trade between Member States if the volume of export goods concerned is material relative to the overall volume of EU trade.

[607] Effect on Trade Guidelines (n 589, above) paras 106 et seq.

[608] Case T-204/03 *Haladjian Frères v Commission* [2006] ECR II-3779, [2007] 4 CMLR 1106.

[609] *Haladjian Frères v Commission,* above. There was evidence that the system established was necessary to support the official spare parts distribution network and still allowed substantial parallel importing to take place. Note that there were no restrictions on parts moving between one EU Member State and another, only between the US and the EEA.

[610] Case C-306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983, [1998] 5 CMLR 172, paras 25–26. See further paras 1.110 et seq, above.