HORIZONTAL AGREEMENTS AND CARTELS IN EU COMPETITION LAW

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
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First Edition published in 2015

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2015930567

ISBN 978–0–19–969820–2

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

INTRODUCTION TO CHAPTERS 1–8

Chapters 1–8 of the book deal with cartels. Cartels are the object infringements par excellence, heavily sanctioned worldwide and even criminalized in some jurisdictions. European Union (EU) competition law does not provide for criminal sanctions, but the fine levels imposed by the European Commission (Commission) are astronomically high. Some EU Member States have adopted in the meantime criminal laws that may even go so far as to impose jail sentences on those participating in a cartel. All of this reflects that, in a free market economy, cartels are deemed the most damaging restrictions of competition as they keep prices artificially high and therefore go straight to the pocket of the consumer.

Different from many other areas of EU competition law, the rules and principles governing the fight against cartels are not so much found in black-letter law, with limited exceptions (such as the basic prohibition of Article 101 of the Treaty on the Functioning of the European Union [2010] (TFEU) and the provisions contained in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] (Regulation 1/2003)), the relevant principles (for example, on fining and leniency) are contained in soft law and to a considerable extent also in case law of the EU Commission and the General Court and Court of Justice (EU Courts). Practical experience with the way in which these instruments are applied and interpreted is therefore of vital importance when advising and defending companies in this area.

When given the opportunity by Oxford University Press to produce a twin sister (or brother) for our monograph dealing with vertical agreements—F Wijckmans and F Tuytschaever, *Vertical Agreements in EU Competition Law* (2nd edn, OUP 2011)—we faced the challenge of finding the right approach to offer the reader as much added value as possible. We realized very quickly that, given the specificity of the law on cartels, the combination of multiple insights and experiences is to be preferred over the (by definition) narrower perspective of only two authors.

Our reflection process landed at a fairly unique formula. We sliced the subject-matter into distinct topics and for each topic invited an experienced practitioner and public enforcer to share their views and experience, with a view to adding value and extending their contributions beyond the usual parameters of academic writing.

The private practitioners were tasked with a double mission: first, to provide a description of the law as it stands (with a request to reserve more theoretical discussions for the footnotes and to ensure that the footnotes contain enough back-up so that the book can also function as a valuable research tool); second, to share as much practical experience as possible. We phrased this second mission in relatively simple terms: provide the reader with such hands-on input as you yourself would hope to be able to extract from a practitioner of your stature.

The public enforcers were invited not to criticize or comment on the private practitioner's contribution. Rather, they were invited to identify such specific issues of which they felt

practitioners should know and understand the public enforcer's perspective. These could be issues where, in the public enforcer's experience, practitioners often get it wrong, or such issues of which the details of the public enforcer's perspective on the matter cannot so readily be deduced from the available sources. In short, the public enforcers were tasked with providing the reader with such insights as they felt useful and necessary based on their experience with handling cartel cases.

The reader will note that in a number of instances there is an overlap between the contributions of the private practitioner and the public enforcer. This is deliberate and reflects the importance attached by both sides to the issue. In order to obtain a balanced and truly practical insight into the issue, we strongly recommend that both contributions are consulted in tandem. It is the guidance offered by such combined reading that is at the heart of the concept underpinning this part of the book.

Chapter 1 sets the scene: the private practitioner's part of the chapter addresses the concept of 'cartels' and then focuses on the burden of proof and the standard of proof. The chapter demonstrates the importance of various presumptions that are aimed at facilitating the evidentiary task of the enforcers. Felix Ronkes Agerbeek (Legal Service, European Commission) pursues the evidentiary theme further and addresses specific principles and the practice related to proving cartels.

Chapter 2 deals with the detection of cartels. Not surprisingly, leniency occupies a prominent place in this context, but other ways of bringing cartels to light are also discussed. Private practitioners Jim Venit, Ingrid Vandenborre, and Tiffany Rider (Skadden, Brussels and Washington DC) and public enforcer Paula Amador Sanchez (senior legal officer at the Dutch NCA, The Hague) share truly valuable insights from their personal experience.

Once a cartel has been detected, the Commission must conduct a further investigation so as to be in a position to bring a case. This topic is dealt with in **Chapter 3**. The investigation tools that are available to the officials of the Commission are explained and clarified by Ros Kellaway (Eversheds, London) and Jan Nuijten (case handler, Cartels Directorate, Directorate-General for Competition, European Commission). Both authors provide the reader with many tips that come straight from their day-to-day practice.

Chapter 4 provides a thorough description of the procedure before the Commission. Practitioner Konstantin Jörgens (Garrigues, Madrid) guides the reader through the various stages of the Commission's cartel procedure and attaches considerable importance to the case law of the EU Courts. Manuel Kellerbauer (Legal Service, European Commission) selects a number of critical topics that relate to the rights of defence, including the right of access to the file, the right to obtain evidence that is not in the Commission's possession, and the right to be heard orally.

Chapter 5 goes into the topic of public sanctions. Cartel enforcement typically goes hand in hand with very high fines. A solid understanding of the fine calculation methodology is crucial to any practitioner dealing with a cartel case (either as an in-house lawyer or as an external legal advisor). In addition to a solid description of the relevant concepts, practitioners Hans Gilliams, Jan Bocken, and Tristan Baumé (Eubelius, Brussels) focus on the issue of proportionality in relation to this topic and explore the possible impact this legal concept may have on the fining policy of the Commission. Ralf Sauer (Legal Service,

European Commission) likewise addresses the fining methodology, but does so from the perspective of the public enforcer. His insights are of great practical value and should be read in conjunction with the viewpoints expressed by the private practitioners to capture the nuances in full.

Chapter 6 deals with the issue of the attribution of liability. The private practitioner section addresses the direct attribution of liability, parental liability, and successor liability. André Bouquet (Legal Service, European Commission) selects some of the most complex topics in this area and provides his perspective on the EU Courts' case law in relation thereto.

Chapter 7 deals with the next procedural level, namely the judicial review of cartel decisions. Practitioner Dirk Arts (Allen & Overy, Brussels) provides a comprehensive overview of the key questions related to appeals against Commission decisions prohibiting and sanctioning cartels. Xavier Lewis and Maria Moustakali (Legal and Executive Affairs Department, EFTA Surveillance Authority, Brussels) add to this the public enforcer's perspective and focus on the nature of the review by the EU Courts and the nature of an action brought on appeal.

Chapter 8 takes the reader from the area of public enforcement into that of private enforcement. Directive (EU) No 104/2014 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] (Private Damages Actions Directive) is expected to give a boost to private damage claims and hence to render cartel infringers more and more subject to a line of attack from the victims of a cartel. Practitioner Thomas De Meese (Crowell & Moring, Brussels) demonstrates the wide variety of legal issues (in areas such as the selection of the appropriate forum, the determination of the applicable law, the issue of causation, and the determination and quantification of the damages) that are bound to be faced by private litigants. Eddy De Smijter (head of the Private Enforcement Unit, Directorate-General for Competition, European Commission) deals with two critical provisions of the Private Damages Actions Directive, namely the rules on access to evidence and the issue of civil joint and several liability. He provides an insight into the balancing act of the EU legislator between the private interests of the cartel victims and the need to safeguard the enforcement activities of the Commission and the National Competition Authorities (NCAs).

Each part of each chapter ends with an overview of so-called key points. This overview is obviously far from exhaustive, but is intended to provide the reader with an easy tool to identify the issues on which he receives practical guidance from the authors. The key points are also intended to provide the flavour of such guidance and serve as an invitation to read and review the corresponding sections in the chapter.

INTRODUCTION TO CHAPTERS 9–11

Chapters 9–11 of the book concern agreements between competitors that are not cartels. Chapter 9 deals with Research and Development (R&D) and specialization agreements. Chapter 10 concerns joint purchasing agreements, agreements on joint commercialization, and standardization agreements, including standard terms. Chapter 11 discusses information exchanges between competitors. These are the so-called 'soft' horizontals.

As opposed to Chapters 1–8, Chapters 9–11 do not couple a private practitioner to a public enforcer. That approach seemed to us less fruitful for horizontal agreements that are not cartels, where there are more substantive legal instruments and much less case law than is the case for cartels. The tandem approach risked therefore to cause considerable overlap without offering sufficient added value.

The following chapters are therefore intended to offer the practitioner a framework or road map to analyse horizontal cooperation agreements in light of the applicable hard and soft law.

The chapters assume that there is an agreement, concerted practice, or decision of an association of undertakings in the sense of Article 101(1) of the Treaty on the Functioning of the European Union [2010] (TFEU) which appreciably affects trade between the European Union (EU) Member States.[1] They also assume that the agreement, concerted practice, or decision is between (actual or potential) competitors and do not discuss cooperation between non-competitors.

The main legal instruments that are dealt with are: (i) the block exemption regulations applicable to certain categories of horizontal cooperation agreements, namely Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] (Regulation 1217/2010) (on R&D agreements), and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] (Regulation 1218/2010) (on specialization agreements); (ii) the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] (Horizontal Guidelines), which contain guidance on the above mentioned categories of agreements as well as on information exchanges between competitors; and (iii) the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] (2014 De Minimis Notice). Horizontal cooperation agreements can benefit from that Notice, provided that they do not restrict competition by object, which is the reason why cartels are excluded from de minimis treatment. In addition to these legal instruments, reference is also made to the Commission Notice—Guidelines on the application

[1] Ch 11, at para 11.72ff, does recall the conditions that must be fulfilled before an information exchange can be a concerted practice in the sense of Art 101(1) TFEU.

of Article 81(3) of the Treaty [2004] (Article 81(3) Guidelines), which generally set out the European Commission's (Commission) interpretation of the conditions for exemption contained in Article 101(3) TFEU. The Horizontal Guidelines must be read in tandem with the Article 81(3) Guidelines.[2]

The competition law assessment of agreements between competitors that are not cartels is, both legally and economically, more complex than that of cartels, which raise a wealth of interesting legal questions, as shown by chapters 1–8, however with a focus more on procedural and evidentiary issues.

The competition law assessment of horizontal cooperation agreements is more of a substantive nature and generally consists of two steps: a first step to determine whether or not the agreement restricts competition in the sense of Article 101(1) TFEU; and, if so, a second step that consists of the weighing of the pro- and anti-competitive effects of the agreement under Article 101(3) TFEU.[3] The second step may itself consist of two stages, namely a first stage to determine whether the agreement can be block exempted, and, if not, a second stage to determine whether it qualifies for an individual exemption pursuant to Article 101(3) TFEU.

As regards the first step, there is no restriction of competition in the sense of Article 101(1) TFEU when the conditions of the 2014 De Minimis Notice are fulfilled, meaning that the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement,[4] and that it does not concern an agreement with object restrictions.[5]

Beyond the market share limit of the 2014 De Minimis Notice, a horizontal cooperation agreement does not necessarily restrict competition in the sense of Article 101(1) TFEU. The Horizontal Guidelines repeatedly contain language that, although not creating a genuine safe harbour, provide parties with a basis to argue that their agreement remains outside the prohibition of Article 101(1) TFEU.

For example, cooperation between competitors that objectively speaking would not be able to independently carry out a project covered by the cooperation (due to the limited technical capabilities of the parties) normally does not restrict competition in the sense of Article 101(1) TFEU, save if the parties could have carried out the project with less stringent restrictions.[6] The exchange of genuinely public information is unlikely to constitute an infringement of Article 101(1) TFEU.[7] Joint purchasing by parties without market power—that is, parties with a combined market share not exceeding 15% on the purchasing market(s) and the selling market(s)—is unlikely to have restrictive effects on competition in the sense of Article 101(1) TFEU. Also, if participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard

[2] Horizontal Guidelines, paras 19 and 31.
[3] Horizontal Guidelines, para 20.
[4] 2014 De Minimis Notice, para 9. The 10% market share is reduced to 5% where, in a relevant market, competition is restricted by the cumulative foreclosure effect of parallel networks of agreements having similar effects on the market (2014 De Minimis Notice, para 10).
[5] 2014 De Minimis Notice, para 13.
[6] Horizontal Guidelines, para 30.
[7] Horizontal Guidelines, para 92.

on fair, reasonable, and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1) TFEU.[8]

Parties therefore do well to give sufficient attention to Article 101(1) TFEU before moving to the second step of Article 101(3) TFEU. That second step takes the form either of an analysis of the applicable block exemption regulation or, more difficult for companies and their advisors, of a self-assessment when no block exemption is available or its conditions are not complied with.

As said, although horizontal cooperation between competitors occurs much more often than competitors entering into a cartel arrangement, there is all in all little case law to be found on cooperation between competitors outside the cartel sphere. There are hardly any Commission decisions and related litigation before the General Court and Court of Justice (EU Courts), and hardly any preliminary rulings of the Court of Justice of the European Union (Court (of Justice)). The website of the Directorate-General for Competition (DG COMP) does not list opinions pursuant to Article 15(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] (Regulation 1/2003) and there seem to have been no amicus curiae observations pursuant to Article 15(3) of Regulation 1/2003.

Horizontal cooperation between competitors therefore to a very large extent occurs under the radar, by way of contracts that are shaped by the block exemption regulations and the various Commission guidelines, by parties solving their commercial problems as much as possible amicably (in any event, leniency, only available to secret cartels, is no option here) or by approaching the Commission informally, on a no name basis, for further guidance. In this respect, it may be worthwhile for the Commission to consider publishing periodic FAQs on the horizontal block exemption regulations and guidelines on its website. This would add practical meat to the bones of the available block exemptions, notices, and guidelines.

If there is one exception to there being hardly any case law on horizontal cooperation, that exception concerns information exchanges between competitors. Information exchanges pose many practical questions and have found their way into EU and national case law, mainly as supporting measures of a cartel, but nowadays also as self-standing practices. In the context, the inclusion of guidelines on information exchange is probably the most significant addition to the Horizontal Guidelines and is discussed extensively in Chapter 11.

Before that, Chapter 9 and 10 set out the framework of analysis for the other categories of agreements that are covered by the Horizontal Guidelines.

Chapter 9, written by Stephanie Pautke (Commeo, Frankfurt), discusses the categories of agreements between competitors that may be covered by a block exemption regulation, namely R&D agreements and specialization agreements.

The chapter discusses each category along the lines of the same structure, where the definition of the category of agreements that is under discussion is followed by a three step analysis, in line with the methodology stated above: first, an Article 101(1) TFEU analysis

[8] Horizontal Guidelines, para 280.

to determine whether or not the collaboration is caught by the prohibition of that provision; second, an analysis under the relevant block exemption regulation (in the following order: market share limits; hard-core restrictions; and, where applicable, excluded restrictions); and third, an analysis on the basis of the guidance that can be found in the Horizontal Guidelines.

Chapter 10, written by Ángel Valdés Burgui and Pablo Faura Enriquez (Lupicinio International Law Firm, Madrid and Barcelona), offers a framework of analysis for the other categories of horizontal agreements covered by the Horizontal Guidelines. In the absence of a block exemption regulation, these agreements—joint purchasing, joint commercialization and standardization agreements—are subject to an Article 101(3) TFEU self-assessment by the parties if an exemption is needed. The guidance on standardization agreements now also encompasses, besides guidance on standard-setting processes, guidance on the use of standard terms in contracts.

The chapter applies the same framework of analysis to each category of those agreements. First, it is checked what object and effect restrictions in a joint purchasing or commercialization or standardization agreement may bring the agreement under Article 101(1) TFEU. In that context, safe harbours are identified. In a second step, in the absence of a block exemption, the main points of attention under each one of the four conditions of Article 101(3) TFEU are listed.

Finally, **Chapter 11**, written by economists Vincent Verouden (director at E.CA Economics, Brussels/Berlin, and former Deputy Chief Economist at the Directorate-General for Competition) and Aleksandra Boutin (European Commission, currently FNRS research scholar at the European Centre for Advanced Studies in Economics and Statistics) deals with the new chapter on information exchanges in the Horizontal Guidelines.

The Commission introduced that chapter following demand from stakeholders and National Competition Authorities (NCAs) for guidance on the assessment of information exchange, the objective being to enhance legal certainty.[9] Next to a survey of the pro- and anti-competitive features of information exchanges, the chapter contains a discussion on the various types of information exchanges, as seen from a competition law perspective: from information exchanges that are not restrictive of competition, over those that are restrictive by effect, to those that constitute an object infringement and may be treated (and fined) like a cartel.

As the authors emphasize, the Commission, against popular demand, did not introduce any safe harbour, that is, a 'white list' of information exchanges that are per se lawful, for example, because the market coverage of the exchange is limited or because of the characteristics of the information exchange (for example, because the exchange concerns one-year-old market share data). Instead, the Commission introduced what the authors refer to as 'safety zones', in which a given exchange is *unlikely* to infringe competition law.

The reader will judge whether, in so doing, the Commission has succeeded in its attempt to bring more legal certainty to the everyday practice of information exchanges. Experience so far teaches us that the Horizontal Guidelines are more helpful in identifying what is likely not to be allowed, rather than the inverse. Notably, information exchanges between

[9] European Commission, MEMO/10/163, 4.5.2010.

competitors of individualized data regarding intended future prices or quantities are considered to be object infringements, and private exchanges between competitors of their individualized intentions regarding future prices or quantities as cartels.[10]

However, these 'dark grey' or 'black' examples lie at the very end of the scale of information exchanges. A very large part of that scale is composed of information exchanges without a restrictive object, but possibly with restrictive effects (for example, exchanges for statistical or benchmarking purposes). With no safe harbours, advising on these remains very much case-driven and set against the background of many variables pertaining to the information itself (historic versus future, aggregated versus individualized, etc.), the exchange (frequent or not, genuinely public or private), the market (atomized versus concentrated; stable versus dynamic; etc.), as well as the market coverage.

As a consequence, practitioners will need to closely follow the case law on the matter in order to properly advise their clients. The chapter contains several examples of existing cases, including from the US.

[10] Horizontal Guidelines, para 74.