Glossary
of terms used in EU competition policy

Antitrust and control of concentrations

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Commission

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It can be accessed through the Europa server (http://europa.eu.int).

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Absolute territorial protection

Practice by manufacturers or suppliers, relating to the resale of their products and leading to a separation of markets or territories. Under absolute territorial protection, a single distributor obtains the rights from a manufacturer to market a product in a certain territory, and other distributors are prohibited from selling actively or passively into this territory.

→ *Passive sales, Hard-core restrictions*

Abuse of a dominant position

Anti-competitive business practices (including improper exploitation of customers or exclusion of competitors) which a dominant firm may use in order to maintain or increase its position in the market. Competition law prohibits such behaviour, as it damages true competition between firms, exploits consumers, and makes it unnecessary for the dominant undertaking to compete with other firms on merit. Article 82 of the EC Treaty lists some examples of abuse, namely unfair pricing, restriction of production output and imposing discriminatory or unnecessary terms in dealings with trading partners.

→ *Dominant position, Tying*

Access to the Commission's file

Right of natural or legal persons who are parties to a Commission investigation to see the Commission's file, whenever the Commission proposes to adopt a decision which would be unfavourable to those parties. Access is given during the course of the administrative procedure to all the documents in the case concerned, with the exception of internal Commission documents, business secrets of other companies and other confidential information. Access to the file is thus one

of the principal procedural guarantees intended to protect the rights of defence of the parties.

(See: Article 18(3) of the merger regulation; Articles 6 and 13(1) of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty; Commission notice on the internal rules of procedure for processing requests for access to file (OJ C 23, 23.1.1997, p. 3).)

→ *Hearing officer*

Active sales

Sales made by actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group. This may be, for instance, by direct mail or visits; by actively approaching a specific customer group or customers in a specific territory allocated exclusively to another distributor through advertisement in the media or other promotions specifically targeted at that customer group or customers in that territory; or by establishing a warehouse or distribution outlet in another distributor's exclusive territory. Clauses limiting a distributor's right to sell actively into another distributor's territory are usually part of exclusive distribution networks and can benefit from the block exemption for vertical agreements.

(See: Commission Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 22.12.1999); guidelines on vertical restraints (OJ C 291, 13.10.2000).)

← → *Passive sales*

Actual competitor

Firm which is either currently active on the same relevant market as the company under investigation, or which is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability).

(See: Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).)

Advisory committee

Committee composed of representatives of the Member States which is consulted by the Commission in antitrust and merger cases where such a consultation is foreseen. A preliminary draft decision by the Commission is submitted to, and discussed with, the advisory committee in question. The advisory committee issues

an opinion, which shall be taken into account in the final Commission decision.

(See: Article 10 of Regulation No 17 and Article 19 of the merger regulation.)

AKZO procedure

Procedural rule established by the European Court of Justice which has also been inserted into the mandate of the hearing officer and which concerns the disclosure of confidential documents or business information by the Commission. This rule says that where the Commission intends to disclose information while the company providing it wants this information to be treated as commercially sensitive (business secret or other confidential information), the Commission shall inform that company in writing of its intention and the reasons for it. Where the company concerned still objects to the disclosure of such information, but the Commission finds that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision. This decision has to be notified to the company concerned, which must be given the opportunity to bring its case before the European Court of First Instance with a view to having the Commission's assessments reviewed. The information may not be disclosed before one week after the decision has been notified.

(See: Judgment of the European Court of Justice of 24 June 1986 in Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission,* [1986] ECR, p. 1965, paragraph 29; Article 9 of Commission decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21).)

Ancillary restraints

Restrictions on the parties to an agreement (including an agreement to form a concentration), which do not constitute the primary object of the agreement, but are directly related to and necessary for the proper functioning of the objectives envisaged by agreement. In the field of cooperation agreements, an example would be an obligation within an (→) R & D agreement not to carry out, independently or together with third parties, research and development in the field to which the agreement relates. An example of a restraint ancillary to a concentration is a non-competition clause imposed by the buyer on the vendor for a transitional period of time.

(See: Articles 6(1)b and 8(2) of the merger regulation; Commission notice on restrictions directly related and necessary to concentrations (OJ C 188, 4.7.2001, p. 5).)

Antitrust

Field of competition law and policy. In the EU context, both the rules governing anti-competitive agreements and practices (cartels and other forms of collusion) based on Article 81 of the EC Treaty and the rules prohibiting abuses of (existing) dominant positions based on Article 82 of the EC Treaty, are commonly referred to as 'antitrust'.

Article 6 letter

Administrative letter by which the Commission informs a complainant of its intention to reject the complaint. This so-called Article 6 letter defines the Commission's preliminary position regarding a complaint, and gives the complainant an opportunity to make further observations and comments within a specified time limit. Because of its nature as a preparatory and preliminary document, an Article 6 letter cannot be challenged in Court as a separately reviewable act. However the complainant may insist that a final decision rejecting his complaint be taken, which in turn is subject to judicial review by the Court of First Instance.

(See: Article 6 of Regulation No 2842/98 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty (OJ L 354, 1998, p. 18).)

Article 11 letter

Written request for information the Commission addresses to undertakings and associations of undertakings, as well as to governments and competent authorities of the Member States, in order to obtain the information necessary to conduct its investigations. Such requests can be sent to companies which are suspected of infringements, are party to a concentration or to third parties who may be in a position to clarify certain matters which are relevant for the investigation in question.

(See: Article 11 of Regulation No 17 and Article 11 of the merger regulation.)

Article 19(3) notice

Notice published in the Official Journal by which the Commission informs undertakings, associations of undertakings and the general public of its intention to clear or exempt a certain notified agreement under Article 81 of the EC Treaty. The notice should contain a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

(See: Article 19(3) of Regulation No 17.)

Bid rigging

Particular form of coordination between firms which can adversely affect the outcome of any sale or purchasing process in which bids are submitted. For example, firms may agree their bids in advance, deciding which firm will be the lowest bidder. Alternatively, they may agree not to bid or to rotate their bids by number or value of contracts.

Black clause

→ *Hard-core restrictions*

Block exemption (regulation)

Regulation issued by the Commission or by the Council pursuant to Article 81(3) of the EC Treaty, specifying the conditions under which certain types of agreements are exempted from the prohibition on restrictive agreements laid down in Article 81(1) of the EC Treaty. When an agreement fulfils the conditions set out in a block exemption regulation, individual notification of that agreement is not necessary: the agreement is automatically valid and enforceable. Block exemption regulations exist, for instance, for vertical agreements, R & D agreements, specialisation agreements, technology transfer agreements and car distribution agreements.

Buyer power

Ability of one or more buyers, based on their economic importance on the market in question, to obtain favourable purchasing terms from their suppliers. Buyer power is an important aspect in competition analysis, since powerful buyers may discipline the pricing policy of powerful sellers, thus creating a 'balance of powers' on the market concerned. However, buyer power does not necessarily have a positive effect. Where a strong buyer faces weak sellers, for example,

the outcome can be worse than where the buyer is not powerful. The effects of a buyer's strength also depend on whether the buyer, in turn, has seller power in a downstream market.

Carlsberg notice

Notice published in the Official Journal whereby the Commission informs third parties of a notification and invites them to submit information and/or comments concerning the notified case. The invitation contains a short summary of the case and is published in the Official Journal with the consent of the parties directly involved in the matter. This possibility of obtaining case-related information was first used by the Commission in the 'Carlsberg' case in 1992. In contrast to an (→) Article 19(3) notice, a Carlsberg notice is neutral and gives no indication on the preliminary position of the Commission.

As regards mergers, the Commission is obliged to publish the fact that a merger has been notified, at the same time indicating the names of the parties, the nature of the concentration and the economic sector involved.

(See: Notice on prior notification of a joint venture: Case 34.281 Carlsberg-Tetley (OJ C 97, 16.4.1992, p. 21); Article 4(3) of the merger regulation.)

Cartel

Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits. In practice, this is generally done by fixing prices, limiting output, sharing markets, allocating customers or territories, bid rigging or a combination of these specific types of restriction. Cartels are harmful to consumers and society as a whole due to the fact that the participating companies charge higher prices (and earn higher profits) than in a competitive market.

Collecting society

Association that collects payments made by users of intellectual property rights for the holders of such rights. For instance, a radio station, playing a record for which a record company holds a copyright, has to pay a fee to a collecting society, which then transfers the payments to the record company.

Collusion

Collusion refers to the coordination of firms' competitive behaviour. The likely result of such coordination is that prices rise, output is restricted and the profits of the colluding companies are higher than they would otherwise be. Collusive behaviour does not always rely on the existence of explicit agreements between firms. Collusive behaviour can also result from situations where firms act individually but — in recognition of their interdependence with competitors — jointly exercise market power with the other colluding competitors. This is normally described as 'tacit collusion'.

Comfort letter

Administrative letter sent to the notifying parties confirming informally and normally without any reasoning either:

— that the Commission sees no grounds for action against an agreement under Article 81(1) of the EC Treaty, because it does not restrict competition and/or affect trade between Member States (negative clearance-type comfort letter), or

— that the agreement fulfils the conditions for granting an exemption under Article 81(3) of the EC Treaty (exemption-type comfort letter).

Comity

Principle applied in the field of international cooperation on competition policy. By negative comity, every country that is party to a cooperation agreement guarantees to take account of the important interests of the other parties to the agreement when applying its own competition law. By positive comity, a country may ask the other parties to the agreement to take appropriate measures, under their competition law, against anti-competitive behaviour taking place on their territory that affects important interests of the requesting country.

Commission notice

Interpretative text adopted by the Commission in order to facilitate the application of competition rules and to provide for transparency and legal certainty with regard to the Commission's administrative practice. These texts are sometimes also referred to as guidelines and are published in the *Official Journal of the European Communities*. They can also be found on the web site of Competition DG.

(See: http://europa.eu.int/comm/competition/index_en.html)

Commitments (or remedies)

Proposal by the parties to a (→) concentration to modify their originally notified project within a specified period (for example, by divesting a business or assets). Such commitments must address the competition concerns raised by the Commission and restore competition in the relevant product and geographic markets. They can form the basis for the Commission's clearance of the notified concentration. The Commission may attach (→) conditions and/or (→) obligations to its clearance decision, so as to ensure compliance with the commitments offered.

A similar approach is applied by the Commission in procedures aimed at clearing (→ *Negative clearance*) or exempting notified agreements (→ *Individual exemption*), as well as in proceedings dealing with the (→) abuse of a dominant position.

(See: Articles 6(2) and 8(2) of the merger regulation; Commission notice on remedies (OJ C 68, 2.3.2001, p. 3).)

Competition

A situation in a market in which sellers of a product or service independently strive for the patronage of buyers in order to achieve a particular business objective, for example, profits, sales and/or market share. Competitive rivalry between firms may take place in terms of price, quality, service or combinations of these and other factors which customers may value. Fair and undistorted competition is a cornerstone of a market economy and the European Commission has been vested with the powers necessary to oversee and enforce EU competition law to ensure effective competition in the internal market.

Complaint

Request by a natural or legal person who claims a legitimate interest, asking the Commission to investigate an alleged infringe-

ment of EU competition law and to bring it to an end. Formal complaints oblige the Commission to act (either to find that there is an infringement or to reject the complaint) and give the complainant certain procedural rights. These include the right to be heard and — in proceedings under (→) Regulation No 17 — access to the Commission's file (albeit limited compared with parties subject to an investigation). Informal complaints (where a complainant refuses disclosure of the information he provides) or anonymous complaints may lead the Commission to open a case, but confer no rights on the complainant.

Compliance programme

A company's internal policy, established to ensure its complete compliance with competition rules in all its business actions. In a compliance programme the company trains its personnel on competition rules and provides them with guidance on how to avoid agreements or practices that restrict competition when they engage in commercial actions and contacts with competitors. Some compliance programmes also set out what action needs to be taken if staff members find out that an agreement or practice, to which the company is a party, infringes competition rules.

Concentration

A concentration arises either where two or more previously independent undertakings merge (merger), where an undertaking acquires control of another undertaking (acquisition of control), or where a joint venture is created, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture).

(See: Article 3(1) and (2) of the merger regulation; Commission notice on the concept of concentration (OJ C 66, 2.3.1998, p. 2).)

→ *Merger control procedure*

Concerted practice

Coordination between undertakings which, without having reached the stage of concluding a formal agreement, have knowingly substituted practical cooperation for the risks of competition. A concerted practice can be constituted by direct or indirect contact between firms whose intention or effect is either to influence the conduct of the market or to disclose intended future behaviour to competitors.

Conditions

Requirements imposed by the Commission which need to be fully complied with by the parties concerned, in order to allow the Commission to declare an otherwise incompatible concentration compatible with the common market, or to exempt an otherwise illegal agreement.

(See: Article 8 of Regulation No 17; Articles 6(2) and 8(2) of the merger regulation; Commission notice on remedies, paragraph 12 (OJ C 68, 2.3.2001, p. 3).)

→ *Obligations*

Consortium

A group of independent companies working together for the fulfilment of a specific project. Consortia are frequent, for example, in the construction industry where large projects (buildings, motorways) require close cooperation between engineering, planning and construction companies. The Commission has issued a specific block exemption regulation concerning consortia between shipping companies relating to the joint operation of liner transport services. These are liable to restrict competition within the common market and to affect trade between Member States and would otherwise be prohibited by Article 81(1) of the EC Treaty.

(See: Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24).)

‘De minimis’ notice

Communication from the Commission clarifying under what conditions the impact of an agreement or practice on competition within the common market can, in its view, be considered to be non-appreciable, namely where the aggregate market share of the undertakings involved remains below certain thresholds. In addition, agreements between small and medium-sized enterprises are said to be rarely capable of significantly affecting trade between Member States or competition within the common market; they will in any event not normally be of sufficient Community interest to justify intervention. In short, agreements or practices falling under the ‘de minimis’ notice are considered to be of minor Community importance and are not examined by the Commission under EC competition law. National competition authorities may however, examine certain cases.

(See: Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C 368, 22.12.2001).)

Delegation of powers

The Commission, as a collegiate body, delegates certain decision-making powers to its individual commissioners (empowerment procedure) or to directors-general (delegation procedure). A delegation of powers allows management, administrative, procedural and routine matters to be decided by the individual commissioner or director-general concerned. This mechanism ensures that Commission meetings are not overloaded and the decision-making process is not paralysed.

(See: Articles 13 and 14 of the rules of procedure of the Commission of 29 November 2000 (OJ L 308, 8.12.2000, p. 26).)

Divestiture

Decision by a firm to sell part of its current operations, divisions or subsidiaries as a result of business restructuring in order to concentrate on certain products or markets. Under EC competition law, divestiture may also be offered by firms as a commitment (→ *Commitments*) to the Commission in order to eliminate competition concerns related to a notified agreement or concentration.

(See: Article 6(2) and 8(2) of the merger regulation, as well as Section III(1) of the Commission's notice on remedies (OJ C 68, 2.3.2001, p. 3).)

Dominant position

A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level, to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market. Under EU competition law, it is not illegal to hold a dominant position, since a dominant position can be obtained by legitimate means of competition, for example, by inventing and selling a better product. Instead, competition rules do not allow companies to (→) abuse their dominant position. The European merger control system (→ *Merger control procedure*) differs from this principle, in so far as it prohibits merged entities from obtaining or strengthening a dominant position by way of the merger.

A dominant position may also be enjoyed jointly by two or more independent economic entities united by economic links in a specific market. This situation is called collective (or joint or oligopolistic) dominance. As the Court has ruled in the *Gencor* judgment, there is no reason, in legal or economic terms, to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which those parties are in a position to anticipate each one another's behaviour and are therefore strongly encouraged to align their conduct in the market.

(See: Article 82 of the EC Treaty and Article 2(3) of the merger regulation; on collective dominance see also: Commission Decision No 97/26/EC of 24.4.1996 in Case IV/M.619 *Gencor/Lonrho* (OJ L 11, 14.1.1997, p. 30) and judgment of the Court of First Instance of 25.3.1999 in Case T-102/96 *Gencor Ltd* v *Commission* [1999] ECR, p. II-0753.)

→ *Collusion, Oligopoly*

Downstream market

Market at the next stage of the production/distribution chain, for example, the distribution and sale of motor vehicles would be a downstream market in relation to the production of motor vehicles.

Duopoly

Special case of oligopoly: industry structure with two sellers. In competition cases the term is often also used for situations where two *main* sellers dominate the competitive structure and a fringe of smaller sellers adapts to their behaviour. The two main sellers are then referred to as the duopoly.

Economies of scale

Economies of scale occur when firms achieve per unit cost savings by producing more of a good or service (that is, when average costs decrease as output increases). Such effects arise when it is possible to spread fixed costs over a higher output. Examples of scale economies are the bigger lorry that transports more while still requiring only one driver or the larger plant that does not require more spare parts to be kept in stock than the smaller plant.

Economies of scope

Economies of scope occur when firms achieve cost savings by increasing the variety of goods and services that they produce (joint production). Such effects arise when it is possible to share components and to use the same facilities and personnel to produce several products. For example, a bank may sell retail insurance products in its local branches in order to spread the fixed costs (like the office rent) over a larger number of products.

EEA

EEA stands for European Economic Area. The EEA agreement, to which all EU Member States and the EFTA members Iceland, Liechtenstein and Norway are parties, entered into force on 1 January 1994. The objective of the agreement is to establish a dynamic and homogeneous European Economic Area, based in substance on common rules and equal conditions of competition. Formally, two separate legal systems coexist within the EEA: the EEA agreement is applied when trade between EFTA members and the Community or between EFTA States is affected; Community law when trade between EU Member States is affected. The EEA agreement is applied both by the European Commission and by the EFTA Surveillance Authority (→ *ESA*). The division of jurisdiction and a framework for cooperation between the Commission and ESA are laid down in the agreement.

(See: Decision of the Council and the Commission of 13 December 1993 on the conclusion of the agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (94/1/ECSC, EC) (OJ L 1, 3.1.1994), as amended following the non-ratification of the EEA agreement by Switzerland.)

Effect on trade between Member States

A necessary condition for the application of EU antitrust rules. Articles 81 and 82 of the EC Treaty are only applicable if there may be a direct or indirect, actual or potential influence on the flow or pattern of trade between at least two Member States of the EU. An effect on trade exists in particular where national markets are partitioned or the structure of competition within the common market is affected. Anti-competitive agreements or conduct that have no effect on trade, therefore, fall outside the scope of EU competition rules and may only be dealt with by national legislation.

The merger regulation, by contrast, applies where a concentration has a Community dimension defined in terms of (→) turnover thresholds.

Effects doctrine

According to this doctrine, domestic competition laws are applicable to foreign firms — *but also to domestic firms located outside the State's territory,* when their behaviour or transactions produce an 'effect' within the domestic territory. The 'nationality' of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. The 'effects doctrine' was embraced by the Court of First Instance in the *Gencor*

judgment when stating that the application of the merger regulation to a merger between companies located outside EU territory 'is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.'

(See: Judgment of the Court of First Instance of 25.3.1999 in Case T-102/96, *Gencor Ltd v Commission* [1999] ECR, p. II-0753, at paragraphs 89–92.)

Enabling regulation

Legislative act by which the Council empowers the Commission to adopt secondary Community legislation (in the form of regulations or directives) such as, for example, block exemption regulations or implementing regulations.

English clause

Contractual agreement in the context of (→) single branding arrangements between a supplier and its customer (for example, a retailer), allowing the latter to purchase a product from other suppliers on more favourable terms, unless the 'exclusive' supplier accepts to supply the product under the same advantageous conditions. Despite the greater freedom to contract enjoyed by the customer, 'English clauses' tend to increase transparency between competing suppliers and thus facilitate collusion, particularly where such clauses oblige the customer to reveal the name of the alternative source to his 'exclusive' supplier. For this reason, 'English clauses' have to be looked at in the light of the circumstances of the particular case to assess their conformity with competition law.

Entry barriers

Barriers to entry are factors that prevent or hinder companies from entering a specific market. Entry barriers may result, for instance, from a particular market structure (for example, sunk cost industry, brand loyalty of consumers to existing products) or the behaviour of incumbent firms. It is important to add that governments can also be a source of entry barriers (such as through licensing requirements and other regulations).

ESA

ESA stands for EFTA Surveillance Authority. The authority was established under an agreement between the EFTA States, which contains basic provisions on the authority's organisation and lays down its tasks and competencies. The task of the ESA is to ensure, together

with the European Commission, the fulfilment of the obligations set out in the (→) EEA agreement. The authority has far-reaching competencies in the fields of competition and State aid.

Essential facility

A facility or infrastructure which is necessary for reaching customers and/or enabling competitors to carry on their business. A facility is essential if its duplication is impossible or extremely difficult due to physical, geographical, legal or economic constraints. Take, for example, a national electricity power grid used by various electricity producers to reach the final consumers: since it would not be viable for these producers to build their own distribution network, they depend on access to the existing infrastructure. Denying access to an essential facility may be considered an (→) abuse of a dominant position by the entity controlling it, in particular where it prevents competition in a (→) downstream market.

Europe agreements

Europe agreements are bilateral association agreements that have been concluded between the European Communities and their Member States on the one hand and each of the following countries of central and eastern Europe: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. Europe agreements recognise the fact that the ultimate objective of the associated countries is to accede to the European Union. Their purpose is to help the associated countries achieve that objective. Europe agreements include the establishment of a political dialogue, the creation of a free trade area, a commitment by the associated countries to approximate their legislation with that of the Community, as well as economic, cultural and financial cooperation. In trade between the Community and the associated country, competition disciplines similar to those of the EC Treaty apply.

Exclusionary practice

Practice by a dominant company that tends to impair the opportunities of competitors based on considerations other than competition on the merits. An example would be the decision, by a company dominant on the market for production of a certain product, not to supply a client, because he is a competitor active in the market for distribution of this product.

Exclusive distribution

A distribution system, in which a company grants exclusive rights on its products or services to another company. The most common forms include (→) single branding and/or exclusive territory rights, whereby a single distributor obtains the right to market a supplier's product in a specific territory. The supplier's purpose in granting exclusivity is normally to provide the distributor with incentives to promote the product and provide better service to customers. In most cases, the distributor's market power is limited by (→) inter-brand competition.

Exhaustion

Intellectual property rights (IPRs) such as patents and trademarks give the developer certain exclusive rights over the exploitation of his work, such as in production and commerce. However, within the EU, the exclusive right cannot be used to artificially split up the common market along national borders. Therefore, the holder of an IPR in a Member State cannot oppose the import of a product protected by the IPR into that Member State, where that product was already put on the market in another Member State by the holder or with his consent. To this extent the holder's IPR is considered to be exhausted. The principle of exhaustion does not apply with regard to products put on the market in third countries.

→ *Intellectual property right*

Extra-territoriality

Term normally used to describe the exercise by a sovereign State of jurisdiction over foreigners in respect of acts done outside the borders of that State. One could say that – in a very broad sense – the EU applies its competition rules in an extra-territorial manner when it makes use of the (→) effects doctrine.

Failing firm defence

→ *Rescue merger*

Fine

A monetary penalty imposed by a Commission decision on an undertaking, for a violation of EC competition rules.

(See in particular: Article 15 of Regulation No 17 and Article 14 of the merger regulation.)

Fixed costs

Costs that do not vary with the amount of goods or services produced. Examples include interest payments on accumulated debt, property taxes and rent.

Foreclosure

Strategic behaviour by a firm or group of firms to restrict market access possibilities of potential competitors either (→) upstream or (→) downstream. Foreclosure can take different forms, from absolute refusal to deal to more subtle forms of discrimination such as the degradation of the quality of access. A firm may, for example, pre-empt important sources of raw material supply and/or distribution channels through exclusivity contracts, thereby causing a foreclosure of competitors.

→ *Entry barriers*

Form A/B

Form which companies are obliged to use if they apply to the Commission for (→) negative clearance or if they notify a restrictive agreement to the Commission in order to obtain an exemption (→ *Individual exemption*). Form A/B may also be used where compa-

nies wish to obtain a negative clearance with regard to the prohibition to abuse a dominant position under Article 82 of the EC Treaty. Form A/B is annexed to Commission Regulation No 3385/94/EC on formalities of applications and notifications provided for in Regulation No 17 (OJ L 377, 31.12.1994). It explains, in detail, how applications and notifications of agreements must be submitted, what information has to be given and what supporting documentation must be provided to the Commission.

Form CO

Form which companies must use where a planned concentration has a Community dimension within the meaning of the merger regulation and therefore has to be notified to the Commission. Form CO is an annex to Commission Regulation (EC) No 447/98 (OJ L 61, 2.3.1998) which implements the merger regulation. It explains in detail how notifications of concentrations must be submitted and what information and supporting documentation must be provided to the Commission.

Franchising

A special type of agreement whereby one undertaking (the franchiser) grants to the other (the franchisee), in exchange for direct or indirect financial consideration, the right to exploit a package of industrial or intellectual property rights (franchise) for the purposes of producing and/or marketing specified types of goods and/or services. This package typically relates to trademarks, trade names, shop signs, utility models, designs, copyrights, know-how or patents. A franchise agreement usually contains obligations relating to (1) the use of a common name/shop sign and a uniform presentation of contract premises and/or means of transport, (2) the communication by the franchiser to the franchisee of know-how, (3) the continuing provision by the franchiser to the franchisee of commercial and technical assistance during the life of the agreement.

Free riding

Free riding occurs when one firm (or individual) benefits from the actions and efforts of another without paying for or sharing the costs. For example, a retail store may initially choose to incur costs of training its staff to demonstrate to potential customers how a particular kitchen appliance works, in order to expand its sales. However, the customers may later choose to buy the product from another retailer who is able to sell it at a lower price because his business

strategy is to do without such training and demonstration, thus avoiding the costs involved. This second retailer is thus viewed as 'free-riding' on the efforts and costs incurred by the first retailer, who will lose the incentive to continue demonstrating the product.

Guidelines

→ *Commission notice*

Hard-core restrictions

Refers to restrictions of competition by agreements or business practices, which are seen by most jurisdictions as being particularly serious and normally do not produce any beneficial effects. They therefore almost always infringe competition law. Under EU law, the most prominent examples on the horizontal level include agreements between competitors that fix prices, allocate markets or restrict the quantities of goods or services to be produced, bought or supplied. Examples of hard-core restrictions in vertical relationships (that is, between undertakings operating at different levels of the production or distribution chain) are (→) resale price maintenance and certain territorial restrictions. Provisions of an agreement that contain such

restrictions are also referred to as black clauses and prevent the agreement from benefiting from a block exemption. Furthermore, agreements containing black clauses can only exceptionally be exempted on the basis of an individual assessment.

→ Block exemption, Individual exemption

Hearing

Opportunity for parties, to whom the Commission has addressed objections for violation of EU competition law, to make their views known. In order to respect the parties' right to be heard, the Commission must in its final decisions only deal with objections on which the parties were afforded the possibility to present their position. This is normally done in writing and — upon the parties' request — orally in a meeting with the Commission services where representatives of Member States are also present. The oral hearing is conducted by the (→) hearing officer. Likewise, where the Commission rejects a complaint, or, conversely, raises objections relating to an issue in respect of which it received a complaint, it must give the complainant the opportunity to make his views known. Moreover complainants, and third parties showing a sufficient interest, have a right to be heard in writing and may also be given the opportunity to develop their views at the oral hearing.

Hearing officer

An independent senior official who is charged with organising hearings and with ensuring that they are properly conducted. The hearing officer thus contributes to the objectivity of the hearing itself, the observance of due process, the respect of the parties' rights of defence and the objectivity of any decision taken subsequently. The tasks of the hearing officer also include resolving disputes between the Commission services and the parties concerned about the confidentiality of documents and access to the file which one or more of the parties claim in order to prepare their defence. The hearing officer reports to the Commissioner with special responsibility for competition; his final report on a competition case is attached to the decision and published in the Official Journal. The terms of reference of the hearing officer are laid down in a Commission decision.

(See: Commission decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21); as regards the respect of fundamental rights, especially the right to be heard and the right of access to the file, in the context of the Commission's enforcement action in competition matters, see also Articles 41 and 48 of the Charter of Fundamental Rights of the European Union (OJ C 80, 10.3.2001, p. 1).)

Herfindahl-Hirschmann Index (HHI)

Specific measurement of market concentration, that is, of the extent to which a small number of firms account for a large proportion of output. The HHI is used as one possible indicator of market power or competition among firms. It measures market concentration by adding the squares of the market shares of all firms in the industry. Where, for example, in a market five companies each have a market share of 20 %, the HHI is 400 + 400 + 400 + 400 + 400 = 2 000. The higher the HHI for a specific market, the more output is concentrated within a small number of firms. In general terms, with an HHI below 1 000, the market concentration can be characterised as low, between 1 000 and 1 800 as moderate and above 1 800 as high.

Horizontal agreement

Arrangement between actual or potential competitors, that is, undertakings operating at the same level of the production or distribution chain, covering, for example, research and development, production, purchasing or commercialisation. Horizontal agreements may restrict competition in particular where they involve price fixing or market sharing, or where the market power resulting from the horizontal cooperation causes negative market effects with respect to prices, output, innovation or the variety and quality of products. On the other hand, horizontal cooperation can be a means to share risk, save costs, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises, cooperation can be important means to adapt to the changing market place.

(See so-called 'horizontal guidelines': Commission notice — guidelines on the applicability of Article 81 to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2).)

Implementing regulation

Legislative act by the Commission, based on an enabling regulation by the Council, which specifies Community law provisions. Examples of such secondary legislation adopted by the Commission in the area of competition law are Commission Regulation No 2842/98 on the hearing of parties in antitrust proceedings (OJ L 354, 30.12.1998), Commission Regulation No 447/98 on certain aspects of the merger control procedure (OJ L 61, 2.3.1998) and the various block exemption regulations adopted by the Commission.

Individual exemption

Decision of the Commission pursuant to Article 81(3) of the EC Treaty to exempt notified agreements between companies from the prohibition of Article 81(1) of the EC Treaty, on the basis of an individual assessment (← → *Block exemption regulation*). In broad terms, restrictive agreements qualify for exemption if their benefits to general welfare (product improvement, technical or economic progress, benefits to consumer) outweigh their restrictive effects on competition.

Infringement proceeding

An infringement proceeding is an action against a Member State, which fails to fulfil an obligation under the EC Treaty or under secondary EU legislation. The Commission leads the proceeding on its own initiative or at the request of another Member State. Individuals do not have the possibility to force the Commission to start an infringement proceeding. If justified, the proceeding can result in a judgment of the European Court of Justice, stating that the Member State in question has indeed committed an infringement. In case of non-respect of such a judgment, the Court can impose a penalty payment on the failing Member State in a separate proceeding.

(See: Articles 226–228 of the EC Treaty.)

Intellectual property right (IPR)

General term for the assignment of property rights through, for example, patents, copyrights or trademarks. These property rights give the holder the exclusive right to exploit the innovation. The holder thus has monopoly power on the use of the item, normally for a specified period of time and within a specific geographic area. This power allows the holder of an intellectual property right to restrict imitation and duplication of the product concerned. IPRs prevent (→) free riding by other companies and constitute an incentive to undertake R & D efforts.

Inter-brand competition

Competition between firms that have developed brands or labels for their products in order to distinguish them from other brands sold in the same market segment. Although not perceived as being fully equivalent by consumers, branded products nevertheless compete with each other, but normally to a lesser degree. Coca-Cola versus Pepsi is an example of inter-brand competition.

← → *Intra-brand competition*

Interim measures

1. Conservatory measures imposed on firms by the Commission in relation to a competition case, in which a final decision on the substance has not been reached yet, in order to avoid anti-competitive behaviour leading to irreversible damage before being sanctioned. Interim measures may be taken on the Commission's own initiative, but are often requested together with a formal complaint. They can only be granted if the two following conditions are both met:

— a firm's behaviour *prima facie* constitutes an infringement of competition rules, and

— there is urgency, that is, a risk of serious and irreparable harm to the applicant.

For instance, a company whose existence is threatened by a potentially anti-competitive conduct of another company may request that the Commission investigate the matter under competition law, and in addition ask that the Commission prohibit the conduct in question until the investigation is terminated by a formal decision.

(See: Order of the European Court of Justice in Case 792/97 *R Camera Care* v *Commission* [1980] ECR, p. 119, at paragraph 12–21).

The Commission can also take interim measures in merger cases in order to prevent the implementation of concentrations before the Commission has cleared them. The merger regulation prohibits the implementation prior to the Commission's authorisation, to avoid irreversible changes to the market structure before it is certain that the conditions for clearing a concentration are actually assembled.

(See: Articles 7 and 8(4) of the merger regulation.)

2. Interim measures can also be granted by the president of the Court of First Instance, to prevent a company from suffering serious and irreparable harm through the enforcement of a Commission decision, the legality of which is challenged by that same company in a main action.

(See: Articles 104–110 of the rules of procedure of the Court of First Instance.)

International competition network (ICN)

A project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries. The ICN serves to share experiences and exchange views on competition issues deriving from an ever-increasing globalisation of the world economy, as well as to encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. The ICN was announced publicly on 25 October 2001 in New York and will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. Any national or regional competition agency responsible for the enforcement of antitrust laws may become a member of the ICN. The network will also actively seek advice and contributions from the private sector and various non-governmental organisations. The ICN is intended as a virtual structure without any permanent secretariat, flexibly organised around its projects, guided by a steering group which will identify projects and devise work plans for approval of the ICN as a whole. There will be one ICN conference per year, which will bring together heads of antitrust agencies.

(More information can be obtained at: www.internationalcompetitionnetwork.org)

International cooperation

Cooperation in the area of competition policy and enforcement, between competition agencies in two (bilateral) or more countries (trilateral, plurilateral), which mostly takes place in an informal way, but sometimes on the basis of formal cooperation agreements. It aims to exchange information in specific antitrust or merger cases of

mutual interest to the agencies, to coordinate the respective approaches in a number of key items — such as market definition, remedies, etc. — and to provide each other with assistance in enforcement activities.

Beyond this daily case-related cooperation, competition agencies cooperate within multilateral and international forums — such as the OECD Competition Committee, the Unctad Intergovernmental Group of Competition Experts and the WTO Working Group on Trade and Competition — to exchange views on various policy matters, promote consensus on best practices and agree upon policy recommendations addressed to their governments and to the private sector.

Intra-brand competition

Competition among distributors or retailers of the same branded product, be it on price or non-price terms. For example, a pair of Levi's jeans may be sold at a lower price in a discount store as compared to a department store, but often without the amenities in services that the latter provides.

← → *Inter-brand competition*

Joint control

Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions that determine the strategic commercial behaviour of an undertaking. Joint control can be acquired legally or de facto.

(See further: Commission notices on the concept of full-function joint ventures and on the concept of concentration (OJ C 66, 2.3.1998, pp. 1 and 5).)

Joint venture

Association of firms or individuals formed to undertake a specific business project. Under the Community competition rules, joint ventures are undertakings that are jointly controlled by two or more other undertakings. In practice joint ventures encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R & D, production or distribution. Full-function joint ventures, which act on the market independently from their mother companies, are treated as concentrations under the merger regulation.

(See: Article 3(2) of the merger regulation.)

→ *Joint control*

Know-how

Specific knowledge held by an individual or a company on a product or production process, often obtained through extensive and costly research and development (R & D). Under the Community competition rules know-how is normally deemed to be a body of technical information that is secret, substantial and identified. 'Secret' means that the know-how package as a body, or in the precise configuration and assembly of its components, is not generally known or easily accessible. 'Substantial' means that the know-how includes information that must be useful. 'Identified' means that the know-how is described or recorded in such a manner as to make it possible to verify that it satisfies the criteria of secrecy and substantiality.

Leniency (programme)

General term for the total or partial reduction of fines applied to firms that cooperate with antitrust authorities in cartel investigations.

The current leniency programme of the Commission is the 2002 notice on immunity from fines and reduction of fines in cartel cases, which replaces the 1996 notice on the non-imposition or reduction of fines in cartel cases.

(See: OJ C 45, 19.2.2002; the new notice is also available on the web site of Competition DG at http://europa.eu.int/comm/competition/antitrust/leniency.)

Letter of formal notice

Letter the Commission sends to a Member State, in particular in application of Article 86 of the EC Treaty, when it is alleged that the Member State enacts or maintains in force a measure which is contrary to EU competition rules. A letter of formal notice is the procedural equivalent to a (→) statement of objections sent to undertakings.

(See: Article 226 of the EC Treaty.)

Marginal costs

Costs born by a firm of producing an additional unit of output. Marginal costs are a function of variable costs only, since fixed costs do not vary with output.

Market power

Strength of a firm in a particular market. In basic economic terms, market power is the ability of firms to price above marginal cost and for this to be profitable. In competition analysis, market power is determined with the help of a structural analysis of the market, notably the calculation of (→) market shares, which necessitates an examination of the availability of other producers of the same or of substitutable products (→ *Substitutability*). An assessment of market power also needs to include an assessment of barriers to entry or growth (→ *Entry barriers*) and of the rate of innovation. Furthermore, it may involve qualitative criteria, such as the financial resources, the vertical integration or the product range of the undertaking concerned.

Market share

Measure for the relative size of a firm in an industry or market, in terms of the proportion of total output, sales or capacity it accounts for. In addition to profits, one of the frequently cited business objectives of firms is to increase market share. This is because market share, economies of scale and profits are often positively correlated in market economies. In competition policy analysis, market shares are an important indicator for the existence of market power. In this respect, one should not only look at the absolute market share level, but also at the market share level relative to competitors. However, even firms with large market shares do not necessarily possess market power, for example, in cases where barriers to enter the

market concerned (→ *Entry barriers*) are very low and the threat of entry prevents the exercise of market power.

Merger control procedure

The merger control procedure under EC law is laid down in the merger regulation (which was amended once), and in the implementing regulation. The merger regulation confers on the Commission the sole authority to assess concentrations with a Community dimension.

Concentrations, which meet the turnover thresholds of the merger regulation, must be notified to the Commission within a week of the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Such concentrations may not be implemented before the Commission takes a clearance decision. Violations of these obligations may lead to fines being imposed by the Commission.

From the date of the notification, the Commission has, in general, a period of one month to make an initial assessment of the notified transaction. If the Commission has serious doubts as to the compatibility of a concentration with the common market, it undertakes a more detailed, so-called second phase investigation for which a further four months are allowed. If the Commission does not take a decision within these deadlines, the operation is deemed to have been authorised.

(See: Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentration between undertakings (OJ L 395, 30.12.1989, p. 1, corrected version OJ L 257, 21.9.1990, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1, with a corrigendum in OJ L 40, 13.2.1998, p. 17), commonly referred to as 'the merger regulation'; Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1), commonly referred to as 'the implementing regulation'.)

Monopoly

Market situation with a single supplier (monopolist) who – due to the absence of competition – holds an extreme form of market power. It is tantamount to the existence of a dominant position. Under monopoly, output is normally lower and price higher than under competitive conditions. A monopolist may also be deemed to earn supra-normal profits (that is, profits that exceed the normal remuneration of the capital). A similar situation on the demand side of the market, which is with a single buyer only, is called monopsony.

Negative clearance

When the Commission, on the basis of the facts presented to it, comes to the conclusion that there are no grounds under Article 81(1) or 82 of the EC Treaty to take action in respect of an agreement or practice, the Commission issues a negative clearance either as a formal decision or informally by way of a (→) comfort letter. In Article 81 cases, companies usually combine their application for negative clearance with a notification for exemption.

Network effect

Network effects arise when a product is more valuable to a user, the more users adopt the same product or compatible ones. Economists refer to this phenomenon as a network externality, because when additional consumers join the network of current consumers they have a beneficial 'external' impact on the consumers who are already part of the network.

Non-compete obligation

→ *Single branding*

Non-competition clause

Contractual clause bringing about a direct or indirect obligation causing the parties to an acquisition agreement, or at least one of them, not to manufacture, purchase, sell or resell independently goods or services which compete with the contract goods or services. Such an obligation on the seller of the assets guarantees that the acquirer receives the full value of the assets transferred and hence is normally considered as ancillary to the main agreement.

→ *Non-compete obligation*

Non-opposition procedure

Special procedure laid down in certain (→) block exemption and other (→) implementing regulations to simplify exemption procedures, by not raising objections to a notified agreement within a period defined in these regulations. In this way the Commission either grants individual exemptions (in the transport regulations) or considers agreements block exempted (in the technology transfer regulation).

(See: Council Regulation No 1017/68 of 19.7.1968 on rail, road and inland waterway transport (OJ L 175, 23.7.1968, p. 1); Council Regulation No 4056/86 of 22.12.1986 on maritime transport (OJ L 378, 31.12.1986, p. 4); Council Regulation No 3975/87 of 14.12.1987 on air transport (OJ L 374, 31.12.1987, p. 1); Commission Regulation No 240/96 of 31.12.1996 on certain categories of technology transfer agreements (OJ L 31, 9.2.1996, p. 2).)

Notification

Formal information that firms provide to the Commission under EU antitrust and merger law in certain situations and that concern agreements they plan or have concluded.

Notification of restrictive agreements is not compulsory, but undertakings which put them into effect risk that civil law courts will find them contrary to Article 81(1) of the EC Treaty and will not enforce them (→ *Nullity*) in application of Article 81(2). There is also the risk that the Commission or national cartel authorities adopt prohibition decisions (possibly with fines) on the basis of Article 81 of the EC Treaty. If undertakings wish to benefit from an exemption (→ *Individual exemption*) or to obtain a (→) negative clearance, they have to notify the agreement to the Commission under (→) Regulation No 17 on the basis of (→) form A/B. However, notification for exemption is not necessary if the agreement in question is covered by a (→) block exemption regulation. Notification of an agreement affords the companies concerned immunity from fines under Article 15 of Regulation No 17.

The merger regulation obliges undertakings to notify any concentration with a Community dimension to the Commission on the basis of (→) form CO, normally within one week of the conclusion of the concentration agreement. The participating undertakings are not allowed to put the concentration into effect before its notification and before the Commission has declared it compatible with the common market.

Nullity

Under Article 81(1) of the EC Treaty, agreements between undertakings that restrict competition and may affect trade between Member States are prohibited. According to Article 81(2) of the EC Treaty they are void unless they are exempted from the prohibition under certain conditions laid down in Article 81(3) of the EC Treaty.

Obligations

Requirements the Commission imposes on undertakings in order to be able to exempt a notified agreement or to declare a notified concentration compatible with the common market (→ *Conditions*). The breach of such obligations may result in the revocation of the Commission's decision.

(See: Article 8 of Regulation No 17; Articles 6(2) and 8(2) of the merger regulation; Commission notice on remedies (OJ C 68, 2.3.2001, p. 3).)

Oligopoly

A market structure with few sellers, who realise their interdependence in taking strategic decisions, for instance on price, output and quality. In an oligopoly, each firm is aware that its market behaviour will distinctly affect the other sellers and their market behaviour. As a result, each firm will take the possible reactions from the other players expressly into account. In competition cases, the term is often also used for situations where a few big sellers jointly dominate the competitive structure and a fringe of smaller sellers adapt to their behaviour. The big sellers are then referred to as the oligopolists. In certain circumstances this situation may be considered as one of collective (also joint or oligopolistic) dominance.

→ *Collusion*

Parallel trade (parallel imports)

Trade in products, which takes place outside the official distribution system set up by a particular firm. Through their own distribution system, firms may cause differences in prices for different countries, exploiting national differences in the behaviour of consumers. Parallel traders buy products in countries where they are sold at lower prices and sell them in high-price countries. The flow of products thereby created is called parallel trade.

Passive sales

Sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers. Sales generated by general advertising or promotion in the media or on the Internet that reaches customers in other distributors' exclusive territories or customer groups, but is at the same time a reasonable way to reach customers outside those territories or customer groups (for instance, in non-exclusive territories or in one's own territory), are normally considered passive. Restrictions on passive sales in vertical agreements are hard-core restrictions and fall outside the Commission's block exemption regulation on vertical restraints.

(See: Commission Regulation 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 22.12.1999); Commission notice – guidelines on vertical restraints (OJ C 291, 13.10.2000).)

← → *Active sales*

Periodic penalty payment

The Commission may, by decision, impose periodic penalty payments in order to compel an undertaking to stop an infringement of competition rules in accordance with an earlier decision. In such a case, a daily amount is fixed which has to be paid for every day the infringement continues after the date stipulated in that decision.

The Commission enjoys the same power where an undertaking refuses to supply complete and correct information that has been requested by decision or to submit to an investigation which has been ordered by decision.

(See: Article 16 of Regulation No 17; Article 15 of the merger regulation.)

Potential competition

Pressure exercised upon incumbent firms by the possibility that new or existing firms will enter a specific market (→ *Potential competitor*). New entrants may be attracted by above-normal profits made in this market by incumbent firms, possibly as a result of weak competition. Additional firms entering the market will increase the overall quantity supplied with the effect that prices fall and above-normal profits disappear. Thus, the possibility of market entry has a certain 'disciplinary effect' on the behaviour of incumbents. However, the threat of potential competition is relatively small when (→) entry barriers are high.

Potential competitor

A firm is treated as a potential competitor if there is evidence that this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs to enter the relevant market in response to a small and permanent increase in prices. This assessment has to be based on realistic grounds: the mere theoretical possibility to enter a market is not sufficient. Market entry needs to take place sufficiently fast so that the threat of potential entry is a constraint on the market participants' behaviour. Normally, this means that entry has to occur within a short period, for example, a period of maximum one year for the purposes of the block exemption regulation on vertical restraints. However, in individual cases longer time periods can be taken into account. The time period needed by companies already active on the market to adjust their capacities can be used as a yardstick to determine this period.

(See: Commission notice on the definition of the relevant market for the purposes of Community competition law, paragraph 24 (OJ C 372, 9.12.1997, p. 5); Commission Decision 90/410/EEC in Case *Elopak/Metal Box–Odin* (OJ L 209, 8.8.1990, p. 15); guidelines on vertical restraints, paragraph 26 (OJ C 291, 13.10.2000, p. 1).)

Predatory pricing

A (deliberate) strategy, usually by a dominant firm, of driving competitors out of the market by setting prices below production costs. If the predator succeeds in driving existing competitors out of the market

and in deterring the future entry of new firms, he can subsequently raise prices and earn higher profits. Predatory pricing by dominant firms is prohibited by EU competition law as (→) abuse of a (→) dominant position. Prices set below average variable costs can be presumed to be predatory, because they have no other economic rationale than to eliminate competitors, since it would otherwise be more rational not to produce and sell a product that cannot be priced above average variable cost. Where prices are set below average total (but above variable) costs, some additional elements proving the predator's intention need to be established in order to qualify them as predatory, given that other commercial considerations, like a need to clear stocks, may lie at the heart of the pricing policy.

Public undertaking

An undertaking over which the public authorities directly or indirectly exercise dominant influence by virtue of their ownership, financial participation, or the rules which govern it. A dominant influence of public authorities is presumed in particular when they: a) hold the major part of the undertaking's subscribed capital, b) control the majority of the votes attached to shares issued by the undertaking or c) are in a position to appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

R & D agreement

Agreement between firms to jointly undertake research and development (R & D) activities, in order to pool know-how and to share the costs and risks of inventing new products. An R & D agreement normally covers the acquisition of know-how relating to products or processes; the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes; and the establishment of the necessary

facilities and obtaining intellectual property rights for the results. Such agreements may allow products or services to be introduced on the market more quickly, at better quality and/or at lower cost, thus promoting technical progress for the benefit of consumers. The Commission needs to take these positive effects into account when analysing possible restrictions on competition arising from such agreements, especially when concluded between competitors.

Regulation No 17

First implementing regulation in the field of EU competition law, setting out the system of (→) notifications, procedural instruments for the enforcement of antitrust law and vesting the European Commission with far-reaching powers, in particular as regards investigation, penalising of infringements by undertakings and exemption of agreements under Article 81(3) of the EC Treaty.

The ongoing revision of Regulation No 17 aims at increasing involvement of national courts and competition authorities in the enforcement of EU antitrust law (decentralisation) and would allow the Commission to focus its limited resources on the most serious infringements and on policy development. Adoption of a new basic regulation by the Council is envisaged in the course of year 2002.

(See: Council Regulation (EEC) No 17: First regulation implementing Articles 85 and 86 (*now 81 and 82*) of the Treaty (OJ 13, 21.2.1962, p. 204).)

Relevant market

The definition of a relevant market is a tool to identify and define the boundaries of competition between firms. It establishes the framework within which the Commission applies competition policy principles. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. Market definition makes it possible, inter alia, to calculate the respective (→) market shares of the undertakings active on the relevant market, which convey meaningful information regarding (→) market power for the purposes of assessing dominance (→ *Dominant position*). A relevant market is defined according to both product and geographic factors. In general terms, a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable (→ *Substitutability*) by reason of product characteristics, prices and intended use. Products and/or services that could readily be put on the market by other producers without significant switching cost or by potential competitors at reasonable cost and within a limited time span also need to be taken

into account. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas, because the conditions of competition are appreciably different in those areas.

(See: Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).)

Remedies

→ *Commitments*

Resale price maintenance

Agreements or concerted practices between a supplier and a dealer with the object of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product/service to his customers. A provision which foresees resale price maintenance will generally be considered to constitute a (→) hard-core restriction. In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear-cut. However, resale price maintenance can also be achieved through indirect means: for example, by fixing the distribution margin or the maximum level of discount the distributor may grant from a prescribed price level; by making the supplier's rebates or his reimbursement of promotional costs subject to the observance of a given price level; by linking the prescribed resale price to the resale prices of competitors; or by threats, warnings, or even sanctions against a dealer who does not respect a certain price level (such as penalties, delay or suspension of deliveries or termination of contracts).

Rescue merger

The concept of the rescue merger, also referred to as 'failing firm defence', enables the Commission to clear a concentration even though a dominant position is created or strengthened in its aftermath, provided that there is no causal link between the concentration and the dominant position, that is to say, the merger does not lead to a deterioration of the competitive structure of the market. The Commission has developed the following criteria for the application of the rescue merger concept: (1) the undertaking to be acquired must be ' failing' (that is, it would, in any event, be forced out of the market); (2) there is no alternative buyer who could provide for a less

anti-competitive solution; (3) the market share of the acquired undertaking would, in any event, be taken over by the acquiring undertaking, or its assets would inevitably exit the market if not taken over by another undertaking. So far, the concept of the rescue merger has been applied rarely.

(See: Commission decision of 14 December 1993 in Case IV/M.308 — *Kali+Salz* (OJ L 186, 21.7.1994, p. 38); Commission decision of 11 July 2001 in Case COMP/M.2314 — *BASF/Eurodiol/Pantochim.*)

Retailer

Firm at the end of the distribution chain, which normally buys a product from a wholesaler in order to sell it to the final consumer.

Selective distribution

Distribution system whereby a supplier enters into (vertical) agreements with a limited number of selected dealers in the same geographic area. Selective distribution agreements, on the one hand, restrict the number of authorised distributors. On the other hand, they prohibit sales to non-authorised distributors: this leaves authorised dealers only other appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products.

The possible competition risks are a reduction in intra-brand competition, the facilitation of (→) collusion between suppliers or buyers and the foreclosure of certain type(s) of distributors, especially in the case of cumulative effects of parallel networks of selective distribution in a market. Purely qualitative selective distribution is, in general, considered to fall outside the prohibition of Article 81(1) of the EC Treaty, provided three conditions are satisfied. Firstly, the nature of the product in question must necessitate a selective distribution system. Secondly, resellers must be chosen on the basis of objective criteria

of a qualitative nature. Thirdly, the criteria laid down must not go beyond what is necessary.

→ *Vertical agreement*

Services of general economic interest

Services of an economic nature, the provision of which can be considered to be in the general interest. For example, basic, publicly accessible supply of energy, telecommunication, postal services, transport, water and waste-disposal services. The Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of the activities concerned. However, their definitions are subject to the Commission's control for manifest errors where Member States specifically entrust undertakings within the meaning of Article 86(2) of the EC Treaty with services of general economic interest. The precise definition of the particular task assigned to the entrusted undertaking is an important element for assessing whether, and to what extent, it is justified for the State to grant exclusive rights or funds to that undertaking in order to ensure the fulfilment of the task.

(See also: Article 16 of the EC Treaty; communication from the Commission of 20.9.2000, services of general interest in Europe (OJ C 17, 19.1.2001); Commission report to the Laeken European Council of 17.10.2001, services of general interest (COM(2001)598 final).)

Single branding

This term covers both non-compete obligations and quantity forcing. A non-compete obligation is an obligation or incentive scheme in a supply or distribution agreement which causes the buyer not to manufacture, purchase, sell or resell products which compete with the contract products or to purchase at least 80 % of his requirements of that type of product from the supplier. Quantity forcing on the buyer is a weaker form of a non-compete obligation, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate his purchases to a large extent, but less than 80 %, on the brand(s) of one supplier. Single branding may take the form of a direct obligation not to purchase competing brands (often called 'ties'), but may, for example, also take the form of minimum purchase requirements, quantity rebate schemes or loyalty rebate schemes. The possible competition risks are (→) foreclosure of the market to competing suppliers, facilitation of (→) collusion between suppliers in the case of cumulative use and, where the buyer is a retailer, a loss of in-store (→) inter-brand competition.

Specialisation agreement

An agreement between undertakings relating to the conditions under which they specialise in the production of a narrow or specific range of goods and/or services. Agreements on specialisation can contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Specialisation agreements are divided into agreements whereby one participant gives up the manufacture of certain products, or provision of certain services in favour of another participant (unilateral specialisation); agreements whereby each participant gives up the manufacture of certain products, or provision of certain services in favour of another participant (reciprocal specialisation); and agreements whereby the participants undertake jointly to manufacture certain products, or provide certain services (joint production). The issue is covered by a specific block exemption regulation.

(See: Council Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000).)

Spillover effects

Side effects of an agreement or a merger between two or several firms, which affect competition between them in another relevant market than the one covered by the agreement or the merger in question. Spillover effects are referred to in Article 2(4) of the merger regulation, which concerns the creation of a joint venture that has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent. In that case, the Commission shall appraise this coordination also taking into account whether two or more parent companies retain, to a significant extent, activities in a market which is (→) downstream or (→) upstream from that of the joint venture or in a neighbouring market closely related to this market.

Start-up costs

Costs faced by a firm that intends to start economic activity in a specific market segment. These costs include, for example, the expenditure to undertake research and development (R & D) activities, the costs of acquiring production and/or distribution facilities, as well as the costs of marketing the product (i.e. advertising).

State measure

Law, ministerial decree, decision or other administrative act adopted by a Member State. A Member State's omission to act may also constitute a measure. The Commission may start (→) infringement proceedings if State measures, taken in relation to (→) public undertakings and undertakings to which Member States grant special or exclusive rights, contravene EU competition law.

Statement of objections (SO)

Written communication, which the Commission has to address to persons or undertakings before adopting a decision that negatively affects their rights. This obligation of the Commission flows from the addressee's rights of defence, which require that they be given the opportunity to make their point of view known on any objection the Commission may wish to make in a decision. The SO must contain all objections on which the Commission intends to rely upon in its final decision. The SO is an important procedural step foreseen in all competition procedures in which the Commission has the right to adopt negative decisions.

(See: Article 19(1) of Regulation No 17; Article 18(3) of the merger regulation.)

Substitutability

Measure of the extent to which products may be seen as interchangeable from the viewpoint of producers or consumers. A firm's pricing policy for a specific product is disciplined if consumers have the possibility to buy another product, which they judge as being equivalent by its nature, use and/or price (demand-side substitution). Additional competitive constraint on the firm may stem from producers of other products capable of switching their production without delay towards the product in question at negligible cost and willing to enter into competition on the market segment concerned (supply-side substitution). Product substitutability is an important element in defining the relevant product market (→ *Relevant market*).

Sunk costs

Sunk costs are (→) fixed costs that have already been incurred and cannot be recovered. They arise because some activities require specialised assets that cannot readily be diverted to other uses. Second-hand markets for such assets are therefore limited. Examples of sunk costs are investments in equipment that can only produce a specific product, the development of products for specific customers, advertising expenditures and R & D expenditures.

Take or pay contracts

Contract between a buyer and a seller, whereby the former agrees to purchase from the latter a fixed quantity of a product for a given price over a certain period of time. Irrespective of the quantity which is finally needed and transferred, the buyer is bound by its commitments and is required to pay for the whole volume of sales at the contractual terms agreed upon.

Trustee

A legal or natural person appointed in merger cases to oversee the implementation of (→) commitments, and to contribute to their implementation where required. The trustee is appointed by the parties who have offered commitments to the Commission with the Commission's approval. His powers and duties are set out in the trustee mandate, an agreement between the trustee and the parties – again subject to the Commission's approval. The trustee normally has the power to propose, and if necessary impose, measures on the parties to ensure compliance with the commitments, as well as an irrevocable mandate to effect the divestiture of the business or businesses to be sold, at no minimum price, if the parties fail to do so within a given period.

(See: Commission notice on remedies (OJ C 68, 2.3.2001, p. 3).)

Turnover threshold

The combined annual turnover of the parties is used in the field of merger control as a criterion to divide competence between Member States and the Commission. Concentrations where the parties' combined turnover exceeds the thresholds set in Article 1 of the merger regulation are considered to be of 'Community dimension' and will be assessed by the Commission.

→ *Merger control procedure*

Tying or tied selling

Commercial practice of conditioning the sale of one product on the purchase of another product. If tying is not objectively justified by the nature of the products or their commercial usage, such practice may restrict competition. Economic theory suggests that a firm which enjoys (→) market power in one market (tying market) may, under certain conditions, be able to lever this market position or dominance into another market (tied market), squeeze competitors out of this second market and then raise prices above the competitive level. In a competition analysis perspective, the main negative effect of tying on competition is, therefore, possible (→) foreclosure on the market of the tied product. In addition tying may lead to higher prices for both the tying and the tied product.

Unbundling

Separation of the various components of production, distribution and service in order to introduce greater elements of competition to these segments of an industry. 'Functional unbundling' requires monopolistic utilities to provide access to (part of) their distribution or service network, in exchange for an access fee. 'Structural unbundling' makes complete vertical separation necessary and obliges monopolistic utilities to divest their production, their distribution or their service assets.

Undertaking

For the purpose of EU antitrust law, any entity engaged in an economic activity, that is, an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded.

The rules governing concentrations speak of 'undertakings concerned', that is, the direct participants in a merger or in the acquisition of control.

(See for details: Commission notice on the concept of undertakings concerned (OJ C 66, 2.3.1998).)

Upstream market

Market at the previous stage of the production/distribution chain, for example, the production, distribution and marketing of motor vehicles would be an upstream market in relation to the sale of motor vehicles to final consumers.

Variable costs

Costs that vary with the amount of production. Examples are the costs of material and energy used in the production process.

Vertical agreement

Agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

(See so-called 'vertical guidelines': Commission notice — guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1).)

White clause

Provision contained in certain block exemption regulations, listing agreements or practices that are presumed not to prevent, restrict or distort competition within the common market and that are therefore generally considered compatible with EC competition law. The more recent block exemption regulations do not contain white clauses any more.

← → *Black clause*

Wholesaler

Intermediate in the distribution chain that buys the product in mass quantity from the manufacturer, and sells it in smaller quantities to distributors or retailers.

Withdrawal (of the benefit of a block exemption)

Possibility for the Commission (or in certain cases for the national competition authorities) to withdraw the benefit of exemption from the prohibition of Article 81(1) of the EC Treaty, granted to an agreement by a (→) block exemption regulation. The Commission may withdraw the benefit of a block exemption if it considers that specific circumstances, which are mentioned by the relevant block exemption regulation, bring about the need for a closer examination of possible anti-competitive effects of the agreement.

(See: Article 7 of Council Regulation No 19/65/EEC as amended by Article 1(4) of Council Regulation (EC) No 1215/1999 of 10 June 1999.)

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