EUROPEAN ECONOMIC LAW (A SEMINAR)

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Abstract: This paper has been prepared for the Seminar on European Economic Law lectured on April 2004 to the Masters and Post-graduate Program on European, International and Comparative Law of the Faculty of Law, University of Macau. It addresses the legal framework of the internal market of the European Community, in special *economic freedoms* (free movement of goods, persons, services and capital) and their exceptions, as well as *competition law* concerns such as *antitrust and cartels* (agreements which restrict competition - e.g. price-fixing agreements, or cartels, between competitors -, and of abuses by firms who hold a dominant position on the market), *merger control* (the control of mergers between firms - e.g. a merger between two large groups which would result in their dominating the market), *liberalization* (introducing competition in monopolistic economic sectors - e.g. telecommunications), and *state aid control* (the control of state aid measures by Member State governments to ensure that such measures do not distort competition in the Common Market - e.g. the prohibition of a state grant designed to keep a loss-making firm in business even though it has no prospect of recovery). Moreover, this paper provides an overview of the general framework of *European electronic commerce law*, addressing issues such as, namely, the single market of information society services, contract and liability law, consumer protection, and intellectual property.

Keywords: EU Economic Law; Internal Market; competition; state aid; e-commerce.

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I. Introduction

1. Dimensions of EC economic law (common market and economic & monetary union)

EC economic law is an important tool of the European way to peace and development.[1] It is a wide and complex branch of European law comprehending not only the common market, but also the economic and monetary union as well as several common economic policies of the European Community[2], established by the Treaty of Rome (1957).[3] Some basic notions of economics, such as market economy, perfect competition and instruments of political economy, are also addressed as they provide the context of understanding of EC economic law.

2. Basic notions of economics

In fact, the background of European economic law is economics, namely the features of the market economy, the model of perfect competition, and the instruments of political economy.

2.1. To begin with, the concept of *market economy* is a notion of economics. A market economy is an economy that produces the so-called private goods, i.e. goods that are subject to the basic rules of the market: consuming rivalry and price exclusion. Consuming rivalry is a consequence of the scarcity of goods and it means that one's consummation rivals with another's. Price exclusion decides this rivalry because price will exclude from effective use of the good all those who can't or aren't willing to pay such price for that good according to their personal evaluation.

These two principles of the market economy (consuming rivalry and price exclusion) determine not only how production costs are covered but also the

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1 See e.g. T.C. Hartley, *The Foundations of European Community Law*, Oxford University Press, 2003; Nicholas Green/Trevor C. Hartley/John A. Usher, *The Legal Foundations of the Single European Market*, Oxford University Press, 1991; Dennis Swann, *The Economics of Europe: From Common Market to European Union*, Penguin Books, 2000.

2 The special policies are, namely, a common commercial policy as well as common policies on agriculture, fisheries, and transport (title II), and special policies on visas, asylum, immigration and other policies related to free movement of persons (title IV), and transport (title V). On EU Policies and Integration, see Manuel Porto, *Theory of Integration and EU Policies,* Institute of European Studies, Macau, 2004.

3 On EC Law see e.g. *European Community Law*, ed. F. Snyder, Dartmouth, 2 volumes, 1993; Hans W. Micklitz/Stephen Weatherill, *European Economic Law*, Dartmouth, 1997; Christian Gavalda/Gilbert Parleani, *Droit des affaires de l'Union europeenne*, 4e ed., Paris, Litec, 2002.

utility and composition of the products, as well as how the productive resources are allocated and the product is distributed. In comparison, they do not apply to public goods such as national defense and security. Moreover, there are goods that can be subject to consuming rivalry and price exclusion such as justice, education and health, because they are object of individual request. However, for political reasons it is understood that these goods should not be left only to the rules of the economy market, in special price exclusion, in order to provide universal access to them. Taxes are the main source to cover the production costs of these public goods.

Moreover, there are other goods such as communications, energies, banking and insurance, which by nature are not excluded of the market logic, but nonetheless the State may decide not to leave them or not to leave them only subject to the market, opting to produce them for political strategic reasons. However, the liberal model of market economy opposes the State production of such goods, due to several reasons, namely: public management is considered to be not efficient in comparison with private management in applying market management rules (1), the market is deemed to be a better optimizer of resources (2), and taxes charged to cover the public production are considered to reduce private investment in capital goods (3).

2.2 As for the economic model of *perfect competition*, European competition rules are based upon the assumption that competition in the marketplace is deemed a simple and efficient means of guaranteeing consumers products and services of excellent quality at competitive prices. On one hand, suppliers (producers and traders) offer goods or services on the market to meet their customers' demands. On the other hand, customers seek the best deal available in terms of quality and price for the products they require. Accordingly, the best deal for customers emerges as a result of a contest between suppliers. Moreover, competition policy aims to ensure wider consumer choice, technological innovation and effective price competition, thus contributing to both consumer welfare and to the competitiveness of industries. This is achieved by ensuring that companies compete rather than collude, that dominant companies do not abuse their market power and that efficiencies are passed on to final consumers.

In economics theory, the economic model of perfect competition is featured by certain characteristics. First, the principle of *non interference*, meaning that there is a sufficient high number of producers and consumers and consequently no individual producer or consumer can affect the offer, the demand and the prices. Secondly, the principle of *maximization or optimization*, meaning that while consumers aim to maximize their well-fare by purchasing goods that satisfy their needs providing the highest utility of their income, producers aim to maximize their profits producing goods demanded by consumers and allocating to their production the available resources according to the prices they have to pay for it. Thirdly, the principle of *absolute mobility* of factors, meaning that factors can move exclusively according to their price and utility. Fourthly, the principle of *transparency*, meaning that in all markets there is adequate, general and updated information about their evolution. Fifthly, the principle of *inexistence of external effects* (externalities), meaning the utilities of producers or consumers are achieved by themselves and there is no positive or negative influence of third agents. Sixthly, the principle that the market of perfect competition produces only *private goods*, i.e. goods subject to consuming rivalry and price exclusion. Seventhly, the principle according to which the functioning of the market is *automatic and spontaneous* and that the State can only interfere where there are imperfections in the market and in so far as it is strictly necessary to correct them.

European competition rules have a view to this model of perfect competition. However, they are not aimed to achieve it, since they are based upon the functional concept of "workable competition", i.e. rules that recognize "market failures" and are aimed to prevent their negative effects in so far as possible.

2.3. As for basic instruments of political economy, they include the following: 1° financial instruments, e.g. using expenses and income as a way to achieve economic effects; 2° monetary instruments, by influencing the general offer of currency or changing interest rates, credit conditions (e.g., technical provisions); 3° exchange rates, for example devaluating and revaluating the currency, in general or in specific transactions or in relation to specific currencies, or by changing globally the exchange system (e.g. adhering to the Euro); 4° control and direct interventions, by establishing the values of certain economic values that are excluded from the normal functioning of the market (e.g. the prices of certain goods, the tradable amounts, the credit values, or the prohibition of capital exporting or importing certain type of goods); 5° institutional reforms (e.g. adhesion to the EU).

EC economic law limits the political economy sovereignty of Member States (MS). In fact, many of these instruments can only be exercised by European authorities, and therefore Member States cannot individually take such measures.

3. Notion and features of the common market (Treaty of Rome, Arts. 1, 2 and 3)

This study will focus on common market law. In fact, the establishment of a common market is a main tool of the task of the European Community (Treaty of Rome, arts. 1 and 2). The question is then how is the EC common market legally configured by the EC Treaty.

According to article 3, the EC common market is featured by several normative patterns, such as, namely:

1.º The prohibition between Member States of custom duties on imports and exports and of all charges having equivalent effect, including customs duties of a fiscal nature;

2.º An internal market characterized by the abolition between MS of obstacles to the free movement of goods, persons, services and capital, within a system ensuring that competition therein is not distorted[4];

3.º The establishment of the common market must provide protection of certain interests, namely the promotion of research and technological development and the strengthening of consumer protection;

4.º The prohibition of discrimination and the elimination of inequalities as well as the promotion of equality between men and women.

4. EC powers and tools to establish the common market and the relation between EC law and MS national legal orders (EC Treaty and ECJ case-law)

Community action is based upon a system of *attributed powers* (Art. 5). As the EC Court of Justice constantly held, the Community is a new legal order of international law in favor of which Member States have limited their sovereign powers, despite in limited areas.[5] Moreover, in its relation with MS national orders, the Court has established the powers of *supremacy* of community law towards national and its precedence towards national courts.[6] Moreover, when implementing community legislation MS are bound by a principle of *loyalty* to

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4 A guiding principle of Community action is the principle of an *open market economy with free competition* (Art. 4(1) in fine).

5 Case 26/62, 5.2.1963 (*van Gend en Loos v. Nederlandse*), ECR 1963, p. 8; see also e.g. case 143/83, 30.1.1985 (*Commission v. Denmark*), ECR 1985, p. 427.

6 Case 6/64, 15.7.1964 (*Costa v. Enel*), ECR 1964; case 14/48, 13.2.1969 (*Wilhelm v. Bundeskartellamt*), ECR 1969, p. 1; case 106/77, 9.3.1978 (*Simmenthal*), ECR 1978, p. 629; case C-213/89, 19.6.1990 (*Factorname*), Rec. 1990, p. 2434. The reactions of Member-States to the case-law of the European courts has made possible the principle of absolute supremacy of community law over national law (T.C. Hartley, *The Foundations of European Community Law*, Oxford: Clarendon, 1988, p. 219), meaning the precedence of the application of community provisions over conflicting national rules, although not over Constitutional norms (cf. Gomes Canotilho / Vital Moreira, *Constituição da República Portuguesa Anotada*, 3.ª ed., Coimbra: Coimbra Editora, 1993, p. 90).

the Community.[7]

Concerning instruments of Community legislation, *regulations* have direct applicability, but concerning *directives* a special form of reception by MS internal legislation is required (procedure of implementation of directives). Furthermore, directives bind concerning the purpose or result to be achieved, i.e. they impose to MS an obligation of result. Accordingly, freedom left to MS in implementing directives is not absolute, for it is bound to the result to be achieved by the directive.[8] *Recommendations* have a relevant interpretative value.[9] *Decisions* bind the concerned parties (for ex., decisions of the Commission concerning competition cases).

Another principle to take into consideration is the possibility for directives to have (vertical) direct effect after the implementation period has expired, and the national authority cannot argue its non implementation.[10] Moreover, MS may be held liable for damages caused to individuals due to the non implementation or defective implementation of directives.[11] Finally, it should be stressed the principle of interpretation of national provisions according to the wording and the *teleological* spirit of the directives[12], i.e. having in mind the aim or goal of the directive[13].

II. The Economic Freedoms of the Common Market

Community action is guided by the principle of an *open market economy with free competition* (Art. 4, 1 *in fine*). An open market economy means that there is freedom of movement of goods, persons, services and capital, within a system that preserves free competition.[14] Each economic freedom of the common market

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7 Kapteyn/Themaat, *Introduction to the Law of the European Communities*, Deventer: Kluwer, 1989, p. 86. See e.g. cases 199/82, 9.11.1983 (*San Giorgio*), ECR 1983, p. 3595, and C-217/88, 10.7.1990 (*Commission v. Germany*), Rec. 1990, p. 2879.

8 Case 38/77, 23.11.1977 (*Enka*), Rec. 1977, p. 2212. Considering that the term of implementation is an obligation of result, see case 102/79, 6.5.1980 (*Comission v. Belgium*), Rec. 1980, p. 1483.

9 See case C-322/88, 13.12.1989 (*Grimaldi*), Rec. 1989, p. 4421.

10 See cases 148/78, 5.4.1979 (*Tullio Ratti*), ECR 1979, p. 1629, 152/84, 26.2.1986 (*Marshall*), ECR 1986, p. 723, 22/84, 15.5.1986 (*Johnson*), ECR 1986, p. 1651, C-188/89, 12.7.1990 (*Foster*), Rec. 1990, p. 3344.

11 Case C-6,9/90 (*Francovich*), CMLR 1992, p. 557.

12 Case 14/83, 10.4.1984 (*Sabine*), ECR 1984, p. 1909.

13 Case C-106/89, 13.11.1990 (*Marleasing*), Rec. 1990, I, p. 4157.

14 The rules on abuse of dominant position and agreements between competitors which have a

requires the prohibition of restrictions, on one hand, and confers subjective rights to particulars, on the other hand. Prohibitions are generally based on the principle of non discrimination based particularly on nationality. Nevertheless, some room of general interest is left for MS to adopt restrictions to economic freedoms of the common market.

1. Free movement of goods

1.1. The free movement of goods requires the adoption of a common tariff (Common Customs Tariff) in the relations of Member States with third countries, and the prohibition between Member States of custom duties on imports and exports and of all charges having equivalent effect, including customs duties of a fiscal nature (Art. 23) [15].[16]

1.2. However, exceptions to the free movement of goods within the common market are allowed provided that they meet certain requirements (Art. 30). First, such prohibitions or restrictions on imports, exports or goods in transit cannot constitute a means of arbitrary discrimination or a disguised restriction on trade between Member Sates. Secondly, they must be justified on grounds of public morality, public policy or public security (1), the protection of health and life of human, animal or plants[17] (2), the protection of national treasuries possessing artistic, historic or archaeological value (3), or the protection of industrial and commercial property (4).

1.3. Concerning this last ground of justification of prohibitions or restrictions

restrictive effect on trade are contained in articles 81 (agreements or concerted practices of undertakings or decisions of associations of undertakings which have an anti-competitive object or effect) and 82 (abuses of dominant position by one or more undertakings which may affect trade between member states). European competition law also covers mergers, liberalization (Art. 86), and state aid control (Art. 87).

15 This applies to products originating in MS and to products coming from third countries which are in free circulation in MS, i.e. if the import formalities have been complied with and any customs or charges having equivalent effect which are payable have been levied in that MS, and if they have not benefited from a total or partial drawback of such duties or charges (Art. 23, 2, and 24).

16 The free movement of goods also requires MS to adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of MS (Art. 31, 1). We will come to this later concerning liberalization of markets (e.g. telecommunications, gas and electricity).

17 See, for example, the regulation of medicines, cosmetics, homeopathic products and medical devices.

on imports and exports between MS, it should be noted that the ECJ has figured out a balance between IP rights (namely patents, trademarks and copyright) and the freedom of circulation of goods.[18] In fact, the principle of territoriality of IP rights means that they exist in each MS. Accordingly, IP rights, in particular the distribution right, could enable their holders to divide national markets exercising the distribution right in each MS and therefore prohibiting or restricting parallel imports and fragmenting the market. However, the ECJ held that the Treaty of Rome applies to IP rights, including copyright law[19], and that the provisions of free movement of goods mean that the territorial protection granted by national legislation to the commercial and industrial property can not lead to the division of national markets and artificial fragmentation of markets and therefore IP right holders could not invoke their protection in one MS to prevent the importation of a legally traded product in another MS by the IP right holders or with their consent.[20]

It is considered that the distribution right is exhausted with the legitimate first sale of the product in the EC market and therefore the IP right cannot prevent parallel imports between MS of such product.[21] However, the principle of exhaustion applies only to the distribution by sale (or any act of transfer of property) of the product.[22] Concerning copyright law, other rights such as reproduction or adaptation remain unaffected. Moreover, the exhaustion principle does not apply to the exploitation of copyrighted works by acts of provision of services, such as broadcasting[23], and it does also not apply to any other form of

18 See e.g. David T. Keeling, *Intellectual Property Rights in EU Law: Free Movement and Competition Law*, Oxford University Press, 2004.

19 See the application of the principle of non discrimination in case Phill Collins (ECJ, 92/92, 20/10/93).

20 Case 270/80, 9.2.1982 (*Polydor v. Harlequin Record Shops*), ECR 1982, p. 349. See also, for example, cases 15/74, 31.10.1974 (*Centrafarm v. Sterling*), ECR 1974, p. 1147 (patents), 102/77, 23.5.1978 (*Hoffmann-la Roche*), ECR 1978, p. 1139, and C-10/89, 17.10.1990 (*Hag II*), ECR 1990, p. 3711 (trademark subject matter). On the notion of implied consent, see Cases C-414/99 a C-416/99, 20/11/2001 (*Zino Davidoff et al.*)

21 The principle of exhaustion has been elaborated in Germany by Kohler (*Erschöpfungslehre*). In the US, the principle of exhaustion corresponds to the doctrine of *first sale*.

22 For certain limitations to the exhaustion principle, see case C-337/95, 4/11/1997 (*Christian Dior*), interpreting Articles 5 e 7 of Directive 89/104, establishing limits to the exhaustion of the trademark distribution right in case the reputation of the trademark is seriously affected by the promotional use of the product.

23 See cases 78/70 (*Deutsche Gramophon/Metro*), Rec. 1971, p. 487, 62/79 (*Coditel/Ciné-Vog Films*), Rec. 1980, p. 881, 55-57/80 (*Musikvertrieb Membran/Gema*), Rec. 1981, p. 147, 279/80 (*Polydor/Harlequim Record Shops*), Rec. 1982, p. 329, 262/81 (*Coditel/Ciné-Vog Films*), Rec. 1982, p. 3381, 156/86 (*Warner Brothers and Metronome Video/Christiansen*), Rec. 1988, p. 2605, 341/87 (*EMI Electrola/Patricia*), Rec. 1989, p. 79, and 395/87 (*Tournier*), Rec. 1989, p. 2521.

distribution such as rental or lending of tangible copies of copyrighted works.[24] Moreover, the principle of exhaustion refers to the European Economic Area, it is only Community exhaustion and not international exhaustion.[25]

2. Free movement of workers

The free movement of workers (Art. 39) imposes the abolition of any discrimination based on nationality between workers of the MS as regards employment, remuneration and other conditions of work and employment.

This freedom entails the right not only to accept offers of employment actually made, but also to move freely within the territory of MS for this purpose and to stay in a MS for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action, as well as to remain in the territory of a MS after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. This freedom can be subject to limitations on grounds of public policy, public security or public health, and it does not apply to employment in the public service.

3. Freedom of establishment

The freedom of establishment (Art. 43) imposes the prohibition of restrictions on the freedom of establishment of nationals (including the setting-up of agencies, branches and subsidiaries) of a MS in the territory of another MS. The positive dimension of the freedom of establishment is the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular profit –making companies or firms.[26]

However, the freedom of establishment does not apply to activities that in a MS are connected, even occasionally, with the exercise of *official authority*, and the Council may also exclude other activities by qualified majority (Art. 45, 2 and 3). Moreover, this freedom does not prevent MS from adopting measures

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24 Case 158/86, 17.5.1988 (*Warner v. Metronome*), ECR 1988, p. 2631.

25 According to the ECJ case-law, several instruments of EC legislation on IP rights have provided the principle of exhaustion. On copyright law, see directives on software (91/250/CEE, Art. 4.º-c), rental and lending (92/100/CEE, Art. 1.º, 4), databases (96/9/CE, Art. 5-c and Art. 7.º/2-b), information society (2001/29/CE, Art. 4.º); both the later provide the non-exhaustion in case of electronic deliveries of works which are considered to be services. On trademarks see First Trademark Directive (89/104/CEE, Art. 7.º) and Community Trademark Regulation (Art. 40/94, Art. 13.º). On models and designs, see directive 98/71/CE (Art. 15.º).

26 In order to promote activities of self-employed persons, the Council is empowered to issue directives for the mutual recognition of diplomas, certificates and other evidence or formal qualifications (Art. 47, 1).

of special treatment for foreign nationals on grounds of public policy, public security or public health (Art. 46).

4. Free provision of services

The free provision of services (Art. 49) in the common market is based upon the prohibition of restrictions on the freedom to provide services within the Community in respect of nationals of MS who are established in a State of the Community other than that of the person for whom the services are intended.[27]

MS are allowed to maintain restrictions on the freedom to provide services only and in so far as those restrictions are not abolished by harmonizing measures and providing that they are applied without discrimination on grounds of nationality or residence to all persons providing services (Art. 54). In order to abolish restrictions to the provision of services directives have been issued in several sectors, namely on banking and insurance.

4.1. The *internal market of banking and insurance services* has been established according to the following principles: 1° the principle of the *single license* (or Community passport), meaning that access to the activity requires an administrative license to be granted by the competent authority of the MS of establishment (*home country*), upon which the enterprise is authorized to exercise its activity in the territory of all MS, therein setting-up agencies, branches and subsidiaries or providing services (*host country*); 2° the principle of *prudential supervision* by the authorities of the MS of establishment (*home country control*) of the activity of the banking or insurance enterprise, namely checking their solvency margins and controlling their technical provisions; 3° the principle of *additional control* by the authorities of the MS of destination (*host country control*), concerning the fulfillment in its territory of its provisions of general interest regarding namely marketing and contractual conditions.

The completion of the internal market in the banking sector has been achieved by the Second Banking Directives[28]. Two generations of directives were also planned for the insurance sector. However, for several reasons it took three generations of directives to complete the insurance internal market. In fact, the first generation has carried out the freedom of establishment of direct insurance

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27 A notion of services is provided (Art. 50), according to which services are activities (industrial, commercial, professional, and craftsmanship activities), normally exercised for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.

28 Council Directive 89/646/CEE, of January 15.

enterprises[29]. Conflicting interests among protectionists and liberals left the free provision of services not harmonized and therefore it was left to the general regulation provided by the Treaty of Rome as interpreted by the ECJ, in special the so-called *rule of reason*.

According to the ECJ rule of reason, considering that Articles 49(1) (ex 59 (1)) and 50(3) (ex 60(3)) have direct effect and these essential provisions require the abolition of all discrimination against the person providing the service by reason of his nationality or by the fact he is established in a Member State other than that in which the service is to be provided, and that there may be discrimination where imposing the respect for the conditions imposed to the nationals of the State where the provider is temporarily pursuing his activities, the Court[30] held that the *particular nature* of certain services may justify the imposition of certain requirements on the provider of the services, but only and in so far as:

1.° those requirements result from imperative reasons of protection of the general interest (*general good*);

2.° those requirements are indistinctly imposed on the persons or undertakings operating in the MS (*non-discrimination*);

3.° the general interest is not adequately safeguarded by the conditions imposed to the provider of the service in his home country or MS of establishment (*necessity and non equivalence*);

4.° the same result can't be achieved by less restrictive rules (*proportionality*).

In short, such restrictions must be grounded on public interest and indistinctly applicable (non-discrimination on the grounds of nationality), the public interest cannot be already protected by the rules of the MS of establishment (principle of equivalence), otherwise the restrictive measures are not objectively necessary or, at least, the same result could be achieved by less restrictive rules (proportionality).

Later on, the ECJ has applied this reasoning to some cases concerning the insurance sector.[31]

The Court held that the insurance sector was a *sensitive area* from the viewpoint of consumer protection, due to the special nature of insurance

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29 Directive 73/239/CEE, of July 24, on non life insurance, and Directive 79/267/CEE, of March 5, on life insurance.

30 Case 33/74, *Van Binsbergen*; joined Cases 110-111/78, *Van Wesemael*; Case 279/80, *WEBB*; Case 205/84, *Commission v. Germany*; Case C-76/90 (*Sager v. Dennemeyer*).

31 See cases 220/83 (France), 252/83 (Denmark), 205/84 (Germany), 4/12/1986, ECR 1986, 3755 (par. 30, 40 e 41).

services that are characterized by the so-called inversion of the production cycle and constitute a mass phenomenon. Moreover, the Court considered that there were no Community measures of harmonization capable of providing adequate consumer protection in this sector. Therefore, the Court held that restrictions to the free provision of services could be justified meaning the requirement of previous authorization and control by the host MS concerning solvency margins, technical provisions (calculation methods and application) and the insurance policy conditions of enterprises willing to provide their services therein.[32]

The Second Generation of directives in the insurance sector[33] has been influenced by this case-law. In fact, it has provided a *two speed* free provision of insurance services establishing a dualistic structure in the insurance market. In the first speed were non life insurance of large risks as well as life insurance passively provided: these first speed insurances were ruled by the principle of single license and home country prudential control, allowing the host MS to restrict the free provision of services only and in so far as necessary and proportional to control its national general interest provisions (e.g., contract terms). In the second speed were the non life insurances of mass risks as well as life insurance actively provided: concerning these second speed insurances host MS were allowed to maintain the requirement of previous authorisation for the provision in their territory and to control the activity of foreign insurance enterprises (in short, no single license or community passport applied to these insurances).

Despite this detour, the third generation of insurance directives[34] has extended to all categories of insurances the single insurance license or passport as well as the prudential supervision and control by the home MS, abolishing restrictions to this freedom in the internal market. Matters not harmonized by the second generation of insurance directives could still justify the imposition of restrictions by host MS, namely in what concerns consumer protection. Nonetheless, Community law is occupying several zones of consumer protection, therefore harmonizing consumer law standards and leaving small room left for

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32 In short, "...Community law tolerates authorisation necessary to achieve *permitted* supervision of providers of services, which in turn should be designed to ensure compliance with mandatory requirements relating to technical reserves and contractual terms. Those requirements *may not* duplicate equivalent home State statutory requirements, *must* take account of home State supervision and verification and *may not* go beyond what is necessary to protect the consumer (policyholder or "insured person")" - J. Flynn, "Insurance: Recent Judgements of the European Court of Justice", XXXVII *International and Comparative Law Quarterly* (1988), p. 166.

33 Council Directive 88/357/CEE, of June 22, on non life insurance, and Council Directive 90/619/ CEE, of November 8, on life insurance.

34 Council Directive 92/49/CEE, of June 18, on non life insurance, and Council Directive 92/96/ CEE, of November 10, on life insurance.

MS to impose restrictions to the free provision of services in their territories. But does it mean the end of the MS general interest scapegoat?

4.2. Concerning *consumer protection in the internal market*, the first question is whether the EC has competence to adopt instruments of consumer protection. According to the Treaty of Rome in the Amsterdam updated version, the EC has competence to protect consumers (arts. 3, 95 and, in special, *article 153* that makes Title XIV concerning consumer protection). EC primary consumer law has mainly five basic principles: 1º the principle of community competence to adopt measures directly aimed at consumer protection; 2º the duty to consider consumer protection concerning other matters not directly concerned; 3º the principle of providing a high level of protection concerning harmonizing measures; 4º the principle of no complete harmonization, leaving room left for MS to adopt stricter consumer protection standards; 5º national legislation on consumer protection must comply with EC primary law, in special with the freedoms of the common market.

Accordingly, the EC has adopted several instruments of harmonization aimed to protect consumers, namely on product liability, unfair terms, time-sharing, advertising, electronic commerce, financial services, etc.[35] Often, these instruments do not provide full harmonization, meaning that MS are allowed to provide stricter patterns of consumer protection in their national legislation. However, national legislation on consumer protection cannot offend the basic freedoms of the internal market, and it will be up to the Court to determine whether

35 See, e.g., Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers, Council Directive 92/59/EEC of 29 June 1992 on general product safety, Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products.

there is an infraction, according to the above mentioned "rule of reason". In other words, consumer protection does not justify national economic protectionism.

5. Free movement of capital

The free movement of capital (Art. 56) means the prohibition of all restrictions on the movement of capital and payments between MS and between MS and third countries. However, exceptions are allowed (Art. 58), such as, beyond those on establishment and provided that restrictive measures and procedures do not constitute a means of arbitrary discrimination or a disguised restriction: 1. tax law provisions distinguishing taxpayers according to their place of residence or place of investment; 2. public policy and security, control of taxation and prudential supervision of financial institutions. Moreover, it is up to the Community to issue directives on investment, establishment, financial services provision or the admission of securities to capital markets.

III. Competition Law

1. Introduction

1.1. The Treaty on European Union states in its principles that the Community's Member States are to adopt an economic policy "conducted in accordance with the principle of an open market economy with free competition". Competition is considered to be an essential market engine to provide value for consumers and greater competitiveness in the European industry. Accordingly, European competition rules are aimed to fulfill the following three functions: 1. to prevent the erection of barriers to trade; 2. to preserve effective competition in the single market; 3. to encourage efficiency, innovation and lower prices. European competition policy is based on a Community legislative framework essentially provided by the EC Treaty (Articles 81 to 90). Further rules to be applied to merger control are provided by a Council Regulation known as the "Merger Regulation" (Regulation 4064/89, replaced by Regulation 139/2004 on May 1st).

European competition law includes antitrust & cartels, merger control, liberalization, and State aid control. Shortly, *antitrust & cartels* means the elimination of agreements which restrict competition (e.g. price-fixing agreements, or cartels, between competitors) and of abuses by firms who hold a *dominant position* on the market. *Merger control* is the control of mergers between firms (e.g. a merger between two large groups which would result in their dominating the market). *Liberalization* refers to introducing competition in monopolistic economic sectors (e.g. telecommunications). *State aid control* is the control of state aid measures by Member State governments to ensure that such measures do not distort competition in the Common Market (e.g. the prohibition of a state grant designed to keep a loss-making firm in business even though it has no prospect of recovery).[36]

1.2. The European Commission is the primary source of Community competition policy. Within the broad framework of Articles 81 and 82, it is the Commission's task to administer competition rules of the Treaty for the States of the European Union. The decisions of the Commission can be referred to the European Court of Justice for appeal.[37]

Commission policy would be ineffective if its monitoring and control activities were not accompanied by decisions and penalties. Concerning *investigation procedures*, the Commission has considerable powers to investigate suspected abuses of competition law. The rights of parties under investigation, as well as their commercial confidentiality, are guaranteed.

Moreover, concerning *penalties* for anti-competitive activities, the Commission has considerable powers to prohibit anti-competitive activities, to issue injunctions against, and to impose fines on firms found guilty of anti-competitive conduct. The amount of these fines varies according to the gravity and duration of the anti-competitive activities. It may be as much as 10% of the firm's worldwide turnover. In state aid cases, the Commission has the power to require that illegally granted aid be repaid by recipients to the public authorities which granted it.

As for *appealing* against Commission decisions, all Commission decisions are subject to judicial review by the Community's legal system. An appeal against a Commission decision may be lodged with the Court of First Instance or the Court of Justice of the European Communities.

1.3. There is a partnership relation between national MS and European competitions laws. The European Commission has been entrusted by Member

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36 See http://europa.eu.int/comm./competition/. On EC competition law and economics see e.g. Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules: The European School*, Kluwer Law International, 2002, Julio Baquero Cruz, *Between Competition & Free Movement: The Economic Constitutional Law of the European Community*, Hart Publishing, 2002; Mike Walker/Simon Bishop, *The Economics of EC Competition Law: Concepts, Application & Measurement*, Sweet & Maxwell, 2002; Alison Jones/Brenda Sufrin, *EC Competition Law: Text, Cases & Materials,* Oxford University Press, 2001; Subiotto/Snelders, *Antitrust Developments in Europe*, Kluwer Law International, 2003; Kerse/Kerse, *EC Merger Control*, Sweet & Maxwell, 1999.

37 The EFTA States are supervised by the EFTA Surveillance Authority (ESA) subject to judicial review by the EFTA Court.

States with the power to deal with competition matters at Community level. In some cases, this power is shared with the Member States' own competition authorities and law courts, while in other cases the authority lies exclusively with the Commission.

EC competition law does not enter into play until such time as trade between Member States is affected by the practices in question. For example, a price-fixing agreement between local companies in a given town will not have any impact on the Community market, and European law is therefore not applicable to this kind of situation. Most Member States, however, also have their own domestic laws to counter anti-competitive practices. This makes it possible to take action under national law against practices which do not have any impact on trade between Member States. Enforcement of national competition law is the responsibility of the Member State concerned.

Antitrust competition procedures have been recently revised.[38] Council Regulation (EC) nº 1/2003 provided new features of antitrust competition procedures such as: 1.º companies will no longer have to notify their individual agreements in order to obtain clearance or exemption under the antitrust rules; 2.º national competition authorities become enforcers of EU competition rules; 3.º a network of European Competition Authorities is set up under the co-ordination of the European Commission (ECN); 4.º antitrust & cartels rules become directly applicable in the national laws of the MS, and the Courts can apply them, including Art. 81(3); 5.º the Commission is empowered to search private homes upon judicial mandate.

2. Prohibition of anti-competitive agreements (Art. 81)

2.1. European competition law controls cartels and other anticompetitive agreements between companies, i.e. restrictive agreements which are a threat to fair competition (collusion between companies). In fact, to be effective, competition assumes that the market is made up of suppliers, who are independent of each other. However, if certain companies agree among themselves to collude, rather than compete, such agreements impair competition. The most familiar example is an *agreement on prices*, or a *cartel*, where firms fix price levels jointly as a result of which consumers are unable to take advantage of competition between suppliers to obtain competitive prices. Other types of agreements have the object

38 In fact, the Council adopted Council Regulation (EC) nº 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. This regulation came into force on 1.5.2004 replacing Regulation 17/62.

or effect of fixing other conditions for the operation of markets (e.g., they may *allocate production quotas to firms or share markets* between them).

Agreements of this type are prohibited in the European Union under Article 81 of the EC Treaty and the European Commission has been entrusted by Member States with the responsibility of enforcing this prohibition. It has particularly intensified its fight against cartels by adopting a leniency policy in 1996 revised in 2002[39] and by increasing the level of fines imposed on companies. Article 81 also requires the Commission to fight agreements between companies designed to hinder imports from low to high price countries in the Union. The decisions adopted against Volkswagen in 1998, Mercedes Benz in 2001 or Nintendo in 2002 are examples of this.[40]

In the decision against *Volkswagen* (1998), the Commission fined Volkswagen ECU 102 million for systematically forcing its authorized dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, mainly from German and Austria; in 1995 the Commission received a large number of complaints from consumers who had had difficulty buying new cars in Italy. In its decision on the case, the Commission finds that Volkswagen, Audi and Volkswagen's Italian subsidiary Autogerma have devised in concert with their Italian dealers a strategy aimed at preventing, or at least substantially restricting, sales from Italy to other MS, especially Germany and Austria. Examples of the illegal practices identified are: about fifty authorized dealers were threatened that their dealership contracts would be terminated if they sold to foreign customers, and some twelve dealerships were actually terminated (1), the profit margins and bonuses of authorized dealers who sold outside their allotted territories were systematically reduced (2), Volkswagen and Audi also refused to issue certificates of conformity without seeing invoices and contracts of sale, so as to be able to identify the origin and destination of the vehicles (3).

In the decision against *Mercedes Benz*, the Commission fined Daimler-Chrysler € 72 million for infringing EC competition rules in the area of car distribution by adopting measures aimed to prevent parallel trade in cars and limit competition in the leasing and sale of motor vehicles. In fact, the undertaking instructed by circular letters the members of its German distribution network for

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39 Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03), OJ CE C 45/3, 19.2.2002. For example, immunity from any fine will be granted if the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Art. 81 in connection with an alleged cartel affecting the Community (8-b), cooperates fully with the Commission, ends its involvement in the suspected infringement, and did not take steps to coerce other undertakings to participate in the infringement (11).

40 Source: http://europa.eu.int/comm./competition/.

Mercedes passenger cars not to sell cars outside their respective territory and to oblige foreign customers to pay a deposit of 15% to Daimler-Chrysler when ordering a car in Germany.

In the decision against *Nintendo*, the Commission has imposed a total fine of € 167.8 million on Japanese video games maker Nintendo and seven of its official distributors in Europe for colluding to prevent exports to high-priced from low-priced countries. The fine on Nintendo alone was calculated at € 149 million to reflect its size in the market concerned, the fact that it was the driving force behind the illicit behavior and also because it continued with the infringement even after it knew the investigation was going on. Prices for play consoles and games differed widely from one EU country to another during the period investigated by the Commission, with the United Kingdom up to 65 percent cheaper than Germany and the Netherlands. The Commission has collected evidence showing that Nintendo and its distributors colluded to maintain artificially high price differences in the EU between January 1991 and 1998. According to the arrangements, each distributor was under the obligation to prevent parallel trade from its territory, i.e. exports from one country to another via unofficial distribution channels. Under the leadership of Nintendo, the companies intensively collaborated to find the source of any parallel trade. Traders that allowed parallel exports to occur were punished by being given smaller shipments or by being boycotted altogether.

The Commission has the power to prohibit restrictive agreements and impose fines on the offending firms of up to 10 percent of their annual global turnover in the year preceding the decision. In order to control restrictive agreements, the Commission can carry out investigations on its own initiative into the behavior of certain companies or into specific market sectors when it suspects possible restrictions of competition.

On the other hand, the European Commission currently may certify that agreements notified to it by the enterprises concerned are not contrary to European competition law (often called “negative clearance”). This gives a degree of certainty to firms that their business agreements are in accordance with European competition law. Moreover, the Commission may also, in certain limited circumstances, exempt some anti-competitive agreements if the overall benefits of the agreement outweigh its anti-competitive aspects.

2.2. Article 81(1) prohibits agreements between employees of different companies or entities which have the object or the effect to reduce competition within the common market. Such anti-competitive agreements are automatically void (Art. 81(2)). The prohibition of Article 81 applies to “agreements between undertakings, decisions of associations of undertakings and concerted practices”.

The term of "undertaking" is a wide term which extends to almost any legal or natural person regardless of its legal status or the way it is financed. It includes companies, partnerships, trade associations, sole traders and State corporations, regardless of whether the undertaking is profit making or immaterial, provided it carries out economic activities not excluded from the scope of application of competition rules. Moreover, the argument according to which the employee was not acting in representation of its senior management is not a defense.

The form of the agreements between the competitors is not relevant. Even an unwritten agreement can be considered as illegal under Article 81(1). Gentlemen's agreements and any other type of informal unwritten agreements between competitors are found to meet the requirement. The existence of an anti-competitive agreement may even be inferred from all the circumstances.[41] It means that all types of agreements, whose aims or effects are to restrict competition, are prohibited under Article 81(1). In practical terms, all agreements, whereby members of the same category of actors directly or indirectly prevent other categories of players from entering in a market, or even exclude them, are considered to be anti-competitive. Examples of anti-competitive practices are, namely, price-fixing, output limitation or allocation of markets or customers, boycotts or refusals to deal and re-sale price maintenance.

2.3. There are however restrictive agreements that may ultimately encourage competition. In fact, some agreements that restrict competition in one way may still encourage competition in another way, for example, if they promote technical progress or improve distribution. In fact, in case such restrictive agreements, decisions or practices contribute to improving the production or distribution of goods or to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertaking concerned restrictions that are not indispensable to the attainment of these objectives nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question (Art. 81(3)). Accordingly, the Commission may exempt such agreements from the prohibition in Article 81 because they ultimately have a beneficial effect on the market.[42]

Besides individual exemptions, certain categories of agreements of the same nature, such as, for example, distribution agreements, may benefit from

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41 The most important element in the prohibition of Article 81 is that the agreement needs to have either an anticompetitive object or effect on trade between Member states. This criterion is more easily fulfilled when the companies adopting the agreements are multinational groups.

42 Before the revision of the anti-competition procedures, to obtain an *individual exemption* firms should notify their agreements to the European Commission.

group exemptions. Such group exemptions are often called *block exemptions*. Agreements falling under block exemptions do not need to be notified to the Commission, as exemption is granted automatically. Block exemptions are laid down in a series of Community regulations concerning vertical agreements, on one hand, and horizontal agreements, on the other hand.

2.3.1. As for *block exemptions* concerning *vertical agreements*, these are agreements whereby each participating undertaking operates for the purposes of the agreement at a different level of the production or distribution chain, such as, for example, selective distribution systems (e.g., franchising).

Art. 81(3) of the Treaty has been implemented by Council Regulation 19/65/EEC, of 2 March 1965 (amended by the Council Regulation (EC) n° 1215/1999 of 10 June 1999), which has empowered the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Art. 81(1). Upon this Regulation several regulations providing block exemption for certain types of vertical agreements have been adopted, such as in general Commission Regulation (EC) nº 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, and Commission Regulation (EC) nº 1400/2002 of 31 July 2002, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector. Some examples of verticals agreements falling within block exemptions are the following[43]:

1° - Commission Regulation 2790/1999 provides exemption for «vertical agreements», i.e. agreements or concerted practices 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 (Art. 2(1)). It includes selective distribution systems and agreements containing obligations of non-competition. This exemption applies in case all the members of association are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding € 50 million (Art. 2 (2)), and provided that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services (Art. 3). However, the exemption does not apply for example in case the agreements impose resale prices and market territories to the buyer (Art. 4), as well as to clauses imposing obligations of non-competition exceeding five-years (Art. 5).

43 Note that the benefit of the block exemption Regulations may be withdrawn, in case the agreements have effects that are contrary to Art. 81(3).

2º - Commission Regulation 1400/2002 provides exemption to categories of vertical agreements and concerted practices in the *motor vehicle sector*. This Regulation provides stricter rules than Commission Regulation 2790/1999 for vertical agreements for the purchase and sale of new motor vehicles, spare parts and after sales (repair and maintenance) services. It applies to agreements in which the supplier concerned has a market share of up to 30% on the markets for the distribution of new motor vehicles or spare parts (Art. 2(2a), or up to 40% where quantitative selective distribution is used for the sale of new motor vehicles (Art. 3(1)). However, the exemption does not apply in case, for example, the agreements do not provide for written and transparent termination notices (Art. 3(4)), as well as certain periods of prior notice of no renewing the Agreement (Art. 3(5)). Also, it does not apply to agreements that contain «hardcore restrictions» (Art. 4), such as namely imposing resale prices and market territories to the buyer, prohibiting cross-supplies between distributors or repairers within a selective distribution system (price-fixing, output limitation or allocation of markets or customers); the same is valid, *mutatis mutandis*, concerning clauses imposing obligations of non-competition (Art. 5).

2.3.2. *Horizontal* co-operation agreements are potentially distortive of competition and are liable to fall under EC competition rules (Article 81 of the Treaty). The general regulatory framework of block exemptions concerning horizontal agreements is provided by Council Regulation No 2821/71 on application of Article 85 (3) [*now 81 (3)*] of the Treaty to categories of agreements, decisions and concerted practices.

The European Commission has adopted new competition rules concerning so-called horizontal co-operation agreements, i.e. co-operation agreements between competitors. They consist of revised block exemption Regulations on Research and Development agreements and Specialization agreements and Guidelines on various types of co-operation agreements (covering agreements on R&D, production, marketing, purchasing, as well as standardization and environmental agreements).[44]

The new rules embody a shift from the formalistic regulatory approach

44 Commission Regulation (EC) nº 2658/2000, of 29 November 2000, on the application of Article 81(3) of the Treaty to categories of specialization agreements, and Commission Regulation (EC) nº 2659/2000, of 29 November 2000, on the application of Article 81(3) of the Treaty to categories of research and development agreements. These new Regulations have replaced the existing Regulations on Specialization (Commission Regulation (EEC) No. 417/85) and R&D (Commission Regulation (EEC) No. 418/85). In comparison to the existing Regulations the new texts are designed to be more user-friendly, with greater clarity and an increased scope of application.

underlying the previous legislation towards a more economic approach in the assessment of horizontal co-operation agreements. The basic aim of this new approach is to allow competitor collaboration where it contributes to economic welfare without creating a risk for competition, and the approach is very similar to that of the Regulation 2790/1999 setting out the rules for the distribution sector ("vertical co-operation agreements").

The new block exemptions replace the existing system of specifically exempted 'white list' clauses by a general exemption of all conditions under which undertakings pursue R&D and specialization agreements. This move away from a clause-based approach is aimed to give greater contractual freedom to the parties of such agreements and to remove the "strait-jacket" imposed by the old Regulations. The market share threshold for exemption of all parties to an agreement combined is set at 20% for specialization agreements, and at 25% for R&D agreements. Beyond these market shares, R&D or specialization agreements will not automatically be prohibited but will have to be assessed individually. However, 'hardcore' restrictions (price-fixing, output limitation or allocation of markets or customers) will generally remain prohibited irrespective of the parties' market power.

The guidelines complement the block exemption Regulations. They are applicable to R&D and production agreements not covered by the block exemptions as well as to certain other types of competitor collaboration (e.g. joint purchasing, joint commercialization). The guidelines describe the general approach which should be followed when assessing horizontal co-operation agreements and set out a common analytical framework. This helps companies to assess with greater certainty whether or not an agreement is restrictive of competition and, if so, whether it would qualify for an exemption.

2.3.3. As for other exemptions, Regulation 772/2004, 27/4[45] provides block exemptions for certain categories of technology transfer agreements.[46] Patent or know-how licensing agreements are agreements whereby one undertaking which holds a patent or know-how ('the licensor') permits another undertaking ('the licensee') to exploit the patent thereby licensed, or communicates the know-how to it, in particular for purposes of manufacture, use or putting on the market. This block exemption applies to agreements of exclusivity and non-competition concerning the exploitation of know-how in a certain territory.

45 This regulation has replaced Commission Regulation (EC) nº 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements.

46 Note that in other regulations IP rights clauses as such are normally exempted (Reg. 2790/1999, Art. 2(3), Reg. 1400/2002, Art. 2(2b)).

Other exemptions include, namely, Commission Regulation (EC) nº 358/2003, of 27 February 2003, on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

3. Abuses of dominant position (Article 82)

3.1. Article 82 prohibits the abuse of the dominant position of a company which negatively affects trade between Member States. An enterprise holding a dominant position may be tempted to abuse its position by, for example, charging exorbitant purchase or selling prices or by conferring discriminatory benefits on certain customers in order to control their behaviour or to keep competitors out of the market.

A practice is prohibited under Article 82 when the following criteria are fulfilled:

1º - The company enjoys a dominant position on the market which means that it is capable of behaving independently from its' competitors and customers in this market. So, a firm holds a dominant position if its economic power enables it to operate on the market without taking account of the reaction of its competitors or of intermediate or final consumers. In appraising a firm's economic power, the Commission takes account of its market share and also of other factors such as whether there are credible competitors, whether the firm has its own distribution network, whether it has favorable access to raw materials, etc. The *dominance* of a company is evaluated with regard to various elements. A company owning products which are not interchangeable with other products on the market is likely to be in a dominant position. The reference to the market share of the company for a specific product is also a determinant element. The possession of a technical advantage to lead a product development, or the ownership of an intellectual property right might be an important factor to establishing dominance even if they are not sufficient in themselves.

2º - The undertaking abuses its dominant position on this market in order to impose unfair and abusive conditions. In fact, efficient businesses are run with a view to conquering markets, to the point where they may establish very strong market positions. Holding a dominant position is not wrong in itself if it is the result of the firm's own effectiveness. But if the firm exploits this power to stifle competition, this is an anti-competitive practice which constitutes abuse. It is therefore the *abuse* of the dominant position which is prohibited by Article 82 of the EC Treaty.

3º - Trade between Member states is negatively affected as a result of the behavior of this company. The evaluation of an abuse of a dominant position is a question of fact and degree. The "normal industry practices" serve as references to evaluate the abuse. Abusive behavior results in weakening the degree of competition, through recourse to methods different from those which condition normal competition in products or services.

3.2. Abuse of dominant position can be illustrated by several examples, such as, *abuses on pricing* (i.e., the imposition of unfairly high prices or predatory low prices that allow the company to achieve benefits that would not be possible to achieve in a more competitive environment; the imposition of different prices for the same product in different areas without any justification can also be considered anti-competitive), granting of *fidelity rebates* (i.e., rebates granted by dominant companies in return for securing their customers), *abuse of intellectual property rights* (the imposition of unfair licensing terms or the charging of excessive price for a product protected by intellectual property rights may be an abuse, although the mere existence of a patent, trademark or copyright is not sufficient to establish a dominant position), and *tying clauses* (i.e., clauses whereby the dominant company only delivers the product or service to the customer if as a condition of selling that product to that customer, the customer also undertakes to buy another product from the dominant company which he would otherwise not buy). Other types of abuse, which is an open concept, include the imposition of discriminatory and unfair conditions by the dominant company to any categories of users or any other company having contractual relationships with the dominant company.

3.3. Concerning the powers of the European Commission to control abuses of dominant position, the Commission can adopt a decision prohibiting an abuse and fining the offending firm up to 10 percent of its turnover (same rules as for cartels detailed above). The Commission can investigate suspected abuses either on its own initiative or following complaints from competitors or customers. There is no exemption available for abuse of a dominant position. Some examples illustrate the Commission's action in this field, such as the cases *Deutsche Post*, *Michelin* and *DSD*.[47]

In the case *Deutsche Post* (2001/3/20), the Commission issued its first Article 82 decision in the postal sector, finding that the German postal operator, Deutsche Post AG (DPAG), had abused its dominant position in the market for business parcel services by granting *fidelity rebates* and engaging in *predatory pricing*. Following the decision, DPAG was to create a legal entity for its business parcel services separate from its letter post monopoly. In addition to requiring the two entities to deal with one another on the basis of transparent and market-based

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47 See http://europa.eu.int/comm./competition/.

pricing, the Commission's decision also laid down rules for postal monopolies on the application of cross-subsidies. In view of the long-standing market foreclosure caused by its practices, DPAG was fined € 24 million.

In the case *Michelin* (2001/6/20), the Commission fined French tyre maker Michelin € 19.76 million for abusing its dominant position in the French market for retread and replacement tyres for heavy vehicles. The Commission's investigation established that, between 1990 and 1998, Michelin operated a complex *system of rebates, bonuses and commercial agreements*, which had the effect of tying dealers to Michelin as their supplier, and thus of artificially barring Michelin's competitors from the market. The heavy penalty reflected the seriousness and duration of the infringement and a previous, similar infringement by Michelin.

In the case *DSD* (2001/4/20), the European Commission adopted a decision finding that Duales System Deutschland AG (DSD), a company which created "The Green Dot" (Der Grüne Punkt) recycling trademark, had abused its dominant position in the market for organizing the collection and recycling of sales packaging in Germany. The decision was limited to one provision of DSD's trademark agreement and did not call into question the existence and overall functioning of the DSD system. The Commission found that, in certain cases, the payment system used by DSD disadvantaged its customers and prevented the entry of competitors in the market.

4. EU Merger control

4.1. There are mergers that increase competition and others that are anticompetitive, i.e. mergers that create or strengthen a dominant position. The control of mergers and acquisitions is one of the pillars of European Union competition policy. When companies combine via a merger, an acquisition or the creation of a joint venture, this generally has a positive impact on markets: firms usually become more efficient, competition intensifies and the final consumer will benefit from higher-quality goods at fairer prices.

However, mergers which create or strengthen a dominant market position are prohibited in order to prevent ensuing abuses. A firm is in a dominant position when it is able to act on the market without having to take account of the reaction of its competitors, suppliers or customers. In a dominant position a firm can, for example, increase its prices above those of its competitors without fearing any loss of profit. All market players and especially consumers stand to lose from the emergence of this kind of dominant structure, which is likely to result in higher prices, a narrower choice of goods or scarcity.

It is not illegal for a firm to hold a dominant position on the market if that position results from its own competitive strength and effectiveness. However, acquiring a dominant position by buying out competitors is in contravention of EU competition law.

Companies are usually able to address the competition problems, normally by offering to divest part of their businesses. The statistics available since 1990, when the Commission was entrusted with the task to review big mergers and acquisitions, highlight this aspect. The Commission has been notified 2,399 mergers between September 1990 (when the Merger Regulation first came into force) and the end of 2003. The number of notifications in 2003 fell sharply to 212 cases accentuating the downward trend initiated in 2001 when the merger wave came to a halt. This compares with a record number of notifications of 345 in 2000 and 279 in 2002. Since 1990, the Commission has cleared a total of 2,235 cases after only a routine one month/six weeks review (see review timetable above). It blocked a total of 18 mergers.[48]

4.2. The European Commission functions as a «one-stop shop» of merger control in the European Union. In fact, in order to control large-scale mergers, Member States considered it necessary to create a one-stop shop for all the European Union. The system for monitoring merger transactions has been governed by the Merger Regulation (Council Regulation 4064 of 1989) since 1990.

The Merger Regulation removes the need for companies to seek clearance for certain large-scale mergers in a myriad of different national regulatory regimes and ensures that all such mergers receive equal treatment.

The Merger Regulation gives the European Commission the exclusive power to investigate mergers with a *"Community dimension"*. As a result of this investigation, the Commission may prohibit mergers which create or strengthen a dominant position in the Common Market, defined as "a situation where one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, consumers" (Case T-102/96, Gencor v. Commission, ECR 1999 II-753, par. 200).

The Merger Regulation defines the "Community dimension" of a merger using thresholds based on the turnover of the companies involved. The most important are the worldwide threshold (€ 5 000 million) and the Community-wide threshold (€ 250 million). Below these thresholds, merger control is carried out by the authorities in the Member States under their own legislation.

Mergers and acquisitions with a Community dimension *must* be notified to the Commission for its agreement before they are put into effect.

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48 For full statistics see: http://europa.eu.int/comm/competition/mergers/cases/stats.html

4.3. The Council has adopted Council Regulation (EC) nº 139/2004, of 20 January 2004, on the control of concentrations between undertakings (the EC Merger Regulation), which came into force on 2004 May 1st.

The *turnover thresholds* remain the same in the new Regulation. Under the original Merger Regulation which came into force in 1990, the European Commission has exclusive jurisdiction for mergers between firms with a combined worldwide turnover of at least €5 billion *and* a turnover within the European Economic Area of more than €250 million for each of them. In this way, mergers can be assessed in a single procedure, and don't have to go through a number of different procedures in individual EU countries (the "one stop shop" principle). If the companies concerned have more than two-thirds of their European turnover in one and same EU country, the merger is examined by the competition authority of that country because the latter is better placed than the Commission to examine its potential effects.

Then, the principle of «one-stop shop» is reinforced. To resolve the problem of the multiple filings the Council has agreed that companies will be able to ask to benefit from the one-stop shop (Commission examination) if they have to notify in three or more Member States. If none of the competent Member States object to the referral within 15 working days of receiving the submission, the merger benefits from the one-stop shop, and will be examined by the Commission. In addition, a Member State may refer to the Commission the examination of a merger if it significantly affects competition in a national market or more. The rationale behind the improved referral process to and from the Commission is to ensure that mergers are examined by the best placed authority.

As for the *substantive test* (the so-called «carbon test»), it is the *raison d'être* of the Merger Regulation. The Commission must bear this test in mind when deciding whether a merger must be challenged or not. Regulation 4064 was based on the concept of dominance: a merger must be blocked if it creates a dominant position, and therefore would likely result in higher prices, less choice and innovation. This concept has been interpreted by the Commission and the European courts along the years as applying also to situations of "joint dominance" or duopolies (Kali und Salz/MdK and Gencor/Lonrho) as well as to situations of "collective dominance" or oligopolies (Airtours/First Choice). The new Regulation has adapted the substantive test to make clear that all anti-competitive mergers resulting in higher prices, less choice or innovation are covered. This is achieved by the new test, which states that a merger must be blocked if it would *«significantly impede effective competition»*. Dominance, in its different forms, will remain the main scenario. But the test will also now clearly encompass anticompetitive effects in oligopolistic markets where the merged company would not be strictly dominant in the usual sense of the word (i.e. much bigger than the rest). The central question is whether *sufficient* competition remains after the merger to provide consumers with sufficient choice.

The new Merger Regulation is to be interpreted according to the Commission's Guidelines on the appraisal of mergers between competing firms (so-called *Horizontal Guidelines*)[49], which are the result of both the Commission's experience in almost 14 years and Court rulings.

5. Liberalization (Art. 86)

5.1. One of the major concerns of EU competition law is to introduce competition in monopolistic sectors. In order to perform «*services of general economic interest*», public or private enterprises can be granted special exclusive rights, in particular monopoly rights, by Public authorities in the Member States. Postal deliveries, rail transport or electricity generation and distribution are sectors in which such rights have typically been granted.

Since these special rights generally correspond to responsibilities linked to the performance of a public service entrusted to the enterprise, they are permitted, provided that, however, such special rights do not go beyond what is necessary for the performance of that service and so that they do not create situations that restrict competition. In fact, the concern of introducing competition in monopoly industries is because it is understood that if a monopoly that is entrusted to an enterprise is not justified by a service of general economic interest, it will lead in most cases to high prices, poorer quality service and backwardness in terms of innovation and investment.

Accordingly, the Commission checks that Member States, when they grant special or exclusive rights, comply with the Community competition rules, in particular ensuring that public authorities do not go beyond what is strictly necessary to the performance of those services when setting the conditions in which services of general interest entrusted to undertakings are performed. Moreover, the Commission also checks that the Community competition rules are properly complied with by enterprises that have been granted special or exclusive rights, but the application of the competition rules cannot obstruct the performance of that task.

5.2. Separating infrastructure from commercial activities is the strategy adopted to introduce competition in monopolistic sectors, because these

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49 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), OJ C 31/5, 5.2.2004.

monopolies exist often in network industries, such as transport, energy and telecommunications. The strategy of separating infrastructure from commercial activities is possible and justified in these sectors because a distinction must be made between the infrastructure and the services provided over this infrastructure. In fact, while it is often difficult to establish a second, competing infrastructure, for reasons linked to investment costs and economic efficiency, it is possible and desirable to create competitive conditions in respect of the services provided.

The concept of separating infrastructure from commercial activities is based upon the understanding that the infrastructure is merely the vehicle of competition. Accordingly, the right to exclusive ownership may persist as regards the infrastructure (the telephone or electricity network for example), but, at the same time, monopolists must grant access to companies wishing to compete with them as regards the services offered on their networks (telephone communications or electricity supply).

Based upon this general principle, a number of Community liberalization directives have been adopted in several sectors. In fact, the European Union has introduced directives to initiate the opening-up of the following markets: telecommunications, transport, postal services, gas, electricity markets. The objectives laid down in these directives must be incorporated into national legislation and must be enforced by the Member States. The Commission checks that these objectives are actually achieved.

6. State aid control in the European Union (Art. 87)

6.1. State aid is considered as a distortion of competition, because state aid seriously disrupts normal competitive forces by giving certain firms or products favored treatment to the detriment of other firms or products. The *rationale* of the prohibition by the EC Treaty of State aid that distorts competition is that neither the beneficiaries of state aid nor their competitors prosper in the long term, because very often all public subsidies achieve is to delay inevitable restructuring operations without helping the recipient actually to return to competitiveness, and unsubsidized firms who must compete with those receiving public support may ultimately run into difficulties, causing loss of competitiveness and endangering the jobs of their employees, so that, ultimately, the entire market suffers from it, and the general competitiveness of the European economy is thus imperiled.

6.2. It does not mean however that no forms of State aid are allowed. In fact, the EC Treaty allows exceptions to the ban on state aid where the proposed aid schemes may have a beneficial impact in overall Union terms. Article 87 of the EC Treaty allows the following forms of aid: a) aid having a social character, granted to individual consumers; b) aid to make good the damage caused by natural disasters or exceptional occurrences; c) aid designed to: 1. promote the economic development of underdeveloped areas (regarded as particularly backward in accordance with Community criteria); 2. promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; 3. facilitate the development of certain activities or areas; 4. promote culture and heritage conservation. *In the last two cases, such aid cannot affect trading conditions and competition in the Community to an extent that is contrary to the common interest.*

6.3. Concerning the forms of assistance that may constitute state aid, Article 87 of the EC Treaty prohibits any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain firms or the production of certain goods. The aid in question can take a variety of forms such as, for instance: state grants; interest relief; tax relief; state guarantee or holding; provision by the State of goods and services on preferential terms.

6.4. The European Commission monitors proposed and existing state aid measures by Member States to ensure that they are compatible with EU state aid legislation and do not distort intra-community competition. The Commission has the power to require that aid granted by Member States which is incompatible with the common market be repaid by recipients to the public authorities which granted it, and the Member State must recover the aid immediately in accordance with domestic procedures.

In order to appraise the conformity of State aid measures with EU legislation the Commission has adopted a number of clarifying "guidelines" or "frameworks" in a number of areas, such as: regions lagging behind in terms of development; research & development; employment; protection of the environment; rescue and restructuring of firms in difficulty. Moreover, the Commission has also adopted a number of "block exemption" regulations for state aid to: small and medium-sized enterprises; aid for training; aid for employment. Aid granted in conformity with all the conditions set out in these regulations is automatically considered compatible with the common market.

IV. EU e-Commerce Law and the Internal Market (Overview)

The Internet is a powerful business marketplace. E-commerce operates virtually worldwide. There is direct and indirect e-commerce. Direct e-commerce means that goods are offered, purchased and delivered by Internet electronic means (e.g., buying e-books or software online). Indirect e-commerce means that goods are offered and eventually purchased online, but delivery is done by post mail or traditional delivery services (e.g., paper books). Moreover, e-commerce can take place both in business-to-business (B2B) and business-to-consumer (B2C) situations. E-commerce places a number of legal questions.[50]

The EU has adopted Directive 2000/31[51] to provide harmonized regulation of certain aspects of e-commerce in the internal market. Very broadly, this Directive provides a regulatory framework of e-commerce to create an environment of confidence and trust not only to undertakings but also and in special to consumers. It is based upon the following principles.

To begin with, the principle of free access to the e-market, meaning that enterprises who want to operate in the Internet (namely Internet service providers) do not require a previous administrative authorization or license, except if they need it to operate in the "real" market, such as banking and insurance companies or gaming companies.

This principle of free access is related with the principle of home-state control, meaning that the authorities of the MS of establishment of an e-trader will supervise his activities, and therefore a third MS cannot in principle prevent such an e-trader from providing his services in its territory. However, there are exceptions to this home-country control, allowing the authorities of the host MS to adopt restrictive measures for reasons, such as, to comply with national consumer protection standards, in so far as they are compatible with EU economic law.

Then, EU e-commerce regulation establishes the principle of transparency, which imposes obligations of information upon e-operators as well as restrictions on advertising. E-operators must identify themselves so that the market is able to know who is behind a webpage.

Moreover, the principle of freedom of e-contracting prevents MS from

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50 On e-commerce law see e.g. John Dickie, *Internet and electronic commerce law in the European Union*, Oxford, Hart, 1999; Terry R. Broderick, *Regulation of information technology in the European Union*, London: Boston, Kluwer Law International, 2000; Garzaniti, *Telecommunications, broadcasting, and the Internet: E.U. competition law and regulation*, London: Sweet & Maxwell, 2000; Spindler/Börner (eds.), *E-Commerce Law in Europe and the USA*, Springer, 2002; Evans/Waelde (eds.), *Law & the Internet: A Framework for Electronic Commerce*, Hart Publishing, 2000; A.L.D. Pereira, *Law & Internet: Regulatory Issues of Electronic Commerce*, Coimbra, 2002/2003.

51 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

creating barriers to the negotiation by electronic means.[52] There are however some exceptions to this freedom of e-contracting, concerning namely personal transactions (e.g., marriage) and real estate rights. Furthermore, the freedom of e-contracting is limited by concerns of consumer protection. In fact, e-consumers are granted special imperative rights[53], and a favourable jurisdiction established to protect them not only in terms of competent court[54] but also concerning applicable law (Rome Convention) to e-commerce consumer contracts.

Finally, another basic principle of EU e-commerce law is the freedom of Internet communication freedom. This principle is evidenced by the regulation of ISP liability. In fact, where they act as access, caching or hosting providers, they are in principle not liable for the infringement committed by users of their services. Nonetheless, this freedom of communication does not prevent the reinforcement of intellectual property rights, concerning the general prohibition of use of copyrighted material, as well as protection software, databases, and websites.[55]

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52 The legal value of e-signatures is regulated by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999, on a Community framework for electronic signatures.

53 See, in special, Directive 97/7/CE of the European Parliament and the Council of 20 May, on the protection of consumers in respect of distance contracts («distance selling directive»).

54 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

55 See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.