European Union Law and Policies

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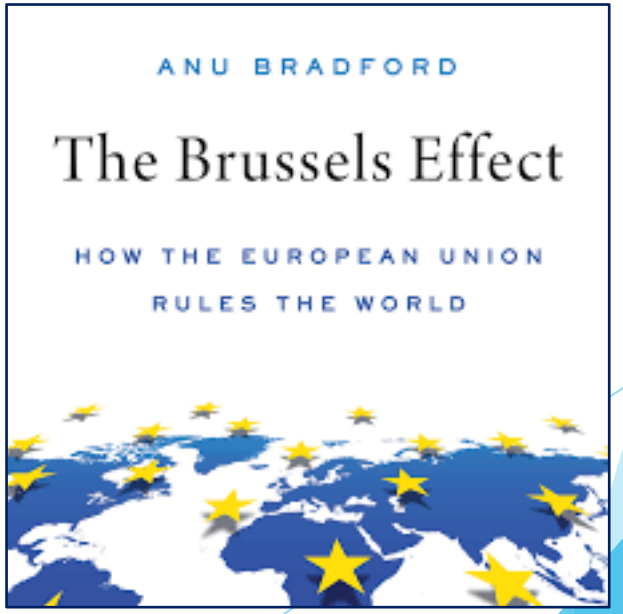
Competition Law: Substantive Rules

The main sources of EU competition law are Articles 101-102 TFEU.

EU competition law has largely taken inspiration from US antitrust law (e.g., Sherman Antitrust Act of 1890; Clayton Antitrust Act of 1914). Its growth since WWII has followed the globalization of level playing field rules in business (e.g., in the World Trade Organization).

As we will see, in the global competition for competition law, the EU has now become the most influential provider of competition rules around the world: it is the so-called Brussels Effect.



Competition Law: Substantive Rules

The rationale and ideology underlying competition law have changed over time. Ordo-liberalism invited to see competition law as protecting the freedom of firms to compete. Since the 1990s, EU institutions have gradually embraced the view that competition law should also protect consumer welfare.

According to the ECJ, competition law protects "the interests of competitors or of consumers [and] the structure of the market and, in so doing, competition as such" (*GlaxoSmithKline Services Unlimited v. Commission*, Cases C-501/06 etc. [2009], para 63)

Also, at the beginning it was thought that competition law could offer collateral support to the pursuit of other goals (e.g., national culture or employment). Since the 1990s, a purist view emerged. Only in recent years the wind seems to be changing again.

Competition Law: Substantive Rules

Rationales and ideologies matter because they influence the way in which the technicalities of competition law are understood. Think of issues such as: What is a 'market'? What is market power? How should market power be measured? Which consequences of market power should be taken into account? Should a formalistic view of competition law be embraced (i.e., certain behaviors are prohibited per se), or rather should the focus be on the effects of anti-competitive behavior (i.e., a behavior is prohibited only if it produces some effects)?

Finally, an additional layer of complexity stems from the fact that EU competition law coexists with national competition laws, which have their own rules and often also have their own rationales and ideologies.

Let us start by analyzing some common features of Articles 101 and 102 TFEU.

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Article 101 TFEU: “1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market [...].
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.”

Article 102 TFEU: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”.

Both provisions apply to acts carried out by undertakings pursuing an economic activity and affecting trade between Member States.

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The meaning of 'undertaking' is the same under both Articles.

Società Italiana Vetro SpA v. Commission, T-68/89 [1992]

An undertaking is any "entity engaged in an economic activity" (*Höfner and Elsner v. Macrotron*, Case C-41/90 [1991], para 21).

Acts of employees (*Jean Claude Becu*, C-22/98 [1999], para 26) and agents (*Bundeskartellamt v. Volkswagen*, C-266/93 [1995], paras 18-19) are referred to their employer/principal.

The activity of a subsidiary company is referred to its parent company when the latter exercises decisive influence over the subsidiary (*Imperial Chemical Industries v. Commission*, C-48/69 [1972], paras 125-146). Where the parent holds a 100% of the subsidiary, a rebuttable presumption arises that it exercises decisive influence (*P Akzo Nobel v. Commission*, C-97/08 [2009], para 60). Otherwise, the parent company's influence is ascertained on a case-by-case basis: *Istituto Chemioterapico Italiano SpA v. Commission*, Joined Cases C-6/73 and C-7/73 [1974]).

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Even the State can be defined as an ‘undertaking’.

The State entity qualifies as an undertaking when it provides job procurement services: *Höfner and Elsner v. Macrotron*, Case C-41/90 [1991], paras 22-23.

Consumer purchasing is not an economic activity: *Béguelin Import Co v. SAGL Import Export*, C-22/71 [1971].

The activity of an undertaking must have a cross-border effect.

Activities have cross-border effects when it may be held with a “sufficient degree of probability, on the basis of a set of objective factors […], that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market […] influence must not be insignificant” (*Asnef-Equifax v. AUSB*, C-238/05 [2006], para 34). See also *Javico International and Javico v. Yves Saint Laurent Parfums*, C-306/96 [1998]

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Although not explicitly mentioned, it is commonly held that some exclusions apply to both Articles 101 and 102 TFEU.

Article 39 TFEU on the objectives of the common agricultural policy

Article 346(1) TFEU: "The provisions of the Treaties shall not preclude [… that …] (b) any Member State may take such measures as it considers necessary for […] the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes."

Article 151 TFEU: "The Union and the Member States […] shall have as their objectives the promotion of employment, improved living and working conditions."

Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie, C-67/96 [1999]

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Article 101 TFEU: "The following shall be prohibited [...]: all agreements between undertakings, decisions by associations of undertakings and concerted practices [...]"

Reference is to joint (rather than individual) conduct.

An agreement is "a concurrence of wills [...] on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market" (*Bayer AG v. Commission*, T-41/96 [2000], para 67).

A concerted practice is a knowing coordination for competition (*Imperial Chemical Industries v. Commission*, C-48/69 [1972], paras 64-65).

A decision by associations of undertakings is an institutionalized form of cooperation, when undertakings act through a collective structure (*Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99 [2002].

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Article 101 TFEU: "The following shall be prohibited [...]: all agreements [...] which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

Agreements should restrict competition by object or by effect.

In determining whether an agreement restricts competition by object, "regard must be had inter alia to the content of its provisions, the objectives it seeks to ascertain and the economic and legal context of which it forms part" (*GlaxoSmith-Kline Services Unlimited v. Commission*, C-501/06 P [2009], para 58).

In case of agreements restricting competition by object, it is not necessary to demonstrate that the agreement has anti-competitive effects.

The category should be interpreted restrictively: *Groupement des Cartes Bancaires (CB) v. Commission* (C-67/13 P [2014]).

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Examples of such agreements are:

- horizontal cartels aiming to reduce the quality of a product or service or consumer choice, limiting output or dividing markets;
- horizontal cartels aiming to reduce capacity;
- horizontal cartels aiming to exchange information designed to fix purchase or selling prices;
- vertical agreements to fix or set the minumum prices at which retailers can seel the contract product;
- vertical agreements to confirm absolute territorial protection on a distributor or otherwise partition national markets.

European Night Services v. Commission, Joined Cases T-374/94 etc. [1998]

Competition Authority v. BIDS, C-209/07 [2008]

T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, C-8/08 [2009]

SA Binon & Cie v. SA Agence et Messageries de la Presse, C-243/83 [1985]

GlaxoSmithKline Services [2009]; *Pierre Fabre v. Président de l'Autorité de la concurrence*, C-439/09 [2011])

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In case of agreements restricting competition by effect, it is necessary to demonstrate that the agreement has anti-competitive effects, that is, that it on forecloses competitors from entering or expanding in the market.

"A beer supply agreement is prohibited [...] if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. [...] The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement" (*Delimitis v. Henninger Bräu* (C-234/89 [1991], para 27).

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An anti-competition agreement by object or by effect might not be prohibited if it falls within the exceptions laid down by Article 101(3) TFEU, or in the scope of one of the Block Exemptions Regulations or of the De Minimis notice of the European Commission.

Article 101(3) TFEU: "The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement [...] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

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It is hard to prove that the conditions for applying Article 101(3) TFEU are met. Much easier is to rely on one of the many Block Exemptions Regulations.

Council Regulation (EC) 169/2009 (transport by rail, road and inland waterway)
Council Regulation (EU) 2022/720 (vertical agreements)
Council Regulations (EC) 1217/2010 and 1218/2010 (horizontal agreements)
Council Regulation (EC) 316/2014 (technology transfer agreements)

Agreements falling within a Block Exemptions Regulation are automatically exempt from the prohibition of Article 101(1) TFEU. Most of the Regulations contain market-share thresholds and a list of 'hardcore restraints' which, if included within the agreement, preclude the application of the block exemption.

Council Regulation (EC) 2022/720 applies only if the undertakings' market shares is inferior to 30% of the relevant market, and their agreement does not incorporate provisions fixing or setting minimum selling prices, territorial restrictions and restriction of sales to end-users.

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Another exemption route (for anticompetitive agreements by effect) is to prove that the agreement does not appreciably affect the internal market trade.

"An exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the [...] protection, escape the prohibition laid down in Article [101(1) TFEU]" (*Völk v. Vervaecke*, C-5/69 [1969], para 3.

European Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU [2014]: an anti-competitive agreement by effect is likely to be of minor importance when the parties occupy less than 10% or 15% of the market, depending on whether the agreement is or not between (actual or potential) competitors.

The De Minimis rule does not apply to agreements restrictive by object: *Expedia Inc v. Authorité de la Concurrence*, C-226/11 [2012], para 38.

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Article 102 TFEU: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”.

Two essential elements are necessary for Article 102 TFEU to apply: an undertaking’s dominant position and the abuse of such position.

A dominant position “enables [an undertaking] to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition” (*Hoffmann-La Roche v. Commission*, C-85/76 [1979], paras 38-39).

An undertaking is independent when it has market power and the ability to maintain high prices (*AstraZeneca v. Commission*, C-457/10 P [2012]).

Competition Law: Substantive Rules

To prove dominance, it is first necessary to determine the relevant market (from both a product and a geographic perspective).

Secondly, it must be determined whether the undertaking is dominant on the relevant market. This is done by looking at market shares and other factors indicating dominance.

Where market shares are very large and have been held for some time, this is a good proxy for dominance (*Hoffmann-La Roche v. Commission*, C-85/76 [1979], para 41). If market shares are above 50%, there is a presumption of dominance (*AKZO Chemie v. Commission*, C-62/86 [1991], para 60).

Yet, in addition to market shares, the following should also be considered: the breadth of the market of the rival undertakings; the development in time of the dominant firm's market shares; the dynamics of competition in the market; whether or not there are barriers to entry or expansion in the market; and buyer power.

Competition Law: Substantive Rules

According to the Commission's Guidance on the Commission's Enforcement Priorities in Applying Article 82 [now Article 102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings [2009], market shares should be only one of the many factors to be assessed for determining dominance. It is also important to examine constraints imposed on an undertaking by credible threats of future entry or expansion – where entry/expansion is "likely, timely and significant".

For Article 102 TFEU to apply, dominance is not enough: there should also be an abuse of dominance.

Although a finding of dominance is not a recrimination, a dominant firm does have a special responsibility "not to allow its conduct to impair genuine undistorted competition" (*NV Nederlandsche Vanden-Industrie Michelin v. Commission*, C-322/81 [1983], para 57.

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Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), article 5: “The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.

4. The gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels [...].

5. The gatekeeper shall allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using the core platform services of the gatekeeper.”

Competition Law: Substantive Rules

Article 102 TFEU: “Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Article 102 TFEU protects consumers not only from direct exploitation of market power, but also from conduct which, through its impact on the structure of competition, is detrimental to them indirectly (*Europemballage Corporation and Continental Can Company Inc v. Commission*, C-6/72 [1973]).

Competition Law: Substantive Rules

Examples of exploitative abuses are unfair prices and trading conditions. It is however hard to challenge exploitative abuses, because it is often hard to determine what the fair price and trading conditions are.

In 1999, the Commission held that the sale arrangements for entry tickets to the 1998 Football World Cup, which were operated by Comité francais d'organisation de la Coupe du monde de football 1998 (CFO), were exploitative. Customers could only purchase tickets from CFO if they provided a postal address in France: "only by entering into wholly arbitrary, impractical and exceptional arrangements [...] could most of the general public resident outside France have obtained tickets direct from CFO". The CFO's conduct "had the effect of imposing unfair trading conditions on residents outside France which resulted in a limitation of the market to the prejudice of those consumers. By discriminating against customers on the grounds of nationality, the behaviour was also inimical to the internal market objective" (Commission decision, *1998 Football World Cup*, Case IV/36.888 [1999]).

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It is also hard to draw a line between fair and exclusionary practices.

In the past, the Commission and the ECJ had interpreted the notion of exclusionary abuses quite broadly, holding that an exclusionary abuse might consist in the incorporation of an exclusive dealing obligation (a duty only to sell the dominant undertaking's products) (*Hoffmann-La Roche v. Commission*, C-85/76 [1979]) and in the refusal to supply a customer, when the latter is also a competitor (*Istituto Chemioterapico Italiano SpA v. Commission*, Joined Cases C-6/73 and 7/73 [1974]).

In its Guidance on the Commission's Enforcement Priorities in Applying Article 82 to Abusive Exclusionary Conduct by Dominant Undertakings [2009], the Commission has promised to focus only on cases where the exclusionary conduct of the dominant firm impairs competition by "foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare."

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A refusal by a vertically integrated dominant firm to deal with a downstream rival is an abuse only if access to the firm's products is indispensable for the rival to compete, and the refusal is likely to eliminate all competition on the secondary market (*RTE and ITP v. Commission*, C-241/91 P [1995]; *Oscar Bronner v. Mediaprint Zeitungs-und Zeitschriftenverlag*, C-7/97 [1998]). See also *AKZO Chemie v. Commission*, C-62/86 [1991] on predatory pricing.

The Commission and the CJEU interpret broadly also Article 102(c) TFUE, holding that it prevents dominant firms from impairing competitors through exclusionary price-cutting tactics (primary line injury), but also from performing price discrimination that distorts competition between downstream buyers (secondary line injury).

A dominant firm may argue that the abuse is technically/commercially necessary or justified or that is counterbalanced by objective economic advantages that benefit consumers: *British Airways v. Commission*, C-95/04 [2007], para 86.

Competition Law: Enforcement

The public enforcement of UE competition law is shared between the Commission and national competition authorities (NCAs) of the Member States (which are all part of the European Competition Network (ECN)).
Cases are allocated according to the principle of proximity: if a conduct affects competition within a given territory, the competence is of the relevant NCA; if the conduct affects a substantial part of the EU market, the case is for the Commission. Decisions of the NCAs and national judges cannot contradict previous decisions of the Commission.

Article 3 TFEU: "1. The Union shall have exclusive competence in the following areas: [...] (b) the establishing of the competition rules necessary for the functioning of the internal market [...]."

It should however be considered that each Member State has also its own anti-competition rules, that often predate EU ones.

Competition Law: Enforcement

Article 2598 of the Italian Civil Code: “Acts of unfair competition between competitors include:
(1) the use of names or distinctive signs capable of producing confusion with the names or distinctive signs legitimately used by others, or the slavish imitation of the products of a competitor, or the performance by any other means of acts that create confusion with the products and business of a competitor;
(2) the spread of news and opinions regarding a competitor’s products and business where such news and opinions are likely to create discredit, or the appropriation of the qualities of the products or of the enterprise of a competitor;
(3) the use of unfair and dishonest means to damage the business of another”.

Whoever engages in such a conduct might be obliged to terminate it and to eliminate its effects (Article 2599 of the Italian Civil Code), and to compensate the damage caused to its competitors (Article 2600 of the Italian Civil Code).

Competition Law: Enforcement

The public enforcement of UE competition law, originally, lied entirely in the hands of the European Commission, which was the only authority allowed to rule on the compatibility of an agreement with Article 101(3) TFEU. But the system was growing increasingly complex.

The situation changed with the adoption of Council Regulation (EC) 1/2003.

Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

The Regulation codified many rules developed by the Commission's practice and the ECJ's decisions, but also strenghtened the Commission's investigatory powers, established a presumption that agreements covered by block exemptions are allowed, removed the Commission's exclusive right to apply Article 101(3) TFEU and therefore empowered Member States' NCAs to apply Articles 101 and 102 TFEU directly.

Competition Law: Enforcement

Article 1, Council Regulation (EC) No 1/2003: “2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.”

Article 5, Council Regulation (EC) No 1/2003: “The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: requiring that an infringement be brought to an end; ordering interim measures; accepting commitments; imposing fines, periodic penalty payments or any other penalty provided for in their national law.”

Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Competition Law: Enforcement

Further, in order to ensure the coordination of the work of national competition authorities and their cooperation with the Commission, the latter set up in 2002 the European Competition Network (ECN), comprising all NCAs and the Commission.

European Commission, Notice on cooperation within the Network of Competition Authorities [2004]: each competition case should be handled by a single authority. When starting a case, a NCA should inform the ECN of the procedure, thus allowing other national authorities or the Commission to claim to be better placed. The Commission might be better placed to intervene in three scenarios: when the activity affects three or more Member States; when the competition is closely linked to other EU law prohibitions; or when the case requires the adoption of a Commission decision to develop competition policy when a new competition issues arises or to ensure effective enforcement.

Competition Law: Enforcement

Since the powers now recognized to NCAs are modelled on those historically recognized to the Commission, it is important to see the Commission's anti-competition procedure. The procedure is an administrative procedure with inquisitorial traits that has been adapted through time to meet hightened expectations of compliance with human rights principles.
The Commission may start the procedure ex officio.

> Article 17, Council Regulation (EC) No 1/2003: "Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors."

However, the Commission may also start the procedure after receiving information by the ECN, a complainant, or a leniency applicant. In these cases, the Commission has the discretion to decide whether to start a procedure.

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Article 2, Council Regulation (EC) No 1/2003: "In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."

Proving infringement of competition law is a hard task.

To prohibit an agreement between a supplier and its wholesalers, the Commission has to prove that there was active agreement between the parties: *Bayer AG v. Commission*, C-2 and C-3/01 P [2004].

Proof of parallel behavior by suppliers in fixing the prices of their products is not per se evidence of a concerted practice: *Re Wood Pulp Cartel: Ahlstrém Osakeyhtié v. Commission*, Joined Cases C-89/85 etc [1993].

Competition Law: Enforcement

Article 18, Council Regulation (EC) No 1/2003: “1. […] [T]he Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information. […]
3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.”

This provision might potentially clash with the right to defence and the right to the presumption of innocence covered by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and by Article 48 of the EU Charter of Fundamental Rights.

Competition Law: Enforcement

The Commission cannot "require disclosure of the 'details of any system which made it possible to attribute sales targets or quotas to the participants' [... thus requiring] an acknowledgment of its participation in an agreement intended to limit or control production or outlets or to share markets." (*Orkem v. Commission*, C-374/87 [1989]

The Commission cannot ask parties to disclose the communications between the undertaking and its lawyers, because the latter are covered by the lawyer's privilege (*AM&S Europe Ltd v. Commission*, C-155/79 [1982], para 24).

However, the lawyer-client privilege only applies between the undertaking and external lawyers and only insofar as the communication refers to matters linked with the subject matter of the investigation.

Competition Law: Enforcement

Article 20, Council Regulation (EC) No 1/2003: “1. […] [T]he Commission may conduct all necessary inspections of undertakings […]
2. The officials […] authorised by the Commission […] are empowered: (a) to enter any premises, land and means of transport of undertakings […]; (b) to examine the books and other records related to the business […]; (c) to take or obtain in any form copies of or extracts from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking […] for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers […]
4. Undertakings […] are required to submit to inspections ordered by decision of the Commission. […]
7. If the assistance […] requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for.”

Competition Law: Enforcement

Article 21, Council Regulation (EC) No 1/2003: "1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection [...], are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings [...] concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.
3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned."

Article 20 of Regulation (EC) No 1/2003 might clash with the right to privacy covered by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the European Court of Human Rights, Article 8 covers private as well as business premises and prior judicial authorisation is always necessary to supersede a person's right to intimacy (*Société Colas Est and Others v. France*, 37971/97 [2002]).

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No clash with the ECHR exists according to the CJEU.

Article 20(7) of the Regulation (EC) 1/2003 makes it clear that prior judicial authorization is not always necessary; furthermore, the defence rights of the parties are guaranteed by the circumstance that, in case of abuse by the Commission of its investigatory powers, that abuse may be challenged in court and the Commission will be prevented from using the evidence that it obtained illegally (*Deutsche Bahn v. Commission*, C-583/13 P [2015]).

The clash runs deeper.
Under ECtHRs case-law (*Menarini Diagnostics v. Italy*, 43509/08 [2011]), whoever is involved in proceedings with a substantial criminal character must enjoy the protection of Article 6 ECHR, such as the right of defence, the right to an oral hearing, the prohibition of double jeopardy, the right of judicial review, the right to be judged by an independent court, the right to a proportionate sanction, and so on and so forth.

Competition Law: Enforcement

Article 27 of the Regulation (EC) 1/2003: "1. Before taking decisions [...], the Commission shall give the undertakings [...] which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.
2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets".

The hearings involve the Commission, the NCAs and the undertakings.
After the hearings, the Commission prepares a decision as a collegiate body.

The decision should be fully reasoned: *ACF Chemiefarmia v. Commission*, C-41/69 [1970], paras. 76-81.

Competition Law: Enforcement

Article 7 of the Regulation (EC) 1/2003: “1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings [...] concerned to bring such infringement to an end.
For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.
Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy”.

Structural remedies are rarely imposed.

Competition Law: Enforcement

Article 23 of the Regulation (EC) 1/2003: “2. The Commission may by decision impose fines on undertakings [...] where, either intentionally or negligently:
(a) they infringe Article 81 or Article 82 of the Treaty; or
(b) they contravene a decision ordering interim measures under Article 8; or
(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.
For each undertaking [...] participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year. [...]
3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.”

The European Commission has been repeatedly accused of imposing too high fines and too arbitrarily.

European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) 1/2003 [2006]

Competition Law: Enforcement

European Commission, Guidelines on the method of setting fines [2006]: the basic amount of the fine is up to 30% of the value of the sales of the goods to which the infringement relates, multiplied for the years of the infringement and augmented or diminished considering aggravating or mitigating circumstances. Fines are not be imposed to the undertaking that informed the Commission of the existence of an anti-competitive practice and is reduced for the first understaking which started collaborating.

Article 9 of the Regulation (EC) 1/2003: “1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.”

Competition Law: Enforcement

The parties involved in a commitment procedure have limited rights.

Commitment decisions cannot be challenged before EU courts: *Commission v. Alrosa*, C-441/07 P, [2010].

Article 31 of the Regulation (EC) 1/2003: "The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed."

Public enforcement of antitrust is complemented by private enforcement.

Articles 101 and 102 TFEU have direct effects: *BRT v. SABAM*, 127/73 [1974]. Persons injured by an infringement of Article 101 or 102 TFEU may sue its author before national courts seeking a declaration of nullity, an injunction, and damages compensation: *Courage Ltd v. Crehan*, C-453/99 [2001]; *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, Joined Cases C-295/04 etc. [2006].

Competition Law: Enforcement

Private litigation is however deterred by a number of obstacles, since litigation is uncertain, slow and expensive.

The Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union now attempts to facilitate damages actions before national courts by facilitating evidence and ensuring the coordination of private and public enforcement. Yet Article 11(4) Directive provides that "a defendant who has benefited from leniency will not be jointly and severally liable for the infringement unless the claimants are unable to secure full compensation from other cartel members".

The Directive 2020/1828 on representative actions for the protection of the collective interests of consumers now enables collective claims for redress at the EU level in cases where a trader fails to comply with legislation aimed at protecting consumers and users.

Competition Law: Enforcement

EU competition law has now fully separated itself from its US counterpart and historical model.

United States	European Union
• US antitrust law protects consumer welfare	• EU competition law protects consumer welfare and market integration
• the abuse of dominant position is rarely sanctioned	• finding abuse of dominant position is common
• US antitrust law is mostly enforced by private litigants	• EU competition law is mostly enforced through administrative actions
• US antitrust law is backed by criminal sanctions	• EU competition law relies on administrative fines

Competition Law: Enforcement

Further, as we already noted, EU competition law has overall gone more global than its US counterpart.

The majority of jurisdictions that have adopted competition law regimes since the 1957 have laws that resemble more closely EU competition law rather than US antitrust laws.

The Europeanization of competition regulation across the world is partly linked to the EU's efforts to expand its regulations through trade and political agreements, and to the fact that its regulatory standards are more stringent than US ones. In part, the globalization of the EU model is connected to its ability to accommodate diverse policy goals, its tendency to defer less to markets and more to governments, and its statutory form, that makes it easier to copy and paste it.