

# Essential EU Competition Law in Charts

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# PART ONE: EU COMPETITION LAW

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## Chart C5

## Comparison of Arts. 101 and 102 TFEU

### Topic:

Even though they regulate different situations, Arts. 101 and 102 TFEU may apply simultaneously.

### Arts. 101 and 102 TFEU

#### Two distinct prohibitions ...

Arts. 101 and 102 TFEU seek to achieve the same aim (namely the maintenance of effective competition within the internal market) on different levels; *Continental Can* (1973).

#### Content

##### Art. 101(1) TFEU

Prohibition of **collusive conduct** between two or more independent undertakings, which may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition

See **Chart C6**

##### Art. 102 TFEU

Prohibition of the **abuse of a dominant position** of one undertaking (or of two or more connected undertakings), which may affect trade between Member States

See **Chart C28**

#### Number of undertakings involved

Conduct must be bi- or multi-lateral, so-called "collusive conduct".

See **Chart C7**

Conduct may be strictly unilateral (conduct of one single undertaking). Alternatively: collective dominance.

See **Chart C29**

#### Nature of the prohibition

Prohibited in principle; exemptions may apply:

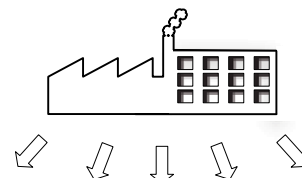
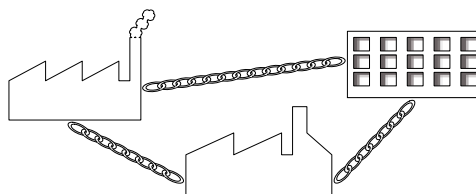
- Individual exemptions under Art. 101(3) TFEU;
- Block exemptions for certain types of cases (regulations).

See **Chart C16**

Absolute prohibition:

- No exemptions or derogations under Art. 102 TFEU;
- However, objective justification may prevent the conduct from being defined as abusive.

See **Chart C32**



#### ... which may, however, apply simultaneously

E.g. participation in a collusive practice may involve the abuse of a dominant position; *Hoffmann-La Roche* (1979); compare also *Piau* (2005).

## Chart C7

## Art. 101 TFEU: an overview

### Topic:

Art. 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, if these may affect trade between Member States and if they have as their object or effect the prevention, restriction or distortion of competition.

### Art. 101(1) TFEU: prohibition of certain conduct between undertakings as incompatible with the internal market

Directly effective prohibition; *BRT v SABAM* (1974)

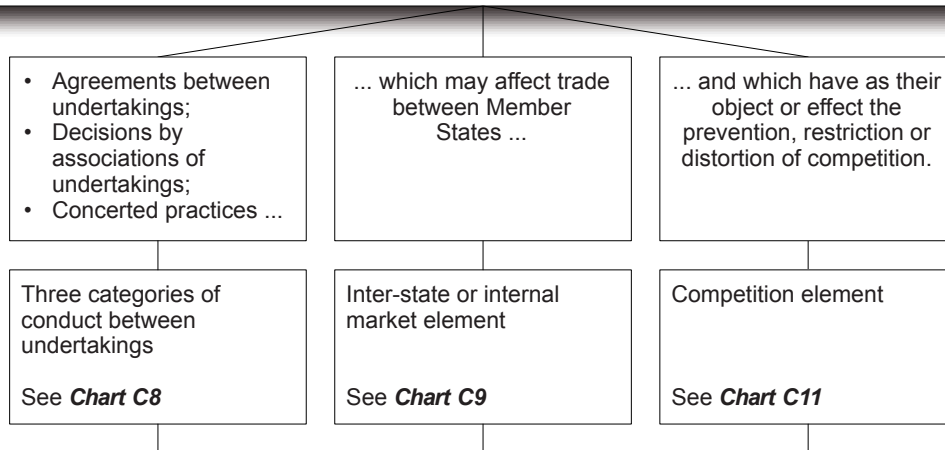
### Collusive conduct

The action must involve two or more independent undertakings; single economic entities are excluded.

Examples of joint action that does not fall under Art. 101(1) TFEU:

- Parent company and subsidiary, if the subsidiary has no real freedom to determine its course of action in the market, and if the conduct is concerned merely with the internal allocation of tasks; *Centrafarm* (1974), *Viho* (1996);
- Principle and agent relationships where the agent is not an independent economic operator; *CEEES* (2006), *CEPSA* (2008); see **Chart C23**;
- Collective agreements between employers and workers that pursue social policy objectives; *Albany* (1999), *Van der Woude* (2000).

### Three decisive elements as mentioned in Art. 101(1) TFEU



### Consequence

Conduct meeting the above conditions is contrary to EU law ("prohibited as incompatible with the internal market", Art. 101(1) TFEU; in the case of agreements and decisions: automatically void, Art. 101(2) TFEU) ...

... unless a block exemption or an individual exemption under Art. 101(3) TFEU applies (see **Chart C16**) or the case is covered by Art. 106(2) TFEU (see **Chart C45**).

Note: the finding of an infringement must be limited only to those parts of a contract which constitute the infringement as long as they are severable from the rest of the agreement; *Consten and Grundig* (1966).

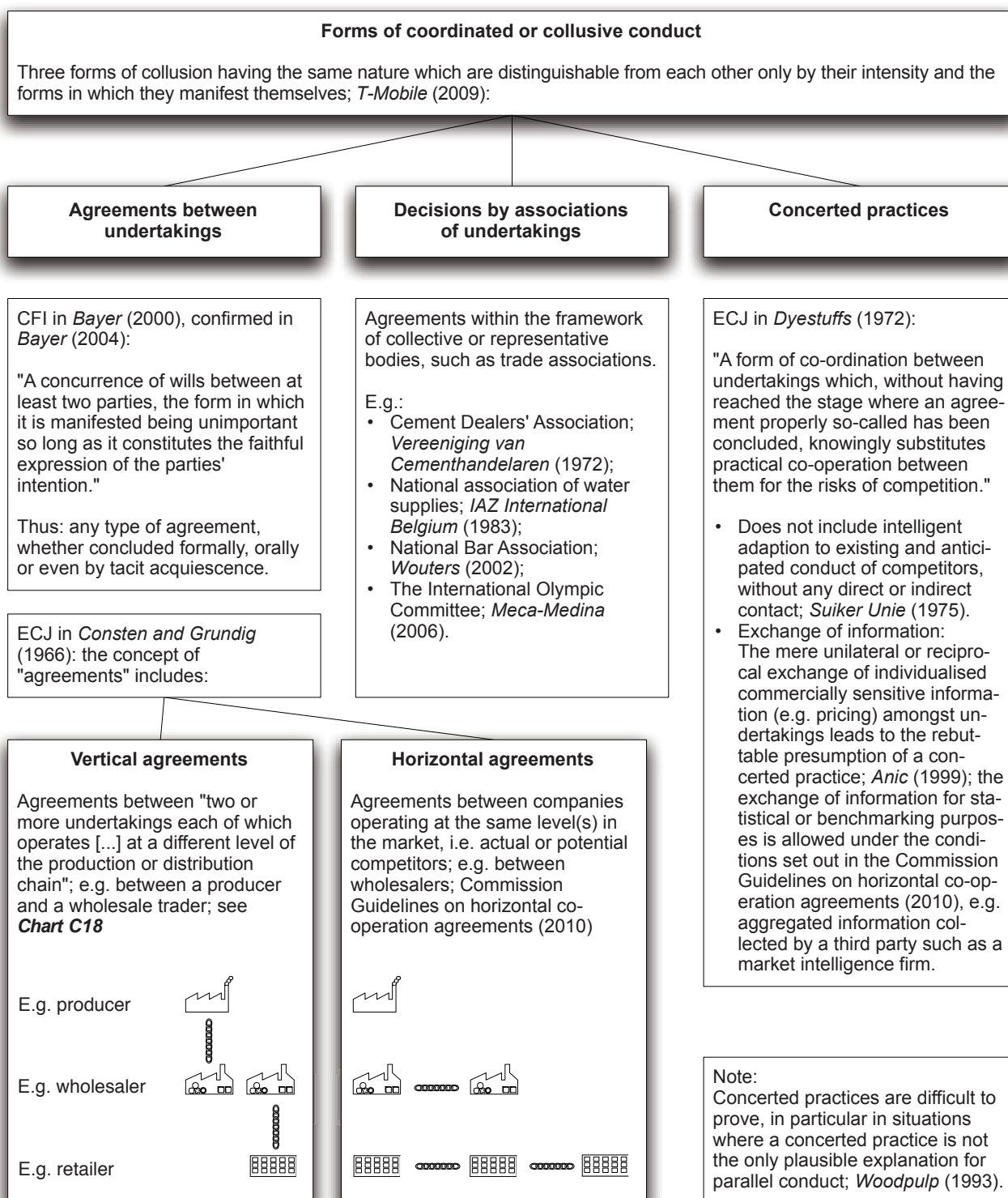
## 2.1.1 Art. 101 (1) TFEU

### Undertakings' conduct under Art. 101(1) TFEU

### Chart C8

#### Topic:

The conduct prohibited by Art. 101(1) TFEU includes three forms of coordinated action between two or more undertakings ("collusive conduct").



## 2.1.1 Art. 101 (1) TFEU

### The *de minimis* rule regarding effect on competition

### Chart C12

#### Topic:

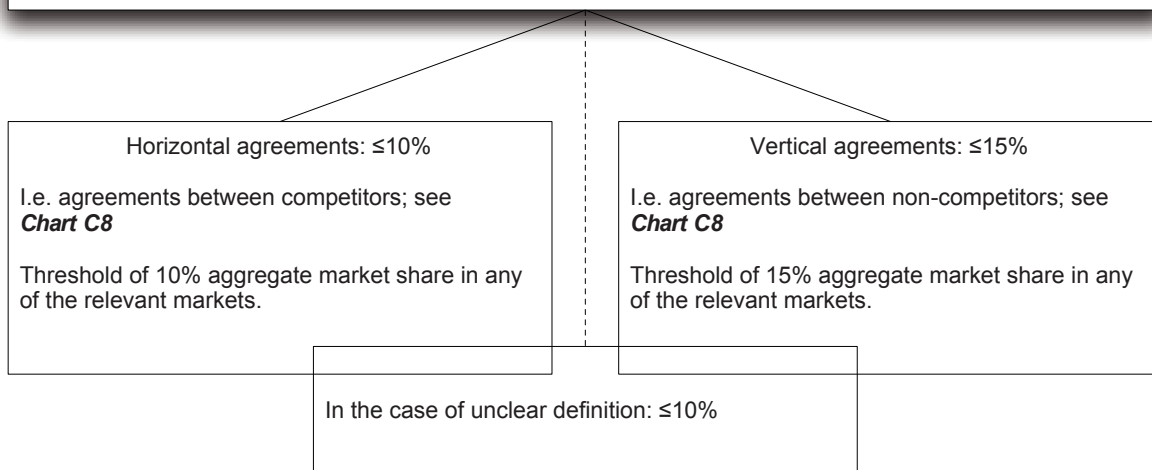
Art. 101(1) TFEU does not cover conduct which has an insignificant effect on competition.

#### *De minimis*: appreciable effect on competition

Art. 101(1) TFEU applies only where conduct has (or is intended to have) an appreciable effect on competition.

Guidance from the Commission through the Commission Notice on agreements of minor importance (2001):  
Art. 101(1) TFEU does not apply where certain market share thresholds are not exceeded and where there are no hardcore restrictions.

#### Thresholds:



In the case of a cumulative foreclosure effect of parallel networks of similar agreements having similar effects on the market: ≤5%.

In all cases:  
Threshold may be exceeded by 2% within two successive calendar years.

#### Practical consequence

In the case of undertakings with market shares below the relevant thresholds, the Commission will not institute proceedings (see **Chart C35**), unless the agreement contains a hardcore restriction; see **Chart C13**.

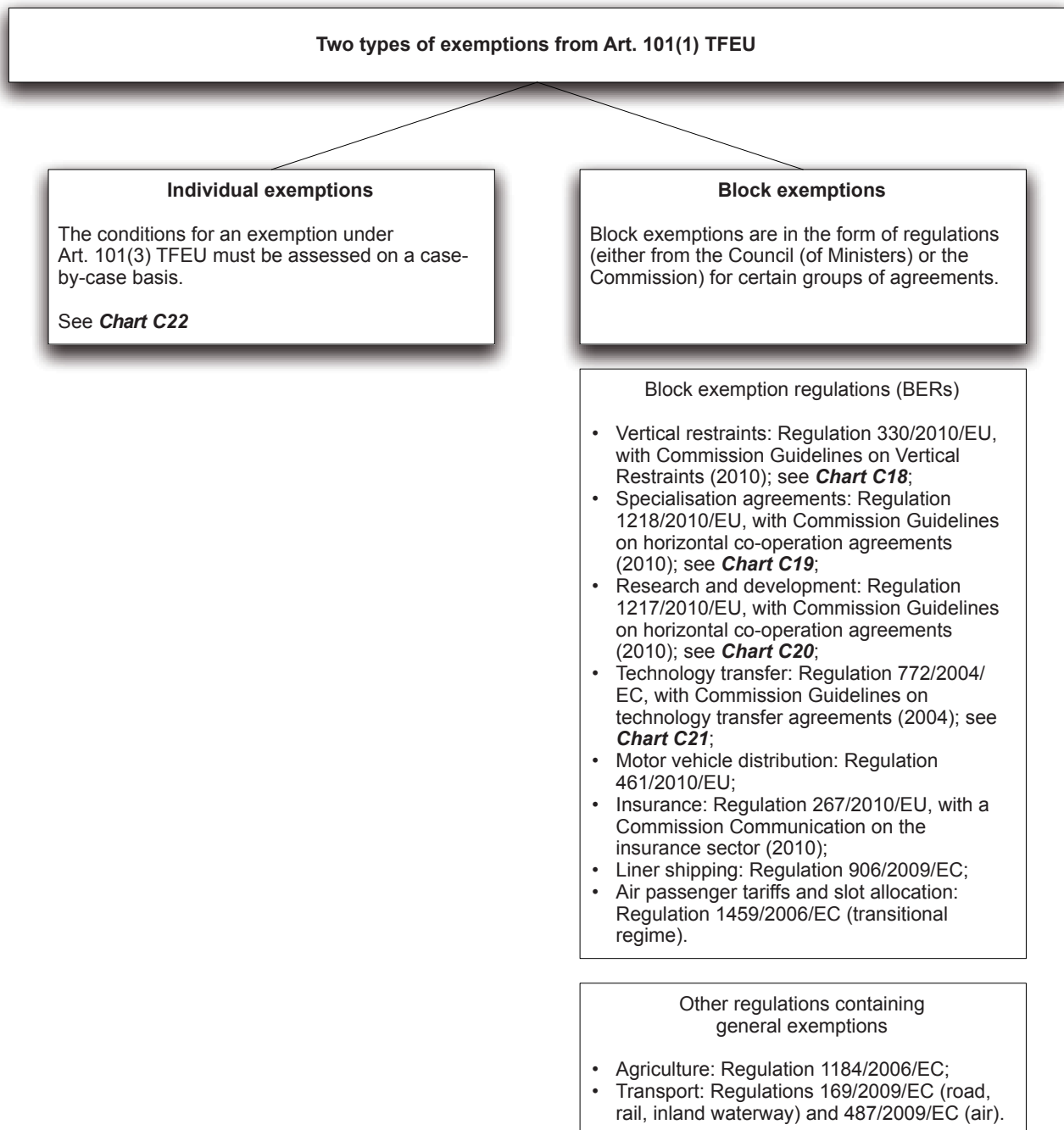
## 2.1.2 Exemptions from Art. 101 (1) TFEU

### Exemptions from Art. 101(1) TFEU

### Chart C16

#### Topic:

In certain situations and under certain conditions, the prohibition of Art. 101(1) TFEU does not apply. EU law provides for two types of so-called “exemptions from Art. 101(1) TFEU”, namely for individual exemptions and for block exemptions.



#### Note:

There is also a block exemption in the field of state aid; see **Chart C52**.



## Chart C19

## Block exemptions: specialisation agreements

### Topic:

The block exemption regulation on specialisation agreements concerns horizontal agreements (i.e. agreements between companies active on the same product market) under which undertakings agree to specialise in the production of certain products and to refrain from producing those products and to purchase them from the other party. A specialisation agreement is exempt if it complies with the terms of Regulation 1218/2010/EU.

### Block exemption: categories of specialisation agreements, Regulation 1218/2010/EU

#### "Specialisation agreement", Art. 1(1)

- Unilateral specialisation agreement: an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;
- Reciprocal specialisation agreement: an agreement between two parties which are active on the same product market by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties who agree to produce and supply them;
- Joint production agreement: an agreement by virtue of which two or more parties agree to produce certain products jointly.

#### Terms of the Regulation, Arts. 2-5

In principle, all arrangements that do not contain hardcore restrictions are allowed, if the combined market share of all parties is  $\leq 20\%$  (in the case of a subsequent rise, the exemption continues to apply for a limited period of time).

To the following type of agreement further conditions apply, Art. 2(2):  
Specialisation agreements relating to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation (primary object: see **Chart C21**).

#### Allowed restrictions

E.g.:

- Exclusive purchase or exclusive supply obligations or both for the products concerned, Art. 2(3)(a);
- Joint distribution of the products manufactured under the specialisation agreement, Art. 2(3)(b);
- Fixing of prices charged to immediate customers in the context of joint distribution; Art. 4(a);
- Provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of capacity and production volume in the context of a joint production agreement, Art. 4(b)(i);
- Setting of sales targets in the context of joint distribution, Art. 4(b)(ii).

#### Prohibited restrictions

Hardcore restrictions as listed in Art. 4:

- Fixing of prices;
- Limitation of output or sales outside a joint production agreement and joint distribution;
- Allocation of markets or customers.

Note:

Art. 6 establishes a transitional regime until 31 December 2012 for agreements already in force on 31 December 2010 and complying with the former block exemption regulation on specialisation agreements (Regulation 2658/2000/EC).

## 2.1.2 Exemptions from Art. 101 (1) TFEU

### Individual exemption under Art. 101(3) TFEU

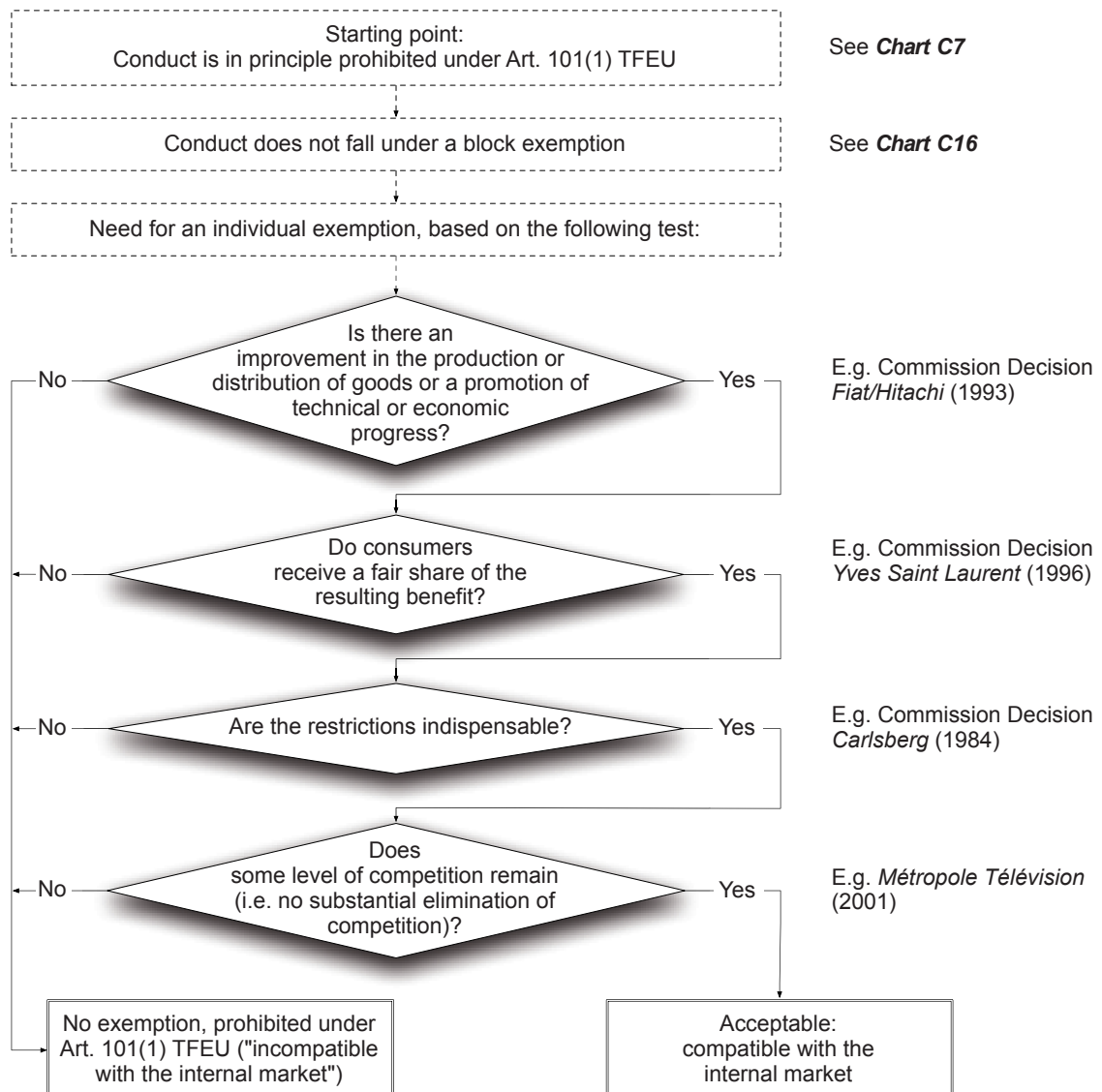
### Chart C22

#### Topic:

In order to benefit from an individual exemption under Art. 101(3) TFEU, the conduct of undertakings needs to fulfil the conditions laid down in Art. 101(3) TFEU.

#### Individual exemption under Art. 101(3) TFEU: a test with four cumulative elements

Commission Guidelines on the application of Art. 81(3) of the Treaty (2004)



#### Application in practice

Under Regulation 1/2003/EC, individual exemptions are based on self-assessment, which is, however, subject to control by the national competition authorities (NCAs), the national courts and arbitrators, and is subject to control by the Commission, the General Court and the Court of Justice; see **Chart C33**.

## 2.1.3 Selected issues within the scope of Art. 101 TFEU

### Joint venture agreements

### Chart C26

#### Topic:

Joint venture ("JV") agreements may fall under Art. 101(1) TFEU. In the case of JV agreements on a full-function JV with a Union dimension, the Merger Regulation applies. In the latter case, supplementary clauses may fall under Art. 101(1) TFEU.

#### Joint ventures (JV) under EU competition law

##### Applicability of Art. 101(1) TFEU (or the Merger Regulation or both)

Depending on their nature, JVs fall under different provisions of EU competition law. There is a decisive distinction between full-function JVs and other JVs.

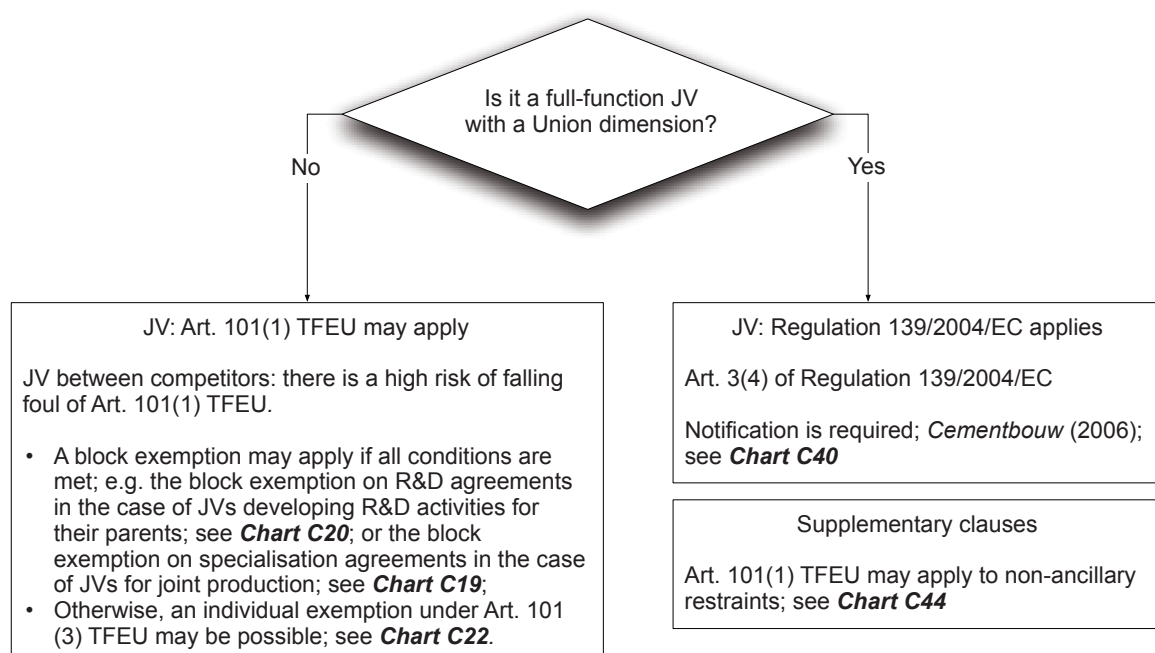
- Full-function JVs constitute concentrations under Regulation 139/2004/EC (Merger Regulation). The Regulation applies if the JV has a Union dimension. Supplementary clauses in the JV agreement that restrict competition may fall under Art. 101(1) TFEU;
- Other JVs may fall under Art. 101(1) TFEU.

##### "Full-function joint venture"

The JV performs as an autonomous economic entity (i.e. a full function JV) if:

- It has sufficient resources (finance, staff, other assets) to operate independently;
- Its activities are not auxiliary to its parents' activities (e.g. R&D activities for the parents);
- It has its own access to and presence on the market and it is not a mere sales agency of its parents, except for an initial start-up period;
- It operates on a lasting basis and not for a short finite duration (e.g. not on a project basis).

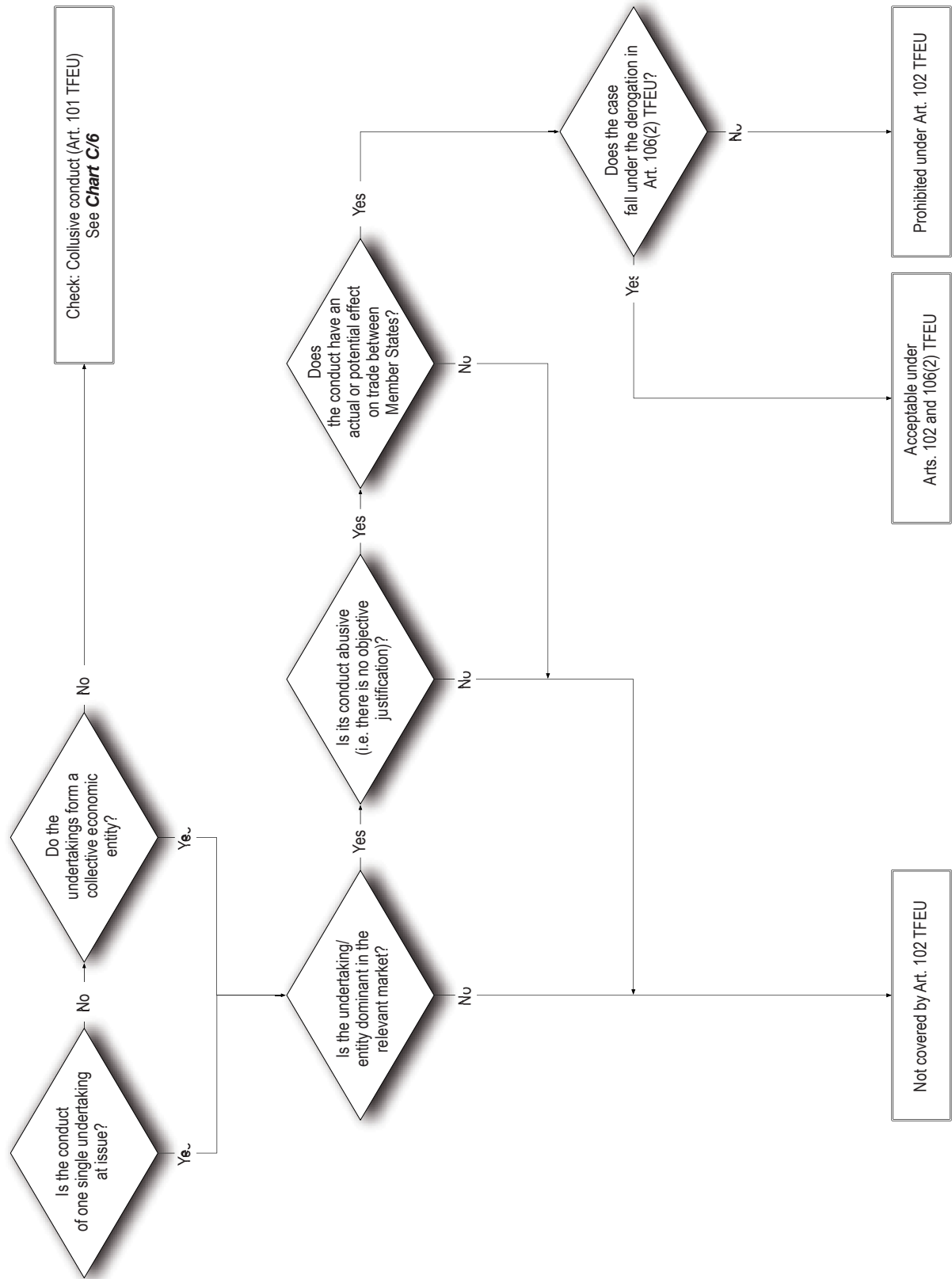
Commission Consolidated Jurisdictional Notice (2008), B.IV.



2.2 Art. 102 TFEU: abuse of a dominant position

Decision tree: abuse of a dominant position (Art. 102 TFEU)

Chart C28



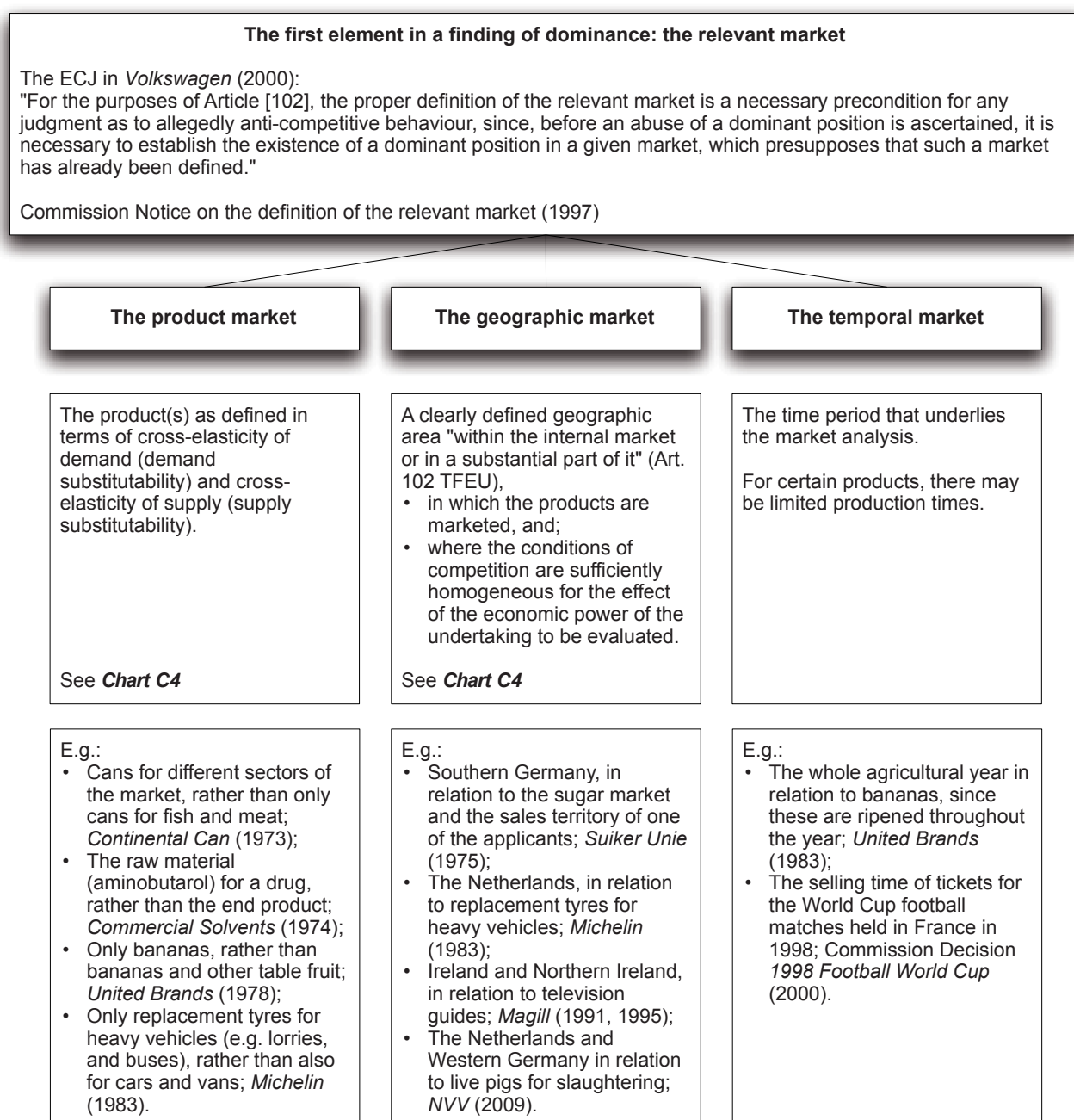
## 2.2 Art. 102 TFEU: abuse of a dominant position

### The relevant market

### Chart C30

#### Topic:

The existence of dominance is determined by the undertaking's power in the relevant market, which in turn is defined in terms of products, geography and time.



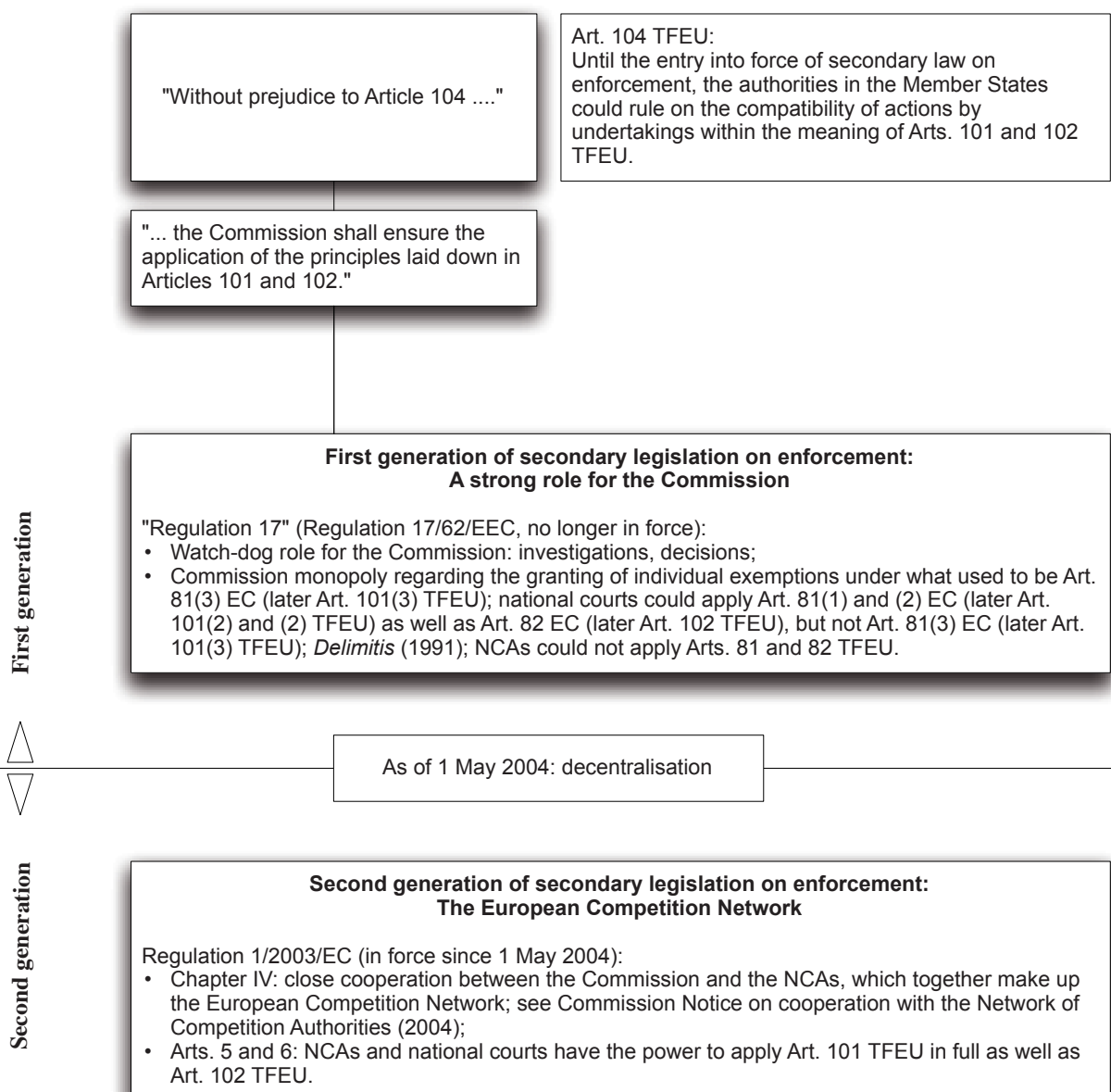
## Chart C33

## Enforcement of Arts. 101 and 102 TFEU

### Topic:

According to Art. 105 TFEU, the Commission is the main body in charge of ensuring the application of Arts. 101 and 102 TFEU. To some extent, Regulation 1/2003/EC has brought about decentralisation.

### Enforcement of Arts. 101 and 102 TFEU: the system foreseen by Art. 105 TFEU



## 2.4 Merger control

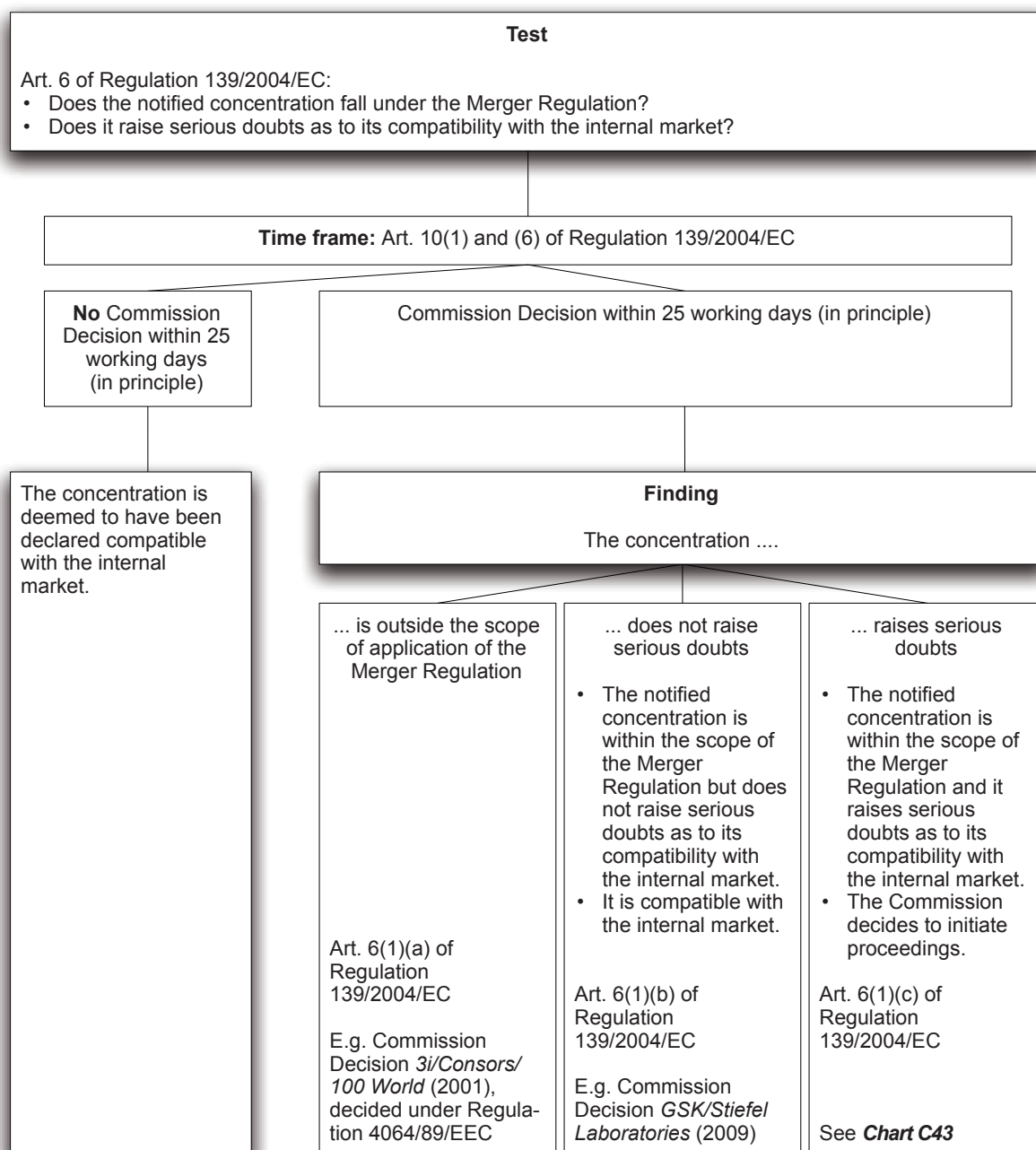
### Phase 1: examination of the notification

### Chart C42

#### Topic:

In the first phase of merger control proceedings, the Commission examines whether the notified concentration falls under the Merger Regulation and whether it raises serious doubts as to its compatibility with the internal market.

#### Phase 1: preliminary examination of the notification by the Commission



## Chart C49

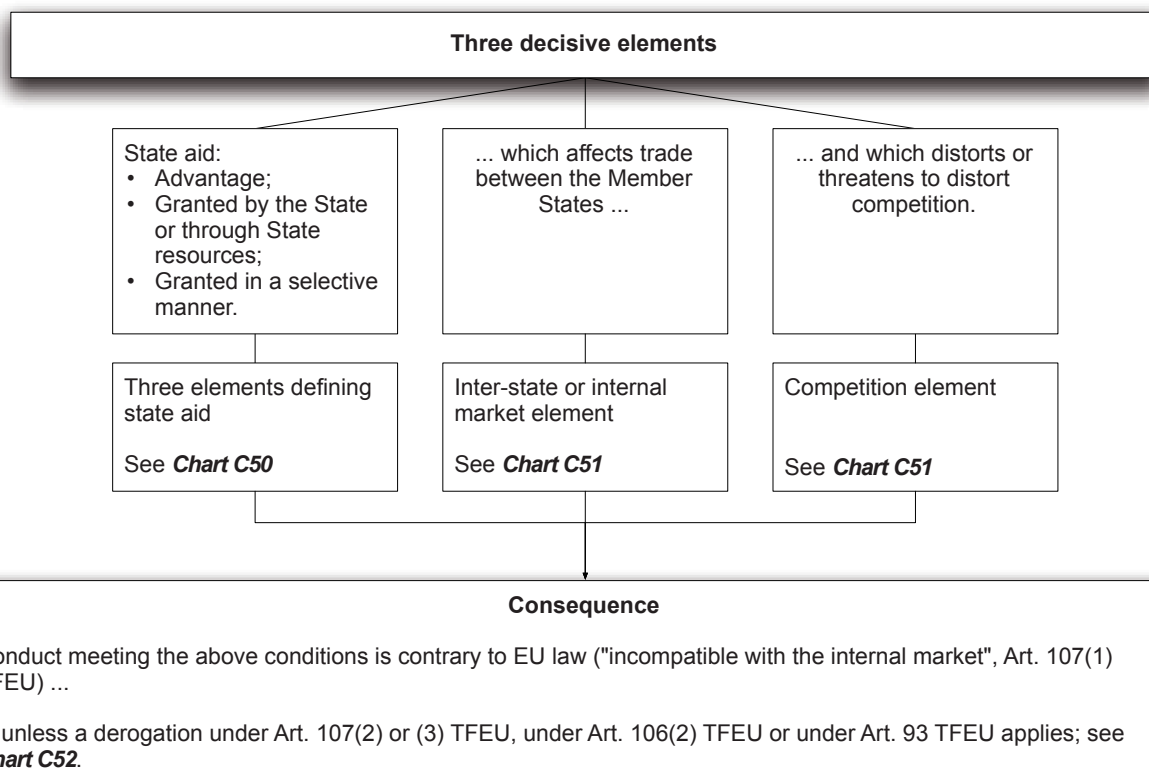
## Art. 107 TFEU: an overview

### Topic:

Under Art. 107 TFEU, state aid in any form whatsoever which distorts or threatens to distort competition is incompatible with the internal market in so far as it affects trade between Member States.

### Art. 107(1) TFEU: state aid incompatible with the internal market

Art. 107(1) TFEU is not directly effective; *Capolongo* (1973).



System of prior notification and examination of aid, Art. 108 TFEU: see **Chart C54**, **Chart C55**

#### Notes:

- Even though Art. 107(1) TFEU does not use the term "prohibition", the ECJ in fact treats it as such; e.g. *Commission v France* (1969), *Holland Malt* (2009).
- The Commission has published a number of Guidelines on the application of Art. 107 TFEU in certain, specific contexts; e.g.:
  - Commission Guidelines on State aid for rescuing and restructuring firms in difficulty (2004);
  - Commission Guidelines on State aid to promote risk capital investments in SMEs (2006);
  - Commission Guidelines on State aid for environmental protection (2008).



## Chart C53

### Compensation for public service obligations and state aid

#### Topic:

Compensation for public service obligations does not fall under Art. 107(1) TFEU provided that the conditions defined by the ECJ in the important *Altmark* (2003) decision are met.

#### Compensation for public service obligations

#### The ECJ's decision in the *Altmark* (2003) case

Compensation for public service obligations does not amount to state aid (i.e. it is not caught by Art. 107(1) TFEU) and does not have to be notified (see **Chart C54**) to the Commission if the following conditions are met:

##### Genuine public service

The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined.

E.g. *BUPA* (2008), *TV 2* (2008)

##### Parameters for the compensation

The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.

E.g. *Traghetti* (2010)

##### Amount of compensation

The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

E.g. *BUPA* (2008), *Deutsche Post* (2008, 2010), *TF1* (2009)

##### Cost analysis

Where the undertaking has not been chosen in a public procurement procedure, the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the necessary means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

E.g. *BUPA* (2008)



#### Cases where the *Altmark* conditions are not fulfilled

- Art. 107(1) TFEU applies;
- An exemption may be possible based on Art. 106(2) TFEU; see **Chart C45**.

#### Follow up on *Altmark* (2003)

- For certain types of public service obligations that do not meet the *Altmark* conditions: Commission Decision 2005/842/EC on State aid in the form of public service compensation (Art. 107(1) TFEU applies but there is an exemption under Art. 106(2) TFEU; no notification is required);
- For other cases, with the exception of transport and broadcasting: Commission Framework for State aid in the form of public service compensation (2005) (notification is required);
- Transport: in particular Regulation 1370/2007/EC (see **Chart C52**); broadcasting: Commission Communication on the application of State aid rules to public service broadcasting (2009).

## II. Explanatory text: EU Competition Law (Arts. 101 – 109 TFEU)

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The present text deals with EU competition law, i.e. the *competition law of the European Union*. The EU is a complex international organisation whose legal order was recently fundamentally revised through the so-called Lisbon revision. In order to understand the EU legal system, it is helpful to know that an important part of what is today EU law – including competition law – used to be the law of the European Community (EC; originally called the “European Economic Community”, or EEC), an international organisation older than, and separate from, the EU.

For those readers who are not familiar with this history, the development from the (original three) European Communities to the present EU is briefly described in the second part of this work.<sup>1</sup> Again for the benefit of readers not already familiar with EU law, the second part of this work further explains the place of EU competition law in the legal system of today’s EU and describes briefly some particularly important elements of the general system concerning the enforcement of EU law that are also relevant in the context of competition law.

### 1. INTRODUCTION AND OVERVIEW

In EU law, *the rules on the internal market are complemented by rules on competition*, as provided for in Part Three, Title VII, Chapter 1 of the TFEU (Arts. 101 TFEU et seq.). The underlying idea is that competition between economic operators is beneficial for them as well as for consumers, in particular by offering the latter a greater choice and better prices or quality or both. According to Arts. 119 and 120 TFEU, the economic policy of the EU and of the Member States is conducted in accordance with the principle of an open market economy with free competition.

Note that competition law in a broader sense may include other types of rules as well. EU law on public procurement (i.e. rules to be followed by the State when it buys goods and services from private companies) provides an example. Though part of EU social law, the principle of equal pay for men and women originally also had a competition law background.

EU competition law aims at *ensuring that competition in the internal market is not distorted* (Protocol No 27 on the internal market and competition) [Chart C1]. Competition law and free movement can apply simultaneously. They are functionally linked in particular through the requirement that for

<sup>1</sup> See below pp. ...<##to be inserted later>.

EU competition law to apply, the conduct in question must have a (potential) effect on trade between Member States. According to Art. 3(1)(b) TFEU, the EU has exclusive competence to set up the competition rules that are necessary for the functioning of the internal market. Conversely, their application and enforcement is a task of both EU and national authorities and courts.

Within this framework, the TFEU contains a *number of substantive and directly effective provisions on competition* (Arts. 101 TFEU et seq.) **[Chart C2]**. In addition, there is important secondary law on competition matters, based on what used to be Art. 83 EC (post-Lisbon: Art. 103 TFEU) or on what used to be Art. 89 EC (post-Lisbon: Art. 109 TFEU).

The Treaty chapter on competition distinguishes between *two main categories* of rules, namely rules on the conduct of so-called undertakings (Arts. 101 and 102 TFEU) and rules on State conduct (Arts. 107 TFEU et seq.). In between both is Art. 106 TFEU, which concerns undertakings with a special position under national law. On the level of secondary law, there are special rules on mergers (i.e. the Merger Regulation, which provides that concentrations with a Union dimension must be approved by the Commission) as well as on various specific economic sectors (e.g. on energy, postal services and transport). The sector-specific legislation is not discussed further in these materials.

## 2. CONDUCT OF UNDERTAKINGS

### 2.1 General remarks

The term “*undertaking*” is not defined in the TFEU. According to the ECJ, it must be interpreted broadly, so as to include all independent economic operators, regardless of their legal form and of whether they are publicly or privately financed **[Chart C3]**. It should be noted that, as distinct from free movement law, the conduct of *undertakings from outside the EU* is covered by EU competition law in so far as it may affect trade between Member States **[Chart C3]**. In the case of agreements, this is true even if the agreement was concluded outside the EU. Otherwise, it would be easy to circumvent the prohibition.

In the context of undertakings, *the relevant market* may be an important element for the examination of competition issues **[Chart C4]**. In its “Notice on the definition of the relevant market” of 1997, the Commission has explained the relevance and the meaning of both the product market and the geographical market.

The product market is based on the economic test of substitutability. It comprises all products (i.e. the goods or services offered by the undertakings in question) that are, from the perspective of consumers or producers, interchangeable with the product produced by the undertaking in question (demand-side substitutability and supply-side substitutability, respectively).

The geographical market concerns a clearly defined geographic area in which the products are marketed and where the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

The Treaty addresses *two types of conduct of undertakings* that may distort competition, namely the interplay between undertakings, such as cartels (so-called *collusive conduct*, Art. 101 TFEU), and the abuse of a dominant position (Art. 102 TFEU) **[Chart C5]**. Whilst the former necessarily involves more than one undertaking, the latter may involve only a single undertaking (so-called *unilateral conduct*). Alternatively, there may also be collective dominance of two or more undertakings, which form an economic entity.

### 2.2 Collusive conduct: Art. 101 TFEU

Art. 101 TFEU addresses *collusive conduct* of two or more undertakings **[Chart C6, Chart C7]**. The provision consists of three parts: Section 1 describes the prohibited conduct of the companies, Section 2 (read together with Section 1) states the legal consequence(s) of such conduct and Section 3 provides that certain types of conduct will not fall under Section 1 (in other words, that this conduct is not prohibited under EU law).

#### 2.2.1 The prohibition: the relevant conduct

Art. 101(1) TFEU states the conditions necessary for undertakings’ conduct to be prohibited **[Chart C7]**. Its starting point is that it concerns the interplay between more than one undertaking (“collusive conduct”). Further, there are three decisive elements for a finding that these companies’ conduct infringes Art. 101(1) TFEU.

##### 2.2.1.1 Three forms of relevant conduct

Under Art. 101(1) TFEU, there are *three forms of relevant action*, namely agreements by undertakings, decisions by associations of undertakings and so-called concerted practices (i.e. parallel conduct that is based on coordination without reaching the stage of an agreement) **[Chart C8]**. The three forms of collusion are distinguishable from each other by their intensity and the forms in which they manifest themselves.

In practice, the dividing line between agreements by undertakings and decisions by associations of undertakings, on the one hand, and concerted practices, on the other hand, may be difficult to identify.

For an *agreement* to exist there must be a “meeting of minds” that leads to a contract (written or unwritten). This is often described using the term “cartel”. *Agreements* may be of a horizontal (i.e. concluded by undertakings on the same level of production; e.g. producers) or of a vertical nature (i.e. concluded by undertakings on different levels of production; e.g. producers and wholesale traders). Art. 101(1) TFEU covers both types of agreements. As for *deci-*

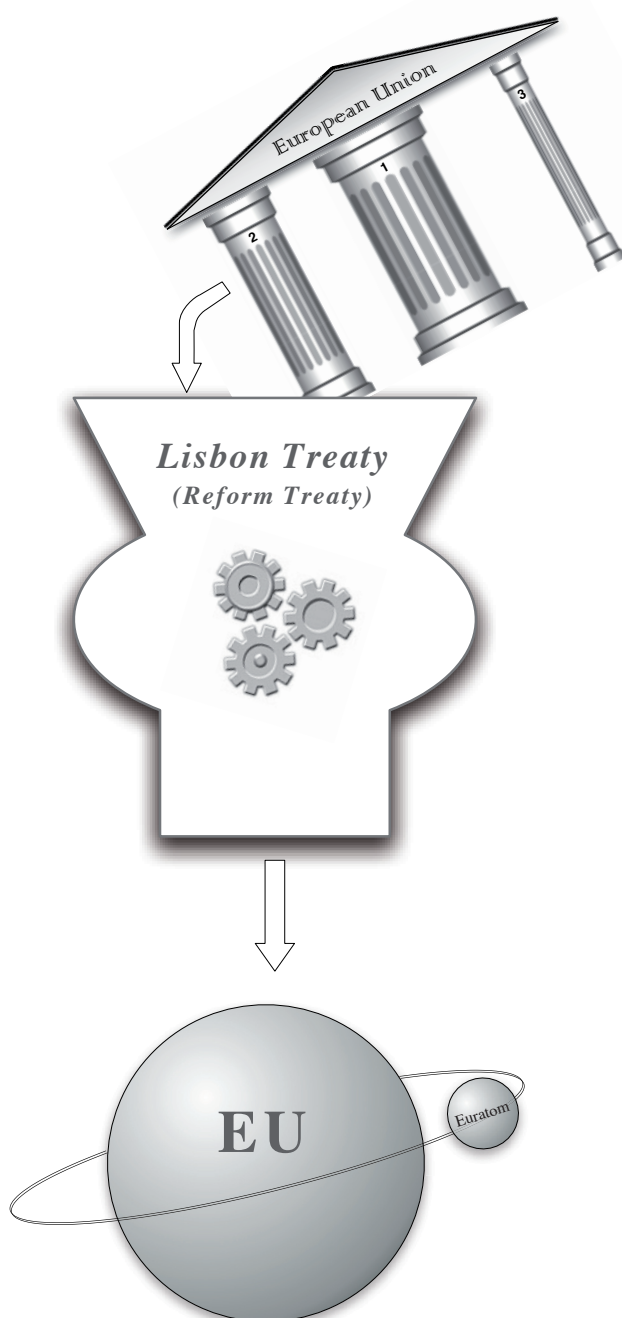
## The Lisbon revision

## Chart B3

**Topic:**

In order to revise the existing Community and EU Treaties, the Member States signed the Lisbon Treaty in 2007. It entered into force on 1 December 2009. The Lisbon Treaty does away with the European Union's traditional pillar structure.

## The effect of the Lisbon Treaty on the structure of the EU



The EU before the Lisbon Treaty:

Three Treaties (Nice versions):

- The EU Treaty (overall structure);
- The EC Treaty (first pillar);
- The Euratom Treaty (first pillar).

The Lisbon Treaty (Reform Treaty) contains the changes to the present Treaties.

The Lisbon Treaty does away with the EU's traditional pillar structure. The Union is no longer based on the European Communities. The EC is replaced and succeeded by the EU. Euratom exists outside the framework of the EU Treaty.

The EU and Euratom following the Lisbon Treaty:

Three Treaties (Lisbon versions):

- Two Treaties on the EU: the EU Treaty (TEU) and the Treaty on the Functioning of the European Union (TFEU; former EC Treaty);
- One Treaty on the Atomic Energy Community: the Euratom Treaty.

See **Chart B4**, **Chart B6**

**Chart B18****Specifically: the action for annulment****Topic:**

In the framework of an action for annulment, the ECJ examines the legality of (certain) acts by the European Union's political institutions (European Parliament, European Council, Council of Ministers, Commission), the European Central Bank and of bodies, offices and agencies of the Union. This also includes competition law measures.

**Action for annulment, Arts. 263 TFEU et seq.****Background:**

The nature of the EU as being based on the rule of law; *Les Verts* (1986).

**Purpose:**

Testing the legality of (certain) acts by EU institutions, bodies, offices and agencies; asking the EU Courts to rule on the validity of a given measure.

**Admissibility of the action**

Reviewable act under the terms of Art. 263 TFEU

**Standing:**

Depends on the nature of the applicants. Under Art. 263 TFEU, there is a distinction between privileged applicants (Member States and institutions) and non-privileged applicants (any natural or legal person).

In relation to certain acts, non-privileged applicants may only bring an action for annulment if they are directly concerned or directly and individually concerned (*Plaumann* (1963)) by the particular measure at issue.

Time-limits: two months, Art. 263 TFEU

**Substance of the action: grounds**

In order to be successful, the request for annulment must be based on one or more of several ground(s) listed in Art. 263 TFEU:

- Lack of competence;
- Infringement of an essential procedural requirement;
- Infringement of the Treaties or of any rule of law relating to their application;
- Misuse of powers.

**Content and effect of judgment**

Declaration of nullity *ex tunc*, obligation of the institutions to comply, Arts. 264 and 266 TFEU.

**Note:**

Only the ECJ is entitled to annul EU secondary measures, not the national courts; *Foto-Frost* (1987), *IATA* (2006).

## Specifically: the preliminary ruling

## Chart B19

**Topic:**

Preliminary rulings by the ECJ are intended to help national courts in resolving cases before them.

## Preliminary ruling procedure, Art. 267 TFEU

**Purpose:**

The preliminary ruling procedure is an instrument of **cooperation between the ECJ and the national courts**. National courts ask questions which arise out of a case before them regarding the correct interpretation of EU law and the validity of EU secondary measures; e.g. *Kempton* (2008).

**Indirect procedure:**

The procedure is indirect because it is not the parties in the national case that turn to the ECJ, but rather the national court. Nevertheless, the parties may appear before the ECJ.

