GUIDE

ON PROMOTING & ENHANCING COMPETITION IN PUBLIC POLICY MAKING

FEBRUARY
2023

ΕΠΙΤΡΟΠΗ ΑΝΤΑΓΩΝΙΣΜΟΥ
HELLENIC COMPETITION COMMISSION

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The GUIDE ON PROMOTING & ENHANCING COMPETITION IN PUBLIC POLICY MAKING is available in electronic form at www.epant.gr

Design

JIB advertising

Photographic material:

adobestock, depositphotos, pixabay, freepik, shutter-stock, Fotolia, dreamstime.

The purpose of this Guide is to provide information to central government bodies and other public bodies about the need to ensure the protection of competition in the context of public policy making.

I. INTRODUCTORY NOTE

1. State action aims at promoting and serving the public interest. The creation, protection and strengthening of competitive markets is part of the wider public interest as competitive markets encourage undertakings to be efficient and innovative, thereby creating more choice for consumers, reducing prices and improving the quality of goods and services and hence a country's economic performance. Government authorities should therefore also consider the impact of a policy or intervention on competition and opt for the course of action that is likely to lead to an increased, rather than reduced, competition between undertakings to the benefit of consumers. This assessment becomes even more effective when it is carried out from the outset of public policy making, so that it is included in the early stages of policy design in order to prevent distortions of competition which are detrimental for consumer welfare as well as the economy and citizens in general.

2. National and EU rules on the protection of free competition, namely articles 1 and 2 of Law 3959/2011 and 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), are addressed to undertakings, i.e. the economic operators of the market, and the Hellenic Competition Commission is responsible for their enforcement.

3. In some cases, state interventions in the national economy may affect market structure or competition between undertakings more than it is necessary to meet the public interest objectives they seek to pursue. Examples of state interventions that can hinder effective competition, e.g. by encouraging anti-competitive agreements between competitors or abuse of a dominant position by undertakings in a privileged position and/or creating barriers to the single market within the European Union, include:

(a) Financial aid to certain undertakings or groups of undertakings, leading to distortions of competition within the single European market (i.e. state aid, see articles 107-109 TFEU).

(b) State measures contrary to the rules on the protection of free competition (and other provisions of the Treaty) relating to public undertakings and undertakings to which special or exclusive rights have been granted. (see Article 106(1) and 102 TFEU).

(c) Enactment of rules that create barriers to the entry of new players as well as to the activity of businesses in the market, in general. This may be linked to the failure to properly transpose into national law EU rules aimed at strengthening inter-State trade and harmonizing the conditions for exercising economic activity

within the single market or to the discriminatory treatment of market players, without any justification on grounds of overriding reasons of public interest,
(d) State measures that induce or encourage undertakings to violate the rules on free competition by preventing their effective application (see Article 4(3) TEU in conjunction with Articles 101/102 TFEU).

4. The purpose of this guide is to inform central government and other public bodies about the need to protect competition in the context of public policy making and it focuses on the latter form of state interventions, as noted above, (namely those preventing the effective application of competition rules).

5. In this context, this Guide in principle presents the basic legislative framework that lays down the practices of undertakings that are prohibited by the law on the protection of free competition and:
A. It explains what the state's obligations are with regard to the enforcement of the rules on free competition based on: (a) - the constitutional protection of free competition (b) the duty of sincere cooperation between the EU and the member states and (c) the broader EU law and case law.
B. It gives examples of state measures that either observe or infringe competition law
C It explores the impact of the infringement on the State and individuals
The purpose of this Guide is also to:
D. Present the tools for analyzing the effects of a state measure on competition, as developed by the OECD and the EU,
E. Propose best practices for the preparation and adoption of state measures and the conduct of consultations with market players.

6. The protection of competition is more effective where consideration is given to the public policy at the designing stage and, therefore, distortions of competition which have negative effects both on consumer welfare and the economy and citizens in general.

What business practices are prohibited under the law on free competition?

The Hellenic Competition Commission is responsible for enforcing national and EU law on free competition.

The core provisions of the law on free competition concern the prohibition of anti-competitive agreements / collusions (Article 1 of Law 3959/2011 and 101 of the TFEU) and the prohibition of abuse of a dominant position (Article 2 of Law 3959/2011 and 102 TFEU).

A) National law

Article 1 - Prohibited collusion

1. Without prejudice to paragraph 3, all agreements and concerted practices between undertakings and all decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition in the Hellenic Republic shall be prohibited, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, distribution, technical development or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent trading transactions, especially the unjustified refusal to sell, buy or otherwise trade, thereby hindering the functioning of competition;

e) make the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations which, by their nature or according to commercial practice, have no connection with the subject matter of such contracts.

Article 2 - Abuse of a dominant position

1. It is prohibited for one or more undertakings to abuse their dominant position within the national market or in a part of it.

2. 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, distribution or technical development to the prejudice of consumers;

c) applying dissimilar conditions to equivalent trading transactions with other trading parties, especially the unjustified refusal to sell, buy or otherwise trade, thereby placing certain undertakings 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 practice, have no connection with the subject matter of such contracts.

B) Union law

A similar wording is found in Articles 101 and 102 TFEU which apply alongside the relevant national provisions in the event that an anti-competitive practice affects intra-Community trade.

State measures that may restrict competition

A) State aid - Articles 107-109 TFEU

For an aid to be considered as State aid, four criteria must be cumulatively met:

(i) the aid should be granted by the State, i.e. any public or private body controlled by the State (including local government), or through State resources, i.e. it concerns any measure that has an impact on the State budget or is under a significant State control, for example, tax exemptions.

(ii) the aid gives an advantage to one or more "undertakings" over others. it should be "selective", affecting the balance between the beneficiary undertaking and its competitors. Advantage can take many forms. It can be a grant, loan or tax reduction, but it can also involve the granting of free use of State property or at a below-market price. In any case, it is an advantage that an enterprise could not receive under normal circumstances from a private investor applying normal commercial criteria, ("Market Economy Operator Principle" or "MEOP" principle).

(iii) the aid must not create, or have the potential to create, distortions of competition. Even small amounts of financial support to undertakings with a low market share may fall under the State aid ban.

(iv) the aid affects trade between Member States.

Responsibility for implementation of Articles 107-109 TFEU lies with the European Commission and the national courts. In addition, the Central State Aid Unit in the Ministry of Finance is responsible for examining the compatibility of national measures with state aid rules and providing a written opinion, in accordance with the provisions.[1] **The HCC has no competence to implement the provisions on state aids.**

B) Measures that are contrary to rules of the EU Treaties concerning public undertakings or undertakings enjoying exclusive or special rights - Article 106 TFEU

Article 106(1) TFEU prohibits the enactment or maintenance in force of any state measure contrary to the rules contained in the EU Treaties In the case of public undertakings and undertakings to which Member States grant special or exclusive rights. According to Article 106(1) TFEU, State measures must not be contrary to the provisions of the Treaty on competition (Articles 101 and 102 TFEU), State aid (Articles 107-109 TFEU) and the prohibition of discrimination on grounds of nationality (Article 18 TFEU). Other provisions that may be violated by State measures in favor of public undertakings and undertakings with exclusive/special rights are those on the free movement of goods, services free movement of capital and freedom of establishment. According to the EU case law , State of Article 106(1) in conjunction with Article 102 TFEU where the granting of exclusive or special rights to a favoured

[1] https://www.minfin.gr/web/kentrike-monada-kratikon-enischyseon.

undertaking may lead that undertaking, through the mere exercise of the exclusive or special rights granted to it, to an abuse of its dominant position or where such rights are liable to create a situation in which the undertaking in question is led to adopt such an abusive behaviour. [2] It is pointed out that it is possible to establish that the State violates the above provisions, even if there is no actual abusive behavior by undertaking holding exclusive rights of the favoured company. The existence of a risk of a potentially abusive conduct may be sufficient for a breach of Articles 106(1) and 102 TFEU if it can be attributed to State conduct (e.g. the granting of exclusive rights). [3]

According to Article 106(3) TFEU, the European Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States. **The HCC may not apply the relevant state regulation that violates Articles 106(1) and 102 TFEU.**

In the event of undertakings providing services of general economic interest, a balancing shall be made, on the basis of Article 106(2) and/or Article 107(2-3) TFEU, between the application of competition rules and the specific mission assigned to the above undertakings.

C) Article 4(3) TEU in conjunction with 101/102 TFEU

The case-law of the EU courts has concluded from the principle of sincere cooperation established in Article 4(3) TEU the obligation of Member States not to infringe Articles 101 and/or 102 TFEU, thus extending the scope of application of the latter provisions to State behavior.

These provisions may be applied by the HCC as well as by the European Commission and are analyzed in detail in Section II herein.

[2] Cases C- 163/ 96, Criminal proceedings against Silvano Raso and Others, C- 179/ 90 - Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA.

[3] See. C- 18/ 88 - RTT v GB- Inno BM, C- 260/ 89 - Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis., C- 393/ 92 - Municipality of Almelo and others v NV Energiebedrijf Ijsselmij, C- 203/ 96 - Chemische Afvalstoffen Dusseldorp BV and Others v Minister, σκ. 63, C- 553/ 12 - Commission v DEI, T- 169/ 08 RENV - DEI v Commission.

II. STATE OBLIGATIONS ACCORDING TO THE EU COURTS' CASE-LAW

7. Does the State have a legal obligation to maintain free competition? The relevant rules of the Union (Articles 101 and 102 of the Treaty on the Functioning of the European Union or "TFEU") and national law (Articles 1 and 2 of Law 3959/2011, respectively) are mainly addressed to undertakings, i.e. economic operators, and concern anti-competitive activities carried out by undertakings on their own initiative.[4]

8. However, even the State is subject to the obligation not to create restraints on competition.

A. At national level - The constitutional protection of free competition

9. The freedom of economic activity is limited by the rights of others, constitutional rules and moral standards. At national level, the provision of article 5 par. 1 S enshrines personal and economic freedom as an individual right and states that all citizens "have the right to freely develop their personality and to participate in social, economic and political life, provided that they respect the rights of others, the Constitution and moral standards." It also includes all the individual rights enshrined in the Constitution and related to the exercise of economic activity, e.g. the freedom of profession as well as the freedom of trade.[5] The constitutional protection of the freedom of economic activity aims at ensuring the free economic function of undertakings, so that the latter can operate profitably within the competitive market. [6]

10. The triad of restrictions is complemented by article 106 paras. 1 and 2 of S: of the Constitution which, on the one hand, prohibits the abusive exercise

» » »

[4] Cases C-359/95 P and C-379/95 P - Commission of the European Communities and French Republic v Ladbroke Racing Ltd., para. 33 and the references cited therein.
[5] State Council 2677/2016 seven-member court composition 1014/2011 seven-member court composition 4175/1998 seven-member composition.
[6] State Council 1038/2006.

» » »

of the right of economic freedom and, on the other hand, provides for State interventions in the economy to protect the general interest and private economic initiative.[7,8] In particular, the provision of article 106 par. 2 S of the Constitution stipulates that: "Private economic initiative is not to be permitted to develop at the expense of freedom and human dignity or to the detriment of the national economy".

11. Combined with each other, these two provisions (5 par. 1 and 106 par. 2 CONSTITUTION) enshrine free competition both as a subjective individual right and as an objective institutional guarantee. Therefore, free competition is, at the same time, an expression of the constitutionally entrenched economic freedom and a core foundation of the current economic Constitution. The State cannot, in principle, overturn the balance of competition and equal opportunities between competitors, but on the contrary, it must take the necessary measures to protect them, both in terms of the subjective (individual) rights of those involved in the competitive process, as well as the objective institutional guarantee of free competition.[10]

12. A State measure may impose restrictions on this freedom. These restrictions must **generally be defined in an objective manner** and be justified by **due cause of public or social interest,** which in any case must be **relevant to the object and character of the regulated activity.** Also, they are not allowed to reach the point where it becomes impossible or excessively difficult to realise the legitimate purposes of the entrepreneurial activity, on which the viability of the undertaking as an economic entity depends. [11]

13. Furthermore, in accordance with the constitutional principle of proportionality (article 25 par. 1 subparagraph four of the Constitution), the restrictions imposed by law must be appropriate and necessary to attain the objective pursued by the legislator and should not be disproportionate to it.[12]

[7] See. A. Manesis-A. Manitakis, "State intervention and Constitution" (Bank control under C.L 1665/51 και N. 431/76), Opinion, Nov. 1981, p. 1201 et seq., adopting the interpretation of the provisions of art. 5 S in conjunction with the provisions of art. 106 S "which provide the measure of scope and limits of economic freedom.

[8] See P. Pararas, Economic Freedom, 2019, Chapter II, Section six, p. 408.)

[9] State Council Plenary 228, 229, 420 - 424/2014, 3962/2014, 1621/2012, 2764 -2768/2011, 2227/2010.

[10] D. Kyriazis, The Constitutional guarantee of free competition and the possibilities of its interaction with EU competition law (2022).

[11] State Council Plenary 3013, Plenary 3016/2014 1210/2010, 669/2016 7-member composition, 4568 , 4569/2015 2016 7-member composition

[12] See State Council Plenary 2148 - 2150/2015, 228, 229, 420 - 424/2014, 3962/2014, 2204¬2224/2010 , 2227/2010, 1991,1992, 3665/2005

B. At Union level - the principle of sincere cooperation between Member States and the European Union requires the protection of competition

Main points

According to the EU courts' case law, EU Member States are required not to introduce or maintain in force measures, even of a legislative or regulatory nature, that may render ineffective the EU competition rules.

This general principle / obligation is stems from Article 4(3) of the Treaty on EU (TEU), which establishes the principle of sincere cooperation between the EU and the Member States, in conjunction with Articles 101 and 102 of the Treaty on the Functioning of the EU. The following section summarises the scope of this duty based on the EU courts' case law.

14. As early as the 1970s, the European courts recognised the principle according to which the Member States may not adopt or maintain in force measures which may render ineffective the competition rules applicable to undertakings. (i.e. Articles 101 and 102 TFEU).

15. The legal basis of the above principle is found in Article 4(3) of the Treaty on the European Union (TEU), which establishes the principle of sincere cooperation between the EU and the Member States:

> *«3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.»*

» » »

16. This provision imposes obligations on the Member States. In conjunction with the principle of the primacy of EU law over national law[13], requires Member States to refrain from any action or enactment of any rule that conflicts with EU rules, including TFEU provisions on competition, or any measure which could jeopardise the attainment of the objectives of the European Treaties. Therefore, the authorities of a Member State are under the obligation not to apply national rules that are contrary to EU competition rules. This obligation binds all state authorities, including national courts and administrative authorities such as the HCC. Based on the very general provision of Article 4(3) TEU, the CJEU has ruled in several cases that national courts should not apply measures which encourage, require or enhance the effects of an agreement in breach of Article 101(1) and/or Article 102 TFEU. (see Section II).

17. Besides, free competition is one of the objectives of the European Union internal market, as reflected in Article 3(3) TEU and Protocol 27 of the Treaty of Lisbon on the internal market and competition, according to which:

"[The Union] shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance." (article 3, paragraph 3, subparagraphs 1-3)

And Member States

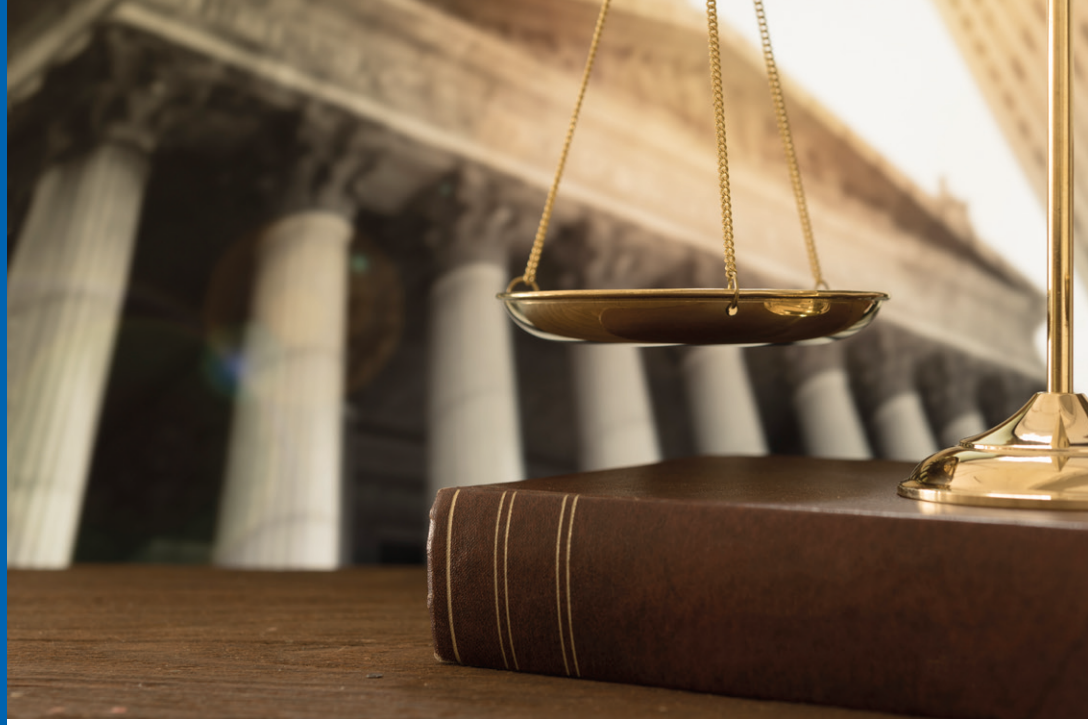
"[c]onsidering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, HAVE AGREED that: To this end, the Union shall, if necessary, take action under the provisions of the Treaties, […].

This protocol shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union.

18. Therefore, State measures that result in the violation of fundamental rules of primary EU law, such as Articles 101 and 102 TFEU, constitute a breach of Member State obligations vis-à-vis the EU. This protection of the EU's internal market from possible distortions of competition, and therefore the establishment of a genuinely competitive system, aims at ensuring equal opportunities for all market participants, taking into account the specificities of each market and the conditions of effective competition.

19. The following section explains the concept of sincere cooperation between the EU and the Member States in the context of the application of the rules of free competition, as developed by a number of decisions of the EU courts.

[13] Case 6/64 - Flaminio Costa versus ENEL.



C. What kind of "state measures" are covered by the principle of sincere cooperation in conjunction with Articles 101, 102 and 106 TFEU?

20. The principle of sincere cooperation includes both positive (adoption of measures) and negative obligations (refraining from adopting measures that have an anti-competitive effect). The selection of the appropriate measures remains with the State itself depending on the context.[14]

21. The legal nature of the state measure does not affect the state's obligation to maintain the practical effectiveness of Articles 101 and 102 TFEU. The obligation covers administrative acts (of an individual or regulatory nature) and even formal laws.

22. However, in order to establish a violation by the Member State of Articles 101 and 102 TFEU, all the conditions of the above articles should be met, in particular:

(α) There must be conduct originating from **an undertaking(s) or association of undertakings** within the meaning of EU competition law.

The concept of undertaking covers any entity that carries out an economic activity, regardless of its legal status and the way it is financed. Economic activity constitutes any activity consisting in the supply of goods or services on a given market.[15] The fact that the supply of goods or services is made on a not-for-profit basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, as that supply exists in competition with that of other operators which do seek to make a profit. [16]

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[14] Ryanair Holdings plc v. Competition Commission, 2012, para. 55.
[15] Indicatively, see C-350/07 - Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft, σκ. 34, C-41/90 - Hofner and Elser, para. 21, C-280/06 - ETI etc., para. 38.
[16] Indicatively, see C-222/04 - Cassa di Risparmio di Firenze etc., para.122 and 123.

» » »

Therefore, undertakings controlled by the State, insofar as they carry out an economic activity, can be undertakings under the free competition law.

It should be noted, however, that State action in the context of the exercise of public authority does not, in principle, constitute an economic activity and, therefore, may be excluded from the application of Articles 101 and 102 TFEU.

Furthermore, the EU courts have ruled that a public body does not act as an undertaking where it fulfils an exclusively social function based on the principle of "solidarity". Solidarity entails the redistribution of income between those who are in a better situation and those who, due to their resources and health status, would otherwise be deprived of the necessary social coverage.[17]

The characterisation of an activity as falling within the exercise of the prerogatives of a public authority or as an economic activity **must be attributed separately for each activity of a particular entity.**

Therefore, the same entity may qualify as an undertaking for certain activities but not for others.

In the MOTOE case,[18] the CJEU found that an entity (ELPA) which had been given the power to give its consent to applications for authorisation submitted to the public authorities for the organisation of motorcycle races, did not constitute an undertaking when giving such a consent. However, it acted as an undertaking when it carried out economic activities such as the organisation and commercial exploitation by means of advertising of advertising motorcycle races, in the context of which it concluded sponsorship, advertising and insurance contracts.

(b) The conduct must affect **intra-Community trade.** [19]

(c) The conduct must fall within **the prohibition of Articles 101 or 102 TFEU and therefore distort competition.**

23. In other words, the obligation established in Articles 4(3) TEU in conjunction with 101/102 TFEU does not cover legislative initiatives that are not linked to some (anti-competitive) business conduct.

[17] C- 159 & 160/ 91 - Poucet and Pistre v AGF and Cancava, C- 244/ 94 - Federation Frangaise des Societes d'Assurance (FFSA) v. Ministere de l'Agriculture et de la Peche, C- 264/ 01, 306 & 355/ 01 - AOK Bundesverband and Others.
[18] C-49/07 – MOTOE v Greek State, paras 25-29.
[19] C-393/08 - Emanuela Sbarigia v Azienda USL RM/A and Others, paras. 29, 32.

Examples

The state imposes, by Ministerial Decision, fixed prices on specific categories of basic commodities.

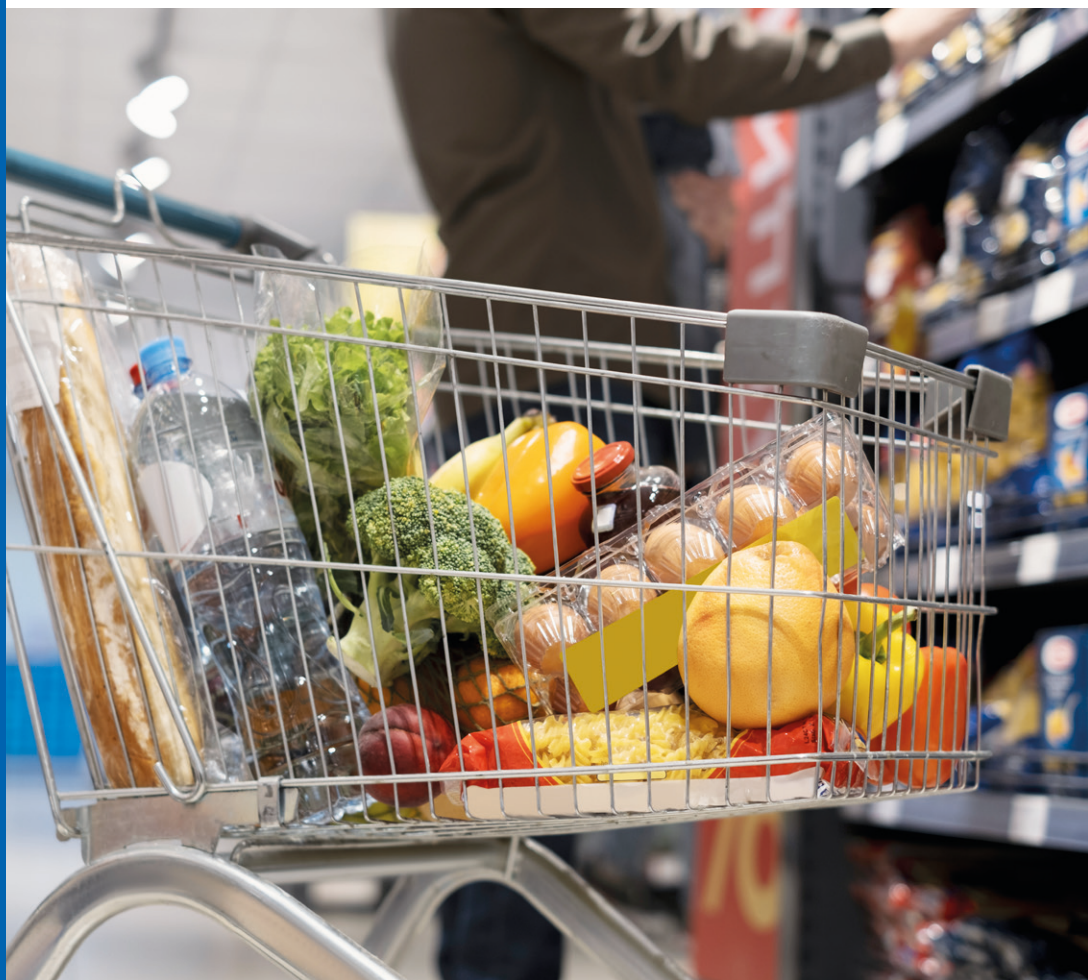
➔ The State measure **does not fall** within the scope of Articles 4(3) TFEU and 101/102 TFEU, as long as it is not linked to the conduct of undertakings (e.g. an existing agreement between undertakings on the level of fixed prices for the specific items) where there was no participation of undertakings or their representatives in preparing the measure.

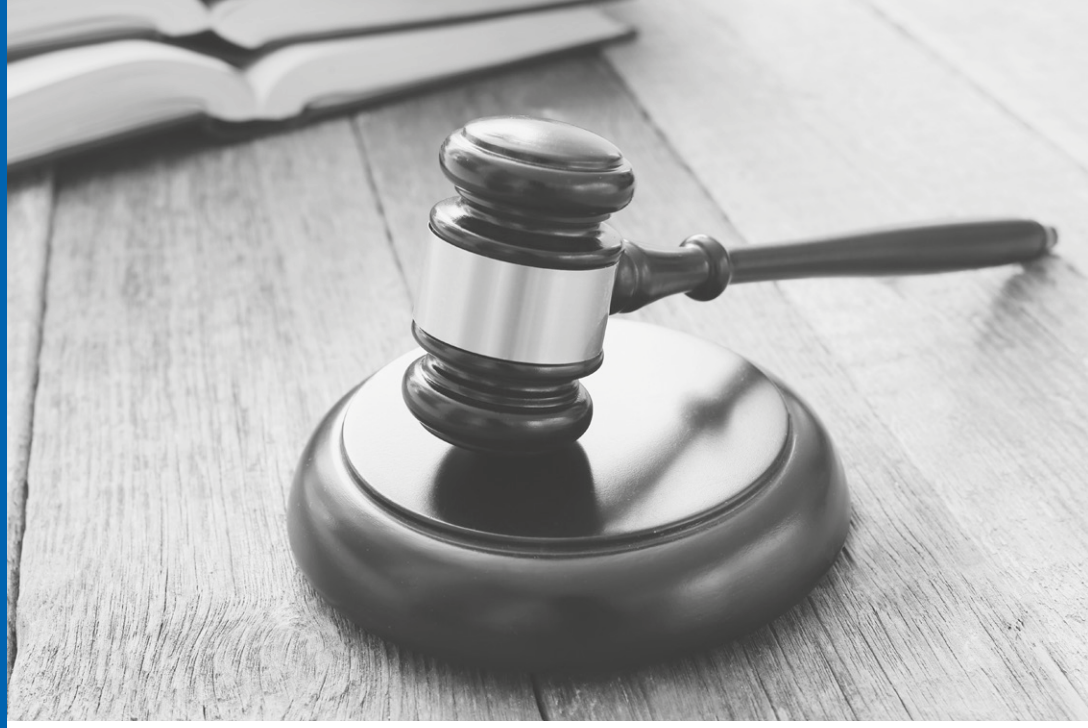
Under national legislation, the three largest supermarket operators are required to agree on a price range for specific categories of basic consumer goods. The price range agreed becomes mandatory by Ministerial Decision.

➔ The State measure **falls** within the scope of Articles 4(3) TEU and 101 TFEU (see below Section D.1)

The state commissions a group of experts, in which representatives of the supermarket industry and State actors participate, to draw up price lists for basic commodities, which is ratified by a Ministerial Decision.

➔ Whether or not the State measure falls within the scope of Articles 4(3) TEU and 101 TFEU **depends** on whether the group of experts' decision is a State regulation or an agreement/decision of an association of undertakings. (see Section D.2 below)





D. How can the State violate the principle of sincere cooperation?

24. EU courts ' case law distinguishes two main case categories: [20]

(a) The State requires or facilitates an anti-competitive conduct or reinforces its effects, or

(b) The State deprives its own rules of its character of State legislation, delegating to private economic operators responsibility for taking decisions affecting the economic sphere. [21]

1. The State measure requires or facilitates anti-competitive conduct by undertakings or reinforces its effects

25. National legislation may impose anti-competitive behavior on undertakings or create a legal framework which, per se, precludes any possibility of undertakings' competitive behaviour. This case has been restrictively applied by the EU courts. [22]

26. Also, a regulation can be considered to have the purpose of "legitimising" the effects of pre-existing agreements if its subject-matter is the business agreements with the undertakings at issue.

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[20] Case 267/86 - Van Eyeke v. ASPA, para. 86.

[21] See Case 136/86 - Aubert, para. 23, C-35/96 - Commission of the European Communities v Italian Republic, C-35/99 - Ardui-no, para. 35, C-250/03 - Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano, para. 20.

[22] Case Van Landewyck and others v Commission of the European Communities, para. 130 and 133, Italian Republic v Commission of the European Communities, para. 19, Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 - Stichting Sig-arettenindustrie and others v Commission of the European Communities, paras 27 to 29, T-387/94 - Asia Motor France and others v Commission of the European Communities, paras 60 and 65.

Examples

In the **INNO/ATAB** case, the first case in which the obligation of Member States not to take or maintain in force measures that may render Articles 101/102 TFEU ineffective was recognised, the State measure imposed at issue, on the sale of manufactured tobacco to consumesr, the compliance with the prices set by the producer or importer. The CJEU did not rule out the possibility that such a measure could facilitate the abuse of a dominant position by producers and importers in breach of (current) Articles 4(3) TEU and 102 TFEU.

In the cases of **BNIC v. Aubert** (reference for a preliminary ruling) and **BNIC v. Claire** (judgment following an appeal against a Commission Decision), the Bureau national inter-professionnel du cognac (BNIC), an association representing vine-growers and cognac traders in France decided on production quotas for vine-growers. By Ministerial Decision, quotas were made industry-wide (i.e. applicable even on non-BNIC members) mandatory under penalty of a fine.

In **BNIC v. Claire**, the CJEU held that BNIC's decisions on quotas infringed Article 101 TFEU as they constituted decisions by an association of undertakings whose object was production-sharing between competitors.

In **BNIC v. Aubert**, the CJEU ruled that the ministerial decision was also illegitimate because it reinforced the effects of an anti-competitive behavior.

2. State regulation delegates to private economic operators responsibility for taking decisions affecting the economic sphere

27. This category includes cases in which the measure at issue is adopted by a collective body with the participation of representatives from the private sector. In order to determine whether the measure at issue is deprived of its state character from that participation, the following factors shall be considered together: [23]

(a) The composition of the body adopting the measure at issue and the capacity in which the representatives of the private sector act (in particular, whether such representatives act as independent experts based on the general interest or represent the interests of the particular sector).

(b) If national legislation leaves some discretion to the relevant body or specifies with sufficient clarity the criteria of general interest that the relevant body should take into account.

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[23] C-185/91 - Reiff, C-153/93 - Delta Schiffahrts- und Speditionsgesellschaft, C-140/94 to C-142/94, DIP, C-35/99 - Arduino, C-250/03 - Mauri, C-758/06 - Cipolla.

(c) The decision-making process and the degree of state participation and supervision in it. For example, it is examined whether the members of the collective body who come from the private sector hold an honorary office and are not bound by orders or instructions from private operators, whether a high-ranking government official (e.g. the competent Minister) can participate in the meetings or be represented in them to ensure state supervision, etc.

(d) Whether or not the State retains the final decision-making capacity, e.g. the decisions of the collective body are subject to the final approval of the competent Ministry, which may take a decision instead of the collective body where it is necessary in the public interest, the State representative retains a veto right,[24] and/or comments from other public and private bodies are taken into account before a final decision is reached. [25]

Example

Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities (T-513/93 and C-35/96)

The case concerned legislation under which the CNSD, an entity governed by public law rules and the members of which were representatives of customs agents in Italy, determined by decision a tariff laying down uniform maximum and minimum prices for customs clearance services provided by customs agents. The tariff has been made compulsory by ministerial decree. By law, customs agents who did not comply with the tariffs set by the CNSD were liable to disciplinary measures.

In this case the Court of First Instance (now: the General Court) considered two issues:

(a) Is the CNSD a public authority or an association of undertakings? If it is a public authority, its decision will be a purely State measure. If not, it should be considered whether the tariff decision was required by law or not (under question (b)).

(b) Does the Italian legislation allow any room for manoeuvre for undertakings-members of the CNSD in terms of the method used in establishing the tariff?
If so, then in addition to the breach of Articles 4(3) TEU in conjunction with 101 TFEU by the legislator, the CNSD's decision to draw up a tariff was the result of the autonomous conduct of the undertakings in breach of 101 TFEU. If not, then

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[24] C-185/91 - Reiff, C-153/93 - Delta Schiffahrts- und Speditionsgesellschaft, C-140/94 to C-142/94, DIP, C-35/99 - Arduino, C-250/03 - Mauri, C-758/06 - Cipolla.
[25] With regard to the latter, see C-38/97 - Librandi.

only the measure infringed the above articles, while no sanctions could be imposed on the undertakings.

Is the CNSD a public authority? The Court answered the question in the negative, taking into account the following facts:

- CNSD members are representatives of professional customs agents.
- Nothing in the national legislation concerned prevents the CNSD from acting in the exclusive interest of the profession. No rule required or encouraged them to take into account criteria of public interest.
- The Italian Minister for Finance, who is responsible for the supervision of the professional organisation in question, could intervene in the appointment of the CNSD members.

As the CNSD is not a public authority, **does the Italian legislation allow any room for manoeuvre for undertakings-members of the CNSD in terms of the method used in establishing the tariff?** In other words, were the restrictive effects of the tariff on competition stemmed solely from national legislation or were arising, at least in part, from the CNSD's conduct?

The Court's conclusion moved towards the latter, considering the broad discretion enjoyed by the CNSD in establishing the tariff laying down the scales to be applied and, in particular, that:

- Neither the Law nor the implementing provisions laid down specific price levels or ceilings that the CNSD should necessarily take into account or, at least, any criteria on the basis of which the CNSD was to draw up the tariff.
- The CNSD laid down mandatory invoicing methods according to which each professional service or individual customs operation should be invoiced, despite the absence of any such requirement by the law.
- In practice, the CNSD conferred on itself the right to allow derogations from the minimum tariff prices laid down, by abolishing those minimum prices and allowing real exemptions etc.

  In that regard, the CNSD substantially increased the minimum prices the increase (in some cases, up to 400%). Whereas, under the previous tariff, customs agents were charging at the top price (leaving enough room to lower it), with the new increases they were charging at the minimum price, thus further limiting competition.

In the light of the foregoing considerations, the Court concluded that, although the Italian legislation itself contained significant restrictions of competition, **the CNSD enjoyed a margin of discretion** in the implementation of the national legislation such that the nature and scope of competition in that business sector was in practice dependent on its decisions.

The case was also heard by the CJEU in the action brought of the European Commission against the Italian Republic under Article 258 TFEU.

28. However, even if the state measure endorses a decision adopted by an association of undertakings which in principle restricts competition or restricts the economic operators' freedom of action, it may nevertheless lie outside the prohibition of Articles 101(1) TFEU and 4(3) TEU. In the context of this assessment, the following shall be taken into account: [26]

(a) The general context in which the decision was adopted or produces its effects, in particular, the purposes pursued thereby, and

(b) Whether the restrictive effects on competition are inherent in pursuing these objectives, in other words, whether the restrictions imposed are limited to the extent necessary to ensure the achievement of these objectives.

29. In other words, a State regulation that in principle restricts competition may not infringe Articles 4(3) TEU and 101(1) TFEU if it serves a legitimate purpose of general interest and the principle of proportionality is observed.

Example 1

API — Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti (C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13)

The case concerned Italian legislation under which the price of haulage services for hire and reward may not be lower than minimum operating costs, which were fixed by a body composed mainly of representatives of the economic operators concerned ((the Osservatorio).

The relevant legislation referred to the purposes of protecting road safety and the smooth operation of the road haulage services for hire and reward and provided that the minimum operating cost must, in any case, guarantee compliance with the safety standards laid down by law.

The CJEU held that:

- The Osservatorio must be regarded as an association of undertakings and did not conduct itself like an arm of the State working in the public interest:

  a) The national legislation establishing the Osservatorio did not indicate the guiding principles which the decision-making body must observe and it did not contain any provision such as to prevent the representatives of the professional organisations from acting in the exclusive interest of the profession. The legislation at issue in the main proceedings merely made a vague

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[26] C 309/99 - Wouters and Others, para. 97, C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 - API and Others, paras 46-48, C-136/12 - Consiglio Nazionale dei Geologi, para 53¬54, C-427/16 and C-428/16 - CHEZ Elektro Bulgaria AD v Yordan Kotsev (C-427/16) and FrontEx International EAD v Emil Yanakiev (C-428/16), paras 53-55.

reference to the protection of road safety and, moreover, leaved a very large margin of discretion and independence to the members of the Osservatorio in the determination of the minimum operating costs in the interest of the professional organisations which appointed them.

(b) The public authority did not exercise any effective review over the assessments of the Osservatorio regarding the criteria for fixing minimum operating costs or the rate set.

- The fixing of minimum operating costs for road transport, which was made mandatory by legislation, was equivalent to a horizontal fixing of binding minimum fees because it prevented undertakings from setting fees lower than this cost, and affected the internal market.
- Although it cannot be ruled out that the protection of road safety may constitute a legitimate objective, the fixing of minimum operating costs did not appear appropriate, either directly or indirectly, for ensuring that that objective is attained.

(a) The legislation at issue in the main proceedings merely referred to the protection of road safety, without establishing any link whatsoever between the minimum operating costs and the improvement of road safety.

(b) The legislation did not serve the objective pursued consistently and systematically, because it provided for derogations from the obligation to respect the minimum costs set by the Osservatorio (e.g. through sectoral agreements between market players).

(c) In any event, the measures in question went beyond what was necessary. First, they did not enable carriers to prove that, although they offered prices lower than the minimum tariffs fixed, they complied fully with the safety provisions on road safety in force. Second, there were a number of rules, including the rules of EU law, relating specifically to road safety, which constituted more effective and less restrictive measures for attaining the appropriate level of road safety.

Example 2

CHEZ Elektro Bulgaria AD v Yordan Kotsev and FrontEx International EAD v Emil Yanakiev (C-427/16 και C-428/16)

The question referred for a preliminary ruling concerned the rules of lawyers' fees in Bulgaria. Bulgarian legislation authorised the Supreme Council of the Legal Profession, whose members are all lawyers elected by their peers, to determine the minimum fees without any possibility of review by public authorities. It also did not allow a lawyer and his client to agree remuneration in an amount below the minimum amount set, with the lawyer even being subject to a disciplinary procedure.

The CJEU held that:

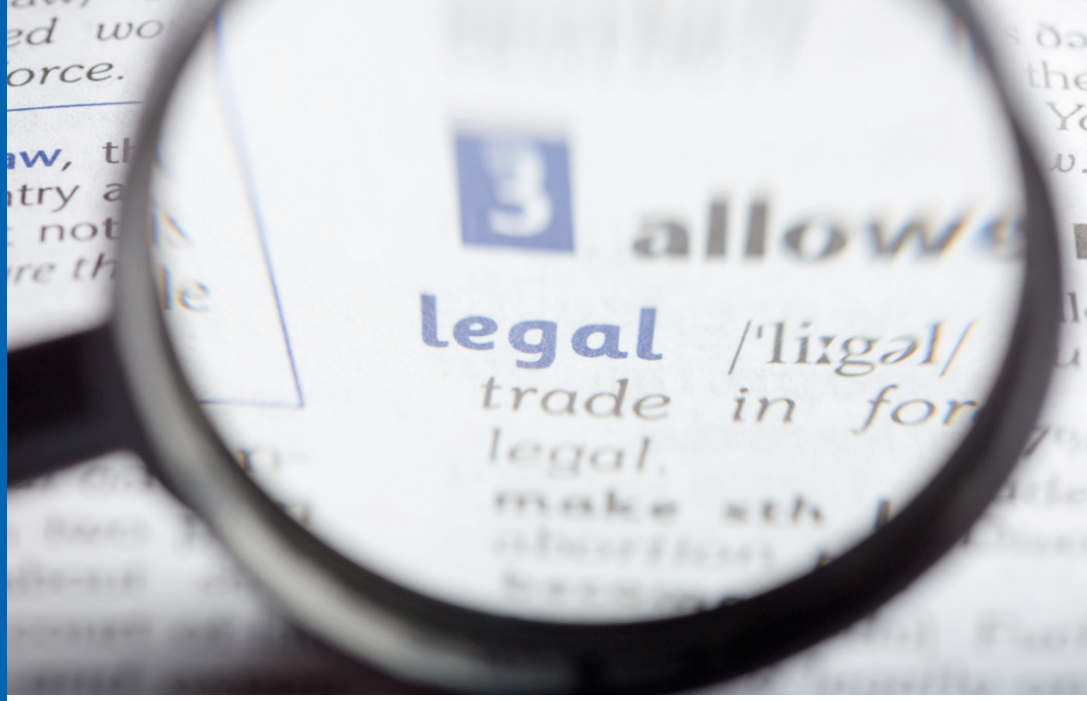
- the national rules at issue which entrusted the determination of minimum fees to the Supreme Council of the Legal Profession, made minimum fees mandatory and prevented legal service providers from setting a fee below the minimum fee set, on the one hand constituted a State measure favoring the adoption of an agreement, decision or concerted practice between private economic operators and, on the other hand, delegated the State's responsibility to private economic operators.

(a) The Supreme Council of the Legal Profession acted as an association of undertakings and not as an arm of the State working in the public interest, composed exclusively of lawyers since it was composed exclusively of lawyers.

(b) The national rules at issue contained no specific criterion ensuring that the minimum amounts of lawyers' remuneration, as determined by the Supreme Council of the Legal Profession, were fair and justified in line with the general interest.

(c) There was no actual review of the regulations issued by the Supreme Council of the Legal Profession by the State.

- The national rules amounted to the horizontal fixing of mandatory minimum tariffs, it was therefore was likely to restrict competition within the internal market.
- There was not enough evidence in the case file for the CJEU to judge whether the regulation at issue was necessary for the implementation of a legitimate objective. The CJEU stated that It is for the national court to render judgment in that regard.



E. Impact of infringements of Articles 4(3) TEU and 101/102 TFEU

1. Impact on the State measure and the State

30. if one of the above situations arises, the State becomes responsible for any anti-competitive behavior of undertakings.

31. According to EU case law, national authorities are required not to apply a State measure which is contrary to Articles 4(3) TEU in conjunction with Articles 101/102 TFEU. Otherwise, the practical effectiveness of competition rules would be reduced.[27] All State authorities, including administrative authorities and national courts, are subject to this obligation. Therefore, the HCC, within the framework of its competence to control business activity, can find that the State measure is contrary to the combined provisions of Articles 4(3) and 101/102 TFEU so that it is not implemented.

32. In addition, the European Commission may initiate infringement proceedings against the Member State under Article 258 TFEU.

2. Impact on undertakings implementing the State measure

32. With regard to the liability of undertakings that infringed Articles 101 and 102 of the TFEU pursuant to the State measure, EU case law distinguishes two different cases:

(a) those where the State measure imposes anti-competitive behavior or creates a legal framework which, per se, rules out any possibility of competitive behavior by undertakings, and

(b) those where the State measure leaves room for manoeuvre for undertakings (i.e. favors, encourages or reinforces anti-competitive behaviour).

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[27] C-198/01 - Consorzio Industrie Fiammiferi (CIF) κατά Autorita Garante della Concorrenza e del Mercato, σκ. 50.

33. In the first case, the infringement of the competition rules cannot be attributable to the undertakings which are under the obligation to implement the State measure. Articles 101 and 102 TFEU do not apply and undertakings that acted under it are not subject to any sanction (regardless of its nature as administrative or criminal) until the national competition authority decides that the State measure infringes competition rules. Otherwise, the general principle of legal certainty would be violated.[28]

34. However, once the decision of the national competition authority, which finds violations of Article 101/102 TFEU and declares the national legislation inapplicable, becomes final against the undertakings, this decision is imposed on the undertakings concerned. From that moment on, the undertakings can no longer argue that they are under the obligation to infringe EU competition rules. Therefore, their future behavior is subject to sanctions.[29]

35. In the second case, the autonomous anti-competitive conduct of the undertakings implementing the State measure is still subject to the sanctions of Articles 101 and 102 TFEU.[30] This practically means that, despite the existence of a State measure which favors, encourages or reinforces anti-competitive behaviour, undertakings are still subject to the obligation not to enter into anti-competitive agreements and dominant firms still bear a particular responsibility of not harming market competition through their behavior.[31] Furthermore, failing to meet these obligations is attributable to undertakings and the national competition authorities may impose sanctions.

36. The fraudulent or non-fraudulent character of the conduct may be taken into account exclusively for establishing the illegal nature of this conduct, as well as for setting the amount of the fines.[32] In particular, if an undertakings behavior is induced by the State measure, it can be taken into account as an attenuating factor for reducing the fine. [33]

37. It is noted, however, that the obligations incumbent on national authorities are distinct from those incumbent on undertakings and maintained, regardless of whether or not sanctions are imposed on the undertakings.

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[28] CIF, op. cit., para. 51 with further reference to 41/83 - Italy v Commission, para. 19, Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 - Stichting Sigaret-teninindustrie and others v European Commission, paras 27 to 29.

[29] CIF, op. cit., para. 55.

[30] CIF, op. cit., para. 46.

[31] With regard to Article 102 TFEU see C-280/08 P - Deutsche Telekom AG v European Commission, paras 80-85, 88-89.

[32] C-280/08 P - Deutsche Telekom, op. cit., paras 80-85, 88-89, Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, Suiker Unie and others v European Commission, paras 36 to 73, CIF, op. cit., para. 56, Cases 209/78 to 215/78 and 218/78, Van Landewy-ck and others v European Commission, Cases 240/82, 241/82, 242/82, 261/82, 262/82, 268/82 and 269/82, Stichting Sigarettenindustrie and others v European Commission, C-219/95P, Ferriere Nord v European Commission

[33] CIF op. cit., para. 52.

Example
Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato (C-198/2001)

In the **CIF case**, the national rules at issue established a consortium of domestic match manufacturers (Consorzio Industrie Fiammiferi or CIF) on which it conferred a commercial monopoly consisting of the exclusive right to manufacture and sell matches for consumption on the Italian domestic market.

The CIF ' s activity was regulated by an agreement between the CIF and the Italian State. Under that agreement, the Italian State undertook to prohibit the distribution on the domestic market of products originating from undertakings which did not belong to the CIF, to prevent the formation of new match-producer undertakings and to set, by a measure issued by the Ministry of Finance, the selling price for matches.

The same agreement conferred on a special committee responsibility for the setting and allocation of match production quotas between the CIF undertakings. The committee was composed of an official of the Amministrazione dei Monopoli di Stato, a representative of the CIF and three representatives of CIF 's member undertakings. Compliance with the quotas was monitored by another committee composed of three members appointed by the CIF's management board.

The Italian competition authority issued a decision finding that the conduct of the CIF member undertakings was contrary to Article 101 TFEU (ex Article 81 TEC) and declared the national law inapplicable as infringing Articles 4(3) and 101 TFEU.

As to the impact on the State measure, the CJEU emphasised that the Italian competition authority had rightly declared the national rules inapplicable. The practical effectiveness of competition rules would be reduced if, within the framework of their competences regarding the control of business activity, the Competition Authorities cannot establish that a national measure is contrary to the combined provisions of Articles 4(3) TEU (ex Article 10 TEC) and 101 TFEU (ex Article 81 TEC)

With regard to the liability of undertakings that infringed competition rules under the State measure, the CJEU drew a distinction between the case where national rules imposed the anti-competitive behavior or merely encouraged/allowed it.

In the first case, the CJEU further distinguished two time periods:

- For the period prior to the issuance of the decision by which the Italian competition authority established the infringement, the obligation to apply the illegal national regulation constituted a ground of justification which shielded the undertakings concerned from all the consequences of an infringement of Articles 101 and 102 TFEU, vis-à-vis both public authorities and other economic operators.
- From the time the national competition authority ' s decision finding an infringement became definitive in their regard onwards, the undertakings concerned could no longer claim that they were obliged by that law to act in breach of the Community competition rules. Their future conduct was therefore liable to be penalised.

In the second case, the undertakings' liability was recognised.

III. BEST PRACTICES FOR STATE REGULATIONS THAT RESTRICT COMPETITION

A. State rules likely to have a restrictive effect on competition: indicative examples

38. State regulations must not:

(a) compel, encourage or facilitate an anti-competitive conduct or reinforce the effects of such conduct;

(b) prevent undertakings from autonomously planning their conduct and commercial policy;

(c) constrain undertakings' behavior to such an extent that the only behavior that may ultimately be adopted by undertakings leads them to practices with anti-competitive effects.

39. Anti-competitive practices are, indicatively, as follows:

(a) Fixing purchase or selling prices or other trading conditions

(b) Limiting or controlling production, distribution, technical development or investments

(c) Reducing product and service quality or innovation

(d) Exchanging commercially sensitive information on significant competition factors (prices, quantities, commercial policy, etc.)

40. As analysed in the previous section, State regulations restrict free competition if they:

(a) lead to a limitation of the number of suppliers/producers in the market,

(b) create legal barriers which eliminate any possibility of competitive activity

(c) limit the ability or incentives of firms to compete with each other, limit choices and available consumer information,

(d) provide a competitive advantage to some undertakings over their actual existing or potential competitors.

41. In order to avoid the creation of legal barriers, government institutions take into account that any additional regulation may have significant adverse effects on competition in markets where significant entry/exit barriers already exist.

42. Indicative examples of regulations that restrict the ability or incentives of undertakings to compete with each other

(a) restriction of the ability of sellers to set the selling prices of the goods or services they offer

(b) restriction of the ability of advertising the products or services provided by undertakings

(c) adoption of quality criteria that ensure a comparative advantage in some undertakings or are beyond the required standards, that a properly informed consumer would need to be aware of in order to make his choice of a product or service

(d) requirement or encouragement of disclosure of commercially sensitive information such as prices, costs, quantities, future price increases, etc.

43. Regulations provide a competitive advantage to some undertakings over their actual or potential competitors, for example where they ensure more favorable conditions for existing undertakings compared to new entrants (e.g. provision for compliance with environmental standards for new entrants, while incumbent undertakings are given a longer time period for compliance with these standards). In such cases, a regulatory impact analysis should be carried out, not exceeding the strictly necessary duration.

44. The adoption or extension of exclusive rights should be done following a documented and thorough examination, as these rights often lead to a foreclosure of competitors and do not necessarily improve consumer surplus (e.g. extension of patent license to the pharmaceutical sector).

45. Indicative examples of limiting consumer choice and available information:

(a) Limiting or hindering consumer mobility between different providers by creating or increasing switching costs (e.g. regulations restricting switching of electricity provider)

(b) Regulations introducing restrictions on the ability of consumers to

choose their goods or services providers

(c) Adequate comparative information sources must be provided to consumers

(d) In "complex" markets (e.g. financial services, energy, etc.), specific information standards comprehensible to the majority of consumers should be adopted

46. Other indicative examples of regulations that restrict free competition:

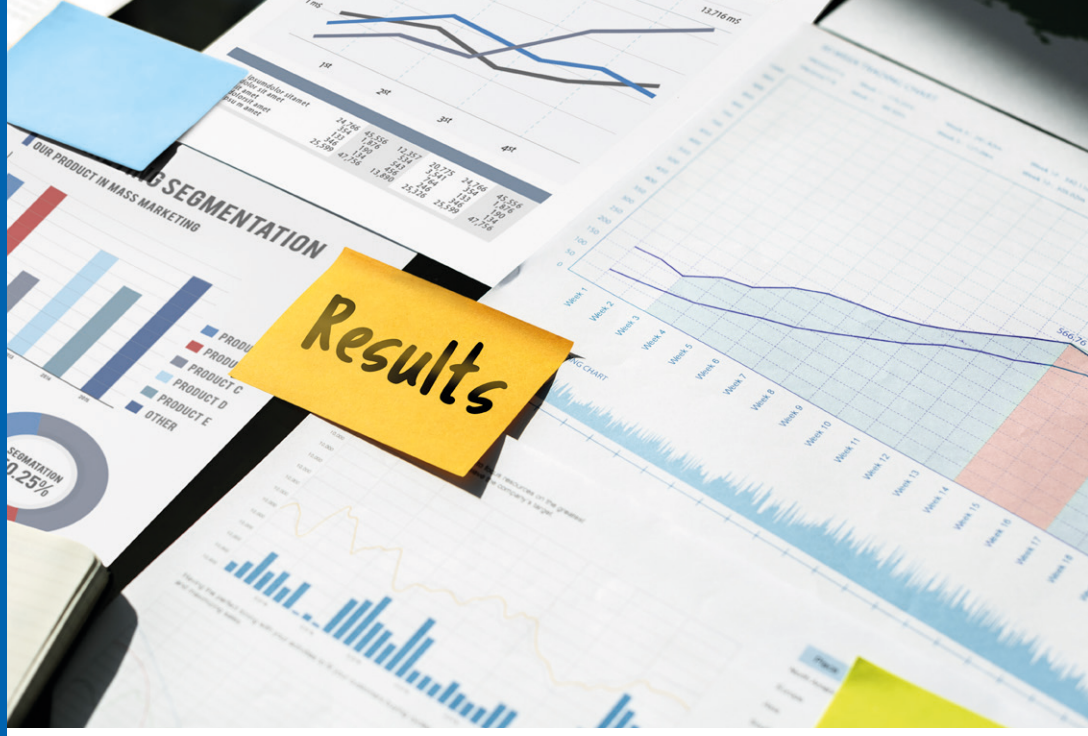
(a) granting exclusive rights to a supplier, without this being absolutely necessary due to market conditions

(b) establishing licenses or licensing procedures as a prerequisite for the operation of an undertaking, where this is not required

(c) limiting the ability of some suppliers to provide their goods or services or excessively increasing their costs;

(d) creating geographical restrictions on the supply of goods, services, employment or investment

(e) adopting population criteria in order to allow the entry of new firms into certain markets



B. Competitive impact assessment

47. The best practice recognised worldwide to prevent the creation of any barriers to free competition consists in assessing any effects of an intended State regulation or initiative on free competition and the proportionality of any entailing restrictions against the intended purpose, depending on the prevailing market circumstances and conditions.

48. In particular, it is recommended to conduct, prior to the adoption of a State regulation, a thorough analysis of its effects on the economy and on competition in the markets concerned thereby, according to the toolkit set out i in Annex I of this Guide.

49. In this context, it is recommended to assess:

(a) the objective to be served by the adoption of the regulation;

(b) the prevailing competitive conditions in the relevant market and the conduct of undertakings in that market;

(c) the impact of the regulation on the behavior of incumbent undertakings and new entrants, on price, output or other factors of competition (e.g. choice, innovation, etc.);

(d) the effect of the regulations on the evolution/development of the market, as well as on any related markets, the impact of the regulations on market development and growth, as well as on any related markets,

(e) any alternative less restrictive market arrangements.

Recommended solutions:

50. Adoption of less restrictive regulations compared to more intrusive measures, for example:

(a) fostering innovation which can reduce costs and lead to improved efficiency and lower prices for consumers

(b) wider variety

51. Using financial incentives instead of regulation to deal with externalities[34]. For example:

(a) Ensuring adequate information to consumers instead of adopting mandatory product characteristics

(b) Possibly, in assessing the effectiveness of market self-regulation which, subject to certain conditions, may be more flexible, involve less costs for businesses and better information for markets and consumers and create only the regulatory measures required for the optimal functioning of the market (e.g. required safety standards for a product). In the case of market self-regulation, particular attention should be paid to the possibility that this may facilitate collusion between competitors.

(c) Strengthening investments for the development of new more ecological technologies to limit environmental impacts

52. Enhancing consumer choice by:

(i) avoiding adopting arrangements that limit consumer choice beyond what is necessary,

ii) eliminating supplier-switching costs, and

(iii) enhancing required and useful information

[34] Externalities concern environmental, financial, health-related costs and benefits, etc. of a product/service which are not reflected in the price of the product/service or their cost.

C. Participation of business representatives in government initiatives

53. Free competition law does not prohibit consultation with private operators before any adoption of State decisions. However, the following preventive measures are deemed appropriate to avoid situations that may be contrary to the requirements of free competition:

(a) ensuring that the contribution of businesses is not of such a nature and extent that the regulation loses its state character, e.g. participation of representatives of the private sector as independent experts, exercise of supervision and final decision-making power by the competent State body, etc. (see, in that regard, Section II.D.2),

(b) carrying out consultations with the necessary supervision so as not to allow the possibility of an agreement between competitors on competition parameters (such as prices), the exchange of sensitive information or the strengthening of transparency in the market, in general (which is problematic mainly in oligopolistic markets).

54. Where communication between competitors and State institutions is deemed necessary, it is appropriate to:

(a) establish an agenda with the topics to be discussed,

(b) State representatives should ensure to bring the discussion back to the issues of the agenda, where issues concerning commercially sensitive information that belong to the sphere of each undertaking's autonomous commercial policy are raised.

(c) keep minutes, in order to avoid possible discussions on issues that will have as their object or effect a restriction of competition. These minutes shall be available to the HCC, if so requested thereby.

State interventions concerning price caps and competition law

Are any legislative intervention measures in the form of price caps on consumer goods compatible with the rules on free competition in order to address high pricing practices for products that are in short supply in times of crisis?

Pricing mechanisms are one of the most restrictive forms of market intervention, and, in most cases, they bring about results that deviate from the purpose of ensuring free competition within the internal market and involve risks. However, in view of social impacts and the public interest (such as the protection of vulnerable consumers, geopolitical risks, etc.) which, under certain circumstances, may override the purpose of ensuring competition in the market, price regulation is not, a priori, incompatible with the objectives of competition law.

The purpose of State intervention in the selling prices of consumer products through price caps aims, according to economic theory, at ensuring consumer protection. In view of that aim, this intervention price is set at a level lower than that in an open market economy. For this reason, it should be adopted in exceptional cases, and in crisis management, where effective competition is objectively impossible, there are imperative reasons of overriding public interest and no other less restrictive measure concerning competition can be effective. it should also be carefully designed.

The imposition of a price cap on a product by the government may have the following negative effects (some in the short term, others in the medium or long term):

- Shortages in the market: To the extent that production exists for the particular product abroad or a production/distribution decision that is affected by prices in other countries, if setting a low price at a national level diverts the product abroad, where profit may be higher, shortages are likely to occur in the domestic market.
- Long-term supply reduction by businesses.
- Inefficient allocation of resources in the economy.
- Risk of strengthening some major market players to the detriment of smaller operators, mainly Greek undertakings.
- Occurrence of the umbrella pricing effect: in this case, price caps act as a focal point for resellers (umbrella pricing) and may be applied by most or even all resellers as fixed prices. Therefore, the selling prices of all similar products, even those the price of which was at lower levels before the imposition of a price cap, will approach the price cap set.
- Occurrence of “grey” or “black” market phenomena: The fact that some consumers, due to the scarcity of goods, cannot not satisfy their needs, although they are willing to pay a price higher than the intervention price, is likely to lead to “grey” or “black” market phenomena, where products are sold at a price significantly higher than the intervention price.
- Prevention of any structural changes in the market which are already introduced by the government.

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Under what conditions may any decision on the adoption of (any) measure of State intervention in product selling prices result in the least possible harm of the market structure?

With regard to any decision: 1) it should have a short duration, 2) the interventions should be reviewed periodically, 3) the ability of the Administration to impose price caps on specific products or services should be clearly defined, in the sense that such an intervention is justified in the public interest in exceptional circumstances and for a limited period of time, and finally, 4) ensure that regulated entities maintain incentives to operate effectively while ensuring that profits are not excessive and that the entities remain viable.

Alternative measures to protect the consumers from overpricing, which constitute the least possible intervention in the market, are the following. Some of these measures may be more effective than others, depending on the prevailing circumstances and market conditions.

- Determination of a profit rate or profit expressed in absolute percentage points for specific goods sold or services provided at the wholesale and retail level at levels prior to the specific crisis.
- Limitation on purchase quantity per person, per transaction..
- Possibility for the State to purchase these products and made them available directly to citizens as a measure of social policy.
- Possibility for the State to produce these and made them available to consumers as a means of strengthening competition in the market.
- Regular publication , of a " bulletin on high , or excessive pricing", in which certain cases of products or undertakings applying excessive pricing will be made public, based on objective comparative data (naming and shaming).
- Generally, providing financial incentives, (subsidies, tax exemptions, etc.) rather than statutory rules to deal with externalities.

ANNEX

TOOLS FOR ASSESSING A STATE MEASURE'S IMPACT ON COMPETITION

This Annex is partly based on the European Commission's guidelines, "Better regulation toolbox 2021, Chapter 3 - Identifying impacts in evaluations, fitness checks and impact assessments"[35] and the respective OECD guidelines, "The OECD Competition Assessment Toolkit".

55. This section describes the appropriate methodology and steps to be followed in order to assess the impact of a State measure on competition. It is recommended to carry out the assessment during the planning stage of the State measure (or any legislative or regulatory initiative). The proposed methodology is based on publicly available European Commission and OECD guidelines.

1st Step: definition of the affected relevant markets or market

The first step in the analysis of a measure's impact on competition is to define the relevant market, i.e. the market affected by the proposed policy initiative. Broadly speaking, it combines the characteristics and use of as well as the demand for the products or services and their geographic availability.

56. A relevant market comprises all products that consumers regard as interchangeable or substitutes by reason of their characteristics, their prices and their intended use, taking into account competitive conditions and the structure of supply and demand in the market.

57. A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

58. In defining the relevant market, the HCC takes into account the various parameters of competition that customers consider important in the area and

[35] https://commission.europa.eu/system/files/2022-06/br_toolbox_-_nov_2021_-_chapter_3.pdf

time period considered. Those parameters may include the price of the product, but also its degree of innovation, its quality in various respects — such as, for example, durability, sustainability, its value and the variety of proposed uses thereof, the image it conveys or the safety and protection of privacy it provides, as well as its availability, in terms of, inter alia, delivery time, resilience of supply chains, reliability of supply and transportation costs

2nd Step: assessment of the market power of undertakings operating in the relevant market

59. Market power in the internal market is defined as an undertaking's ability to affect competition parameters, for example, to raise prices above competitive levels in a profitable way or limit innovation and/or other competition parameters (see para 60). Market power can arise for various reasons and last for a shorter or longer period. An undertaking may be able to temporarily increase prices above competitive levels. However, in the absence of market power, such price increases are unsustainable because customers can then switch to other competitors.

60. In this context, when assessing the effects of a proposed State regulation on competition, the key issue is to determine whether the proposed policy may lead to an increase in market power, with further effects on prices, efficiency and innovation. Once the relevant market has been clearly defined, a number of characteristics describing market structure should be examined in order to assess whether a negative impact on competition exists or may arise.

61. Those variables may include:

(a) the number of firms operating in the relevant market;

(b) the firms' market shares;

(c) other competition parameters (e.g. strong IPRs, brand recognition and first mover advantage);

(d) existence of entry and exit barriers (as explained below) and

(e) market power of buyers and suppliers.

62. Barriers to entry and exit are defined as factors that might hinder the entry and exit of firms into and from the relevant market. When important barriers to entry or exit in a market, any new regulation imposing additional constraints on competition can cause significant harm to the competitive process and, ultimately, to consumers. Different types of barriers to entry include:

(a) natural barriers, such as strong economies of scale;

(b) barriers created by the conduct of incumbent firms, for example limited

access to networks; and

(c) regulation that can impose additional entry barriers (e.g. legal restrictions on new entry in certain sectors such as licenses, patents, local professional certifications, etc).

63. Types of barriers to exit include:
(a) sunk costs, i.e. costs that cannot be recovered when a firm chooses to exit a market (e.g. non-recoverable establishment costs);

(b) labour related exit costs such as staff redundancy costs;

(c) regulatory exit requirements;

(d) long-term contracts etc;

3rd Step: Are there any alternative measures that have less negative effects on competition?

64. The next step is to assess whether the proposed State regulation may have any of the following effects:

Limiting the number or range of suppliers and producers

65. This is likely to be the case if the State regulation:
(a) grants exclusive rights for a supplier or producer to provide goods or services;

(b) establishes a license, permit or authorisation process as a requirement of operation;

(c) limits in other ways the ability of certain types of suppliers or producers to provide goods or services (e.g. public procurement requirements for tenderers to have many years of experience may keep out new businesses and start-ups);

(d) significantly raises the cost of entry or exit by a supplier or producer;

(e) creates a geographical barrier to the ability of companies to produce or supply goods or services or to invest capital.

Limiting the ability of suppliers and producers to compete

66. This is likely to be the case if the State regulation:
(a) limits suppliers' or producers' ability to set the prices for their goods or services;

(b) limits freedom of suppliers or producers to advertise or market their goods or services (particularly for potential entrants);

(c) sets standards for product quality that provide an advantage to some suppliers or producers over others e.g. by requiring a particular technology or by setting unduly strict standards that are difficult or impossible for the large majority of existing producers to meet;

(d) significantly raises costs of production for some suppliers or producers compared to others.

Reducing the incentive of suppliers or producers to compete

67. This may be the case if the State regulation:

(a) creates a self-regulatory or co-regulatory regime which risks collusion or setting high entry barriers by sector associations;

(b) requires or encourages information on suppliers' or producers' production levels, prices, sales, or cost structures etc. to be published;

(c) exempts the activity of a particular industrial sector or group of suppliers or producers from the scope of general competition law, etc.

Limiting the choices and information available to customers

68. This may be the case if the State regulation:

(a) limits the ability of customers or producers to decide from which supplier or producer they purchase (e.g. allowing sale of certain products only in certain type of licensed shops);

(b reduces mobility of customers between suppliers and producers of goods or services by increasing the cost of changing suppliers;

(c) allows suppliers and producers to confuse customers with misleading, unreliable or rapidly changing information that prevents them from purchasing effectively.

Practical assessment of impacts: list of criteria

69. The following list of criteria may help in competitive impact assessment. Not all the criteria may be relevant to every State regulation. The proportionality analysis will depend on the significance of the competition effects. As a rule of thumb, the higher the market power of firms identified in the relevant market, the more careful the assessment should be.

Impacts on existing firms

ANNEX

Key Criteria

Impact on the cost of implementing the regulation:

(1) the State regulation creates additional costs for existing firms, to be quantified where possible (e.g. new requirements for licences or permits);

(2) types of costs: fixed (non-recurring) or variable (recurring) costs; fixed costs may represent an additional entry barrier;

(3) Analyse if the size of the costs relative to businesses' annual sales revenues:

- vary by the size of the business (for example, where small businesses are more adversely affected);

- are higher for new entrants or decrease over time;

- depend on other characteristics of the firms or of the market(s) (for instance: vertically/horizontally integrated markets, location such as urban vs. rural, coastal vs. inland etc.)

Impact on the exit of firms:

(1) Where new costs or requirements may lead some businesses to exit the market:

- which businesses are more likely to exit (small or large firms; older incumbents etc.?)

- in some cases, it could be relevant to make a distinction between a dominant supplier or producer and their competitors.

(2) where the initiative limits growth opportunities of existing competitors;

(3) where the initiative favours the incumbent over its existing competitors;

(4) where the initiative limits the possibility of inefficient firms to exit the market, raising barriers to exit that cause market inefficiency.

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ANNEX

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Impact on the anti-competitive behaviour of firms:

(1) impact on the incentive for anti-competitive practices of firms (collusion, etc.);

(2) a history of collusion or other anti-competitive practices in the sector should be accounted for in the decision-making process (the HCC can help to provide such information).

Impact of state aid measures[36]:

(1) impact on competitors of the firm benefiting from State aid;

(2) impact in the form of distortions of competition on the internal market;

(3) past evidence of similar measures;

(4) appropriateness of the measures and proportionality of the aid granted in relation to the needs.

[36] State aid control is not included among the competences of the HCC, but mainly lies with the European Commission.

Impacts on entry of new firms

(1) Restriction of entry:
for all entrants: for example, if a regulation limits the total number of pharmacies per 5,000 people, this applies to all types of pharmacies and will limit the extent of competition in the market in a very explicit manner;

- for specific types of firms: new firms rather than incumbents, small and medium entrants rather than large undertakings, foreign firms rather than national firms.

(2) Limitation of access to specific resources:
for instance input products, know-how, distribution channels.

Impacts on consumer prices

(1) Identify likely causes of price increase:

- increase of production costs;
- increase in market power;
- greater information sharing and cooperation among businesses leading to collusion.

Non-price impacts on consumers

(1) Impacts on the quality and variety of products and consumer choice,
for instance where the regulation sets a minimum of quality standard or creates barriers to entry).

(2) Impacts on the incentive to innovate: high barriers to entry or exit through long protection periods for incumbents; prohibition of advertising.

Impact on upstream and downstream markets

Analyse the policy options to determine:

(1) different impacts on vertically-integrated firms (e.g. because of the difference in switching costs);

(2) incentives to increase vertical integration in the market, thereby potentially increasing entry and exit barriers;

(3) how the bargaining power of buyers will be affected;

(4) how the bargaining power of suppliers will be affected.

Notes

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GUIDE

ON PROMOTING & ENHANCING COMPETITION IN PUBLIC POLICY MAKING

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