Study B-750 June 22, 2023

First Supplement to Memorandum 2023-29

Antitrust Law: Presentation

Professor Alison Jones made a slide presentation to the Commission at the June 22, 2023, meeting, discussing European Union competition law. Professor Jones gave permission to reproduce her slides. They are attached.

Respectfully submitted,

Brian Hebert
Executive Director

An Overview of EU Competition Law

Overview

Why (EU) Competition Law and their core provisions?

Core similarities and differences to US Antitrust Law

Enforcement

Agreements, Unilateral Conduct, and Mergers

A short note on the DMA

1. WHY (EU) COMPETITION LAW AND WHAT ARE THEIR PROVISIONS? INTRODUCTION

Why Competition Law?

Since 1980s competition law a truly global regulatory exercise

Before 1990 less than 20 regimes, including the EU regime (EEC, 1957)

More than 130 jurisdictions now have competition law systems

EU Competition Laws: Context

- Treaty of European Union (TEU): establishes the EU, its values and objectives, and deals with competence of EU and institutions etc
- Treaty on the Functioning of the European Union (TFEU) includes more detailed provisions and of substantive law, including competition law (Articles 101-109)
- The aims and objectives of the TEU and TFEU provide the context for the application/ interpretation of competition law (including the single market objective)

EU Competition Laws

The Treaty context of EU Competition Law

- Art 3(3)TEU: the Union shall establish an internal market. 'It shall work for the sustainable development of Europe based on …a highly competitive social market economy'
- Competition rules necessary for the functioning of the internal market
  - Protocol 27 – Internal Market shall include a system of ensuring competition not distorted

EU Competition Law: Role of EU Institutions (Judicial and Non-Judicial), including

- European Commission
  - Key enforcer of competition laws at the EU level (delegated to DGComp – one Commissioner has competition portfolio)
  - Can also proposal legislation in legislative procedure
- EU Courts
  - The Court of Justice of the European Union, comprising the Court of Justice (CJ) and the General Court (GC), responsibility for interpreting the Treaties (Art 19 TFEU)
  - Ability to review legality of acts adopted by EU institutions (Art 263 TFEU) and give preliminary rulings on questions of EU law following requests by national courts/ tribunals (Art 267 TFEU)
- EU Legislative and other acts
  - Autonomous EU institutions (the Council/ Parliament and Commission) adopt e.g. regulations, directives, decisions which flesh out principles of Treaties

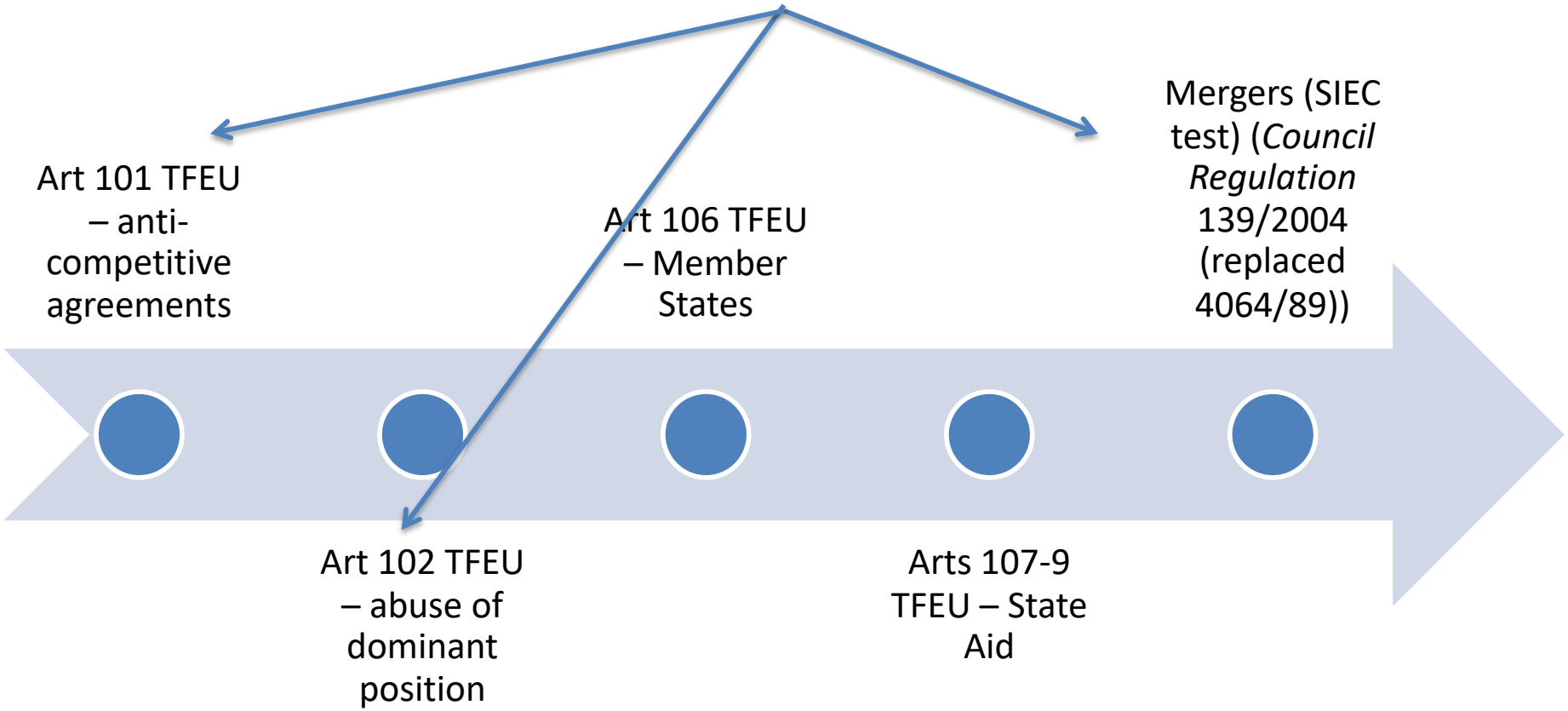
What are the core provisions of EU Competition Law?

Most competition law systems to prevent competition being distorted stand on, at least, three main pillars:

- Provisions prohibiting restrictive agreements between independent firms (e.g. Section 1 Sherman Act)
- Provisions prohibiting certain unilateral conduct of single dominant firms (e.g. Section 2 Sherman Act)
- Provisions prohibiting mergers which will substantially lessen or significantly impede effective competition in a market (e.g. Section 7 Clayton Act)

TFEU rules to ensure competition in the internal market not distorted

Rules applicable to 'undertakings' – entities engaged in economic activity



Note there are also rules directed at states: e.g. rules governing state aid

Summary of Articles 101/102 and EUMR: all apply to 'undertakings' and require an *EU* dimension

Article 101	Article 102	EUMR
• Article 101(1) prohibits agreements etc between undertakings which restrict competition and affect trade between Member States (inter-State trade) • Article 101(3) – legal exception for agreements that satisfy its conditions • Note (in contrast to Sherman Act bifurcated structure) • ***Generally ex post analysis***	• Prohibits abuse of dominant position held by an undertakings(s) in the internal market (or substantial part of it) in so far as it affects trade between Member States • ***Ex post analysis***	• Concentrations (mergers) between undertakings with a 'Community' (or EU) dimension which would significantly impede effective competition in the EU or substantial part of it, in particular by creation/ strengthening of a dominant position should be declared incompatible with the CM • ***Generally ex ante analysis (before merger completed)***

2. HOW ARE RULES ENFORCED?

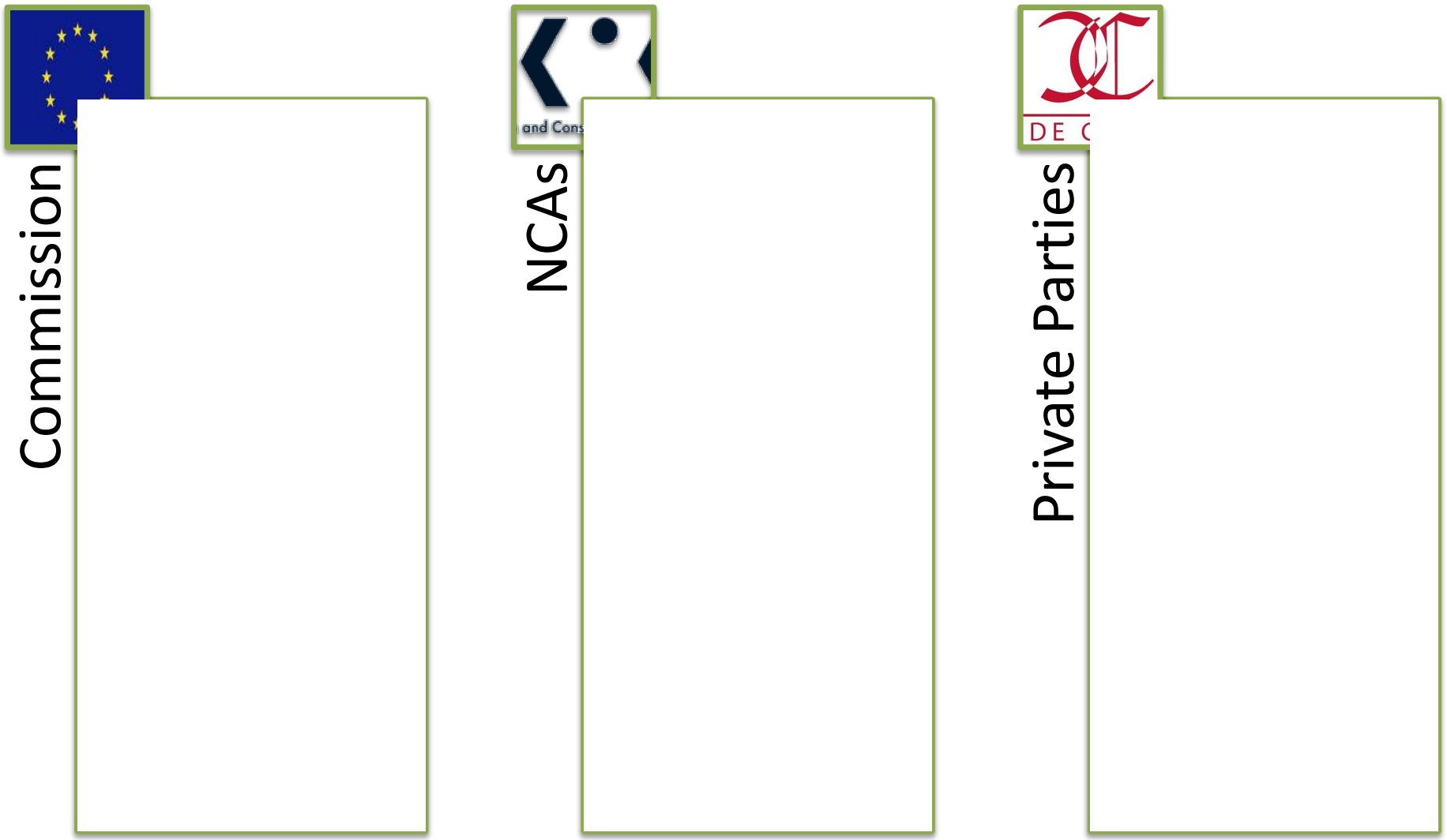
Effective Enforcement

- Application and interpretation of the law
- How law gets clarified and developed
- Ensure infringements brought to an end
- Punishment
- Deterrence
- Compensation

Arts 101/102 enforcement structure (different for mergers)

Public enforcement through the European Competition Network – EU and national level

Direct Effect and Regulation 1/2003, Arts 5 and 6



National courts/ tribunals can refer questions on interpretation of EU law to the European Court of Justice, Article 267 TFEU

European Commission

Follows integrated administrative model	Acts pursuant to Reg 1/2002 (and implementation model as integrated decision-taker);
	Decides: investigation; initiation of proceedings; whether infringement occurred; and sanctions
	Does not have to *prove* case before an independent tribunal or court (judicial model)
	Only *review* by GC (appeal on point of law to ECJ)

Integrated administrative model

Pros/ Advantages

- Expert agency can contribute to development of a coherent competition policy and accurate/efficient decision-taking

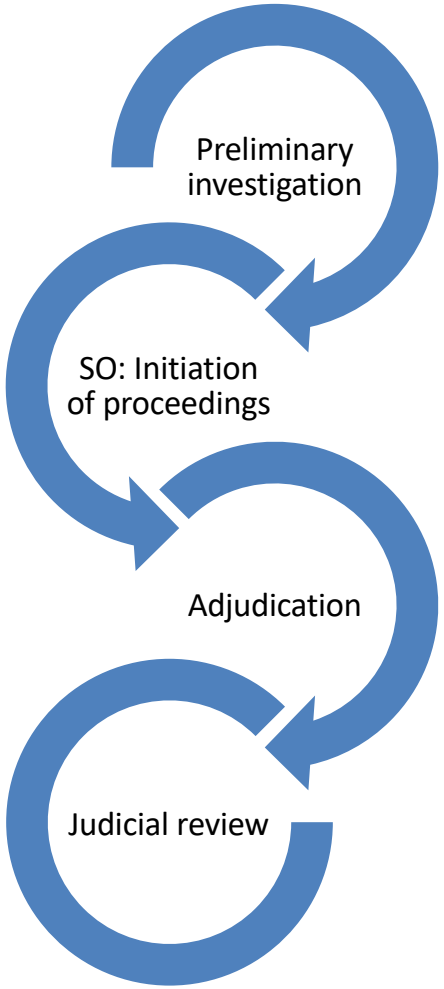
Cons/Disadvantages/ Concerns?

- Competition law not really so inquisitorial/ administraitve but rather adversarial/ prosecutorial in the nature (fines of quasi-criminal nature)
- Is system compatible with principles of good administration and ECHR, especially principle of effective judicial protection and the right to a fair trial before an independent and impartial tribunal (ECHR, Art 6 and EU Charter, Art 47)

No wholesale restructuring necessary

- ECtHR use of integrated agency model is compatible with Art 6 so long as decision-taking procedures governed by sufficient strong procedural guarantees and subject to judicial control by a body will full jurisdiction on questions of fact/law and power to quash challenged decisions

EU Process (Commission)



2. Enforcement

Preliminary investigations

Own initiative; Complaint, leniency applicant or whistleblower

Fact-finding powers (including right to conduct investigations at business/ certain residential premises)

Balance: need to allow the commission to accomplish institutional objectives against demands of due process

Safeguards to ensure rights of defence not irremediably impaired – rule against self-incrimination; legal professional privilege; independent hearing officer to preside over the administrative procedure; chief economist and peer-review panels (devils advocates)

Close/settle/commitments/ or proceed to full and final decision.

Initiation of Proceedings

Written Statement of Objections (case against – facts/ suspected infringement and likely remedy)

State of play meetings, right to be heard and access to the file

Other interested parties can be heard (including complainants)

Balance – right of access and protection of business secrets and confidentiality

Commission decisions can be annulled for procedural failures (eg failing to respect rights of defence)

Adjudication

Infringement decisions

Fines reaching record levels (cartels eg *Trucks* and abuse of dominance eg *Intel/ Google*) for legal entities within *undertaking* (not individuals)

Deterrence not compensation

Other proportionate remedies (behavioural or structural) in order to ensure that the infringement is brought to an end and compliance with the rules is restored – scope for restructuring (break-up)?

Structural only if no equally effective behavioural or less burdensome – and to date mainly in energy sector and through commitments (rather than prohibition)

Adjudication

Commitments decisions

- Render binding undertakings given by parties without adopting final decision
- Commission made extensive use of the procedure
- Even to achieve structural solutions (beyond that which could be imposed in final decision)
- Not top down imposed in public-law decision but contract following negotiation?

Non-infringement decisions (none to date)

Interim measures – extremely rare

Sector Inquiries

Judicial Review

Unlimited jurisdiction to cancel, increase or reduce fines (TFEU, Art 261

Review of legality of decision (TFEU, Art 263)

- lack of competence,
- infringement of essential procedural requirement,
- infringement of Treaties or rule of law (e.g. misapplied/ misinterpreted law, manifest error of appraisal, evidence relied on doesn't support the finding of law)
  - too deferential to Commission's findings where complex and technical appraisals at issue?
  - CJ – GC must engage with the Commission's complex economic assessments
- misuse of powers

Judicial Review

- GC does not rehear the case (not full appeal on the merits), but examines facts to determine whether the factual basis of the Commission decision was correct or sufficient and that the Commission has produced 'sufficiently precise and coherent proof' to support its case – high standard
- GC unlimited jurisdiction to review fines (Art 261 TFEU)
- Appeal on point of law to CJ

EUMR

1. The EUMR applies to 'concentrations' with an EU dimension (CEUD). Notification and suspension – general rule no completion until clearance (Phase I or 2)
2. CEUD: Basic principle (*subject to exceptions*,) – one stop shop**, exclusive appraisal by the Commission under EUMR**, subject to review by EU Courts (Article 263) (NCAs and national courts cannot apply)
3. Concentrations which do not have an EU dimension generally (*subject to exceptions*) appraised at national level under national merger rules
4. Are a few cases where concurrent appraisals can occur of merger or aspects of the merger

3. OBJECTIVES

What are the Goals/Objectives?

EU legislation does not contain a clear statement of objectives – skeletal provisions

Key concepts, such as restriction of competition/ abuse/ dominant position/ SIEC not defined

Some examples but meaning elucidated through cases – EU Courts (but influence of Commission as an integrated decision-taker)

Growing consensus that the/a main goal should be consumer welfare had been developing. But as in other jurisdictions, what extent can/should non-competition factors creep into antitrust analysis?

Strong social/ environmental arguments (e.g. sustainability agreements)? Note the Treaty perspective

A more ‘egalitarian’ vision – inequality/ rise of economic patriotism

Markets too concentrated and rise of Big Tech companies (the need for closer regulation of conduct?) - too great market *and* political power?

Can antitrust address all/some of these issues + privacy – fake news – loss of jobs? More aggressive competition law enforcement

Objectives crucial as guide interpretation of key words …

- … and particularly crafting of tests to identify anticompetitive (restrictive) agreements/ conduct (abuse)/ mergers and distinguishing them from procompetitive or competitive neutral conduct
- Separating beneficial sheep from antitrust goats (Justice Breyer)
- In general, less concerned about false positives than in the US so tests do not set such a high bar for plaintiffs/ claimants

4. ARTICLE 101 – PROHIBITION OF RESTRICTIVE AGREEMENTS

Article 101 - Text

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

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

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

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

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

Article 101: unlike Section 1 Sherman Act in parts with substantive assessment bifurcated

Article 101(1)

- Prohibition of agreements etc between undertakings that have as their object or effect restriction of competition and which affect trade between MS

Article 101(2)

- Nullity of restrictive provisions in the agreement (just *one* of consequences of violating Article 101(1)

Article 101(3)

- Agreements which meet its four conditions are excepted from the Article 101(1) prohibition (individual application or group/block exemptions)

Who needs to prove what in an antitrust case?

Burden is on the person alleging an infringement of Article 101(1) to prove the same

Burden shifts to undertakings claiming benefit of Article 101(3) to establish criteria met

Article 101(1) draws an important distinction between object and effect restrictions

- Agreements that restrict competition by object
  - Assumed to restrict competition (no demonstration of effects necessary)
  - Prohibited unless justified under Art 101(3) (not likely, so close to per se rule in practice)
- Where no restrictive objective, restrictive effects must be demonstrated

Legal exception – Article 101(3)

Block Exemption Regulations (BERs) – agreements meeting conditions automatically 'exempt' from Art 101(1) prohibition (e.g BERs for vertical, technology transfer and horizontal cooperation agreements)

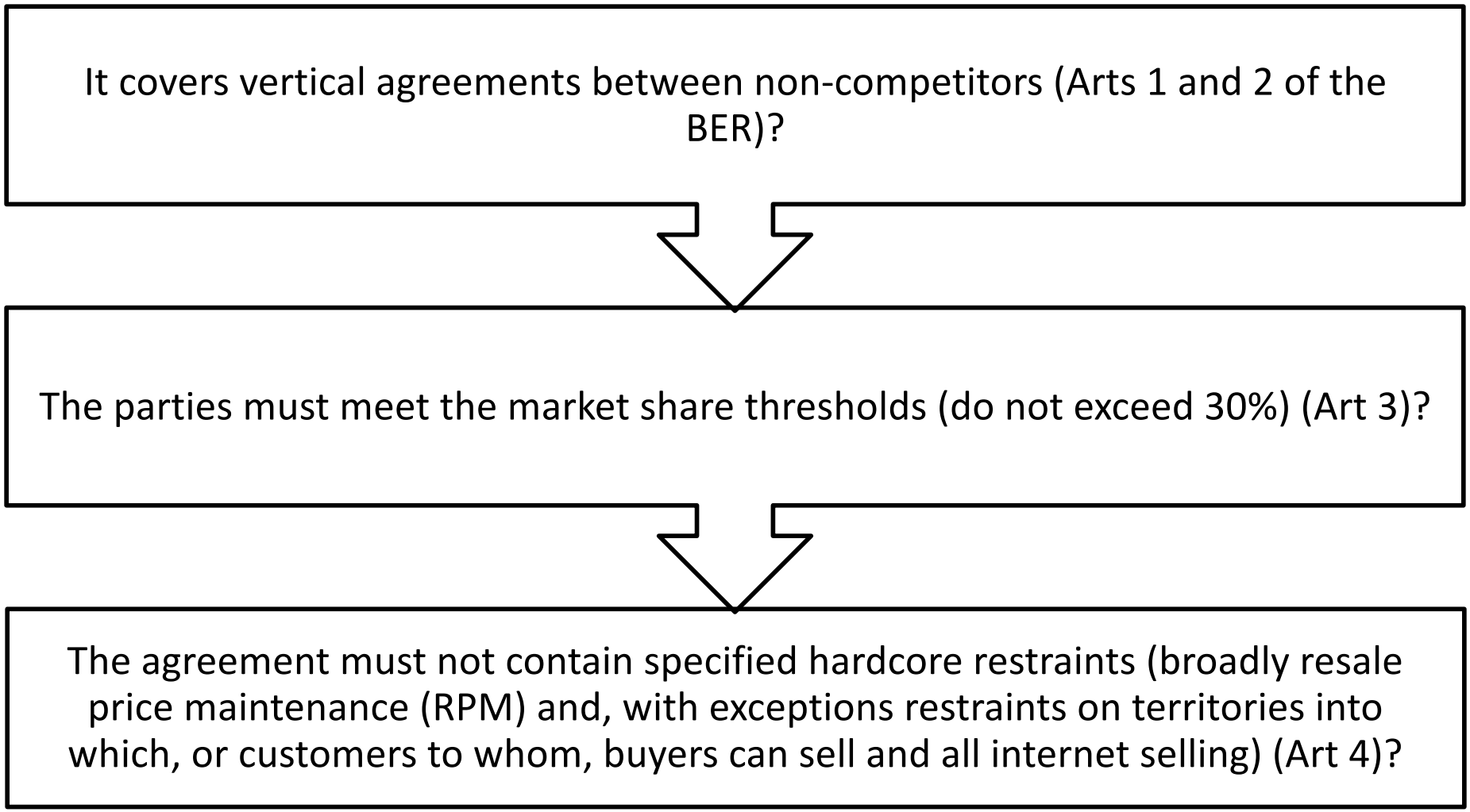
Those relying on Art 101(3) individually to establish agreement meets 4 criteria:

- Improves the production or distribution of goods or services or promotes technical or economic progress (substantiated *efficiencies*?)
- Consumers a fair share of the benefit (pass-on of efficiencies?)
- No restrictions that not indispensable (restrictions reasonably necessary to achieve efficiencies?)
- No possibility of eliminating competition

Block exemption regulations

- BERs exist for a number of different categories of agreements
- But generally apply subject to
  - Market share thresholds being satisfied
  - Agreements containing no particular clauses which are identified as ‘hardcore’ restraints in the BER
  - Other conditions being satisfied

For example, the Vertical BER, very broadly applies as follows:



Article 101: similarities and differences to Section 1 SA

- As with Section 1 Sherman Act, core priority is fight against cartel activity. If collusive conduct established (agreements etc which fix prices, limit output, share markets, rig bids), such arrangements restrict competition by object no efficiency story to tell under Article 101(3)
  - Core issue is how to detect, prevent and deter
  - Corporate fines and private actions
  - Unlike US no individual or criminal sanctions at EU level (but they do exist in some Member States)

Article 101: similarities and differences to Section 1 Sherman Act

- Detailed regimes governing vertical, horizontal cooperation, and technology transfer agreements. More hands on:
  - Strict approach against certain hardcore restraints, including RPM
  - Broad block exemptions (safe harbours) for agreements meeting conditions of the BERS, and
  - Detailed Commission 'guidelines' as to how BER and Article 101 applies where BER does not
  - Updated regularly especially to reflect increasing e-commerce

Vertical agreements

- Certain agreements are presumptively illegal e.g. those involving RPM, territorial restraints and bans on internet selling
  - Restrict competition by object
  - Not covered by the Verticals BER (hardcore restraint, Art 4)
  - Only possible if can make a convincing argument under Art 101(3) individually, but may be difficult to establish indispensability etc
- A large swathe of agreements benefit from the safe harbour of the VBER
- Detailed guidance on how Article 101 applies in other circumstances, but relatively little from EU Courts

5. ARTICLE 102: ABUSE OF A DOMINANT POSITION

Article 102: Prohibits abuse of a dominant position - text

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

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

NB Objective justification defence (read into the text by case-law)

Objective justification

The EU courts have held that dominant undertaking may provide 'objective justification' for behaviour

- Objectively necessary (e.g., on technical or commercial grounds); or
- Counterbalanced by objective economic justifications (advantages in terms of efficiency that also benefit consumers): essentially Art 101(3) defence added into Article 102 by the court
- No per abuses (even if some conduct is presumptively abusive)
- A meaningful defence (enforcement focussed on cases where justifications weaker) and high bar?

Focus on single firm conduct

(Article 101 joint conduct of two or more undertakings).

Like Section 2 Sherman Act, Article 102 applies principally to the *unilateral behaviour* of a single *dominant undertaking* (but note concept of collective dominance)

Constrains the behaviour of firms whose behaviour is not constrained by other forces – by prohibiting abusive conduct

Core differences to Section 2 Sherman Act

- No offence of attempted monopolization/ dominating a market
  - Although dominance found at lower levels, e.g. around 40%
- The dominant firm has a special responsibility not to hinder the maintenance of existing competition or its growth or to affect adversely an effective competitive structure (Case C-680/20, *Unilever*)
- Article 102 captures *exploitative* (e.g. unfairly high pricing, contrast *Trinko*), and *discriminatory* (including secondary line injury, Art 102(c) (see US Robinson Patman Act)) conduct as well as *exclusionary* abuses (although enforcement has principally focused on the latter)

Exclusionary abuse: Similarities to Section 2

- No offence to be dominant – unlawful conduct required
- Concept of abuse is an objective concept (no need for subjective intention to 'abuse' – although intent evidence can reinforce conclusion)
- Challenge to identify unlawful exclusionary behaviour and to distinguish from competition on merits
- Burden shifting framework for demonstration of anti- and procompetitive effects

General points on exclusionary abuse

- *Hoffmann-La Roche*: The concept of an (exclusionary) abuse: 'is an objective concept relating to the behaviour of an undertaking in a dominant position … where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, *through recourse to methods different from that which condition normal competition* ..., has *the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*' (emphasis added).
- The cases thus draw a distinction between competition on the merits based on superior performance and unlawful exclusionary behaviour.

General points on exclusionary abuse

Post Danmark I (Grand Chamber): Art 102 applies 'to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, *to the detriment of consumers*, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition' (emphasis added).

Article 102's purpose is not to prevent an undertaking from acquiring on its own merits a dominant position or to ensure less efficient competitors should remain on the market (*Unilever*). It is not the role of Article 102 to keep inefficient competitors on the market – so excluding competitors is not necessarily detrimental to competition – competition on merits may by definition lead to departure of less efficient competitors.

Leveraging

- Dominance, abuse and effects can be on different markets and may involve *leveraging* of market power from one market where a dominant position is held to another non-dominated, usually related (upstream/downstream or even a closely associated) market (e.g. refusal to deal/ margin squeeze/ self-preferencing).
- Leveraging is not automatically prohibited (*Google Shopping*), but Article 102 does apply to such practices if the impact on the related market does not result from competition on the merits but from taking advantage of the dominant position (e.g. see *Microsoft* bundling and refusal to supply interoperability information or *Google Shopping* artificially manipulating an online search algorithm to discriminate in favour of the dominant firm's own service).

Tests developed to identify an abuse

- More recent US case-law displays a more sceptical stance towards claims of monopolization and displays concerns about false positives – wrongly condemning aggressive competition by dominant firms e.g. case-law governing predatory pricing and refusal to deal
- EU Courts have not imposed such demanding standards to prove an abuse as their US counterparts have to demonstrate monopolizing conduct
- In relation to some conduct a (rebuttable) presumption that conduct is abusive is applied

Predatory pricing test developed in cases: (see especially *AZKO, Post Danmark I*)

- Prices below average variable cost (AVC) must be regarded as abusive
- Prices between AVC and average total cost (ATC) abusive if determined as part of plan for eliminating a competitor
- *Post Danmark I:* 'to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs …, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term'
- Proof that recoupment likely, possible *not* required (contrast *Brooke Group* in the US)
- Objective justification possible – but no defence that was simply meeting competition

Exclusivity Contracts and Loyalty Rebates

- Orthodox approach: exclusivity contracts and loyalty rebates are abusive (*Hoffmann-La Roche*)
- But *Intel judgment, paras 138-139*
  - If dominant firm submits that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, Commission must prove actual or probable foreclosure effects
  - (Non-exhaustive?) factors relevant to the assessment of capacity to foreclose/ foreclosure capability (para 139): the extent of the undertaking's dominant position on the relevant market; the share of the market covered by the challenged practice; the conditions and arrangements for granting the rebates in question; their duration and their amount; and the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market
- *Intel* approach reaffirmed in *Unilever*

Refusal to deal by a vertically integrated firm: leveraging of market power

- *Oscar Bronner* and subsequent cases: To constitute an abuse:
  - Primary and secondary market (and dominant firm and firm requesting access compete in secondary market)
  - The access would have to be indispensable (here home delivery) to the carrying on of the other person's business there being no actual or potential substitute for it (not enough that not economically viable to replicate)
  - Elimination of effective competition in the secondary market
  - [? Party seeking supply should offer *new* product for which there is consumer demand (IP cases only?)]
- High bar (although not as high as that imposed by *Trinko*)
- Question that has arisen in subsequent cases, is whether same conditions apply in other cases involving leveraging by a vertically integrated dominant firm (eg margin squeeze/ self-preferencing

Tying

Orthodox approach to tying:

- Tied sales which limit outlets and make contracts subject to acceptance of conditions is abusive irrespective of whether foreclosure effects are demonstrated (*Tetra Pak II*).
- Assumed that the practice constitutes conduct which by its very nature is liable to foreclose competition (although Intel now suggests that presumption of capacity to foreclose is a rebuttable one?)

But more recent cases (where technical tying)

- Tying/tied products two separate products
- Undertaking is dominant in tying product market
- Undertaking does not give customers a choice to obtain the tying product without the tied
- The practice in question is capable of foreclosing competition and has the capacity to restrict

New theories of harm: e.g. self-preferencing

- GC in Google endorsed self-preferencing as a standalone independent form of leveraging abuse
- Although the GC made it clear that mere extension of market power from one market to another (leveraging) does not in itself constitute an abuse, it may do so where leveraging takes an abusive form e.g. the artificial manipulation of general search algorithms in a manner which is liable to result in a weakening of competition (preferring own service irrespective of its usefulness).
- The finding of discriminatory leveraging in Google Shopping hinged on:
  - Abnormal business behaviour which diverted traffic away from rivals;
  - Capacity for anticompetitive effects (conduct capable or likely to have anticompetitive effects).

New theories of harm: e.g. self-preferencing

- The GC did attach importance to the fact that Google's search activities were akin to an essential facility, and its superdominant position
- Supports general principle of equal treatment (for dominant operators in the internet sector) – comparable situations not to be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.
- Conclusion: Google could not engage in positive acts of discrimination to favour its services or to disadvantage those of rivals. Duty applicable only to activities of dominant digital platforms?

Some Article 102 and Big Tech: Cases at the EU Level (note also actions at national level)

Google (Shopping) (above)

- Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – self-preferencing
- Upheld on appeal (GC)

Google Android

- Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine – rebates and tying (Play Store app with Google Search and Google Chrome apps)
- GC upheld tying but annulled finding relating to exclusive dealing

Google Search (AdSense) (2019)

- Commission fined Google €1.49 billion for imposing a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search adverts on these websites (exclusivity)

Google (Ad tech)

- Commission sends Statement of Objections to Google over abusive practices in online advertising technology (favouring own online display advertising technology services) and suggesting possible structural remedies to deal with inherent conflicts of interest

Some Article 102 and Big Tech: Cases at the EU Level

Amazon

- Commitments Decision: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime (self preferencing relating to its online retailer marketplace)

Apple

- Commission sent Statement of Objections to Apple on App Store rules for music streaming providers (28/02/2023)
- Commission sends Statement of Objections to Apple over practices regarding Apple Pay (02/05/2022)
- Commission opened investigations into Apple's App Store rules and practices (16/6/2020)

Facebook

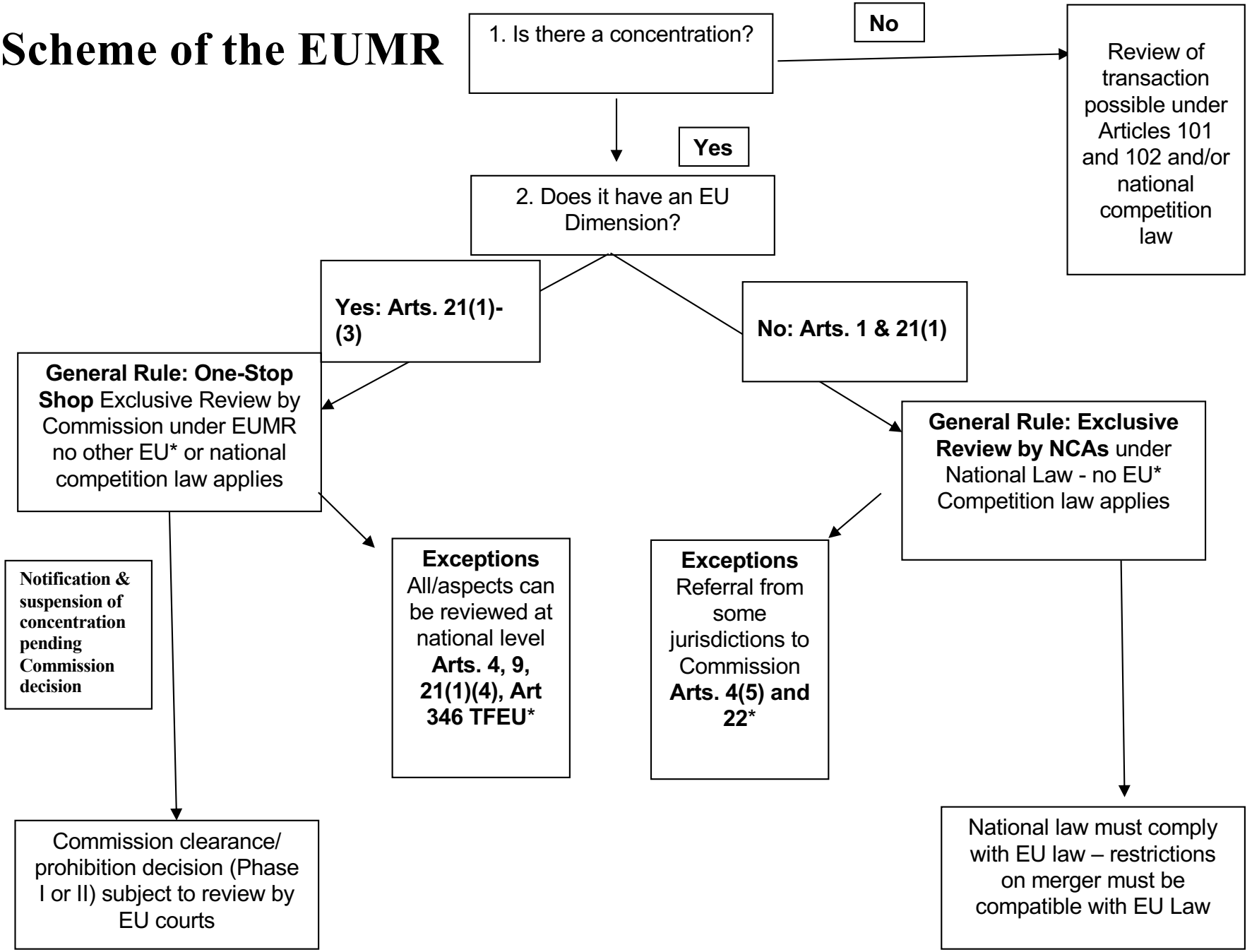
- Commission sent Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace (19/12/2022) (tying and leveraging through unfair trading conditions)

6. THE EU MERGER REGULATION

The EU Merger Regultion (EUMR)

- The EUMR applies to concentrations (mergers) with an EU dimension (broadly, dependent on worldwide and EU-wide turnover)
- If the EUMR does not apply, national merger control rules can (applied by NCAs). The general rule is that one or other should apply, not both (but exceptions)
- The substantive test in the EUMR, is the 'SIEC' test
  - A concentration **which would significantly impede effective competition** in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, **shall be declared incompatible** with the common market (art 2(3))
  - Concerns horizontal, vertical and conglomerate mergers

Scheme of the EUMR



Some concerns: Jurisdictional gaps?

Controversy: does it catch all the right transactions?

- What about acquisitions of start-ups without high (any) turnover (eg *Facebook/WhatsApp* – pharma sector) – is there need for a different jurisdictional test?
- Flexible solutions rather than new test (and see also Digital Markets Act below)

Concerns about the substantive test

- EC must assess, using a prospective analysis, whether the concentration would (or would not) lead to a situation where there is a SIEC.
- For merging parties to provide evidence of 'efficiencies'
- EC must provide sufficiently consistent and cogent body of evidence that a SIEC is more likely than not (*Tetra Laval*)
- Not able to reflect public interest concerns unless conceptualised as a parameter of competition (eg privacy)

Concerns about the substantive test: Some core issues

- Is standard of proof too high?
- Should burden of proof be reversed in some cases?
- How is impact on innovation/ dynamic competition to be assessed? What about acquisitions of start-ups?
- Has Commission (and other competition authorities) underenforced with respect to certain mergers (e.g. tech mergers)

7. REGULATION IN THE DIGITAL ECONOMY? THE DIGITAL MARKETS ACT (DMA)

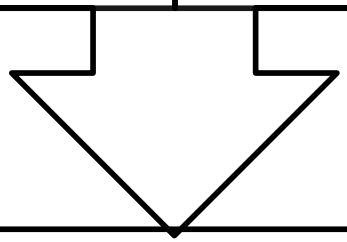
Background

- Discussion in many jurisdictions as to how to deal with concerns arising about conduct of digital platforms, extending beyond competition law
- Numerous policy reports on how to deal with emerging problems, including through unwinding of past mergers, breakup of platforms, legal reform, codes of conduct, stricter policing of mergers, bolder action against exclusionary conduct AND new regulatory regimes

Need for more flexible regulatory tool?

Seen that Commission has applied (and continuing to apply) Arts 101 and 102 to digital competition law problems. But:

Market definition and assessment of market power very complex	Features challenge conventional techniques	Complex development of new theories of harm	Speed Effectiveness of interventions	Individual rather than market-wide solutions.	Scope of laws may be too narrow (EUMR?)



EUMR effective to counter growth through acquisitions?

Are competition rules sufficient to address digital competition problems? Not optimally calibrated or sufficiently nimble?

The Digital Markets Act (Regulation 2022/1925)

- The DMA – regulates activities of gatekeepers that provide core platform services (CPS, gateway for business users to reach end users), whether or not 'dominant'
- To be enforced by the Commission – fines and behavioural and structural remedies possible.
- Ex-ante regulatory framework – distinct from, but complementary to, Articles 101 and 102

DMA, very complex but broadly

- Designation process (regularly reviewed) and duty to ensure and demonstrate compliance
- Being a gatekeeper is not outlawed but designation triggers binding application of a self-executing series of obligations, set out in Arts 5–7, dozens of discrete and quite distinct restrictions/obligations to ensure contestable and fair markets in digital sectors
- With limited exceptions, one size fits all approach (not tailored to individual undertaking)
- Not an effects-based approach. Liability – without a need to establish conduct has a capacity to foreclose competition
- No efficiency defence
- Obligation to inform Commission of intended mergers

THANK YOU!