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### Coding non-competition interests under Article 101 TFEU

*A quantitative and qualitative study*

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## ANNEX A: REFERENCES

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### Chapter 2: History of Article 101 TFEU Balancing

#### **2.1. First enforcement period: prohibited horizontal agreements that impede market integration (footnote 269)**

26623 Quinine; 128 Julien/Van Katwijk; 597 V.V.V.F.; 324 Vereniging van Cementhandelaren; 581 Cementregeling voor Nederland; 243 244 245 Cimbel; 26918 Sugar; 791 1373 1374 1498 1499 1500 SCPA; 795 Kali und Salz/Kali Chemie; 400 Agreements between manufacturers of glass containers; 426 Papiers peints de Belgique; 26602 FRUBO; 712 Stoves and Heaters; 256 Bomee-Stichting; 147 Centraal Bureau voor de Rijwielhandel; 28948 Cauliflowers; 29176 Vegetable parchment; 312 COBELPA/VNP; 28980 Pabst & Richarz/BNIA

### Chapter 3: Article 101(3) TFEU Individual Exemptions

#### **3.1. First enforcement period: industrial policy considerations justify exemptions (footnote 482)**

Specialisation agreements: 26437 Jaz—Peter and the renewal of the exemption in 1977; 26625 Clima Chappée-Buderus; 26418 Sopelem-Langen; 26624 F.N. — C.F.; 26612 MAN/SAVIEM; 642 Papier mince; 26825 PRYM-BEKA; 27073 Bayer/Gist-Brocades

Joint research agreements: 26917 Henkel/Colgate; 26603 Rank/Sopelem

Joint ventures for the development, manufacture, and marketing of products: 27422 Vacuum Interrupters; 27093 De Laval/Stork; 29428 GEC-Weir Sodium Circulators; 29236 Sopelem/Vickers; 26940 KEWA; 26940 United Reprocessors GmbH

#### **3.2. First enforcement period: focus on industrial policy benefits (footnote 483)**

R&D: 26437 Jaz—Peter; 26625 Clima Chappée-Buderus; 26418 Sopelem-Langen

International competitiveness or EU industry: 26612 MAN/SAVIEM

Penetration into new geographic markets and overcoming difficulties in developing advanced technology products: 27422 Vacuum Interrupters; 27093 De Laval/Stork; 29428 GEC-Weir Sodium Circulators; 29236 Sopelem/Vickers

#### **3.3. Fourth enforcement period: Commission rejects outright the possibility of Article 101(3) TFEU exemptions (footnote 534)**

37980 Souris (2004), para 143-158; 37750 French beer market (2004), para 75; 38549 Barème d'honoraires de l'Ordre des Architectes belges (2004), para 104-110; 38456 Bitumen Nederland (2006), para 162-168; 39181 Candle waxes (2008), para 317; 39188 Bananas (2008), para 340; 38698 CISAC (2008), para 231-237; 39510 Ordre National des Pharmaciens en France (ONP) (2010), para 703-706; 39633 Shrimps (2013), para 438; 39574 Smart card chips (2014), para 334-335; 39964 Air France/KLM/Alitalia/Delta

(2015), para 42; 40055 Parking heaters (2015), par 59-60; 40028 Alternators and Starters (2016), para 68; 39850 Container Shipping, para 57-58; 39824 Trucks, para 87-88; 40023 Cross-border access to pay-TV (2016), para 51-52; 399904 rechargeable battery (2016), para 54-55; 39960 Thermal Systems (2017), para 80; 40013 Lighting Systems (2017), para 53

### **3.4. First enforcement period: refusal to exempt agreements that impede market integration (footnote 538)**

Distribution agreements with elements of export restrictions, resale price maintenance, or other limitations on production or sales: 24510 GERO-fabriek; 28282 The Distillers Company Limited; 29146 BMW Belgium NV and Belgian BMW dealers; 29418 Spices; 26894 26876 26892 Pittsburgh Corning Europe — Formica Belgium — Hertel; 29151 Video cassette recorders; 29018 Miller InternationalSchallplatten GmbH)

Uniform discounts and rebates protecting domestic manufacturers: 25963 Gas water-heaters and bath-heaters

Joint selling or purchasing agencies agreements resulting in similar negative impediments to market integration: 24510 GERO-fabriek; 28282 The Distillers Company Limited; 29146 BMW Belgium NV and Belgian BMW dealers; 29418 Spices; 26894 26876 26892 Pittsburgh Corning Europe — Formica Belgium — Hertel; 29151 Video cassette recorders; 29018 Miller InternationalSchallplatten GmbH

### **3.5. First enforcement period: exemptions emphasising the lack of harm to market integration (footnote 542)**

Selective distribution agreements: 3036 D.R.U.-Blondel; 2702; 22491 Maison Jalatte; 847 Saba; 5715 Junghans; 10498 11546 12992 17394 17395 17971 18772 18888 3213 Omega; 14650 Bayerische Motoren Werke AG

Horizontal technical cooperation and joint R&D agreement: 26045 ACEC/Berliet, page 4; IPRs agreements: 17545 6964 26858 26890 18673 17448 Davidson Rubber Co.; 21353 Kabelmetal/Luchaire; also see; 171 856 172 117 28173 Campari

### **3.6. Second and third enforcement periods: refusal to exempt agreements impeding market integration (footnote 555)**

Horizontal agreements: 29453 SNPE-LEL; 29672 Floral; 29430 Kawasaki; 29595 Pioneer Hi-Fi Equipment; 29011 Rennet; 25007 IMA Rules; 197 Industrieverband Solnhofener Natursteinplatten eV; 30070 National Panasonic; 30077 Cafeteros de Colombia; 29629 Rolled zinc products and zinc alloys; 30174 Vimpoltu; 30064 Cast iron and steel rolls; 30988 Flat-glass sector in the Benelux; 30907 Peroxygen products; 28930 Milchforderungsfonds; 30809 John Deer; 31128 Fatty Acids; 29535 White lead; 29702 Johnson & Johnson; 29525 30000 SSI; 26870 Aluminium imports from eastern Europe; 29725 Wood pulp

Vertical agreements: 28852 29127 29149 Fedetab; 29440 Arthur Bell and Sons Ltd - conditions of sale; 28859 Wm. Teacher and Sons Ltd-conditions of sale; 1576 Zanussi;

26912 Hennessy-Henkell; 30188 Moët et Chandon (London) 'Ltd; 30696 Distribution system of Ford Werke AG; 30299 Grohe's distribution system; 30261 Ideal-Standard's distribution system; 30739 Siemens/Fanuc; 31143 Peugeot; 31741 Sandoz; 31017 Fisher-Price/Quaker Oats Ltd — Toyco; 29021 BP Kemi –DDSF; 25757 Hasselblad; 28748 AEG-Telefunken; 30658 Polistil/ Arbois; 30839 Sperry New Holland; 31192 31507 Tipp-Ex; 31503 Konica; Viho/Toshiba; 32290 Newitt/Dunlop Slazenger International; 32725 Viho/Parker Pen; 32948 34590 Tretorn; 35733 VW; 36264 Mercedes-Benz; 35587 35706 36321 Video Games; 27393 27394 Net book agreements; 30979 31394 Decca Navigator System; 31550 31898 Zera Montedison/Hinkens Stahler

### **3.7. Second enforcement period: loose application of Article 101(3) TFEU conditions to agreements strengthening market integration and industrial policy (footnote 557)**

Horizontal cooperation agreements leading to innovation and the production of new products: 28796 Beecham/Parke, Davis; 30517 Amersham Buchler; 29329 VW-MAN; 30971 BP/Kellogg; 30320 optical fibres; 31340 Mitchell Cotts/Sofiltra; 32306 Olivetti/Canon

Rationalisation, greater competitiveness of EU firms: 299555 Carbon Gas Technologie; 30320 Optical fibres

Improving the structure of the market: 30437 Rockwell/Iveco; 31846 Enichem/ICI

Ensuring security of supply: 299555 Carbon Gas Technologie

Joint buying agreement: 27958 National Sulphuric Acid Association

Restrictions in distribution agreements required for effective marketing strategies: 29420 Grundig's EEC distribution system; 30846 Ivoclar

### **3.8. Second and third enforcement periods: sectoral approach in "special" markets (footnote 554)**

Selective distribution systems in luxury cosmetics markets: 33242 Yves Saint Laurent Parfums (1991); 33542 Parfums Givenchy system of selective distribution (1992)

Beer distribution agreements: 35079 Whitbread (1999), para 150-154

Similarly, instead of banning an exclusive distribution agreement, the Commission was willing to accept voluntary commitments from undertakings in the beer sector: IP-19-94-345 Interbrew exclusive right (1994); 35612 Tuborg/Pripps (1998)

Horticultural market: 35280 Sicasov (1998)

### **3.9. Third enforcement period: Article 101(3) TFEU in newly liberalised markets (footnote 560)**

Post services: 36748 REIMS II

Energy: 33151 33997 Jahrhundertvertrag; IP-95-550 Interconnector; 37732 Synergen

Telecom: 32737 Eirpage; 35617 Phoenix/GlobalOne; 34857 BT/MCI; 35337 Atlas; 35830 Unisource; 35738 Uniworld; 36237 TPS; 36592 Cégétel; 36539 British Interactive

Broadcasting; IP/01/1845 Scandinavian digital satellite TV broadcasting; 38370 UK Network Sharing Agreement; 38369 Germany Network Sharing Agreement; 38287 Telenor/Canal+/Canal Digital

Transport: 32490 Eurotunnel; 34518 ACI; 34600 Night Services; IP-94-850 Rapid delivery services; 34494 Decision on tariff structures in the combined transport of goods; 37396 Revised Trans-Atlantic Conference Agreement; IP-96-400 Baltic Liner Conference Agreement; 36253 P&O Stena Line; 32792 IATA agency programs; 32659 IATA Passenger Agency Programme; 35545 Lufthansa/SAS; 37730 Austrian Airlines/Lufthansa; 38477 British Airways/SN Brussels Airlines; 38479 British Airways and Iberia; 38284 Société Air France/Alitalia Linee Aeree Italiane; 37812 Bmi British Midland/Lufthansa/ SAS; 36213 GEAE/P&W; 33585 Distribution of railway tickets by travel agents SAS Maersk Air; 32450 French-West African shipowners' committees; 33218 Far Eastern Freight Conference; 32448 32450 Cewal, Cowac and Ukwal; 34018 Far East Trade Tariff and Surcharges Agreement (FETTSCA); 34250 Europe Asia Trades Agreement

**3.10. Third enforcement period: Article 101(3) TFEU in regulated sectors (footnote 560)**

Regulated professions: 33407 CNSD; 33686 Coapi; 36147 EPI

Sports: IP-98-355 Danish Tennis Federation; 37124 FIFA rules on players' agents; 37398 Joint selling of the commercial rights of the UEFA Champions League

Television and film: 32524 Screensport/EBU members; 32745 Astra; 35617 Phoenix/GlobalOne; IP/01/82 Broadcasting in Belgium of French horseraces

Pharmaceutical products: 34279 ADALAT; 32026 Bayo-n-ox; 36957 Glaxo Wellcome

**3.11. Third enforcement period: sectoral approach focusing on market integration (footnote 561)**

Financial services: 34607 Banque Nationale de Paris — Dresdner Bank; 29373 Visa International's multilateral interchange fee

Post: 36748 REIMS II

Telecom: 34279 ADALAT; 32026 Bayo-n-ox; 36957 Glaxo Wellcome

Sports: IP-98-355 Danish Tennis Federation; 37124 FIFA rules on players' agents; 37398 Joint selling of the commercial rights of the UEFA Champions League

Transport: 32490 Eurotunnel; 34518 ACI; 34600 Night Services; IP-94-850 Rapid delivery services; 34494 Decision on tariff structures in the combined transport of goods

**3.12. Third enforcement period: exemptions in "special sectors" to agreements that do not directly fix prices or quotes (footnote 563)**

Financial services: 31499 Dutch Banks; 31291 Uniform Eurocheques

Regulated professions: 36147 EPI

Sports: IP-98-355 Danish Tennis Federation; 37124 FIFA rules on players' agents; 37398 Joint selling of the commercial rights of the UEFA Champions League

Transport: 37396 Revised Trans-Atlantic Conference Agreement; IP-96-400 Baltic Liner Conference Agreement; 36253 P&O Stena Line; 32792 IATA agency programs; 32659 IATA Passenger Agency Programme; 35545 Lufthansa/SAS; 37730 Austrian Airlines/Lufthansa; 38477 British Airways/SN Brussels Airlines; 38479 British Airways and Iberia; 38284 Société Air France/Alitalia Linee Aeree Italiane; 37812 bmi British Midland/Lufthansa/ SAS

### **3.13. Third enforcement period: Exemptions for joint ventures and cooperation agreements that do not fall within the BERs (footnote 588)**

Rationalisation interests: 31902 Iveco/Ford; 34252 Philips-Osram; 32368 BBC Brown Boveri

R&D and innovation: 32368 BBC Brown Boveri; 34252 Philips-Osram; 33814 Ford/Volkswagen; 33640 Exxon/Shell; 33863 Asahi/Saint-Gobain; 34891 Fujitsu AMD Semiconductor; IP/97/742 Scandairy; IP/98/353 photo-graphic manufacturers; 36836 Yoplait/Valio; 37802 Precision Blasting; 37889 GM/Fiat; 32681 Cekacan; 32363 KSB/Goulds/Lowara/ITT; 36213 GEAE/P&W; and dissemination of technology: 34410 Olivetti-Digital

### **3.14. Third enforcement period: additional justification (footnote 597)**

Environmental considerations: 14650 Bayerische Motoren Werke AG, para 24; 29428 GEC-Weir Sodium Circulators, 8; 29955 Carbon Gas Technologie, 3; 32368 BBC Brown Boveri, para 23

Employment considerations: Synthetic fibres, para 37; 33814 Ford/Volkswagen, para 36; 34456 Stichting Baksteen, para 27

Industrial policy: 30373 37143 P & I CLUBS, para 56; 30810; 35617 Phoenix-GlobalOne, para 60; 35337 Atlas, para 51; 38014 IFPI 'Simulcasting', para 91; 38370 UK Network Sharing Agreement, para 139; 26612 MAN/SAVIEM, para 29; 14650 Bayerische Motoren Werke AG, para 124; 26940 United Reprocessors GmbH, page 6; 29955 Carbon Gas Technologie, page 3; 30320 Optical fibres, para 59; 32034 Computerland, para 31; 32368 BBC Brown Boveri, para 23; 34857 PT-MCI, para 53-54; IP-94-850 Rapid delivery services; 36718 CECED, para 50; IP-94-850 Rapid delivery services

### **3.15. Exemptions to hard-core restrictions (footnote 631)**

30810 Synthetic fibres; 31055 ENI/Montedison; 30863 BPCL/ICI; 36494 EACEM (1998); 36718 CECED (1999); 30804 Nuovo Cegam (1984); 30373 P&I Clubs (1985); 32408 TEKO (1989); 33100 Assurpol (1992); 32265 Concordato Incendio (1989); 29373 Visa International's multilateral interchange fee (2002); 34494 Decision on tariff structures in the combined transport of goods (1993); 36748 REIMS II (1999)

### **3.16. Preliminary rulings (footnote 634)**

Prior to modernisation - focus on distribution systems: C-126/80 SALONIA; C-243/83 Binon; C-41/96 VAG-Händlerbeirat eV

Following modernisation – regulated markets: C-238/05 Asnef-Equifax (financial sector); C-403/08 C-429/08 Football Association Premier League (broadcasting of sport programs); C-1/12 Ordem dos Técnicos Oficiais de Contas (the activity of chartered accountants). Distribution via the internet in C-439/09 Pierre Fabre (2011)

### **3.17. Article 101(3) TFEU appeals (footnote 635)**

CJEU

First enforcement period: C-56/64 C-58/64 Grundig-Consten, page 347; C-8/66 C-9/66 C-10/66 C-11/66 Noordwijks Cement Accoord, 92; C-17/74 Transocean Marine Paint Association, para 16; C-71/74 Frubo, para 42-43

Second enforcement period: Distribution systems: C-26/76 SABA; C-28/77 Theal/Watts; C-30/78 The Distillers Company Ltd; C-209/78 C-210/78 C-211/78 C-212/78 C-213/78 C-214/78 C-215/78 C-218/78 Fedetab; C-43/82 C-63/82 VBBB/VBVB; C-35/83 Tokects/Dorcet; C-25/84 C-26/84 Distribution system of Ford-Werke AG; C-240/82 C-241/82 C-242/82 C-261/82 C-262/82 C-268/82 C-269/82 SSI; C-260/82 SSI; C-75/84 SABA. Trade association: C-61/80 Rennet; C-258/78 Breeders' rights — maize seed; C-96/82 C-97/82 C-98/82 C-99/82 C-100/82 C-101/82 C-102/82 C-103/82 C-104/82 C-105/82 C-108/82 C-110/82 AVEWA-ANSEAU; Insurance: C-45/85 Fire insurance; specialised fairs: C-43/85 UINDI

Third enforcement period: Distribution agreements: C-360/92 Publishers Association — Net Book Agreements (1995). Professional associations: C-137/95P Building and Construction Industry in the Netherlands (1997); C-8/95P UK Agricultural Tractor Registration Exchange (1998)

Fourth enforcement period: Professional associations: C-171/05P FIFA rules on players' agents (2006); Distribution agreements: C-501/06P C-513/06P C-515/06P C-519/09P

GlaxoSmithKline (2009); MIF agreements: C-382/12P MasterCard (2014)

GC:

Third enforcement period: Distribution agreements: T-19/91 Vichy; T-9/93 Langnese-Iglo; T-19/92 Yves Saint Laurent Perfumes; T-19/92 Yves Saint Laurent Perfumes, para 197-205; T-88/92 Perfumes Givenchy system of selective distribution; T-231/99 Bass; T-131-99 Whitbread; T-65-98 Van den Bergh Foods Limited. Horizontal agreements: T-14/89 Polypropylene, para 271; T-39-92 T-40-92 Eurocheque. Trade associations: T-61/89 Dansk Pelsdyravlerforening v Commission; T-66/89; Publishers Association v Commission; T-34/92 UK Agricultural Tractor Registration Exchange; T-35/92 UK Agricultural Tractor Registration Exchange; T-213/95 T-18/96 Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven, para 190-212. Joint ventures and cooperation agreements: T-71/93 Ford/Volkswagen; T-

528/93 T-542/93 T-543/93 T-546/93 EBU/Eurovision System; T-185-00 T-216-00 T-299-00 T-300-00 Eurovision (2002); T-112/99 TPS; T-395/94 Trans-Atlantic Agreement

Fourth enforcement period: T-193/02 FIFA rules on players' agents, para 100-106; T-259/02 T-260/02 T-261/02 T-262/02 T-263/02 T-264/02 T-271/02 Austrian banks – 'Lombard Club', para 213-214; T-289/01 DSD, para 37-49, 142-155; T-419/03 Austrian system for the disposal of packaging waste, para 64-80; T-362/02 Bitumen, para 82-83; T-359/06 Bitumen, para 30-31; T-357/06 Bitumen, para 122-124; T-354/06 Bitumen, para 68-69; T-353/06 Bitumen, para 134-135; T-451/08 CISAC, para 98-108; T-544/08 Candle Waxes, para 263-267; T-469/13 Lundbeck (2016); T-470/13 Lundbeck (2016); T-472/13 Lundbeck (2016); T-699/14 Licensing of intellectual property rights for football collectibles (2017)

### **3.18. Basis for GC scrutiny (footnote 638)**

Procedural requirements: T-19/91 Vichy, para 90; T-14/89 Polypropylene, para 271; T-61/89 Dansk Pelsdyravlerforening v Commission, para 148; T-66/89 Publishers Association v Commission<sup>1</sup>, para 69, 76; T-29/92 Building and Construction Industry in the Netherlands, para 288; T-575/93 Buma, para 40, 56

Very general appraisal of the Commission's discretion: T-39/92 T-40/92 Eurocheque, para 109-115; T-34/92 UK Agricultural Tractor Registration Exchange, para 99; T-35/92 UK Agricultural Tractor Registration Exchange, para 105; T-29/92 Building and Construction Industry in the Netherlands, para 256, 288; T-9/93 Langnese-Iglo, para 140-149; T-19/92 Yves Saint Laurent Parfums, para 197-205; T-88/92 Parfums Givenchy system of selective distribution, para 197-205; T-213/95 T-18/96 Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven; T-395/94 Trans-Atlantic Agreement, para 251-264; T-231/99 Bass, para 36, 47/67; T-65/98 Van den Bergh Foods Limited, para 120-144; T-544/08 Candle Waxes (2014), para 263-267; T-469/13 Lundbeck (2016), para 353-354; T-470/13 Lundbeck (2016), para 56-58; T-472/13 Lundbeck (2016), para 712-714

### **3.19. Fourth enforcement period: appeals on Commission's old exemptions involving non-economic benefits (footnote 653)**

Confirming exemptions granted: On the basis of sport: T-193/02 FIFA rules on players' agent; C-171/05P FIFA rules on players' agent. Environmental considerations: T-289/01 DSD, para 38; T-419/03 Austrian system for the disposal of packaging waste, para 23. Financial services: T-259/02 T-260/02 T-261/02 T-262/02 T-263/02 T-264/02 T-271/02 Austrian banks – 'Lombard Club

Appeals affirming that in theory non-economic benefits could justify an exemption: On the basis of free riding: T-491/07 Groupement des cartes bancaires, para 77, 259. R&D: T-168/01 GlaxoSmithKline, para 268. Culture: T-451/08 CISAC, para 103



### **3.20. France: consideration of broad non-competition interests (footnotes 699 and 702)**

Prior to 2009: Protection of jobs: 05-D-03 Bleach (2005), para 117-121

Living standards of agriculturist: 05-D-10 Fruit and vegetables in Brittany (2005), para 130-132

Stabilisation of prices: 05-D-10 Fruit and vegetables in Brittany (2005), para 130-132; 05-D-55 Essential Oils of Lavandin (2005), para 78-85

Increased bargaining power: 05-A-17 Collective bargaining on deadlines intercompany payment (2005), para 31-37; 05-D-55 Essential Oils of Lavandin (2005), para 78-85

Public health and safety: 06-D-03 Heating, ceramic sanitary and plumbing equipment (2006), para 1254-1261; 07-D-49 Defibrillators (2007), para 323-325

Protection of SMEs: 07-D-49 Defibrillators (2007), para 321-325

Fair trade rules: 06-A-07 Fair trade (2006)

Agriculture: 07-A-04 Quality label (2007)

After 2009: Increased bargaining power: 13-D-14 Strasbourg vets (2013), para 147-150

Survival of industry: 15-D-19 Standard and express delivery (2015), para 717-725

Broadcasting of sports: 09-D-31 Football rights (2009), para 299-300; 04-A-09 Broadcasting rights for sporting competitions (2009)

Investment: 08-A-16 Mobile virtual network operators (MVNO) (2016), para 123; 11-A-20 Relay masts (2011), para 9-33; 13-A-08 Network sharing and roaming (2013), para 65

Culture: 09-A-50 Cinema code (2009), para 94-95

Public health: 11-A-20 Relay masts (2011), para 9-33

Environmental considerations and development of rural areas: 13-A-08 Network sharing and roaming (2013), para 65

### **3.21. Germany: consideration of cost and quality benefits (footnote 709)**

B1-25/04 Verta/Danzer, 19; B8-113/03-1 Long-term gas supply, 23-28; B1-116/04 Sandlime Brick, para 134; B10-148/05 Lottery, para 422-425; B4-1006/06 Container glass; Joint selling of media rights (2008); B2-90/01-4 Timber; B1-232/07 Association of the German construction industry, 2; B3-64/05 Merck and VWR distribution agreement, para 105-110; B10-44/09 B10-45/09 B10-47/09 B10-48/09 B10-10/10 B10-11/10 B10-13/10 B10-14/10 B10-18/10 B10-19/10 B10-20/10 B10-21/10 B10-22/10 B10-23/10 B10-24/10 B10-25/10 Gas and electricity supplier resale bans; B3-134/09 Federal Guild of Hearing Aid Acousticians, para 44-46; B6-114-10 Joint selling of media rights for the German football leagues (2012); B9-96-09 Lufthansa, para 51; B7-11/13 Bosch Siemens, page 4; B3-93/15 lighters, para 43; B6-46/12 Amazon (2013), 2-3; B9-66/10 HRS-Hotel Reservation Service (2013), para 199-212; B7-46/13 Telekom and Telefónica (2014), para 90

### **3.22. Germany: industrial policy considerations (footnote 710)**

B8-113/03-1 Long-term gas supply (2006), 24-26; B7-22/07 Basic Encryption of TV Programs – Commitments (2012), 41; B7-1/13-35 Sennheiser (2013), 1-2; B3-137/12 Adidas (2014), 6-7; B2-98/11 Asics (2015), para 613-622; B6-81/11 ARD/ZDF online platform "Germany's Gold" (2014); B7-46/13 Telekom and Telefónica (2014), para 88-89

### **3.23. UK: NCA outright reject Article 101(3) TFEU exceptions (footnote 722)**

CE/2464-03 UOP/prices for desiccant; CE/2890-03 Future fees by certain independent fee-paying schools; CE/4327-04 Bid rigging in the construction industry in England; CE/7510-06 Construction Recruitment Forum; CE/8950/08 Loans to large professional services firms; CE/3094-03 Dairy retail price initiatives; CE/7691-06 Airline passenger fuel surcharges for long-haul flights; CE/9161-09 Distribution of Mercedes-Benz commercial vehicles (vans); CE/9248-10 Access control and alarm systems to retirement properties; CE/9627/12 Supply of prescription medicines to care homes in England; B8-175/11 Titisee-Neustadt (2015), para 151

### **3.24. Germany: NCA refusal to grant exceptions on basis of the first and third conditions (footnote 732)**

B1-25/04 Verta/Danzer, 19-25; B8-113/03-1 Long-term gas supply, 23-28; B1-116/04 Sand-lime brick, para 134-138; B10-148/05 Lottery, para 422-425; B4-1006/06 Container glass, para 144, 153; B1-232/07 Association of the German construction industry, 2; B3-64/05 Merck and VWR distribution agreement, para 105-110; B10-44/09 B10-45/09 B10-47/09 B10-48/09 B10-10/10 B10-11/10 B10-13/10 B10-14/10 B10-18/10 B10-19/10 B10-20/10 B10-21/10 B10-22/10 B10-23/10 B10-24/10 B10-25/10 Gas and electricity suppliers resale bans; B3-134/09 Federal Guild of Hearing Aid Acousticians, para 44-46; B9-96-09 Lufthansa, para 51; B7-11/13 Bosch Siemens, 4; B1-62/13 Rental of retail space in factory outlet centres, para 323-354; B1-72/12 Round timber in Baden-Württemberg (2015), para 455-458, 482-485; B3-93/15 Lighters, para 43; B7-1/13-35 Sennheiser, 1-2; B3-137/12 Adidas, page 6-7; B2-98/11 Asics, para 613-622; B6-81/11 ARD/ZDF online platform "Germany's Gold"; Sanitary sector (2016); B6-32/15 Joint selling of media rights to matches of the German Bundesliga (2016); B4-71/10 Online banking conditions (2016), para 421-436

### **3.25. Hungary: broad interpretation of Article 101(3) TFEU until 2005 (footnote 725)**

Rejecting exceptions in cases of price-fixing: Vj-74/2004/58 Public procurement bidding for building a block of flats with respect to bid-rigging; VJ-138/2004/14 Hungarian Bakers Guild, para 17-19; Vj-60/2004 Budapest Sports Stadium. The decision was upheld by the Budapest Metropolitan Court in 7.K.34341/2005/15 Budapest Sports Stadium

Granting exceptions for other types of agreements: Vj-169/2003/68 Fertilizers, para 6,32; Vj-132/2004/26 Card issuance, para 6, 13-15; Vj-200/2004/13 Funeral service in Szolnok, 5-6, 8; Vj-128/2004/23 Tomb construction activities in Túrkeve, para 40; Vj-

178/2004/5 Pont Audio, para 35; Vj-23/2005 Rába Group and Integri, para 67, 76; Vj-207/2004/51 Rába IT agreement

### **3.26. Hungary: NCA refusal to grant exceptions for agreements since 2006 (footnote 726)**

Vj-161/2004/59 Animal Feed Phosphates II; Vj-162/2004 Universities IT tender; Vj-199/2005 Egg cartel; Vj-71/2005 Sara Lee price restrictions; Vj-158/2005/148 Hyundai Motors Hungary; Vj-140/2006 newspaper distribution I; Vj-26/2006 Navigation tools; Vj-81/2006/74 Medical equipment; Vj-166/2006 Car navigation tools; Vj-195/2007/129 Newspaper distribution II; Vj-69/2008 Wheat mill products I; Vj/134/2008 Wheat mill products II; Vj-151/2009/260 Model contracts for programme; Vj-115/2010 Dental headpieces; Vj-66/2012 Geophysical measuring operations; Vj-96/2010 Contact lenses; Vj-29/2011-522 Ready-mix concrete; Vj-45/2008-641 Colour television tubes; Vj-2/2010 Car refinishing paints; Vj-23/2011 Daily newspapers; Vj-40/2013 Driving schools in Győr; Vj-48/2013 Tenders in Nagylóc and Szécsényfelfalu; Vj-49/2011 Hungarian beer market; Vj-73/2011 Mosquito control; Vj-11/2014 Media Service Support and Asset Management Fund; Vj-156/2004/68 Ice-cream; Vj-2/2015 lead-acid batteries (2016); VJ-37/2014 Meat products temporary sales (promotions) (2016)

### **3.27. Hungary: professional association cases (footnote 727)**

Cases terminated by accepting commitments: Vj-16/2005 Deontological rules of auditors; Vj-60/2006/37 Hungarian Chamber of Pharmacists; Vj-1/2008 Hungarian Real Estate Association; Vj-57/2008/23 Gyöngy Strategic Association; Vj-97/2013 Driver training ethics code, as upheld by the first instance in 38.Kpk.46.218/2014/5 Driver training ethics code; Vj-8/2012 Hungarian Banking Association

Cases ended with a prohibition decision: Vj-180/2004 Hungarian Bar Association of attorneys; Vj-51/2005 The Hungarian Association of Automobile Dealers, confirmed by the Budapest Metropolitan Court in 7.K.31.11612007144 The Hungarian Association of Automobile Dealers; Vj-201/2005 Hungarian Chamber of Architects, upheld by the Budapest Metropolitan Court in 11.K.31.445/2008/11 Hungarian Chamber of Architects and the Budapest Appeal Court in 2.Kf.27.463/2009/5 Hungarian Chamber of Architects; Vj-36/2008 Association of journalists, upheld by the Budapest Metropolitan Court in 3.K.30.051/2009/12 Association of journalists and the Budapest Court of Appeals in 2.Kf.27.217/2010/4 Association of journalists; Vj-3/2008 Rail freight transport services; Vj-51/2008 Professional Guild of Hairdressers, as partially altered (not with respect to Article 101(3) TFEU) by the Budapest Metropolitan Court in 7.K.34.976/2009/9 Professional Guild of Hairdressers, and revised to the GVH's position by the Budapest Court of appeals in 2.Kf.27.333/2010/6 Professional Guild of Hairdressers; Vj-143-016/2008 Chamber Of Plant Protection In Hungary

### **3.28. Netherlands: NCA rejects outright Article 101(3) TFEU exceptions (footnote 747)**

4014 Horticultural Services, para 117-120; 5851-121 Thuiszorg 't Gooi, para 224; 108/258 Thuiszorg Kennemerland, para 184-185; 6274/569 Midden IJssel, para 224-231; 6538 Houses merchants foreclosure auctions, para 219; 6425 Window cleaners, para 246-251; 6888/435 LHV pace of establishment, para 151-154; 7036\_1/386 Bell peppers, para 280-281; 7401-106 Demolition firms bid-rigging - Bergambacht & Dilettant, para 128-129; 7244-597 Magazine packs, para 279-284; 13.0612.53 Mobile operators, para 83; 7571/40.O1018 Mandatory flood insurance, para 61-64; ACMDM2015201065\_0V Proton therapy, 6

### **3.29. France: strict intensity of control (footnote 764)**

Demanding economic evidence to substantiate the existence of the first two conditions of Article 101(3) TFEU: 09-A-48 Dairy (2009), para 86; 09-A-50 Cinema code (2009), para 166-170; 10-D-13 Le Havre Port (2010), para 321-332, 435-441; 10-D-20 Electronic discount coupons (2010), para 57; 11-D-02 Restoration of historic monuments (2011), para 566-567; 12-D-08 Endives (2012), para 576; 12-D-09 Flour mills (2012), para 663-664, 725-726; 15-D-19 Standard and express delivery (2015), para 720-725, 757-763

Strict application of the indispensability condition: 09-D-31 Football rights (2009), para 299-301; 09-A-48 Dairy (2009), para 85; 10-D-20 Electronic discount coupons (2010), para 58; 11-D-01 Port handling sector on Reunion Island (2011), para 129; 12-D-08 Endives (2012), para 580-584; 12-D-09 Flour mills (2012), para 673-677; 13-D-03 Pork slaughtering (2013), para 252; 13-D-14 Strasbourg vets (2013), para 148-150; 14-A-04 Seed (2014), para 105-107

## Chapter 5: Article 101(1) TFEU

### **5.1. State action defence: anti-competitive behaviour goes beyond what is necessary (footnote 972)**

C-8/74 Dassonville (1974), para 15; C-209/78 C-210/78 C-211/78 C-212/78 C-213/78 C-214/78 C-215-78 C-218/78 Fedetab (1980), para 130-131, 161; 29395 Windsurfing International (1983); C-246/88 Roofing felt (1989), para 17-18; C-811/79 ARIETE S.P.A. (1980), para 14-17; C-339/89 Alsthom (1991), para 11; T-14/89 Polypropylene (1992), para 310-312; 188/86 Lefèvre (1987), para 7; C-254/87 Syndicat des libraires de Normandie (1988), para 10-15; C-412/93 Société d'Importation Edouard Leclerc-Siplec (1995), para 25-26; C-134/94 Esso Española SA (1995), para 19-20; C-70/95 Sodemare SA (1997), para 41-43; C-327/12 SOA Nazionale Costruttori (2013), para 37-39; T-145/89 Welded steel mesh (1995), para 56, 140; 36693 Volkswagen (2001), para 72; 36571 Austrian banks - 'Lombard Club' (2002), para 373-375

## **5.2.State action defence: settling politically sensitive issues (footnote 973)**

Member States' constitutions: broadcasting rights in 31734 Film purchases by German television stations (1989), para 39; freedom of association in T-14/89 Polypropylene (1992), para 318-319; freedom of press in C-243/83 Binon (1985), para 41-42

Trade and international agreements: 27095 Franco-Japanese ball- bearings agreement (1974), 5; 29725 Wood pulp (1984), para 80; T-406/08 Industries chimiques du fluor (ICF) (2013), para 208; 39180 Aluminium Fluoride (2008), para 68-72; C-43/82 C-63/82 VBVB (1984), para 33-40; C-126/97 Eco Swiss China Time Ltd (1999), para 36-41; 32450 French-West African shipowners' committees (1992), para 33; 428 VBVB (1981), para 45; 38698 CISAC (2008), para, 93

EU Treaties: C-172/80 ZÜCHNER (1981), para 8; C-45/85 Fire insurance (1987), para 12-25; 34073 34395 35436 Van den Bergh Foods Limited (1998), para 211-214

EU Charter of Fundamental Rights: 38279 French beef (2003), para 114; T-217/03 T-245/03 French beef (2006), para 98-101; C-43/82 C-63/82 VBVB (1984), para 33-40

EU secondary law: T-229/94 HOV SVZ-MCN (1997), para 41; C-90/76 Van Ameyde (1977), para 15; 33151 33997 Jahrhundertvertrag VIK-GVSt (1992), para 19, 24; 34579 36518 38580 MasterCard I (2007), para 439-444; 38698 CISAC Agreement (2008), para 107-110, 161-163; 39401 E.On/GdF (2009), para 253

Professional associations: 27000 IFTRA rules for producers of virgin aluminium (1975), 6; 28980 Pabst & Richarz-BNIA (1976), 27; 29883 AROW-BNIC (1982), para 54-58; 33686 Coapi (1995), para 34-35; 36147 EPI code of conduct (1999), para 26-27, 42, as confirmed by the GC in T-144/99 EPI code of conduct (2000), para 49-50

## **5.3.State action defence: lack of autonomy strand of cases (footnote 977)**

Exception accepted in: C-5/79 Buys (1979), para 29-31; C-177/82 C-178/82 Van de Haar (1984), para 24; Asia Motor France III (1994) (unpublished. The decision quoted in T-387/94 Asia Motor France III (1996), para 24; C-185/91 Bundesanstalt für den Güterfernverkehr (1993); C-207/01 Altair Chimica SpA (2003), para 30-37; T-325/01 Mercedes-Benz (2005), para 156; T-370/09 GDF Suez SA (2012), para 9; T-360/09 E.ON/GDF (2012), para 102; 39401 E.ON/GDF (2009)

Exception rejected in: 28852 29127 29149 Fedetab (1978), para 88, 105 as confirmed by the CJEU in C-218-78 Fedetab (1980), para 130-131, 1; 29133 WANO Schwarzpulver (1978), 6-7; 29021 BP Kemi - DDSF (1979), para 71; 29702 Johnson & Johnson (1980), para 34; 33585 Distribution of railway tickets by travel agents (1992), para 85-90; 29525 30000 SSI (1982), para 100-105 as confirmed by the CJEU in C-240/82 and other SSI (1985), para 23-37, 40 and C-260/82 SSI (1985), para 26-30; 34279 ADALAT (1996), para 202-206; 38238 Spanish Raw Tobacco (2004), para 349-355; 38281 Italian raw tobacco (2005), para 320-233; 39188 Bananas (2008), para 306

**5.4.State action defence: rejected if undertakings’ autonomy was considerably restricted, but not limited (footnote 979)**

T-142/89 Welded steel mesh (1995), para 91; T-143/89 Welded steel mesh (1995), para 29; C-219/95P Welded steel mesh (1997), para 24-25; 37614 Interbrew and Alken-Maes (2001), para 247-249; T-66/99 Greek Ferries (2003), para 176-198 and T-65/99 Greek Ferries (2003), para 119-141; C-198/01 Consorzio Industrie Fiammiferi (CIF) (2003), para 66-80; T-217/03 T-245/03 French beef (2006), para 87

**5.5.State action defence: non-legislative measures (footnote 989)**

GC: T-387/94 Asia Motor France III (1996), para 60-65; T-217/03 T-245/03 French beef (2006), Para 92; 38279 French beef (2003), para 150-156; T-216/13 Telefónica-Portugal Telecom (2016), para 111-120. In T-7/92 Asia Motor II (1993), para 68-73 and T-37/92 SMMT-JAMA arrangements (1994), para 66-70 the GC overturned the Commission’s decisions in this regard

Commission: 32732 Ijsselcentrale (1991), para 21; 38456 Bitumen Nederland (2006), para 159; 39181 Candle waxes (2008), para 192-194; 39188 Bananas (2008), (para 307-308, 319); 39258 Airfreight (2010), para 966-981, 987-1006

**5.6.State action defence: an opinion or draft decision on the basis of public interest criteria is not a delegation of powers (footnote 997)**

Conveying an opinion or draft decision: 35591 35634 Weyl-PW+SSR (1997). The decision was not published, yet is was summarized by the GC in T-197/97 T-198/97 Weyl-PW+SSR (2001), para 67, 79; C-221/99 Giuseppe Conte (2001), para 21; C-35/99 Manuele Arduino (2002), para 40-43; 38401 EMC-Producteurs européens de ciment (2005), para 91,as confirmed by the GC in T-432/05 EMC Development AB (2010), para 122; C-94/04 C-202/04 Federico Cipolla (2006), para 44-54; C-225/09 Jakubowska (2010), para 47-53; C-121/16 Salumificio (2016), para 22-23; C-532/15 C-538/15 Eurosaneamientos (2016), para 36-40

On the basis of public interest criteria: C-96/94 Centro Servizi Spediporto Srl (1995), para 19-34; C-38/97 Autotrasporti Librandi Snc di Librandi F. & C. (1998), para 26-37; C-309/99 Wouters (2002), para 67-69

**5.7.Article 106(2) TFEU: failing the proportionality test (footnote 1026)**

EU Courts: T-289/01 DSD (2007), para 207-210; C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 107

Commission: 28980 Pabst & Richarz/BNIA (1976), 5; 29995 NA VEWA-ANSEAU (1981), para 66-67; 30979 31394 Decca Navigator System (1988), para 130; 31734 Film purchases by German television stations (1989), para 40; 32732 Ijsselcentrale (1991), para 43-46; 32524 Screensport/EBU Members (1991), para 68-69; 33151 33997 Jahrhundertvertrag VIK-GVSt (1992), para 28; 32150 EBU/Eurovision System (1993), para 78-79; 36748 REIMS II (1999), para 91-92; 38698 CISAC (2008), para 256-259

**5.8. Notion of undertaking: commercial activities of associations irrespective of statutes under national law (footnote 1037)**

299 Belgisch Syndikaal Verbond van de Parfumerie (ASPA) (1970), 3; 28980 Pabst & Richarz/BNIA (1976), 4; 26870 Aluminium imports from eastern Europe (1984), para 9.2; 31029 French inland waterway charter traffic: EATE levy (1985), para 37-39; 31734 Film purchases by German television stations (1989), para 38; 33407 CNSD (1993), para 40-41; 33686 Coapi (1995) para 32-33; 34179 34202 Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven (1995), para 18; 36147 EPI code of conduct (1999), para 23-24; 30373 37143 P & I CLUBS (1999), para 50-51

**5.9. Notion of undertaking: sport-related economic activities (footnote 1039)**

Commission: 33384 33378 Distribution of package tours during the 1990 World Cup (1992), para 43-60; 32150 EBU/Eurovision System (1993), para 45-46; 36851 Mouscron (1999); 37576 UEFA Broadcasting Regulations (2001), para 47; 37806 ENIC/UEFA (2002), para 25-26; 38158 Meca Medina (2002), para 33-39; 39471 Certain joueur de tennis professionnel/ Agence mondiale antidopage (2009), para 19-27; 40208 International Skating Union's Eligibility rules (2017), para 146-153

GC: T-313/02 MecaMedina and Majcen/IOC (2004), para 35-69; T-193/02 FIFA rules on players' agents (2005), para 68-72

**5.10. Notion of undertaking: definition (footnote 1042)**

C-159/91 C-160/91 Poucet (1993), para 17; C-244/94 Federation Française des Sociétés d'Assurance (1995), para 14; C-219/97 Maatschappij Drijvende Bokken BV (1999), para 67; C-115/97 C-116/97 C-117/97 Brentjens' Handelsonderneming BV (1999), para 77; C-67/96 Albany (1999), para 77; C-180/98 C-181/98 C-182/98 C-183/98 C-184/98 C-185/98 Pavlov (2000), para 74; C-475/99 Ambulanz Glöckner (2001), para 19; C-218/00 Cisal (2002), para 22; C-309/99 Wouters (2002), para 46; C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2004), para 46; C-350/07 Kattner Stahlbau (2009), para 34; C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 35; C-327/12 Ministero dello Sviluppo economico (2013), para 27

**5.11. Notion of undertaking: offering goods and services in a market (footnote 1049)**

C-180/98 C-181/98 C-182/98 C-183/98 C-184/98 C-185/98 Pavlov (2000), para 75; C-475/99 Ambulanz Glöckner (2001), para 19; C-218/00 Cisal (2002), para 23; C-309/99 Wouters (2002), para 47; C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 35-36; C-327/12 Ministero dello Sviluppo economico (2013), para 27

**5.12. Notion of undertaking: solidarity (footnote 1052)**

Schemes based on solidarity principles: C-159/91 C-160/91 Poucet (1993), para 8-19; C-218/00 Cisal (2002), para 31-45; C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2004), para 47-65; C-350/07 Kattner Stahlbau (2009), para 44-68 (the



Court noted that this finding is subject to verification of relevant factors by the referring court)

Schemes based on capitalisation principles: C-244/94 Federation Française des Sociétés d'Assurance (1995), para 16-22; C-219/97 Maatschappij Drijvende Bokken BV (1999), para 70-77; C-115/97 C-116/97 C-117/97 Brentjens' Handelsonderneming BV (1999), para 81-87; C-67/96 Albany (1999), para 78-87; C-180/98 C-181/98 C-182/98 C-183/98 C-184/98 C-185/98 Pavlov (2000), para 74-89

**5.13. Notion of undertaking: the participation criterion (footnote 1053)**

Social security schemes: C-159/91 C-160/91 Poucet (1993); C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2004)

Pension funds: C-219/97 Maatschappij Drijvende Bokken BV (1999); C-67/96 Albany (1999); C-115/97 C-116/97 C-117/97 Brentjens' Handelsonderneming BV (1999); C-180/98 C-181/98 C-182/98 C-183/98 C-184/98 C-185/98 Pavlov (2000)

Old-age insurance: C-244/94 Federation Française des Sociétés d'Assurance (1995)

Workers' health and accident insurance: C-218/00 Cisaal (2002); C-350/07 Kattner Stahlbau (2009); C-437/09 AG2R Prévoyance (2011)

Professional associations: C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 37; C-327/12 SOA Nazionale Costruttori (2013), para 29; C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 35; C-327/12 Ministero dello Sviluppo economico (2013), para 29; C-413/13 FNV Kunsten Informatie en Media (2014), para 33

**5.14. Inherent restrictions: balancing is confined to Article 101(3) TFEU (footnote 1076)**

C-136/86 BNIC (1987), para 21; T-29/92 Building and construction industry in the Netherlands (1995), para 96, 104, 178, 186-187; 37124 FIFA rules on players' agents (2002), para 30; C-209/07 Beef Industry (2008), para 21; 39510 Ordre national des pharmaciens (ONP) (2010), para 604; 39226 Lundbeck (2013), para 653; 39612 Perindopril (Servier) (2014), para 1205; T-90/11 Ordre national des pharmaciens (ONP) (2014), para 675

**5.15. Inherent restrictions: balancing is confined to Article 101(3) TFEU, types of non-competition interests (footnote 1077)**

Financial or structural crisis and financial security: C-41/69 Quinine (1970), para 47, 125-127; C-45/69 Quinine (1970) para 33; T-14/89 Polypropylene (1992), para 298-301; T-305/94 T-306/94 T-307/94 T-313/94 T-314/94 T-315/94 T-316/94 T-318/94 T-325/94 T-328/94 T-329/94 T-335/94 PVC (1999), para 740-741; 27039 Preserved mushrooms (1975), III.2; 28948 Cauliflowers (1977), 7; 30188 Moët et Chandon (London) Ltd (1981), para 7, 15; 30350 Zinc producer group (1984), para 73; 31865 PVC (1988) para 36; 31866 LdPE (1988), para 43; 31572 32571 Building and construction industry in the Netherlands (1992), para 71-75, 117, as confirmed by the



GC in T-29/92 Building and construction industry in the Netherlands (1995), para 96, 104, 178, 186-187; 36571 Austrian banks - 'Lombard Club' (2002), para 392

Consumer protection: 27000 Primary aluminium (1975), 8; 28980 Pabst & Richarz/BNIA (1976), 2, 4-5

Health and safety: 31624 Vichy (1991) para 18; 38370 UK Network Sharing Agreement (2003), para 83-85; 38369 Network Sharing Rahmenvertrag (2003), para 92-102

Fight against illegal practices: 38281 Raw Tobacco Italy (2005), para 291

Anti-dumping: 26870 Aluminium imports from eastern Europe (1984), para 12.2; 36604 Citric acid (2001) para 162-166

Sporting rules: 40208 International Skating Union's Eligibility rules (2017), para 171

Social aims: C-61/80 Rennet (1981), para 12; T-61/89 Hudson's Bay — Dansk (1992), para 54

Promote competition or correct market failures: T-14/89 Polypropylene (1992), para 296; 32290 Newitt/Dunlop Slazenger International (1992), para 56 as confirmed by the Court in T-43/92 Newitt/Dunlop Slazenger International and Others (1994), para 131; 36957 Glaxo Wellcome (2001), para 127

#### **5.16. Inherent restriction: regulated associations and sporting rules (footnote 1088)**

Accepted with respect to sporting rules: 39471 Certain joueur de tennis professionnel/Agence mondiale antidopage (2009); 39732 Certain Formula One engine manufacturers (2011)

Rejected with respect to sporting rules: 40208 International Skating Union's Eligibility rules (2017)

Rejected with respect to professional associations: 38549 Barème d'honoraires de l'Ordre des Architectes belges (2004); T-217/03 T-245/03 French beef (2006), para 89; T-451/08 CISAC (2013), para 92; C-1/12 Ordem dos Técnicos Oficiais de Contas (2013); C-136/12 Consiglio nazionale dei geologi (2013); C-184/13 C-185/13 C-186/13 C-187/13, C-194/13, C-195/13 C-208/13 API (2014)

#### **5.17. Ancillary restraints: horizontal cooperation agreements (footnote 1127)**

Restrictions subordinate to the creation of joint ventures: 34857 BT/MCI (1994), para 46; 34891 Fujitsu AMD Semiconductor (1994), para 36; 34252 Philips-Osram (1994) para 19-20; 35617 Phoenix/GlobalOne (1996), para 53; 35337 Atlas (1996), para 42; 35830 Unisource (1997), para 82; 35738 Uniworld (1997), para 65; 37123 MetroHoldings (1999); 39258 Airfreight (2010), para 938-963; 39736 SIEMENS/AREVA (2012), para 32, 42, 43

Cooperation in technology markets: 32688 Konsortium ECR 900 (1990), 33; 34410 Olivetti-Digital (1994), para 20; 35518 Iridium (1996), para 42-49; 35742 EUCAR (1998), 36237 Métropole (1999), para 99-109; 36581 Télécom Développement (1999), para 41-48

Pooling R&D: 26352 Eurogypsum (1968), 2; 28796 Beecham/Parke, Davis (1979), para 33

Specialisation agreements: 29869 Italian cast glass (1980), 6

Standardisation: 197 Industrieverband Solnhofener Natursteinplatten eV (1980), para 35-40; 31458 X/Open Group (1986), para 36-38; 38401 EMC/European Cement Producers (2005), para 91

Joint purchasing and selling: 28838 Intergroup (1975)

**5.18. Ancillary restraints: selective distribution systems based on qualitative objective criteria (footnote 1132)**

Commission: 10498 11546 12992 17394 17395 17971 18772 18888 3213 Omega (1970), para 5; 24055 Kodak (1970), para 21-24; 14650 Bayerische Motoren Werke AG (1974), para 22; 847 SABA (1975), para 34-41; 5715 Junghans (1976), para 20-26; 25757 Hasselblad (1981), para 63; 28748 AEG-Telefunken (1982), para 53-54; 30668 Murat (1983), para 13-17; 29598 SABA's EEC distribution system (1983), para 2; 30849 IBM personal computer (1984), para 16-17; 30299 Grohe's distribution system (1984) para 15; 30261 Ideal-Standard's distribution system (1984), para 15; 29420 Grundig's EEC distribution system (1985), 5-6; 30665 Villeroy & Boch (1985), para 22; 32026 Bayo-n-ox (1989), para 43; 32595 d'Ieteren motor oils (1990), para 12; 31624 Vichy (1991), para 18; 33242 Yves Saint Laurent Parfums (1991), para 4-7; 33542 Parfums Givenchy system of selective distribution (1992), para 15-18; 29420 Grundig's EC distribution system (1993), para 23-35; 33714 VAG FRANCE (1996), 3-4; 39855 Volkswagen Group Italia (Audi) 5 (2016), para 46-50; 39836 Volkswagen Group Italia (Audi) 3 (2016), para 46-50; 39828 Volkswagen Group Italia (Audi) 2 (2016), para 46-50

EU Courts: C-26/76 SABA (1977), para 20-21; C-209/78 C-210/78 C-211/78 C-212/78 C-213/78 C-214/78 C-215-78 C-218/78 Fedetab (1980), para 138; C-99/79 Lancôme (1980), para 20-21; C-31/80 L'ORÉAL (1980), para 15-21; C-126/80 SALONIA (1981), para 24-27; C-210/81 Revox (1983), para 20; C-107/82 AEG-Telefunken (1983), para 42-43, 135-13; C-243/83 Binon (1985), para 31-35; C-31/85 ETA (1985), para 16-18; C-45/85 Fire insurance (1987), para 40-43; T-19/91 Vichy (1992); C-19/92 Yves Saint Laurent Parfums (1996); T-88/92 Parfums Givenchy system of selective distribution (1996), para 141-148; C-439/09 Pierre Fabre (2011), para 46; T-712/14 Watch Repair (2017), 95; C-230/16 Coty (2017), para 24

**5.19. Exhaustion doctrine: formalistic approach (footnote 1159)**

Commission: until the second enforcement period: 5405 Burroughs/Geha-Werke (1971), 2; 5400 Burroughs-Delplanque (1971), 2; 17545 6964 26858 26890 18673 17448 Davidson Rubber Co. (1972), par 7-9; 26813 Raymond-Nagoya (1972), 40-42; 28374 Advocaat Zwarte Kip (1974), 14-15; 27879 Sirdar-Phildar (1975), 29; 21353 Kabelmetal/Luchaire (1975), para 8; 28967 Bronbemaling-Heidemaatschappij (1975), 28-29; 171 856 172 117 28173 Campari (1977), 73-75; 29246 Penneys (1977), 25-26; 29290 Vaessen-Moris (1979), para 15, 23; 30128 Toltecs/Dorcet (1982), 24-25; 29395 Windsurfing International (1983), 10-17; 30129 Carlsberg (1984), 33-34; 4204

Velcro/Aplix (1985), 27-29; 30017 Breeders' rights-roses (1985), para 23-25; 31302 Boussois-Interpane (1986), para 16-17; 31340 Mitchell Cotts-Sofiltra (1986), para 18-24; 31206 Rich products (1987), para 29-38

During the third enforcement period: 314798 Delta Chemie/DDD (1988), para 30-36; 31734 Film purchases by German television stations (1989), para 40-47; 32026 Bayonox (1989), para 57-61; 32736 Moosehead/Whitbread (1990), para 15; 31550 31898 Zera/Montedison and IHinkens/Stähler (1993), para 125; 33375 PMI-DSV (1995), para 10-12; 34279 ADALAT (1996), para 207-211; 36219 Micro Leader/Microsoft (1998), para 29; 35280 Sicasov (1998), para 50-62; Sony licensing agreements for video games (1998); 38014 IFPI 'Simulcasting' (2001), para 61-80; 37920 3G Patent Platform (2002); 37398 Joint selling of the commercial rights of the UEFA Champions League (2003), para 120-124

EU Courts: C-24/67 Parke, Davis and Co (1968), 17-18; C-78/70 Metro-SB-Grossmarkte (1971), para 5-10; C-40/70 SIRENA (1971), para 9-12; C-15/74 Centeafarm (1974), para 38-41; C-8/74 Dassonville (1974), 38-41; C-51/75 EMI Records I (1976), para 31-34 and C-86/75 EMI Records II (1976), para 28-31 and C-96/75 EMI Records III (1976), para 15-18

#### **5.20. Exhaustion doctrine: licensing agreements (footnote 1164)**

C-262/81 Coditel (1982), para 14-19; C-35-83 Tokecs-Dorcet (1985), para 33; C-193-83 Windsurfing surfing International (1986), para 45-49; C-161/84 Pronuptia (1986), para 15-27 C-27/87 Erauw-Jacquery (1988), para 10-11; C-320/87 Ottung (1989), para 17-18; T-504/93 Tierce Ladbroke/PMU-DSV (1997), para 146-162; C-567/14 Genentech (2016), para 35-43; T-460/13 Lundbeck (2016), para 140-141; T-472/13 Lundbeck (2016), para 117-118; T-469/13 Lundbeck (2016), para 243-244; T-470/13 Lundbeck (2016), para 224-225; T-471/13 Lundbeck (2016), para 315-316

#### **5.21. De minimis: qualitative test (footnote 1176)**

Pension funds: C-180/98 C-181/98 C-182/98 C-183/98 C-184/98 C-185/98 Pavel Pavlov (2000), para 91-97

Financial institutions: 31362 Irish Banks' Standing Committee (1986), para 16; 31764 Baltic International Freight Futures Exchange Limited (1987), 26; 31499 Dutch banks (1989), para 47-49; 29373 Visa International (2001), para 42-44, 54, 58, 64; 37462 Identrus (2001), para 54-55

Sport: 37576 UEFA Broadcasting Regulations (2001), para 51-59

R&D: 242 295 Convention chauffourniers (1969), 10-11

#### **5.22. Hungary: following the EU state action doctrine (footnote 1207)**

Vj-180/2004 Hungarian Bar Association of attorneys (2006), para 20, as upheld by the Court on this point in 2K.30863/2009/8 Hungarian Bar Association of attorneys (2009), 17; Vj-16/2005 Deontological rules of auditors (2006), para 48-50; Vj-51/2005 The Hungarian Association of Automobile Dealers (2006), para 622-645; Vj-60/2006/37

Hungarian Chamber of Pharmacists (2007), para 46-50, 73; Vj-44/2007/19 Taxi in Győr (2007), para 25; Vj-201/2005 Hungarian Chamber of Architects (2007), para 127-133; Vj-1/2008 Hungarian Real Estate Association (2008), para 42-46; Vj-51/2008 Professional Guild of Hairdressers (2009). The NCA did not discuss state influence, however in was discussed in appeal 7.K.34.976/2009/9 Professional Guild of Hairdressers (2010); Vj-36/2008 Association of journalists (2008), para 5, 15-36 as upheld by the court in 3.K.30.051/2009/12 Association of journalists (2010) and 2 Kf. 27. 217/2010/4 Association of journalists (2010), 7; Vj-143-016/2008 Chamber Of Plant Protection In Hungary (2010), para 41; Vj-180/2004 Hungarian Bar Association of attorneys (2006), para 20 as upheld by the Court on this point in 2K.30863/2009/8 Hungarian Bar Association of attorneys (2009), 17; Vj-16/2005 Deontological rules of auditors (2006), para 48-50; Vj-199/2005 Egg cartel (2006), para 372-400, para 454-462, as upheld by 7.K.30.838/2007/33 Egg cartel (2008); Vj-3/2008 Rail freight transport services (2012), para 189; 306-314. As upheld by the Court in 3.K.28.763/2013/48 Rail freight transport services (2014), 2.Kf.650.115/2014/5 Rail freight transport services (2015), 18-19 and Kfv.II.37.646/2015/14 Rail freight transport services (2016), 22-23

**5.23. Hungary: notion of undertakings (footnote 1214)**

Vj-93/2004/14 Hungarian Chamber of Pharmacists (2005), para 24; Vj-180/2004 Hungarian Bar Association of attorneys (2006), para 19, 42, as confirmed by the court in 2K.30863/2009/8 Association of attorneys (2009), 14-15; Vj-16/2005 Deontological rules of auditors (2006); Vj-51/2005 The Hungarian Association of Automobile Dealers (2006), para 500-503; Vj-60/2006/37 Hungarian Chamber of Pharmacists (2007), para 42-45; Vj-44/2007/19 Taxi in Győr (2007), para 22; Vj-201/2005 Hungarian Chamber of Architects (2007), para 119-123; Vj-33/2007/212 Network of Pharmacists (2008), para 31; Vj-36/2008 Association of journalists (2008), para 31, as confirmed by the court in 3.K.30.051/2009/12 Association of journalists (2010) and 2. Kf. 27. 217/2010/4 Association of journalists (2010), 6; Vj-151/2009/256 Model contracts for programme (2013), para 123-125; Vj-151/2009/260 Model contracts for programme (2013), para 204-206; Vj-97/2013 Driver training ethics code (2015), para 102-114

**5.24. Netherlands: non-economic benefits in the ancillary restraints exception (footnote 1198)**

3022 Breda pharmacies (2004), para 99-101; 5709 day-care (2008), para 32-35; 5851/211 Thuiszorg 't Gooi (2008), para 195-196 as upheld on this point 5851/262 Thuiszorg 't Gooi (2010), para 77-84; 6091\_1/204 Distributors of sodium hypochlorite (2009), para 127-132; 6895 Amsterdam hospitals (2010), para 13, 48; 6442 WMO Friesland (2012), para 56-58, 66-69; 7138 Home care (2011), para 17. In ACM-DM-2013-202346 Independent pharmacies (2013), the NCA declared that such interests justified collaborations negotiating between independent pharmacies and health insurers, without referring to the ancillary restraints exception explicitly

## Chapter 6: Unique national exceptions

### **6.1. France: joint offering of bids in tenders (footnote 1265)**

The exception was accepted in: 04-D-57 Road surfacing work in the Pyrénées Orientales (2004), para 40-47; 05-D-24 Public roads in Somme (2005), para 51-67; 05-D-61 Highway A51 (2005), para 150-160; 05-D-74 Storage of aggregates (2005), para 36-41; 06-D-32 Departmental roads in Aveyron (2006), para 32-41; 06-D-33 Public procurement contracts in the building sector in Auvergne (2006), para 135, 154; 07-D-01 Piping work in the Morbihan (2007), para 99-105; 07-D-11 Road works in Marne (2007), para 99-107; 07-D-34 Saint-Léon Hospital (2007), para 23-42; 08-D-28 Aggregates in Ille-et-Vilaine (2008), para 122-149; 09-D-35 General Hospital Centre Jean (2009), para 16-29

The exception was rejected in: 04-D-43 Grasse school and extracurricular transportation (2004), para 101-115; 04-D-50 Vallée des Lacs (2004), para 28-53; 05-D-26 Public works in the Meuse department (2005), para 152-153; 05-D-47 Weapon destruction (2005), para 193; 200; 06-D-07 Ile-de-France Bid Rigging (2006), para 470, as confirmed by the court in 2006/06913 Ile-de-France Bid rigging (2008), 47; 06-D-25 Work on the Rouen cathedral, para 48; 07-D-47 Aerial navigation (2007), para 173-174, 240-243; 08-D-15 Renovation of boiler rooms in Saône-et-Loire (2008), para 59, 106, 110; 08-D-22 Property surveyors in Haut-Rhin (2008), para 104-121; 08-D-28 Aggregates in Ille-et-Vilaine (2008), para 157-158; 09-D-03 Coach transportation (2009), para 105-108, as upheld by the court in 2009/02679 Coach transportation (2010), 9; 10-D-10 Landscaping (2010), para 38-45; 11-D-07 Industrial painting (2011), para 134; 16-D-02 School bus transportation in the Lower Rhine (2016), para 125-130

### **6.2. France: public body prerogative (footnote 1276)**

Claims for lack of jurisdiction were accepted in: 05-D-04 Gaz de Strasbourg (2005), para 12-16; 05-D-02 Maritime Transport to Hyère (2005), para 12-14; 06-D-14 CPPAP, para 15-17; 11-D-16 Telecare for senior (2011), para 20-23; 13-D-10 Press Distribution (2013), para 97-100; 16-D-30 Banking (2016)

Claims for lack of jurisdiction were partially rejected in: 04-D-39 Public slaughterhouse of Laval (2004), para 86-93, as upheld by the court in 2004/14592 Public slaughterhouse of Laval (2006) and the Cour de Cassation in 05-13048 Public slaughterhouse of Laval (2006); 05-D-20 Casino du Lac de la Magdeleine (2005), para 23-28, as upheld by the court in 2005/11128 Casino du Lac de la Magdeleine (2005), 4; 05-D-23 France Fire installers (2005), para 14-23; 05-D-60 Transport to Saint Honorat, para 15-17, as upheld by the court in 2005-23732 Transport to Saint Honorat, 6; 07-D-10 CIGC (2007), para 64-71; 09-D-17 Pharmacists in Lower Normandy (2009), para 29-37; 10-D-13 Le Havre Port (2010), para 148-150; 11-D-02 Restoration of historical monuments (2011), para 279-281, as upheld by the court in 2011/03298 Restoration of historical monuments (2012), 47; 12-D-13 Control of

heavy vehicles (2012), para 76-103; 12-D-26 Fire extinguishers (2012), para 164-169; 12-A-14 Veterinary medicines (2012), para 76-78

Claims for lack of jurisdiction were fully rejected in: 04-D-49 Artificial insemination of cattle (2004), para 141-145; 10-D-17 Bowling (2010), para 58-67; 05-D-41 Vocational Training (2005), para 38-43; 05-D-43 Dental surgeons in Puy-de-Dôme (2005), para 190, as upheld by the court in 2005/15784 Dental surgeons in Puy-de-Dôme (2007), 7 and the Cour de Cassation in 06-13498 Dental surgeons in Puy-de-Dôme (2006), 4-5, 196-197; 05-D-47 Weapon destruction(2005), para 38-42; 07-D-08 Corsican cement (2007), para 64-71; 07-D-27 Professional training (2007), para 70-74, as upheld by the court in 2007/15305 Professional training, 4; 07-D-28 Coal handling in the Havre port (2007), para 53-63, as upheld by the court in 2007-17386 Coal handling in the Havre port, 3; 09-D-18 Marseille transportation (2009), para 21-29; 09-D-07 Supplementary health insurance (2009), para 21-29, as upheld by the court in 2009/06049 (2010) Supplementary health insurance, 8 and the Cour de Cassation in 10-12038 Supplementary health insurance (2011), 4; 12-D-03 AURAL-Lyon (2012), para 76; 12-D-28 Consortium Stade de France (2012), para 53-55; 12-D-19 Tooth whitening (2012), para 70-79; 15-D-15 Suburban station of North of Paris (2015), para 38-43; 13-D-02 Towing light vehicles (2013), para 36-41

### **6.3.Hungary: NCA decisions in the agriculture sector prior to the amendment (footnote 1297)**

Vj-199/2005 Egg cartel (2006) as upheld by 7.K.30.838/2007/33 Egg cartel (2008); Vj-69/2008 Wheat mill products I (2010); Vj-89-2003/58 Hunting cartel (2004), as upheld by the court in 3.K.33.949/2010/17 Hunting cartel (2011); Vj-132/2003/37 Council for Wild Animals Products and Services (2005) as upheld by the court in 3. K. 31. 984/2005/30 Council for Wild Animals Products and Services (2008)

## Chapter 7: Commitments and fines

### **7.1.Modifications required following a market test (footnote 1319)**

38173 The Football Association Premier League Limited, para 15-17; 38348 Repsol, para 40; 39596 BA/AA/IB, para 12-13; 39398 Visa MIF (2010), para 8; 39847 Ebooks, para 14; 39230 Rio Tinto Alcan, para 12; 39595 Continental/ United/Lufthansa/Air Canada, para 15; 39398 Visa MIF (2014), para 11; 39964 Air France /KLM/Alitalia/Delta, para 16; 39745 CDS Information Market, para 7; 40023 Cross-border access to pay-TV, para 16-17

## 7.2. Commitments by sector (May 2004 to 2017) (footnote 1342)

Enforcer	Formal commitments	Informal commitments
<b>Regulated and liberalised markets</b>		
<i>Media, telecom and IPRs</i>		
Commission	37214 DFB; 38173 The Football Association Premier League Limited; 40023 Cross-border access to pay-TV; 38681 Cannes Agreement; 39151 39152 SABAM and BUMA	38427 Pay Television Film Output Agreements; 39673 Virtual Print Fee agreements; 39943 E5 - Cooperation among large telecom operators; 38767 FIPCOM/Koninklijke Philips Electronics N.V.; 39636 Rights Agency Ltd/SCAPR a.o.
France	06-D-29 Access of local radios to national advertisement; 06-D-40 Association conducting surveys on magazine press; 07-D-32 Remuneration of press distributors; 05-D-12 EUROPQN; 07-D-17 Films; 07-D-31 Citroën; 10-D-01 iPhone marketing	
Germany	B6-114/10 Joint selling of media rights; B7-22/07 Basic Encryption of TV Programs – Commitments; B7-17/06 T-Mobile, Vodafone and O2; B6-32/15 Joint selling of media rights to matches of the German Bundesliga	Arena and Premiere
Hungary		Vj-51/2004 Remittance via mobile phone
The Netherlands	13.0612.53 Mobile operators	KPN Customer call data
UK	CE/2558-03 TV Eye; CE/2479/03 London-wide newspaper distribution	
<i>Energy and transport</i>		
Commission	38348 Repsol; 39140 DaimlerChrysler; 39141 Fiat; 39142 Toyota Motor Europe; 39143 Opel; 39416 Ship Classification; 39596 BA/AA/IB; 39595 Continental/United/Lufthansa/Air Canada; 39964 Air France/KLM/Alitalia/Delta; 39850 Container Shipping	38307 PO/Territorial restrictions Germany (Gazprom); 37811 Algerian gas export contracts; 39699 Baltic Max Feeder; European Minibulk and Container Feeder cooperatives
France	08-D-26 UAT taxis Abbeilles; 09-D-01 pleasure boats; 13-D-15 Europe-Antilles Sea Freight	
Germany	B8-113/03-1 to B8-113/03-12 and B8-113/03-15 long-term gas supply; B10-44/09 B10-45/09 B10-47/09 B10-48/09 B10-10/10 B10-11/10 B10-13/10 B10-14/10 B10-18/10 B10-19/10 B10-20/10 B10-21/10 B10-22/10 B10-23/10 B10-24/10 B10-25/10 Gas and electricity suppliers resale bans; B10-6/11 Dinkelsbühl; B10-17/11 Markkleeberg; B9-96/09 Lufthansa	Verivox; Tank & Rast
Hungary		Vj-7/2008/178 Motor oils and lubricants
The Netherlands		VSS; APX and Endex
UK	11/2013 Provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain	
<i>Professional associations</i>		
Commission		
France	10-D-18 Veterinary analyses; 12-D-29 FFGolf; 15-D-12 Guides in refuge du Gouter; 06-D-40 Association conducting surveys on magazine press; 08-D-26 UAT taxis Abbeilles; 09-D-01 Pleasure boats; 05-D-12 EUROPQN; 07-D-17	



Enforcer	Formal commitments	Informal commitments
	Films	
Germany	B3-11/13 Ophthalmologists-AOK; B3-11/13 ophthalmologists-AÄGB; B3-123/11 Pharmacists association in Westphalia-Lippe	B1-232/07 association of the German construction industry
Hungary	Vj-60/2006/37 Hungarian Chamber of Pharmacists; Vj-44/2007/19 Taxi in Gyor; Vj-84/2007 Bar Association of Békés; Vj-97/2013 Driver training ethics code	Vj-93/2004/14 Hungarian Chamber of Pharmacists; Vj-16/2005 Deontological rules of auditors; Vj-1/2008 Hungarian Real Estate Association
The Netherlands	6895 Amsterdam hospitals; 7191/138 National Association of General Practitioners; 7245/151 Federation Textile Management Netherlands	Orthobanda industry association; Royal Dutch Society for the Advancement of Pharmacology (KNMP); Architects; The Royal Dutch Notarial Society [Koninklijke Notariële Beroepsorganisatie (KNB)I; Dutch Association for Real estate Agents (NVM); Royal Dutch Institute of Chartered Accountants (NIVRA) and the Dutch Association of Accounting Consultants (NOvAA); Royal Dutch Notarial Society [Koninklijke Notariële Beroepsorganisatie (KNB)II; Foundation for Appraisals and Validations; APX and Endex; ROTA; Frisian horses; Breed association; Flower-bulb; Travel Agents and Tour Operators General Agency Conditions; VSS; 6502 Breed association
UK	CE/2558-03 TV Eye; CE/2479/03 London-wide newspaper distribution; 50243 Showmen's Guild of Great Britain	OFT946 Scottish legal 'mixed doubles' rule; Bar Council of Northern Ireland; School suppliers; Asbestos awareness training
<i>Public health and safety</i>		
Commission		
France	07-D-22 Distribution of Medicine (I); 07-D-45 Distribution of Medicine (II); 07-D-46 Distribution of Medicine (III); 11-D-18 CT and MRI	
Germany	B3-11/13 Ophthalmologists-AOK; B3-11/13 Ophthalmologists-AÄGB; B3-123/11 Pharmacists association in Westphalia-Lippe; B7-30/07-1 Fire detection systems in Düsseldorf	B12-11/08 Ophthalmic lenses
Hungary		Vj-57/2008/23 Gyöngy Strategic Association
The Netherlands	6895 Amsterdam hospitals; 7138/47-BT930 Home care providers; 7191/138 National Association of General Practitioners	Orthobanda industry association; Royal Dutch Society for the Advancement of Pharmacology (KNMP)
UK		NHS trusts; asbestos awareness training
<i>Regulated and liberalised markets - other</i>		
Commission		
France	08-D-34 Funeral services in Marseille; 09-D-27 MGRS; 17-D-12 Sugar production	
Germany	B4-32/08 Quantity transfer contracts; B2-90/01-1 to B2-90/01-4 Timber	
Hungary		
The Netherlands	5709 Day-care; 5998 Insurance pool	UvA and VU tuition fees
UK	CE/9388-10 Motor Insurers	
<b>Technology markets</b>		
Commission	39847 Ebooks; 39230 Rio Tinto Alcan; 39736 SIEMENS/AREVA	40360 Production and distribution of audiobooks



Enforcer	Formal commitments	Informal commitments
France	06-D-24 Bijourama; 06-D-28 Home Cinema; 07-D-07 Sale of cosmetic products on the internet; 10-D-20 Electronic discount coupons; 15-D-06 Online hotel booking	Adidas
Germany	B4-9/11 B4-94/11 Electronic cash card payment system	B7-1/13-35 Sennheiser; B6-46/12 Amazon; B3-137/12 Adidas; B2-98/11 Online sales of ASICS running shoes; Audible; Digital cement trading platform; B5-100/10 Sanitary fittings
Hungary		
The Netherlands		
UK	50408 Live online bidding auction platform	CE/9320-10 Hotel online booking; Yamaha musical instruments; CE/9692/12 Amazon's price parity policy; CE/9857-14 Bathroom fittings & fixtures; BMW car comparison sites
<b>Financial services</b>		
Commission	39398 Visa MIF (2010); 39398 Visa MIF (2014); 39745 CDS Information Market	39876 EPC online payments; 39177 Which?/DFB + Mastercard + FIFA
France	11-D-11 "CB" payment card; 12-D-17 Non-cash means of payment; 13-D-17 MasterCard; 13-D-18 Visa	
Germany	B4-9/11 B4-94/11 Electronic cash card payment system	B4-13/10 B4-117/15 Fees for ATM withdrawal
Hungary	Vj-152/2006/86 Budapest Stock Exchange (BÉT); Vj-78/2013 MasterCard and OTP	
The Netherlands		
UK		
<b>Other</b>		
Commission		
France	09-D-08 Motorway breakdown services; 11-D-08 Multi-brand gift card	
Germany	B3-93/15 Lighters	B05-144-13 GARDENA; B7-11/13 Bosch Siemens; B2-118/10 Procurement of raw milk; Lego II; B2-31/17 Edeka/Tengelmann
Hungary	Vj-71/2005 Sara Lee; Vj-63/2006/122 Inform Média; Vj-158/2005/148 Hyundai Motors Hungary; Vj-28/2007 Beer supply agreements; Vj-49/2011 Hungarian beer market; Vj-111/2014 Ferrous and non-ferrous scrap; Vj-104/2016 Nemak-Cevher	Vj-156/2004/68 Ice-cream; Vj-157/2004/73 Frozen food; Vj-96/2009-113 Book market; Vj-91/2004/18 Comix
The Netherlands	7533-22 Art auctions; 15.0959.29 Ready-mix concrete	Concert organisation and ticket sales; Ballast Nedam
UK		OFT1415 Street furniture advertising

### 7.3. Rejecting fine reduction pleas on the basis of Article 29(5) of the 2006 Fining Guidelines (footnote 1409)

39401 E.On/GdF (2009), para 338-339, 380-389, as upheld by the GC in T-370/09 E.On/GdF (2012), para 451; 38543 International Removal Services (2008), para 596-599, as upheld by the GC in T-204/08 T-212/08 International Removal Services (2011), para 131-135; 39309 LCD (2010), para 429, 445; 39510 Ordre National des Pharmaciens en France (ONP) (2010), para 768; 39839 Telefónica and Portugal Telecom (2013), para 505, as upheld by the GC in T-216/13 Telefónica and Portugal Telecom (2016), para 334. In T-

399/09 Calcium carbide and magnesium based reagents for the steel and gas industries (2013), para 143-149 the GC rejected such a claim, which had not been raised in the Commission's decision

#### **7.4. Rejecting crisis cartel situations as justification for a reduction of the fine (footnote 1425)**

34018 Far East Trade Tariff and Surcharges Agreement (FETTSCA), para 197-198; 36490 Graphite electrodes, para 194-197; 37614 Interbrew and Alken-Maes, para 321; 37027 Zinc Phosphate, para 337-341; 36212 Carbonless paper, para 430-431; 36571 Austrian banks — 'Lombard Club', para 526-530; 37978 Methylglucamine, para 252-253; 38240 Industrial tubes, para 370-372; 38069 Copper plumbing tubes, para 741-746; 37533 Choline chloride, para 215-216; 38337 Thread, para 376-378; 38281 Raw Tobacco Italy, para 384; 38354 Industrial bags, para 810-811; 38620 Hydrogen peroxide, para 488-490; 38645 Methacrylates, para 389-390; 38121 Fittings, para 804-805; 39396 Calcium carbide and magnesium based reagents, para 331; 38589 Heat stabilisers, para 735; 39258 Airfreight, para 1258-1261; 5-12-2012 TV and computer monitor tubes, para 1106; 40018 Car battery recycling, para 362

#### **7.5. Inability claims based only on the "economic situation" (footnote 1438)**

38543 International Removal Services (2008), para 657; 38589 Heat stabilisers (2009), 774-795; 39092 Bathroom fittings & fixtures, case summary (2010), para 19-20; 38344 Pre-stressing steel (2010), para 1131-1189; 39168 PO/Hard Haberdashery: Fasteners (2011); 39600 Refrigeration compressors, para 97; 39452 Mountings for windows and window-doors, para 551; 39437 TV and computer monitor tubes, para 1104; 39780 Envelopes, para 106; 39563 Retail food packaging, para 59-60

#### **7.6. Netherlands: confidential inability to pay decisions (footnote 1448)**

5210 Metal grilles; 5211 Nurseries; 6431\_1/172 Kazerne II; 6429\_1/176 Kazerne I; 6430\_1/131 Meiveld; 6274/569 Midden IJssel; 6494 6836 Southern Dutch construction companies; 6306 Flour; 6929\_1/205 Ship-generated waste collection cartel; 6306 Flour; 6538 Houses merchants foreclosure auctions; 7237 7268 Houses merchants foreclosure auctions; 6538 Houses merchants foreclosure auctions; 7237 7268 Houses merchants foreclosure auctions; 7244-597 Magazine packs

#### **7.7. Inability to pay claims, NCAs (footnote 1449)**

FR: Accepted: 10-D-35 Welding electrodes, para 271-289; 10-D-39 Road sign, 460, 468; 11-D-02 Restoration of historical monuments, para 720; 12-D-02 Géfil para 166-169; 206-208; 233-235; 241-243; 254-256; 12-D-08 Endive, para 653; 12-D-09 Flour mills, para 954-959; 13-D-03 Pork slaughtering, para 460-472; 13-D-09 Miradors Perpignan, para 202-203; 13-D-12 Distribution of commodity chemicals, para 1132-1336; 14-D-16 Relocation of military personnel in Martinique, para 161-165; 14-D-20 Wallpaper, para 340-348; 15-D-03 Fresh

dairy products, para 397-401; 15-D-04 Bakery flour, para 407-409; 15-D-08 Sale of poultry meat, para 359; 383-390; 15-D-19 Standard and express delivery, para 1389-1400; 16-D-02 School bus transportation in the Lower Rhine, para 222-226; 16-D-17 Liquid fuel backup heating units; 16-D-20 Modelling sector, para 519-521

Rejected: 08-D-32 Steel trading, para 481-488; 10-D-39 Road signs, para 450; 11-D-02 Restoration of historical monuments, para 720; 11-D-13 Electrification and electrical installation, para 417; 12-D-09 Flour mills, para 942-953; 957-959; 13-D-03 Pork slaughtering, para 460-472; 15-D-03 Fresh dairy products, para 402-403; 15-D-04 Bakery flour, para 410-411; 16-D-20 Modelling sector, para 519-521; 16-D-28 Property management, para 191

DE: Accepted: B11-13/06 Flour mills; B1-164/13 B1-167/13 B1-87/14 B1-47/15 Furniture

Rejected: B11-20/05 Sale of liquefied petroleum gas (LPG)

NL: Accepted: 6108/258 Thuiszorg Kennemerland, para 238-244; 7130/216 Taxi transport IJssel cities, para 191-193; 6538 Houses merchants foreclosure auctions, 360-364; 6306 Flour, 8-10; 7244-597 Magazine packs (2013), para 251-254

Rejected: 4014 Horticultural Services, para 195-205; 6091/204 Distributors of sodium hypochlorite, para 250; 6108/348 Thuiszorg Kennemerland, 154-160; 6108/348 Thuiszorg Kennemerland, para 154-160; 6425 Window cleaners, para 340; 6442 WMO Friesland (2012), para 152; 7237 7268 Houses merchants foreclosure auctions, par 373; 6888/435 LHV pace of establishment (2014), para 401-405

HU: Accepted: Vj-120/2004/35 Bio-traditional fruits, para 49; Vj-69/2008 Wheat mill products I, para 324-325; 328-342; Vj-74/2011 Mortgage loans para 324-325; 328-342; Vj-2/2010 Car refinishing paints, para 590-601; Vj-48/2013 Tenders in Nagylóc and Szécsényfalu, para 256-262; Vj-65/2012 Public procurement in Komló, para 328-334; Vj-8/2012 Hungarian Banking Association, para 1383-1388

Rejected: Vj-69/2008 Wheat mill products I, para 324-325; 328-342; Vj-134/2008 Wheat mill products II, para 124; Vj-3/2008 Rail freight transport services, para 379; Vj-45/2008-641 Colour television tubes, para 329; Vj-48/2013 Tenders in Nagylóc and Szécsényfalu, para 256-262; Vj-73/2011 Mosquito control, para 578-584; Vj-11/2014 Media Service Support and Asset Management Fund, para 504-507

UK: Accepted: CE/7510-06 Construction Recruitment Forum, para 5.261-5.270; 50223 Posters and frames, para 6.44-6.45; CE/9859-14 Modelling, para 5.99; 50235 Residential estate agency services

Rejected: CE/4327-04 Bid rigging in the construction industry in England, para VI.276-288; CE/7510-06 Construction Recruitment Forum, para. 261-5.270

**7.8. Commission: no fines imposed when Articles 101(1) and (3) TFEU balancing tools were discussed (footnote 1473)**

26349 Besluiten van de Vereniging G.I.S.A.; 28374 Advocaat Zwarte Kip; 27095 Franco-Japanese ballbearings; 28996 Pabst & Richarz/BNIA; 28282 The Distillers Company Limited, Conditions of sale; 29418 Spices; 29535 White led; 29290 Vaessen/Moris; 29869 Italian cast glass; 29988 Italian flat glass; 28930 Aluminium imports from eastern Europe; 32732 Ijsselcentrale; 33494 Scottish Salmon Board; 33585 Distribution of railway tickets by travel agents; 31400 Ford Agricultural; 32448 32450 Cewal, Cowac and Ukwal; 33407 CNSD; 33686 Coapi; 40208 International Skating Union's Eligibility rules

**7.9. German NCA: no fines imposed when Articles 101(1) and (3) TFEU balancing tools were discussed (footnote 1474)**

B1-116/04 Sand-lime brick; B10-148/05 Lottery; B4-1006/06 Container glass; B4-31/05 Pecuniary loss liability risks for auditors and chartered accountants; Joint selling of media rights (2008); B3-64/05 Merck and VWR distribution agreement; B3-134/09 Federal Guild of Hearing Aid Acousticians; B3-19/08 CVH; B9-66/10 HRS-Hotel Reservation Service; B1-62/13 Rental of retail space in factory outlet centres; B1-72/12 Round timber in Baden-Württemberg; B9-121/13 Booking; B4-71/10 Online banking conditions; B6-132/14-2 Ticketing

**7.10. EU Courts: state involvement, crisis in sector and inability to pay as mitigating circumstances (footnote 1484)**

State involvement: T-14/89 Polypropylene, para 384-385; T-145/89 Welded steel mesh, para 121-122; T-148/89 Welded steel mesh, para 118; T-141/94 Steel beams, para 501, 588, as upheld by the CJEU in C-194/99P Steel Beams, para 113-116; C-240/82 C-241/82 C-242/82 C-261/82 C-262/82 C-268/82 C-269/82 SSI, para 94; C-100/80 C-101/80 C-102/80 C-103/80 Pioneer Hi-fi equipment, para 100

Crisis in sector: T-6/89 Polypropylene, para 285-291, 290; T-7/89 Polypropylene, para 327-336; 335; T-8/89 Polypropylene, para 305-306; T-11/89 Polypropylene, para 350-352; T-13/89 Polypropylene, para 372; T-14/89 Polypropylene, para 379; T-213/00 Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA), para 351-354; T-85/10 Concrete reinforcing bars, re-adoption, para 111-114; T-70/10 Concrete reinforcing bars, re-adoption, para 399-400; T-69/10 Concrete reinforcing bars, re-adoption, para 241-242; T-489/09 T-490/09 T-56/10 Concrete reinforcing bars, re-adoption, para 193. Also see T-141/89 Welded steel mesh, para 146-147; T-142/89 Welded steel mesh, para 117; T-148/89 Welded steel mesh, para 125

Inability to pay: T-71/03 T-74/03 T-87/03 T-91/03 Speciality Graphite, para 332-333; T-23/99 Pre-Insulated Pipe Cartel, para 308; T-213/00 Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA), para 351-356; T-452/05 PO/Thread, para 93-97; T-11/06 Raw tobacco – Italy, para 255-256; T-400/09 Calcium carbide and magnesium based reagents for the steel and gas industries, para 92-120; T-392/09 Calcium carbide and magnesium based reagents for

the steel and gas industries, para 111-149; T-54/14 Shrimp, para 131-142; C-308/04P Graphite electrodes, para 105; T-51/06 Industrial bags, para, para 161-166; C-40/12P Industrial bags, para 107-108; C-58/12P Industrial bags, para 98-101; T-393/10 Prestressing steel, para 288; T-406/09 Calcium carbide and magnesium based reagents for the steel and gas industries, para 285; T-352/09 Calcium carbide and magnesium based reagents for the steel and gas industries, para 185-210; T-426/10 T-427/10 428/10 T-429/10 T-438/12 439/10 440/10 T-441/12 Prestressing steel (2016) (French), para 489-499

**7.11. EU Courts: confirm change in the Commission approach to crisis situations (footnote 1486)**

T-236/01 T-239/01 T-244/01 T-245/01 T-246/01 T-251/01 T-252/01 Graphite electrodes (2004), para 345; C-328/05P Graphite electrodes (2007), para 100; T-38/02 Interbrew and Alken-Maes (2005), para 413-416; T-64/02 Zinc phosphate (2005), para 139-140; T-259/02 T-260/02 T-261/02 T-262/02 T-263/02 T-264/02 T-271/02 Austrian banks – ‘Lombard Club’, para 510; T-109/02 T-118/02 T-122/02 T-125/02 T-126/02 T-128/02 T-129/02 T-132/02 T-136/02 Carbonless paper, para 657-666; T-127/04 Industrial tubes, para 122; T-25/05 Copper plumbing tubes, para 129; T-29/05 Raw tobacco – Spain, para 147; T-12/06 Raw tobacco – Italy, para 289; T-39/06 Raw tobacco – Italy, para 352-354; T-30/05 PO/Needles, para 207-208; T-456/05 T-457/05 PO/Thread, para 195-196

**7.12. GC: confirm inability to pay claims (footnote 1490)**

T-23/99 Pre-Insulated Pipe Cartel, para 308; T-213/00 Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA), para 351-356; T-44/00 Seamless steel tubes, para 286; T-50/00 Seamless steel tubes, para 318-334; C-308/04P Graphite electrodes, para 105; T-73/04 Electrical and mechanical carbon and graphite products, para 307-318; T-452/05 PO/Thread, para 93-97; T-217/06 Methacrylates, para 324-329; T-204/08 T 212/08 International Removal Services, para 168-178; T-199/08 International Removal Services, para 96; T-11/06 Raw tobacco – Italy, para 255-256; T-410/09 Calcium carbide and magnesium based reagents for the steel and gas industries, para 261-277; T-400/09 Calcium carbide and magnesium based reagents for the steel and gas industries, para 92-120; T-392/09 Calcium carbide and magnesium based reagents for the steel and gas industries, para 111-149; T-412/10 Bathroom Fittings and Fixtures, para 159-170; T-411/10 Bathroom Fittings and Fixtures, para 194-205; T-27/10 Heat Stabilisers, para 310-314; T-46/10 Heat Stabilisers, para 195-196; T-56/09 T-73/09 Carglass, para 387; T-72/09 Carglass, para 308; T-456/10 Animal feed phosphates, para 197-213; T-422/10 Prestressing steel, para 345-350; T-426/10 T-427/10 T-428/10 T-429/10 T-438/12 T-439/10 440/10 T-441/12 Prestressing steel, para 489-507; T-54/14 Shrimp, para 131-142; C-444/11P International Removal Services, para 188; C-439/11P International Removal Services, para 171; C-619/13P Bathroom Fittings and Fixtures, para 113

**8.1. Target discretion: in the fourth enforcement period, Article 101(3) TFEU is applied to price-fixing, market-sharing, and equivalent restrictions (footnote 1647)**

37980 Souris-TOPPS, para 141-158; 37750 French beer market, para 75; 38456 Bitumen Nederland, para 162-168; 39181 Candle waxes, para 317; 39188 Bananas, para 339-343; 39125 Carglass, para 529-532; 39633 Shrimps, para 438-440; 39510 Ordre National des Pharmaciens en France (ONP), para 703-706; 38549 Barème d'honoraires de l'Ordre des Architectes belges, para 104-110; 38662 GDF-ENEL, para 143-145; 38662 GDF-ENI 120-122; 39736 SIEMENS/AREVA, para 82-83; 38698 CISAC, para 231-247; 39092 Bathroom fittings & fixtures, para 989-990; 39596 BA/AA/IB, para 77-80; 39258 Airfreight, para 1040-1045; 39462 Freight Forwarding, para 635-636; 39839 Telefónica and Portugal Telecom, para 439-446; 37214 DFB (Joint selling of the media rights to the German Bundesliga), para 24; 38173 The Football Association Premier League Limited, para 30; 39861 Yen Interest Rate Derivatives (YIRD), para 84-85; 39914 Euro Interest Rate Derivatives, para 66; 39610 Power cables, para 689; 39574 Smart card chips; 40055 Parking heaters; 40028 Alternators and Starters; 39824 Trucks; 39850 Container Shipping, para 57-58; 399904 Rechargeable battery; 39960 Thermal Systems; 40013 Lighting Systems

**8.2. Target discretion: Commission rejects outright Article 101(3) TFEU exceptions in regulated markets (footnote 1649)**

Energy: 38662 GDF/ENEL; 38662 GDF/ENI; 39736 SIEMENS/AREVA; 39610 Power cables, para 689

Telecom: 39839 Telefónica and Portugal Telecom; 40023 Cross-border access to pay-TV, para 51-52

Liberal professions: 38549 Barème d'honoraires de l'Ordre des Architectes belges

Broadcasting of sports: 37214 DFB (Joint selling of the media rights to the German Bundesliga); 38173 The Football Association Premier League Limited

Health services: 39510 Ordre National des Pharmaciens en France (ONP), para 704-705

Transport: 39416 Ship Classification, para 13; 39596 BA/AA/IB; 39258 Airfreight, para 1040; 39595 Continental/United/Lufthansa/Air Canada; 39462 Freight Forwarding, para 635-636; 39964 Air France/KLM/Alitalia/Delta, para 42, 110; 39850 Container Shipping, para 57-58

IPRs: 39230 Rio Tinto Alcan; 38698 CISAC, para 231-247

Financial services: 37860 Morgan Stanley Dean Witter/Visa para 312-317; 38606 Groupement des Cartes Bancaires "CB", para 428-433; 34579 36518 38580 MasterCard I, para 671-679; 39398 Visa MIF, para 21; 39861 Yen Interest Rate Derivatives (YIRD), para 84-85; 39914 Euro Interest Rate Derivatives, para 66



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## ANNEX B: CODING BOOK VARIABLES

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### **Case Identification Variables**

1. Jurisdiction: the jurisdiction (country/EU) rendering the decision.
2. Decision Date: the date the decision was rendered.
3. Authority: the administrative/judicial body rendering the decision.
4. Case ID: the (national) docket number of the decision.
5. Case Name: the name of the case (name of the first listed undertaking or the subject matter), according to the convention in each jurisdiction.
6. Procedure Type: the type of procedure (e.g. regular infringement decision, leniency application, decision in preliminary ruling, decision in appeal, decision not to investigate, informal procedure).

### **Undertaking's Identification Variables**

7. Undertaking 1: the name of the undertaking(s) subject of the case that allegedly infringed Article 101 TFEU. Undertaking 1 is the undertaking mentioned first in the decision. In appeals, Undertaking 1 includes all appellants.
8. Undertaking 2: the name of the undertaking(s) subject of the case that allegedly infringed Article 101 TFEU. Undertaking 2 is the undertaking mentioned second in the decision. In appeals, Undertaking 2 includes all defendants.
9. Other Undertakings: the name of the undertaking(s) subject of the case that allegedly infringed Article 101 TFEU, other than Undertakings 1 and 2. In appeals, Other Undertakings are all intervening parties (including Member States).
10. Relevant Market: the relevant product and geographical market(s) as identified by the decision.

### **Substantive Balancing Variables**

*Variables regarding the infringement of Article 101 TFEU*

11. Source: the legal provision that was (allegedly) infringed (e.g. Article 101 TFEU and/or the national equivalent provision).



12. Object/effect: whether the (alleged) infringement is a by-object or by-effect restriction. In addition, this variable indicates whether the competition enforcer's classification is in line with the Commission's policy papers: According to the Commission Article 101(3) Guidelines (2004), para 23 restrictions that are black-listed in BERs or identified as hard-core restrictions in the Commission's guidelines and notices are generally considered as by-object restrictions.

*Variables regarding the relevant non-competition interest*

13. Interest: the non-competition interest balanced against the competition concerns.
14. Origin: the legal source of the non-competition interests (EU or national). With regard to EU interests, this variable indicates whether the case has referred to the policy-linking clauses of the Treaties.

*Variables regarding Article 101(1) TFEU balancing*

15. Article 101(1) – Source: the legal source facilitating Article 101(1) TFEU balancing tools (e.g. the notion of "undertakings"; *effet utile*; IPRs).
16. Article 101(1) – Method: the balancing method (e.g. commercial or regulatory ancillary restraints; other European-style or American-style rule of reason).
17. Article 101(1) – Proportionality: if, and to what extent, a proportionality test was applied to facilitate Article 101(1) TFEU balancing.
18. Article 101(1) – Result: the outcome of the balancing applied in the case.
19. Article 101(1) – Weight: the relative importance of Article 101(1) TFEU balancing in the case. This variable is based on the subjective assessment of the coder.

*Variables regarding Article 101(3) TFEU balancing*

20. Article 101(3) – BERs: if, and if so which, BER is examined in the case (European and/or national BERs).
21. Article 101(3) – improvement (A): if, and what type of benefit is considered. The coding of this variable is based on the classification suggested by the OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), distinguishing between direct economic benefits, indirect economic benefits, and non-economic benefits.
22. Article 101(3) – improvement (B): if, and what type of improvement is considered. The coding of this variable is based on Monti (2007), 45 typology of efficiencies (e.g. static and dynamic productive efficiencies; allocative, distributive and social efficiencies).
23. Article 101(3) – improvement – Met: whether the "improvement" condition was fulfilled.

24. Article 101(3) – consumer: the definition of “consumer” followed by the case (e.g. direct and indirect consumers, consumers in affected markets, society as a whole).
25. Article 101(3) – fair share: if, and what type, of the fair share requirements are considered.
26. Article 101(3) – fair share – Met: whether the “fair share” condition was fulfilled.
27. Article 101(3) – indispensability: if, and in what manner, indispensability requirements are considered.
28. Article 101(3) – indispensability – Met: whether the “indispensability” condition was fulfilled.
29. Article 101(3) – elimination of competition: if, and to what extent, the no elimination of competition requirement is considered.
30. Article 101(3) – elimination of competition – Met: whether the “elimination of competition” condition was fulfilled.
31. Article 101(3) – Result: whether an Article 101(3) TFEU exemption/exception was granted.
32. Article 101(3) – Weight: the relative importance of the Article 101(3) TFEU balancing in the case. This variable is based on the subjective assessment of the coder.

*Variables regarding other balancing methods*

33. Article 101 as a whole: if the case included balancing with reference to Article 101 as a whole (as opposed to Articles 101(1) or (3) TFEU balancing tools). If so, whether the balancing led to exemption from the competition rules.
34. Balancing in remedy stage: if, and to what extent, non-competition interests were considered in the remedy stage (commitments and fines).

*Variables regarding other circumstances*

35. Article 102: whether the case concerns an alleged infringement of Article 102 TFEU (or of the national equivalent provision), and the relationship between Articles 101 and 102 TFEU balancing.
36. Free Movement: whether the case concerns an alleged infringement of the EU free movement rules, and the relationship between Article 101 TFEU and the free movement balancing.
37. Miscellaneous: other features of the case that were not reflected in other variables (e.g. parallel proceedings in other jurisdictions, economic crisis).

**Outcome Variables**

38. Outcome: the outcome of procedure (e.g., infringement of Article 101 TFEU, commitments, exemption/exception, administrative closure).

39. Fine: the amount of fine imposed, if applicable.

**Descriptive fields**

40. Alleged Infringement: summary of the alleged infringement of Article 101 TFEU.

41. Comments: any relevant comments of the coder.

# ANNEX C: BERS DEVELOPMENT

## Effect-based Sectoral

1968	1978	1988	1998	2008	2018
<b>Vertical (Enabling Regulation 19/65)</b>					
6/67 Exclusive Distribution and Purchasing		1980/83 Exclusive Distribution 1984/83 Exclusive Purchasing The BER is mainly a general one, yet it established sectoral rules for beer supply and petroleum services/distributions.		2790/99 Vertical	330/2010 Vertical
		488/98 Franchising			
		2340/84 Patent Licensing		240/96 Technology Transfer	772/2004 Technology Transfer
		55/89 Know-how Licensing			316/2014 Technology Transfer
		12/85 Motor Vehicle	145/95 Motor Vehicle	140/2002 Motor Vehicle	461/2010 Motor Vehicle
<b>Horizontal (Enabling Regulation 2821/71)</b>					
		418/86 R&D (amended by 2238/97)		2659/2000 R&D	1217/2010 R&D
		41/785 Specialization (amended by 2238/97)		2658/2000 Specialization	1218/2010 Specialization
<b>Insurance (Enabling Regulation 1534/91)</b>					
		3932/92 Insurance		358/2003 Insurance	267/2010 Insurance End of validity: March 2017
<b>Air transport (Regulations 3975/87, 3976/87, 2411/92, 411/2004, 487/2009)</b>					
141/62 Exempting transport from the application of Regulation 17/62 End of validity: April 2004 (entry into force of Regulation 1/2003)		267/88 GCS	83/91 GCS	3652/93 GCS	
		267/88 Passengers	84/91 Passengers	152/96 (amended by 1087/99; 1105/2002)	1493 - Passengers' Inuits Conferences End of validity: June and October 2005 (according to the type of agreement)
		267/88 Ground	87/92 Ground	1617/93 (amended by 2006/2006)	
		267/88 Inland	14/2004 Inland		
<b>Transport by rail, road and inland waterway (BER adopted directly by Council)</b>					
141/62 Exempting transport		1017/968 Rail, road and inland waterway		169/2009 Rail, road and inland waterway	
<b>Linear conferences (BER adopted directly by Council)</b>					
141/62 Exempting transport from the application of Regulation 17/62 End of validity: April 2004 (entry into force of Regulation 1/2003)		4056/1986 Linear conferences		1419/2006 Linear conferences* End of validity: October 2008	
<b>Consortia (Enabling regulation 479/92, 246/2009)</b>					
141/62 Exempting transport from the application of Regulation 17/62 End of validity: April 2004 (entry into force of Regulation 1/2003)		874/1996 Consortia		823/2009 (amended by 431/2004, 611/2005) Consortia 966/2009 (amended by 697/2014) Consortia	