Art. 101 para. 1 TFEU - effect on trade between member states

• A. Introduction
• B. The concept of "trade"
• C. Agreements involving third countries
• D. Relationship between EU and National Law

A. Introduction

The definition of the element "effect on trade between Member States" is important to set out a jurisdictional limit to the prohibition laid down in Articles 101 and 102 TFEU, given that both Articles deal with agreements having a minimum level of cross-border effects within the EU, what means that the practices must appreciably affect trade between Member States\(^1\). As the requirement is merely viewed as jurisdictional matter, it has been interpreted broadly, although it is accepted that the EU has no jurisdiction over cases in which the effects of an agreement, or conduct, are confined to one Member State\(^2\).

The meaning of an effect on trade has been clarified in the case law. To determinate what is to be interpreted by "effect on trade" the Commission has also prepared a notice on the concept of effect on trade between Member States, which aims to set out the principles developed by the Court and to spell out when agreements and conduct may "appreciably" affect trade between Member States. Its main goal is "to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations\(^3\)."

In paragraphs 58-109 of the guidelines it applies the general principles set out in the cases to common types of agreements and abuses, for examples: different types of agreements and abuse covering or implemented in several Member States, agreements and abuses covering a single or only part of a Member State; agreements and abuses involving imports and exports with undertakings located in third countries.

B. The concept of "trade"

The Commission's guideline stresses that the concept of "trade" is not limited to the most usual and traditional idea of simple exchange of goods and services across borders. It is a much wider concept including all cross-border economic activity, including for instance the establishment by undertakings of agencies, branches or subsidiaries in other Member States\(^4\). This interpretation is consistent with the fundamental objective of the Treaty to "promote free movement of goods, services, persons and capital\(^5\)."

An agreement will be therefore found to "affect trade" if it interferes with the pattern of trade between Member States impacting the flow of goods and services or other relevant economic activities concerning at least two Member States. An Agreement or practice my also be found to affect trade if it is liable to interfere with the structure of competition in the common market, for example, where it eliminates or threatens to eliminate competitors operating within the Union.

Ruling the case Société La Technique Minière v. Maschinenbau Ulm\(^6\), the ECJ fix the requirements that an agreement should be considered affecting trade on the internal market: "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".

Accordingly to the Commission's guidelines\(^7\), it must therefore be demonstrated:

a) that a sufficient degree of probability of a set of objective factors of law or of fact;

b) an influence of the pattern of trade between Member States;

c) a direct or indirect, actual or potential influence on the pattern of trade.

C. Agreements involving third countries
Agreements involving undertakings situated in third countries are also able to appreciably affect trade between Member States, so far it is capable of affecting cross-border economic activity inside the Union. To assess if an agreement with an undertaking outside of the EU will affect trade within the Union will depend on factors such as the object of the agreement (the agreement's object can restrict competition within the EU), the prices charged in and out the EU, among others.

D. Relationship between EU and National Law

The Art. 3 of the Regulation 1/2003 determines the relationship between Articles 101 and 102 and national law, providing that while applying national competition laws to an agreement or practice that affects trade between Member States, National Competition Authorities or national courts must also apply Art. 101 or 102. The application of national competition law may not lead to the prohibition of agreements which affect trade between Member States, but which do not restrict competition within the meaning of Art. 101 para. 1 TFEU, or which fulfill the conditions of Art. 101 para. 3 TFEU or which are covered by an EU block exemption, as well as the national authority or court cannot authorize agreements prohibited by EU Law.

5. Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty 2004 OJ C101/81, para 19.