Module 05 – European Union Law MQF Level 5, 4 ECTS

Lecture 7 – EU Competition Law & State Aid

Diploma in Law (Malta)

Lecturer: Dr.Veronica-Anne Spiteri, LL.D

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CAMILLERI PREZIOSI
ADVOCATES

What is Competition Law?

- The purpose of Competition law is to protect the process of fair competition, for the benefit of the consumers and the economy.
- Competition law is created to prohibit firms for engaging in conduct which will distort the competitive process and harm competition.
- It helps in preventing firms from indulging in anti-competitive agreements, preventing firms with a powerful position on a market from abusing their market power, or dominant position, and preventing firms from lessening competition by merging with their competitors.

EU Competition Law - Rationale

- The main objective of the EU competition rules is to enable the proper functioning of the EU's internal market.
- The TFEU aims to prevent restrictions on and distortions of competition, such as the abuse of dominant positions, anti-competitive agreements and mergers and acquisitions should they reduce competition.
- Furthermore, State aid is prohibited when it leads to distortions of competition but can be authorised in specific cases.

EU Competition Law – Legal Basis

- Articles 101 to 109 TFEU and Protocol No 27 on the internal market and competition, which make clear that a system of fair competition forms an integral part of the internal market, as set out in Article 3(3) of the Treaty on European Union;
- The Merger Regulation (Council Regulation (EC) No 139/2004) and its implementing rules (Commission Regulation (EC) No 802/2004);
- Articles 37, 106 and 345 TFEU for public undertakings and Articles 14, 59, 93, 106, 107, 108 and 114 TFEU for public services, services of general interest and services of general economic interest; Protocol No 26 on services of general interest; Article 36 of the Charter of Fundamental Rights of the European Union.

EU Competition Law - Objectives

- Competition policy is a key instrument for achieving a free, dynamic and functioning internal market and promoting general economic welfare.
- Competition enables businesses to compete on equal terms across Member States, while at the same time incentivising them to strive to offer the best products at the lowest price for consumers. This, in turn, drives innovation and spurs long-term economic growth.
- EU competition policy also applies to non-EU businesses that operate in the internal market.
- Societal, economic, geopolitical and technological changes pose challenges to EU competition policy.

EU Competition Law - Tools

- Broadly speaking, the EU competition policy toolbox includes rules on antitrust, merger control, State aid and public undertakings and services. Preventive competition policy tools encompass merger control and State aid rules.
  1. Antitrust aims at restoring competitive conditions, e.g. in case of the formation of cartels or abuse of dominance.
  2. Merger control pre-empts potential distortions of competition by assessing in advance whether a potential merger or acquisition could have an anti-competitive impact.
  3. State aid rules aim to prevent undue state intervention wherever preferential treatment of given undertakings or sectors distorts, or is likely to distort, competition and adversely affects trade between Member States.
  4. Services of general economic interest (SGEI) are particularly important to consumers and are subject to specific rules in the context of State aid, with a view to promoting social and territorial cohesion, a high level of quality, safety and affordability, and equal treatment.

A. Comprehensive ban on anti-competitive agreements (Article 101 TFEU)

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

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

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

(c) share markets or sources of supply;

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

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

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

A. Comprehensive ban on anti-competitive agreements (Article 101 TFEU)

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

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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

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

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

Article 101(1) - Undertakings

- Not defined in Art.101
- EU Courts & Competition authorities have taken a broad view.
- *Hofner:* The ECJ held that the term undertaking covers any entity engaged in an economic activity regardless of its legal status and the way it is financed. Including: Corporations, partnerships, individuals, trade associations, the liberal professions, stat-owned corporations and cooperatives.
- If article 101 is inapplicable, it may still be possible to use Article 102.

Article 101(1) – Agreements, Decisions

- Quinine Cartel Case: Informal agreements can be caught under article 101. The mere fact that the parties claim to have terminated them will not be conclusive. Court examines the facts to determine whether it is economically plausible that the parties pricing behaviour could have been achieved without collusion.
- Polypropylene: Commission held that there was a single agreement between firms in the petro-chemical industry for many years, even through it was not legally binding.
- An agreement existed if the parties reached a consensus on a plan that limited, or was likely to limit, their commercial freedom by determining the lines of their mutual action, or abstension from action, in the market

Article 101(1) – Concerted Practices

- Firms may have well colluded, but they could have destroyed all paper evidence, or never even written anything on paper. The concept of concerted practice must be able to capture this aspect of business life.
- *Sugar Cartel Case:* There can be a concerted practice even though there is no actual 'Plan' between the parties. Four points to note when speaking about the concept of concerted practice.
    1. The burden of proving an infringement of Article 101 rests with the Commission, and the mere existence of parallel conduct will not, in itself, prove a concerted practice.
    2. The Court will not readily accept that uniformity of price is the result of oligopolistic market structure.
    3. There can be differences of opinion on which side of the line a case falls
    4. There is the issue of whether a concerted practice must have been put into effect.

Article 101(1) – Object or Effect of Preventing, Restricting or Distorting Competition

- Object – *STM Case*: The Court accepted that if the object of the agreement was anti-competitive then it could be condemned without pressing further, since certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. (Ex: Horizontal Price fixing, market division, collective boycotts)
- Effect – Where the anti-competitive quality of an agreement is not evident from its object then it is necessary to consider its effects, as emphasized in the *Delimitis Case.*
- *Effect = that it was possible to forsee with a sufficient degree of probability on the basis of a set of objectives 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 MS.*

Article 101(1) – De Minimis Doctrine

- De minimis is a legal principle which allows matters of insufficient importance or small scale to be exempted from a rule or requirement.

- Which means if the agreement has little impact on the market, when it does not have an appreciable impact on competition or inter-state trade, then the agreement will not be caught by Article 101(1).

Article 101 – Re-Cap

- Collusion between companies distorts the level playing field and causes harm to consumers and other businesses.
- Agreements between undertakings, such as cartels, are prohibited and automatically void. However, agreements may be exempted if they contribute to improving the production or distribution of goods or if they promote technical or economic progress.
- The conditions for granting an exemption are that consumers are allowed a fair share of the resulting benefit and that the agreement does not impose unnecessary restrictions or aim to eliminate competition for a substantial part of the products concerned. Rather than such exemptions being granted on a case-by-case basis, they are most commonly governed by the Block Exemption Regulations.
- These regulations cover groups of similar specific agreements, which usually have a comparable impact on competition.
- Finally, certain agreements are not regarded as infringements if they are of minor importance and have little impact on the market (*the de minimis principle*). Such agreements are often seen as useful for cooperation between small and medium-sized enterprises.

Prohibition of abuse of a dominant position - Article 102 (TFEU)

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

Such abuse may, in particular, consist in:

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

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

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

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

Article 102

- Article 102 requires that the undertaking or undertakings, be in a dominant position.
- According to the Court of Justice of the EU, a dominant position is 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.
- It is assessed in relation to the internal market as a whole, or at least a substantial part of it.

Article 102

- Dominance is assessed in relation to three variables:
  1. The Product Market: A firm will only have market power in the supply of particular goods or services.
  2. The Geographical Market: The territory in which all traders operate in the same or sufficiently homogenous conditions of competition in relation to the relevant products or services, without it being necessary for those conditions to be perfectly homogenous.
  3. The Temporal Market: A firm may possess market power at a particular time of year, during which competition from other products is low because these other products are available only seasonally.

Article 102 – Assessing Dominance

- The Commission's first step in an Article 102 investigation is to assess whether the undertaking concerned is dominant on any given market or not.
- Before assessing dominance, the Commission defines the product market and the geographic market.
- Product market: the relevant product market is made of all products/services which the consumer considers to be a substitute for each other due to their characteristics, their prices and their intended use.
- Geographic market: the relevant geographic market is an area in which the conditions of competition for a given product are homogenous.

Article 102 – Assessing Dominance

- Market shares are a useful first indication of the importance of each firm on the market in comparison to the others.
- The Commission's view is that the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance. If a company has a market share of less than 40%, it is unlikely to be dominant.
- The Commission also takes other factors into account in its assessment of dominance, including the ease with which other companies can enter the market:
  - whether there are any barriers to this;
  - the existence of countervailing buyer power;
  - the overall size and strength of the company and its resources, and
  - the extent to which it is present at several levels of the supply chain (vertical integration).

What is an abuse of dominance?

- Holding a dominant position on any given market is not in itself illegal.
- However, a dominant company has a special responsibility to ensure that its conduct does not distort competition.
- Examples of behaviour that may amount to an abuse include:
  1. requiring buyers to purchase all units of a particular product only from the dominant company (exclusive purchasing);
  2. setting prices at a loss-making level (predation or predatory pricing);
  3. refusing to supply input indispensable for competition in an ancillary market, and
  4. charging excessive prices.

Abuse & Mergers

- *Continental Can Case:* Made it apparent that Article 102 would cover exclusionary action where the primary injury was to competitors.
- It did not need to be proven that Continental Can's economic muscle has forced the merger on a reluctant undertaking.
- It sufficed that the merger in fact resulted in damage to the competitive market structure.
- {Facts: CC was American company that acquired German company, hence merger, that specialized in how to close cans. Commission felt that they had dominance in market of cans for fish, meat, and metal tops.}

Abuse & Refusal to Supply

- Generally, dominant companies are free to decide whether to deal (or not) with a counterparty.
- As Advocate General Jacobs confirmed in *Bronner*, it is 'generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business'. Refusal to supply cases have generally concerned alleged exclusion of rivals (ie, refusals to deal that may eliminate competition). As a practical matter, absent a competitive relationship between the customer and the dominant company, a refusal to supply an actual or potential customer is very unlikely to infringe article 102 of the TFEU.
- Even when dealing with rivals, though, a refusal to supply products or access to facilities can be found abusive only in exceptional circumstances. The following three conditions need to be met for this to be the case:
    1. the requested input must be indispensable (ie, it is an essential facility);
    2. the refusal to supply is likely to eliminate competition in the downstream market; and
    3. there is no objective justification for the refusal.

Abuse & Refusal to Supply

- A refusal to supply can be express or constructive (ie, the dominant company insists on unreasonable conditions for granting access to the facility).
- The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are 'technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult' to compete without access to the input (*Bronner, IMS Health*).
- If there are 'less advantageous' alternatives, that means the input is not indispensable.

Abuse & Price Discrimination

- Unlawful price discrimination under article 102(c) of the TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions.
- Abusive price discrimination requires a number of elements:
  - the dominant company must enter into equivalent transactions with other trading parties;
  - the company must apply dissimilar conditions to these equivalent transactions (*Hoche*);
  - if there are legitimate commercial reasons for the discrimination, there is no abuse (*Michelin*); and
  - the discrimination must restrict competition downstream (ie, on the relevant market where the customers are competing) by excluding equally efficient competitors (*MEO*)
- Price discrimination abuses are relatively rare under article 102 of the TFEU.
- Price discrimination will generally only be found to be abusive if it is part of a strategy to drive rivals out of the market.

Abuse & Predatory Pricing

- Predatory pricing arises when a dominant company prices its products below cost such that equally efficient competitors cannot viably remain on the market.
- A two-stage test applies to classify predatory pricing as abusive:
  1. first, pricing below average variable cost (AVC) is presumptively abusive (*Akzo*);
  2. second, pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor (*Akzo*).
- Recoupment (*that is, the ability of the dominant firm to raise prices once other competitors have been foreclosed and thus recoup its costs associated with predatory pricing*) is not a formal precondition of predatory pricing under article 102 of the TFEU (*France Telecom Case*).

Abuse & Selective Pricing

- *Irish Sugar Case:* When judging the legality of a selective pricing policy, the EU Courts will take account of the fact that the practice was aimed at eliminating a competitor from the market.

Competition Law: Merger Controls

- Mergers can be of three kinds:
  - Horizontal Mergers: Those between companies that make the same products and operate at the same level of the market.
  - Vertical Mergers: Those between companies that operate at different distributive levels of the same product market.
  - Conglomerate Mergers: Those between firms that have no connection in any product market.
- Horizontal Mergers are potentially the most damaging to the competitive process.

Arguments against Mergers

- A horizontal merger may enable the new entity to set price and output as a single-firm monopolist.
- A vertical merger is a form of vertical integration: a company may relate to those down-market in different ways ranging from ordinary contract, through exclusive-distribution arrangements to vertical merger.
- When speaking of conglomerate mergers and their impact on competition, while some see them as dangerous, allowing a wealthy firm to cross-subsidize between products to defeat new entrants, others are sceptical whether such mergers involve detriment to competition.

Arguments in favour of Mergers

- Mergers can enhance economic efficiency in a number of different ways.
- They can render it easier to reap economies of scale.
- Mergers may also enhance distributional efficiency.
- A threat of a take over may be a spur for management to perform more efficiently.
- The Merger Regulations recognises the inevitability and desirability of mergers in the EU.

Regulation 139/2004

- This regulation is applicable only if there is concentration.
- Article 3(1) & (2) of this regulation bring about different issues, and catch concentrations with an EU dimension irrespective of whether the firms are base in the EU.
- The determination of whether or not a concentration exists is based on qualitative rather than quantitative criteria, focusing on the notion of control.
- Article 3(1)(a) – Complete Merger
- Article 3(1)(b) – Change of Control

Concentration: Joint Ventures

- Joint venture covers a wide range of business arrangements, from the establishment of a new corporate entity by two competitors, to a joint-purchasing scheme or joint research and development.
- A joint venture will be caught by the Merger Regulation only if its results in the creation of an autonomous economic entity, which performs functions on a lasting basis.
- Concentrative joint ventures will lead to the creation of the requisite autonomous economic activity.
- These JV must operate on a market in the same general way as other undertakings on that market.

Concentrations with an EU Dimension

- In order for a concentration to be caught it must have an EU dimension.
- When does a concentration have an EU Dimension?
- Article 1(2) of Regulation 139/2004:

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Concentrations with an EU Dimension

- Article 1(3) of Regulation 139/2004:

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

State Aid

What is State Aid?

- State aid is defined as an advantage in any form whatsoever conferred by national public authorities to undertakings on a selective basis. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid (examples include general taxation measures or employment legislation).
- A company receiving government support may gain a distortive advantage over its competitors. Therefore, Article 107 TFEU generally prohibits State aid unless exceptionally justified.

Prohibition of State Aid – Article 107 TFEU

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

What is State Aid?

- To be State aid, a measure needs to have these features:
  1. there has been an intervention by the State or through State resources which can take a variety of forms;
  2. the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions
  3. as a result, competition has been or may be distorted;
  4. the intervention is likely to affect trade between Member States.
- Despite the general prohibition of State aid, in some circumstances government interventions are necessary for a well-functioning and equitable economy. Therefore, the Treaty leaves room for a number of policy objectives for which State aid can be considered compatible. These exemptions can be found in legislation relevant to State aid.

Verifying State Aid

- EU State aid control requires prior notification of all new aid measures to the Commission.
- Member States must wait for the Commission's decision before they can put the measure into effect.
- There are a few exceptions to mandatory notification, for example:
  - aid covered by a Block Exemption;
  - de minimis aid that among other, does not exceeding €200,000 per undertaking over any period of 3 fiscal years; or (*Malta Enterprise)*
  - aid granted under an aid scheme already authorised by the Commission.

Verifying State Aid

- Each notification triggers a preliminary investigation by the Commission.
- From the time it has received a completed notification, the Commission has two months (20 working days) to decide whether:
  - there is no aid within the meaning of the EU rules;
  - the aid is compatible with EU rules; or
  - serious doubts remain as to the compatibility of the notified measure with EU State aid rules, prompting an in-depth investigation.
- Aid measures can only be implemented after approval by the Commission. The Commission also has the power to require a Member State to recover incompatible State aid.

Sector Inquiries

- The 2013 revision of the State aid Procedural Regulation introduced the possibility of conducting State aid sector inquiries, which was previously only possible as part of Antitrust and Merger control.
- State aid sector inquiries can be launched in situations where State aid measures may distort competition in several Member States, or where existing aid measures are no longer compatible with the regulatory framework.
- Companies and consumers in the European Union may trigger investigations by lodging complaints with the Commission.

Transparency

- State Aid Rules & Regulations require a certain level of transparency between MS and the EU.
- The State aid transparency public search gives access to State aid individual award data provided by Member States in compliance with the European transparency requirements for State aid.
- Citizens and companies can easily access information about awarded aid: name of the beneficiary, amount, location, sector and objective.
- The purpose of the transparency requirements is to promote accountability of granting authorities and to reduce asymmetries on the market for state aid.

Assessment of Existing Aid

- To secure the abolition or adaptation of old pre-accession aid that is incompatible with the internal market or to review aid schemes which were authorized in the past but which may no longer be compatible with the internal market under the conditions currently prevailing, the Commission must inform the Member State concerned, who can then submit comments within one month.
- The Commission then examines these comments and - if necessary - proposes appropriate measures to bring the existing aid in line with EU State aid rules.
- If the Member State does not accept these measures, the Commission must then initiate the formal investigation procedure.

Unlawful Aid

- Unlawful aid is aid granted without prior Commission authorisation.
- The Commission must examine all information it receives concerning alleged unlawful aid immediately.
- The Commission first opens a preliminary investigation. If there are doubts as to the compatibility of the measure, the Commission subsequently carries out an in-depth investigation.
- The Commission may use injunctions to obtain information from Member States, suspend the further granting of aid or impose provisional recovery obligation on the Member State.
- In case of a final negative decision, recovery of the aid already paid out, with interest, will take place.

Formal Investigation Procedure

- The Commission is obliged to open a formal investigation under Article 108(2) TFEU where:
  1. it has serious doubts about the aid's compatibility with EU State aid rules, or
  2. it faces procedural difficulties in obtaining the necessary information.
- The decision to initiate this procedure is sent to the relevant Member State. It summarises the factual and legal bases for the investigation and includes the Commission's preliminary assessment, outlining any doubts as to the measure's compatibility with EU state aid rules.
- The decision is published in the EU's Official Journal, and Member States and interested third parties have one month from the date of publication to submit comments. The Member State concerned is invited to comment on observations submitted by interested parties

Adopting a Final Decision

- The Commission adopts a final decision at the end of the formal investigation.
- There is no legal deadline to complete an in-depth investigation and its actual length depends on many factors, including the complexity of the case, the quality of the information provided and the level of cooperation from the Member State concerned.
- There are mainly three possible outcomes:
    1. Positive decision: the measure is not considered State aid or the aid is compatible with the internal market.
    2. Conditional decision: the measure is found compatible, but its implementation is subject to the conditions stated in the decision.
    3. Negative decision: The measure is incompatible and cannot be implemented. The Commission in principle orders the Member State to recover aid that has already been paid out. Where the decision is on existing aid, the Commission cannot order the recovery of aid already given, but will prevent the Member State from granting future aid.
- The case can also be closed following the withdrawal of the notification by the Member State.

Recovery of Aid

- If the Commission has taken a negative decision in the context of aid that has already been paid out, the Commission requires the Member State to recover the aid with interest from the beneficiary (*unless such recovery would be contrary to a general principle of EU law*).
- In this case, the Commission opens a 'recovery case' to enforce the implementation of its decision.
- If the Member State does not comply with the decision in due time, the Commission may refer it to the European Court of Justice (ECJ), without initiating an infringement procedure under Article 258 TFEU.
- The aim of recovery is to remove the undue advantage granted to a company (or companies) and to restore the market to its state before the aid was granted. [There is a limitation period of ten years for recovery.]

Judicial Review

- All decisions and procedural conduct of the Commission are subject to review by the General Court and ultimately by the ECJ.

Enforcement of Competition Rules

- Rigorous and effective enforcement of the EU competition rules is essential to ensure the achievement of the competition policy objectives.
- The Commission is the main body responsible for ensuring the correct application of these rules and has wide-ranging inspection and enforcement powers.

21 ACADEMY

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CAMILLERI PREZIOSI
ADVOCATES