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EURASIAN ECONOMIC UNION

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Foreword

Peer reviews of competition laws and policies are an important tool in helping to strengthen competition institutions. Strong and effective competition institutions can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

A peer review is a two-stage process. First, a report on the current state of a jurisdiction's competition framework and its enforcement practice is prepared. Second, that jurisdiction is subject to an evaluation by its peers based on the report. As such, peer reviews are founded upon the willingness of a country to submit its laws and policies to substantive review by other members of the international community. This process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all.

This peer review was undertaken at the request of the Eurasian Economic Union. The OECD would like to thank the Eurasian Economic Union and its Member States for volunteering to be peer reviewed at a meeting held on 8 November 2021, and at a Global Competition Forum meeting held on 8 December 2021. The OECD acknowledges the hard work of the lead examiners, Mr. Alexandre Cordeiro Macedo and Mr. Diogo Thomson de Andrade (Brazil); Rd. Willard Mwemba (COMESA - Common Market for Eastern and Southern Africa); Mr. Csaba Balázs Rigó (Hungary); and Mr. Bong-Sam Shin (Korea), and would like to thank them for their contribution to this peer review.

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Table of contents

Acronyms and abbreviations	9
Executive summary	13
1. Context and Foundations	21
1.1. General.....	21
1.2. Historical context	22
1.3. The EAEU Treaty	23
2. Legal Framework for The EAEU’s Competition Policy	31
2.1. Policy Statements and Economic Objectives	31
2.2. Provisions in the EAEU Treaty	32
2.3. Annex 19 to the TEAEU – Protocol on the General Principles and Rules of Competition	36
2.4. Normative Provisions Adopted on the Basis of the TEAEU	37
2.5. Sector-specific Rules	38
2.6. Rules Governing Multilevel Enforcement	39
2.7. Scope of Application of EAEU competition law	47
2.8. Sanctions and Remedies	55
3. Institutional Setting for Enforcement of Competition Laws	61
3.1. The EAEU Commission.....	61
3.2. The Competition Branch of the Commission.....	65
3.3. Decision-making.....	67
3.4. Prioritisation and Evaluation	71
3.5. Judicial Review.....	72
4. Application of Substantive Competition Law	77
4.1. Market Definition.....	77
4.2. Horizontal Agreements and Restrictions	84
4.3. Vertical Agreements and Restrictions	95
4.4. Abuse of Dominant Position	100
4.5. Mergers	111

5. Procedural Law	113
5.1. Overview – Main Stages of the Procedure.....	113
5.2. Examination of Application or Materials (Procedure 97)	114
5.3. Investigations (Procedure 98)	125
5.4. Case Consideration (Procedure 99).....	137
5.5. Final Decision	141
5.6. Cross-Cutting Procedural Issues.....	142
5.7. Fine Collection and Monitoring Remedies	150
6. Related Policy Areas.....	153
6.1. Unfair Competition.....	153
6.2. Trade Policy.....	154
6.3. Price Regulations	156
6.4. Co-operation in the Field of Consumer Protection	157
7. International Co-operation	159
7.1. Existing Instruments	159
7.2. Initiatives.....	161
8. Advocacy	163
8.1. Assessment and Development of Legislation	163
8.2. Promoting Competition Culture	164
9. Conclusions and and policy options	167
9.1. Strengths and Weaknesses of the Eurasian Economic Union's Competition Regime	167
9.2. Policy Options for Consideration	173
Annex A. Enforcement Statistics	193
Annex B. List of Natural Monopolies as specified in Annex 2 to Annex 20 to the TEAEU	194
Annex C. Case Descriptions	196
References	208

Tables

Table A A.1. Enforcement Statistics	193
Table A B.1. Spheres of Natural Monopolies in the Member States	194

Figures

Figure 1.1. Institutional Framework of the EAEU	24
Figure 1.2. Main areas of activity of the Eurasian Economic Commission	28
Figure 3.1. Organisation chart of the Competition Branch	66

Boxes

Box 2.1. Ex Post Studies	32
Box 2.2. Delineation of competences, preliminary assessment of market power	44
Box 2.3. Cross-Border Market in the <i>Cochlear</i> case	46
Box 2.4. Cochlear Case and lack of extraterritorial jurisdiction	49
Box 2.5. <i>Corning</i> Case and lack of extraterritorial jurisdiction	51
Box 2.6. General comments on lack of extraterritorial jurisdiction	52
Box 2.7. Fining Guidelines – no duration multiplier	60
Box 2.8. Fining Guidelines – prescription period	60
Box 3.1. The NLMK Case	70
Box 4.1. Definition of the relevant market in the <i>Corning</i> Case	80
Box 4.2. Definition of the relevant product market in the <i>Airlines</i> Case	82
Box 4.3. Definition of the relevant geographic market in the <i>Airlines</i> Case	84
Box 4.4. Market sharing agreement in the <i>Delrus</i> case	86
Box 4.5. Exclusivity and market sharing agreements in the <i>Cochlear</i> case	87
Box 4.6. – Judgment in <i>Delrus</i> on the definition of undertaking	90
Box 4.7. Leniency Rules and Priority	93
Box 4.8. Assessment of vertical agreements in the <i>Corning</i> Case	96
Box 4.9. Examination of exemptions in the <i>Cochlear</i> case	98
Box 4.10. Assessment of individual dominance in the <i>Corning</i> Case	104
Box 4.11. Examination of joint dominance in the <i>Airlines</i> Case	105
Box 4.12. Market share threshold for establishing dominance	107
Box 4.13. Assessment of abuse in the <i>Corning</i> Case	108
Box 4.14. Assessment of abuse in the <i>Airlines</i> Case	108
Box 4.15. Competition law and monopolies in the <i>Audit.KG</i> Case	110
Box 5.1. Illustrations on the start of proceedings	115
Box 5.2. Proposals	119
Box 5.3. Proposal in the <i>NLMK</i> Case	120
Box 5.4. Ex officio investigations in the <i>Corning</i> Case	127
Box 5.5. Request for information in the <i>Cochlear</i> Case	129
Box 5.6. Investigations in the <i>Corning</i> Case	130
Box 5.7. Requests for procedural actions in the <i>Delrus</i> Case	133
Box 5.8. National Rules and Unannounced Inspections	135
Box 5.9. Referral to NCA in the <i>Corning</i> Case	137
Box 5.10. Hearings during Case Consideration	138
Box 5.11. Request for procedural actions and hearings in the <i>Airlines</i> Case	139
Box 5.12. Lack of Statement of Objections	146
Box 5.13. Confidentiality	149

Acronyms and abbreviations

Entities

EAEU	The Eurasian Economic Union
Supreme Council	The Supreme Eurasian Economic Council
Intergovernmental Council	Eurasian Intergovernmental Council
Commission or EEC	The Commission of the EAEU
EAEU Court or Court	Court of the EAEU
Member State	Member State of the EAEU
NCA	National Competition Agency, the authorised body of a Member State in charge of competition policy

Sources of law

Treaty or EAEU Treaty or TEAEU	Treaty on the Eurasian Economic Union, signed at Astana (present day Nur-Sultan) on 29 May 2014
Annex 19 to the TEAEU	Annex 19 to the TEAEU “Protocol on Common Principles and Rules of Competition”
Agreement on Confidentiality	Agreement on Procedures for the Protection of Confidential Information and Liability for its Disclosure in the Exercise of the Eurasian Economic Commission’s Authority to Control over Compliance with the General Rules of Competition of 12 November 2014
Criteria of Cross-Border Markets	Decision No. 29 of the Supreme Eurasian Economic Council of 19 December 2012 “Criteria of Market Classification as Cross-Border Market”

Fining Guidelines	Decision No. 118 of the Council of the Commission of 17 December 2012, on the “Methods of Calculation and Procedure for Imposition of Fines for the Violation of Common Competition Rules on Cross-Border Markets”, as amended
Methodology	Decision No. 7 of the Council of the Commission of 30 January 2013 on the “Methods of Evaluation of Competitive Situation”, as amended
Methods on Identifying Monopolistic Pricing	Decision No. 117 of the Council of the Commission of 17 December 2012 on the “Methods of Identifying Monopolistically High (Low) Prices”, as amended
Procedure 97	Decision No. 97 of the Council of the Commission of 23 November 2012 on the “Procedure for Considering Applications (Materials) on Violation of the General Rules of Competition in Cross-Border Markets”
Procedure 98	Decision No. 98 of the Council of the Commission of 23 November 2012 on the Procedure for Investigating Violations of the General Rules of Competition in Cross-Border Markets
Procedure 99	Decision No. 99 of the Council of the Commission of 23 November 2012 on the Procedure for Considering Cases of Violation if Competition Rules
Other terminology	
Cross-Border Market	Relevant geographic market that includes the territories of two or more Member States under paragraph 2 of the Criteria of Cross-Border Markets
Economic Entity	“a commercial organisation or a non-profit organisation operating with generation of profit, an individual entrepreneur, as well as a natural person whose professional income-generating activities are subject to state registration and/or licensing under the legislation of the Member States” as defined in paragraph 20 of Annex 19 to the TEAEU

Examination of Applications/Materials	see Procedure 97
Applications	Complaints submitted by private parties to the Commission that trigger Procedure 97
Materials	Materials submitted by NCAs to the Commission that trigger Procedure 97
Investigation	see Procedure 98
Case Consideration	see Procedure 99
Case Consideration Commission	the ad hoc commission that considers the case under Procedure 99

Executive summary

The Eurasian Economic Union (EAEU) is a regional organisation for economic integration comprising the Republic of Armenia (Armenia), the Republic of Belarus (Belarus), the Republic of Kazakhstan (Kazakhstan), the Kyrgyz Republic (Kyrgyzstan) and the Russian Federation (Russia) (together, the 'Member States'). Beginning with a customs union in 1995, and moving towards a more integrated economic area ever since, culminating with the creation of the EAEU in 2015, the history of the EAEU is marked by constant legislative and institutional change.

Likewise, competition law and its enforcement in the EAEU have evolved greatly over the years. During the past decade, the EAEU has made continuous and significant efforts to ensure sustainable growth in business activity, to balance trade and fair competition, and to put in place a complex institutional architecture to achieve these goals. The enormity of these changes cannot be understated. Setting up a new international organisation and competition agency with competences across different jurisdictions, each going through reforms of their own; harmonising competition rules; and putting in place common competition policy, enforcement and practice across countries with different trajectories since their independence, are all challenging tasks.

The cornerstone of these efforts is the EAEU Treaty, which aims, among other goals, at guaranteeing fair competition and ensuring the observance of market economy principles. However, these broad principles have not yet been further defined as regards competition law and policy. In particular, the EAEU has not identified more targeted competition policy goals such as those often pursued by competition law in jurisdictions across the OECD, e.g. promoting consumer welfare, economic efficiency, innovation, growth, fairness, or a competitive industry structure.

Despite this, the policy goals and substantive rules governing competition law and policy are highly aligned across the EAEU. There are no major differences between EAEU competition law and national laws, and the competition policy objectives pursued by the EAEU and the Member States are broadly the same. This is achieved not only by granting exclusive jurisdiction to the EAEU Commission in cross-border cases, but also by imposing minimum harmonisation

requirements on the principles of competition law to be implemented by Member States, and by requiring Member States to adopt substantive provisions in line with those set out in the EAEU Treaty. However, Member States may determine, in their legislation, additional requirements and restrictions with regard to the competition prohibitions set out in the EAEU Treaty. National courts may also interpret EAEU competition provisions differently between themselves. This could open the door to the different (application of) competition rules at the national level.

EAEU substantive competition provisions cover the usual subject matters of competition law across the OECD, such as abuse of dominant position, anti-competitive agreements and horizontal/vertical restrictions. Some of the EAEU's substantive competition provisions, while aligned with those of the EAEU Member States, depart from the typical competition rules found across the OECD. Examples of this include abusive practices, in particular in that: (i) beside individual dominance, joint dominance on oligopolistic markets is also subject to *ex post* competition enforcement, and (ii) there are rigid market share thresholds below which neither individual nor joint dominance can be established. EAEU competition law also includes an autonomous prohibition of illicit co-ordination of economic activities by a natural or legal person who is not a competitor of the colluding economic entities, which can be sanctioned even if the Commission has not sanctioned or investigated a related collusive conduct.

Further, and unlike in most regional competition regimes, the EAEU is not empowered to review mergers, with competences over mergers staying with those NCAs empowered to review them under their national law. Whether the EAEU Commission should be vested with the power to review mergers with effects across cross-border markets has been a topic of debate; however, no high-level decision has yet been taken on this.

The EAEU Treaty's competition provisions are coupled with a number of secondary rules. Some of these touch on substantive matters – e.g. the scope of the Union's competition rules, or the methodologies used to evaluate competitive scenarios and anti-competitive prices. However, secondary rules mainly deal with procedural issues – e.g. the setting of fines, the allocation of jurisdiction between the Commission and the NCAs, procedural steps in enforcement procedures, and the handling of documents, including the treatment of confidential information.

Non-hard core competition restrictions, vertical arrangements and co-operative joint ventures can be exempted in certain circumstances. This is something that has been considered in individual cases. However, and despite the possibility of adopting secondary rules, EAEU competition law contains no block exemption

regulations or guidelines on permissible business conduct – except as regards monopolistic pricing, which is a topic traditionally deemed to fall outside the scope of competition law other than in exceptional circumstances.

The EAEU comprises a number of governing bodies. The Supreme Council is the top-level body of the EAEU, comprising the Heads of the Member States. The Intergovernmental Council consists of the Heads of Government of the Member States. The EAEU Commission (the ‘Commission’), comprising a Council and Board, is the executive arm of the EAEU, under the guidance and subject to the instructions of the Supreme and Intergovernmental Councils. Finally, the Court is the judicial body of the EAEU, responsible for reviewing Commission decisions, including on competition matters. In addition, the EAEU Court may issue advisory opinions that offer guidance to regulators and undertakings.

The Commission is the beating heart of the EAEU’s competition law and policy, and the Commission’s Board is responsible for adopting decisions on individual cases in the competition law field. However, the Commission also has a large substantive remit beyond competition law and policy. Currently, the Member of the Board in charge of competition policy heads two Departments: the Department for Antitrust Regulation and the Department for Competition and Public Procurement Policy (the Commission’s Competition Branch). This branch is responsible not only for competition law and policy as usually understood across the OECD, but also for other topics such as antidumping, unfair competition and price regulation, and public procurement.

The wide-ranging responsibilities of the Competition Branch of the Commission give it an extremely large mandate, which goes along with generous resources and a large staff. This wide remit may, however, also distract the Commission from enforcement in core competition areas. Most notably, the inclusion of unfair competition – which covers matters that in other jurisdictions are often classified as unfair business practices – as a focus of competition policy departs from the approach adopted across the OECD. As a result, some Commission activities that are presented as competition enforcement are on occasion indistinguishable from actions that, in most other jurisdictions, would fall outside the scope of competition law and be categorised as unfair business practices instead. In effect, the Commission has only taken limited action in enforcing traditional competition provisions, and particularly against cartels, while it has been very active – and successfully so – as regards unfair competition matters.

The large substantive competence remit of the Commission is strictly circumscribed as regards the division of competences with national competition

authorities. The Commission is only competent if a situation touches on cross-border markets, i.e. when the relevant geographic market includes the territories of two or more Member States. In addition, the application of individual substantive competition provisions can be subject to additional jurisdictional requirements, e.g. the Commission only has powers as regards anticompetitive agreements if, in addition to there being cross-border effects, there are at least two economic entities registered in two different Member States involved in the alleged infringement. Some of these jurisdictional requirements are quite onerous, particularly for cases of abuse of dominance, where a number of conditions concerning market structure and the existence of market power in several Member States must be met for the Commission to be competent.

As a result, enforcement of competition rules falls within the competence of the individual NCAs – even when a case has cross-border effects – whenever infringements do not concern cross-border markets, or, more generally, where the relevant jurisdictional requirements are not met. Furthermore, the Commission also lacks jurisdiction whenever a company under investigation is not registered in an EAEU country. In such cases, competence reverts to those NCAs that can exercise extra-territorial jurisdiction in line with common international practice. This state of affairs means that the Commission cannot prosecute possible breaches of EAEU competition law where the potential infringer is registered in a third country, even where the potential infringement could have similar effects in several or all the EAEU Member States.

Competence over competition cases can move between the Commission and NCAs throughout the process. If the Commission establishes, at any stage prior to the procedural step devoted to the adoption of a final decision, that prosecution of a competition infringement falls within the competence of an NCA, the Commission must refer the case to it. In turn, NCAs shall refer competition cases to the Commission throughout the proceedings if it is found that the case falls within the latter's competence. NCAs may also submit materials to the Commission, and thus initiate Commission proceedings.

Where the Commission has competence, its decision-making process in competition cases is divided into three procedural stages: a pre-investigation stage involving the examination of applications filed by private parties or materials transferred from Member State authorities (Procedure 97); investigations (Procedure 98); and case consideration (Procedure 99). Separate case teams comprising different employees and senior officials of the Commission are engaged at each procedural stage. The NCAs – and other Member States bodies

authorised to interact with the Commission as regards the adoption of a final decision – are closely involved in this process in accordance with formal, detailed and transparent rules.

At the pre-investigation stage in the proceedings, Procedure 97 provides for a Proposal procedure, since replaced in July 2021 by the Warning procedure. The Proposal was a flexible tool to reach early resolution of unfair competition and abuse of dominant position cases – except when the abuse consisted in setting monopolistically high or low prices – through the adoption of remedies and behavioural commitments. These remedies had to be accepted by the applicant (where a complaint was made), the alleged infringer, the NCAs and the Commission. If remedies were accepted, no formal investigation took place. No fines could be imposed through a Proposal, and no liability could be imposed. These features have been kept, in essence, by the Warning tool, which differs from and replaced the Proposal.

The Proposal and Warning procedures are the only early termination procedures in the EAEU's Commission toolbox. However, they cannot apply beyond this procedural stage – i.e. no commitments or settlements are allowed once an investigation (Procedure 98) starts – and they are not available for anticompetitive agreements and abusive conducts involving high or low prices. Further, since the Proposal and Warning procedures can only start following a complaint, there are no early termination procedures available for cases that the Commission starts *ex officio*.

Despite these limitations, the Commission in recent years has been able to make extensive use of the Proposal procedure. From May 2018 to December 2020, the Department for Antitrust Regulation drew up 18 draft Proposals, out of which seven were agreed (3 cases concerning abuse of dominance, 4 concerning unfair competition), and 11 were not agreed (2 cases of abuse of dominance, 9 concerning unfair competition). The Commission may start an investigation procedure (Procedure 98) after a Proposal or Warning procedure concludes, or *ex officio*. Between 2016 and 2020, the Commission conducted 32 investigations, including 11 investigations initiated *ex officio* by the Commission.

As a source of enforcement actions not dependent on individual complaints, the EAEU Treaty provides for a leniency policy to be implemented by the Commission. However, the Commission has not received any leniency application to date. A number of reasons have been advanced for this, first and foremost the absence of cartel enforcement and deterrent fines failing to create the requisite incentives for infringing companies to come forward. Another possible reason is that it seems

that the benefits of immunity for the first company that informs the Commission of a secret cartel are not transferable to proceedings before NCAs, nor from a NCA to the Commission. In addition, the EAEU's leniency policy lacks clarity about how priority would be established when different parties submit leniency applications before the Commission and NCAs, respectively; and there is no mechanism for rewarding applicants who are not able to benefit from full immunity.

While the Commission has the ability to request data throughout a case, it can only request certain types of data, or rely on certain investigative powers, once an investigation stage formally begins. For the pursuit of many investigative steps, the Commission relies on the NCAs, to whom it must direct requests to take such steps. NCAs must pursue the Commission's requests in accordance with their national laws; however, in certain cases the NCA can reject to pursue the requested investigative act.

This state of affairs raises difficulties, which are particularly apparent as regards unannounced inspections (dawn raids). The Commission is not authorised to carry out unannounced inspections; instead, it has a mere right to send a reasoned request for such actions to the NCAs. NCAs must then execute the Commission's requests for procedural actions in accordance with national legislation – with the consequence that unannounced inspections are not possible in those Member States which national law does not permit them. This divergence in national approaches to unannounced inspections may preclude the Commission from organising co-ordinated and simultaneous dawn raids across the whole of the EAEU, limiting the Commission's ability to prosecute secret cartels.

EAEU law does not provide for the need for the parties to justify the confidential nature of individual pieces of information included in documents, and the confidentiality stamp on an entire parcel precludes access to the file with respect to all the documents included in it. This creates obstacles to the transfer of confidential information between NCAs and the Commission without the permission of the information holder. Despite this permission being normally given, this can lead to procedural delays.

Following the investigation stage (Procedure 98) comes the case consideration stage (Procedure 99). The case consideration stage begins with the adoption of a ruling, adopted at the close of the investigation stage, outlining the grounds for initiating the case consideration stage and the norms breached. The content of this ruling is important from the point of view of the rights of the defence, since it is the sole basis provided to alleged infringers to build their defence. However, supporting evidence is not enclosed, and a description of the relationship between

the charges and supporting evidence is not provided. Further, the Case Consideration Commission may gather additional information and evidence, in the same way as under Procedure 98 investigations. While alleged infringers may be granted access to the file later in the process, EAEU process does not contemplate the issuance of a formal statement of objections to investigated parties, i.e. a single document that combines the description of all the evidence (simple facts), the preliminary conclusions that the Commission draws from the evidence (qualified facts), and the application of relevant provisions to those facts (legal qualification).

Interested parties (the applicant, the infringer, and the NCAs) have access to the file, and are entitled to submit and comment on evidence, submit their views and react to other parties' views. EAEU law does not contain any specific provisions on legal privilege or on the right against self-incrimination, leaving those matters to national law. Further, once a document or set of documents contained in a parcel bears the "confidential" mark, no content included in it can be disclosed without the permission of the information holder even for the exercise of defence rights. Permission to disclose confidential information is rarely granted *vis-à-vis* the alleged infringer, which, therefore, cannot access these files. EAEU does not contain provisions on access to confidential data necessary for the exercise of rights of defence.

Final decisions are adopted by the Board of the Commission, on the basis of a draft drawn up by the Case Consideration Commission. The NCAs receive copies of the draft decisions submitted to the Board, and can submit their Member States' comments and proposals to the Board prior to the adoption of the final decision. The Board of the Commission adopted 11 decisions in the field of competition law between 2016 and 2020, including four decisions on the failure to submit information to the Commission in due time.

Should the Commission establish an infringement, it is empowered to impose behavioural remedies and pecuniary sanctions. The Commission's powers in this regard are broadly in line with international practice. However, there are doubts about how deterrent the sanctions imposed by the Commission might be. Maximum fine thresholds are low by international standards – being limited to 15% of profits in the relevant market and 2% of the infringing company's total turnover. The Commission's is also unable to accurately reflect the duration of the infringement in the fine amount. Finally, a very short statute of limitations applies, which runs from the date that the infringement ceases, regardless of when it was uncovered, to the date when a penalty is imposed.

Commission decisions are subject not only to judicial review but also, on request from a Member State or a member of the Council of the Commission, to administrative review before the higher bodies of the EAEU. However, the Court admits appeals for judicial review without the applicant being required to pursue an administrative review first. All economic entities may challenge Commission decisions, or certain provisions therein, that directly affect their rights and legitimate interests. To date, two of the Commission's 11 decisions on competition law matters have been appealed. One appeal was dismissed as inadmissible, while in the second appeal the Court quashed the infringement decision on the ground that the Commission had not proven to the requisite standard that companies found to have concluded anti-competitive agreements were separate undertakings.

To promote competition law and policy, the Commission is engaged in regulatory impact assessments, and holds regular meetings with business representatives across the EAEU. The Commission is also engaged, in co-operation with national authorities, in various forms of dissemination of information on EAEU competition law to the business community, the general public, and media in all EAEU Member States. Officials and employees of the Commission's Competition Branch also give lectures and participate in seminars on EAEU competition law in all Member States.

The EAEU has concluded international agreements that include provisions concerning co-operation with competition agencies of third countries. In addition, the EAEU and the Commission have entered into memoranda of understanding with other countries and regional organizations providing for exchanges of information. However, these memoranda do not regulate enforcement co-operation. The Commission has not yet had an opportunity to undertake co-ordinated enforcement actions with a third country competition agency, nor has it carried out co-ordinated advocacy activities. On the other hand, the Commission routinely exchanges experiences with other countries, engages in international capacity-building activities, and participates in international competition fora.

1. Context and Foundations

1.1. General

The Eurasian Economic Union (EAEU) is an international organisation for regional economic integration comprising the Republic of Armenia (Armenia), the Republic of Belarus (Belarus), the Republic of Kazakhstan (Kazakhstan), the Kyrgyz Republic (Kyrgyzstan) and the Russian Federation (Russia) (together, the Member States). The EAEU was established by the Treaty on the Eurasian Economic Union (EAEU Treaty TEAEU or Treaty). The EAEU ensures free movement of goods, services, capital and labour among its Member States; pursues co-ordinated, harmonised and common policies in the sectors determined by the Treaty. The EAEU operates through supranational and intergovernmental institutions.

The EAEU is the world's largest economic integrated area by territory (20,229,248 km²). Its population amounts to 184.5 million people and its GDP to USD 4.778 trillion.¹

The EAEU was established with the objective of enhancing competitiveness and co-operation between the national economies of the Member States, and promoting stable development in order to raise the living standards of the nations of the Member States.²

¹ GDP on purchase power parity, 2020 estimate. Source: <https://data.worldbank.org/>

² Introduction on <http://www.eaeunion.org/>

1.2. Historical context

The first step towards the establishment of the EAEU was taken in 1995, when Belarus, Kazakhstan and Russia signed the **Treaty on the Customs Union**, which envisaged the elimination of any barriers hindering free economic co-operation between them, as well as ensuring free trade and fair competition.

In 1999, Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan signed the **Treaty on the Customs Union and the Single Economic Space** with a view to form the Eurasian Customs Union and the Single Economic Space. Following this, in 2000, these countries established the **Eurasian Economic Community** to promote the creation of a customs union and single economic space.

In 2007, Belarus, Kazakhstan and Russia signed the Treaty on the Creation of the Single Customs Territory and Establishment of the Customs Union. As a result of this Treaty, **the Customs Union of Belarus, Kazakhstan, and Russia came into existence on 1 January 2010**. Common customs tariffs were implemented, customs formalities and customs control at the internal borders were cancelled, and free movement of goods within the three contracting states was ensured.

In 2011, Belarus, Kazakhstan, and Russia signed the Declaration on Eurasian Economic Integration. This declaration set out that a customs union had been successfully implemented and announced the transition to the next stage of integration, the **Single Economic Space**. These countries also signed the **Treaty on the Eurasian Economic Commission**.

In 2012, the Treaty on the Eurasian Economic Commission entered into force. A **Single Economic Space** was created with a single market for **goods, services, capital and labour**, and coherent industrial, transport, energy and agricultural policies. Moreover, in that same year, **the Eurasian Economic Commission also started operating** as a regulatory agency in a number of areas which are outlined below.

On 29 May 2014, the three founding States, Belarus, Kazakhstan and Russia, signed the **Treaty on the Eurasian Economic Union (EAEU Treaty)**, which incorporates all integration achievements and replaces previous treaties. Later that year, the **Agreement on Accession of the Republic of Armenia** to the EAEU was signed, followed by the signature of the Agreement on **Accession of the Kyrgyz Republic** to the EAEU.

In 2015, the **EAEU Treaty and the accession agreements entered into force**, and the EAEU came into existence. Currently, the following States are members of the EAEU: Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia.

1.3. The EAEU Treaty

The EAEU Treaty defines the objectives of the EAEU, its institutional framework, and the policy areas in which the Member States have decided to pursue co-ordinated action and therefore conferred powers on the EAEU.

1.3.1. Economic Objectives

The EAEU Treaty sets out, in its preamble, several objectives. Of these, the following are relevant to competition law policy:

- **to strengthen the economies** of the Member States of the Eurasian Economic Union and to ensure their harmonious development and convergence, as well as to ensure **sustainable growth** in business activity, **balanced trade and fair competition**;
- to promote economic progress by means of joint activities intended to solve common problems on sustainable economic development faced by Member States of the Eurasian Economic Union, to ensure comprehensive modernisation and to **strengthen the competitiveness of national economies** within the framework of the global economy;
- to further strengthen mutually beneficial **economic co-operation with other countries**, international integration associations and **international organisations**.

Article 4 TEAEU provides that the main objectives of the EAEU include:

- to create conditions for **stable economic development** of the Member States in order to improve the living standards of their people;
- to create a **common market for goods, services, capital and labour** within the EAEU;
- to achieve comprehensive modernisation, co-operation and **competitiveness of the EAEU's national economies within the global economy**.

1.3.2. Institutional Framework of the EAEU

Under Article 8 of the EAEU Treaty, the bodies³ of the EAEU shall include:

- The Supreme Eurasian Economic Council (“**Supreme Council**”);
- The Eurasian Intergovernmental Council (“**Intergovernmental Council**”);
- The Eurasian Economic Commission (“**Commission**”);
- The Court of the Eurasian Economic Union (“**EAEU Court**” or “**Court**”).

Figure 1.1. Institutional Framework of the EAEU

EAEU bodies	Composition
Supreme Eurasian Economic Council	Heads of the Member-States
Eurasian Intergovernmental Council	Heads of the Member-States Governments
Eurasian Economic Commission	
- Council of the Commission	- Vice-Prime Ministers of the Member-States
- Board of the Commission	- 2 Members (Ministers) from each Member-State
Departments of the Commission	25 Departments
Court of the Eurasian Economic Union	2 judges from each Member-State

The presidency of the Supreme Council, the Intergovernmental Council and the Council of the Commission is assigned on a rotation basis to one Member State of the EAEU for one calendar year without right for prolongation.⁴

The **Supreme Council** is the top-level body of the EAEU. It is composed of the Heads of the Member States. Ordinary meetings of the Supreme Council are held at least once a year. Extraordinary meetings may be convened on the initiative of any Member State or the Chairman of the Supreme Council (the head of the Member State holding the rotating presidency). The Supreme Council considers fundamental issues of activity of the EAEU, defines the strategy, direction and prospects of integration, and takes decisions aimed at achieving the objectives of the EAEU. Its powers include issuing instructions to the Intergovernmental Council and to the Commission, and deciding on the establishment of subsidiary bodies

³ In the official translation of the EAEU Treaty, the institutions of the EAEU are mentioned as 'bodies'.

⁴ TEAEU Art 8.

in relevant areas. The Supreme Council issues decisions and instructions⁵ which are adopted by consensus.⁶

The **Intergovernmental Council** consists of the Heads of Government of the Member States. Ordinary meetings of the Intergovernmental Council are held when necessary, but at least twice a year. In order to solve urgent issues, extraordinary meetings shall be convened on the initiative of any Member State or the Chairman of the Intergovernmental Council (the head of government of the Member State holding the rotating presidency). The Intergovernmental Council's powers include ensuring the implementation of the EAEU Treaty, international agreements within the EAEU and the decisions of the Supreme Council; considering issues on which consensus has not been achieved by the Council of the Commission; giving instructions to the Commission; and suspending the implementation of decisions of the Council or Board of the Commission. The Intergovernmental Council issues decisions and instructions, which are adopted by consensus.

The **Commission** is based in Moscow, Russian Federation, and consists of the Council and Board.⁷ The Council of the Commission is composed of the deputy prime ministers of the Member States. It is in charge of **regulating the integration processes** in the Union, including those relating to competition, as well as of the general management of the Commission's activities.⁸ The Board of the Commission is the executive body of the Commission. It is composed of two Members from each Member State (see 3.1.1). The Board is responsible for adopting decisions on individual cases in the competition law field.

The Commission issues decisions, instructions and recommendations (see 1.3.4). These instruments must be adopted by consensus by the Council, but the Board may adopt them by qualified majority or by consensus depending on the issue

⁵ Распоряжения.

⁶ TEAEU Arts 10–13.

⁷ According to TEAEU Art 18, the status, objectives, composition, functions, powers and procedures of the Commission are specified in Annex 1 to the Treaty (Regulation on the Eurasian Economic Commission).

⁸ Paragraph 22 of Annex 1 to the TEAEU.

concerned. Individual decisions in the competition law field are adopted by majority of the votes.

The **Court of the EAEU** is the judicial body of the EAEU. Its status, structure, competences and procedures are specified in the Statute of Court.⁹ The seat of the Court of the EAEU is in Minsk, Belarus. It reviews the decisions on competition law adopted by the Commission.

In order to ensure that the EAEU performs its functions in co-ordinated or agreed policies, the Supreme Council may establish subsidiary bodies (boards of the heads of state offices of the Parties, working groups, special commissions) in relevant policy areas and/or instruct the Commission to co-ordinate the interaction of the Member States.¹⁰

1.3.3. Principles, Powers and Common Policies

The EAEU's competences are subject to the **principle of conferral**. This principle is set out in Article 3 of the EAEU Treaty as follows: "The EAEU shall operate within the competence granted to it by the Member States in accordance with the present Treaty". Moreover, the EAEU Treaty emphasises that the EAEU is based on principles of "sovereign equality of the Member States" and the "respect [of] the differences of political structures of the Member States". In this regard, Article 5 of the EAEU further states that "the EAEU shall perform its functions within the limits established under the present Treaty and international agreements within the EAEU" and that "Member States shall carry out co-ordinated and agreed policies within the limits established under the present Treaty and international agreements within the EAEU."

Article 3 of the EAEU Treaty also defines principles of economic nature, under which the EAEU ensures market economy and **fair competition**, as well as the functioning of the **Customs Union**.

Further, Article 3 of the EAEU Treaty lays down the principle of **loyal co-operation**, according to which "Member States shall create favourable conditions for fulfilment of the functions of the EAEU and shall refrain from measures that could prevent the achievement of the objectives of the EAEU." This

⁹ Annex 2 to the TEAEU, Statute of the Court of the Eurasian Economic Union.

¹⁰ TEAEU Art 5.

means that Member States cannot adopt measures that would go against the principles of market economy and fair competition.

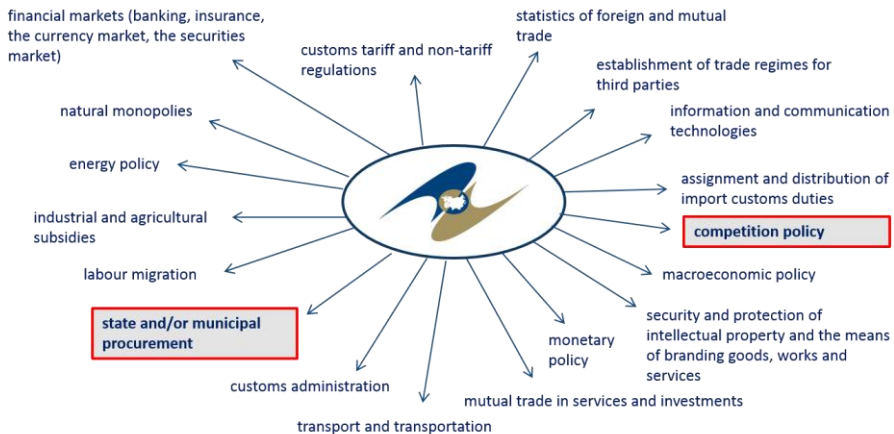
Depending on the depth, intensity and the methods of taking common action in various fields, policy areas may be “**co-ordinated policies**”, “**agreed policies**” or “**common policies**”. A co-ordinated policy (скоординированная политика) aims to achieve the objectives of the EAEU under the Treaty through the implementation of co-operation among the Member States by means of common approaches approved by the bodies of the EAEU. An agreed policy (согласованная политика) is a policy implemented by Member States on the basis of decisions of the EAEU in various fields that requires the harmonisation of legal regulation to the extent necessary to achieve the objectives of the EAEU under the Treaty. Finally, a common policy (единая политика) is a policy implemented by the Member States through the adoption by the Member States of uniform legal regulation in particular areas provided under the Treaty following decisions of the bodies of the EAEU within their competence.¹¹

These common actions are deployed in the policy areas falling within the competences of the Commission, which are illustrated by the below table:

¹¹ TEAEU Art 1. defines co-ordinated, agreed, and common policies .

Figure 1.2. Main areas of activity of the Eurasian Economic Commission

Main areas of activity of the Eurasian Economic Commission



Source: Eurasian Economic Commission

1.3.4. Sources of Law

Articles 2 and 6 of the EAEU Treaty contain the provisions on the sources of law, listed in an order that reflects the hierarchy of norms:

- The **EAEU Treaty**;
- **International agreements within the EAEU**; These are “international agreements concluded between the Member States on the issues related to the functioning and development of the EAEU”
- **Agreements of the EAEU with a third party**; These are international agreements concluded with third countries or with international organisations;
- Decisions of the Supreme Council, the Intergovernmental Council, as well as those of the Commission, are acts of the Bodies of the EAEU that have a legal nature. Importantly, there are two types of decisions: **regulatory decisions** are of general application (normative acts), which can be adopted, in the competition field, by the Council of the Commission; **individual decisions** adopted by the Board of the Commission, such as

those that concern the application of competition rules to individual cases. In case of conflict, decisions of the Supreme Council take precedence over the decisions of the Intergovernmental Council and the Commission; while decisions of the Intergovernmental Council take precedence over the decisions of the Commission. Regulatory decisions adopted by the Council of the Commission prevail over individual decisions of the Board.

- Finally, **instructions** are acts of the EAEU institutions that have organisational and administrative nature.

2. Legal Framework for The EAEU's Competition Policy

2.1. Policy Statements and Economic Objectives

The EAEU Treaty enshrines several fundamental principles that are relevant for competition law, as presented in 1.3.1 above. In particular, it is stated that the EAEU aims at **guaranteeing fair competition** and ensuring the observance of the principles of **market economy**. Fair competition also appears as a fundamental tenet in almost all policy areas of the EAEU.

The EAEU Treaty lays down general objectives which are applicable in the competition law field. In addition, the document “Strategic Directions for Developing the Eurasian Economic Integration until 2025”, adopted by the Supreme Council on 11 December 2020 states that “A constant strategic focus shall be placed on the complete removal of barriers and the maximum reduction of exemptions and restrictions and the enforcement of common principles and rules of competition for the free movement of goods, services, capital and labour in the internal market of the Union. The full implementation of existing arrangements in this area will strengthen the foundations of the functioning of the Union and the absence of barriers within the Union will increase the confidence of Member States in each other as well as in the Commission.” On the other hand, more specific goals, such as promoting consumer welfare, economic efficiency, innovation, growth, fairness, competitive industry structure or protection of small and medium sized enterprises through competition policy, have not yet been defined. EAEU officials and officials of the national competition agencies of the Member States (NCAs) mentioned at the interviews conducted by the OECD that discussions regarding future development of the EAEU's competition policy, including the setting of its goals, are underway.

Despite this, there was a consensus that there are no major differences between EAEU competition law and national laws, and that the **competition policy objectives pursued by the Commission and the NCAs are broadly the same.**

With respect to the assessment of the common competition policy's impact on market and economic performance, no surveys, studies or empirical analyses have been published yet.

Box 2.1. Ex Post Studies

With respect to the assessment of the common competition policy's impact on market and economic performance, no surveys, studies or empirical analyses have been published yet. While it is true that the EAEU Treaty entered into force relatively recently, by 2015, the Commission has already delivered several important decisions. Therefore, examining the economic effects of the common competition policy on preservation and strengthening of effective competition, as well as on intensifying intra-EAEU trade may be a topic worth of attention in the future.

2.2. Provisions in the EAEU Treaty

The main competition law rules are set out in Section XVIII “Common principles and rules on competition” of the EAEU Treaty. Article 74 TEAEU sets out the most fundamental legal provisions; Article 75 TEAEU details the basic harmonisation requirements towards Member States in the field of competition policy; while Article 76 TEAEU lays down the substantive rules to be applied directly by the Commission. These rules are reproduced below with added annotations in [square brackets].

2.2.1. General Provisions on Competition Policy

The general provisions on the EAEU's competition law policy are as follows:

Article 74

General Provisions

[Scope] *The subject of this Article is establishment of common principles and rules of competition, providing detection and restraint of anticompetitive practices in the territory of the Member States and actions, **adversely affecting competition on cross-border markets in the territory of two and more Member States.***

[Cross-border criterion] *The provisions of this sector are applied to relationship, connected with implementation of competition (antimonopoly) policy in the territory of the Member States, and to the relationship with participation of economic entities of the Member States, which adversely affect or may affect competition on cross-border markets in the territory of two and more Member States. Criteria of reference of the market to cross-border for the purposes of determining competence of the Commission are established by the decision of the Supreme Council.*

[Additional national rules] *The Member-states are entitled to determine in their legislation:*

1. *additional prohibitions, as well as additional requirements and restrictions in regard to the prohibitions set by Articles 75 and 76 of current Treaty;*
2. *other (additional) conditions for recognition of the dominant position of an economic entity (market participant);*
3. *grounds and order of issuing **warnings** while implementing the authority on preventing and detecting the signs of violation of competition (antitrust) legislation of a Member State;*
4. *grounds and order of issuing **cautions** on inadmissibility of taking an action (omission) that can lead to violation of competition (antitrust) legislation of a Member State.*

[Agreed policy regarding companies registered in third countries] *The Member States pursue the agreed competition policy regarding actions of economic entities of the third countries, if these actions may adversely affect the condition of competition on the goods markets of the Member States.*

[Safeguard clause] *Nothing in this Section should not be interpreted as preventing any member State from taking any measures it considers necessary for protection of the major interests of national defence or security of the State.*

[Natural monopolies] *Provisions of this Section are applied to natural monopoly entities as provided for by this Treaty.*

[Annex 19] *Implementation of provisions of this Article is performed pursuant to Annex 19 to this Treaty.*

2.2.2. Common Principles to be implemented by Member States

Article 75 TEAEU sets out the minimum harmonisation requirements towards Member States. It concerns relate to situations where the Commission has no competence, which remains exclusively with the Member States, but where the Member States are compelled to introduce in their own legislation some common principles regarding competition law. The term “authorised body of the member State”, referring to the national competition agencies of the Member States, is abridged as “NCA” in the present report. Article 75 TEAEU provides as follows:

Article 75

Common Principles of Competition

[Principle of non-discrimination] *Application by the Member States of the provisions of their competition legislation to economic entities of the Member States is carried out similarly and equally irrespective of legal form and place of registration of such economic entities on equal terms.*

[Prohibitions with regard to public bodies] *The Member States establish prohibitions in their legislation, including on the following:*

1. *Agreements between public authorities, local governments, other authorities or organizations carrying out their function or between them and economic entities if such agreements lead to or may lead to prevention, restriction or elimination of competition, except for the cases provided by this Treaty and/or by other international agreements of the Member States;*
2. *granting of the State or municipal preferences, except for the cases provided for in the legislation of the Member States and with consideration of specificities as provided for by this Treaty and/or other international agreements of the Member States.*

[Enforcement] *The Member States take effective measures for the prevention, identification and suppression of the actions (inaction) provided by subparagraph 1 of paragraph 2 of this Article.*

[Merger control by NCAs] *The Member States in accordance with their legislation ensure effective control over economic concentration to the extent necessary for the protection and development of competition in the territories of each member State.*

[Powers of NCAs] *Each member State provides existence of the national authority of the government whose competence includes implementation and (or) carrying out competition policy, which means, inter alia, granting to such authority powers to control observance over prohibition of anti-competitive actions and prohibition of unfair competition, control over economic concentration, and also powers on prevention, identification of violation of the competition (antimonopoly) legislation, take measures on termination of the mentioned violation and bringing to responsibility for such violation (hereinafter – the authorized body of the member State).*

[Sanctions and fine setting principles] *The Member States establish in their legislation effective sanctions for conducting anticompetitive actions regarding economic entities and officials of authorized bodies, based on the principles of effectiveness, proportionality, security, inevitability and definiteness, and provide control of their application. The Member States recognize that in case of application of penalties, the highest penalties have to be established for the violations constituting the greatest threat for competition (agreements limiting competition, abuse of the dominant position by economic entities of the Member States), thus the preferable fines are estimated from the sum of revenues of the offender gained from sale of goods or from the sum of expenses of the offender on purchase of goods, in the market where the violation took place.*

[Transparency] *The Member States pursuant to their legislation provide informational openness of competition (antimonopoly) policy pursued by them, including by publication of information on activity of the authorized bodies of the Member States in mass media and the Internet.*

[Co-operation between NCAs] *Authorized bodies of the Member States in accordance with the legislation of their State and this Treaty carry out co-operation by sending notices, requests for providing information, carrying out consultations, informing on the investigations (hearing of cases) affecting interests of the other Member State, carrying out investigations (hearing of cases) at the request of the authorized body of one of the Member States and informing on its results.*

2.2.3. Substantive Competition Rules

Article 76 of the TEAEU sets out the substantive competition law provisions which are directly applicable by the Commission to individual cases and which are also common provisions that national legislations must include, for the purposes of application by NCAs. These rules concern abuse of dominant position (see 4.4.1), anti-competitive agreements, horizontal/vertical restrictions and illicit co-ordination of economic activities (see 4.2.1 and 4.3.1 below), as well as unfair competition (see 6.1).

As to enforcement, Article 76(7) TEAEU provides as follows:

7. [competition enforcement] Prevention of violation by economic entities of the Member States, and also by natural persons and non-commercial organizations which do not carry out business activity, of common rules of competition established in this section if such violations affect or can adversely affect competition on cross-border markets in the territory of two and more Member States, except for financial markets, is carried out by the Commission in the order provided by the Annex 19 to this Treaty.

2.3. Annex 19 to the TEAEU – Protocol on the General Principles and Rules of Competition

Annex 19 to the EAEU Treaty consists of the Protocol on the General Principles and Rules of Competition. This document contains the rules on the following aspects of the EAEU competition law:

- The exemptions from the general prohibition of anti-competitive agreements;
- The investigative and decision-making powers of the Commission;
- Rules on the judicial review of acts of the Commission;
- The basic rules on fine-setting;
- Delineation of competences between the Commission and NCAs;
- Provisions regulating the co-operation of NCAs;
- Provisions regulating the co-operation between the Commission and the NCAs;

- The Commission’s powers regarding issuing Caution and Warning (according to the new TEAEU amendments that came into force on 15 July 2021).

2.4. Normative Provisions Adopted on the Basis of the TEAEU

The above fundamental rules laid down in the TEAEU and in Annex 19 thereto are complemented by other normative acts, mostly adopted in the form of regulatory decisions. Indeed, “decisions” of the EAEU Bodies “have a legal value” and this legal value may also be of normative nature, i.e. **decisions** may be acts of **general application** (see also 1.3.4). In addition, normative rules have also been adopted in the form of an “**international agreement within the EAEU**” (on the handling of confidential information).

The following normative decisions have been adopted with regard to **substantive competition law**:

- Decision of the Supreme Council of 19 December 2012 No. 29 On approving Criteria of market **classification as cross-border market** (hereinafter “**Criteria of Cross-Border Markets**”),¹²
- Decision of the Council of the Commission of 30 January 2013 No. 7 On the **Methods of Evaluation of Competitive Situation**, (hereinafter “**Methodology**”);
- Decision of the Council of the Commission of 17 December 2012 No. 117 On the **Methodology of Identifying Monopolistically High (Low) Prices**, (hereinafter “Methods on Identifying Monopolistic Pricing”);
- Decision of the Council of the Commission of 17 December 2012 No. 118 On the Methodology of **Calculation and Procedure for Imposing Fines** for Violation of the General Rules of Competition in Cross-Border Markets, (hereinafter “**Fining Guidelines**”).

The procedural law aspects of the EAEU’s competition law are regulated in the below sources of law:

- Decision of the Council of the Commission of 23 November 2012 No. 97 On the **Procedure for Examination of Applications** (Materials) on

¹² This is discussed in greater detail in section 2.6.2 NCA Competences below.

Violations of the General Rules of Competition in Cross-Border Markets, (hereinafter “**Procedure 97**”);

- Decision of the Council of the Commission of 23 November 2012 No. 98 “On the **Procedure for Investigating Violations** of the General Rules of Competition in Cross-Border Markets”, (hereinafter “**Procedure 98**”);
- Decision of the Council of the Commission of 23 November 2012 No. 99 “On the **Procedure for Considering Cases** of Violation of the General Rules of Competition in Cross-Border Markets”, (hereinafter “**Procedure 99**”);
- **Agreement** on Procedures for the Protection of **Confidential Information** and Liability for its Disclosure in the Exercise of the Eurasian Economic Commission's Authority to Control over Compliance with the General Rules of Competition of 12 November 2014, hereinafter “**Agreement on Confidentiality**”);
- Decision of the Council of the Commission of 18 September 2014 No 71 “On the **Procedure for Handling Documents** of Limited Distribution (Confidential and For Official Use) in the Eurasian Economic Commission”;
- Decision of the Council of the Commission of 5 March 2021 No 28 “On Approving the **Procedure for issuing a Caution about the inadmissibility** of actions that may lead to a violation of the general rules of competition in the cross-border markets of the Eurasian Economic Union Member States”.

2.5. Sector-specific Rules

While the Commission has the general power to enforce EAEU competition law (as defined in Section XVIII “Common principles and rules on competition” of the Treaty)¹³ with respect to Cross-Border Markets, Annex 19 to the TEAEU¹⁴ creates an exception. When it comes to **financial markets**, even if they are cross-border, the Commission has no power to enforce competition rules. Instead, that

¹³ See 2.2.

¹⁴ Paragraph 9 of Annex 19 to the TEAEU.

enforcement is ensured by the NCAs in accordance with the legislation of the Member States.

Moreover, the Treaty creates special regimes in several other fields. In particular, Section XVIII of the TEAEU on “Common principles and rules on competition” applies to **natural monopolies** but this is without prejudice to the specific rules provided for in Section XIX “Natural Monopolies” of the Treaty, which prevail over competition rules. The term “natural monopoly” means “a situation of the services market when the creation of a competitive environment to meet the demand for a particular type of services is not possible or is economically infeasible due to the specific technological features of production processes and provision of these services” – i.e. where infrastructure that cannot be duplicated in an economically viable way.¹⁵ Natural monopolies include, among others, services for the transportation of oil and petroleum products via main pipelines; services for the transmission and/or distribution of electricity; and railway transportations.¹⁶ The definition of “natural monopoly” varies with respect to each Member State, and must be defined upfront by each Member State and notified to the Commission. The current list of national monopolies is reproduced in Annex 2.

Finally, in the fields of **electricity, gas, and oil products**, competition rules are applied with account taken of the specific rules provided for in Sections XX “Energy” and XIX “Natural Monopolies” of the EAEU Treaty.

2.6. Rules Governing Multilevel Enforcement

Under the EAEU Treaty, the Commission is empowered to enforce substantive competition law rules in cases involving **Cross-Border Markets** (save in the case of financial markets). However, with respect to **infringements that do not concern Cross-Border Markets**, the national equivalents of these substantive rules are **enforced** by the NCAs on the territory of the Member State(s)

¹⁵ Paragraph 2 of Annex 20 to the TEAEU (Protocol on Common Regulation Principles and Rules for Activities of Natural Monopoly Entities).

¹⁶ Annex 1 to the Protocol on Common Regulation Principles and Rules for Activities of Natural Monopoly Entities

concerned.¹⁷ In addition, the EAEU Court may issue advisory opinions that offer guidance to regulators and undertakings (see Advisory Opinions below).

If the Commission establishes, at any stage of consideration of the application or materials (Procedure 97, see 5.2 below), that prosecution of a competition infringement falls within the competence of an NCA, the Commission must refer the case to the NCA of the Member State which has jurisdiction. Referral on such grounds is also possible at the stage of Investigations (Procedure 98, see 5.3 below).

In turn, the NCAs shall also refer competition cases to the Commission if it is found that the case is within the competence of the Commission. Such a decision shall be taken by the NCAs at any stage of the consideration of the application, taking into account the specifics established by the legislation of the member state transmitting the application. NCAs may also submit materials to the Commission and thus initiate the Commission proceedings under Procedure 97.

With regard to procedural mechanisms, it should be noted that the **NCAs** directly or indirectly **participate in the proceedings** conducted by the **Commission** that aim at ensuring compliance with the general rules of competition in cross-border markets. This participation streamlines the identification of cases for referral and the smooth continuation of proceedings following such referrals. These mechanisms are detailed in Part 5 Procedural Law.

As explained above, it follows from Article 76(7) TEAEU that the Commission has the power to enforce competition rules if the violation affects or can adversely affect competition on Cross-Border Markets in the territory of two and more Member States. The criteria for defining the competence of the Commission in Cross-Border Markets are laid down in the Decision of the Supreme Eurasian Economic Council of 19 December 2012 No. 29 “**Criteria of Market Classification as Cross-Border Market**” (hereinafter referred to as “Criteria of Cross-Border Markets”). If there is no competence of the Commission in a **given** cross-border market, then the competence is at the national level.

¹⁷ Paragraph 8 of Annex 19 to the TEAEU.

2.6.1. Establishing the Commission’s Competences – Cross-Border Markets

The main – and a necessary – condition for a market to be qualified as a Cross-Border Market is that the relevant **geographic market includes the territories of two or more Member States** (hereinafter the “**Relevant Cross-Border Market**”).¹⁸

Furthermore, the Criteria determining the competence of the Commission in the Cross-Border Markets lay down **specific conditions in respect of various types of infringements**, i.e. unfair competition, anti-competitive agreements and abuse of dominant position. **These specific conditions do not relate to the extent of the relevant market but rather to cross-border effects of the conduct.** Indeed, with regard to unfair competition and anti-competitive agreements, the Commission has powers only if at least two economic entities involved in the alleged infringement are registered in two different Member States. In the case of abuse of dominant position, the **market structure** (and the existence of market power in several Member States) is also taken into account when determining if the market is “Cross-Border”, that is, if the Commission has the power to enforce EAEU competition law. These specific conditions will be discussed below separately in respect of each type of infringements.

Abuse of dominant position

The provisions laid down in the Criteria of Cross Border Markets, detailed below, serve for the delineation of competences between the Commission and the NCAs, and not for a final assessment of dominance (see 4.4.2 below). The Criteria of Cross-Border Markets¹⁹ thus provide that prosecution of breaches of Article 76(1)

¹⁸ Under Paragraph 2 of the Criteria of Cross-Border Markets, “for the purposes of application of the general rules of competition stipulated in Article 76 of the Treaty on EAEU, a market is considered to be cross-border, if geographical boundaries of a commodity market include the territories of two or more Member States.” The Criteria of Cross-Border Markets apply to subjects of **natural monopolies**, taking into account the features provided for by the Treaty on EAEU and (or) the international treaties within the EAEU (Paragraph 6 of the Criteria of Cross-Border Markets).

¹⁹ Paragraph 5 of the Criteria of Cross-Border Markets.

TEAEU is carried out by the Commission if conditions A–B are met in total or, alternatively, conditions C–F are met in total:

the **share of the sales or purchases** of an economic entity occupying a dominant position in the Relevant Cross-Border Market from the total volume of goods circulating in the territory of **each of the Member States** affected by the infringement, **is at least 35%**;²⁰

AND

the infringement leads or **may lead to prevention, restriction, elimination of competition** in the relevant market or harms the interests of other undertakings in the territories of **two or more Member States**;

OR

the combined **share of the sales or purchases of several economic entities, each of which** occupying a **dominant position** in the Relevant Cross-Border Market, and whose actions lead to an abuse, of the volume of goods circulating in the territory of each of the Member States affected by the violation is **at least 50%** for no more than **three economic entities** OR **at least 70%** for **no more than four economic entities** (this rule shall not apply if the share of at least one of these economic entities is less than 15 percent in the territory of each of the Member States);²¹

AND

during a long period (during at least one year or, if such period is less than one year, during the period of existence of the corresponding commodity market) the relative sizes of shares of economic entities are relatively stable, and the entry to the relevant product market is difficult for new competitors [**stable market shares and high barriers to entry**];

AND

goods sold or purchased by the economic entities cannot be replaced by another product, an increase in the price of goods does not cause a decrease in demand

²⁰ The nationwide market share is taken into account, not the market share on the narrowest possible geographic market, which may also be regional.

²¹ The nationwide market share is taken into account, not the market share on the narrowest possible geographic market, which may also be regional.

reflecting the price increase for these goods, information about the price, the conditions of sale or purchase of the products is available to the public [**no supply side substitutability, transparent markets**];

AND

violation of the prohibition leads or may **lead to prevention, restriction, elimination of competition** in the commodity market that meets the criteria established in paragraph 2 of the Criteria or infringement of the interests of others in the territories of **two or more Member States**.

The Criteria of Cross-Border Markets thus establishes a rather complex set of conditions which determine if the Commission has the power to prosecute abuses of dominant position. The first set of conditions (cumulative conditions A–B) refer to a situation where a single economic entity holds more than 35% market share in at least two Member States,²² while the second set of conditions (cumulative conditions C–F) refer to oligopolistic structures where several large economic entities are present in concentrated markets.

²² Share of sales or purchases by an economic entity must be at least 35% of the total volume of circulated goods on the territory of each of the at least two Member States affected by the violation. Therefore, only the countrywide market shares are relevant, even if the relevant geographic market may be regional in size.

Box 2.2. Delineation of competences, preliminary assessment of market power

With respect to the definition of the Commission's powers by reference to market structures and markets shares in the field of abuse of dominance, the OECD received several observations during the interviews held with stakeholders.

First, with respect to individually held dominant position (conditions A–B), the OECD received several comments on criterion A both from regulators and legal representatives. These comments highlighted that the presence of a general condition under which the market share of the economic entity under examination must be above 35% in at least two Member States may appear overly strict from a practical point of view.

In particular, in some markets such as digital markets, measuring both the exact size of the relevant market and the market share of an operator may prove difficult in practice, even if there are rather clear signs that the operator acts, to a large degree, independently of its competitors and customers and is thus likely to be in a dominant position. The strict market share threshold defined in the Criteria of Cross-Border Markets thus leaves the Commission with the alternatives of either carrying out an in-depth market analysis at a stage of the procedure where its competence has not yet been established or of dropping the case, even if it transpires that the conduct of an operator on digital markets is uniform in several Member States and may well be abusive.

Another issue, that applies even in non-digital markets, concerns scenarios where it transpires that an operator has market power in the relevant market in several Member States, but its market share is not above 35% in at least two Member States. Apart from high market shares, dominant position may also derive from other factors, such as control of essential facilities or inputs in upstream markets, or buyer power in downstream markets. It is also possible that the dominant undertaking only has a market share of above 35% in one Member State, and, still, that market power can be felt in another Member State because the inputs are sourced from the first Member State or the main purchaser of the goods on the downstream market is located in the first Member State. Finally [pending reply by the EEC to the above question], it is also possible that the relevant geographic market is not nationwide, and the

economic entity under examination has a dominant position and its market share exceeds 35% on the relevant subnational geographic market, but its market share on the nationwide market is below 35%.

Several interviewees voiced the opinion that relaxation of the 35% market share criterion and a more flexible approach towards establishing the Commission's competence could be considered. Indeed, an overly strict market share criterion may deprive the Commission of its enforcement competence in cases where the same conduct affects the markets of several Member States and intervention by the Commission could bring added value, also account taken of the fact that the Commission has better investigative powers to gather information on the conduct and its effects in several Member States.

Based on the above, the relaxation of the market share condition reproduced in point A of above is an issue that may be given consideration. Possibly, the Commission could establish its competence by showing that the undertaking under examination occupies a dominant position (as defined in Annex 19 to the TEAEU) in the relevant product and geographical markets in two or more Member States (even if the relevant geographic market is subnational in size and the 35% threshold is not achieved nationwide). Such determination of competence could possibly be submitted to the approval by the NCAs, in case any departure from the current institutional balance is to be avoided.

Anti-competitive agreements

When it comes to anti-competitive agreements specified Article 76(3)–(5) TEAEU, the Criteria of Cross-Border Markets²³ provides that the Commission has the power to enforce these rules if **at least two economic entities** whose actions lead or may lead to a violation of the prohibition, are **registered on the territory of different Member States**.

²³ Paragraph 4 of the Criteria of Cross-Border Markets.

Box 2.3. Cross-Border Market in the *Cochlear* case

In the *Cochlear* Case, the Commission received Materials from the Ministry of National Economy of Kazakhstan on 3 July 2018. It was suspected that companies concluded potentially illegal agreements (i) obliging the buyer not to sell the goods of the seller's competitors (exclusivity) and (ii) aimed at the territorial division of the market. The companies involved were Cochlear Europe Limited (registered in the UK, hereinafter "Cochlear UK"), EuroMax LLC (registered in Russia, hereinafter "Euromax"), Pharm Express LLC (registered in Kazakhstan, hereinafter "Pharm Express").

Under Procedure 97 (Procedure for Examining Applications), with respect to the definition of the relevant market as a Cross-Border Market, the Commission took into account that, by virtue of national legislation,²⁴ the circulation of medical devices and medical products that have passed state registration is allowed on the territories of the Kazakhstan and Russia. Cochlear UK and Euromax **registered components of cochlear implant systems**, speech processors, other parts and accessories thereto, as well as consumables in Russia and Kazakhstan. This indicated that the goods in question could be supplied in the territory of Russia and Kazakhstan, also because no special requirements for means of transportation for delivery of the goods in question were imposed. The Commission thus held that the goods in question could circulate at least in the territories of two member states of the Union. Furthermore, at least two economic entities, whose actions lead or may lead to a violation of the ban, were registered in different Member States (Euromax and Pharm Express). Therefore, **the Commission concluded that the alleged infringement concerned a Cross-Border Market and it had competence to investigate the case under the Criteria of Market Classification.**

Therefore, the Member of the Commission in charge of competition policy issued **a ruling on the investigation of violations** of the general rules of competition on the basis of paragraphs 14 and 15 of Procedure 97 (the Procedure for Examination of Applications).

2.6.2. NCA Competences

The Criteria of Cross-Border Markets defines the conditions under which the Commission has the power to prosecute violations of Article 76 TEAEU. **If those conditions are not met**, enforcement of these competition rules falls within the competence of the NCAs of the Member States. NCAs may apply Article 76 TEAEU directly, however, practice shows that NCAs tend to refer to the national rules that correspond to the TEAEU's competition law provisions.

2.7. Scope of Application of EAEU competition law

2.7.1. Subjective Scope

General

The provisions of Section XVIII “General Principles and Rules of Competition” of the EAEU Treaty (Articles 74–76 TEAEU) apply to conduct of **economic entities**²⁵ of the Member States that have or may have a **negative impact on competition in Cross-Border Markets** in the territories of two or more Member States.

Under point 20 of paragraph 2 of Annex 19 to the TEAEU, the term “**economic entity (market entity)**” means “**a commercial organisation or a non-profit organisation operating with generation of profit, an individual entrepreneur, as well as a natural person whose professional income-generating activities are subject to state registration and/or licensing under the legislation of the Member States**”.²⁶

²⁴ Health and Health Care System Code No. 193-IV LRK dated September 18, 2009; Federal Law No. 323-FZ dated November 21, 2011 "On the Fundamentals of Health of Citizens in the Russian Federation".

²⁵ “Хозяйствующий субъект (субъект рынка)” is translated as “business entity (market entity)” in the English version of the TEAEU.

²⁶ “хозяйствующий субъект (субъект рынка)” is translated as “economic entity (market participant)” in Annex 19 to TEAEU. The definition in Russian is „коммерческая организация, некоммерческая организация, осуществляющая деятельность,

Under paragraph 16 of Annex 19 to the TEAEU, **economic entities** (including individual entrepreneurs), natural persons, as well as officials (**managers and employees**) of economic entities, **may be fined** for breaches of substantive competition rules and for not submitting information or deliberately submitting false information to the Commission. Such liability may also be established with respect to officials (managers and employees) of non-profit organisations that are not economic entities.

The EAEU law does not provide for exemptions in relation to state-owned companies, to whom, therefore, the Union's competition laws apply fully. However, EAEU competition law does not apply to State authorities, as these are not covered by the concept of "economic entities".

The subjective scope of EAEU competition law is not limited by the application of the competition law of the Member States.

No Extraterritorial Jurisdiction

It follows from Article 74(2) TEAEU that the competition law provisions laid down in Articles 74–76 TEAEU **do not apply to economic entities of third countries** that are not EAEU Member States. This rule contrasts to the situation of some NCAs (Russia, Belarus, Armenia),²⁷ which have jurisdiction over entities of non-Member States with respect to the application of competition rules.

приносящую ей доход, индивидуальный предприниматель, а также физическое лицо, чья профессиональная приносящая доход деятельность в соответствии с законодательством государств-членов подлежит государственной регистрации и (или) лицензированию".

²⁷ The Kazakh and the Kyrgyz NCAs have no extraterritorial jurisdiction.

Box 2.4. Cochlear Case and lack of extraterritorial jurisdiction

The Cochlear Case concerned exclusive distribution agreements concluded by Cochlear UK (registered in the UK) and distributors operating in various EAEU Member States. Voice processors manufactured by Cochlear UK for cochlear implants were distributed, by virtue of distribution agreements concluded with Cochlear UK, by EuroMax in Russia, Pharm Express and SPP VEK in Kazakhstan, and Assomedica in Belarus. These contracts stipulated that the **distributors were not allowed to sell the goods outside the territory of the countries in which they were respectively registered** (for the facts and legal qualification, see Box 4.4).

At the Investigation stage (Procedure 98), the Commission established signs of **illicit vertical agreements**, prohibited by subparagraph 2 of Article 76(4) TEAEU. These were contained in the provisions of distribution agreements concluded by Cochlear UK with Euromax, Pharm Express, SPP VEK and Assomedica, the terms of which include the obligation of distributors not to sell the goods of any competitor. The Commission even examined the possibility of applying individual exemptions to vertical agreements (see Box 4.9). The Commission also found signs of **other agreements** prohibited by Article 76(5) TEAEU contained in the provisions of distribution agreements concluded by the same parties, the terms of which led to the **division of the relevant Cross-Border Market on the territorial principle**.

However, **at the Case Consideration stage (Procedure 99)**, the Commission refocused its examination. The Case Consideration Commission established that the competing companies Belvivad, Assomedica, Pharm Express, SPP VEK and Euromax, operating in one relevant product market, participated in a **horizontal agreement** prohibited by subparagraph 3 of Article 76(3) TEAEU, which led to the division of the market by the territorial principle and (or) the repartition of customers (see Box 4.4). This was held so, even though Assomedica, Pharm Express, SPP VEK and Euromax each concluded distribution agreements with Cochlear UK, but not with each other.

It is noteworthy that the Commission decided to establish a breach of the prohibition of horizontal agreements, albeit distribution agreements are essentially vertical in nature. This case is the perfect illustration of the situation where a producer of goods partitions the common market of an economic

integration along national borders, through territorial protection clauses which ban cross-border sales outside each distributor's allotted territory. The Commission decided that refusing unsolicited orders from the territory of other Member States (passive sales) was illegal.

Assomedica, its subcontractor Belvivad, Pharm Express, SPP VEK and Euromax were fined, but no infringement committed by Cochlear UK was established, and no fine was imposed on that company, even though it was in the centre of the distribution scheme that partitioned the common market along national borders. Indeed, the Commission has no jurisdiction to establish the violation of Article 76 TEAEU with respect to companies registered outside the five EAEU Member States. This case thus illustrates that enlarging the Commission's powers by granting it extraterritorial jurisdiction could also have an impact on its assessment of cases. Here, a particular reference is made to the findings of the Commission at the stage of Investigation (Procedure 98), which detected signs of illicit vertical agreements, and even examined the possibility of exemptions. Such breaches were, however, not established in the final decision, possibly because the Commission had no power to prosecute violations committed by Cochlear UK.

Box 2.5. *Corning* Case and lack of extraterritorial jurisdiction

In the *Corning* Case, the Commission carried out a full analysis of the relevant market, market structure and the allegedly unlawful conduct. It found that a scheme of exclusive supply agreements concluded by Corning Inc (USA) with Minskabel and Beltelekabel could be in breach of **Article 76(5) TEAEU**, which prohibit other anti-competitive agreements. In particular, it found that the obligation (resulting from written and oral agreements) to purchase over 70% of single-mode optical fibres from Corning Inc could create obstacles for access to the market of sale of single-mode optical fibres for other producers of optical fibres.

The Commission, however, stopped short of a final analysis of the conduct. **Corning Inc is registered in the USA and is not registered in any Member State.** Therefore, issuing a decision on the legality of the conduct **was not within the powers of the Commission** under paragraph 4 of the Criteria of Cross-Border Markets. Considering the above, all documents and information available to the Commission were forwarded for consideration to the Belarusian NCA, which finally decided the case on 2 December 2020.

The *Corning* Case is therefore another illustration of the limitations the Commission experiences because of its lack of extraterritorial jurisdiction.

Box 2.6. General comments on lack of extraterritorial jurisdiction

The OECD received observations from many stakeholders on the lack of competence of the Commission with regard to companies registered in third countries. It is true that in traditional industries, a local subsidiary of an international company is normally present and is in charge of local sales and distribution of products or provision of services. However, it was repeatedly observed by stakeholders that the situation is fundamentally different when it comes to digital markets, where no such local presence is required. The lack of extra-territorial jurisdiction entails that the Commission cannot prosecute possible breaches of EAEU competition law where the potential infringer is registered in a third country, even though the potential infringement (e.g. flowing from standard terms for providing online services or selling goods online) have very similar effects in several or all Member States.

Opinions voiced at the interviews conducted by the OECD converged on the view that, in such situations, the Commission would be very well-placed to conduct the investigation and impose sanctions. Avoiding multiple parallel proceedings concerning the same conduct by a company registered in a third country may also contribute to efficient management of resources by the NCAs. It was also observed that, as regards digital markets, competition practice constantly encounters new issues and challenges. Therefore, decisions by the Commission in this field would also help to standardise the approach across the Member States and contribute to the development of competition policy.

As a separate issue, some interviewees mentioned that the lack of extraterritorial jurisdiction may cause a negative collision of competences. It appears that in abuse cases, where the market share of the infringer is above 35% in two Member States and the criteria for Cross-Border Markets are fulfilled, but the infringer's seat is in a third country, neither the Commission nor the NCAs have powers to investigate the case.

2.7.2. Material Scope, Exceptions

General Rule and Exceptions

Article 74–76 TEAEU on the general rules on competition apply in a uniform manner to all economic sectors, **except to financial markets**, which are exempted from the scope of EAEU competition law. Moreover, there are sector-specific rules on **natural monopolies** and **electricity, gas, oil and petroleum products** (see 2.5 above).

Exceptions Regarding Intellectual Property in EAEU and National Laws

As explained above in Chapter Rules Governing Multilevel Enforcement, the substantive competition law rules set out in Article 76 of the TEAEU (abuse of dominant position, anti-competitive agreements, unfair competition) are applied both by the Commission (with respect to Cross-Border Markets) and by NCAs (with respect to markets that do not qualify as Cross-Border), as the same rules are also present in national legislation.

One particular issue was highlighted both in the reply to the OECD's questionnaire and at the interviews held with stakeholders with regard to exceptions provided for in national legislation: that of **intellectual property rights (IPRs)**, which are regulated by the Member States.

It must be noted that the **substantive competition rules of the EAEU** only **create one explicit exception** to the application of competition rules when the potentially illicit conduct has an IPR related aspect. Under Article 76(4) point 2) TEAEU, the general prohibition of exclusive sales agreements does not apply if the agreement concerns distribution under a trademark or brand of the supplier. This exemption appears to cover exclusive distribution agreements where exclusivity is justified by trademark/brand protection. Furthermore, two exemptions laid down in Annex 19 to the TEAEU may also be relevant. First, commercial concession agreements, including franchise agreements (which involve trademark and know-how licenses) are generally exempted from the prohibition of anti-competitive agreements.²⁸ Secondly, otherwise anti-competitive agreements (including but not limited to those touching on IP matters) may also

²⁸ Section II of Protocol 19 to the EAEU Treaty, paragraph 6.

be covered by exemptions if they improve **“the production (sale) of goods or stimulates technical progress”**.²⁹ The latter exemption is relevant, among other topics, to the assessment of technology transfer agreements (involving patent, design and know-how license) as well as of exclusive distribution agreements (involving trademark license).

On the other hand, **Member States** have various pieces of national legislation in force which display divergent approaches, at least when it comes to the application of national competition law rules, that are binding on NCAs. In particular, the national laws of some EAEU Member States contain provisions on not applying antitrust measures in some cases where IPRs are involved. Below, we provide a few examples,

In the **Russian Federation** (Federal Law No. 135-FZ of July 26, 2006 “On Protection of Competition”), provisions are in place under which antitrust prohibitions (anticompetitive agreements and abuse of dominant position) do not apply to actions consisting in the exercise of intellectual property rights.

In the Republic of Belarus (Law of the Republic of Belarus of 12.12.2013 No. 94-Z “On Counteraction to Monopolistic Activities and Development of Competition” and the Kyrgyz Republic (Law of the Kyrgyz Republic of 22.07.2011 No. 116 “On Competition”) the legislator defined **“immunities” for the exercise of IPRs only in terms of prohibitions on anticompetitive agreements**³⁰, without providing for such immunities as regards abuses of a dominant position.

The prohibition of anticompetitive agreements established in the Entrepreneurial Code of the **Republic of Kazakhstan** dated 29.10.2015 № 375-5 determines that the requirements of the **prohibition** of anti-competitive agreements **do not apply to agreements on the exercise of IPRs**, but at the same time contains a reservation that this immunity for IPRs does not apply if such agreements have led or may lead to **limitation or elimination of competition**.

In the **Republic of Armenia**, the Law of 6 November 2000 No. HO-112 “On Protection of Economic Competition” has been amended to extend the scope of the law to relations related to IPRs without any conditions.

²⁹ Section II of Protocol 19 to the EAEU Treaty, paragraph 5.

³⁰ According to legislation of Belarus, cartels are not included in the exceptions.

Thus, based on the provisions of the legislation of the EAEU Member States, the possibility to apply competition legislation to the conduct involving IPRs is fully defined by law in Kazakhstan and Armenia and, partially, in the Republic of Belarus and the Kyrgyz Republic.

2.8. Sanctions and Remedies

EAEU competition law provides for behavioural remedies to infringements as well as pecuniary sanctions. The latter may be imposed for breaches of substantive law and for breaches of procedural provisions. Pecuniary sanctions can be applied both to economic entities and to individuals who are managers or employees of economic entities. Remedies and sanctions are detailed in Section IV of Annex 19 to the TEAEU.

2.8.1. Behavioural Remedies

Under paragraph 10(3) of Annex 19 to the TEAEU, in application of Section XVIII of the TEAEU, the **Commission has the power to adopt decisions** binding for economic entities, which may **prescribe behavioural obligations** (i) to terminate violations of competition law, (ii) to eliminate the consequences of such violations, (iii) to ensure effective competition and (iv) to refrain from any conduct that may hinder the emergence of competition and/or may result in restriction or elimination of competition in cross-border markets.

In addition, EAEU competition law includes a flexible tool called “Warning”. This instrument replaces the previously applicable “Proposal” tool with effect of 15 July 2021, albeit, at the time of writing, the procedural rules for the Warning have not yet been adopted. The Proposal served for an early resolution of cases through remedies through behavioural commitments. No fines could be imposed through a Proposal. Proposals were drawn up in both unfair competition cases and in abuse of dominant position cases, except when the abuse consisted in setting monopolistically high or low prices. Proposal (Warning) was also drawn up in co-ordination of economic activity cases. The procedure was regulated by Procedure 97, and will be explained in 5.2 below. If the company subject to the proceedings, the (possible) complainant, the Commission and all the NCAs agreed on the content of the Proposal, which normally included commitments (behavioural remedies) to be complied with by the company, the formal

investigation was not started. These fundamental features are apparently kept by the Warning instrument as well.

2.8.2. Pecuniary Sanctions

Main Rules

The ranges of fines that can be imposed for breaches of the prohibition of anti-competitive agreements are defined in paragraph 16(2) of Annex 19 to the TEAEU, updated by Decision No. 118 of the Council of the Commission on the Methods of Calculation and Procedure for Imposition of Fines for the Violation of Common Competition Rules on Cross-Border Markets (hereinafter the “**Fining Guidelines**”). The fines are set differently with regard to natural persons and legal persons.

Thus, for **officials**³¹ (e.g. managers and employees of economic entities) and individual **entrepreneurs**, the range of fine that may be set is in the amount of **RUB 20,000 to 150,000**.

For legal persons (companies), the amount of the fine is set in the range of **1–15% of the annual income** gained by the infringer from selling goods (works, services) **in the market in which the violation occurred** or the amount of annual expenditure of the offender on the purchase of goods (works, services) in the market of which the violation occurred, **but not more than 2% of the annual**

³¹ The term “official” is defined as follows in paragraph 16(5) of Annex 19 to the TEAEU: “For the purpose of this Protocol, **officials** shall refer to managers or employees of economic entities (market participants) and non-profit organisations that are not economic entities (market participants) performing organisational and regulatory or administrative and business functions, as well as heads of organisations operating as the sole executive authorities of economic entities (market participants) and non-profit organisations that are not economic entities (market participants). For the purposes of this Protocol, natural persons carrying out professional income-generating activities that are subject to state registration and/or licensing under the legislation of the Member States shall be liable for violations of the general rules of competition in cross-border markets as being officials.”

turnover of the offender from selling all goods (works, services) and **no less than RUB 100,000**.³²

For legal persons, the above rules are further nuanced with respect to companies that realise most of their income from the relevant market(s) affected by the infringement. If the infringer's income from selling goods (works, services) **in the affected market exceeds 75% of the total income** of the offender from selling goods (works, services), the amount of the penalty may range between **0,3% to 3% of the amount of the income gained** by the infringer from selling goods (works, services) **in the affected market** or of the amount of purchases of goods or services by the infringer in the affected market(s). In any event, the amount of the fine **cannot be more than 2% of the annual turnover** of the offender from selling all goods (works, services) and **cannot be less than RUB 100,000**.³³ Where several companies belonging to the same undertaking ("group of persons" in the terminology of EAEU competition law) are fined, separate fines are imposed on each individual company.

The Fining Guidelines

The EAEU Fining Guidelines lay down more detailed rules applicable to the calculation of pecuniary sanctions to be imposed on economic entities.

This document explains the method of calculation fines that can be imposed for breaches of Article 76 TEAEU step by step:

- A. First, the Commission **determines the income** of the infringer realised on the relevant markets affected by the infringement and **the total turnover** of the infringer. For both amounts, the data of the full calendar year preceding the initiation of the Case Consideration stage (Procedure 99, see 5.4 below) are taken into account.³⁴

³² Paragraphs 7–8 of the Fining Guidelines.

³³ Paragraphs 7–8 of the Fining Guidelines.

³⁴ Paragraph 2 of the Fining Guidelines.

- B. Next, the Commission determines the **basic amount of the fine** which is the average of the minimum and the maximum amount that can be imposed.³⁵
- C. Finally, the Commission modulates the basic amount of the fines by taking into account **aggravating and mitigating circumstances**.

The basic amount of the fine (BF) is calculated according to the following formula:

$$BF = (\text{MaxF} + \text{MinF}) / 2$$

where: MaxF means amount of maximum fine; MinF means amount of minimum fine.³⁶

Annex 1 to the Fining Guidelines details the aggravating and mitigating circumstances and also specifies the coefficients (weights) that should be applied in respect of each of these:

- A. Aggravating circumstances:
 - Repeated violation of common competition rules after the infringer has already been found to have committed breaches of EAEU competition law (**recidivism**) –weight: 2,5;
 - Continuing (for 1 or more years) violation by the infringer of competition rules (**continuous infringement**) – weight: 1,5;
 - Arranging of agreements restricting competition or concerted practices violating competition rules (**ring-leader**) – weight: 2.
- B. **Mitigating circumstances** include, in particular:³⁷
 - **Voluntary rectification** of violation of common competition rules – weight: 1,25;
 - **Voluntary** reimbursement of inflicted damage or **making good the harm caused** – weight: 1;
 - **Voluntary notification** of violation to the Commission or to an NCA – weight: 1; (this rule is without prejudice to the possibility of obtaining immunity from fines under leniency);

³⁵ Paragraphs 5–6 of the Fining Guidelines.

³⁶ Fining Guidelines, para 6.

³⁷ The list provided in the Fining Guidelines is not exhaustive.

- **Assisting the Commission** in the proceedings beyond general obligations – weight: 0,5;
- **Preventing harmful consequences** of the violation – weight: 0,5;
- The infringer is **not an initiator** of the conclusion of an anti-competitive agreement or of concerted practices, **or received binding instructions** to take part therein – weight: 0,5;
- The infringer **did not start to implement** the anti-competitive agreement by having voluntarily **withdrawn** from illegal behaviour – weight: 1,25 (only applies to agreements and concerted practices);
- The infringer **did not start to implement** the anti-competitive agreement **for reasons beyond its control** – weight: 0,5.

The final amount of the fine is calculated according to the following formula:

$$F = BF + (\Sigma AL - \Sigma ML)$$

where BF means basic amount of fine; ΣAL means a sum of index numbers characterising circumstances aggravating liability; ΣML means a sum of index numbers characterising circumstances mitigating liability.³⁸

One might observe that the Fining Guidelines do not include any duration multiplier, that is, no coefficient is applied to multiply the basic amount of the fine in proportion to the duration of the infringement. The sole instrument that the Commission may use is the application of the weight 1,5 to be applied on continuous and lasting infringements.

³⁸ Fining Guidelines, para 5.

Box 2.7. Fining Guidelines – no duration multiplier

At present, pecuniary penalties do not take into account the number of years the infringement last, and are solely calculated based on income information from a single year. However, companies involved in the same cartel may participate during different periods, and reap the benefits of price fixing accordingly. Without taking into account of the duration of a company's participation in an infringement, there is a serious risk of penalties not being deterrent enough, since the company is being punished in light of its yearly turnover but the practice may have lasted many years, if not decades. For example, company that is involved in a price fixing cartel for 10 years could arguably be subjected to a the same fine as a company involved for 2 years. As a result, under the present rules there is a risk that pecuniary penalties make it economically beneficial for the participating companies to participate in lengthy infringements even if caught.

Finally, the Fining Guidelines also lay down provisions on prescription. Under paragraph 12, “a decision on the case on violation of substantive rules may be issued upon expiry of 3 years from the date of violation.” Under paragraph 13, in the case of violation of procedural rules (refusal or untimely submission of materials), the prescription period is 1 year.

Box 2.8. Fining Guidelines – prescription period

By international standards a three-year prescription period is rather short even for starting an investigation, let alone to limit the Commission's ability to reach a decision. Such an arrangement may allow companies, the infringement by whom is established after 3 years counted from the end date of the infringement, to escape fines. In addition, such a rule may give an incentive for the infringing company to prolong the procedure.

3. Institutional Setting for Enforcement of Competition Laws

It should be recalled that the Treaty's substantive competition provisions are enforced by the Commission with respect to Cross-Border Markets (see 2.6.1). National provisions corresponding to Article 76 TEAEU are enforced by the NCAs with respect to the territory of the Member State concerned where the relevant market cannot be considered as a Cross-Border Market.

In the present Part 3, the main features of the Commission's Competition Branch will be presented. The detailed rules on co-operation between the Commission and the NCAs will be examined in Part 5 Procedural Law.

3.1. The EAEU Commission

As already outlined above, the Commission is charge of enforcing the EAEU Treaty and ensuring co-ordinated action of the Member States in the Union's fields of competence.

The Commission is a two-tier body, comprising a Council and a Board. The Board is the executive body of the Commission and the body primarily responsible for competition enforcement. – e.g. it adopts decisions on competition proceedings, including infringement procedures. As such, the Board will be discussed in more detail below.³⁹

³⁹ Paragraph 31 of Annex 1 to the TEAEU "Regulation on the Eurasian Economic Commission".

3.1.1. People

The Board of the Commission

The Board is composed of ten Board Members, or “Ministers”. Each Member State designates two Members. One of the Board Members also assumes the function of being the Chairman of the Board. The Commission includes 25 Departments;⁴⁰ each Member of the Board is responsible for several Departments.

Annex 1 to the TEAEU “Regulation on the Eurasian Economic Commission” lays down several fundamental rules with regard to the Commission, summed up below.

As to **eligibility**, Board Members must have professional training (qualifications) corresponding to their official duties, as well as professional experience in the area related to their official duties of at least 7 years, including at least one year in a senior management position at a public authority of a Member State.

As to the **selection procedure**, Board Members, including the Chairman, shall be approved by the Supreme Council on the proposal of the Member States. Each Member State nominates one candidate for the Board of the Commission to the Supreme Council. If the Supreme Council does not approve a candidate for the Board, the Member State shall nominate a new candidate within 30 days.

Board Members are **appointed by the Supreme Council for a term of 4 years**. This term can be renewed. The Chairman of the Board is appointed by the Supreme Council for a non-renewable term of 4 years. For each four-year term, the Chairman is from a different Member State; rotation is held in the alphabetical order of the names of the Member States.

Board Members work solely for the Commission, and hold no roles with the Member States – unlike Council Members, who are Vice-Prime Ministers in their Member States. When exercising their powers, Board Members shall be **independent** of all public authorities and officials of the **Member States**, and may not request or receive instructions from government authorities or officials of the Member State. Member States are not entitled to recall a member of the Board of the Commission, except in cases of unfair performance of his or her duties or in cases specified in paragraphs 35–37 of Annex 1 to the TEAEU (external activities

⁴⁰ <http://www.eurasiancommission.org/en/Pages/structure.aspx>; <https://eec.eaeunion.org/>

that cannot be reconciled with the duties of a Board Member). Early termination of office of a Board Member may be decided by the Supreme Council upon request from a Member State.

Distribution of responsibilities among the Board Members, total staffing of the Departments, remuneration of Board Members, officials and employees of the Commission shall be approved by the Supreme Council.

Commission Departments' Officials and Employees

Departments of the Commission consist of officials and employees. Officials are defined in the TEAEU as directors and deputy directors of the Commission Departments, head and deputy head of the Secretariat of the EAEU Court, as well as the advisers of the judges.⁴¹ The remaining staff of EAEU bodies are defined as “employees”.

Directors and deputy directors of Commission Departments must be nationals of the Member States, and have appropriate professional training (qualifications) for their official duties and professional experience in the area related to their official duties of at least five years. The **director and the deputy director** of a Commission Department cannot be citizens of the same Member State.⁴² The selection of candidates for these positions is made by the **EEC Examination Commission**,⁴³ taking into account the principle of equal representation of Member States. Candidates are presented by a Commission Council Member

⁴¹ Article 2 TEAEU.

⁴² Article 9 TEAEU.

⁴³ Under Article 9(4) TEAEU, “The Examination Commission for the selection of candidates for positions of the officials of a Department of the Commission (Directors and Deputy Directors) shall be composed of all members of the Board of the EEC, excluding the Chairman. The Examination Commission shall make decisions in the form of recommendations by a majority vote and submit them to the Chairman for approval. If in respect of a particular candidate the Chairman decides contrary to the recommendation of the Examination Commission, the Chairman shall refer the issue to the Council of the EEC for a final decision. The regulation on the Examination Commission shall be approved by the Council of the EEC.”

from the relevant Member State, and selected from a list by the EEC Examination Commission.

Employees of Commission Departments are selected on a competitive basis from among nationals of the Member States meeting the qualification requirements for the position, as approved by the Council of the Commission. Issues related to the dismissal of Commission officials and employees are regulated by the labour legislation of the host country of the Commission, i.e. the Russian Federation.

3.1.2. Budget

The preparation and approval of the EAEU budget is regulated in Section IV of the TEAEU, as well as in the Regulation on the EAEU Budget.⁴⁴ Activities of the EAEU bodies are financed from the EAEU budget, as approved for each fiscal year in Russian roubles. Income is sourced from the contributions of Member States, these contributions being established by the Supreme Council. The EAEU budget must balance revenues and expenditures.

The preparation of **draft budget estimates** of the EAEU bodies is carried out on the basis of EAEU acts that determine the maximum staffing of EAEU bodies, remuneration levels and other staff expenses, security expenses, costs of support work, and projected expenditure on meetings of the Supreme Council, the Intergovernmental Council and the Council of the Commission, and on IT systems. The EAEU budget is thus not used for purposes other than financing the functioning of the EAEU Bodies.

After **approval by the Commission's Board Members**, the draft budget of the EAEU is submitted to the **governments of the Member States** for consideration, following which it is submitted to the Council of the Commission. The draft budget also needs to be **approved by the Intergovernmental Council**, whereupon the **Supreme Council adopts the budget**. Amendments to the EAEU budget and the Regulation on the EAEU budget are made by the Supreme Council.

⁴⁴ Approved by Decision No. 78 of the Supreme Eurasian Economic Council of 14 October 2014.

3.1.3. Accountability and Reports

In order to monitor the implementation of the EAEU budget, **an audit of financial and economic activities of EAEU bodies is carried out by representatives** of state financial control bodies of the Member States at least once **every two years**. The results are submitted to the Eurasian Intergovernmental Council.⁴⁵ In addition, **external audits** are carried out by representatives of the supreme state financial control bodies of the Member States in order to determine the effectiveness of the drafting and approval, management and use of the EAEU budget, as well as the effectiveness of use of property and other EAEU assets. Results are submitted to the Supreme Council.⁴⁶

With respect to competition policy, before 1 June each year the Commission submits **annual report on the competitive situation in Cross-Border Markets** and on enforcement measures to the **Intergovernmental Council**. It publishes the approved reports on the official website of the EAEU.

In addition, the Commission draws up **work plans** in various areas and submits **reports** on their implementation for approval by the higher authorities of the EAEU. These documents include the main directions of the international activities of the EAEU, guidelines on the macroeconomic policy of the EAEU Member States, instructions from the EAEU supreme bodies, etc. In 2020, the Supreme Council approved the **Strategic Directions for the Development of Eurasian Economic Integration until 2025**, on which a progress report will be submitted on an ongoing basis.

3.2. The Competition Branch of the Commission

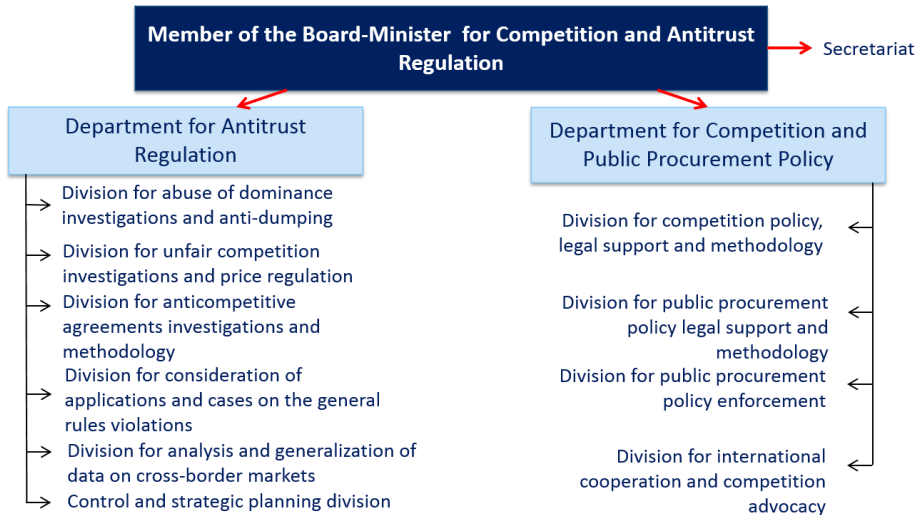
Currently, the Member of the Board in charge of competition policy heads two Departments: the Department for Antitrust Regulation and the Department for Competition and Public Procurement Policy. These two Departments are hereafter referred to as the Commission's Competition Branch.

The organisation chart of the Competition Branch is as follows:

⁴⁵ Article 21 TEAEU.

⁴⁶ Article 22 TEAEU.

Figure 3.1. Organisation chart of the Competition Branch



Source: Eurasian Competition Union

The **Department for Antitrust Regulation** is headed by a director, currently from the Russian Federation, and by four deputy directors from the four other Member States. Its 38 employees are allocated to six divisions:

- Division for Abuse of Dominance Investigation and Anti-dumping (6 employees)
- Division for Unfair Competition and Price Regulation Investigation (6 employees).
- Division for Anticompetitive Agreements Investigation and Methodology (6 employees).
- Division for Consideration of applications (materials) and Cases on violation of general competition rules (6 employees).
- Division for Analysis and Data integration on Cross-border markets and Interaction with competition authorities (7 employees).
- Division for Control and Strategic planning (7 employees).

The **Department of Competition Policy and Public Procurement Policy** is headed by a director, currently from Kazakhstan, and four deputy directors from the four other Member States. Its 27 employees are allocated to four divisions:

- Division for Competition Policy, Legal Support and Methodology (8 employees).
- Division for Public Procurement Policy, Legal Support and Methodology (6 employees).
- Division for Public Procurement Policy Enforcement (7 employees).
- Division for International Co-operation and Competition Advocacy (6 employees).

Among the staff of the Competition Branch, 37 employees have law degrees, 30 employees have economics degrees, and 41 employees have degrees in other fields. Two employees hold Ph.D. degrees in economics, one in political science and one in law.

During the interviews held with regulators by the OECD, it was explained that the Competition Branch often hires staff of NCAs and vice versa. This practice is regarded as beneficial by both the NCAs and the Commission as it contributes to exchange of experience and good practices.

The budget of the Competition Branch is part of the general budget of the Commission, which is included in the EAEU Budget (see 3.1.2).

3.3. Decision-making

3.3.1. Main Features

While this will be explored in greater detail below in Part 5 Procedural Law, it is useful to provide a high-level overview of the decision-making process of the Competition Branch, in order better to understand the discussions that follow and the structure of the Commission. In short, the decision-making process of the Competition Branch is divided into the following main steps:

- A. Examination of applications (from private parties) or materials (from Member State authorities) (Procedure 97);
- B. Investigations (Procedure 98);
- C. Initiation and considering of a case (Procedure 99);
- D. Adoption of a formal decision ending the case.

There are **three separate case teams** examining and assessing the case at stages A–C, which are always composed of different employees and senior

officials of the Commission. In particular, Procedure 99 provides that the Case Consideration Commission (which is in charge of drawing up the final decision establishing the presence or absence of a breach) must be composed of members who have not participated at the investigations.⁴⁷ During the interviews held by the OECD, regulators explained that this arrangement has been introduced on purpose, in order to ensure independent and unbiased review and to evade any attempts of corruption.

Decisions (called “rulings”) taken at the end of steps **A–B that move the proceedings into the next stage** (or end the proceedings) are adopted by the **Board Member** in charge of competition policy [possibly delegated to a director of an authorised structural unit (Department of antimonopoly Regulation)].⁴⁸ The **final decision ending the case (D) is drawn up by the Case Consideration Commission under Procedure 99 and is adopted by the Board** of the Commission.

The NCAs – and, at the final stage D, the Member States bodies authorised to interact with the Commission – **are involved in the decision-making in accordance with formal, detailed and transparent rules**, as explained below in Part 5 Procedural Law with respect to each phase of the proceedings.

The Proposal procedure (replaced by the Warning procedure as of 15 July 2021), included in Procedure 97, which aims at finding an early resolution to the case between the applicant (complainant) and the purported infringer, as well as Procedure 99 Case Consideration, allow interested parties to participate. In particular, interested parties (the applicant, the infringer, and the NCAs) have access to the file, can make comments thereon, are entitled to submit evidence, comment on evidence, submit their views and react to other parties’ views. Under the Proposal/Warning procedure, the aim is to address concerns through “commitments” which can require the applicant’s consent. Under the Case Consideration procedure, while the applicant continues to play an active role in the proceedings, the case is directed solely by the Case Consideration Commission. It is the Chairman of the latter who presides over Case

⁴⁷ Paragraph 6 of Procedure 99.

⁴⁸ Paragraphs 14–15 of Procedure 97.

Consideration Commission sessions. There is no separate hearing officer to play a neutral role.

Under Annex 19 to the TEAEU,⁴⁹ **decisions of the Commission imposing fines and/or obliging the infringer of competition rules to perform certain actions are enforcement documents** and shall be mandatorily executed by national authorities (responsible for enforcing court judgments) of the Member State in which the infringer has its seat or residence. Since judicial appeals have a suspensive effect, enforcement of Commission decisions is limited to those not appealed against or which have been upheld by the EAEU Court.

3.3.2. Administrative Review

Apart from judicial review detailed below in Chapter 4.6., the EAEU legal system also provides for administrative review performed by higher bodies. Under Article 104 of the Regulation on the Eurasian Economic Commission (Annex 1 to the TEAEU), within 15 days from the publication of a decision of the Board of the Commission, any **Member State or member of the Council of the Commission** is entitled to submit to the Board of the Commission a **proposal for the cancellation or amendment of the decision**. The proposal is forwarded to the Council of the Commission along with case materials and is examined and **decided on by the Council of the Commission** within 10 days. Any **Member State may further seek review** of the decision of the Council of the Commission **before the Intergovernmental Council and/or the Supreme Council**. In the competition field, the individual decisions of the Board cannot be amended by the superior bodies of the EAEU, such decisions can only be cancelled (“vetoed”) by the latter.

The decision of the Board of the Commission whose cancellation was requested does not come into force and its effects are suspended until review is decided on **by the Intergovernmental Council and/or the Supreme Council**. Such “veto” has already been applied in practice on a decision of the Competition Branch of the Commission.

⁴⁹ Paragraph 14 of Annex 19 to the TEAEU.

Box 3.1. The NLMK Case

The NLMK case provides an illustration of this procedure. In August 2016, the Commission received an application from KTZ to initiate proceedings. Based on the results of the investigation, the Board of the Commission adopted Decision No. 130¹ establishing an instance of **abuse of dominant position** committed by NLMK and Viz-Steel, members of the same group of persons, during 2015 and the first half of 2016, consisting in discriminatory conditions applied on consumers of anisotropic steel in Belarus and Kazakhstan. Additional charges on account of macroeconomic risk ratios were applied only on consumers of Belarus and Kazakhstan, while no such additional charges were collected from Russian consumers.

In October 2017, the Commission received an **appeal** from the Russian **member of the Council of the Commission to cancel the Decision**. After that, a similar appeal was received from the Chairman of the Government of the Russian Federation. At the next meeting of the Eurasian Intergovernmental Council, the **decision** of the EEC Board No. 130 was **suspended**.

In February 2018, the Intergovernmental Council instructed the governments of Belarus, Kazakhstan and Russia to assist in resolving the situation on the anisotropic steel market in the EAEU.

In July 2018, the Intergovernmental Council reconsidered the issues of resolving the situation on the anisotropic steel market and instructed the Commission, together with the NCAs of Belarus, Kazakhstan and Russia, to further study the situation on the market and report back. The Commission informed the Intergovernmental Council on the results in November 2018.

In the meantime, in August 2018, the Commission received a second application (complaint) from KTZ, which indicated not only the continuation of the violation, but also possible new violations in the actions of NLMK.

The Commission, applying the soft law procedure, sent a **Proposal**² to NLMK stipulating that NLMK should develop a trade and sales policy (TSP), which should provide equal and non-discriminatory conditions for Union consumers.

During 2019 and 2020, the Competition Branch of the Commission held meetings to work out the provisions of the TSP with the participation of representatives of Member States, NLMK and KTZ.

The TSP has ultimately been agreed upon by all participants and is already applied by NLMK. Therefore, examination of the second application (complaint) of KTZ ended.

Notes:

¹ Decision No. 130 of 26 September 2017.

² The procedure and conditions for issuing the Proposal are set forth in Procedure 97. Previously, this instrument was called Proposal. After amending the EAEU law, it is called Warning.

3.4. Prioritisation and Evaluation

On an annual basis, the Head of the State presiding over the Supreme Council addresses the heads of other EAEU Member States. As part of the address, **priorities are set for the EAEU for the following year**. Priorities cover all fields of activity of the Commission, including competition. Based on the priorities, an **action plan** is developed to implement the priorities, which is approved by the Chairman of the Board of the Commission. At the end of the year, a report on the **implementation of priorities** is submitted to the Supreme Council.

In the context of competition policy, the **Commission submits annual reports on the competitive situation** in cross-border markets and on **enforcement measures**.⁵⁰ It posts the approved reports on the official website of the EAEU.

Other work plans and strategies are detailed above. Competition issues are reflected in these documents.

Within the Competition Branch of the Commission, the priorities of work are reflected in various documents with more generic purposes. The activities of the Competition Branch are mainly led by the cases that reach the Commission's docket. In selecting priorities, the EEC takes into account Member States' proposals, the views of business, academia, law enforcement practices, global trends, and other factors. All documents under development define the activities

⁵⁰ Paragraph 10(9) of Annex 19 to the TEAEU.

and set deadlines for their implementation, which will be monitored on a permanent basis. In addition, at the end of the deadlines, reports on their implementation will be submitted to the Competition Branch, to the Board and other bodies of the EAEU.

For the last five years, different approaches have been used to assess the effectiveness of work. These approaches were not published, and were prepared for the purposes of organising internal work. Examples include the description of processes of the Competition Branch and the implementation of control over their implementation.

Under Article 57 of Annex 19 to the TEAEU, the **Commission holds meetings with NCAs** at the level of heads of competition authorities and the member of the Board of the Commission in charge of competition policy (so called “5+1” format). At these meetings, issues related to the **Commission’s initiatives** in the field of development and protection of competition in cross-border markets are discussed with regard to coming periods.

3.5. Judicial Review

3.5.1. Powers of the Court – Types of Proceedings

Appeals against Commission Decisions

Under paragraph 14 of Annex 19 to the TEAEU, acts and omissions of the Commission in the field of competition law may be **challenged before the EAEU Court**. The institutional and procedural rules concerning the Court are laid down in Annex 2 to the TEAEU (Statute of the Court of the EAEU).

If a decision of the Commission is appealed, its effect is **suspended** until the date of delivery of the Court’s judgment. **Review is direct**: the Court admits appeals without the applicant being required to first appeal to the Commission to resolve the matter in any pre-litigation procedure.

Advisory Opinions

Under paragraphs 46, 47 and 98 of the Statute of the Court, at the request of a Member State or a Body of the Union, the Court provides clarifications (**interprets**) on the **provisions of the EAEU Treaty, international treaties within the Union and decisions of the Bodies of the Union**. At the request of

employees and officials of the Bodies of the Union and the Court, the Court provides clarifications on the same sources of law regarding labour relations.

“Providing clarifications” in an advisory opinion **does not deprive the Member States of the right for joint interpretation** of international agreements. Advisory opinions are **non-binding**.

3.5.2. Review of Commission Decisions

Under paragraph 39 of the Statute of the Court, the Court reviews the legality of Commission decisions.

Standing and Grounds of Review

Where review is **requested by a Member State**, the Court examines the decisions’ **compliance with the TEAEU, with international treaties within the Union, and with decisions of hierarchically superior Bodies of the Union**. The Court reviews the legality of omissions of the Commission on the same grounds.

Review may also be requested by **natural or legal persons** having their seat in a Member State or in a third country (all these categories are caught by the concept of “**economic entity**” in the context of the Statute). As to **standing**, economic entities may challenge Commission decisions, or certain provisions therein, that directly affect their rights and legitimate interests in the sphere of business and other economic activities. It is worth noting that the right to request review is thus not limited to the addressee of the decision and complainants before the Commission, but extends to all natural or legal persons whose rights derived from the TEAEU or such international agreements have been adversely affected.

Where the action has been brought by an economic entity, the Court examines **compliance the decision of the Commission** or its relevant provisions **with the Treaty, its annexes, and/or international treaties within the Union**, from which individual rights can be derived as explained in the paragraph above.

Economic entities may also request the review of legality of **omissions of the Commission** under the same standing criteria as explained above. These proceedings are the equivalent of the EU’s action for failure to act.

Scope of Review

Under Article 45 of the Rules of the EAEU Court,⁵¹ when assessing a case brought by an economic entity, the Court examines

- if the Commission had the power to adopt the contested decision (**formal legality**);
- if the rights relied on by the applicant are enforceable, that is, if the case concerns the breach of rights or legitimate interests of economic entities in the field of entrepreneurial and other economic activities provided by the Treaty and/or international treaties within the Union (**enforceable rights**);
- if the contested decision, or its separate provisions or the contested inaction of the Commission is compliant with the Treaty and/or international treaties within the Union (**substantive legality**).

The Court applies the following norms, in light of which the legality of the Commission's decision or inaction is assessed:

- generally recognised principles and norms of international law;
- EAEU Treaty, international treaties within the EAEU and other international agreements, to which the relevant Member States are parties
- decisions and orders of superior EAEU Bodies;
- international custom can be relied on as evidence of universal practice recognised as a legal norm.⁵²

The Commission as Defendant

Where an action has been brought against the Commission in the field of competition law, the Department for Antitrust Regulation of the Commission prepares materials to be submitted to the Court. Representatives of that Department also participate at court sessions. Legal work is co-ordinated by the Legal Department of the Commission.

⁵¹ Approved by the Decision No. 101 of the Supreme Council of 23 December 2014.

⁵² Paragraph 50 of the Statute of the Court.

3.5.3. Composition of the Court

The EAEU Court is composed of two judges from each Member State. The judges' term of office is 9 years. Judges are appointed by the Supreme Council upon proposal of the Member States. To be eligible, candidates must meet the requirements applicable to judges of the highest judicial authorities of the Member States. The judges elect the president and the vice-president of the Court from among their numbers. These two posts cannot be filled by judges from the same Member State.⁵³

The Court examines cases in three different formations: **Panel, Grand Panel and Appeals Chamber.**

The Court sits in the **Grand Panel** formation when hearing cases **brought by a Member State** (appeals against acts of EAEU Bodies, actions against another Member State for breaching provisions of EAEU law).⁵⁴ In addition, the Grand Panel conducts clarification proceedings that result in advisory opinions. The Grand Panel of the Court shall include all judges of the Court. For the quorum, all judges must be present.

The Court sits in the **Panel** formation when hearing **actions brought by a natural or legal person** (economic entity, see 3.5.2 above) against acts (e.g. decisions) and omissions of the Commission. The Panel includes **at least one judge from each Member State**, who participate on a rotating basis in various Panels, based on the alphabetical order of their names. The session is valid if at least one judge from each Member State is present.

The Court sits in the Appeals Chamber formation when examining **appeals** against judgments and orders of the Panel of the Court. The Appeals Chamber includes **judges who did not participate in the proceedings** that resulted in the first instance decision of the Panel. The quorum is fulfilled if one judge from each Member State is present at the session.

There is no specialised competition court or competition chamber in the EAEU Court. Appeals against competition law decisions of the Commission are brought before the Panel by economic entities and before the Grand Panel by Member

⁵³ Statute of the Court, paragraphs 7–11, 15.

⁵⁴ Paragraph 39(1) of the Statute of the Court.

States. Decisions of the Panel can be further appealed before the Appeals Chamber.

3.5.4. Court Practice and Statistics

In the period from 2016 to 2020, the Board of the Commission adopted **11 decisions in the field of competition law**, including four decisions on the failure to submit information to the Commission in due time.

Out of these decisions, two were appealed against. First, NLMK and Viz Steel appealed the NLMK decision, however, these appeals were dismissed as inadmissible by the EAEU Court. Secondly, the Delrus decision⁵⁵ was also appealed twice before the Court. The case is described in Box 4.4. The decision and the first instance judgment were set aside by the Appeals Chamber on the ground that the Commission had not proven to the requisite standard that the companies found to have concluded anti-competitive agreements were separate undertakings.

In the Delrus case, the **duration** of the court proceedings in the two instances was approximately **1.5 years**. EAEU law does not provide for expedited or simplified procedures for consideration of cases in the Court.

In addition, Global Farma LLC on 20 September 2021, brought an appeal against the Commission's ruling on the initiation of an Investigation, claiming that the relevant market was not to be considered as Cross-Border Market, meaning that the Commission did not have the power to initiate a case. The appeal is still pending at the time of writing.

Furthermore, the Court considered the application of the National Chamber of Entrepreneurs of Kazakhstan "Atameken" to clarify the provisions of Articles 74, 76 of the EAEU Treaty and paragraphs 2 and 5 of the Criteria of Cross Border Markets. The Grand Panel issued an **advisory opinion** on the matter.⁵⁶

⁵⁵ No. 165 of 17 September 2019.

⁵⁶ Advisory Opinion of the Court of 18 June 2019 in the *Atamaken* case.

4. Application of Substantive Competition Law

In this part of the report, the application of the substantive provisions of EAEU competition law is presented in the following order: 4.1. Market Definition, 4.2. Horizontal Agreements; 4.3. Vertical Agreements; 4.4. Abuse of Dominant Position. Concentrations are briefly addressed in 4.5. Mergers, albeit the Commission does not have any competence in this regard. The report explains the relevant provisions and provides practical examples.

It is important to note that the Commission co-operates extensively with the NCAs at all stages of the proceedings (Examination of Applications, Investigations, Case Consideration, Decision, see 5.1 below). Since these tools of co-operation are the same in respect of all the fields concerned (anti-competitive agreements and abuse of dominant position), they will be presented below in Part 5 Procedural Law.

4.1. Market Definition

The rules on the definition of the relevant product and geographic markets are laid down in Sections III and IV of Decision of the Council of the Commission of 30 January 2013 on the “Methods of Evaluation of Competitive Situation” (hereinafter “**Methodology**”). These rules concern the definition of the relevant markets in the classic sense of the word and are not to be confused with those foreseen in the Criteria of Cross-Border Markets, which serve for the delineation of competences between the Commission and the NCAs.

4.1.1. Relevant Product Market

Under paragraph 11 of the Methodology, defining the relevant product market is the procedure for defining the product (account taken of its consumer properties) without any **substitutable or interchangeable products** traded at the same commodity market.

The procedure for determining the relevant product market includes the following steps:

- preliminary definition of the product;
- identification of the product properties determining the buyer's choice and products potentially interchangeable with such product;
- detection of interchangeable products.⁵⁷

Determination of the relevant product market is based on the **opinions of the buyers on interchangeability** of products constituting a single product group. When the antitrust proceedings concern monopsony, the opinions of sellers are taken into account.⁵⁸ The buyers' opinion shall be determined as a result of **survey or analysis of the subject of the agreements on the basis of which the product is sold**. The product may be sold on one and the same territory at different types of markets. In particular, the product may be sold at **wholesale markets** and at **retail markets**. Evaluation of competitive situation at such markets shall be held separately, because the composition of the buyers and the sellers may differ and the level of development of competition at such markets may be not similar.⁵⁹

The **preliminary definition of the product** can also be based on a) the agreement entered into with respect to the product; b) authorisations (licenses) for carrying out certain types of activity; c) normative acts governing production, sale of products; d) classifiers of types of economic activity, products, works and services adopted on the territories of the Member States; e) commodity

⁵⁷ Paragraph 12 of the Methodology.

⁵⁸ Paragraph 13 of the Methodology.

⁵⁹ Paragraph 14 of the Methodology.

dictionaries or commodity expert guides; f) opinions of specialists and experts having special knowledge in the relevant sphere.⁶⁰

Upon identification of product properties, the Commission examines factors determining the **buyer's choice (substitutability)**, on the basis of the product's a) **functional purpose** (in particular, consumer properties); b) **acquisition purpose** (in particular, productive consumption, resale or personal consumption); c) **qualitative characteristics**; d) **technical characteristics** (in particular, performance indicators, restrictions for transportation and storage, conditions of assembly, repair, technical maintenance (including warranty service), particular aspects of productive consumption); e) **price**; f) **conditions of sale** (in particular, size of product consignments, form and conditions of payment for products, place of receipt of the product by the buyer); g) **marketing aspects** (in particular, the impact of advertising).⁶¹

Next, the Commission examines the presence of **products being potentially interchangeable** on the basis of a) **expert assessments and opinions of specialists**; b) **analysis of products comparable** as to the material properties of products part of one classification group of the classifier of types of economic activities, products, works, services valid on the territory of one of the Member States.⁶²

With regard to the determination of the relevant product market, the **Commission applies the SNNIP test** (small but significant and non-transitory price increase in the range of 5-10%), and in particular applies a) the "hypothetical monopolist" test; b) analysis of pricing and price dynamics, adjustment of demand level upon change of prices; c) calculations of cross price elasticity.⁶³ The SNNIP test is based on surveys on how the buyers of the product will react to a small but significant (5-10%) price increase for a duration of 1 year or more.

⁶⁰ Paragraph 15 of the Methodology.

⁶¹ Paragraph 16 of the Methodology.

⁶² Paragraph 17 of the Methodology.

⁶³ Paragraphs 18–20 of the Methodology.

Box 4.1. Definition of the relevant market in the Corning Case

In 2020, the Commission launched an *ex officio* enquiry in respect of the conduct of economic entities operating in the Cross-Border Market of wholesale distribution of single-mode optical fibre intended for manufacturing of optical communication cables.

The **signs of violation** of competition rules were detected in the conclusion by **Corning Inc** (registered in the USA, hereinafter “Corning”, world leader in the production of optical fibre, optical cable, components and passive communication equipment) of **long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a **guaranteed volume** of the products concerned, as well as the **preferential right to supply optical fibre** produced by Corning to the above economic entities. Conclusion of agreements with such long-term conditions may create unequal conditions of competition with respect to other producers.

Given that there was insufficient information to establish a breach, the Commission commenced the Procedure 98 procedure (Investigation) in order to collect and analyse additional information. As part of the investigation, **an assessment of the state of competition** was carried out for the period from 2018 to 2019. This timeframe of the investigation was determined taking into account the duration of the alleged infringements.

The Commission defined the **relevant product market** as that for the “primary wholesale distribution of single-mode optical fibre intended for optical communication cables”. The main customers of these products were manufacturers of optical communication cables themselves. In turn, optical communication cables are used in fibre-optic communication networks. In addition, test batches of optical fibres are purchased for research purposes by scientific and other organisations (usually in small quantities).

The market definition was based, among other things, on the replies by customers to the Commission’s questionnaire. The majority of optical fibre customers (95%) asserted that there was no substitute to the purchased single-mode optical fibre for the production of optical fibre. 89% of respondents stated that single-mode optical fibres from different manufacturers were interchangeable if manufactured in accordance with the ITU-T international recommendations developed by the International Electrotechnical

Commission. Under the SSNIP test, none of the customers indicated it could switch to other types of optical fibre if a 5-10% price increase had taken place. On this basis, the Commission held that the primary wholesale market for single-mode optical fibre intended for optical cable production was a separate market based on its characteristics and that single-mode optical fibres from different manufacturers were interchangeable. Therefore, the relevant product market included single-mode optical fibre from all manufacturers, produced in accordance with the ITU-T international recommendations.

The relevant geographic market was defined as the territories of Belarus, Kazakhstan and Russia, based on the supply data. Therefore, it qualified as a Cross-Border Market.

For the legal qualification of the conduct, see Box 4.8.

Box 4.2. Definition of the relevant product market in the Airlines Case

The Airlines case started on the initiative of the Armenian NCA, which transferred Materials to the Commission in 2016 on possible signs of violations of Article 76(1) TEAEU regarding abuse of dominant position. The Materials concerned an **increase of air tickets price for flights operated by Russian airlines** (Aeroflot-Russian Airlines, Rossiya Airlines, Donavia, Sibir Airlines and Ural Airlines, hereinafter the “Airline Companies”), which was brought in connection with the temporary closure of the Upper Lars checkpoint in June and July 2016. This situation implied that transport between Armenia and Russia was only possible by air.

The Commission conducted **an assessment of the state of competition** in the air passenger transportation market on the basis of the Methodology. The timeframe of the examination was from the second half of 2015 to the first half of 2016.

The **relevant product market** was defined on the basis of the regulations governing passenger air transportation. The relevant product market was determined as international passenger air transportation services between Yerevan-Moscow; Yerevan-Krasnodar; Yerevan-Sochi; Yerevan-Rostov-on-Don. The Commission noted that according to an international agreement between Russia and Armenia on air communication (1993), air transportation between these countries is performed by designated airlines on established routes between points of departure and destinations.

4.1.2. Relevant Geographic Market

Under the provisions of the Methodology, the relevant geographic market is the area in which the buyer **actually acquires the product** or has an economical, technical or other **capability to acquire the product** or considers it expedient to acquire the product but at the same time has no such capability or considers it inexpedient to acquire it outside that area. The procedure for determining the geographical boundaries of the commodity market includes:

- preliminary determination of the relevant geographic market;
- identification of the **conditions of product circulation** restricting economical, technical capabilities for acquisition of the product by the buyer outside the area;

- identification of territories included in the geographical boundaries of the relevant market.⁶⁴

Preliminary identification of the relevant geographic market is based on information on the following elements: a) **territory wherein the signs of violation** of common competition rules at Cross-Border Markets have been detected; b) price formation at the product market or **differences in the level of prices for the product on the territories of the Member States**; c) **geographical structure of product delivery**.⁶⁵

At this stage, the Commission also **examines whether the relevant geographic market has cross-border characteristics**, for instance a) delivery of the product from the territory of one Member State to the territory of another Member State; b) delivery of the product from the territories of third countries to the territories of two or more Member States.⁶⁶

With respect to the examination of conditions of product circulation restricting economical, technical capabilities for acquisition of product by the buyer, the Commission takes into account a) **conditions of product transportation**; b) organisational and transportation schemes of product acquisition; c) a possibility to transport the product to the buyer or the buyer to the product; d) **existence, availability and interchangeability of vehicles** to transfer the product (the buyer of the product); e) **transportation and acquisition costs**; f) particular aspects of the territory within the pre-determined geographical limits, (including **natural and climatic and social and economic aspects**, existence of areas of regulated or partially **regulated pricing**); g) regional aspects of product demand (including consumer preferences); h) business conditions, rules and practices.⁶⁷

The final determination of the extent of the relevant geographic market takes place a) by applying a “**hypothetical monopolist**” test (**SSNIP test**), b) a method of **establishment of actual regions of sale** (location of the buyers within the pre-determined geographical boundaries); c) a combination of methods a) and b) or

⁶⁴ Paragraph 24 of the Methodology.

⁶⁵ Paragraph 25 of the Methodology.

⁶⁶ Paragraph 26 of the Methodology.

⁶⁷ Paragraph 27 of the Methodology.

other methods which enable establishment of the product sellers (based on the pre-determined sellers), unambiguous determination of geographical location of the actual regions of sale (location of the buyers) within which the sellers compete with each other. The SNNIP test is based on **surveys and analyses** on how the buyers of the product will react to a small but significant (5-10%) price increase for a duration of 1 year or more.⁶⁸

In the context of **services of natural monopoly entities, the relevant geographic** is determined with account of specific aspects of provision of such services, in particular a) existence and location of **technological infrastructure** (networks); b) availability of **access for the buyers to technological infrastructure** and its use (connection to the networks).

Box 4.3. Definition of the relevant geographic market in the Airlines Case

In the Airlines Case (for the facts, see Box 4.1), the **relevant product markets** were determined as international passenger air transportation services between Yerevan-Moscow; Yerevan-Krasnodar; Yerevan-Sochi; Yerevan-Rostov-on-Don. The limits of the **relevant geographic market** were defined as the points of origin and destination located in the territories of different Member States. The Commission also held that the relevant markets (particular routes between two cities) were **Cross-Border Markets**, the limits of which were defined as the territories of Armenia and Russia.

4.2. Horizontal Agreements and Restrictions

4.2.1. Main Rules

The main rules on horizontal agreements and restrictions are laid down in Article 76(3) and (5) TEAEU. These rules are as follows:

3. Agreements between economic entities (market participants) of the Member States shall be prohibited if these entities are competitors operating in the same product market and such agreements lead or may lead to:

⁶⁸ Paragraphs 28–30 of the Methodology.

1) [**price fixing**] setting or maintaining prices (tariffs), discounts, allowances (surcharges), extra charges;

2) [**bid rigging**] increasing, decreasing or maintaining prices in public tenders;

3) [**market sharing agreement**] dividing the commodity market in the territorial principle, by the volume of sales or purchases of goods, by the range of products sold or composition of sellers or buyers (customers);

4) [**output limitation**] reduction in or cessation of the production of goods;

5) [**boycott**] refusal to conclude agreements with certain sellers or buyers (customers).

[...]

5. [**other anti-competitive agreements**] Other agreements are forbidden between economic entities [...] if it is established that such agreements lead or can lead to restriction of competition.

In addition, Article 76(6) TEAEU also prohibits the co-ordination of economic activities of competing economic entities by a co-ordinator (natural or legal person) who is not a competitor of the economic entities whose activities are co-ordinated. These rules are as follows:

6) [**co-ordination of economic activities**] It shall not be allowed for natural persons, business and non-profit organisations to co-ordinate economic activities of economic entities (market participants) of the Member States, if such co-ordination leads or may lead to any of the consequences set out in paragraphs 3 and 4 of this Article that may not be recognised as admissible in accordance with the admissibility criteria determined in Annex 19 to this Treaty. The Member States may determine in their legislation a ban on co-ordination of economic activities if such co-ordination leads or may lead to the consequences specified in paragraph 5 of this Article that may not be recognised as admissible in accordance with the admissibility criteria determined by Annex 19 to this Treaty.

As explained above, the rules laid down in Article 76(3), (5) and (6) cited above are enforced by the Commission if the horizontal agreements or restrictions (including co-ordination of economic activities) concern Cross-Border Markets, that is, if at least two economic entities committing infringement are registered on the territory of different Member States. Each of the NCAs are responsible for enforcement in their territory where the Cross-Border Criteria are not fulfilled.

Box 4.4. Market sharing agreement in the *Delrus* case

The Commission had the opportunity to apply Article 76(3), subparagraph 3) (market sharing agreements) in the *Delrus* case.

The proceedings were started upon receiving, by the Commission, of Materials from the Ministry of National Economy of Kazakhstan on 22 December 2017, further to which the Commission also received an Application (complaint) and supporting documents from Scuderia LLP (registered in Kazakhstan), which indicated signs of violation of Article 76 TEAEU by Delrus LLC, Russia (hereinafter: “Delrus Russia”) and Delrus RK LLP, Kazakhstan (hereinafter: “Delrus Kazakhstan”).

It was established that the applicant Scuderia, being the winner of the tender for the service of calibration of ultrasound sensors to the apparatus “FibroScan”, addressed to Delrus Kazakhstan and Delrus Russia, as well as to the company “Echosens”, a request by email to provide service for the machine “FibroScan”, including the calibration of its sensors. Delrus Kazakhstan offered a price in the amount of 2 450 000 tenge. On the other hand, Delrus Russia offered similar services for cca 200 000 – 400 000 tenge in Russia, but **refused to provide these services in Kazakhstan, by referring Scuderia to Delrus Kazakhstan.**

The Commission found that there was an agreement between Delrus Russia and Delrus Kazakhstan that led to division of the Cross-Border Market for these services by the territorial principle. This agreement was implemented by the two companies and caused a significant difference in the price of the relevant services in the territories of Russia and Kazakhstan.

As a result, the Board of the Commission adopted Decision No. 165 of 17 September 2019 “On the violation of general rules of competition in cross-border markets”. It found that the above actions (inaction) of Delrus Russia and Delrus Kazakhstan, as well as individual employees of the mentioned companies, were in breach of subparagraph 3 of Article 76 (3).

This decision was later appealed against and annulled by the EAEU Court by reason of insufficient evidence on whether the two Delrus companies formed a single undertaking (see below Box 4.6).

Box 4.5. Exclusivity and market sharing agreements in the *Cochlear case*

In the Cochlear Case, the Commission received Materials from the Ministry of National Economy of Kazakhstan. It was suspected that companies concluded potentially illegal agreements (i) obliging the buyer not to sell the goods of the seller's competitors (exclusivity) and (ii) aimed at the territorial division of the market (market sharing).

The case concerned the **wholesale market for cochlear implant system voice processors** (medical devices) manufactured by Cochlear UK. These voice processors constituted the relevant product market, which was found to be a Cross-Border Market (see Box 2.3). The **products were distributed**, by virtue of exclusive distribution agreements by EuroMax in Russia, Pharm Express and SPP VEK in Kazakhstan, and Assomedica in Belarus.

At the Investigation stage (Procedure 98), the Commission established the following signs of violation of the general rules of competition:

- **vertical agreements**, prohibited by subparagraph 2 of Article 76(4) TEAEU, contained in the provisions of distribution agreements concluded by Cochlear UK with Euromax, Pharm Express, SPP VEK and Assomedica, the terms of which include the obligation of distributors not to sell the goods of any competitor;
- **other agreements** prohibited by Article 76(5) TEAEU contained in the provisions of distribution agreements concluded by the same parties, the terms of which led to the **division of the relevant Cross-Border Market on the territorial principle**.

The Commission held that no exemptions from the prohibitions laid down in Article 76 TEAEU could be applied (see Box 4.9).

Based on the above considerations, the Member of the Commission in charge of competition policy issued a ruling on the initiation of **the procedure for Case Consideration** (Procedure 99) on 5 March 2019.¹

At the **Case Consideration stage (Procedure 99)**, the Case Consideration Commission established that the competing companies Belvivad, Assomedica, Pharm Express, SPP VEK and Euromax, operating in one relevant product market, participated in a **horizontal agreement** prohibited by subparagraph 3 of Article 76(3) TEAEU, which led to the division of the market by the territorial principle and (or) the repartition of customers. It found as follows:

- The **competing companies** assumed **obligations to sell** cochlear implant systems manufactured by Cochlear UK **only within the borders of the Member State in which they were respectively registered**. This was confirmed by the provisions of the non-exclusive distribution agreements that each of them concluded with Cochlear UK, which contained obligations to sell the goods exclusively in the territory of a particular member state (Assomedica in Belarus, Pharm Express in Kazakhstan, Euromax in Russia).
- One of the companies **operating in Russia refused to supply the goods to Kazakhstan**, as confirmed by information received from the Russian Competition Authority (FAS) on request from the Commission;
- The competing companies under examination **did not actually sell cochlear implant systems outside the territories defined in the distribution agreements** concluded with Cochlear UK.

The agreement prohibited by subparagraph 3 of Article 76(3) TEAEU was contained in the following documents:

- a non-exclusive **distribution agreement** concluded between Assomedica and Cochlear UK, which provided for the sale of cochlear implant systems exclusively in Belarus. The said agreement also defined Belvivad as a sub-distributor.
- a non-exclusive **distribution agreement** concluded between Pharm Express and Cochlear UK, which contained provisions on sale of the goods concerned by Pharm Express in Kazakhstan and not selling those goods outside Kazakhstan;
- a non-exclusive **distribution agreement** concluded between SPP VEK and Cochlear UK, obliging SPP VEK not to sell the goods outside Kazakhstan;
- a non-exclusive **distribution agreement** concluded between Euromax and Cochlear UK obliging Euromax not to sell the goods outside Russia.

On 7 July 2020, the Commission delivered its decision.² It established that Belvivad, Assomedica, Pharm Express, SPP VEK and Euromax were competitors in the same relevant Cross-Border Market and participated in an agreement prohibited by subparagraph 3 Article 76(3) TEAEU, as that agreement led or could lead to the division of the relevant market by the territorial principle or with regard to customers.

On the basis of the Fining Guidelines, it imposed the following fines:

- Assomedica: 100,000 Russian roubles;
- Pharm Express: 381,005 Russian roubles;
- SPP VEK: 100,000 Russian roubles;
- Belvivad: 175,085 Russian roubles;
- Euomax: 3,655,896 Russian roubles;
- To each of the officials of the abovementioned companies a fine of 66,041 Russian roubles.

In addition, the Commission ordered the companies above to **terminate the infringement**, i.e. not to execute the content of the illegal clauses of the distribution agreements. In particular, the companies were ordered to stop partitioning the EAEU market by the territorial principle and to allocate customers. They were also ordered **not to refuse supplying companies** operating outside their allotted territories and to **inform the public on the possibility of cross-border sales**. The Commission also obliged the infringers to **submit reports** on the execution of these orders, which the companies involved later duly submitted.

Notes:

¹ Based on paragraph 10(2)–(3) of Annex 19 to the TEAEU and paragraph 13 of the Procedure for Investigations (Procedure 98).

² Decision No. 88 "On the violation of the general rules of competition on the cross-border markets".

Annex 19 to the TEAEU specifies that **anti-competitive agreements and restrictions between companies belonging to the same group (undertaking) are not caught** by these prohibitions:

*The provisions of [Article 76(3)–(6) TEAEU] shall not apply to agreements between economic entities included in the same group if one of these economic entities has established direct or indirect control with respect to the other economic entity or if such economic entities are under **direct or indirect control of a common person**, except for agreements between economic entities engaged in activities that may not be performed in parallel by a single economic entity under the legislation of the Member States.⁶⁹*

⁶⁹ Paragraph 7 of Annex 19 to the TEAEU.

Box 4.6. – Judgment in Delrus on the definition of undertaking (group of persons)

On 17 September 2019, the Board of the Commission adopted Decision No. 165 of “On the violation of general rules of competition in cross-border markets”. It found that Delrus Russia and Delrus Kazakhstan, as well as individual employees of the mentioned companies, committed a breach of subparagraph 3 of Article 76(3) TEAEU, as they concluded and implemented a market sharing agreement based on territorial principle (see Box 4.4 above).

Delrus Russia and Delrus Kazakhstan, however, brought an appeal against the Commission’s decision the EAEU Court. The effect of the decision was therefore suspended.

The EAEU Court upheld the Commission decision at first instance.

Subsequently, Delrus Russia and Delrus Kazakhstan appealed the first instance judgment to the Appeals Chamber of the EAEU Court.

In November 2020, the Appeals Chamber of the **EAEU Court** delivered its judgment, in which it **quashed the first instance judgment**. It held that there had been **insufficient investigation** into the issue of the presence of **direct or indirect control** of one of the founders of Delrus Kazakhstan, which at the same time indirectly owns shares of Delrus Russia. If the **direct or indirect control is confirmed, the two Delrus companies belong to the same group of persons (undertaking)**, and as a consequence, they cannot be recognised as participants of an anticompetitive agreement.

In order to implement the decision of the Appeals Chamber of the EAEU Court, the Board of the Commission adopted a Decision No. 178 of 22 December, 2020, in which it decided to resume the consideration of the case in order to assess the presence or absence of competition relations between the two companies at issue. This decision was, again, appealed against, the Court case is pending at the time of writing.

4.2.2. Presumptive Rules and Exemptions

EAEU competition law **allows for exemptions** of anti-competitive agreements and restrictions. For the time being, the EAEU has not introduced guidelines or block exemption regulations on horizontal restrictions or *de minimis* rules.

Hardcore restrictions listed in Article 76(3) TEAEU (price fixing, bid rigging, market sharing, output limitation and boycott) cannot be exempted. However, Section II of Protocol 19 to the EAEU Treaty provides for a possibility to **exempt** agreements (horizontal or vertical) otherwise prohibited by **Article 76(5) TEAEU**. These are the “**other anti-competitive agreements**” (see 4.2.1 above) excluding hardcore restrictions. Furthermore, agreements on joint activities that may lead to the consequences specified in Article 76(3) TEAEU (**hereinafter - co-operative joint ventures**) can be covered by exemptions.⁷⁰

With respect to the agreements involving **non-hardcore restrictions** (falling into the category of “other anti-competitive agreements”) and creating **co-operative joint ventures**, exemptions may only be granted if the following cumulative conditions are met in total:

- A. the agreements **do not impose restrictions** on the economic entities which are **unnecessary** to achieve the objectives of these agreements and
- B. they **do not create the possibility of eliminating competition** in the relevant market, and
- C. if the economic entities prove that
 - such agreements have or may have the result of **improving the production (sale)** of goods, stimulating **technical** (economic) **progress** or increasing the competitiveness of goods produced by Member States on the world market
 - **consumers receive a proportionate part of the benefits** that are acquired by the persons concerned from the commission of such actions.

⁷⁰ Paragraph 5 of Annex 19 to the TEAEU.

These legal provisions allow the Commission to grant exemptions with respect to anti-competitive agreements that fulfil the above conditions. The Commission has not yet had the opportunity to exempt such agreements.

4.2.3. Leniency

Leniency policy means that the first company coming forward with sufficient information to establish the presence of a secret cartel is granted an immunity from fines, while some following companies may receive a reduction. As such, leniency is the single most efficient tool in the hands of competition agencies to uncover secret cartels, particularly when coupled with effective competition enforcement and deterrent fines. Indeed, this tool is applied across OECD jurisdictions.

Annex 19 to the TEAEU also provides for a leniency policy to be applied by the Commission. Paragraph 19 provides that a person (group of persons, i.e. undertaking) **having voluntarily informed the Commission of the conclusion of an agreement prohibited by Article 76 of the Treaty shall be exempt from liability for the violation**, where all the following conditions are fulfilled:

- at the time of the application by the person, **the Commission did not have at its disposal any information** or documents concerning the offence;
- the person initially or subsequently **refrained from participating** in the illicit agreement;
- the information and documents submitted are **sufficient to establish the violation** of Article 76 TEAEU.

The exemption from liability shall be granted to the person who is the **first** to fulfil all the above conditions and to all companies that belong to the same group (undertaking). In contrast, leniency applications filed on behalf of several persons that are parties to an agreement shall be rejected.

While the above clearly defined rules would be thought to create sufficient incentives for members of secret cartels to blow the whistle, the Commission received no leniency applications in the period between 2016 and 2020.

Box 4.7. Leniency Rules and Priority

The issue of the leniency policy was addressed at the interviews conducted by the OECD. Stakeholders mentioned, among the possible reasons for the absence of leniency applications, the fact that the benefit of immunity for the first company that informs the Commission of a secret cartel is not transferred to proceedings before NCAs. Therefore, companies may be wary of submitting detailed and self-incriminating information to the Commission at a stage where it is as yet unclear if the case would be handled by the Commission or referred to one or several NCAs, in accordance with the rules on the delineation of competences between the Commission and the NCAs. Another practical issue is the risk that the NCA may receive information on the same cartel from another cartel participant after the initial leniency application with the Commission but before the transfer of the case to the NCA, in which case the NCA would grant the benefit of immunity to the first informer filing the leniency application with the NCA, not to the first informer before the Commission. The issue of identifying the first whistle-blower is not settled between the Commission and the NCAs¹.

These practical problems may act as deterrents that hold back companies from submitting leniency applications to the Commission. There is indeed a clear risk that the Commission would refer the case to an NCA, transfer the received material, but the NCA handling the case would not grant the benefit of immunity to the first applicant.

Other legal practitioners mentioned that it could be possible to hedge against such an outcome by filing leniency applications simultaneously with all five NCAs plus the Commission. While it is true that such an approach removes the risk of receiving fines as a result of the voluntary submission of self-incriminating information, the need to submit six separate leniency applications (which may actually involve oral statements to be made at the competition agencies' premises in the official language of the relevant Member State) increases legal costs.

The OECD's interviews also revealed other regulatory obstacles. Not all Member States have leniency provisions in their national legislation, therefore, extending the benefit of leniency is excluded with respect to these NCAs.

Another aspect is that, for the time being, the extension of the benefits of leniency to second and following applicants, in the form of reduction of fines, is not formally foreseen. While it is true that among the mitigating circumstances, “assisting the Commission in the proceedings beyond general obligations – weight: 0,5” is mentioned, the weight of this factor is rather small, and may not act as a sufficient incentive for second and following leniency applicants.

Note: ¹ It should be mentioned that the Procedure on Leniency is currently being developed. The project is being discussed with NCAs and experts, including the issues raised in this section.

4.2.4. Ambit of National Legislation

As noted above, Article 76 TEAEU lays down the substantive provisions on anti-competitive agreements and concerted practices which are applied by the Commission in the case of Cross-Border Markets. These same substantive rules are also common provisions that national legislations must include, for the purposes of application by NCAs where the market affected by the infringement is not a Cross-Border Market (see 2.2.3 and 2.6.1 above). In addition, under Article 74(3) TEAEU, Member States may determine, in their legislation, additional requirements and restrictions with regard to prohibitions set out in Articles 75–76 TEAEU.

The OECD received comments with respect to interaction between competition policy and national provisions regulating the exercise of intellectual property rights (IPRs).

The EAEU Treaty defines further obligations for the Member States to implement minimum requirements with regard to the observance of EAEU competition law by persons not falling within the subjective scope of Article 76 TEAEU.

In this context, Article 75(2) TEAEU on the “General Principles of Competition” requires Member States to **lay down in their legislation prohibitions of agreements between state government authorities**, local authorities and other agencies or organisations exercising their functions or agreements between them and **economic entities**, if such agreements result or can lead to any prevention, restriction or elimination of competition, except in cases provided for by the TEAEU and/or other international treaties of the Member States.

Furthermore, under Article 75(6) TEAEU the Member States shall determine in their legislation penalties for economic entities and public officials with regard to all anti-competitive behaviour, based on the principles of efficiency, proportionality, security, inevitability and certainty, and shall ensure control over their enforcement.

4.3. Vertical Agreements and Restrictions

4.3.1. Main Rules

Pursuant to **Article 76(4) TEAEU**, “vertical agreements between economic entities shall be prohibited, with the exception of [vertical agreements exempted under Annex 19 to the TEAEU], if:

- **[resale price maintenance]** such agreements lead or can lead to establishment of the price of resale of goods, except for the case when the seller establishes a maximum price of resale of goods for the buyer;
- **[exclusivity]** such agreements stipulate the obligation of the buyer not to sell goods of the economic entity that is a competitor of the seller. Such prohibition does not concern agreement on organisation by the buyer of sale of goods under the trademark or other means of individualisation of the seller or the producer.”

Under **Article 76(5) TEAEU**, “[**other anti-competitive agreements**], other agreements are forbidden between the economic entities (except for vertical agreements exempted under Annex 19 to the TEAEU) if it is established that such agreements lead or can lead to restriction of competition.” Furthermore, Article 76(6) TEAEU on the **prohibited co-ordination of economic activities** also applies to vertical restrictions (see 4.2.1 *in fine*).

As in the case of horizontal agreements, these rules are **enforced by the Commission** if the vertical agreements or restrictions concern Cross-Border Markets, that is, if at least two economic entities committing infringement are registered on the territory of different Member States. The **NCAs** are responsible for enforcement where the cross-border criteria are not fulfilled.

Box 4.8. Assessment of vertical agreements in the *Corning Case*

The *Corning Case* was started by the Commission ex officio upon indications of a potentially unlawful conduct by Corning Inc (USA) on the markets of “primary wholesale distribution of single-mode optical fibre intended for optical communication cables” of Belarus, Kazakhstan and Russia. The behaviour examined by the Commission consisted in the conclusion by **Corning Inc of long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a guaranteed volume of the products concerned, as well as the **preferential right to supply optical fibre** produced by Corning to the above economic entities.

In the context of **vertical agreements**, the Commission stated that Corning Inc. concluded long-term agreements for the sale of single-mode optical fibre with customers Beltelekabel (Belarus) and Minsk Cable Works (Belarus) providing for the obligation to purchase up to 100% of the single-mode optical fibre of their demand from Corning Inc. These companies indeed sourced more than 70% of these products from Corning Inc. In 2019, the price decreased and the **number of sellers increased**, which had a positive impact on competition in this market. Customers had an opportunity to reduce their expenses on the purchase of optical fibre. However, Minskkabel and Beltelekabel continued to buy most of the products from Corning Inc.

Based on the above, the **Commission established** that the sales agreements did not result in setting a resale price for the goods and did not oblige the buyer not to sell goods of a competitor of the supplier and **the agreements were not prohibited under Article 76(4) TEAEU**.

However, due to the conclusion of the exclusive supply agreements between Corning Inc., on one hand, and Minskkabel and Beltelekabel, on the other, access to the Cross-Border Market for other manufacturers, including from the Member States, may be limited. The conduct of Corning Inc, Minskkabel and Beltelekabel could therefore be qualified as **signs of violations of Article 76(5)**, which prohibit other anti-competitive agreements. In particular, the obligation (resulting from written and oral agreements) to purchase over 70% of single-mode optical fibres from Corning Inc could create obstacles for access to the market of sale of single-mode optical fibres for other producers of optical fibres.

The Commission, however, stopped short of a final analysis of the conduct. **Corning Inc is registered in the USA and is not registered in any Member State.** Therefore, issuing a decision on the legality of the conduct **was not within the powers of the Commission** under paragraph 4 of the Criteria of Cross-Border Markets. Considering the above, all documents and information available to the Commission were forwarded for consideration to the Belarusian NCA, which finally decided the case on 2 December 2020.

Vertical agreements between economic entities that form a **single undertaking** by reason of control by a single person over the companies involved **are not caught by the prohibition.**⁷¹

4.3.2. Presumptive Rules and Exemptions

Annex 19 to the TEAEU lays down the conditions under which **vertical agreements and agreements creating joint activities (co-operative joint ventures)**, restricting competition under Article 76(4)–(5), **may be exempted** from the prohibition laid down in that Article.

Article 76(4) TEAEU exempts certain categories of vertical restrictions; Annex 19 to the TEAEU also provides for exemptions subject to the fulfilment of efficiency, market share and consumer benefit conditions. There is, currently, no practice of granting individual exemptions. Apart from these exemptions, EAEU competition law contains no block exemption regulations, guidelines on permissible horizontal and vertical restrictions or *de minimis* rules.

The first set of conditions (paragraph 5 of Annex 19 to the TEAEU) is the same as in the case of anti-competitive horizontal agreements that are non-hardcore restrictions. Vertical restraints and agreements creating co-operative joint ventures involving vertical restraints may be exempted if (i) they do not impose unnecessary restriction on competition, (ii) do not eliminate competition, (iii) improve production or sales, technical progress, competitiveness and (iv) a fair share of the benefits goes to the customers (for precise formulas, see 4.2.2 above).

⁷¹ Paragraph 7 of Annex 19 to the TEAEU.

The second set of conditions is peculiar to vertical agreements. In this respect, paragraph 6 of Annex 19 to the TEAEU provides as follows:

Vertical agreements shall be permitted if:

- 1) *they constitute commercial concession agreements; [OR]*
- 2) *the share of each economic entity [...] that is a party to such an agreement in the [relevant market] covered by the vertical agreement does not exceed 20%.*

EAEU competition law does not yet include *de minimis* rules, block exemption regulations or vertical guidelines.

The Board of Commission has not yet had the opportunity to exempt such agreements in individual cases.

Box 4.9. Examination of exemptions in the Cochlear case

The possibility of exemption was nonetheless examined in the *Cochlear case* (see Box 4.4 above).

At the Investigation stage (Procedure 98), the Commission still examined the case under the rules relating to vertical agreements. Indeed, it established the following signs of violation of the general rules of competition:

- **vertical agreements**, prohibited by subparagraph 2 of Article 76(4) TEAEU, contained in the provisions of distribution agreements concluded by Cochlear UK with Euromax, Pharm Express, SPP VEK and Assomedica, the terms of which include the obligation of distributors not to sell the goods of any competitor;
- **other agreements** prohibited by Article 76(5) TEAEU contained in the provisions of distribution agreements concluded by the same parties, the terms of which led to the **division of the relevant Cross-Border Market on the territorial principle**.

The Commission examined whether the agreements could be compatible with Article 76 TEAEU under one of the **exemptions** laid down in Annex 19 to the TEAEU. First, it concluded that all the IPRs (patents, trademarks, domain names, designs, copyright) remained the exclusive property of Cochlear UK. Given that the distribution agreements merely allowed the distributors to use the trademark, they **were not qualified** as franchise agreements, which could

be covered by the exemption regarding “**commercial concession agreements**”. Secondly, it held that the distribution agreements **were not aimed at improving the production (sale) of goods** or stimulating technical (economic) progress or increasing the competitiveness of goods produced by the EAEU Member State in the world commodity market, and did not offer a proportionate share of benefits to consumers. Therefore, **no individual exemption** specified in paragraphs 5 and 6 of Annex 19 to the TEAEU **could be applied**.

It is worth noting that block exemption regulations and guidelines specifying usually permissible vertical restraints are applied in many OECD jurisdictions, and stakeholders consider them as a useful tool of orientation when drawing up contractual clauses. In particular, vertical block exemptions and guidelines are present in these jurisdictions in the fields of technology transfer (involving patent, design, software copyright, know-how license) and distribution agreements (often involving trademark and know-how license and sometimes commercial franchise).

4.3.3. Ambit of National Legislation

As noted above, Article 76 TEAEU is applied directly by the Commission where Cross-Border Markets are affected (and the Commission has competence according to the Criteria) and corresponding rules are applied by the NCAs with respect to the territories of the NCAs where either the relevant market does not qualify as a Cross-Border Market or the Commission has no competence of the Commission according to the Criteria. In addition, under Article 74(3) TEAEU, Member States may determine, in their legislation, additional requirements and restrictions with regard to prohibitions set out in Articles 75–76 TEAEU, which are applicable in proceedings conducted by the NCAs when they apply national legislation corresponding to Articles 75–76 TEAEU. The main concern voiced in this regard concerns the interaction between competition policy and national provisions regulating the exercise of intellectual property rights (IPRs) (see 2.7.2). These are highly relevant in the case of vertical restraints, especially in the fields of technology transfer agreements, distribution and commercial concession agreements, which normally involve IPR license.

4.4. Abuse of Dominant Position

4.4.1. Main Rules

Pursuant to Article 76(1) of the EAEU Treaty,

*Any **actions (omissions) of dominant economic entities** (market participants) that **result or may result in prevention, restriction or elimination** of competition and/or infringement of interests of other persons shall be prohibited, including the following actions (omissions):*

1. **[unfair pricing]** setting and maintaining monopolistically high or low prices of goods;
2. **[sales restrictions]** withdrawal of goods from circulation resulting in an increase in the price of such goods;
3. **[imposition of unfair terms]** forced imposition of any economically or technologically unjustified contract conditions to contractors that are unfavourable for the latter or not related to the subject matter of the agreement;
4. **[output limitation]** economically or technologically unjustified reduction or cessation of production of goods, if the goods are in demand or orders for their delivery have been placed and their production is feasible, as well as if such reduction or cessation of production of the goods is not explicitly provided for by this Treaty and/or other international treaties of the Member States;
5. **[refusal to deal]** economically or technologically unjustified refusal to enter or evasion from concluding agreements with individual buyers (customers) capable of manufacturing or supplying the relevant goods with account of the specifications set out in this Treaty and/or other international treaties of the Member States;
6. **[discrimination]** economically, technologically or otherwise unjustified setting different prices (tariffs) for the same products, thus creating discriminatory conditions, account taken of the specifications set out in this Treaty and/or other international treaties of the Member States;
7. **[entry or exit barriers]** creating barriers to entry into the commodity market or exit from the commodity market for other economic entities (market participants).

These substantive rules are enforced by the Commission in respect of Cross-Border Markets, for which the Criteria of Cross-Border Markets lay down specific rules in so far as abuse of dominant position is concerned (see Establishing the Commission's Competences – Cross-Border Markets). With respect to markets that are not qualified as Cross-Border Markets, national legislation corresponding to Article 76 TEAEU is enforced by the NCAs.

The methods for establishing the presence of the first scenario of an abuse, i.e. unfair pricing, is explained in detail in Decision of the Council of the Commission of 17 December 2012 on the Methods of Identifying Monopolistically High (Low) Prices (hereinafter “Methodology on Monopolistic Pricing”). For other abusive practices, there is currently no guidance available.

4.4.2. Dominant Position and Market Power

Concept and Factors Examined

Under paragraph 2(7) of Annex 19 to the TEAEU, **dominant position is defined** as the position of an economic entity, group of persons or several economic entities or group of persons in the market of particular goods enabling such economic entity/entities or group(s) of persons **to exert a decisive influence on the general terms for circulation of goods on the relevant market, and/or to eliminate other economic entities** from the relevant market, and/or to **impede access** of other economic entities to this market.

EAEU law is particular as compared to most OECD jurisdictions on two accounts: (i) there are rigid market share thresholds below which dominance cannot be established, and (ii) beside individual dominance, joint dominance on oligopolistic markets is also part of the material scope of the rules on abuse of dominance.

Pursuant to paragraph 3 of Annex 19 to the TEAEU, the dominant position of an economic entity is determined on the basis of the following circumstances:

- the market **share** of the economic entity and its relationship with shares of competitors and customers;
- **the possibility for the economic entity to unilaterally determine the level of prices of goods** and exert a **decisive influence on the general conditions for circulation** of goods in the relevant market;
- presence of **economic, technological, administrative or other restrictions** on access to the relevant market;

- the **period** within which the economic entity may exert a decisive influence on the general conditions of circulation of goods in the relevant market.

The assessment of these factors is detailed in Sections VI–VIII of the Methodology.

In particular, under Sections V–VI of the Methodology, the Commission proceeds to the **examination of the market structure**. Under Section V of the Methodology, it identifies the undertakings competing on the relevant markets and their number. It establishes the **total size of the market** on the basis of data regarding the total value of sales, total volumes manufactured and total value of purchases, as well as the **market shares** of the relevant economic entities. The Commission then turns to examining **market concentration**, using the Herfindahl-Hirschman index.⁷²

Subsequently, under Section VIII of the Methodology, the Commission analyses **barriers to entry**, which include, under the Methodology, the examination of factors such as the size of initial capital investments, restricted access to financial resources, difficulties related to obtaining access to relevant infrastructure and essential facilities, the presence of exclusive rights and/or IPRs blocking entry and access to IPR licenses, transport restrictions, high volume of initial production, administrative restrictions, as well as the behavioural strategy of incumbent market operators that may foreclose entry, such as excessive production capacity, buyer costs of switching to a new supplier, and the possible presence of vertically integrated incumbent operators.⁷³ Account taken also of these factors, the Commission examines **potential competition**, i.e. the possibilities of other undertakings to enter the market at issue, by looking into whether potential sellers operating on neighbouring geographical markets and relying on expert opinion.

Market Share Thresholds

A crucial step in the assessment of the presence of dominant position is the **determination of market shares of the economic entity/entities on the Relevant Cross-Border Market**. First, the Commission determines market shares of the infringing economic **entity and its ratio to the shares of competitors and buyers on the Relevant Cross-Border Market as a whole**,

⁷² Section VII. of the Methodology.

⁷³ Paragraphs 44–45 of the Methodology.

and then the **share** of volume of sale or purchase of this economic entity is **additionally determined separately for each** part of the Relevant Cross-Border Markets located on the territories of different **Member States**. For the purposes of assessing dominance, the market share on the total area of each affected Member State is taken into account, even if the size of the relevant geographic market is merely regional.⁷⁴

Market shares are highly relevant as **EAEU competition law applies strict market share thresholds** for assessing the presence of a dominant position.

Paragraph 57 of the Methodology provides that the position of an economic entity **may not be considered dominant**, if its share in the Relevant Cross-Border Market is less than 35%, except for cases specified in paragraph 59 of the Methodology.

⁷⁴ If the undertaking is dominant in sub-national (regional) markets, which are cross-border in nature, but it does not possess the requisite market shares on the total area of each affected Member State, the NCAs of the affected Member States have the power to investigate the case.

Box 4.10. Assessment of individual dominance in the *Corning Case*

The Corning case concerned the markets of “primary wholesale distribution of single-mode optical fibre intended for optical communication cables” of Belarus, Kazakhstan and Russia. As a result of an ex officio sectoral investigation, the Commission detected **signs of violation** of competition rules in the conclusion by **Corning Inc (USA) of long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a **guaranteed volume** of the products concerned, as well as the **preferential right to supply optical fibre** produced by Corning to the above economic entities. In the Commission’s view, the conclusion of agreements with such long-term conditions could create unequal conditions of competition with respect to other producers.

The Commission started the Investigation (Procedure 98) and examined market structure and presence of a dominant position.

With respect to **market structure**, according to the information provided by national authorities, the only industrial producer of single-mode optical fibre intended for optical communication cables in the EAEU was JSC Optical Fiber Systems (Russia). Based on the information provided by customs authorities and customers of single-mode optical fibres in the Member States, 14 economic entities operated in the Cross-Border Market. In the course of the assessment of the state of competition it was established that the share of the **group of persons (undertaking) consisting of Corning Inc. (USA) and Corning CIS LLC (Russia) was 35% during the period under study**. The Commission also found that no other economic entity occupied a dominant position on the Cross-Border Market. There were three other major players, each holding between 8–18% market share. The Commission established that the market concentration coefficient CR3 and market concentration index HHI for the period under investigation were 81% and 3545, respectively. It held that the Relevant Cross-Border Market featured **undeveloped competition and a high level of concentration**.

While these findings were relevant for finding dominant position, the Commission has not formally stated its presence, as it concluded that no signs of an abuse could be established.

Paragraph 59 of the Methodology contains provisions on what appears to be joint dominance. The position may be considered dominant for each of at most three economic entities having the largest shares on the Relevant Cross-Border Market, if their aggregate share on the Relevant Cross-Border Market as a whole or in each of its parts located on the territories of the Member States is at least 50%. The position may be considered dominant for each of at most four economic entities having the largest shares on the Relevant Cross-Border Market, if their aggregate share on that market as a whole or in each of its parts located on the territories of the Member States is at least 70%. This provision shall not apply, if the share of at least one of the above economic entities is less than 15% at any part of the Cross-Border Market located on the territories of the Member States.

Box 4.11. Examination of joint dominance in the Airlines Case

In the *Airlines Case*, the Commission examined the joint conduct of five Russian airline companies (Aeroflot-Russian Airlines, Rossiya Airlines, Donavia, Sibir Airlines and Ural Airlines) which consisted in the simultaneous raise of air ticket prices during a period where, due to a road closure, passenger transport between Russia and Armenia was only possible by air. The relevant product market was defined as the flights operated between Yerevan-Moscow; Yerevan-Krasnodar; Yerevan-Sochi; Yerevan-Rostov-on-Don.

The Commission examined **market structure**. It calculated the market shares of the largest economic entities and applied the Herfindahl-Hirschman index with respect to each particular route Yerevan-Moscow (2574); Yerevan-Krasnodar (7562); Yerevan-Sochi (7448); Yerevan-Rostov-on-Don (7545). It concluded that the level of concentration in these markets was high.

In application of the rules on market share thresholds, the Commission excluded Ural Airlines from the proceedings as its market share was below 15% of the total volume in the relevant markets of Yerevan-Moscow, Yerevan-Krasnodar, Yerevan-Rostov-on-Don and, therefore, **Ural Airlines did not have a dominant position**.

Satisfaction of these market share criteria alone is, however, not sufficient to establish a dominant position. Both in the case of individual dominance and joint dominance, beside meeting the market share thresholds, the **dominant position**

of an economic entity must be determined under the criteria set out above (market shares and ratios of market shares, **period** during which the economic entity may exert a decisive influence on the market, and barriers to entry).⁷⁵

The provisions on establishing the dominant position of each undertaking on oligopolistic markets, where at most three undertakings hold at least 50% market share or at most 4 undertaking holds at least 70% market share invite some observations.

Creating or reinforcing joint dominance justifies blocking mergers and acquisitions in most OECD jurisdictions, including the EU. This is, however, an ex ante review. It appears that EAEU competition law, while not possessing ex ante merger control, has an ex post tool to control abuses of undertakings operating on oligopolistic markets, too.

The conduct of undertakings present on these very concentrated markets can be caught under violations of competition law rules even if they do not arrange for tacit agreements: their responsibility can be established for abuses of dominant position even if, individually, they might not be able to decisively influence the circulation of goods on the relevant market, account taken of the presence of other large players.

Using such a tool reflects some particularities of the markets of EAEU Member States, for instance, the presence of legacy industries and large industrial conglomerates, and the large role of production of raw materials for various industries which need to be transported over large distances (which may be an obstacle to the development of competition). It is interesting to note that also some countries outside the EAEU have such an ex post review tool, for instance Lithuania, but that it is otherwise exceedingly rare for such a tool to exist and can pose significant challenges regarding the distinction of lawful and unlawful conduct given the potential for tacit collusion to occur in such market scenarios.

While the ex post control of abuses of jointly held dominant position may appear unusual, the OECD has received no negative comments from practitioners in this regard. Persons interviewed explained that this tool can prove efficient to counter clearly anti-competitive behaviour without requiring the Commission to prove secret/tacit agreements.

⁷⁵ Paragraph 56 of the Methodology.

Box 4.12. Market share threshold for establishing dominance

With regard to the general 35% market share threshold under which individual dominance cannot be established, the OECD received many valuable observations both from regulators and from private practitioners. These comments were rather similar to the ones received in the context of the Criteria of Cross-Border Markets (which also apply the 35% threshold in a different context). The observations highlighted that this general market share threshold may appear overly strict from a practical point of view, despite it being commonly held in OECD jurisdictions that dominance is extremely unlikely to occur below 40%.

In particular, it was noted that, measuring both the exact size of the relevant market and the market share of an operator in digital markets may prove difficult in practice, even if there are rather clear signs that the operator is in a dominant position.

Several interviewees voiced the opinion that doing away with the 35% market share criterion and adopting a more flexible approach towards establishing dominance could be considered.

4.4.3. Abuse

The concept of abuse is described in Article 76(1) TEAEU as actions or omissions of dominant undertakings that result or may result in prevention, restriction or elimination of competition and/or infringement of interests of other persons. Moreover, Article 76(1) provides a non-exhaustive list of conduct that is considered as abuse: unfair pricing, sales restrictions, imposition of unfair terms, output limitation, refusal to deal, discrimination and creating entry or exit barriers.

With respect to unfair pricing, both the imposition of excessive prices (in case of supply side dominance) and too low prices (in case of demand side monopsony and predatory pricing) are regulated in the same subparagraph 1).

Box 4.13. Assessment of abuse in the Corning Case

The Corning Case was started by the Commission ex officio upon indications of a potentially unlawful conduct by Corning Inc (USA) on the markets of “primary wholesale distribution of single-mode optical fibre intended for optical communication cables” of Belarus, Kazakhstan and Russia. The behaviour examined by the Commission consisted in the conclusion by **Corning Inc of long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a **guaranteed volume** of the products concerned, as well as the **preferential right to supply optical fibre** produced by Corning to the above economic entities.

At the Investigation stage (Procedure 98), the Commission established that the **difference in prices** for single-mode optical fibre for customers in Belarus, Kazakhstan and Russia **was insignificant** during the period from 2018 to 2019. Those prices were also similar to prices applied by other manufacturers in the Member States. Customers did not report any conduct by the Corning Group that could contain signs of an abuse of dominant position. On this basis, **the Commission held that no signs of an abuse could be established**.

Box 4.14. Assessment of abuse in the Airlines Case

In the *Airlines* Case, the Commission examined the joint conduct of five Russian airline companies (Aeroflot-Russian Airlines, Rossiya Airlines, Donavia, Sibir Airlines and Ural Airlines) which consisted in the **simultaneous raise of air ticket prices** during a period where, due to a road closure, passenger transport between Russia and Armenia was only possible by air.

After having considered that the market was heavily concentrated, with the possible presence of joint dominance of three airline companies, the Commission turned to the examination of abuse.

In that context, the Commission found that **passenger fare included costs** associated with transportation of a passenger and his/her baggage within the free baggage allowance, making a reservation, executing settlements, issuing carriage documents, passenger services, handling baggage within the free baggage allowance, cancellation, re-routing, discount for children, and other expenses in compliance with regulatory rules.¹

Airlines use profitability management software products for efficient application of fare subclasses. Under Russian **regulatory provisions**,² airlines shall independently set tariff groups which may include several subclasses. When **calculating the cost of tickets**, the Airline Companies use software products covered by the copyright of third country companies, which are interconnective and data are transferred among them automatically.

Yield management programmes provide for the allocation of seat resources to fare classes for selected flights, their cost depending on the route, etc. The opening of subclasses in fare groups is done automatically by yield management programmes and in case of deviations between actual data and historical data, manual adjustments are possible. **The Commission has found no evidence of manual adjustments** by the Airline Companies to the application of fare subclasses during the period from 23 June to 6 July and 11 July 2016, which resulted or could have resulted in an increase in the cost of airfares on the routes in question. The **dynamics of the price increase** of air tickets during the temporary closure of the Upper Lars checkpoint (from 23 June to 6 July and 11 July 2016), **was determined by the algorithm** of data application used in the software products.

In view of the above facts, no violation of Article 76(1) TEAEU (abuse of dominant position) was found in the conduct of the Airline Companies, consisting in the increase in flight prices during the temporary closure of the Upper Lars checkpoint. **The Board of the Commission thus adopted a decision ending the case.**³ The decision entered into force.

Notes:

¹ "General Rules of Air Transportation of Passengers, Baggage, Cargo and Requirements for Servicing Passengers, Shippers and Consignees" approved by Order of the Russian Ministry of Transport dated 28 June 2007 № 82, and other regulatory legal acts of the Russian Federation, international treaties of the Russian Federation, legislation of the country of departure, destination and transit and carrier rules.

² Rules for the Formation and Application of Tariffs for Regular Air Transportation of Passengers and Baggage and Charges in Civil Aviation approved by Order of the Ministry of Transport of the Russian Federation No. 155 of 25 September 2008.

³ Decision No. 23 of 4 February 2019 "On Termination of the Case on Violation of General Rules of Competition on Cross-Border Markets".

4.4.4. Presumptive Rules and Guidelines

With respect to the **establishment of a dominant position**, presumptive rules exist with regard to market share thresholds, detailed above.

The Methodology offers detailed guidance on the definition of the **relevant market** (see 4.1) and also defines **factors** to be taken into account when **establishing dominance** (see 4.4.2).

With respect to **abuse**, the Decision of the Council of the Eurasian Economic Commission of 17 December 2012 No.117 “On the Methodology of Identifying Monopolistically High (Low) Prices” (hereinafter “**Methods on Identifying Monopolistic Pricing**”) is relevant.

4.4.5. Monopolies

Under Article 74(6) TEAEU, the provisions of Section XVIII of the TEAEU (general competition rules) apply to natural monopoly entities without prejudice to the specific provisions provided for in the EAEU Treaty. The definition of “natural monopoly” varies with respect to each Member State, must be defined upfront by each Member State and notified to the Commission (see above).

Box 4.15. Competition law and monopolies in the *Audit.KG* Case

The rules of the TEAEU regarding abuse of dominant position were applied in the context of monopolies in the *Audit.KG* case. In 2018, the Commission received an Application from AUDIT.KG Audit and Consulting Group LLC (Kyrgyzstan, hereinafter “applicant” or “*Audit.KG*”) dated 2 April 2018 on possible signs of abuse of dominant position by Manas International Airport JSC (Kyrgyzstan, hereinafter “*Manas Airport*”), in the form of excessively high prices for ground handling of international air transportation between some Member States of the Union at Manas and Osh airports.

Manas Airport was included in the state register of natural monopolies of the Kyrgyzstan, therefore, a copy of the Application was also sent to the Member of the Commission in charge of energy and infrastructure issues.

The Applicant submitted that *Manas Airport*, in the period from 2015 to 2016, twice revised upward the rates of airport fees charged at international airports of the Kyrgyzstan for servicing aircraft of foreign air carriers. For example, take-off and landing fee was increased by 27.6% in 2015 compared to 2014, and in 2016 it was further increased by 38.5%.

The Commission stated that, as specified in Annex 20 to the TEAEU, natural monopolies in Kyrgyzstan include ground handling of domestic air transportation. Therefore, under Article 78(4) TEAEU, **requirements of national legislation apply**. However, it did not examine the merits of the case as it was referred to the Kyrgyz NCA by reason of the Commission’s lack of competence.

4.4.6. *Ambit of National Legislation*

Under the recently amended Article 74(3) TEAEU,⁷⁶ Member States are entitled to determine in their legislation (i) additional prohibitions, as well as additional requirements and restrictions in regard to the prohibitions set by Articles 75 and 76 of current Treaty; as well as (ii) other (additional) conditions for recognition of the dominant position of an economic entity. In its reply to the OECD's questionnaire, the EEC indicated that national and EAEU substantive rules on abuse of dominance do not differ and discussions are regularly held to ensure harmonisation in practice.

4.5. Mergers

Under the EAEU Treaty, the Commission has no powers to control concentrations. It was noted at interviews conducted by the OECD that discussions had been held on whether the Commission should be vested with the power of merger review on Cross-Border Markets. However, no high-level decision has been taken on such extension of powers.

Introduction of a common merger review competence for the Commission requires transfer of sovereign powers by the Member States to the EAEU.

⁷⁶ The amendments entered into force on 15 July 2021.

5. Procedural Law

5.1. Overview – Main Stages of the Procedure

The proceedings conducted by the Commission are divided into three stages, which are regulated by three separate statutory legal documents:

- **Examination of Applications or Materials (Procedure 97).** This stage is, in essence, devoted to the examination of complaints. **Complaints are called “Applications” when lodged by a private party and “Materials” when lodged by NCAs.** A summary assessment of the state of competition is drawn up. At the end of this stage, the Commission may drop the case if there are no signs of a competition violation; it may refer the case to an NCA; it may arrange for a Proposal (recently replaced by Warning),⁷⁷ i.e. early resolution of a case through commitments to be endorsed by all parties); or it may launch an Investigation. Proposals/Warnings were/are available in abuse dominance cases (except unfair pricing), in unfair competition cases, as well as in cases concerning co-ordination of economic activities, but not for anti-competitive agreements.
- **Investigations (Procedure 98).** At this stage, the Commission proceeds to an in-depth investigation of the case to gather more information and evidence. It relies on NCAs in doing so. The Commission may directly start with this Procedure 98 when the case begins *ex officio*. In the context of

⁷⁷ The TEAEU and Annex 19 to it were amended to the effect that the Proposal tool is replaced by the Warning tool with effect of 15 July 2021. The procedural rules related to Warning have not yet been adopted at the time of writing. The present report examines the rules and practice regarding Proposals, which may also apply, depending on the content of the forthcoming procedural rules, to Warnings, *mutatis mutandis*.

Procedure 98, the Commission may drop the case if it considers that there are no signs of violation, refer the case to an NCA, or initiate the Case Consideration stage if there are sufficient grounds to establish a breach. At this stage and later, early resolution of a case through a Proposal was no longer possible, and this may be the case for the Warning tool as well (subject to the final rules to be adopted).

- **Case Consideration (Procedure 99).** The charge formulated during the previous Procedure 98 is brought before the Case Consideration Commission. The latter conducts hearings with interested parties, allows access to the file and hears the parties' arguments, including those of the NCAs. The Case Consideration Commission assesses the case. At the end of this stage, the Commission draws up a final draft decision (on the presence or absence of a breach) and submits it to the Board of the Commission.
- The **final decision** is adopted by the Board of the Commission.

Participation of NCAs in the proceedings conducted by the Commission is regulated in a detailed, clear and transparent manner in statutory legal documents (in particular in Annex 19 to the TEAEU, Procedure 97, Procedure 98, Procedure 99). This will be described as regards each procedural step below.

5.2. Examination of Application or Materials (Procedure 97)

Under Procedure 97, two types of **initial submissions** may trigger the Commission's proceedings:

- **"Applications"** regarding violations of the general rules of competition on cross-border markets may be **filed** with the Commission **by natural or legal persons** (individual complainants);
- **"Materials" indicating signs of a violation** of the general rules of competition on Cross-Border Markets may be **submitted to the Commission by the NCAs** by sending a written request to that effect. Such Materials may also consist of or be based on complaints received by an NCA from a private party.

Box 5.1. Illustrations on the start of proceedings

Several examples exist regarding the initiation of Procedure 97 Examination of Applications/Materials in response to Applications lodged by private parties and to Materials submitted by NCAs.

The **NLMK Case** was initiated upon the receipt, by the Commission, of an Application from a consumer in Kazakhstan.

The **Airlines Case** started on the initiative of the Armenian NCA, which transferred Materials to the Commission in 2016 on possible signs of violations of Article 76(1) TEAEU regarding abuse of dominant position.

The **Cochlear Case** was started when the Commission received Materials from the Ministry of National Economy of Kazakhstan.

The **Delrus Case** started upon reception of Materials from the Ministry of National Economy of Kazakhstan on 22 December 2017, further to which the Commission also received an **Application** (complaint) and supporting documents **from Scuderia LLP** (registered in Kazakhstan), which indicated signs of violation of Article 76 TEAEU.

Where an NCA receives a complaint from a private party and thereafter submits Materials to the Commission, by referring the case to the Commission, the original complainant does not obtain the status of Applicant before the Commission. The private party obtains the status of interested party in the proceedings before the Commission. The initiator of the proceedings is the relevant NCA.

5.2.1. Content of Applications or Materials

The **Application/Materials must contain** the names of the economic entity that allegedly breaches competition rules, the description of the purportedly illegal conduct, available information thereon, and the grounds for the complaint. Materials must also indicate the NCAs' employees who will liaise with the Commission.⁷⁸

⁷⁸ Paragraphs 5–7 of Procedure 97.

The **confidential nature of information** contained in documents and data (included or annexed to Applications/Materials) shall not serve as the grounds for refusal to submit them to the Commission. Under such a scenario, the Application/Materials must provide an exhaustive list of documents and data containing confidential information. The rules on handling confidential information are laid down in the Agreement on Confidentiality and in other procedural provisions.⁷⁹ The Application/Materials and attached documents that contain confidential information shall be sent to the Commission in a sealed envelope (parcel) with a confidentiality mark⁸⁰ (stamp) on it indicating that the documents contained in it are the documents of limited disclosure.⁸¹

If the Application/Materials are not submitted in accordance with the formal and content requirements, the Commission may request their regularisation.

5.2.2. Actions Taken upon Receiving the Application or Materials

If the Application/Materials are submitted in compliance with the formal and content requirements, the Commission accepts it. The Commission shall **notify the NCAs and the applicant** of the receipt within 5 working days from the date of receipt.

The NCAs shall, within 15 working days from the receipt of the Commission's notification, **send to the Commission the documents and information available to them** for a full and comprehensive examination of the Application/Materials. The NCA shall also nominate employees for liaising with the Commission in its investigation.

The Applications/Materials are examined by a case handler of the Department for Antitrust Regulation of the Competition Branch.

⁷⁹ Agreement on Procedures for the Protection of Confidential Information and Liability for its Disclosure in the Exercise of the Eurasian Economic Commission's Authority to Control over Compliance with the General Rules of Competition of 12 November 2014 (this is an agreement within the EAEU).

⁸⁰ "Confidential", "Commercial secret", "For official use only".

⁸¹ Paragraph 9 of Procedure 97.

Until 15 July 2021, the next steps **depended on whether the Proposal procedure applied or not**. A **Proposal had to be** drawn up by the Commission **in all cases, except** the following situations:

1. detection of signs of **anti-competitive agreements** (horizontal, vertical or other) prohibited under Article 76 TEAEU;
2. detection of signs of abuse of the dominant position consisting in fixing or maintaining a **monopolistically high or low price**;
3. detection of signs of a violation of the general rules of competition in Cross-Border Markets in respect of which (i) a **Proposal was issued within the preceding 24 months** or (ii) a **formal decision** has been adopted following Case Consideration (Procedure 99).⁸²

These features are kept with respect to the newly instituted Warning procedure as well.⁸³

5.2.3. Proposal Procedure

Annex 19 to the TEAEU and Procedure 97 included the Proposal tool until 14 July 2021. It was replaced by the Warning tool with effect of 15 July 2021. As the procedural rules of the Warning tool have not yet been adopted at the time of writing, the present report examines the now expired rules of the Proposal procedure, also because many of them may be taken over in the Warning procedure, the draft of which being already available (see Subchapter 5.2.4. Warning Procedure below).

Main Rules

The Proposal was a **flexible tool to reach an early resolution** regarding remedies to a possible breach which can be accepted by the applicant (where the complaint was made by an individual complainant), the alleged infringer, the NCAs and the Commission, through behavioural commitments. No fines could be imposed through a Proposal, and no liability imposed.

⁸² Paragraph 13(2) of Procedure 97.

⁸³ Annex 19 to the TEAEU, paragraph 13, as amended.

Proposals had to be drawn up in **unfair competition cases and in abuse of dominant position cases except when the abuse consists in setting monopolistically high or low prices**, as well as in cases concerning co-ordination of economic activities. Where the Department for Antitrust Regulation identified signs of breaches of general rules of competition on Cross-Border Markets, and the Proposal was not excluded, the Department had to draft, in all cases, a Proposal within 20 working days from the registration of the Application or Materials. The **Proposal was aimed at taking actions to eliminate the breach and ensure competition** on Cross-Border Markets. It consisted solely of **behavioural commitments** to be accepted and implemented by the alleged infringer.

The Commission **sent the Proposal for approval to the NCAs, to the applicant** (where applicable), **and notified it to the purported infringer and to the representations of the Member States**. The Commission proceedings were suspended with this step.

The NCAs, the alleged infringer and the applicant (complainant) (the 'Interested Parties') had to indicate, within 10 working days, **their consent or disagreement** with the Proposal. In case of disagreement, they indicated its reasons and could make suggestions for amending the Proposal.

If the Interested Parties reached a **consensus, the Proposal was deemed to be approved**.

If any of the Interested Parties **disagreed with the Proposal, the Department held consultations** with all the interested parties. During the consultation, the **use confidential information was prohibited**, except upon the written consent of the person who provided the confidential information. The Commission could also **request further information** necessary to finalise the Proposal from the Interested Parties and from any other natural or legal person.

If the Interested Parties reached no consensus, another consultation was held and the Proposal could be amended. This time the Proposal could be approved by the majority of the votes of the NCAs, the Commission's Department, the applicant (complainant) and the alleged infringer, the Commission having the casting vote in case of equal number of votes.

The approved Proposal had to be sent for consideration to the NCAs, the applicant (complainant) and to the alleged infringer. The alleged infringer had to, within ten working days, submit to the Commission a **written confirmation of his consent to implement the measures** stipulated by the Proposal.

Once the Commission's Department received this written confirmation, it informed the applicant or the NCA that submitted Materials to start the proceedings. The applicant or the NCA then sent to the Commission a **letter on the withdrawal of the previously submitted Application or Materials** within ten working days, upon which the Commission returned the Application or the Materials to the sender. If no such withdrawal was received, the proceedings were resumed.

If the alleged infringer complied with and implements the commitments described in the Proposal, the Commission Board Member in charge of competition policy issued a ruling terminating the examination of the Application/Materials due to the withdrawal of the latter. Before such a decision, the applicant or the NCA having started the case were heard at a consultation on compliance. If the alleged infringer did not implement the Proposal, the proceedings resumed.

Box 5.2. Proposals

At the interviews held by the OECD, stakeholders who were involved in such a procedure expressed a general satisfaction over the results of the application of the Proposal procedure. According to their perception, the Commission takes an impartial stance and makes efforts to facilitate a compromise between the complainant and the alleged infringer.

Illustrations on Practice

The Proposal⁸⁴ procedure was extensively applied by the Commission. From May 2018 until the end of 2020, the Department for Antitrust Regulation drew up 19 draft Proposals, out of which:

- 11 were not agreed (2 cases of abuse of dominance, 9 concerning unfair competition);
- 7 were agreed (3 cases concerning abuse of dominance, 4 concerning unfair competition);
- the approval of 1 Proposal is pending (abuse of a dominant position).

⁸⁴ Previously, this instrument was called Proposal. After amending the EAEU law, it is called Warning.

Out of the total number of agreed Proposals:

- 5 were executed in full (2 cases concerning abuse of dominant position, 3 concerning unfair competition);
- 2 are in the process of implementation (1 case concerning abuse of dominant position, 1 concerning unfair competition).

Box 5.3. Proposal in the *NLMK* Case

Examples include the ***NLMK* case**, an abuse of dominance case concerning the anisotropic steel market.

In August 2018, the Commission received an Application from a consumer in Kazakhstan, reporting possible violations of competition rules by Novolipetsk Steel (Russia) and VIZ-Stal (Russia), which were members of the same group of persons (hereinafter *NLMK*). (The term “group of persons” is roughly equivalent to the term “undertaking” applied in EU law).

The complainant submitted that *NLMK* had increased prices and ceased production of goods for which there was demand without economic or technologic justification. In particular, having ceased the production of previously produced anisotropic steel, *NLMK* offered a new type of steel, which was significantly more expensive. This affected the final cost of manufacturers using anisotropic steel and led to their loss of competitiveness.

The Commission evaluated the competitive situation in accordance with the Methodology. In this case, the Commission relied on its previous evaluation regarding anisotropic steel market. It found that it was a Cross-Border Market, and it characterised by an undeveloped competitive environment and was dominated by single undertaking. The Commission established its competence.

Having examined the Application (complaint), the Department for Antitrust Regulation drafted a Proposal. Under paragraph 13.6 of Procedure 97, the Commission received comments on the draft Proposal from Belorussian and Russian NCAs. Consultations began and the Proposal was finally agreed. The commitments for *NLMK* specified the following:

- *NLMK* shall develop and present a trade and sales policy (“TSP”) in relation to the anisotropic transformer steel sold by it, which should provide for equal and non-discriminatory terms of exchange, purchase,

sale, other transfer of the said goods; Under the TSP, economic entities of all EAEU Member States shall be put in an equal position (non-discriminatory terms, including conditions and Application of discounts and surcharges);

- NLMK shall implement the commitment in paragraph 1) within 90 working days from the date of receipt and submit information on implementation to the Commission;
- NLMK shall implement the Proposal in accordance with Procedure No 97.

In 2020, meetings were held with the NCAs, the complainant and NLMK on the development of the TSP concept. As a result, the TSP was agreed upon.

As a result of the successful implementation of the Proposal, the Application (complaint) was withdrawn and the case was closed.

5.2.4. Warning Procedure

Main Rules

The Warning procedure was introduced through amendments of Annex 19 to the TEAEU and amendments to Procedure 97 are underway. The amendments of Annex 19 entered into force on 15 July 2021. Warning is defined in the draft amendments to Procedure 97 as follows: “Warning [may be issued to the alleged infringer regarding] the need to **terminate actions** (inaction) that contain signs of violation of the general competition rules, and/or the **elimination of the causes and conditions that contributed to the emergence of signs of such a violation, and measures to eliminate the consequences** of such actions (inaction)”.⁸⁵ The Warning instrument has replaced the Proposal tool. These two are, to some extent, similar in so far as the Warning procedure also provides for a possibility for early resolution of a case by **accepting commitments by the alleged infringer**. It aims to maintain or restore a normal competitive situation on the relevant Cross-Border Market.

⁸⁵ Draft Amendments to the Procedure for Considering Applications (Materials) on Violation of the General Rules of Competition in Cross-Border Markets, paragraph 1.

The amended paragraph 13.1. of Annex 19 to the TEAEU provides that the **Warning instrument is placed in Procedure 97**. It must be drawn up in every case in the Procedure 97 stage except the ones detailed in paragraph 13.2. of Annex 19 to the TEAEU (see below). The Warning is drawn up **in order to prevent actions** that lead or may lead to prevention, restriction, elimination of competition in cross-border markets. **It is issued by the Board Member** in charge of competition **to the economic entity as well as individuals and non-profit organisations**, which are deemed to have **infringed** the general rules on competition laid down in Article 74–76 TEAEU.

Under paragraph 13.2. of Annex 19 to the TEAEU, **no Warning is issued in the following cases:**

- detection of signs of **agreements** between economic entities that are prohibited under Article 76 of the Treaty;
- detection of signs of abuse of the dominant position consisting in establishing and/or maintaining a monopolistically high or low price of goods;
- detection of signs of violation of the general rules of competition in the actions (inaction) of an economic entity to which, **during the previous 24 months, a Warning was issued** or which was the **subject of a decision** based on the results of Case Consideration (Procedure 99).

The Commission must issue a Warning in all remaining types of cases.

Procedure regarding Warnings

The procedure for preparing, issuing, sending a warning and extending the term for its implementation is to be determined in the procedure for considering applications [Procedure 97].⁸⁶ According to the draft amendments to Procedure 97, these rules are as follows.

First, the Commission's authorised structural unit ("Department for Antitrust Regulation") **assesses the state of competition** in the relevant product market in accordance with the Methodology.⁸⁷ Based on the results of the competition assessment, the Department for Antitrust Regulation prepares an analytical

⁸⁶ Annex 19 to the TEAEU, paragraph 13.4.

⁸⁷ Procedure 97, as amended, paragraph 13.12.

report, which is attached to the materials for consideration of the applications (materials) and is an integral part of them.

Within 7 working days from the date of completion of the competition assessment, the **Department** for Antitrust Regulation **prepares a draft Warning**, save in cases where Warnings are excluded.⁸⁸ The time limit for considering the application/materials is suspended for the period of time needed for issuing a warning and for the addressee to implement the commitments/measures in the Warning.

If necessary, or on the initiative of one or several NCAs, the Department for Antitrust Regulation, when considering issuing a warning, **may hold consultations with the participation of NCAs, the Applicant and/or the alleged infringer (“Interested Parties”)**. The use of confidential information is not allowed during the consultations, except for the case of submission of a written consent of the person who provided the confidential information on the admission of third parties to such information and its use in consultations.

The Warning is drawn up in writing, signed by the member of the Commission Board (Minister) in charge of competition. The Warning has the following mandatory content:

- name and address/seat of the addressee (alleged infringer);
- the **grounds for issuing a warning**;
- a **description of the conduct** of the alleged infringer which display signs of violation of the general rules of competition in cross-border markets, as well as the **relevant provisions** of Article 76 TEAEU;
- the requirement for the need to terminate the conduct displaying signs of violations; and/or a **list of commitments and measures** that the addressee must take in order to eliminate the causes and conditions that gave rise to signs of violations and to eliminate the consequences of such conduct;
- the **deadline for implementing the commitments** and measures specified in the warning;

⁸⁸ Procedure 97, as amended, paragraph 13.14.

- the requirement to notify the Department for Antitrust Regulation on the implementation of the commitments and measures prescribed in the Warning.⁸⁹

The time limit for implementing the commitments and the measures prescribed in the Warning must be reasonable, taking into account the time needed for implementation. It cannot be shorter than 10 working days, counted from the reception of the Warning by the addressee.

The Warning is sent to the addressee. The copies are sent to the NCAs for information.

The addressee may send a reasoned request to the Departments for Antitrust Regulation to extend the time limit open for the implementation of the commitments and measures. The time limit may be extended by the Board Member (Minister) in charge of competition.

The Warning must be considered by the addressee within the period specified in the Warning. **The addressee notifies the Commission on its compliance** with the Warning within 3 working days from the end date of the period established for the Warning's implementation (evidence on implementation must be attached to the notification).⁹⁰

If the warning is implemented within the prescribed period, **the Investigation is not carried out** and the addressee is not subject to liability in the form of a fine for violation of the general rules of competition.

If the addressee fails to comply with the Warning within the prescribed period, the **Commission decides on launching the Investigation stage** (Procedure 98) within 10 working days from the expiration date of the prescribed period.⁹¹ The same happens if the addressee notifies his explicit disagreement with the Warning to the Commission.

⁸⁹ Procedure 97, as amended, paragraph 13.15.

⁹⁰ Paragraph 13.3. of Annex 19 to the TEAEU, as amended; Paragraph 13.21. of Procedure 97, as amended.

⁹¹ Paragraph 13.3. of Annex 19 to the TEAEU, as amended; Paragraphs 13.22–13.23. of Procedure 97, as amended.

5.2.5. Rulings Adopted at the End of Procedure 97

Based on the results of examination of the Application or Materials, the Department for Antitrust Regulation prepares one of the following decisions (rulings):

- initiating the Investigation of violations under Procedure 98;
- transferring the Application or Materials to the NCA or NCAs if the Commission has no competence but the conduct may be caught by national competition rules;
- stating the absence of grounds for an Investigation;⁹²

According to the draft amendments of Procedure 97 regarding Warnings, two more types of rulings can be adopted:

- resumption of consideration of the application/materials (where the alleged infringer disagrees with the Warning or does not implement it in due time);
- termination of consideration of the application (materials) where the addressee has implemented the commitments and measures prescribed in the Warning.

These decisions (called “rulings”) are signed by the Commission Board Member (Minister) in charge of competition or, if such power is delegated by the Minister, by the head of the authorised unit of the Commission.

5.3. Investigations (Procedure 98)

The Department for Antitrust Regulation is responsible for conducting the Investigation and preparation of case files on the violation of the general rules of competition on Cross-Border Markets (Article 76 TEAEU).⁹³ This stage of proceedings is regulated in detail in Procedure 98.

⁹² Although this ruling cannot be challenged before the EAEU Court, the legality of the omission, by the Commission, to continue the proceedings can be reviewed by the Court.

⁹³ Paragraph 12 of Annex 19 to the TEAEU.

5.3.1. Main Features

Investigations of possible violations of Article 76 TEAEU are carried out with a view to:

- **identifying signs of violations** of the general rules of competition in Cross-Border Markets;
- **determining the economic entities** whose conduct could amount to such violations.

The grounds for the Investigation are:

- the conclusion of an examination of the Application (complaint) or Material under Procedure 97 [see 5.2.5 above, ruling 1)] with a Commission ruling that an Investigation should be initiated. Under this scenario, **the Investigation is the result of an Application (complaint) lodged by a private party or Materials lodged by an NCA.**
- **the Commission may also decide ex officio to commence Investigations** if it perceives signs of violations of the general rules of competition in Cross-Border Markets. The Investigation starts with the adoption of a ruling under paragraph 3(2) of Procedure 98.

Box 5.4. Ex officio investigations in the *Corning* Case

In 2020, the Commission launched an ex officio enquiry in respect of the conduct of economic entities operating in the Cross-Border Market of wholesale distribution of single-mode optical fibre intended for manufacturing of optical communication cables.

The **signs of violation** of competition rules were detected in the conclusion by **Corning Inc** (world leader in the production of optical fibre, optical cable, components and passive communication equipment) of **long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a guaranteed volume of the products concerned, as well as the **preferential right to supply optical fibre** produced by Corning to the above economic entities. Conclusion of agreements with such long-term conditions may create unequal conditions of competition with respect to other producers.

Given that there was insufficient information to establish a breach, the Commission commenced the Procedure 98 procedure (Investigation) in order to collect and analyse additional information.

As part of the investigation, an **assessment of the state of competition** was carried out for the period from 2018 to 2019. This timeframe of the investigation was determined taking into account the duration of the alleged infringements.

The Commission's analysis is described in Box 4.10 Box 2.4, Box 4.1, Box 4.8, and Box 4.13.

Between 2016 and 2020, the Commission conducted **32 investigations, including 11 investigations initiated by the Commission**.

The Investigation is **conducted by the Department for Antitrust Regulation**. The investigation also involves the staff of the NCAs responsible for liaising with the Commission in its Investigation.

The Investigation shall be conducted within a period of **90 working days** from the date the ruling on initiating an investigation is issued.⁹⁴ If the Commission lacks

⁹⁴ Paragraph 5 of Procedure 98.

information enabling it to conclude that there are signs of violation of the general rules of competition in Cross-Border Markets, the Board Member in charge of competition policy may **extend the investigation period by 60 working days**.

EAEU law **does not allow for a settlement or the resolution of a case by commitments** in the Procedure 98 Investigation phase. Early resolution of the case is only possible under Procedure 97, through the Warning instrument that replaced Proposals (see Subchapter Warning Procedure).

5.3.2. Investigative Powers

Requests for Information

The Commission has the general right to **request information at all three stages of the proceedings, including the Investigations**. The general rules on requests for information, the obligation to provide information on requests, and penalties are laid down in Annex 19 to the EAEU Treaty.

Under Procedure 98, in the course of the Investigation, the Department for Antitrust Regulation may request in writing the **information, documents, data, explanations necessary for investigation, including confidential ones**, from private individuals and legal entities, the Member States' public authorities, local governments, other Member States' bodies or organisations performing their functions.⁹⁵

⁹⁵ Paragraph 7 of Procedure 98; Paragraph 10(4) of Annex 19 to the TEAEU.

Box 5.5. Request for information in the Cochlear Case

The Cochlear Case concerned exclusive distribution agreements concluded by Cochlear UK and distributors operating in various EAEU Member States. According to the initial information received by the Commission, voice processors manufactured by Cochlear UK for cochlear implants were distributed, by virtue of distribution agreements concluded with Cochlear UK, by EuroMax in Russia and Pharm Express in Kazakhstan. These contracts stipulated that the distributors were not allowed to sell the goods outside the territory of the countries in which they were respectively registered (for the facts and legal qualification, see Box 4.4).

In Application of Procedure 98 (Procedure for Investigations), the Commission sent out **requests for information** to various economic entities and government authorities. These requests aimed at collecting information relevant to the market definition and the establishment of a breach. Additional requests for information were sent out to consumers of cochlear implant systems. The initial 90 working days open for investigations were extended by 60 working days, until 5 March 2019.¹

The investigation was extended in order to gather additional information on other persons participating in the anticompetitive agreements and on market participants. Assomedica (Belarus) and SPP VEK (Kazakhstan) were thus also included in the proceedings. Based on the examination of materials, the Commission found that Cochlear UK, Euromax, Pharm Express, SPP and Assomedica concluded agreements under which **distributors had exclusive rights to import and sell the goods as wholesalers, and they were prohibited from selling the goods of a competitor seller.**

Based on the above considerations, the Member of the Commission in charge of competition policy issued a ruling on the initiation of **the procedure for Case Consideration** (Procedure 99) on 5 March 2019.²

Notes: ¹ Paragraph 5 of Procedure 98. ² Based on paragraph 10(2)–(3) of Annex 19 to the TEAEU and paragraph 13 of the Procedure for Investigations (Procedure 98).

Box 5.6. Investigations in the Corning Case

In 2020, the Commission launched an *ex officio* enquiry in respect of the conduct of economic entities operating in the Cross-Border Market of wholesale distribution of single-mode optical fibre intended for manufacturing of optical communication cables.

The **signs of violation** of competition rules were detected in the conclusion by **Corning Inc** of **long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a guaranteed volume of the products concerned, as well as the preferential right to supply optical fibre produced by Corning to the above economic entities.

Given that there was insufficient information to establish a breach, the Commission commenced the Procedure 98 procedure (Investigation) in order to collect and analyse additional information.

As part of the investigation, **an assessment of the state of competition** was carried out for the period from 2018 to 2019. This timeframe of the investigation was determined taking into account the duration of the alleged infringements.

Copies of such requests are simultaneously **sent to the NCA(s)** on the territory of which the natural or legal person has its residence, seat, or where the State authority operates.⁹⁶

The request shall specify the legal grounds, the purpose of the request, the required information, and the period during which the information shall be provided. Both original documents and copies of documents can be submitted.

The **addressees are obliged to submit** to the Commission, within the time limit set in the request, all **information, documents, statements, clarifications** requested by the Commission. Besides sending a copy to the relevant NCAs of the requests, **no further action by any national authority is required**, the

⁹⁶ Paragraph 78 of Annex 19 to the TEAEU.

Commission's requests are sent directly and the addresses must comply with the request.

Requests may also concern **confidential information**, and the addresses of such requests are obliged to provide them. Handling of confidential documents is regulated by the Agreement on Confidentiality and other acts. Documents containing confidential information must be marked in the same way as in Procedure 97.

Under Annex 19 to the TEAEU, **non-submission or late submission** to the Commission of information (data), including **failure to provide statements** (information) at the request of the Commission, as well as deliberate submission of knowingly **false statements** (information), is subject to a **procedural fine**. Its amount may range between RUB 10,000 to 15,000 for natural persons, **RUB 10,000 to 60,000 for officials⁹⁷** and **individual entrepreneurs**, and **RUB 150,000 to 1,000,000 for legal persons.**⁹⁸

Requests to NCAs for Procedural Actions

The investigations conducted by the Commission may also include a **reasoned request to one or several NCAs to carry out procedural actions** if the information otherwise gathered is not sufficient for making a decision. As we shall see, such possibility also exists at the Case Consideration stage (Procedure 99).

In particular, **the Commission may request NCAs:**

- to question persons subject to the investigation or corresponding proceedings, as well as witnesses;

⁹⁷ Officials are "managers or employees of economic entities (market participants) and non-profit organisations that are not economic entities (market participants) performing organisational and regulatory or administrative and business functions, as well as heads of organisations operating as the sole executive authorities of economic entities (market participants) and non-profit organisations that are not economic entities (market participants)." Natural persons carrying out professional income-generating activities that are subject to state registration and/or licensing under the legislation of the Member States shall be liable for violations of the general rules of competition in cross-border markets as being officials.

⁹⁸ Paragraph 16(5) of Annex 19 to the TEAEU, see also the Fining Guidelines.

- to claim documents required for the investigation or proceedings;
- to inspect territories, premises, documents and objects of persons subject to the investigation or proceedings (except for natural person's housing);
- to submit documents or copies thereof to parties in the relevant case;
- to engage in expert examination and other actions.⁹⁹

The request for procedural actions must be made in writing. As to its **content**, a request for procedural actions addressed to an NCA must specify 1) the case number, a **detailed description of the breach and other related facts, legal qualification** under Article 76 TEAEU; 2) full names and address of persons under investigation or of witnesses, in case of natural persons, their personal data; 3) the exact address of the addressee and name of document to be served (when required); 4) **a list of information to be submitted and actions to be executed**.¹⁰⁰ It may also contain 5) a **time-limit** for executing the request if it differs from the statutory deadline; 6) names of Commission contact persons to be present at or participate in the actions; 7) other motions related to the execution of the submission.¹⁰¹ The request is signed by the Board Member in charge of competition policy. Materials referred to in the text and other documents required for its proper execution shall be annexed.

⁹⁹ Paragraph 61 of Annex 19 to the TEAEU.

¹⁰⁰ Paragraph 62 of Annex 19 to the TEAEU.

¹⁰¹ Paragraph 63 of Annex 19 to the TEAEU.

Box 5.7. Requests for procedural actions in the *Delrus Case*

In application of the Procedure for Investigations (Procedure 98), the Commission found that there was an agreement between Delrus Russia and Delrus Kazakhstan that led to division of the Cross-Border Market for medical equipment calibration services by the territorial principle prohibited under Article 76(3) subparagraph (3) TEAEU. This agreement was implemented by the two companies and caused a significant difference in the price of the relevant services in the territories of Russia and Kazakhstan.

Based on these findings, the Commission requested **the Russian and Kazakh NCAs to conduct certain procedural actions. The NCAs complied with the request**, and, later, the Commission adopted a formal decision finding infringement.

The request must be executed by the NCA **within 1 month of its receipt** or within another period agreed upon in advance by the Commission.¹⁰² If the NCA needs to reach out to another national authority or to a company for information in order to execute the Commission's request, the above periods are extended by the period set by the NCA for the authority or company to provide information.

When conducting procedural actions on the territory of the Member State in which the alleged infringer is registered, the actions are taken **in the presence** or through the participation of the **Commission's employees** and the **representatives of other NCA(s)** on whose territory the breach occurred and/or adverse effects on competition have been identified. When conducting procedural activities on the territory of the Member State where the violation has occurred and/or adverse effects on competition have been identified, employees of the Commission and a representative of the NCA of the Member State of registration of the alleged infringer shall be present.¹⁰³ If participation of these representatives is impossible, the NCA executing the request acts independently.

¹⁰² Paragraph 67 of Annex 19 to the TEAEU.

¹⁰³ Paragraph 61 of Annex 19 to the TEAEU.

The NCA executing the request of the Commission conducts procedural actions **under the legislation of its Member State and only in respect of persons located in the territory of an executing Member State.**¹⁰⁴ **Judicial review** of the procedural actions of the NCA is available according to national legislation, i.e. affected persons may turn to national courts in case of perceived illegality.

The **NCA** shall conduct the actions referred to in the reasoned request and answer the questions raised. In addition, **on its own initiative, it may conduct any actions not provided for by the request** that are related to its execution.¹⁰⁵

In case of a **failure to execute the reasoned request** or impossibility to execute it within the time limit, **the NCA shall inform the Commission** of this fact and of the underlying reasons.¹⁰⁶

The request for procedural actions **may be rejected by the NCA**, in whole or in part, only if its execution may **prejudice the sovereignty, security or public request of an executing Member State or is contrary to its legislation**, which shall be notified to the Commission in writing by the Member State. The Board of the Commission may bring the matter of the lawfulness of a refusal of an NCA to execute a reasoned request before the Council of the Commission.¹⁰⁷

The Commission may send **repeated requests if additional information or clarifications** of the information obtained in the execution of the previous request are required.¹⁰⁸

If requests are sent to several NCAs in the same case, the interaction between such NCAs and the Commission is co-ordinated by employees of the Commission.¹⁰⁹

¹⁰⁴ Paragraph 65 of Annex 19 to the TEAEU.

¹⁰⁵ Paragraph 68 of Annex 19 to the TEAEU.

¹⁰⁶ Paragraph 69 of Annex 19 to the TEAEU.

¹⁰⁷ Paragraph 70 of Annex 19 to the TEAEU.

¹⁰⁸ Paragraph 72 of Annex 19 to the TEAEU.

¹⁰⁹ Paragraph 73 of Annex 19 to the TEAEU.

Unannounced Inspections

The **Commission is not authorised to carry out unannounced inspections** or searches at the business premises of companies under investigation, nor with respect to natural persons.

However, **the Commission has the right to send to the NCAs a reasoned request for such actions**. As noted above, NCAs must execute the Commission's requests for procedural actions **in accordance with national legislation**.

Box 5.8. National Rules and Unannounced Inspections

The interviews conducted by the OECD revealed that the national legislation of some Member State does not allow for unannounced inspections; only inspections notified in advance are permissible. Practitioners and regulators pointed out that this divergence in the approach of national laws precludes the possibility for the Commission to organise co-ordinated and simultaneous dawn raids in all the Member States. It follows that the Commission's possibilities are limited with respect to the prosecution of secret cartels, as it may be deprived of the element of surprise. For instance, if one cartel member or the branch of the infringing company located in the Member State not allowing for announced inspections is notified of the upcoming inspection, it may alert other branches of the same undertaking or other members of a secret cartel, which may lead to the destruction or hiding of evidence.

5.3.3. Rulings Adopted at the End of the Investigations

At the end of the Investigations, the Board Member in charge of competition policy may issue one of the following rulings: **1) initiate the Case Consideration stage;** **2) refuse to initiate** a case; **3) transfer the Application/Materials to NCAs**.

The ruling on initiating Case Consideration is adopted if the investigation has **revealed signs of violation** of the general rules of competition in Cross-Border Markets. This ruling shall contain:

- information on the applicant;
- information on the defendant;

- the date and venue of the Case Consideration session (hearing);
- the **grounds for initiating the case**;
- the **norms of the TEAEU** in respect of which the signs of violation have been revealed;
- the composition of the Case Consideration Commission.¹¹⁰

The content of this ruling is important from the point of view of the rights of the defence. The **grounds for initiating the case** and the **norms breached** are the sole basis for the alleged infringer to build its defence before the Case Consideration Commission, since no formal statement of objections is issued by the Commission at later stages. This issue will be addressed in more detail below.

The ruling on **refusing to initiate a case** is adopted if the actions of the economic entities under examination **do not contain signs of violation** of the general rules of competition in Cross-Border Markets. It must specify the grounds for refusing to initiate the case.¹¹¹

The ruling on **transferring the Application or Materials** to an NCA or NCAs by subordination is adopted if the investigation revealed that the violation in question does not fall within the Commission's competence and, based on the results of the investigation, there are signs of violation of the competition legislation of a Member State (Member States).

¹¹⁰ Paragraphs 12–13 of Procedure 98.

¹¹¹ Paragraph 14 of Procedure 98.

Box 5.9. Referral to NCA in the *Corning Case*

The Corning Case arose from an *ex officio* enquiry in respect of the conduct of economic entities operating in the Cross-Border Market of wholesale distribution of single-mode optical fibre intended for manufacturing of optical communication cables.

The **signs of violation** of competition rules were detected in the conclusion by **Corning Inc** of **long-term agreements with a number of customers in Belarus and Kazakhstan**.

Given that there was insufficient information to establish a breach, the Commission commenced the Procedure 98 procedure (Investigation) in order to collect and analyse additional information. As part of the investigation, an assessment of the state of competition was carried out for the period from 2018 to 2019.

The Commission duly defined the relevant market, the market structure and examined Corning's conduct (see Boxes 2.4, 4.1, 4.8, 4.10 and 4.13).

The Commission, however, stopped short of a final qualification of the conduct. **Corning Inc is registered in the USA and is not registered in any Member State**. Therefore, issuing a decision on the legality of the conduct **was not within the powers of the Commission** under paragraph 4 of the Criteria of Cross-Border Markets.

Considering the above, **all documents and information available to the Commission was forwarded for consideration to the Belarusian NCA**, which finally decided the case on 2 December 2020.

5.4. Case Consideration (Procedure 99)

Case Consideration is the final step of the proceedings during which the parties are heard and the draft decision is drawn up. It is regulated by Procedure 99. This stage begins with the ruling adopted at the end of Procedure 98 to initiate Case Consideration where signs of competition law breaches are established and the Commission has the competence to take a decision on them.

The case is heard by a **Case Consideration Commission**, which is composed of a chairman, a deputy chairman and members. The Chairman is the Board Member in charge of competition policy, who may delegate this task to the director of the Department for Antitrust Regulation. The members of the Case Consideration Commission are selected from among the officers and employees of that Department. One of the members is appointed to be deputy chairman. The Case Consideration Commission is entitled to consider a case if at least two-thirds of the total number of its members are present at the session. Case Consideration also involves **the staff of the NCAs** responsible for liaising with the Commission in its investigation.

Box 5.10. Hearings during Case Consideration

In the *Cochlear* Case, the Case Consideration Commission held eight sessions to examine the evidence, consider and discuss the motions received, and hear the opinions and explanations of the persons involved in the case regarding the evidence presented by other persons involved in the case. It also conducted interviews with persons having information on the circumstances of the case.

After the Case Consideration, the Case Consideration Commission established that the competing companies Belvivad, Assomedica, Pharm Express, SPP VEK and Euromax, operating in one relevant product market, participated in a horizontal agreement prohibited by subparagraph 3 of Article 76(3) TEAEU, which led to the division of the market by the territorial principle and (or) the repartition of customers.

Officials and employees who participated in the Investigations in a given case cannot be included in the Case Consideration Commission in the same case.¹¹² This arrangement aims to ensure independent and unbiased review and to evade any attempts of corruption.

At the stage of Case Consideration, the Commission may still gather information and evidence through **requests for information and requests to NCAs to conduct procedural actions** in the same way as under Procedure 98 Investigations (see Subchapter 5.3.2. Investigative Powers). Thus, in accordance

¹¹² Paragraphs 5–6 of Procedure 99.

with paragraph 21 of Procedure 99 the Case Consideration Commission shall be entitled to request documents, information and explanations from the persons participating in the consideration of the case, in written or oral form, on the issues arising in the course of consideration of the case. The rules on confidential evidence are the same as in Procedure 97 and 98, the Agreement on Confidentiality applies. The rules on failure to comply with the request for information are the same as under Procedure 97 and 98.

Box 5.11. Request for procedural actions and hearings in the *Airlines Case*

In the Airlines Case, following the Investigation, the Commission issued a ruling on 16 March 2017 on the initiation of Procedure 99 Case Consideration, copies of which were sent to the NCAs.

Under paragraph 61 of Annex 19 to the TEAEU, the Case Consideration Commission sent **requests for procedural actions to the Armenian and the Russian NCAs**, in particular with regard to Airline Companies' reservation systems. The case was suspended, copies of that decision were sent to the NCAs. The Armenian NCA reported that the air carriers operating in Armenia could not provide relevant information on reservation systems. The Russian NCA submitted information on the sale of air tickets by the Airline Companies during the period from 23 June 2016 to 6 July 2016.

From February to June 2018, the Case Consideration Commission held several meetings and collected evidence. It closed the investigation with respect to **Donavia because it was declared bankrupt** by court decision of 10 August 2017. It also excluded Ural Airlines from the proceedings as its market share was below 15% of the total volume in the relevant markets of Yerevan-Moscow, Yerevan-Krasnodar, Yerevan-Rostov-on-Don and, therefore, **Ural Airlines did not have a dominant position**.

With respect to the other companies whose conduct was examined, the Case Consideration Commission held that no violation of Article 76(1) TEAEU (abuse of dominant position) could be found. **The Board of the Commission thus adopted a decision ending the case.**¹ The decision entered into force.

Note: ¹ Decision No. 23 of 4 February 2019 "On Termination of the Case on Violation of General Rules of Competition on Cross-Border Markets".

The case consideration period shall not exceed 60 business days from the date of the ruling awarded on initiating and considering the case. If it is necessary to obtain additional information for making a decision, the case consideration period may be extended by at most 60 business days. The Case Consideration Commission shall issue a relevant ruling on extending the case consideration period.

The Case Consideration Commission shall also be entitled to suspend the consideration period in the following instances and for the following periods:

- **consideration by the NCAs, the EAEU Court, the court of a Member State, the law enforcement authorities of a Member State** of another case that is significant for the consideration of this case;
- **conducting the examination.**
- **imposition of restrictive measures** in the territory of a Member State in accordance with the law of the Member State in connection with a worsening **epidemiological situation or martial law or a state of emergency**, if there are indications that the interests of the Member State are affected by a violation of the general rules of competition in a cross-border market, provided that the persons involved in the case cannot participate in the hearing panel in person (if the hearing in videoconference is not possible).¹¹³

When a case is suspended, the period for the consideration of the case shall be interrupted, and starts counting from the moment the case is resumed.

At the end of the examination of the case, the Case Consideration Commission shall prepare a **draft decision on the case for the Board of the Commission** to consider. If there is a violation, the draft decision shall also specify the **agents' liability**.

¹¹³ Paragraph 30 of Procedure 99.

5.5. Final Decision

5.5.1. Types and Content

The **decision in the case is adopted by the Board of the Commission** on the basis of the draft drawn up by the Case Consideration Commission. The Board may issue three types of decisions: (i) decision finding infringement, (ii) decision stating that the conduct is not a breach of competition rules on Cross-Border Markets, (iii) termination of proceedings because the alleged infringer was liquidated. The decision consists of introduction, description of facts, reasoning and operative part.

The **introductory part** of the decision specifies, among others, the composition of the Case Consideration Commission and the Participants in the in the consideration of the case.

The **descriptive part** specifies how the proceedings were initiated (Application, Materials, or ex officio proceedings), the arguments of the defendant and explanations of other Participants.

The **reasoning** indicates the circumstances of the case established during the Investigation, the evidence on which the conclusions are based, the regulatory legal acts applied to the case. It is also noted if the defendant has admitted the existence of a breach.

The **operative part** sets out the conclusions on the presence or absence of grounds for terminating the consideration of the case, conclusions on the presence or absence of the violation of the general rules of competition in Cross-Border Markets through the conduct of the defendant, the amount of the fine, and measures to prevent and (or) eliminate the consequences of the breach and to ensure competition, indicating the terms for their implementation.

5.5.2. Role of Member States

The draft decision is submitted to the Board of the Commission which determines the presence or absence of a breach and adopts the decision. At this stage, the Commission's counterparts are the bodies of the Member States authorised to interact with the Commission (representations of Member States).

The NCAs receive copies of the draft decisions submitted to the Board and they **may send to the respective representations¹¹⁴ of the Member States their position** (proposals, comments). The representations summarise the received positions (proposals, comments) and may submit them to the Commission as a position of the Member State on the draft decision of the Board.¹¹⁵

It should also be noted that all documents (including **draft decisions**) of meetings of the Board of the Commission, as well as other EAEU bodies **are sent to Member States in advance, to allow the latter to present a position** on the agenda.

5.6. Cross-Cutting Procedural Issues

5.6.1. Separation of Investigation and Decision-Making

The Commission is a monist competition authority with no structurally independent and separate investigation branch and decision-making competition council. That said, there are peculiar features of the proceedings that aim to separate investigations and decision-making. The Investigations are carried out, under Procedure 98, by a case team whose members cannot be subsequently appointed to the Case Consideration Commission.

5.6.2. Early Resolution of a Case

As discussed in detail in Subchapter Proposal Procedure EAEU law allowed for an early resolution of a number of disputes involving competition law opposing an individual complainant or a Member State, on one hand, and the alleged infringer, on the other. By involving the complainant, the alleged infringer and all the NCAs, the Commission aimed to find a solution, through behavioural remedies, that solves the issue and restores competition. As of 15 July 2021, the Warning Procedure replaced the Proposal procedure (see Subchapter Warning

¹¹⁴ Each member-state defines one state body, which will be authorised for interaction with the Commission. Further, all other bodies send their positions on specific issues to that body. The body authorised to interact with the Commission brings together the positions received and sends a unified position of the member state.

¹¹⁵ Paragraph 71 of the Regulations of the Commission.

Procedure). Warnings also aim at finding an early resolution to the case by prescribing commitments and measures to be implemented by the alleged infringer. As an important difference to the Proposal procedure, the adoption of Warnings does not necessarily require consultations with the complainant, the alleged infringer and the NCAs, although the Commission may hold such consultations if it deems them necessary. Also, no formal votes are held on the adoption of a Warning, as opposed to the adoption of Proposals. These changes appear to give the Commission much larger autonomy when adopting Warnings, as compared to Proposals, and may speed up the definition of remedies and increase efficiency. When drawing up Warnings, the Commission assumes a stronger role as a competition law enforcer than in the framework of the Proposal procedure, in which the Commission often appeared as a facilitator striving to facilitate a compromise between the complainant and the alleged infringer. In any event, the Warning procedure also allows for consultations, therefore, the Commission may play the role of a mediator in case the particularities of the case require so.

However, as was the case of the Proposal tool as well, the Warning instrument is only applicable to unfair competition cases, abuse of dominance cases (excluding cases concerning monopolistically high or low prices) and to co-ordination of economic activities. No such possibility appears to exist in so far as agreements are concerned, albeit some non-hardcore restrictions could possibly be resolved in this way (notwithstanding the possibility of granting individual exemptions, which does exist).

EAEU competition law **does not include** any instrument to close a case through **commitments once the investigation stage has started**, although many OECD jurisdictions apply such an instrument. Furthermore, EAEU competition law **does not allow for settlements** in cases concerning hard-core horizontal agreements. In contrast, best international practices across the OECD allow for commitments to be reached at all stages of the investigation as regards conduct not involving hard-core cartels, and for cartel participants to settle the case by admitting the infringement and renounce the right to judicial review in return for fine reductions.

Another issue is equal treatment of alleged infringers. The Warning tool is only available in the framework of Procedure 97 Examination of Applications/Materials. If the proceedings start as a result of lodging Applications or Materials, the alleged infringer may receive a Warning and can avoid the establishment of liability and the imposition of a fine if it accepts and implements the commitments and measures prescribed in the Warning. However, no such possibility exists if the

Commission starts the proceedings *ex officio*, since in such cases the proceedings begin with Procedure 98 Investigations, in which the Warning instrument is not applicable. Therefore, for the same infringement, an alleged infringer may escape liability and fines if the case was initiated by a private party complainant or by an NCA (where Procedure 97 applies), but cannot avoid these consequences if the case is commenced by the Commission *ex officio* (where Procedure 97 is skipped).

5.6.3. Caution Procedure

The amendments to Annex 19 to the TEAEU, which entered into force on 15 July 2021, also provide for another tool that serves for preventing possible competition law infringement. Under paragraph 13.4. of Annex 19, the Commission Board Member (Minister) in charge of competition may issue a **Caution notice** to an official of an economic entity, as well as to individuals, in order to **prevent violation of the general rules of competition that may result from planned actions announced publicly**. The detailed rules regarding the Caution instrument are laid down in Decision No. 28 of the Council of the Commission of 5 March 2021 (hereinafter “Decision on Caution”).¹¹⁶ The Caution Procedure is a specific procedure regulated separately, and it does not form part of Procedures 97, 98 and 99.

Under paragraph 3 of Decision on Caution, the grounds for issuing a Caution to an official of an economic entity, as well as to an individual, is the presence of a **public statement** of such persons on the **planned behaviour in the Cross-Border Market**, if such behaviour **may lead to a violation of general competition rules**. A **public statement** is understood as a statement, addressed to anybody, including an indefinite circle of persons. It covers all situations where the statement has been made under conditions that allow obtaining information from such a statement (for example, a statement was made at a conference, in an interview, posted in the media, published on the internet, in advertising brochures or booklets, etc.).

¹¹⁶ Decision No. 28 of the Council of the Eurasian Economic Commission of 5 March 2021 “On approval of the Procedure for issuing a caution on inadmissibility taking actions that may lead to a violation of the general rules of competition in cross-border markets of the member states of the Eurasian Economic Union”.

In this context, the Commission may use the information on the public statements received from a) state bodies of Member States, economic entities, individuals; b) from the media; or c) information collected *ex officio*.¹¹⁷

The Commission's authorised structural unit ("Department for Antitrust Regulation"), within 10 working days from the date of receiving information about the public statement, a) verifies the existence of information (data) on the public statement; b) evaluates the public statement with respect to the presence of signs of violations of competition rules; and c) prepares an opinion on the necessity (or its absence) for issuing a Caution; d) if necessary, draws up a draft Caution and submits them for consideration to the Board Member (Minister) responsible for competition.

A draft Caution prepared by the Department for Antitrust Regulation is attached to the conclusion on the need to issue a Warning, if using of the Warning instrument also appears to be expedient.

The draft caution has the following **content**:

- name of the official of the economic entity who made a public statement, his position, name and place of registration of the economic entity, or the name of the individual who made a public statement and his or her address;
- the source of information on the public statement;
- the content of a public statement on planned behaviour that may lead to a violation of the general rules of competition in cross-border markets;
- the provisions of the TEAEU that may be violated as a result of the implementation of the actions mentioned in the public statement.

The Board Member (Minister) decides on issuing or not issuing the Caution. If it is issued, he signs it.

5.6.4. Due Process

EAEU law does not contain any specific provisions on **legal privilege**. This issue remains in the ambit of national legislation. The OECD has not received any

¹¹⁷ Decision on Caution, paragraph 4.

observations from practitioners on dysfunctions resulting from divergences of national approaches.

The same goes for the respect of the right not to testify against oneself (**self-incrimination**). The issue is regulated in the Member States' legislation. The OECD received observations from private practitioners with respect to the lack of a harmonised approach regarding leniency Applications. It was revealed that if a leniency Application is submitted to the Commission and the case is later transferred to an NCA because of the Commission's lack of competence, **the benefit of leniency is not transferred together with the case.**

With respect to the **rights of the defence**, it was explained in the description of the steps of the proceedings in Chapters 5.2.–5.5. above that, where Investigations have been conducted (Procedure 98), the alleged infringer first receives the ruling that **initiates the Case Consideration stage** (see 5.3.3). It appears that this ruling merely specifies the **grounds for initiating the case** and the **TEAEU norms breached, while supporting evidence is not enclosed and description of the relationship between the charges and supporting evidence is not provided.** The alleged infringer obtains only access to the file at a later stage, in the Case Consideration procedure (Procedure 99), where deadlines are rather short.

It appears that the procedure features **no statement of objections**, i.e. a single document that would combine the description of the evidence (simple facts), the conclusions that the Commission draws from the evidence (qualified facts) and the application of relevant provisions to those facts (legal qualification).

Box 5.12. Lack of Statement of Objections

The lack of a statement of objections was highlighted by several legal practitioners, who mentioned that even though access to evidence is granted in the Case Consideration procedure, it may not be possible to know with certainty what factual conclusions the Commission has reached on their basis.

5.6.5. Confidentiality Issues

Handling confidential information by the Commission and the NCAs, in the context of proceedings before the Commission, is regulated in two key documents: (i) the **Agreement on Confidentiality**,¹¹⁸ which is an international agreement within the EAEU and lays down the most important rules; (ii) Decision No. 71 on the **Procedure for Handling Documents of Limited Distribution** (Confidential and for Official Use) in the Commission. The latter includes a competition law section and lays down strict rules of handling confidential information within the Commission, including personal liability of officials and employees.

As explained above, the confidential information may be included or annexed to the Applications or Materials submitted at the start of Procedure 97. Furthermore, the Commission may request information from any natural or legal person and from national authorities at all three stages of the proceedings. Such information may also be included or annexed to in the position papers that interested parties (in particular the complainant and the alleged infringer) submit at various stages of the proceedings. In addition, NCAs may also gather documents that contain confidential information in execution of the Commission's request for procedural actions, which need to be transmitted to the Commission. NCAs may also wish to transmit to the Commission such documents, relevant to the case, which they have gathered anyway, on their own initiative, in the context of another case, or where they go beyond the original scope of the request for procedural actions by the Commission on their own initiative.¹¹⁹

As a common rule applicable to all submissions containing confidential information is that documents and annexes that contain confidential information must be sent to the Commission in a **sealed envelope (parcel) with a confidentiality mark**¹²⁰ (stamp).

¹¹⁸ Agreement on the Procedure for Protection of Confidential Information and Liability for its Disclosure in the Exercise of the Eurasian Economic Commission's Authority to Control Compliance with the Common Competition Rules of 12 November 2014.

¹¹⁹ The NCA may, **on its own initiative, conduct any actions not provided for by the request** that are related to its execution (paragraph 68 of Annex 19 to the TEAEU).

¹²⁰ "Confidential", "Commercial secret", "For official use only".

Article 3(5) of the Agreement on Confidentiality lays down key rules on transmission of confidential information.

- **Confidential information obtained by the Commission** when executing its competition law competences from legal entities, individuals, NCAs and other authorities of the Member States may be used by the Commission solely for purposes for which such information was submitted. The Commission **is only allowed to transmit such information** to third parties **upon the written consent of its holder**, except for the transmission of confidential information to NCAs “for the purposes of exercise of powers vested in them in compliance with the Agreement on Competition.”¹²¹
- The **Commission may transmit confidential information obtained from one NCA to another solely with the written consent of the NCA** having submitted the confidential information.

Based on the comments from stakeholders interviewed by the OECD, it appears that under national legislation at least in some Member States, the NCA that has gathered confidential information may only transmit that information to anybody else (including the other NCAs) once the information holder has agreed. Therefore, in practice, transmission of documents containing confidential information collected by an NCA and transmitted to the Commission to other NCAs requires two approvals: one from the NCA, and the other from the information holder, and **the NCA having produced confidential documents must first ask for the permission of the information holder** before giving its own consent to the Commission for transmission, by the Commission, of the documents to other NCAs.

Interviewees also mentioned that, in some Member States, national legislation precludes the transmission of documents containing confidential information even to the Commission without the permission of the information holder.

¹²¹ This agreement lost its effect upon the entry into force of the TEAEU. The provisions are included into the EAEU Treaty as well as into other normative acts.

Box 5.13. Confidentiality

According to several interviewees, regulators and private practitioners alike, the need to obtain permission from the source of confidential information and the originating NCA in order to transfer that information to another NCA presents the practical difficulty that, by the time the approval from the holder of the confidential information arrives, the proceedings led by the Commission have already been moved to a next stage, without the NCAs having had access to any part of the documents bearing the confidentiality mark. Commentators also pointed out that permission to disclose the entire document or set of documents is normally given without any problem by the holder of information for the purposes of transmission to other NCAs, and the need for permission is viewed, in many cases, as a source of delay rather than a procedural guarantee.

Another issue is the situation where the Commission has received confidential information in response to a request for information it made to a natural or legal person. It appears that even in this situation, the Commission may only forward documents containing confidential information to NCAs where such transmission is permitted by the information holder. Interviewees indicated that such permission is never refused in practice, however, the need for it prolongs the procedure.

A separate issue regarding confidentiality has been revealed at the OECD's interviews in the context of access to file and rights of defence. It appears that once a document or set of documents contained in a parcel bears the "confidential" mark, no content included in it can be disclosed without the permission of the information holder. Such permission is rarely granted vis-à-vis the alleged infringer, which, therefore, cannot access these files. EAEU law does not provide for the need to justify the confidential nature of individual pieces of information included in documents, and the confidentiality stamp on an entire parcel precludes access to the file with respect to all the documents included in it.

The legal systems of most OECD jurisdictions prescribe the need to justify why some parts or data included in documents are confidential. Justifications include business secrets or sensitive personal data. Entire documents cannot be excluded from the access to file by a simple confidentiality stamp, non-confidential versions

must be submitted. Only those sections can be redacted from a document in respect of which confidential treatment is individually justified.

5.6.6. Practice Regarding Interaction with NCAs

In the period from 2016 to 2020, interaction between the NCAs and the Commission took place:

- in the Examination of 76 Applications or Materials (Procedure 97);
- in the development of 24 Proposals on actions to be taken to eliminate the signs of violation and restore competition;
- in 30 Investigations (Procedure 98) into substantive and procedural breaches;
- in Case Consideration (Procedure 99) of 12 cases concerning breach of substantive law;
- in Case Consideration (Procedure 99) of 4 cases on failure to submit adequate information (procedural breach);
- in the adoption of 9 competition law decisions of the Board (5 substantive, 4 procedural);
- in the adoption of 4 instructions by the Supreme Council on the issue of the Commission's Annual Reports on the state of competition on Cross-Border Markets and the measures taken to combat violations of the general rules of competition in them.

5.7. Fine Collection and Monitoring Remedies

5.7.1. Fine Collection

Under the applicable EAEU rules, the **time-limit for the voluntary payment of a fine is 60 calendar days** from the date of entry into force of the decision of the Board of the Commission on the imposition of a fine.

As to practice, the Commission has not reported any obstacle to the collection of fines. It believes, in general, that the fines imposed have a sufficient deterrent effect.

The **highest ever fine** imposed by the Commission in Decision No. 88 of the Board of the Commission of 7 July 2020 (**Cochlear case**). The Commission

imposed fines on economic entities and their officials totalling at 4,874,277 Russian roubles – i.e. USD 68,218 at that date's exchange rate.¹²²

5.7.2. Monitoring Compliance with Behavioural Remedies

The Commission's decisions imposing behavioural remedies and commitments are binding under the EAEU Treaty, and they oblige the infringer to perform or to abstain from certain actions. The infringer is obliged to execute the decision within the time limits specified in the decision itself. In case the infringer fails to comply, the Commission's decision shall be directly executed by the enforcement authorities of the Member States.

The **operative part** of the Board's decisions specify (i) the content of behavioural remedies/commitments, as well as (ii) the procedure, deadline and terms for their execution. Further, the operative part of the decision also specifies (iii) the terms and deadlines for submission of information (documents, data, evidence) to the Commission confirming the execution, by the infringer, of the remedies. Upon the expiration of the deadline for submitting such information, the Commission has the right to request relevant information from the person liable to execute the order. In case of failure to provide such information, the Commission has the right to consider the issue as separate instance of procedural breach.

According to the Commission's indications, it is currently working on improving the mechanism of execution of such decisions. The Commission has also prepared draft amendments to the EAEU Treaty providing for liability in the form of a fine for non-execution and improper execution of the decision by the infringer.

¹²² The USD/RUB exchange rate on 20 July 2020 was 1 USD = 71.4512 RUB.

6. Related Policy Areas

In addition to its competition enforcement powers, the Commission's Competition Branch has powers in the fields of unfair competition, trade policy and price regulations. Furthermore, while the Competition Branch is not responsible for consumer protection, it co-operates closely with the Department responsible for that policy.

6.1. Unfair Competition

Under Article 76(2) TEAEU, **unfair competition** is categorised as falling within the general rules on competition:

Article 76 TEAEU [...]

[Unfair competition]

2. *Unfair competition is not allowed, including:*

- 1) **[tarnishing]** *dissemination of the false, inadequate or distorted information which can cause losses to an economic entity (market entity) or can cause damage of its business reputation;*
- 2) **[misleading information]** *misleading concerning character, method and place of production, consumer properties, quality and quantity of goods or concerning its producers;*
- 3) **[unlawful comparative advertising]** *incorrect comparison by the economic entities of the goods produced or sold by it with the goods produced or sold by other economic entities (market participants).*

Annex 19 to the TEAEU further specifies¹²³ that unfair competition means **any actions** of an economic entity or group of persons or several of these **aimed at obtaining an advantage in business activities**, contrary to the legislation of the Member States, business customs, requirements of integrity, reasonableness and fairness, which have caused or may cause damage to competitors or their business reputation. This field **may concern cases that involve trademarks** (e.g. the use of the trademarks of competitors for unlawful comparative advertising or other unfair advantage taken from the competitor's reputation) and passing-off.

With respect to cases of unfair competition, the Criteria of Cross-Border Markets¹²⁴ provides that prosecution of **violations** is carried out **by the Commission if the economic entity** whose actions violate the prohibition, and the economic entity (**competitor**) who has been or may be harmed in business reputation as a result of such actions, are **registered in the territories of different Member States**.

In this field, the Warning **procedure** applies.¹²⁵ Upon receiving an Application (from a company) or Materials (from NCAs), the Commission must endeavour under Procedure 97 to find a settlement between the applicant and the company whose conduct is criticised. The settlement must be approved by the applicant, the infringer and the NCAs, beside the Commission itself. These cases are dealt with by the Department for Antitrust Regulation, as in the cases of anticompetitive agreements and abuse of dominant position, albeit by a different division (see Figure 3.1). During the period between 2016 and 2021, out of the 84 cases that have been considered by the Commission in Procedure 97, 43 concerned unfair competition and 41 anticompetitive agreements and abuse of dominant position.

6.2. Trade Policy

In order to implement paragraph 221 of Annex 8 to the TEAEU (Protocol on the Application of Safeguard, Anti-dumping and Countervailing measures in relation

¹²³ Paragraph 2(14) of Annex 19 to the TEAEU.

¹²⁴ Paragraph 3 of the Criteria of Cross-Border Markets.

¹²⁵ Paragraph 13 of Procedure 97.

to Third Countries),¹²⁶ the Competition Branch is empowered to assess the effects of special protective, anti-dumping or countervailing measures on competition on the relevant product markets within the EAEU, in case one or several of the undertakings selling like products in the EAEU may be in a dominant position.

During the period between 2016 and 2021, the Department for Antitrust Regulation carried out 17 assessments of the impact of anti-dumping measures on competition (of which 3 assessments are currently in progress).

Two different departments of the Commission deal with trade policy issues and issues of assessment of consequences of protective measures impact on competition. The body in charge of trade policy is the Internal Market Protection Department (IMPD), which is part of the Trade Policy Branch. The IMPD's competence includes preparing decisions on the introduction of protective measures based on the results of relevant investigations. The Department for Antitrust Regulation (DAR) merely conducts assessment of the consequences of protective measures on competition.

The assessment of the (proposed) protective measures' impact on competition is carried out by DAR if the IMPD has grounds to suppose that there is a dominant economic entity operating in the commodity market at issue.¹²⁷ Due to the fact that the dominant economic entity can influence the conditions for the circulation of

¹²⁶ Under paragraph 221 of Annex 8 to the TEAEU: "If within two calendar years immediately preceding the date of initiation of the investigation, one manufacturer supporting the application referred in paragraph 186 of this Protocol (considering it as a part of a group of persons within the meaning of Section XIII of the Treaty) accounts for such a share of the production in the customs territory of the Union of the like or directly competitive product (in the course of safeguard investigation) or the like product (in the course of anti-dumping or countervailing investigation), that in accordance with the methodology of competition assessment approved by the Commission, the position of this manufacturer (considering it as a part of a group of persons) in the relevant product market of the Union may be recognised as dominant, the structural unit of the Commission authorised to control the compliance with the general rules of competition in cross-border markets area, upon the request of the investigating authority, assesses the effects of the safeguard, anti-dumping or countervailing measures on the competition in the relevant product market of the Union."

¹²⁷ NB: trade law uses the concept of "like products" which does not necessarily correspond to "relevant market" in the competition law sense.

goods on the market, assessment of the consequences of the impact of protective measures on competition is the competence of the Competition branch.

The findings on the assessment of the proposed protective measures' effects on competition are included in the materials prepared for the Board meeting that decides on the adoption of the protective measure (for consideration by the members of the Board). The content of the findings does not appear to be an obstacle to deciding the adoption of the protective measure.

The procedure in this regard is laid down in a Decision of the Board of the Commission.¹²⁸

6.3. Price Regulations

The Competition Branch (Division for Unfair Competition and Price Regulation Investigation) has the power to consider issues related to the introduction by the EAEU Member States of state **price regulation for certain types of goods**.

Consultations are held in this area of activity, and **when a Member State applies for the introduction of state price regulation, the Commission examines such measures** in the context of possible restrictions of competition in cross-border markets, including an assessment of the possibility of creating barriers to entry and reduction of the number of competitors.

The procedure for the introduction of state price regulation is regulated by Section VII of Annex 19 to the TEAEU. The procedure for submitting appeals to the Commission by EAEU Member States on the facts of the introduction of state price regulation, their consideration by the Commission and consultations is regulated in detail in a Decision of the Board of the Commission.¹²⁹ During the period between 2016 and 2021, 30 such cases were dealt with by the Competition Branch. The employees dealing with such cases (Division for Unfair Competition and Price Regulation Investigation) may be the same as the ones who handle unfair competition cases.

¹²⁸ Decision No. 68 of the Board of the Commission of 10 May 2018 "On approval of the Procedure for assessing the effects of Safeguard, Anti-dumping and Countervailing measures in the relevant commodity market of the EAEU".

¹²⁹ Decision No. 221 of the Board of the Commission of 25 December 2018.

6.4. Co-operation in the Field of Consumer Protection

Consumer protection as such is not within the powers of the Competition Branch. It is the responsibility of the **Department of Sanitary, Phytosanitary and Veterinary Measures** of the Commission, pertaining to the portfolio of a different Member of the Board.

Consumer protection is regulated in Section XII of the TEAEU, as well as by Annex 13 to the TEAEU on the “Protocol on Agreed Policy in the Sphere of Consumer Protection”. It aims to ensure equal conditions for the citizens of the Member States to protect and assert consumer rights, through the convergence of national regulation. The Commission creates tools for the EAEU Member States to conduct a co-ordinated policy of the Union. Member States have adopted laws on the protection of consumer rights, national mechanisms for the protection of consumer rights are applied, and various bodies and structures deal with consumer rights.

The **Competition Branch** nonetheless has the power to prosecute violations of the rules on **unfair competition**. This power is in a way intertwined with consumer protection, for instance, misleading information on a competitor may be conveyed towards consumers, and the prohibition of misleading or unfair comparative advertisement under Article 76 TEAEU also aims at protecting consumers, apart from ensuring the rights of competitors.

The Competition Branch may hold consultations and meetings with representatives of other Branches of the Commission (e.g. with the Department responsible for consumer protection, Technical Regulation Branch of the Commission). The two Board Members in charge of competition policy and consumer protection, respectively, may also co-ordinate their approaches.

The Commission may also co-ordinate its approach with representatives of national authorities. Such meetings are actually held on a permanent basis, since draft regulations and other documents of the Branches of the Commission must be agreed on by the national authorities in advance. Furthermore, the agenda and all documents (including draft decisions) of Board meetings are sent to the Member States, ahead of the meetings, in order to allow the latter to present their position on these.

7. International Co-operation

The Commission indicated that it was difficult to obtain information from foreign entities in the context of competition law enforcement, also on account of the exclusion, from its powers, of the possibility of investigating such entities. The below paragraphs sum up the existing international instruments allowing for co-operation with authorities in third countries and the Commission's current initiatives regarding the extension of such possibilities.

7.1. Existing Instruments

The EAEU has concluded **international agreements** that include provisions concerning co-operation with competition agencies of third countries. Such provisions can be found in:

- The free trade agreement between the EAEU and its Member States, of the one part, and the Socialist Republic of **Viet Nam**, of the other part;
- The free trade agreement between the EAEU and its Member States, of the one part, and the Republic of **Singapore**, of the other part;
- The agreement on economic and trade co-operation between the EAEU and its Member States, of the one part, and the **People's Republic of China**, of the other part.

According to these agreements, the contracting parties recognise the importance of co-operation in the field of competition, including promoting effective **competition law enforcement**. Co-operation includes the exchange of information, consultations, and co-operation in competition law enforcement activities.

With respect to enforcement, if a contracting party to these agreements considers that its interests are affected by anticompetitive practices in the territory of another party, **it may request that the other party co-operate in competition law enforcement.** The requested party shall carefully consider the request and decide whether to initiate, in accordance with its laws and regulations, competition law enforcement actions. It will inform the requesting party of the results of such consideration and of the enforcement actions it undertakes. In order to address specific matters, parties may request consultations through contact points. At present, The Commission is investigating competition violations involving companies from the People's Republic of China. In this regard, the Commission requested assistance from the Chinese competition authority. Consultations are currently in progress.

The agreements mentioned in 7.1 above also include joint training programs, workshops and research collaboration, as well as other activities for the purpose of enhancing each party's capacity on competition policy and enforcement.

Moreover, there are a number of Memoranda signed by the Commission and various countries and regional organisations which contain competition provisions. While these documents do not contain provisions requiring co-operation regarding investigations, they contain provisions on exchanges of information. As an example, in 2020, within the framework of the Memorandum of understanding between the Commission and the Andean Community, the Competition Branch of the Commission requested information on the experience of Andean Community in abolishing regional roaming tariffs. The information received was used in drafting the roadmap for abolition of roaming fees within the EAEU. In turn, the Andean Community requested materials and information on the Commission's Review of Competition regulation in Digital Markets. On 25 August 2021, the Co-operation Program with the Andean Community on competition issues was signed, and it was decided to create a working group on roaming and digital markets.

The Commission has not yet had an opportunity to undertake co-ordinated enforcement actions with a third country competition agency, nor has it carried out co-ordinated advocacy activities.

However, as part of the implementation of the agreements and memoranda described above, exchanges of experience and joint seminars have been held.

With respect to staff training, the Commission's personnel have regularly participated in seminars organised by the OECD Regional Centre for Competition

in Budapest since 2018. In 2015 and 2016, there were reciprocal weeklong internships for staff of the Austrian Competition Authority at the Commission, and vice versa. Commission representatives also participate at seminars and other events organised in frames of the ICN working groups.

7.2. Initiatives

For the time being, bilateral arrangements between the Commission and third country competition authorities do not cover assistance in investigations, except in the case of third countries with which free trade agreements have been concluded.

In order to address this issue, and taking into account the regular necessity of obtaining documents from foreign companies, the Commission has initiated its involvement in a number of activities:

- On the basis of **Section F of the United Nation's Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices**, the Commission has requested the assistance from the UNCTAD Competition and Consumer Policies Branch in connection with an ongoing investigation concerning the initiation of contacts and requests for information from foreign multinational companies registered and operating in the US and Ireland. At the time of writing, the process was still underway.
- The Commission participates in the UNCTAD Working Group on Cross Border Cartels, which may foster international co-operation in cross border competition investigations.
- The Commission, jointly with UNCTAD, promoted a meeting with regional organisations with supranational powers in the area of competition, such as European Commission, Andean Community, COMESA, MERCOSUR and others. The meeting aims to discuss possible means of co-operation, exchange experiences and promote possible interactions when investigating cross border cartels. The meeting took place on 26 May 2021, and it was agreed that further meetings will be held.
- A memorandum with COMESA is in the process of negotiation; it includes provisions to facilitate market researches and investigations.

8. Advocacy

Competition advocacy encompasses two main areas: competition assessment of laws and regulations and promotion of competition culture. Within the Competition Branch, the Division for International Co-operation and Competition Advocacy, placed within the Department for Competition and Public Procurement Policy, is responsible for **competition advocacy**. Advocacy encompasses two main areas: competition assessment of laws and regulations and promotion of competition culture.

8.1. Assessment and Development of Legislation

Beside including the Division in charge of advocacy, The Commission has procedures in place regarding the **Institute of Regulatory Impact Assessment**. There is a functioning Working group that also includes representatives of the Competition Branch. As part of this work, the drafts acts of the Commission are submitted for **public consultation**, posted on the official website of the Commission in order to allow interested parties to present their positions.

In addition, the Competition Branch also holds meetings with business representatives under the name “**Public Consultation Office**”. Since 2018, regular field meetings of this Office have been held to expand contacts between the Commission and the business community. At these meetings, business representatives have raised outstanding or problematic issues, e.g. concerning the content of EAEU regulatory legal acts, liability for competition law violations, procedure for submitting Applications/Materials to the Commission and related requirements. During these meetings the Competition Branch’s legislative and other initiatives are also being discussed with business, lawyers, academics.

During the last five years, the Competition Branch held the following Public Consultation Office meetings:

- 2018 – 6 on-site meetings (in all EAEU member states).
- 2019 – 23 on-site meetings (in all EAEU member states).
- 2020 – 1 online meeting.
- 2021 – 8 online meeting, 1 on-site meeting (in all EAEU member state).

In 2018 and 2019, meetings of the Public Consultation Office were held in all EAEU Member States. More than 850 companies took part. Since 2020, the meetings of the Public Consultation Office have been held online, with live broadcasts on YouTube and on the Commission's website. Business representatives have the opportunity to ask their questions directly to the experts.

While NCAs are normally involved in discussions regarding initiatives and drawing up new legislation by the Commission, NCAs have no formal duty to react to legislative initiatives of the Competition Branch.

Finally, the Commission drew up the Survey on “Competition (antimonopoly) regulation in digital markets”. This document has been prepared in order to achieve common understanding of issues related to antitrust regulation in digital markets, including common terminology. The Survey explains the terms “digital markets,” “algorithms,” “digital platforms,” “big data” and other terms relevant to digital market regulation. It also contains the description of regulation of digital markets in other jurisdictions, approaches to definition of geographical borders of digital market, indicators used for determination of volume of digital markets and establishment of dominance in them. The Survey also sets out recommendations which aim to achieve common approaches to regulation of digital markets by the Commission and the Member States.

8.2. Promoting Competition Culture

The Competition Branch is engaged in various forms of dissemination of information on EAEU competition law in the business community, the general public and media in all EAEU Member States, in co-operation with national authorities. These mechanisms include:

- information in the media of the EAEU Member States on the state of competition and measures taken by the Commission and the NCAs to protect and develop it;

- publishing explanatory notes on legislation, news about the activities of competition authorities, texts of decisions issued by competition authorities on the Commission's website;
- publication of printed materials explaining the goals and objectives of modern antitrust regulation;
- interaction with the business community and regulators, including participation of Commission representatives at various conferences, seminars and workshops.

NCAs, public organisations and business associations, chambers of commerce of EAEU Member States actively support the Commission in knowledge dissemination.

In 2019, in Moscow, the Commission held an International Meeting – Round Table on Competition. The main purpose of this event was to inform foreign companies and business associations about the powers of the Commission in the field of competition and antitrust regulation, as well as about the existing common principles and rules of competition in the EAEU. This event brought all stakeholders together; in addition to representatives of foreign companies and associations of third countries, the meeting was also attended by heads of NCAs, judges of the EAEU Court, representatives of the UNCTAD and the OECD, chambers of commerce and industry of third countries, as well as the business community of the EAEU. Further similar meetings are planned for business representatives from EAEU Observer States (Moldova, Uzbekistan, Cuba).

The Competition Branch also regularly releases information on the latest changes in the EAEU law, the general rules of competition and the responsibility for violation of these rules on its website and social networks (Facebook, Telegram, YouTube, etc).

In addition, the Commission published **the manual “Competition Law in the Eurasian Economic Union”**. A **white book “Competition on Cross-border Markets of the EAEU”** has also been prepared. It contains basic information on the rules of EAEU competition law, including information necessary for businesses to protect their rights in the field of competition on the EAEU cross-border markets. The manual and the book are available on the official websites of the Commission and the NCAs, and have been distributed during field meetings of the Public Consultation Office.

Moreover, officials and employees of the Competition Branch give **training lectures and seminars** on EAEU competition law in all Member States at the invitation of individual educational institutions.

Representatives of the Competition Branch are regularly invited to various educational programs to present the EAEU Competition law and enforcement practice. The last program was held in September 2021. The Competition Branch held a training program on “Competition in the Eurasian Economic Union” in the framework of the Training and Methodological Centre of the Federal Antimonopoly Service (FAS) of Russia. The program targets participants from NCAs and competition authorities of the Commonwealth of Independent States (CIS), as well as businesses, lawyers, students and the media. Lectures and courses are also scheduled at various educational institutions.

9. Conclusions and and policy options

9.1. Strengths and Weaknesses of the Eurasian Economic Union's Competition Regime

The history of competition law and its enforcement in the Eurasian Economic Union, arising from the decision of some countries belonging to the Commonwealth of Independent States (CIS) to co-operate more closely and to establish a common market, is marked by constant legislative and institutional changes.

The enormity of the changes cannot be understated. Setting up a new international organisation and competition agency with competences across different jurisdictions, each going through their own reforms; harmonising competition rules; and putting in place a competition policy, enforcement and practice across countries with different trajectories since their independence, are all challenging tasks.

The implementation of reforms over the last years demonstrates that Eurasian Economic Union has risen to the challenge. During the past decade, it has made continuous and significant efforts to ensure sustainable growth in business activity, to balance trade and fair competition, and to put in place a complex institutional architecture to achieve these goals.

The EAEU Treaty sets out substantive provisions on matters such as abuse of dominant position, anti-competitive agreements, horizontal/vertical restrictions and illicit co-ordination of economic activities, as well as unfair competition. Unlike most competition regimes, however, there is no merger control at the regional

level, with competences over mergers staying with those NCAs empowered to review them under national law.

Some of these substantive competition provisions, while aligned with those of the EAEU Member States, are innovative and go beyond the typical competition rules found around the world (e.g. joint dominance, co-ordination of economic activities). In addition, the application of some more traditional competition law concepts also depart from OECD practice. For example, EAEU competition law applies strict market share thresholds for establish that a company holds a dominant position, requiring that an economic dominant have a market share exceeding 35%.

The EAEU Treaty also sets up mechanisms for alignment between competition policy at the Union and the national levels. In particular, the Treaty requires national legislators to adopt competition provisions similar to those contained in the Treaty, alongside minimum harmonisation requirements. However, Member States may adopt additional provisions as regards national competition prohibitions. National courts may also interpret EAEU competition provisions differently. This opens the door to the different (application of) competition rules at the national level.

The EAEU Treaty's competition provisions have been coupled with a number of secondary rules. Some of these touch on some substantive matters – e.g. the scope of the Union's competition rules, or the methodologies used to evaluate competitive scenarios and anticompetitive prices. However, secondary rules mainly deal with procedural issues – e.g. the setting of fines, the allocation of jurisdiction between the Commission and the NCAs, the procedural steps in enforcement procedures, and the handling of documents, including the treatment of confidential information.

Despite the adoption of these secondary rules, EAEU competition law contains no block exemption regulations, or guidelines on permissible business conduct – except as regards monopolistic pricing, which is a topic traditionally deemed to fall outside the scope of competition law except in exceptional circumstances.

The beating heart of the EAEU's competition law and policy is the Commission, an authority with a large substantive remit. The wide-ranging responsibilities of the Commission give it an extremely large mandate, which goes along with generous resources and a large staff.

This wide remit may, however, also distract the Commission from enforcement in core competition areas. Most notably, the inclusion of unfair competition – which

covers matters that in other jurisdictions are often classified as unfair business practices – as a focus of competition policy departs from the approach adopted across the OECD.

As a result, some Commission activities that are presented as competition enforcement are on occasion indistinguishable from actions that, in most other jurisdictions, would fall outside the scope of competition law and be categorised as unfair business practices instead. In effect, the Commission has only taken limited action in enforcing traditional competition provisions, and particularly against cartels, while it has been very active – and successfully so – as regards unfair competition matters.

The large substantive competence remit of the Commission is strictly circumscribed as regards their division with national competition authorities. The Commission is only competent if a situation touches on cross-border markets, i.e. the relevant geographic market includes the territories of two or more Member States.

In addition, the application of individual substantive provisions can be subject to additional jurisdictional requirements, e.g. the Commission only has powers as regards anticompetitive agreements if, in addition to there being cross-border effects, there are at least two economic entities involved in the alleged infringement registered in two different Member States. Some of these requirements are quite onerous, particularly for cases of abuse of dominance.

If the relevant jurisdictional requirements are not met, enforcement of competition rules falls within the competence of the individual NCAs – even when a case has cross-border effects. Furthermore, the Commission also lacks jurisdiction whenever a company under investigation is not registered in an EAEU country. In such cases, competence reverts to those NCAs that can have extra-territorial jurisdiction. This state of affairs means that the Commission cannot prosecute possible breaches of EAEU competition law where the potential infringer is registered in a third country, even where the potential infringement (e.g. flowing from standard terms for providing online services or selling goods online) could have very similar effects in several or all Member States.

Where it has competence, the decision-making process of the Competition Branch is divided into three procedural stages: examination of applications (filed from private parties) or materials (transferred from Member State authorities) (Procedure 97); investigations (Procedure 98); and case consideration (Procedure 99). Separate case teams comprising different employees and senior

officials of the Commission act at each procedural stage. The NCAs – and other Member States bodies authorised to interact with the Commission as regards the adoption of a final decision – are involved in the process in accordance with formal, detailed and transparent rules.

As a source of potential enforcement action, the EAEU Treaty provides for a leniency policy to be applied by the Commission. However, the Commission has not received any leniency application to date. A number of reasons have been advanced for this, including the absence of cartel enforcement in general, departures by the EAEU's leniency policy from international standards, and uncertainties about the value of leniency applications should cases be transferred to NCAs.

At an early stage in the proceedings, Procedure 97 provides for a Proposal procedure, since replaced by the Warning procedure. The Proposal was a flexible tool to reach an early resolution regarding possible breach, through the adopting of remedies which can be accepted by the applicant (where the complaint was made by an individual complainant), the alleged infringer, the NCAs and the Commission. No fines could be imposed through a Proposal, and no liability could be imposed. These features have been kept, in essence, in the Warning tool, which replaced the Proposal.

The Proposal and Warning procedures are the only early termination procedures in the EAEU's Commission toolbox. However, they cannot apply beyond this procedural stage – i.e. no commitments or settlements are allowed once an investigation (Procedure 98) starts – and they are only available for unfair competition, economic co-ordination and certain abuse of dominant position cases. Further, since the Proposal and Warning procedures can only be activated following a complaint, there are no early termination procedures available for cases that the Commission starts *ex officio*. Despite these limitations, the Proposal procedure has been extensively used by the Commission in recent years.

The Commission may start an investigation procedure (Procedure 98) after a Proposal or Warning procedure concludes, or *ex officio*. While the Commission has the ability to request data throughout a case, it can only request certain types of data, or rely on certain investigative powers, once an investigation stage formally begins.

For the pursuit of many investigative steps, the Commission relies on the NCAs, to whom it must direct requests to take such steps. NCAs must pursue the

Commission's requests in accordance with their national laws. In certain cases, the NCA can reject to pursue the requested investigative act.

This state of affairs raises difficulties, which are particularly apparent as regards unannounced inspections (dawn raids). The Commission is not authorised to carry out unannounced inspections; instead, it has a mere right to send a reasoned request for such actions to the NCAs. NCAs must then execute the Commission's requests for procedural actions in accordance with national legislation – with the consequence that unannounced inspections are not possible in those Member States which national law does not permit them.

Following the investigation stage (Procedure 98) comes the case consideration stage (Procedure 99). During this stage, the case is heard by a Case Consideration Commission, which cannot include officials and employees who participated in earlier stages of the procedure. The Case Consideration Commission may gather additional information and evidence, in the same way as under Procedure 98 Investigations, and has indeed done so in the past.

The case consideration stage begins with the adoption of a ruling, adopted at the close of the investigation stage, outlining the grounds for initiating the case and the norms breached. The content of this ruling is important from the point of view of the rights of the defence, since it is the sole basis provided to alleged infringer to build its defence. While alleged infringers may be granted access to the file, no formal statement of objections is issued by the Commission after the beginning of the case consideration stage.

Final decisions are adopted by the Board of the Commission, on the basis of the draft drawn up by the Case Consideration Commission. The NCAs receive copies of the draft decisions submitted to the Board and can provide their Member States' comments and proposals concerning it.

Should the Commission establish an infringement, it is empowered to impose behavioural remedies and pecuniary sanctions. The Commission's powers in this regard are broadly in line with international practice, but there are doubts about how deterrent such sanctions might be – particularly in light of the Commission's inability to accurately reflect the duration of the infringement in the fine amount; and of the very short statute of limitations, which runs from the date that the infringement ceases, regardless of when it was uncovered, to the date when a penalty is imposed.

To promote competition law and policy, the Commission is engaged in regulatory impact assessments, and holds regular meetings with business representatives

across the EAEU. The Commission is also engaged in various forms of dissemination of information on EAEU competition law in the business community, the general public, and media in all EAEU Member States, in co-operation with national authorities. Officials and employees of the Commission's Competition Branch also give training lectures and seminars on EAEU competition law in all Member States.

The EAEU has concluded international agreements that include provisions concerning co-operation with the competition agencies of third countries. In addition, the EAEU and the Commission have entered into memoranda with other countries and regional organizations providing for exchanges of information. These memoranda do not regulate enforcement co-operation, however, which is the focus of an OECD Recommendation requiring Adherents to commit to effective international co-operation wherever possible, and take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities (emphasis is ours).¹³⁰

The Commission has not yet had an opportunity to undertake co-ordinated enforcement actions with a third country competition agency, nor has it carried out co-ordinated advocacy activities. On the other hand, it routinely exchanges experiences with other countries, engages in international capacity-building activities, and participates in international competition *fora*.

In short, and as observed in an earlier OECD peer review of an EAEU Member State, the powers of the Commission, and the rules enhancing co-operation with and between the EAEU's Member States' competition authorities, provide a sound framework for establishing efficient and consistent competition enforcement practices in the EAEU and its Member States.¹³¹

This potential is yet to be fully exploited. Below are identified areas where the EAEU could improve its alignment with OECD best practices relating to competition policy, and policy options that could contribute to the reinforcement of the EAEU's competition regime.

¹³⁰ OECD(2014) Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408](#), at II.

¹³¹ OECD (2016) Competition Law and Policy in Kazakhstan: A Peer Review, p. 108.

9.2. Policy Options for Consideration

9.2.1. Substantive law

Recommendation I – Clarify goals of competition policy

The EAEU aims at guaranteeing fair competition and ensuring the observance of market economy principles. Fair competition, in particular, appears to be a fundamental tenet of almost all policy areas of the EAEU. The competition policy objectives pursued by the Commission and the NCAs are broadly the same, and there are no major differences between EAEU competition law and national laws.

However, the EAEU's instruments do not discuss more targeted objectives pursued by the competition laws of OECD jurisdictions, such as goals associated with consumer welfare, economic efficiency, innovation and growth.

EAEU and NCA officials mentioned during the interviews conducted by the OECD that discussions regarding the future development of the EAEU's competition policy are underway. A topic for discussion in these exchanges is said to be how to particularise the EAEU's particular competition policy goals.

The EAEU may take advantage of these discussions to particularise the meaning of the stated EAEU aims of guaranteeing fair competition and ensuring the observance of market economy principles in line with best international practices that focus on the ultimate promotion of consumer welfare and competitive market structures.

Recommendation II – Harmonise EAEU and national competition rules, and ensure that EAEU competition rules have primacy over national law on cross-border cases

At present, the application of national or Union-level substantive competition rules seems to hinge on whether the Commission or the NCAs are competent. While the EAEU Treaty contains both minimum harmonisation requirements towards Member States' competition laws, and common provisions that national legislations must include for the purposes of competition law enforcement by NCAs, there seem to be no impediments to Member States adopting different competition rules – at least in addition to the common EAEU competition provisions – nor is it clear that national courts will interpret these provisions identically across borders.

Inasmuch as national competition rules at Union-level differ from those of the national level, this may lead to similar cases being treated differently depending on the competent competition authority – an undesirable state of affairs, particularly given the possibility of competence over an investigation changing during the procedure.

The EAEU could consider embedding in the Member States' laws a requirement to harmonise their competition laws with those of the EAEU. In the alternative or addition, the EAEU might want to introduce a generic duty of interpretation of national competition laws in line with EAEU law, which would help ensure a coherent approach to the application of competition rules to similar situations regardless of who is competent to investigate them.

The EAEU may even consider requiring national laws to contain provisions acknowledging the supremacy of EAEU regional competition law in relation to matters having cross-border effects regardless of the entity empowered to enforce it (e.g. the Commission, national agencies, or national courts). This will remove potential conflicts of jurisdiction between agencies, as well as eliminate forum shopping of competition rules by firms under investigation.

Such initiatives could reduce the scope for conflict between national and EAEU competition rules, and facilitate co-ordination of enforcement within the region. Ultimately, they may even play a valuable role in facilitating regional integration.

Recommendation III – Align findings of dominance with international practices

Findings of market power should be based on a rigorous assessment of the factors affecting competitive conditions in the market under investigation, of which market shares is but one criteria. However, at present findings of individual dominance are subject to a minimum market share threshold of 35%.

The OECD received many valuable observations, both from regulators and from private practitioners, regarding these thresholds. It was generally found that such a minimum market share requirement could create unnecessary obstacles to the identification of a dominant position. For example, in some markets – e.g. digital markets – measuring both the exact size of the relevant market and the market share of an operator may prove difficult in practice, even if there are clear signs that the operator acts, to a large degree, independently of its competitors and customers and is thus likely to be in a dominant position.

Several interviewees voiced the opinion that abandoning the current focus on minimum market share thresholds, and adopting a more objective approach towards identifying dominant positions, should be considered. In particular, and instead of imposing market share thresholds, the Commission should be able to establish dominance by reference to all the relevant elements appropriate to identify the requisite level of market power, independently of the relevance of individual market shares for this assessment.

It is worth noting that the EAEU has detailed and modern provisions on the assessment of dominance laid down in its Methodology instruments. Given this, it seems appropriate that market shares be treated as merely one of the indicators of dominance/market power, and that establishing market shares not be required for showing dominance if other factors clearly indicate that the undertaking can operate, to a large extent, independently of its competitors and customers.

Recommendation IV – Ensure that sanctions are deterrent

The OECD Recommendation Concerning Effective Action against Hard Core Cartels recommends that adherents impose effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in competition infringements, particularly cartels.¹³²

At present, it is unlikely that the sanctions that the EAEU is empowered to impose will achieve effective deterrence in all cases. According to the EAEU's Fining Guidelines, the Commission is not to apply any duration multiplier when setting its fines. Instead, the sole instrument that the Commission may use regarding infringement duration is the application of a 1.5 weight to be applied on continuous and lasting infringements.

The result of this is that firms may find that engaging in long-lasting anticompetitive conduct is profitable, even when they are caught and sanctioned. For example, a company that is involved in a price fixing cartel for 10 years should arguably be subjected to a higher fine than a company involved in the same cartel for two years, since the former enjoyed anticompetitive profits for a period five times as long as the latter. However, it is unclear that the two companies would be treated differently at present – and, even if they were, a settled *ratio* of 1.5 would make

¹³² OECD Council Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452](#), II. 5.

any infringement lasting more than one year increasingly valuable for an infringement company by reference to the sanction it would be subject to if caught.

In short, it seems likely that the current system may allow an illicit horizontal agreement or concerted practice to be economically beneficial for the participating companies. *In extremis*, this system may even incentivise companies fearing detection to keep engaging in anticompetitive conduct as a means of minimising the expected cost of the sanction by comparison to the benefits they can derive from the infringement.

Another element of the EAEU's system that is unlikely to contribute to deterrence is the statute of limitations for the imposition of a penalty. Under paragraph 12 of the Fining Guidelines, "*a decision on the case on violation of substantive rules may not be issued upon expiry of 3 years from the date of violation.*"

Such a period is rather short, and may allow companies, the infringement by whom is established after more than three years counting from the end date of the infringement, to escape fines. In addition, such a rule may create incentive for the infringing company to strategically delay the investigation procedure with a view to escape punishment.

The EAEU should give consideration to changing its sanctioning practices to ensure that competition enforcement can deter anticompetitive conduct.

One step in this direction would be to penalise anticompetitive infringements by reflecting their duration and, indirectly, the unlawful profit that a company may have derived from them. Adopting a duration multiplier for pecuniary penalties would allow the Commission better to differentiate between different situations, while also ensuring that EAEU competition law acts as an appropriate deterrent against anticompetitive conduct.

Another step that the EAEU might consider taking would be to ensure that the statute of limitations does not create unnecessary obstacles to the sanction of anticompetitive conduct (and particularly covert anticompetitive conduct). At an international level, the statute of limitation typically applies to the beginning of an investigation – and not to the adoption of a final decision; and is set by reference to the moment when the agency or private parties become (or should have become) aware of the infringement.

Recommendation V – Harmonise the competition treatment of IPR related matters

The application of competition law to conduct involving IPRs is fully regulated by law in Kazakhstan and Armenia and, partially, in the Republic of Belarus and the Kyrgyz Republic. Despite these differences, all five EAEU Member States are parties to the Eurasian Patent Organization (EAPO), which provides unitary legal protection for inventions and industrial designs in the Contracting States on the basis of the single Eurasian patent.¹³³

The adoption of a unitary patent valid in all five EAEU Member States is a major integration achievement,¹³⁴ to which competition law can contribute. Technology transfer agreements allow, through patent and know-how licensing, the faster dissemination of new technologies. In order to promote such dissemination, many practices that might otherwise be deemed anticompetitive clauses are allowed.

The EAEU can capitalise on its unitary patent system for the purposes of an even more effective dissemination of new technologies – particularly given that a single supranational body, the Commission, is in a position to promote uniform application of competition rules on technology transfer agreements.

In particular, the EAEU might want to give consideration to promoting a uniform approach of national legislations within the EAEU as regards the interaction between competition law and IPRs, and as regards the rules applicable to IPRs more generally.

Recommendation VI – Issue guidelines and block exemptions

Issuing substantive and procedural guidance enables businesses, public authorities and courts to anticipate the likely approach adopted by an authority to competition issues. Importantly, guidance can even foster consistency of approach within an agency on the substantive competition assessment of a particular issue.

Around the world, the development of substantive guidelines also provides an opportunity for openly discussing how certain business behaviours should be

¹³³ In addition, Azerbaijan, Turkmenistan and Tajikistan are also members of the EAPO

¹³⁴ At the same time, the EAEU legal system currently does not include unitary trademarks, and only national trademarks are available to its economic operators.

treated, and for official approaches to be justified and adopted. Additionally, such procedures contribute to greater awareness of competition law, and to increased legal certainty among the competition community and the addressees of competition rules.

The EAEU has not yet adopted guidance instruments as regards many important topics of competition law.

The Treaty provides that the Commission may grant exemptions for non-hard core competition restrictions, vertical arrangements and co-operative joint ventures in certain circumstances. This is something that the Commission has considered in some cases. While the granting of individual exemptions in individual cases is valuable, such exemptions have a much more limited effect than adopting generally applicable rules and guidance.

Instead of focusing on the granting of individual exemptions, the EAEU could instead give consideration to drawing up guidelines, and, over time, block exemption regulations. Such instruments could take the form of decisions of the Council of the Commission, which are of general application, as is the case of most regulatory decisions in the field of competition. In addition, the Commission might give consideration to drawing up guidelines that provide generic guidance on the lawfulness of horizontal, vertical and unilateral practices.

Recommendation VII – Explore the possibility of adopting a single regional merger control notification for transactions with cross-border dimension

At present, the EAEU Commission does not have merger control competences. Instead, such competences remain with at the national level.

The EAEU could consider adopting a regional merger control framework. Mergers and acquisitions are very common in everyday business. In an integrated market, an increasing number of firms will operate in more than a single EAEU Member States. While not all mergers harm competition, there may be some transactions which effects can be very harmful to the process of competition and consumer welfare in the EAEU. There is a critical need to ensure that such transactions do not have a significant impact on competition within the EAEU Common Market, especially considering that mergers change market structures irreversibly.

The possible anticompetitive effects that a merger would have in different Member States can be better assessed and remedied at the regional level. Furthermore,

merger control is an important mechanism for regional integration, inasmuch as it allows the Commission to endorse transactions that contribute to regional economic integration, while dealing with those transactions that might partition markets in opposition to the regional integration agenda.

Other benefits of assessing mergers at the regional level include reducing the cost of notifying mergers for businesses, and of merger review for the agencies. This cost reduction may be particularly beneficial for smaller agencies, particularly those that lack the financial and technical capacity to review harmful regional mergers affecting their territory effectively.

The success of this regional merger control regime is critically dependent on the Commission having sole jurisdiction to review mergers with a regional dimension, while co-ordinating its investigation with the NCAs. In order to set up an effective merger control regime that does not inappropriately impinge on areas of national autonomy, it is also crucial that mechanisms for the correct allocation of mergers (e.g. notification thresholds) and for co-operation between the Commission and NCAs (e.g. referral and exchange of information mechanisms) be put in place.

9.2.2. Enforcement, prioritisation and advocacy

Recommendation VIII – Allow prioritisation by the Commission, and enhance its agenda-setting role for all EEA Member States

The activities of the Commission's Competition Branch are driven mainly by the cases that reach the Commission's docket. The existence of a duty to evaluate all the complaints prevents it from allocating its resources in light of its priorities.

Inasmuch as the Commission selects priorities, it takes into account Member States' proposals, the views of business and academia, law enforcement practices, global trends, and other factors. However, there is no transparent process whereby this occurs, nor is a final strategic document where the enforcement priorities are outlined published.

The EAEU should grant the Commission discretion to select the cases it should investigate, including an ability to set its own priorities.

Taking into account the limited resources of the Commission, it should concentrate on identifying those infringements threatening free competition the termination of which would have a significant impact on the economy. This selection should be informed by the application of sound economic analysis and

a full assessment of the relevant materials, and follow a transparent decision-making process.

Transparency and disclosure of its priorities are crucial to establishing the Commission's credibility in the marketplace and to justifying the recommended discretion in taking on cases. Current international trends in the competition arena are towards more transparency regarding agencies' enforcement priorities. This often includes roundtable meetings with lawyers and private sector, public outreach, and the publication of public annual plans setting out an agency's strategic objectives.

Given the fact that the cases with the greatest impact on the EAEU's economy will typically also have significant impact in the individual domestic markets of the Member States, the EAEU may consider extending this priority-setting process into a broader agenda-setting effort for competition law and policy across the EAEU, where the Commission and the NCAs can most effectively adopt complementary roles.

Recommendation IX – Prioritise traditional competition enforcement, including against cartels

The overlap of competition competences within the Commission's competition branch with competence over matters than in other jurisdictions would be the competence of courts (e.g. unfair business practices) or other regulators (e.g. consumer protection) may go some way towards explaining the very limited number of traditional competition cases, and particularly of investigations against cartels, brought in recent years.

Regardless of the Commission's competences, it is important that traditional competition be adequately resourced and enforced. This includes cartels, other anticompetitive agreements and abusive conduct.

Most abuse of dominance cases are difficult by nature and do not address the root causes for the alleged infringements. They treat symptoms instead of underlying causes. Stepped up enforcement against hard core cartels would address directly the most harmful kind of competition law violations and would bring immediate results by making markets work competitively, with all the associated benefits to consumers and society as a whole.

Detection, investigation and prosecution of hard core cartels is a priority policy objective for the OECD, and an enforcement priority for competition authorities in the OECD area and beyond.

The EAEU should prioritise cartel enforcement. In addition, the EAEU should also consider investing in initiatives to promote cartel deterrence / advocacy, which will contribute to increased detection and law compliance.

For cartel enforcement to be effective, it is essential that the EAEU implement an effective cartel detection system, is granted suitable powers to investigate hard core cartels, is able to co-operate with other competition authorities and public entities, and, finally, can impose deterrent sanctions. Some of these requirements are discussed in other recommendations in this chapter.

As regards other types of anticompetitive practices, their identification relies on solid understanding of markets and business models. To effectively enforce competition law as regards business conduct with ambiguous effects – or with plausible procompetitive rationales – the Commission’s staff will need to have the requisite expertise, including specialised economic expertise, to enable the EAEU to conduct the detailed quantitative assessments necessary for investigating such practices.

9.2.3. Jurisdiction

Recommendation X – Remove limitations to appropriate territorial competence

The OECD received observations from many stakeholders on the lack of competence of the Commission with regard to companies registered in third countries. The lack of extra-territorial jurisdiction entails that the Commission cannot prosecute possible breaches of EAEU competition law where the potential infringer is registered in a third country, even though the potential infringement can have very similar effects in several or all Member States.

Opinions voiced during the interviews conducted by the OECD converged on the view that, in such situations, the Commission would be best placed to conduct the investigation and impose sanctions. Avoiding multiple parallel proceedings concerning the same conduct by a company registered in a third country may also contribute to efficient management of resources by the NCAs.

Some interviewees also mentioned that the lack of extraterritorial jurisdiction in such cases might cause a negative collision of competences. It appears that according to the legislation of some Member States, in abuse cases, where the national market share of the infringer is above 35% in two Member States, and the criteria for Cross-Border Markets are fulfilled, but the infringer's seat is in a third country, neither the Commission nor the relevant NCA would have powers to investigate the case.

Given this, the EAEU may give consideration to allowing the Commission to investigate and impose remedies with regard to conduct by companies registered in third country companies. Such a proposal could be adopted in general whenever the Commission would otherwise have jurisdiction over a case. Other case-by-case approaches can also be envisioned, e.g. by allowing the Commission to conduct proceedings where all five NCAs agree, in a particular case, on waiving the condition that the infringer must be registered in one of the Member States; or where one or several NCAs request the Commission to conduct proceedings and each of the remaining NCAs agree.

Recommendation XI – Replace the market share threshold for the Commission to have competence over cross-border abuses of dominance

During the OECD's missions, numerous commentators argued that requiring that the market share of the economic entity under investigation for abuse of dominance position to be above 35% in at least two Member States seems inappropriate.

First, introducing a condition that an investigated company must reach a certain market share in order for the EEC to be deemed competent to investigate a certain case, independently – and well in advance – of any substantive conclusion regarding the conduct under investigation is reached, imposes undue burdens on the Commission at the early stages of a procedure.

In practice, the strict market share threshold defined in the Criteria of Cross-Border Markets requires the Commission to either carry out an in-depth market analysis at a stage of the procedure where its competence has not yet been established; or to archive or transfer the case to the NCAs even when it transpires that the relevant conduct impacts various Member States and may be abusive.

Second, the minimum market share threshold might preclude the Commission's competence over a case even in circumstances where it might be better placed

than the NCAs to conduct an investigation. Where it transpires that an operator is in a dominant position in the relevant market in several Member States, but its national market share is not above 35% in at least two Member States, the Commission would not have competence. Most obviously, this precludes investigations where the economic entity under examination has a dominant position with a market share exceeding 35% on the relevant subnational geographic markets, because that economic entity's market share at the national level falls below this threshold.

In addition, dominant positions may be inferred from factors unrelated to market shares, such as control of essential facilities or inputs in upstream markets, or buyer power in downstream markets. It is also possible that the dominant undertaking only has a market share of more than 35% in one Member State, while its market power can be felt in another Member.

Several interviewees voiced the opinion that abandoning the current focus on minimum market share thresholds, and adopting a more flexible approach to establishing the Commission's competence, could be considered. Indeed, an overly strict market share criterion may deprive the Commission of its enforcement competence in cases where an abusive conduct affects the markets of several Member States and the Commission is better placed than the NCAs to intervene.¹³⁵

Removing the market share threshold would allow for the Commission to have competence over such cases. If preserving the institutional balance between NCAs and the Commission were a concern, a number of alternative mechanisms could replace the market share threshold. For example, the Commission's competence might be dependent on the existence of relevant cross-border effects within the EAEU, e.g. the dominant position would need to occur in the product markets of two or more Member States, even if the relevant geographic market is subnational in size and the 35% market share threshold is not achieved nationwide. An alternative, or complementary possibility would be for the Commission's competence in certain scenarios to be subject to the prior approval of the NCAs.

¹³⁵ This will often be the situation even before we consider the practical advantages that the Commission enjoys over certain NCAs, e.g. the Commission has better investigative powers to gather information on the abusive conduct and its effects in several Member States than individual NCAs.

9.2.4. PROCEDURE

Recommendation XII – Set in place effective and practical leniency procedures

No leniency application has been received by the Commission to date. A number of reasons have been advanced for this. Some relate to the absence of effective cartel deterrence, and concomitant absence of incentives for infringing companies to come forward. Without the risk of cartel detection and of deterrent sanctions being imposed, it is indeed extremely unlikely that any leniency policy will be effective.

Other reasons advanced for the absence of leniency applications concern the current design of the leniency mechanisms in the EAEU.

One possible reason for the absence of leniency applications is the risk that the Commission would refer the case and transfer the leniency materials to an NCA, despite the NCA handling the case not granting the benefit of immunity to the applicant. In effect, it seems that the benefits of immunity for the first company that informs the Commission of a secret cartel are not transferable to proceedings before NCAs.

A related reason is the lack of clarity about how priority would be established when leniency applications are submitted by different parties before the Commission and NCAs, respectively. In such a scenario, and should the co-cartelist apply for leniency before the transfer of the case to the NCA, the NCA would then grant the benefit of immunity to the co-cartelist who filed the leniency application with it, and not to the leniency applicant before the Commission.

In short, companies may be wary of submitting detailed and self-incriminating information to the Commission at a stage where it is yet unclear which entity will be competent to prosecute the case. From this perspective, the current system may even detract from leniency applications to NCAs when there is a risk that the Commission might be competent.

It was mentioned to the OECD that it could be possible to hedge against such an outcome by filing leniency applications simultaneously with all five NCAs and the Commission. While it is true that such an approach removes the risk of sanctions following the voluntary submission of self-incriminating information, the need to submit six separate leniency applications (which may actually involve oral

statements to be made at the competition agencies' premises in the official language of the relevant Member State) increases legal costs and risks.

This is particularly the case since there are no common rules governing when a leniency application should be deemed complete, or how priority is to be established. In effect, not all Member States allow for leniency applications under their national rules, which excludes the possibility of a company benefitting from immunity should a case be transferred to these specific jurisdictions.

In addition, there is a serious risk that a leniency applicant will not benefit from approaching the Commission even if the Commission were competent and the applicant provides valuable information and co-operation. In effect, the second and following leniency applicants will not enjoy any benefits from applying for leniency. This can negatively influence the incentives of companies to come forward, even – or particularly – when there is a threat of another company applying for leniency in advance.

Given all this, the EAEU could consider adopting a common leniency policy applicable across the Union in line with international best practices. Such a policy should: (i) not only grant immunity to the first applicant, but extend some leniency benefits to subsequent applicants; (ii) clarify leniency priority rules, including potentially the adoption of a Union-level marker system; (iii) ensure that national and Union-level leniency policies are coherent and applied in co-ordinated fashion; (iv) minimise the repercussions for leniency applicants of their competition liability and information disclosure in related areas (e.g. criminal liability, liability for damages).

Such conduct will be in line with OECD instruments, which set out that competition regimes should introduce effective leniency programmes which: (i) set incentives for self-reporting by providing total immunity to the first applicant that reports its cartel conduct and fully co-operates with the competition authority and sanction reductions for subsequent applicants; (ii) provide clarity on the rules and procedures governing leniency programmes and the related benefits; (iii) facilitate reporting by using a marker system to encourage early reporting and provide certainty to applicants; (iv) establish clear standards for the type and quality of information that qualifies for leniency; (v) ensure continued co-operation between the leniency applicant and the competition authority throughout the investigation; (vi) provide protection or reduction from sanctions for qualifying officers and employees of corporate leniency applicants; (vii) exclude the availability of immunity for cartel coercers; (viii) provide appropriate confidentiality

protection to leniency applicants; and, importantly,(ix).seek to reduce unnecessary burdens for parties seeking leniency.¹³⁶

Recommendation XIII – Ensure that (co-ordinated) dawn raids are possible across the EEA

It is internationally accepted that competition authorities should have effective powers to investigate anticompetitive practices, including conducting unannounced inspections (“dawn raids”) at business and private premises, and having the requisite powers to access and obtain all documents and information necessary to prove cartel conduct.¹³⁷

Despite no unannounced surprise inspection having taken place thus far, theoretically, the Commission can conduct such initiatives – even if only through the NCAs. However, under the national rules of at least one Member State, unannounced inspections are not allowed. Instead, only inspections notified in advance are permissible.

Observers contacted by the OECD remarked that this divergence in national approaches to unannounced inspections precludes the Commission from organising co-ordinated and simultaneous dawn raids across the EAEU. It follows that the Commission’s ability to prosecute secret cartels is limited. Indeed, if one cartel member, or the branch of the infringing company located in the Member State not allowing for announced inspections is notified of the upcoming inspection, it may alert other branches of the same undertaking or other members of a secret cartel, which may lead to the destruction or hiding of evidence.

Given this, the EAEU may want to give consideration to harmonising national approaches more extensively, and assess the possibility of introducing provisions allowing for unannounced inspections in the legislation of all the Member States.

The EAEU could also give thought to implementing co-ordination mechanisms for dawn raids undertaken by NCAs in cases falling within the jurisdiction of the Commission. Alternatively, the EAEU may also consider empowering the

¹³⁶ OECD Council Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452](#), II. 1.

¹³⁷ OECD Council Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452](#), II. 2.a.

Commission to conduct dawn raids across the EAEU under its own competence and using its own resources.

Recommendation XIV – Set in place early resolution mechanisms for all types of cases

EAEU law provides for the early resolution of possible breaches of competition law through the adoption of commitments that eliminate the unlawful behaviour and restore competition. This type of procedure is nonetheless only applicable to unfair competition cases; to abuse of dominance cases, with the exception of cases concerning monopolistically high or low prices; and to co-ordination of economic activities. In other words, such early resolution mechanisms do not apply to many types of anticompetitive practices.

Further, early termination of proceedings is only possible in the context of pre-investigation procedures (i.e. the Proposal or Warning procedures). One consequence of this is that early termination mechanisms are only available when proceedings derive from a complaint, and cannot be used in *ex officio* proceedings. Therefore, an alleged infringer may escape liability and fines for the exact same conduct if the case is initiated by a private party complainant or by an NCA (where the Proposal or Warning procedures apply), but cannot avoid these consequences if the case is commenced by the Commission *ex officio* (where such procedures are not available).

One last concern is that the Proposal or Warning procedures seem to focus on the resolution of conflicts between market participants, and ignore the broader impact of corporate conduct on non-complainants – as would be the case of most final victims of a competition infringement. This is a concern closely connected to the availability of these procedures solely when there is a complaint, but not when the procedure is opened by the Commission *ex officio*.

Even though the Proposal or Warning procedures are valuable (and positively evaluated by market participants), the EAEU might consider adopting mechanisms more closely aligned with common international practice on this matter. The OECD recommends that competition regimes should '*enable and incentivise early case resolution tools such as plea negotiation and settlements, which often require an admission of guilt and/or the admission of facts and/or a*

waiver of the right to appeal.', typically connected to a reduction in the amount of the applicable pecuniary penalty.¹³⁸

This would include the possibility of such procedures (i.e. as regards the adoption of commitments by investigated firms) being extended to all non-hard core cartel cases up to the end of the investigation stage, regardless of how the procedure begins. In addition, the EAEU might consider subjecting the adoption of such commitments to market testing of a broader nature than that which is currently pursued.

In addition, early termination arrangements should also be put in place regarding hard-core cartels when the cartelists admit their guilt and accept not to challenge a final decision in exchange for a fine reduction (i.e. settlements). This is a common procedure in other jurisdictions.

Recommendation XV – Protect the confidentiality of documents, without creating unnecessary obstacles to enforcement procedures and rights of defence

As a rule, competition enforcement regimes should contain clear rules, policies, or guidance regarding the identification and treatment of confidential information. Further, this treatment should protect the confidentiality of information, but without unduly detracting from the effectiveness of competition investigations or the parties' rights of defence.¹³⁹

As it stands, the rules governing confidential information in the EAEU seem to create undue obstacles to the speedy and effective pursuit of competition investigations.

First, under the national legislation of at least in some Member States, the NCA that has gathered confidential information may only transmit that information to anybody else (including other NCAs) once the information holder has agreed to such transmission (i.e. provided a waiver). In some instances, national legislation

¹³⁸ OECD Council Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452](#), II 4.

¹³⁹ OECD Council Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452](#); OECD (2019) Access to the case file and protection of confidential information [DAF/COMP/WP3\(2019\)6](#).

precludes the transmission of documents containing confidential information even to the Commission without the permission of the information holder.

Conversely, where the Commission has received confidential information in response to a request for information, the Commission may only forward documents containing confidential information to NCAs where the information holder permits such transmission. According to numerous observations provided to the OECD, this arrangement presents the practical difficulty that, by the time that the approval from the holder of the confidential information arrives, the proceedings lead by the Commission may have already been moved to a next stage, without the NCAs having had access to any part of the confidential documents. Commentators also pointed out that permission to disclose the entire document or set of documents is normally given by the information holder for the purposes of transmission to other NCAs. The need for permission is viewed, in many cases, as a source of delay rather than a procedural guarantee.

Compounding these challenges, once a document or set of documents contained in a parcel bears the “confidential” mark, no content included in it can be disclosed to it without the permission of the information holder *even for the exercise of defence rights*. EAEU law does not provide for the need to justify the confidential nature of individual pieces of information included in documents, and the confidentiality stamp on an entire parcel precludes access to the file with respect to all the documents included in it.

Further, permission to disclose confidential information is rarely granted *vis-à-vis* the alleged infringer, which, therefore, cannot access these files. EAEU does not contain provisions on access to confidential data necessary for the exercise of rights of defence.

The legal systems of most OECD jurisdictions prescribe the need to justify why some parts or data included in documents are confidential. Justifications include business secrets or sensitive personal data. Entire documents cannot be excluded from the access to file by a simple confidentiality stamp, non-confidential versions must be submitted. Only those sections in respect of which confidential treatment is individually justified can be redacted from a document.

Given all of this, consideration might be given to introducing a more streamlined approach with respect to handling documents that contain confidential information, including: (i) the creation of guarantees of confidentiality being protected by NCAs and the Commission as regards documents circulated between them; (ii) introducing a right for NCAs/the Commission to circulate

confidential information to other NCAs/the Commission involved in the process; (iii) adopting harmonised rules, and developing guidelines on justifications for requests for confidential treatment.

It is particularly important that consideration be given to introducing a more nuanced and balanced approach towards confidentiality in order to ensure due process, in particular access to file by the alleged infringer to exercise its rights of defence. The Commission might assess possibilities of developing guidelines on justifications for requests for confidential treatment, and of limiting confidential treatment vis-a-vis the alleged infringer to parts of documents where such treatment is indeed justified by the presence of business secrets or sensitive personal information.

Recommendation XVI – Enhance due process and procedural fairness

It appears that the EAEU's competition procedure does not feature a statement of objections, i.e. a single document that combines the description of the evidence (simple facts), the conclusions that the Commission draws from the evidence (qualified facts), and the application of relevant provisions to those facts (legal qualification).

Instead, investigated companies are provided only with the grounds for initiating the case and the norms breached at the close of the formal investigation procedure (Procedure 98). Supporting evidence is not enclosed, and a description of the relationship between the charges and supporting evidence is not provided.

Despite it being issued before the investigation formally concludes, and merely specifying the grounds for initiating the case and the TEAEU norms breached, this document is the main basis on which alleged infringers can build their defence before the Case Consideration Commission. The only additional resource that alleged infringers have to prepare their defence is by means of access to the file at a later stage, in the Case Consideration procedure (Procedure 99), where deadlines are rather short.

The lack of a statement of objections was highlighted by several legal practitioners, who mentioned that, even though access to evidence is granted in the Case Consideration procedure, it might not be possible to know with certainty what factual conclusions the Commission has reached or on what basis.

This creates difficulties for investigated companies, which are unable to fully understand the case against them, and to prepare a full defence against the charges they are subject to prior to the Commission arriving at a final decision.

Transparency and procedural fairness are important for effective and impartial competition law enforcement, and essential to the rule of law. Co-operation and engagement by parties and third parties are key contributing factors to fair, efficient and effective competition investigations.

Reflecting this, the OECD recommends that parties should be informed and offered opportunities to engage meaningfully in the competition law enforcement process, with due regard to the effectiveness of the investigation. An important element of this is for competition authorities to offer parties the opportunity to present an adequate defence before a final decision is made. This should include: (i) informing parties of all allegations against them, and granting them access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information; and (ii) providing parties a meaningful opportunity to present a full response to the allegations and submit evidence in support of their arguments before the key decision makers.¹⁴⁰

In light of this, the EAEU might want to consider, among other steps: (i) preparing a statement of objections at the end of the investigation stage, addressing all the relevant evidence under which a decision might be adopted, (ii) ensuring that parties have full and timely access to the evidence basing the case against them, (iii) allowing a written response to the statement of objection by the alleged infringers, and (iv) allowing for investigated parties to present their defence in an oral hearing prior to adopting a final decision.

¹⁴⁰ OECD Council Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465](#) II, 5(f).

Annex A. Enforcement Statistics

Table A A.1. Enforcement Statistics

	horizontal agreements	vertical agreements	abuse of dominance	concerted practices	unfair competition	procedural infringements
2020: matters opened			3		1	4
no sanction and no order			2		1	4
sanctions or orders sought			1			
sanctions or orders imposed						4
pecuniary sanctions imposed / number firms				4 411 987, 07		
pecuniary sanctions collected / number firms				3 738035,12		
2019: matters opened			3	1		
no sanction and no order				1		
sanctions or orders sought			1			
sanctions or orders imposed			495 580, 21			
pecuniary sanctions imposed / number firms			2/2			
pecuniary sanctions collected / number firms						
2018: matters opened			2		1	
no sanction and no order			2		1	
sanctions or orders sought						
sanctions or orders imposed						
pecuniary sanctions imposed / number firms						
pecuniary sanctions collected / number firms						
2017: matters opened			2			
no sanction and no order						
sanctions or orders sought			1			
sanctions or orders imposed			217367584			
pecuniary sanctions imposed / number firms			2/2			
pecuniary sanctions collected / number firms						
2016: matters opened			1			
no sanction and no order			1			
sanctions or orders sought						
sanctions or orders imposed						
pecuniary sanctions imposed / number firms						
pecuniary sanctions collected / number firms						

Annex B. List of Natural Monopolies as specified in Annex 2 to Annex 20 to the TEAEU

Table A B.1. Spheres of Natural Monopolies in the Member States

Item No.	The Republic of Belarus	The Republic of Kazakhstan	The Russian Federation
1.	Transportation of gas via main and spur pipelines	Storage services, transportation of marketable gas via connecting and main pipelines and/or gas distribution systems, operation of group tank units, as well as transportation of raw gas via connecting pipelines	Gas transportation via pipelines
2.	Services of transport terminals, airports; Air navigation services	Services of air navigation; Services of ports and airports	Services at transport terminals, ports and airports
3.	Public telecommunications and postal services	Telecommunications services, in the absence of a competitive service provider due to the technological impossibility or economic infeasibility of the provision of these types of services, except for universal telecommunications services; Services for property lease (rent) or charter of cable ducts and other fixed assets technologically related to connection of telecommunication networks to the public telecommunications network; Public postal services	Public telecommunications services and public postal services
4.	Transmission and distribution of thermal energy	Services for the production, transmission, distribution and/or supply of thermal energy	Services for the transmission of thermal energy

Item No.	The Republic of Belarus	The Republic of Kazakhstan	The Russian Federation
5.	Centralised water supply and disposal	Water supply and/or disposal services	Water supply and disposal using centralised systems and utility infrastructure systems
6.			Services for the use of the inland waterway infrastructure
7.		Railway services using railway transport under concession contracts	
8.		Approach route services	
9.			Icebreaker support of vessels in the waters of the Northern Sea Route

Annex C. Case Descriptions

Delrus Case – Medical Equipment Calibration Services

The proceedings were started upon receiving, by the Commission, of **Materials from the Ministry of National Economy** of Kazakhstan on 22 December 2017, further to which the Commission also received an **Application** (complaint) and supporting documents **from Scuderia LLP** (registered in Kazakhstan), which indicated signs of violation of Article 76 TEAEU by Delrus LLC, Russia (hereinafter: “Delrus Russia”) and Delrus RK LLP, Kazakhstan (hereinafter: “Delrus Kazakhstan”). The Commission issued a ruling **on the start of investigations** (Procedure 98) on 28 February. Based on the results of the investigation, the Commission opened the Case Consideration (Procedure 99) on 30 July 2018.¹⁴¹

It was established that the applicant Scuderia, being the winner of the tender for the service of calibration of ultrasound sensors to the apparatus “FibroScan”, addressed to Delrus Kazakhstan and Delrus Russia, as well as to the company “Echosens”, a request by email to provide service for the machine “FibroScan”, including the calibration of its sensors. Delrus Kazakhstan offered a price in the amount of 2 450 000 tenge. On the other hand, Delrus Russia offered similar services for 200 000 – 400 000 tenge in Russia, but refused to provide these services in Kazakhstan, by referring Scuderia to Delrus Kazakhstan.

In application of the Procedure for Investigations (Procedure 98), the Commission found that there was an **agreement between Delrus Russia and Delrus Kazakhstan that led to division of the Cross-Border Market for these services by the territorial principle** prohibited under Article 76(3) subparagraph (3) TEAEU. This agreement was implemented by the two companies and caused

¹⁴¹ Based on the results of the investigation, based on subparagraph 2) of paragraph 10 of Annex 19 to the EAEU Treaty and paragraph 13 of the Procedure for Investigations, the Member (Minister) of the Board in charge for Competition and Antitrust Regulation issued a Decision to initiate and consider the case dated July 30, 2018 in view of the following.

a **significant difference in the price** of the relevant services in the territories of Russia and Kazakhstan.

Based on these findings, the Commission requested **the Russian and Kazakh NCAs to conduct certain procedural actions**, on the assumption that the companies belonged to different economic groups.¹⁴²

Pursuant to the Procedure for Case Consideration (Procedure 99) **the Case Consideration Commission held sessions to examine the evidence**, consider and discuss the motions received, and **hear the opinions and explanations of the persons involved** in the case regarding the evidence presented by other persons involved in the case.

It was established that Delrus Kazakhstan and Delrus Russia concluded and implemented an **agreement between competing companies** operating in the same market of services for the calibration of ultrasonic sensors to the “FibroScan” machine, prohibited in accordance with subparagraph 3 of Article 76(3) TEAEU.

As a result, the Board of **the Commission adopted Decision No. 165** of 17 September 2019 “On the violation of general rules of competition in cross-border markets”. It found that the actions (inaction) of Delrus Russia and Delrus Kazakhstan, as well as individual employees of the mentioned companies, constituted the conclusion and implementation of an agreement which led to the **division of the market of services by the territorial principle**. As such, it was found to be contrary to subparagraph 3 of Article 76 (3).

Cochlear Case – Medical Implants

In the Cochlear Case, the Commission received Materials from the Ministry of National Economy of Kazakhstan on 3 July 2018. It was suspected that companies concluded potentially illegal agreements (i) obliging the buyer not to sell the goods of the seller’s competitors (exclusivity) and (ii) aimed at the territorial division of the market. The companies involved were Cochlear Europe Limited (registered in the UK, hereinafter “Cochlear UK”), EuroMax LLC (registered in Russia, hereinafter “Euromax”), Pharm Express LLC (registered in Kazakhstan, hereinafter “Pharm Express”).

¹⁴² Based on paragraph 32 of the Procedure for consideration of cases.

Examination of the Application

Under Procedure 97 (Procedure for Examining Applications), with respect to the definition of the relevant market as a Cross-Border Market, the Commission took into account that, by virtue of national legislation,¹⁴³ the circulation of medical devices and medical products that have passed state registration is allowed on the territories of the Kazakhstan and Russia. Cochlear UK and Euromax **registered components of cochlear implant systems**, speech processors, other parts and accessories thereto, as well as consumables in Russia and Kazakhstan. This indicated that the goods in question could be supplied in the territory of Russia and Kazakhstan, also because no special requirements for means of transportation for delivery of the goods in question were imposed. The Commission thus held that the goods in question could circulate at least in the territories of two member states of the Union. Furthermore, at least two economic entities, whose actions lead or may lead to a violation of the ban, were registered in different Member States (Euromax and Pharm Express). Therefore, **the Commission concluded that the alleged infringement concerned a Cross-Border Market and it had competence to investigate the case under the Criteria of Market Classification.**

Therefore, the Member of the Commission in charge of competition policy issued **a ruling on the investigation of violations** of the general rules of competition on the basis of paragraphs 14 and 15 of Procedure 97 (the Procedure for Examination of Applications).

Investigation

In Application of Procedure 98 (Procedure for Investigations), the Commission sent out requests for information to various economic entities and government authorities. These requests aimed at collecting information relevant to the market definition and the establishment of a breach. Additional requests for information were

¹⁴³ Health and Health Care System Code No. 193-IV LRK dated September 18, 2009; Federal Law No. 323-FZ dated November 21, 2011 "On the Fundamentals of Health of Citizens in the Russian Federation".

sent out to consumers of cochlear implant systems. The initial 90 working days open for investigations were extended by 60 working days, until 5 March 2019.¹⁴⁴

The investigation was extended to include Assomedica (Belarus) and SPP VEK (Kazakhstan). Based on the examination of materials, the Commission found that Cochlear UK, Euromax, Pharm Express, SPP and Assomedica concluded agreements under which **distributors had exclusive rights to import and sell the goods as wholesalers, and they were prohibited from selling the goods of a competitor seller.**

The Commission found that the wholesale market for cochlear implant system voice processors manufactured by Cochlear UK constituted the relevant product market.

Distributors of the goods in question operated in Belarus (Assomedica), Kazakhstan (Pharm Express and SPP VEK) and in Russia (Euromax). The territories concerned thus belonged to several Member States and paragraph 2 of the Criteria of Cross Border Markets was fulfilled.

As a result of the investigation, the Commission established the following signs of violation of the general rules of competition:

- **vertical agreements**, prohibited by subparagraph 2 of Article 76(4) TEAEU, contained in the provisions of distribution agreements concluded by Cochlear UK with Euromax, Pharm Express, SPP VEK and Assomedica, the terms of which include the obligation of distributors not to sell the goods of any competitor;
- **other agreements** prohibited by Article 76(5) TEAEU contained in the provisions of distribution agreements concluded by the same parties, the terms of which lead to the **division of the relevant Cross-Border Market on the territorial principle.**

The Commission examined whether the agreements could be compatible with Article 76 TEAEU under one of the **exemptions** laid down in Annex 19 to the TEAEU. First, it concluded that all the IPRs (patents, trademarks, domain names, designs, copyright) remained the exclusive property of Cochlear UK. Given that the distribution agreements merely allowed the distributors to use the trademark, they **were not qualified** as franchise agreements, which could be covered by the

¹⁴⁴ Paragraph 5 of Procedure 98.

exemption regarding “**commercial concession agreements**”. Secondly, it held that the distribution agreements **were not aimed at improving the production (sale) of goods** or stimulating technical (economic) progress or increasing the competitiveness of goods produced by the EAEU Member State in the world commodity market, and did not offer a proportionate share of benefits to consumers. Therefore, **no individual exemption** specified in paragraphs 5 and 6 of Annex 19 to the TEAEU **could be applied**.

Based on the above considerations, the Member of the Commission in charge of competition policy issued a ruling on the initiation of **the procedure for Case Consideration** (Procedure 99) on 5 March 2019.¹⁴⁵

Case Consideration (Procedure 99)

In accordance with the **Procedure for Case Consideration** (Procedure 99), the Case Consideration Commission held eight sessions to examine the evidence, consider and discuss the motions received, and hear the opinions and explanations of the persons involved in the case regarding the evidence presented by other persons involved in the case. It also conducted interviews with persons having information on the circumstances of the case.

The Case Consideration Commission established that the competing companies Belvivad, Assomedica, Pharm Express, SPP VEK and Euromax, operating in one relevant product market, participated in a horizontal agreement prohibited by subparagraph 3 of Article 76(3) TEAEU, which led to the division of the market by the territorial principle and (or) the repartition of customers. It found as follows:

- The competing companies assumed obligations to sell cochlear implant systems manufactured by Cochlear UK only within the borders of the Member State in which they were respectively registered. This was confirmed by the provisions of the non-exclusive distribution agreements that each of them concluded with Cochlear UK, which contained obligations to sell the goods exclusively in the territory of a particular member state (Assomedica in Belarus, Pharm Express in Kazakhstan, Euromax in Russia).

¹⁴⁵ Based on paragraph 10(2)–(3) of Annex 19 to the TEAEU and paragraph 13 of the Procedure for Investigations (Procedure 98).

- One of the companies operating in Russia refused to supply the goods to Kazakhstan, as confirmed by information received from the Russian Competition Authority (FAS) on request from the Commission;
- The competing companies under examination did not actually sell cochlear implant systems outside the territories defined in the distribution agreements concluded with Cochlear UK.

The **agreement prohibited by subparagraph 3 of Article 76(3) TEAEU** was contained in the following documents.

- a non-exclusive **distribution agreement** concluded between Assomedica and Cochlear UK, which provided for the sale of cochlear implant systems exclusively in Belarus. The said agreement also defined Belvivad as a sub-distributor.
- a non-exclusive **distribution agreement** concluded between Pharm Express and Cochlear UK, which contained provisions on sale of the goods concerned by Pharm Express in Kazakhstan and not selling those goods outside Kazakhstan;
- a non-exclusive **distribution agreement** concluded between SPP VEK and Cochlear UK, obliging SPP VEK not to sell the goods outside Kazakhstan;
- a non-exclusive **distribution agreement** concluded between Euromax and Cochlear UK obliging Euromax not to sell the goods outside Russia.

On 7 July 2020, the Commission delivered its decision.¹⁴⁶ It **established that Belvivad, Assomedica, Pharm Express, SPP VEK and Euromax** were competitors in the same relevant Cross-Border Market and **participated in an agreement prohibited by subparagraph 3 Article 76(3) TEAEU, as that agreement led or could lead to the division of the relevant market by the territorial principle or with regard to customers.**

On the basis of the Fining Guidelines, it imposed the following fines:

- Assomedica: 100,000 Russian roubles;
- Pharm Express: 381,005 Russian roubles;

¹⁴⁶ Decision No. 88 "On the violation of the general rules of competition on the cross-border markets".

- SPP VEK: 100,000 Russian roubles;
- Belvivad: 175,085 Russian roubles;
- Euromax: 3,655,896 Russian roubles;
- To each of the officials of the abovementioned companies a fine of 66,041 Russian roubles.

In addition, the Commission ordered the companies above to **terminate the infringement**, i.e. not to execute the content of the illegal clauses of the distribution agreements. In particular, the companies were ordered to stop partitioning the EAEU market by the territorial principle and to allocate customers. They were also ordered **not to refuse supplying companies** operating outside their allotted territories and to **inform the public on the possibility of cross-border sales**. The Commission also obliged the infringers to **submit reports** on the execution of these orders, which the companies involved later duly submitted.

Corning Case – Optical Fibres

In 2020, the Commission launched an ex officio enquiry in respect of the conduct of economic entities operating in the Cross-Border Market of wholesale distribution of single-mode optical fibre intended for manufacturing of optical communication cables.

The **signs of violation** of competition rules were detected in the conclusion by **Corning Inc** (registered in the USA, hereinafter “Corning”, world leader in the production of optical fibre, optical cable, components and passive communication equipment) of **long-term agreements with a number of customers in Belarus and Kazakhstan**. These agreements provided for the purchase of a **guaranteed volume** of the products concerned, as well as the **preferential right to supply optical fibre** produced by Corning to the above economic entities. Conclusion of agreements with such long-term conditions may create unequal conditions of competition with respect to other producers.

Given that there was insufficient information to establish a breach, the Commission commenced the Procedure 98 procedure (Investigation) in order to collect and analyse additional information.

As part of the investigation, **an assessment of the state of competition** was carried out for the period from 2018 to 2019. This timeframe of the investigation was determined taking into account the duration of the alleged infringements.

The Commission defined the **relevant product market** as that for the “primary wholesale distribution of single-mode optical fibre intended for optical communication cables”. The main customers of these products were manufacturers of optical communication cables themselves. In turn, optical communication cables are used in fibre-optic communication networks. In addition, test batches of optical fibres are purchased for research purposes by scientific and other organisations (usually in small quantities).

The market definition was based, among other things, on the replies by customers to the Commission’s questionnaire. The majority of optical fibre customers (95%) asserted that there was no substitute to the purchased single-mode optical fibre for the production of optical fibre. 89% of respondents stated that single-mode optical fibres from different manufacturers were interchangeable if manufactured in accordance with the ITU-T international recommendations developed by the International Electrotechnical Commission. Under the SSNIP test, none of the customers indicated it could switch to other types of optical fibre if a 5-10% price increase had taken place. On this basis, the Commission held that the primary wholesale market for single-mode optical fibre intended for optical cable production was a separate market based on its characteristics and that single-mode optical fibres from different manufacturers were interchangeable. Therefore, the relevant product market included single-mode optical fibre from all manufacturers, produced in accordance with the ITU-T international recommendations.

The **relevant geographic market** was defined as the territories of Belarus, Kazakhstan and Russia, based on the supply data. Therefore, it qualified as a Cross-Border Market.

With respect to **market structure**, according to the information provided by national authorities, the only industrial producer of single-mode optical fibre intended for optical communication cables in the EAEU was JSC Optical Fiber Systems (Russia). Based on the information provided by customs authorities and customers of single-mode optical fibres in the Member States, 14 economic entities operated in the Cross-Border Market. In the course of the assessment of the state of competition it was established that the share of the **group of persons (undertaking) consisting of Corning Inc. and Corning CIS LLC** (Russian Federation) **was 35% during the period under study**. The Commission also found that no other economic entity occupied a dominant position on the Cross-Border Market. There were three other major players, each holding between 8–18% market share. The Commission established that the market concentration

coefficient CR3 and market concentration index HHI for the period under investigation were 81% and 3545, respectively. It held that the Relevant Cross-Border Market featured **undeveloped competition and a high level of concentration**.

The Commission went on by examining **signs of an abuse of dominant position**. It established that the **difference in prices** for single-mode optical fibre for customers in Belarus, Kazakhstan and Russia **was insignificant** during the period from 2018 to 2019. Those prices were also similar to prices applied by other manufacturers in the Member States. Customers did not report any conduct by the Corning Group that could contain signs of an abuse of dominant position. On this basis, **the Commission held that no signs of an abuse could be established**.

In the context of the examination of anti-competitive **horizontal agreements**, the Commission stated that Corning Inc. had no agreements with competitors.

In the context of **vertical agreements**, the Commission stated that Corning Inc. concluded long-term agreements for the sale of single-mode optical fibre with customers Beltelekabel (Belarus) and Minsk Cable Works (Belarus) providing for the obligation to purchase up to 100% of the single-mode optical fibre of their demand from Corning Inc. These companies indeed sourced more than 70% of these products from Corning Inc. In 2019, the price decreased and **the number of sellers increased**, which had a positive impact on competition in this market. Customers had an opportunity to reduce their expenses on the purchase of optical fibre. However, Minskabel and Beltelekabel continued to buy most of the products from Corning Inc.

Based on the above, the Commission established that the sales agreements did not result in setting a resale price for the goods and did not oblige the buyer not to sell goods of a competitor of the supplier and the agreements were not prohibited under Article 76(4) TEAEU.

However, due to the conclusion of the exclusive supply agreements between Corning Inc., on one hand, and Minskabel and Beltelekabel, on the other, access to the Cross-Border Market for other manufacturers, including from the Member States, may be limited. The conduct of Corning Inc, Minskabel and Beltelekabel could therefore be qualified as signs of violations of Article 76(5), which prohibit other anti-competitive agreements. In particular, the obligation (resulting from written and oral agreements) to purchase over 70% of single-mode optical fibres

from Corning Inc could create obstacles for access to the market of sale of single-mode optical fibres for other producers of optical fibres.

The Commission, however, stopped short of a final analysis of the conduct. **Corning Inc is registered in the USA and is not registered in any Member State.** Therefore, issuing a decision on the legality of the conduct **was not within the powers of the Commission** under paragraph 4 of the Criteria of Cross-Border Markets. Considering the above, all documents and information available to the Commission was forwarded for consideration to the Belarusian NCA, which finally decided the case on 2 December 2020.

Airlines Case

This case started on the initiative of the Armenian NCA, which transferred Materials to the Commission in 2016 on possible signs of violations of Article 76(1) TEAEU regarding abuse of dominant position. The Materials concerned an **increase of air tickets price for flights operated by Russian airlines** (Aeroflot-Russian Airlines, Rossiya Airlines, Donavia, Sibir Airlines and Ural Airlines, hereinafter the “Airline Companies”), which was brought in connection with the temporary closure of the Upper Lars checkpoint in June and July 2016.

In particular, Armenian authorities submitted that the only road connecting the Armenia and Russia used for land transport, including passenger road transport, was the Stepantsminda-Lars road, which passes through the Upper Lars checkpoint (located near a pass through the Caucasus on the Georgian-Russian border). During the **closure of the checkpoint, transportation between Armenia and Russia was only possible by air.** In the absence of the possibility of alternative travel by road, the conduct of the Airline Companies could display signs of violations of Article 76(1) TEAEU, consisting in setting monopolistically high prices for air tickets.

The Commission conducted **an assessment of the state of competition** in the air passenger transportation market on the basis of the Methodology. The timeframe of the examination was from the second half of 2015 to the first half of 2016.

The **relevant product market** was defined on the basis of the regulations governing passenger air transportation. The relevant product market was determined as international passenger air transportation services between Yerevan-Moscow; Yerevan-Krasnodar; Yerevan-Sochi; Yerevan-Rostov-on-Don. The Commission noted that according to an international agreement between

Russia and Armenia on air communication (1993), air transportation between these countries is performed by designated airlines on established routes between points of departure and destinations.

The limits of the **relevant geographic market** were defined as the points of origin and destination located in the territories of different Member States. The Commission also held that the relevant markets (particular routes between two cities) were **Cross-Border Markets**, the limits of which were defined as the territories of Armenia and Russia.

Next, the Commission examined **market structure**. It calculated the market shares of the largest economic entities and applied the Herfindahl-Hirschman index with respect to each particular route Yerevan-Moscow (2574); Yerevan-Krasnodar (7562); Yerevan-Sochi (7448); Yerevan-Rostov-on-Don (7545). It concluded that the level of concentration in these markets was high.

Due to the need to obtain additional information, under Procedure 98 (Investigations), the Commission issued a ruling extending the investigation. Copies were sent to the NCAs.

Following the investigation, the Commission issued a ruling on 16 March 2017 **on the initiation of Procedure 99 Case Consideration**, copies of which were sent to the NCAs.

Under paragraph 61 of Annex 19 to the TEAEU, the Case Consideration Commission sent **requests for procedural actions to the Armenian and the Russian NCAs**, in particular with regard to Airline Companies' reservation systems. The case was suspended, copies of that decision were sent to the NCAs. The Armenian NCA reported that the air carriers operating in Armenia could not provide relevant information on reservation systems. The Russian NCA submitted information on the sale of air tickets by the Airline Companies during the period from 23 June 2016 to 6 July 2016.

From February to June 2018, the Case Consideration Commission held several meetings and collected evidence. It closed the investigation with respect to **Donavia because it was declared bankrupt** by court decision of 10 August 2017. It also excluded Ural Airlines from the proceedings as its market share was below 15% of the total volume in the relevant markets of Yerevan-Moscow, Yerevan-Krasnodar, Yerevan-Rostov-on-Don and, therefore, **Ural Airlines did not have a dominant position**.

A **passenger fare includes** costs associated with transportation of a passenger and his/her baggage within the free baggage allowance, making a reservation, executing settlements, issuing carriage documents, passenger services, handling baggage within the free baggage allowance, cancellation, re-routing, discount for children, and other expenses in compliance with regulatory rules.¹⁴⁷

Airlines use profitability management software products for efficient application of fare subclasses. Under Russian **regulatory provisions**,¹⁴⁸ airlines shall independently set tariff groups which may include several subclasses. **When calculating the cost of tickets**, the Airline Companies use software products covered by the copyright of third country companies, which are interconnective and data are transferred among them automatically.

Yield management programmes provide for the allocation of seat resources to fare classes for selected flights, their cost depending on the route, etc. The opening of subclasses in fare groups is done automatically by yield management programmes and in case of deviations between actual data and historical data, manual adjustments are possible. The Commission has found no evidence of manual adjustments by the Airline Companies to the application of fare subclasses during the period from 23 June to 6 July and 11 July 2016, which resulted or could have resulted in an increase in the cost of airfares on the routes in question. The dynamics of the price increase of air tickets during the temporary closure of the Upper Lars checkpoint (from 23 June to 6 July and 11 July 2016), was determined by the algorithm of data application used in the software products.

In view of the above facts, no violation of Article 76(1) TEAEU (abuse of dominant position) was found in the conduct of the Airline Companies, consisting in the increase in flight prices during the temporary closure of the Upper Lars checkpoint. **The Board of the Commission** thus adopted a decision ending the case.¹⁴⁹ The decision entered into force.

¹⁴⁷ "General Rules of Air Transportation of Passengers, Baggage, Cargo and Requirements for Servicing Passengers, Shippers and Consignees" approved by Order of the Russian Ministry of Transport dated 28 June 2007 № 82, and other regulatory legal acts of the Russian Federation, international treaties of the Russian Federation, legislation of the country of departure, destination and transit and carrier rules.

¹⁴⁸ Rules for the Formation and Application of Tariffs for Regular Air Transportation of Passengers and Baggage and Charges in Civil Aviation approved by Order of the Ministry of Transport of the Russian Federation No. 155 of 25 September 2008.

¹⁴⁹ **Decision No. 23 of 4 February 2019** "On Termination of the Case on Violation of General Rules of Competition on Cross-Border Markets".

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