

Introduction to EU Competition Law (1)



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The nucleus of EU competition law



- Rules aimed (primarily) at undertakings:
 - Art. 101 TFEU: makes illegal any agreement or concerted practice between **undertakings** that significantly restricts competition within EEA (at least two or more undertakings) – promotes independent decision making – directly effective
 - Art. 102 TFEU: makes it illegal for dominant company to abuse its **dominant position** in market (only one undertaking) – directly effective
 - Reg. 139/2004/EC Merger control
- Rules aimed at the Member States
 - Art. 106 TFEU Undertakings with a special position under national law
 - Art. 107 TFEU State Aid

EU Institutions



- **EU Institutions:**
- European Commission
- European Parliament
- Council of Ministers

- Commission actively enforces competition policy (Art 3 TFEU exclusive competence of the Union)
- Through directorate general (DG)
- Can launch surprise investigations at company premises
- Can require large mergers to be approved

- EU Member States have their own competition laws and authorities

- Companies must comply with competition laws of EU and Member States

In the news...



WaGomply Ledger

Glass-Maker Fine Shatters Record

Four Car-Glass Makers Receive €1.4 Billion Fine

The European Commission fined four car-glass makers approximately €1.4 billion for having allegedly formed a market-sharing cartel. One of the companies, Saint-Gobain, was fined €896 million, which breaks a previous penalty record. The case involved discussions between 1998 and 2003 by Saint-Gobain and two competitors regarding prices, shared markets and customers. An anonymous tip led to the investigation.

In the news...



WaComply Ledger

EC Chips Away at Intel

Levies €1 Billion Fine for Abuse of Dominant Market Position

The Commission fined Intel just over €1 billion for its supposed abuse of its dominant market position in violation of Article 102. The decision marks yet another effort by former Commissioner Neelie Kroes to ratchet up the enforcement of EU competition policy, all in the name of preventing consumer harm. The investigation was triggered by Intel's junior rival, AMD, which filed three separate complaints against Intel between 2000 and 2006.

Consequences of Non-Compliance



- Non-compliance has consequences:
- Fines up to 10% of annual worldwide turnover
- Liability in damages under national law
- Voiding of contract
- Criminal liability
- Investigations by other competition authorities

In the treaties



- **Art. 119 TFEU:**
 - The economic policies of the EU and of the Member States are “conducted in accordance with the principle of an open market economy with free competition”

What is competition?



- **The concept of competition:**
 - Oxford EN Dictionary: "striving of two or more for the same object", in commercial terms "rivalry in the market"

Goals of competition law



- What do we want to protect with the competition law
 - Notice on the application of 101(3): The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

Goals of competition



- - economic efficiency
- - consumer welfare: Joined cases C-501/06 P, C-513/06P, C-515/06P and C-519/06 P Glaxo/SmithKline [2008] ECR I-XXX, paras 58-63, Case C-8/08 T-Mobile Netherlands and others v Commission [2009] ECR I-4529, paras, 38, Case T-201/04 Microsoft v COM [2007] ECR II-3601, para 664
- - distribution
- - both?
- - structure or conduct (behaviour)?
- - single market



- The role of competition policy as an instrument of single market integration absolutely crucial to understanding EU competition law
 - Regulates conduct of undertakings threatening the establishment of an internal market
 - Rules on "free movement" directed towards Member States

Economics of competition law



- **Basic economics of antitrust: price theory**
 - Economies of scale
 - Economies of scope
 - Sunk costs
 - Fix costs
 - Variable costs
 - Marginal costs

- **What is a competitive market?**

Perfect vs imperfect competition

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Traditional concepts:

Perfect competition:

- In fact no competition; no product differentiation, no advertising, brand name, etc.; all firms are price-takers.

Imperfect competition:

- Monopoly: pure monopoly, which faces no competition, is a rare case.
- Oligopoly and monopolistic competition

The Search for “Workable Competition”



- “Workable competition is defined as the most desirable forms of competition, selected from those that are practically possible.”
- cannot have perfect competition; all forms of competition are of the second-best.
- Competition is not a state; it is a process taking place through time which is never in equilibrium; competition is a dynamic process.

The Contestable Markets Approach



- A perfectly contestable market: entry is free, exit is costless, existing firms and entrants compete on equal terms, potential entrants are not deterred from entering by the threat of retaliatory price-cutting by incumbents
- The benefits (competitive price, no “excessive” returns) associated with perfect competition will accrue, even though there are very few firms in the industry
- The importance of sunk costs (those costs, which cannot be eliminated, even by stopping production) as the major real deterrent to entry



- **Conditions most conducive to competition**
 - a) All goods are homogenous
 - b) each seller is small in proportion to the entire market
 - c) all resources are completely mobile or alternatively all sellers have the same access to needed inputs
 - d) all participants in the market have perfect knowledge of price, output and other relevant info
- **price setting in any market is a function of the relationship between the amount of a product available and the amount that consumers, at the margin, are willing to pay**

A competitive market is



- one in which every good is priced at the cost of producing it, giving the producers and sellers only enough profit to maintain investment in the industry
- every person willing to pay this price will be able to buy it



natural monopoly:

“When a single firm can always produce the output needed to satisfy demand at a lower cost than any two or more firms”

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Market definition



- the main purpose of market definition is to identify in systematic way the competitive constraints that the undertakings involved face
- also necessary for proxy for market power
 - Market shares
 - Low market shares
 - High market shares
- frame of reference for analysis of the competitive effects



- **Product market**
 - A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use`.
- **Basic principles for market definition**
 - **Competitive constraints**
 - ✦ demand substitutability,
 - ✦ supply substitutability and
 - ✦ potential competition

Demand side substitutability



- Demand side substitutability
 - ✦ determination of the range of products which are viewed as substitutes by the consumer
 - ✦ **Analytical framework : hypothetical monopolist test (SSNIP 'small, but significant non-transitory increase in price' point 17 Market Notice)**
 - prevailing market price or
 - Competitive price

To take into account e.g.:

characteristics and usage of products and consumer preferences

historical buying patterns

Switching costs

Supply side substitutability



- Supply side substitutability
 - ✦ Taken into account when effects are equivalent to those of demand substitution in terms of effectiveness and immediacy
 - ✦ Sometimes treated as a case of market entry
 - ✦ THE question : would it be *profitable* to switch production, given a small (e.g. 5 to 10 per cent) price increase?
 - ✦ spare capacity or competitors free or willing to switch production?

Potential competition



- Potential competition

- ✦ not taken into account when defining markets: since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

Barriers to entry



- Barriers to entry hinder the emergence of potential competition which would otherwise constrain the incumbent undertaking
- Crucial when determining market power
 - May have high market shares but no market power if there are no barriers to entry

Geographic market



- geographic market: an area where reasonable substitution for the firm(s) products can occur
- THE objective is to identify substitutes which are sufficiently close that they would prevent a hypothetical monopolist of the product or service in one area from sustaining price increases of at least 5 to 10 per cent

Aftermarkets



- a market for a secondary product, i.e. a product that is purchased only as a result of buying a primary product
- Possible market definitions:
 - A system market
 - Multiple markets
 - Dual markets

Inter-state trade



- Art 101 and 102 TFEU apply to horizontal and vertical agreements and practices on the part of undertakings which "may affect trade between Member States"
- effect on trade criterion determines the scope of application of Article 3 of Regulation 1/2003
- Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance) Official Journal C 101 , 27/04/2004 P. 0081 - 0096

Inter-state trade



- an autonomous Community law criterion
- assessed separately in each case
- a jurisdictional criterion, which defines the scope of application of Community competition law:
Community competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States.
- the agreement as a whole

Inter-state trade



- **The concept of "trade between Member States",**
 - also encompasses cases where agreements or practices affect the competitive structure of the market
 - must be an impact on cross-border economic activity involving at least two Member States
 - also in cases where the relevant market is national or sub-national
 - Also when one MS only
- **The notion of "may affect"**
 - must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU countries

appreciability



- The concept of "appreciability"
 - the position and the importance of the relevant undertakings on the market for the products concerned
- notice on agreements of minor importance: agreements between small and medium-sized enterprises rarely affect trade between EU countries to a significant degree.
- in principle agreements are not capable of appreciably affecting trade when
 - the aggregate market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5 %;
 - in the case of horizontal agreements, the aggregate annual EU turnover of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million.

undertaking



- The term ‘undertaking’ is not defined in the Treaty
- the term is used to refer to quite distinct situations
- common definition of undertaking exists in relation to both Articles 101 and 102 EC
- the Community Courts look to what the entity **does**, as opposed to its legal status



- the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (Case 41/90, Höfner and Elster v Macrotron, para 21)
- two concepts
 - ‘entity’
 - ‘economic activity’
 - Both interpreted widely
- ‘entity’ includes both natural and legal persons and State bodies.
- ‘economic activity’ is any activity consisting of offering goods and services on a given market, also buying
- the activity must be capable of being carried on, at least in principle, with a view to profit



- “Every entity”
 - The legal form of the entity irrelevant
 - ✦ All kind of companies
 - ✦ Persons
 - Individuals: yes if they commercially exploit their goods, services or intellectual property rights, on their own account
 - Employees – depends on the nature of the employment contracts, see opinion in Albany AG Jacobs – no for public policy reasons
 - ✦ Associations
 - ✦ Corporations
 - Are subsidiaries distinct undertakings from their parent companies and, if so, when
 - Agents: Agency agreements cover the situation in which a legal or physical person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the: purchase of goods or services by the principal, or sale of goods or services supplied by the principal



- “Economic activity”
 - Any activity consisting in offering goods and services on a given market
 - ✦ Wide definition

State bodies



- **Exercising official authority**
 - ECJ: Article 101 does not apply to agreements concluded by bodies “acting in their capacity as public authorities and undertakings entrusted with the provision of a public service” (case 30/87, Bodson)
 - Includes tasks which are typical those of a public authority
 - Such tasks are not of an economic nature
 - Can to a certain extent be financed through fees of economic contributions
- **Engaging in economic activity**
 - Will be regarded as an “undertaking”
 - How the public body is organised is not decisive

Single economic unit doctrine



- Two or more separate legal undertakings can be treated as one undertaking
 - if the undertakings “form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings”
 - ✦ Case 30/87, Corinne Bodson
- Agreements between two undertakings within a single economic unit not regarded as an agreement “between” undertakings



- **The rationale:**
 - No freedom to take decisions regarding the market conduct
 - ✦ Regarded as unilateral conduct
 - ✦ May be caught by Article 102 if the undertaking has a dominant market position
 - Internal allocation of functions
- **The other side of the coin:**
 - If a subsidiary engages in anti competitive agreements the mother company will also be regarded as part of the agreement