

Introduction to EU Competition Law (1)

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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"

- why competition?
- allocate scarce resources efficiently
- aversion of monopolies for economic reasons
- deadweight loss, net loss for society
- X-inefficiency
- aversion of monopolies for policy reasons
- no sympathy for monopolistic gains (distr of income)
- no sympathy for concentration of power
- EU: market integration !

- why competition law?
- theoretical ('ideal') versus real world
- prevent / remove barriers to entry
- enhance 'consumer welfare'? more?



What is EU competition law?



In the news...

Glass-Maker Fine Shatters Record

Four Car-Glass Makers Receive €1.4 Billion Fine

WaComply Ledger

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...



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.

A body of rules which covers a myriad of factual settings

- 12/11/2008 – “Commission fines car glass producers over €1.3 billion for market sharing cartel”
- 27/06/2007 – “Commission prohibits Ryanair’s proposed takeover of Aer Lingus”
 - 23/11/2000 – “Commission withdraws threat of fines against Telefonica and Sogecable, but pursues examination of their joint football rights”
 - 24/03/2004 – “Commission concludes on Microsoft investigation, imposes conduct remedies and a [497 Million €] fine”
- 28/11/2008 – “Preliminary report on pharmaceutical sector inquiry highlights cost of pharma companies’ delaying tactics”
 - 3/12/2004 – “The Commission’s decision on Charleroi airport promotes the activities of low-cost airlines and regional development”

Competition law regulates business conduct

- In their day-to-day business operations, firms can no longer ignore EC and national competition laws:
 - Most M&A transactions must be notified to competition authorities which may (i) clear them, (ii) forbid them, (iii) authorize them, subject to drastic conditions (divestments, etc.);
 - Most inter-firm agreements (cartels, but also JVs, distribution agreements, etc) fall within the purview of the competition laws. Competition authorities may inflict hefty fines (10% of worldwide turnover) and investors may sanction share valuation;
 - Successful companies that end-up enjoying leadership on the market may be found guilty of abusing a dominant position.

Competition law also regulates governments' conduct

- In their day-to-day policy making business, governments can no longer disdain EU competition law:
 - States financial interventions must not distort competition and intra-community trade. 2 types of aids:
 - Aids with a protectionist purpose (support national firms)
 - Aids with a strategic purpose (attract FDI)
 - State-owned companies must observe EU competition law, to the extent this does not jeopardize their Universal Service duties
 - States must refrain from adopting regulatory measures that frustrate the "*effet utile*" of the competition provisions of the EC Treaty

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”

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

Overview of EU competition rules

- **Mergers**, proposed mergers, acquisitions and joint ventures involving companies → subject to **Regulation 139/2004 EC (ECMR)**
- **Cartels** and, more generally, anticompetitive coordination of conduct → covered by **Articles 101 TFEU**
- **Abuse of dominance** market positions → covered by **Article 102 TFEU**
- **State aid**, State-owned firms and anticompetitive regulations → covered by **Article 106, 107, 108 TFEU**

Secondary Legislation

- **Three issues:**

- **Open-textured nature of Treaty provisions.** Allows for considerable variety in interpretation (« undertakings », « dominant position », etc.); Need for interpretative documents: Council and Commission (through delegation), adopt interpretative documents;
- **Brevity of the Treaty provisions** re. enforcement structure (interplay between Commission NCAs, national courts, etc?); Need for enforcement principles: Council adopts regulations (Reg. 1/2003, etc.);
- **Gaps in the Treaty Provisions** (mergers, private enforcement, etc.). Council adopts EC Merger Regulation (4064/89, now 139/2004).

Case-Law

- **Decisional practice of the European Commission**

- Formal decisions (polymorphous: infringement decisions, commitments decisions, inapplicability decisions, etc.)
- Communications and guidelines
- Proliferation of soft law instruments (reports, discussion papers, enforcement papers, etc.)
- Annual reports on competition policy
- Competition policy newsletter
- press release, speeches, etc.

- **Case-law of the ECJ and, more importantly, the GC**

- Annulment proceedings
- Preliminary rulings
- Failure to act
- Action for Damages

- **National case-law**

Goals of EU competition law

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 Law

- **Outcomes**
 - Efficiency (allocative, productive, dynamic)
 - Consumer welfare
- **Process**
 - Protect the process of competition ; challenge ‘private power’ (indirectly achieves outputs above)
- **Achieve a wide range of public policy aims**
 - Integrate the EU market
 - Safeguard employment; promote environmental protection

Aims of EU Competition Law

- [in the application of Art 102, the Commission] ‘will focus on those types of conduct that are most harmful for consumers’ (Guidance Paper on Enforcement Priorities ¶8)
- ‘The function of [Art 102] is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.’ (Case C-52/09 *TeliaSonera* [22])

- Competition increases economic welfare (1)
- Competition policy helps achieve market integration in the European Union (2)

Competition Increases Economic Welfare (1)

- General consensus over positive macroeconomic effects of competition (on growth, consumption, employment and investment), but disagreement over quantification
 - Studies on the cost of monopoly: HABERGER (0.1 to 1% GDP); SCHERER & ROSS (4 to 7% GDP) and N. KROES, several billions;
 - Identification problem
- Hence, the welfare effects of competition law are generally envisaged from a **microeconomic** standpoint.

Competition as a Driver for Economic Efficiency

- Competition delivers **Allocative Efficiency**:
 - Competition brings prices down to production costs. All those customers that “**value**” a good/service, i.e. that are ready to compensate for the producers’ costs, are served;
 - In a monopoly (or cartel), prices can be set significantly above costs (there is “**significant market power**”). Hence, a number of customers, those that cannot pay more than the producer’s costs, are excluded from consumption (“**deadweight loss**”). The producer could make these customers better-off without being worse-off (make a loss). There is thus allocative inefficiency. In addition, those customers that are served pay a price higher than under competition conditions. There is allocative inefficiency, because the revenue transferred to the monopolist could have been invested elsewhere;

Competition as a Driver for Economic Efficiency

○ Competition delivers **Productive Efficiency**:

- Under competitive conditions, firms have incentives to cut down costs and promote efficient productive methods (economies of scale, scope, synergies, etc.)
- Monopolies (and cartels) are under no pressure to achieve economies in production (HICKS: "*The best of all monopoly profits is a quiet life*"). Monopolies make erroneous decisions in terms of production techniques (technical inefficiency). Monopolies performance cannot be benchmarked – and sanctioned – by investors

Competition as a Driver for Economic Efficiency

○ Competition delivers **Dynamic Efficiency**:

- Under competitive conditions, firms have incentives to bring technical (or commercial) innovations to the market place;
- Controversy – SCHUMPETER observes that monopolies are not necessarily harmful. On the contrary, they are a major innovation stimulus (as only can afford capital-intensive R&D investments); ARROW notes that many small firms also innovate + monopolists loose incentives to innovate

Competition as a Driver for Economic Efficiency

- Other forms of efficiencies/inefficiencies:
 - Managerial efficiency etc.
- General consensus that focus should be on both allocative and productive efficiencies:
 - Allocative efficiency alone is not optimal (price = costs, but costs are not optimized)
 - Productive efficiency alone is not optimal (low costs, but risk of deadweight loss)

Competition Law as a Driver for European Market Integration (2)

- Before 1957, pervasive public restrictions on trade: tariffs, quotas and technical obstacles to trade. Domestic firms were insulated from cross-border competition;
- Treaty of Rome dismantles public obstacles to trade between Member States. “Ignition effect” on cross-border competition;
- Yet, risk that firms discreetly reestablish obstacles to trade through market partitioning agreements, exclusive distribution agreements, etc.

Competition Law as a Driver for European Market Integration

- Specificity of EC competition law (no equivalent under US antitrust law);
- Wording of the EC Treaty: agreements, abuses and mergers are said “**incompatible with the common market**”, rather than unlawful.
- Market integration is a critical goal. Accordingly, conduct frustrating market integration is sanctioned as a “**hardcore infringement**” of EC Competition Law (hefty fines in the car and pharmaceutical industries).

How is EU competition law enforced?

EU Institutions

- **EU Institutions:**

- European Commission
- European Parliament
- Council of Ministers

Institutions – The basic enforcement structure

- EC competition law is primarily enforced by specialized administrative agencies at the European – DG COMP – and the national levels – NCAs
 - *Rationale:* Need for expert knowledge; constant monitoring of markets and investigations cannot be carried out by courts; need to design policy orientations.
- EC competition law is also enforced in the context of ordinary litigation before courts
 - *Main interest:* Courts may award injunctive relief (suspension, etc.) as well as damages.
- Relations between DG COMP, NCAs and national courts are dealt with under Regulation 1/2003. **DG COMP's focus is on hardcore cartels, new questions of law and cases with significant transnational interest**
- Different from US law where private enforcement prevails over public enforcement

Norms – *Ex ante* vs. *Ex post* enforcement



- ***Ex ante* – Preventive Control**
 - Rationale is, to hard to remedy *ex post facto* (Merger control and State aid)
 - Challenge is (i) imperfect information and, in turn (ii) speculation on plausibility of anticompetitive harm
- ***Ex post* – Corrective Control**
 - Rationale is hidden behaviour that firms would never disclose (or firms that underestimate the anticompetitive nature of their practices). Primarily cartels, agreements and abuses of dominance
 - Challenge is (i) detection through investigative measures; (ii) determination through proper analytical theories of harm; and (iii) devising appropriate sanctions (fines, personal sanctions, etc.)

Intensity – The Harvard/Chicago divide



- Harvard school (Turner, Areeda, etc.)
 - Supports heavy-handed antitrust enforcement in all markets where there concentration levels are high (SCP and significant market power). Structural remedies, etc.
- Chicago school (Posner, Stigler, etc.)
 - “Small” antitrust. Industrial concentration often delivers efficiency. Perils of structural interventions. Focus only on hardcore cartels.

- competition is not a goal but an instrument
- not absolute competition
- but balanced, workable competition
- free competition is reconciled with other interests
- e.g. environment, regional development, R&D, ...
- important social corrections, protection of services of
- general interest ↗ social exclusion
- the EU competition law model

Is Europe Harvardian or Chicagoan?

- None
- EU competition law is enforced with a varying intensity:
 - Very intensive, when used to ensure loyalty/balance in business transactions (*Michelin*), pluralism, availability of choice for the consumer, regardless of efficiency (*Microsoft*)
 - Less intensive, when used to combat economic inefficiency (cartels)
- Should competition law be enforced less vigorously in tough economic times (current debates re. financial crisis)?



Economics of competition law

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- 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”

“

Scope of application of EU competition law

Ratione Personae (1)

- The primary addressees of EU competition rules are « **undertakings** »
- In EC parlance, an undertaking is « *any entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed. Any activity consisting in offering goods and services on a market is economic activity* ».

Ratione Materiae

- All industrial sectors are equally covered, some with a number of specificities though (agriculture, transport, defense, nuclear energy, etc.);
- Sector specific rules (SSR) for network industries: telecommunications, gas, electricity, etc.
 - In the past, network industries were organised on a monopolistic basis with large State-owned firms providing the service. Shortcomings: expensive and inefficient
 - EC Commission launches liberalisation programmes in the 1990s (opening-up to competition)
 - Need for specific rules and institutions:
 - ✖ Abolish exclusive rights;
 - ✖ Sector specific knowledge is important (re. price regulation mechanisms);
 - ✖ Universal service obligations must be regulated.
 - Competition law remains important
 - ✖ Because the removal of exclusive rights does not alter incumbents' dominant positions

Ratione Loci (1)

- EC competition rules apply to all practices that harm competition « *within the Common market* » (Article 101 and 102 TFEU).
 - EU-based firms reach an anticompetitive agreement over price/quantities on US markets – **EU competition law is not applicable**
 - Non-EU based firms reach an anticompetitive agreement over price/quantities on EC markets – **EU competition law is applicable**
- Illustrations:
 - *Gencor/Lohnro* (merger between two South-African firms exporting on EC markets); *Woodpulp* (concerted practices between finnish producers of woodpulp targeting EC markets);
 - Contrast with export cartels
- Problems: investigative measures on foreign soil; enforcement measures (what about firms without EU-located assets?)

Ratione Loci (1)

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- In addition, to fall within the purview of the EU competition rules, the practice must have an **effect on trade between Member States**:
 - Absent an effect on trade between Member States, the practice may be simply dealt with on the basis of national law

Market definition

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- 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 Elsner 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 or 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