

EU COMPETITION LAW

Introduction

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Scope of lecture

1. Legal framework
2. Specialty of the EU Competition Law
3. Institutions
4. The scope of EC law
5. Subject of EC law
6. Exceptions from the application of EC law
7. The relevant market
8. Effect on trade between Member States

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Introduction

One of the many goals of the EU is to achieve an operative internal market.

The mean which the EU uses for this purpose is the system regulating the behavior of the subject in the market = the competition law.

The competition law ensures, that the competition is not distorted.

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1.
Legal framework

- The Treaty on functioning of the European Union
 - Art. 101, 102, 106
 - Art. 3, 14, 103, 104, 105, 119, 346
- Regulations
- Decisions of the Court of Justice of the EU
- Notices
- Guidelines

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2.
Specialty of the EU Competition Law

1. EU CL is based on economic assumptions which determine the application practice
2. Abstract legislation
3. Parallel application of the EU CL by both Commission and national authorities
4. The importance of judicial decisions

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Ad 1) ECONOMIC BACKGROUND affect

- interpretation of the provisions of generally applicable competition law,
- Procedures for detecting and evaluating the risks of anti-competitive conduct business.
- decisions of competitors
 - Freedom of economic choice includes the right to respond to competitors' actions, but strictly excludes in/direct contacts between market actors whose object or effect is to influence behavior actual or potential competitor, e.g. creation abnormal market conditions.

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Ad 2) ABSTRACT LEGISLATION

- Generally binding rules of European competition law are quite abstract, in particular as regards the specification of the different definitions and forms of anti-competitive behavior.

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Ad 3) PARALLEL APPLICATION

- Articles 101 and 102 TFEU applies directly to both the Commission and the national competition authorities
- Diversity of judicial review

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Ad 4) IMPORTANCE OF THE DECISIONS OF CJ EU

- For determination of
- requirements of a fair trial,
 - adequate justification of individual decisions,
 - legally acceptable standards of proof,
 - limits for the administrative bodies in application of competition law, ...
- The courts by their activities fill gaps in the law, define and interpret concepts, which are an essential part of competition law

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3.
Institutions

- Commission
 - DG Comp
 - The Chief Competition Economist
 - The Hearing Officers
- The Court of Justice of the EU
- National Authorities
- National Courts
- The European Competition Network

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Directorate-General for Competition

- the Directorate-General (DG) for Competition is primarily responsible for these direct enforcement powers
- DG Competition can only intervene if it has evidence of an infringement of the competition rules –
- its decisions are subject to appeal before the Court of Justice of the European Union.
- Its work is concentrated on action against companies or Member States if it believes they are breaching the rules.

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The Chief Competition Economist

The role of the Chief Competition Economist

- **Economic advice for case enforcement and policy initiatives**
 - The Chief Economist is part of the Commission's Competition Directorate General, and
 - assists in evaluating the economic impact of its actions.
 - provides independent guidance on methodological issues of economics and econometrics in the application of EU competition rules.
 - contributes to individual competition cases (in particular ones involving complex economic issues and quantitative analysis), to the development of general policy instruments, as well as assisting with cases pending before the Community Courts.

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The Hearing Officers

- The Hearing Officers' main roles are to organize and conduct the oral hearing and act as an independent arbiter where a dispute on the effective exercise of procedural rights between parties and DG Competition arises in antitrust and merger proceedings.
- In such matters, the Hearing Officers generally intervene only where a dispute cannot be resolved by the parties and DG Competition.
- The Hearing Officers also decide on applications to be heard by third persons in the proceedings.
- Such applications must be submitted directly to the Hearing Officers.

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European Competition Network

- The European Commission and the national competition authorities in all EU Member States cooperate with each other through the **European Competition Network (ECN)**.
- This creates an effective mechanism to counter companies which engage in cross-border practices restricting competition.
- As European competition rules are applied by all members of the ECN, the ECN provides means to ensure their effective and consistent application.
- Through the ECN, the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practices.

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National Authorities

- apply the rules of competition law parallelly with the Commission.
- Under Regulation 1/2003, national authorities involved in the European Competition Network, will
 - apply the rules of the Union in close cooperation and
 - exchange information concerning the procedures.
- Cases will be allocated to authorities that are best placed to solve the case and all parallel proceedings pending before the competition authorities in other EU countries will be interrupted or stopped.

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National Courts

- Plays role in area of
- Securing of the evidence (§ 78a paragraph O.s.p.)

- proceedings for infringement of the provisions of Articles 101 and 102 TFEU

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4.

THE SUBJECT OF ECL

The subject of competition law is to protect against unwanted interference in the competition:

- state intervention

Member States must refrain from actions leading to distortions of competition, including the state aid

Member States are obliged to adapt and not create a new state monopolies.

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• anticompetitive conduct of undertakings

- it prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market

- it prohibits any abuse of a dominant position within the common market or in a substantial part of one or more undertakings, if it may affect trade between Member States

- it introduces ex ante control of concentrations of selected enterprises, which will be implemented in the internal market

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5.
THE SCOPE OF ECL

1. The scope of issues
 1. The parallel application of EU and national competition rules
 2. Ne bis in idem?
2. Territorial application
 1. Doctrine of implementation and effect
 2. Extraterritoriality
3. The personal scope
 1. Undertaking
 2. Doctrine of economic unit
 3. Test of economic continuity

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The parallel application of EU and national competition rules

National vs. European rules

- The same legislation
- Different objectives
 - Protection of competition in the national market v.
 - Protection of competition in the EU market
 - Establishment of the internal market
 - Removal of barriers to the internal market
- The parallel application of the two laws

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6.
Exceptions from ECL application

1. Infringement of competition law commanded by Member State
2. Agriculture
3. Sectoral regulation
4. Services of general economic interest

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7.

THE RELEVANT 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`.
- **'The relevant geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area`.

- Market definition is a tool to identify and define the boundaries of competition between firms.
- It serves to establish the framework within which competition policy is applied by the Commission.
- The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face.
- The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.

Basic principles for market definition

Firms are subject to three main sources or competitive constraints:

- *demand substitutability, supply substitutability and potential competition.*
- From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions.
- A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere.
- Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

Relevant 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

Demand substitution

- The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer.
- One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase.
- The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered.

- If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.



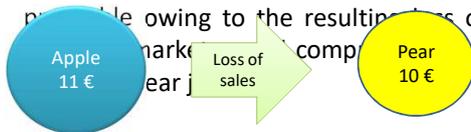
- This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable.

A practical example

- A practical example of this test can be provided by its application to a merger of, soft-drink bottlers.
- An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market.
- In practice, the question to address would be whether consumers of Apple juice would switch to other flavours when confronted with a price increase of 5 % to 10 % for apple juice



- If a sufficient number of consumers would switch to pear juice to such an extent that the price increase for apple juice would not be profitable owing to the resulting loss of sales, the market for apple juice would be considered to be a separate market.



- The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.



The process of defining the relevant market in practice

the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed.

- on the basis of the preliminary information available or
- information submitted by the undertakings involved.
- In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets.
- For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market.
- It is often the case that the inclusion of product B would be enough to remove any competition concerns.

- An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes.
- However, product characteristics and intended use are insufficient to show whether two products are demand substitutes.
- Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well.
- For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets.

- Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.
- The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:
 - Evidence of substitution in the recent past
 - Quantitative tests that have specifically been designed for the purpose of delineating markets
 - Views of customers and competitors
 - Consumer preferences
 - Barriers and costs associated with switching demand to potential substitutes

UNITED BRANDS (27/76)

As bananas have certain

- Characteristics ,
- Appearance ,
- Taste ,
- Softness ,
- Seedlessness ,
- Easy handling ,
- a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young , the old and the sick

they cannot be considered a part of the relevant market of fresh fruit.

Relevant geographic markets

- The relevant geographic market comprises the area
- in which the undertakings concerned are involved in the supply and demand of products or services,
- in which the conditions of competition are sufficiently homogeneous and
- which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area

- The procedure for identifying market is again based on substitution in relation to price movements.
- The question to be addressed is
 - whether customers choose
 - to reorient in the short term and
 - with negligible additional cost of their contract
 - to companies located in other areas.

2 or companies located in different areas do not face competitive constraints in the development of sales activities across geographic market.

The process of gathering evidence

- When a precise market definition is deemed necessary, the Commission will often contact
 - the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion.
 - relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question.
 - It might also request additional information to the undertakings involved.

CALCULATION OF MARKET SHARE

- The definition of the relevant market in both its product and geographic dimensions allows the identification the suppliers and the customers/consumers active on that market.
- On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area.
- In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations.
- When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares

8.

THE EFFECT ON TRADE BETWEEN MEMBER STATES

- in the application of the effect on trade criterion three elements in particular must be addressed:
- (a) The concept of 'trade between Member States',
- (b) The notion of 'may affect', and
- (c) The concept of 'appreciability'.

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- This concept is connected with Articles 101 and 102 of the TFEU.
- These articles would be applied only when cartel agreements or abuse of dominant position shall affect the trade between member states.
- The effect on trade criterion is an autonomous Union law criterion, which must be assessed separately in each case.
- It is a jurisdictional criterion, which defines the scope of application of EU competition law.
- Community competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States.

The concept of 'trade between Member States'

- The concept of 'trade' is not limited to traditional exchanges of goods and services across borders.
- It is a wider concept, covering all cross-border economic activity including establishment.
- This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.

- The requirement that there must be an effect on trade 'between Member States' implies that there must be an impact on cross-border economic activity involving at least two Member States.
- It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State.
- Articles 101 and 102 may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable.
- The application of the effect on trade criterion is independent of the definition of relevant geographic markets.
- Trade between Member States may be affected also in cases where the relevant market is national or sub-national

The notion 'may affect'

- The function of the notion 'may affect' is to define the nature of the required impact on trade between Member States.
- According to the standard test developed by the Court of Justice, the notion 'may affect' implies that it 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 Member States.

- In cases where the agreement or practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established.
- The 'pattern of trade'-test developed by the Court of Justice contains the following main elements
 - 'A sufficient degree of probability on the basis of a set of objective factors of law or fact',
 - An influence on the 'pattern of trade between Member States
 - A direct or indirect, actual or potential influence' on the pattern of trade.

The concept of appreciability

- The effect on trade criterion incorporates a quantitative element, limiting EU law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude.
- Agreements and practices fall outside the scope of application of Articles 101 and 102 when they affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question.
- Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned.

- In a number of cases concerning imports and exports the Court of Justice has considered that the appreciability requirement was fulfilled when the sales of the undertakings concerned accounted for about 5 % of the market (32).
- Market share alone, however, has not always been considered the decisive factor.
- In particular, it is necessary also to take account of the turnover of the undertakings in the products concerned.

Cartels

Article 101 (1) TFEU = *prohibition*

The following shall be prohibited as incompatible with the internal market:

- all agreements between undertakings,
- decisions by associations of undertakings and
- concerted practices

- which may affect trade between Member States and
- which have as their object or effect the
 - prevention,
 - restriction or
 - distortion

of competition within the internal market

in particular those which:

- a. directly or indirectly **fix purchase or selling prices** or any other trading conditions;
- b. **limit or control production**, markets, technical development, or investment;
- c. **share markets** or sources of supply;
- d. **apply dissimilar conditions to equivalent transactions** with other trading parties, thereby placing them at a competitive disadvantage;
- e. make the **conclusion of contracts** subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 101 (2) TFEU = nullity

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

Article 101 (3) TFEU = exceptions

- The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings
 - any concerted practice or category of concerted practices,
- 1. which contributes to improving the production or distribution of goods or to promoting technical or economic progress,
- 2. while allowing consumers a fair share of the resulting benefit, and which does not:
- 3. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- 4. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Division of cartels

By its form:

- **AGREEMENT**
 - Nintendo case
- **DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS**
 - Belgium architects case
- **CONCERTED PRACTICES**
 - Lombard club case

By the structure of the market:

- Horizontal cartel
- Vertical cartel
 - Price limitation
 - Duty to supply in certain way
 - Anticompetitive clause
 - Prohibition of re-export
 - Selective sale

By the consequences

- Hard-core cartels
 - Which have as their object the prevention, restriction or distortion of competition within the internal market
- Cartels, effect of which is the prevention, restriction or distortion of competition within the internal market
 - De minimis clause
 - Legibility demand

Abuse of dominant position

Article 102 TFEU

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

Such abuse may, in particular, consist in:

- a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b. limiting production, markets or technical development to the prejudice of consumers;
- c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

MAIN ISSUES

1. Relevant market
2. Trade between Member States
3. Undertaking
4. Dominant position of undertaking / Collective dominance
5. Abuse of dominance

DOMINANCE

- A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer.
- A dominant firm holding such market power would have the ability to set prices above the competitive level to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market.

Aspects of dominance

- Market power
- Ability to behave independently
- Ability to defend the entry to market

Collective dominance

Commercial Solvents (6-7/73)

- „... Undertakings which have dominant position on the relevant market and their conduct is characteristic with uniform process, must be considered as one economic unit and are competitive responsible.“

Abusive practices

1. Unfair trade conditions
2. Refuse to supply
3. Discrimination
4. Tying
