

EU Competition Law

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Internet Resources

EU Commission: http://ec.europa.eu/index_en.htm

EU Competition Authority: http://ec.europa.eu/competition/index_en.html

European Court of Justice: <http://curia.europa.eu>

European General Court: <http://curia.europa.eu>

Directory of EU Law: http://europa.eu/index_en.htm

Sources of Law

TFEU (2009): Articles 3(b) , Articles 101-109

- key articles: **Article 101, Article 102**

Regulations: e.g. Reg. 1/2003 , Reg. 139/2004

- plus hundreds of additional regulations

Case Law: e.g. 48/69 ICI , 27/76 United Brands

- plus thousands of additional cases

Mission of the European Commission on competition issues

Making markets work better

One of the paramount aims of the founding fathers of the European Community was the establishment of a Single Market. **European Union competition law** arose out of the desire to ensure that the efforts of government could not be distorted by corporations abusing their market power.

Regulatory framework for Competition Law

- compatible,
- transparent and
- fairly standardised

Phases of EU Competition Policy development

- Norms of anti-monopoly policy as development of provisions of art. 28 – 30 TFEU
- Norms of anti-monopoly law for expanding industrial policy of the Community
- Control over mergers and acquisitions

Evolution of EU Competition Law and Policy

- Competition was one of the few areas of laws for the internal market along with agriculture, transport that the TEC treated from the beginning as the common policy
- EC competition law applies only if EC private parties anti-competitive behavior makes has a sufficient community impact
- Competition law and enforcement emerged early as well developed the body of EU administrative law
- Development as a top down regulation with the EC institution as the principal actors for carrying out the EC law (from 1958 to nowadays)
- 2004 big bang in the EU competition policy – bigger role of national competition authorities and courts and the establishment of the EU Competition Network

Introduction

- EU competition policy is **the FUNDAMENTAL ELEMENT OF THE COMMON MARKET** (TEC Art. 3 (g)): one of the 11 original objectives of the EC is the establishment of a regime ensuring that competition is not distorted in the common market
- EU competition policy is within the jurisdiction of Commission and the Competition Directorate General (DG IV)
- EU competition policy and EC competition law apply to all undertakings, all entities engaged in commercial activity (corporations, partnerships, individuals, trade associations, state-owned corporations when they operate in a commercial context, and cooperatives)

Pillars of the EU Competition Policy

- Liberalization – Arts. 3 and 86 TEC rules on the activities of the Community and, in particular, the Commission is ensuring that competition in the internal market is not distorted
- Antitrust – Art. 101 rules on restrictive agreements and concerted practices which cause an appreciable restrictions of competition (price fixing or market sharing) and Art. 102 TEC rules on abuse of a dominant position (Tying or discrimination)
- Merger control – rules on control of mergers in Art. 103 TEC
- State aid – Art. 107 TEC rules on prevention of undue state intervention

Competition in the EU: Policy and Law

Hoekman & Mavroidis (2002)

- Competition **policy**: a broader set of measures and instruments that may be pursued by governments to enhance the competitiveness of the markets
- Competition **law**: set of rules and disciplines maintained by the governments aiming to prevent attempts to monopolize the market either through agreements between firms that restrict competition or through unilateral behavior (abuse of a dominant position)
- Note: competition policy thus constraints both private and government actions while competition law regulates the behavior of private entities

Trade Policy & Competition Policy

Both policies seek to facilitate economic development by removing impediments to competition but in different ways. Trade policy focuses on removing government created barriers to competition while competition policy focuses on removing barriers created by private parties

Objectives of EU Competition Policy and Law

1. Integration and efficiency of the EU market (maximizing consumer welfare & achieving the optimal allocation of resources)
2. Creation of & fair competition at the EU market
3. Protection of consumers and small firms from large aggregations of economic power

Summary of EU Competition Law Concepts

Concepts developed through primary and secondary legislation and case law:

- Undertakings
- Concerted practices
- Horizontal and vertical restraints of trade
- Abuse of a dominant position
- De minimis doctrine
- Mergers
- Exemption from application of competition rules

Article 101

1. The following shall be prohibited as incompatible with the common 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 common market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101: Introduction

Article 101 is the principal vehicle for the control of anti-competitive agreements, is used to attack cartels and other collusive agreements/practices within business

Objectives:

- (1) protect consumers
- (2) protect (small) firms (e.g. cartel rivals)
- (3) protect the "*single market*" (an EU project)
- (4) enhance market efficiency

Article 101: General Scheme

Elements:

- (1) *agreement, decision or concerted practice* (ADCP)
- (2) may affect trade between Member States
- (3) object or effect of preventing, restricting or distorting competition within the internal market

Broad base of liability under Article 101(1)

... but ...

Broad exemptions under Article 101(3)

Article 101: key features

- The meaning given to the terms 'agreement' and etc.
- The relationship between Art. 101 (1) and 101 (3)
- The extent to which economic analyses does and should take place within Art. 101 (1)
- The interpretation accorded to Art. 101 (3), including whether non-economic factors can be taken into account

Article 101: Key Terminology

An "*undertaking*" is any entity engaged in a commercial or economic activity

The EU Commission has expansive interpretations of "*agreements*", "*decisions*", and "*concerted practices*"

Important case law: 41/69 Chemiefarma

48/69 ICI

119/92 Huls

Article 101: Field of Application

Applies to both "*horizontal*" (being made between firms at the same level of the production cycle, e.g. cement manufacturers) and "*vertical*" (between firms at different levels of the distribution cycle, e.g. A producer of stereo equipment and a retailer) ADCP

Undertakings must be *independent* :

- no parent-subsidiary relationship
- no principal-agent relationship

Non-EU undertakings can be liable under Article 101(1)

Public authorities can be liable under Article 101(1)

- e.g. require licensees to charge minimum prices

Article 101: Effect on Trade

An ADCP must have a "*community dimension*" to it:

- first question in an Article 101(1) investigation
 - the *potential* to affect trade between two or more Member States ("*de minimus*" principle)
- ice on Agreements of Minor Importance

Article 101 (1): the de minimis doctrine

An agreement will not be caught by article 101 (1) if it does not have an appreciable impact on:

- competition or
- inter-state trade or
- where the preceding thresholds are not exceeded by more than 2% in two successive years

Criterion of application of de minimis doctrine

Aggregate market share held by the parties does not exceed 10% on markets where the parties are actual or potential competitors

- 15% for cases where the parties are not competitors on the relevant markets
- 10% threshold for cases where it is difficult to classify the agreement
- 5% for vertical cases in which competition may be restricted by the cumulative effect of the agreements (for both competitors and non-competitors)
- 30% of relevant market if parallel networks of agreements having similar effect

Article 101: Anti-Competitive Acts

If an ADCP has an anti-competitive purpose, an anti-competitive effect is presumed (..."*object or effect*"...)

Article 101(1) contains a non-exhaustive list of examples of anti-competitive ADCP: price-fixing, minimum-price, market sharing, output limits, research/investment limits, arbitrary discrimination, fidelity/loyalty rebates, tying clauses, refusal to supply, minimum purchases, ect ...

Article 101: Rule of Reason

EU authorities (e.g. Commission, ECJ, EGC) often engage in a "*rule of reason*" analysis:

- use economic analysis to carefully weigh/balance the pro- and anti-competitive effects of ADCP
- ADCP legal if pro-competitive effects dominate
- ADCP illegal if anti-competitive effects dominate
- certain ADCP condemned without analysis (*per se* rule)

Article 101: Exemptions

Article 101 (3) provides broad individual exemption to Article 101(1) if an ADCP satisfies four conditions:

- (1) improves a production/distribution process or promotes technical/economic progress
- (2) allows consumers a fair share of the resulting benefit
- (3) imposes necessary restrictions
- (4) imposes no threat to competition in the market

Certain EU regulations ("*block exemptions*") provide narrow exemptions to Article 101(1) for broad classes of ADCP.

Article 101: Block Exemptions

Article 101 (3) allows the Commission to declare the provisions of Art. 101 (1) inapplicable to a category of agreements

Object: excluding a generic type of agreement from the ambit of Art 101 (1)

Such **agreements** are said to improve economic efficiency by facilitating co-ordination and reducing distribution costs

Common features in Regulations on BE:

- State the reasons for their enactment;
- Set out the substance of the exemption;
- Contain provisions limiting the size of the firms that can take advantage of them;
- List the types of clauses that are not allowed within the relevant agreement

Article 101: Area of application of block exemptions

Specialization agreements (Commission Regulation (EU) No 1218/2010 of 14 December 2010):

- unilateral specialisation agreement: an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;
- reciprocal specialisation agreement: an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them;
- joint production agreement: an agreement by virtue of which two or more parties agree to produce certain products jointly

Article 101: Area of application of block exemptions

Research and development (Commission Regulation (EU) No 1217/2010 of 14 December 2010): an agreement entered into between two or more parties, relating to the conditions under which the parties pursue:

- joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development;
- joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;
- joint research and development of contract products or contract technologies excluding joint exploitation of the results;
- paid-for research and development of contract products or contract technologies and joint exploitation of the results of that research and development;
- joint exploitation of the results of paid-for research and development of contract products or contract technologies pursuant to a prior agreement between the same parties;
- paid-for research and development of contract products or contract technologies excluding joint exploitation of the results.

Article 101: Area of application of block exemptions

Vertical supply and distribution restraints (Commission Regulation (EU) No 330/2010 of 20 April 2010): certain types of vertical agreements can improve economic efficiency within a production or distribution chain by facilitating better coordination between the participating undertakings, leading to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels

Excluded restrictions:

The Regulation applies to all vertical restraints other than the abovementioned hardcore restraints. However, it does impose specific conditions on three vertical restraints:

- non-compete obligations during the contract;
- non-compete obligations after termination of the contract;
- the exclusion of specific brands in a selective distribution system.

When the conditions are not fulfilled, these vertical restraints are excluded from the exemption by the BER. However, the BER continues to apply to the remaining part of the vertical agreement if that part is severable (i.e. can operate independently) from the non-exempted vertical restraints.

Article 101: Area of Application of Block Exemptions

Technology transfer: a technology transfer agreement is a licensing agreement where one party (the licensor) authorises another party or parties, the licensee(s), to use its technology (patent, know-how, software license) for the production of goods and services.

2 instruments:

- the technology transfer block exemption regulation ("TTBER"): exempts certain categories of licensing agreements concluded between companies that have limited market power and that respect certain conditions set out in the TTBER. Such agreements are deemed to have no anticompetitive effects or, if they do, the positive effects outweigh the negative ones.
- accompanying Guidelines: provide guidance on the application of the TTBER as well as on the application of EU competition law to technology transfer agreements that fall outside the safe harbour of the TTBER.

These instruments will expire on 30 April 2014. The Commission has now drafted a proposal for a revised TTBER and Guidelines. The current consultation is seeking stakeholders' views on this proposal.

Article 101: The Black List

Especially anti-competitive clauses will not benefit from the block exemption

(1) Vertical price fixing:

- Exclusion of resale price maintenance
- Fixed or minimum sale price as a result of pressure from or incentives offered by any of the parties

(2) Territorial protection:

- Permissible to restrict sales to end users by a buyer operating at the wholesale level of trade;
- Restriction does not limit sales by the customers to the buyer;
- Permissible to restrict sales to unauthorised distributors by the members of a selective distribution system;
- Possible to restrict the buyer of components for use from selling them to a customer who would use them to make goods that would compete with those of a supplier.

Article 102

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

Such abuse may, in particular, consist in:

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

Article 102: Introduction

Article 102 is used to attack *dominant* firms (e.g. monopolies, market leaders) engaged in anti-competitive practices

The essence is the control the market power by one or a number of firms.

Objectives:

- (1) protect consumers
- (2) protect smaller firms (e.g. rivals, suppliers)
- (3) protect the "*single market*"
- (4) enhance market efficiency

Article 102: General Scheme

Elements:

- (1) "*abusive*" conduct
- (2) "*dominant*" firm
- (3) may affect trade between Member States

Narrow base of liability under Article 102

No exemptions under Article 102

Article 102: Steps

Steps:

- (1) defining the relevant market as precondition to defining the dominance
- (2) deciding whether a firm is dominant within that market
- (3) determining whether it has abused its dominant position
- (4) determining whether there are any available defences

Article 102: Relevant Market

Dominance must be assessed in relation to three variables:

- The product market;
- The geographical market;
- The temporal factor

Article 102: Relevant Product Market

Dominance must be established within a well-specified "*relevant product/service market*"

- area of extreme contention under Article 102
- EU Commission tries to define markets narrowly
- factor: cross-elasticity of demand/supply
- [Notice on the Definition of the Relevant Market](#)

Important case law:

27/76 United Brands

322/81 Michelin

22/78 Hugin

Article 102: Relevant Geographic Market

Geographic Market: *the territory in which all traders operate in the same or sufficiently homogenous conditions of competition in relation to the relevant products or services, without it being necessary for those conditions to be perfectly homogenous*

Important case law:

27/76 United Brands

88/138 Hilti

82/861 British Telecommunications

Article 102: The Temporal Factor

Temporal Factor: *a firm may possess market power at a particular time of a year, during which competition from other products is low because these other products are available only seasonally*

Other concerns:

- Technological progress
- Changes to consumer habits

Article 102: Relevant Market (cont.)

Dominance must be established within a well-specified "*relevant geographic/temporal market*"

- "...*objective conditions for competition the same...*"
- factors: transport costs, nature of product/service
- duration (i.e. specific time period) of dominance in a well-specified product/service market

Article 102: Relevant Market – Commission's Approach

- The definition of the relevant market will be viewed differently depending upon the nature of the competition inquiry
- The Commission will inquire into demand substitutability, supply substitutability and potential competition - **SSNIP test**
- The Commission will consider: evidence of substitution in the recent past or where there have been shocks in the market; the views of consumers and competitors; quantitative econometric tests; evidence of consumer preferences where available; barriers and costs entailed in substitution; and whether there are distinct groups of customers for the product.

Article 102: Dominance Principle

Dominance implies the power to behave independently of competitive forces:

- rivals, customers, suppliers, distributors
- control market output/price
- eliminate or weaken existing market rivals
- exclude potential market rivals

Factors: market share, market structure, barriers to market entry, discriminatory behaviour, profit margins, ect ...

Article 102: Dominant Position = Market Power

When the Court has defined a relevant product, geographical, and temporal elements of the market, it then has to decide whether the undertaking is dominant within this sphere.

measurement?

Legal test: a position of economic strength enjoyed by an undertaking which **enables it to prevent effective competition** being maintained on the relevant market by giving it **the power to behave** to an appreciable extent **independently of its competitors**, customers and ultimately of its consumers (27/76 United Brands). Such a position **does not preclude some competition**, but enables the undertaking which profits by it at least to have an appreciable influence on the conditions under which that competition will develop, to largely in disregard of it as such conduct does not operate to its detriment (85/76 Hoffmann-La Roche).

Article 102: Evidence of Market Power

The Court will consider two types of evidence to determine whether the firm has market power – **test of dominance**:

- The market share possessed by the undertaking;
- Availability of other factors serving to reinforce its dominance

Article 102: Evidence of Market Power – Market Share

(1) Statutory monopoly confers no immunity from EC Competition law, subject to Art. 102 (2)

(2) The percentage of share as elaborated in case law:

- 40% to 45% in United Brands (sufficient share + other factors were taken into consideration);
- 43% in Hoffman-La Roche (no dominance in the market + no other factors)

(3) The existence of a very large market share, held for some time, would in itself be indicative of dominance (sometimes):

- 50% in Akzo case was a very large share and therefore indicative of dominance

Article 102: Evidence of Market Power – Other Factors

Other factors indicating dominance: Barriers to entry

- Anything that makes it particularly difficult for a new firm to enter the market (broad view)
- Matters are barriers to entry when they are merely indicative of the superior efficiency of the incumbent firm (narrow construction)

Article 102: Evidence of Market Power – Other Factors: Examples

Barriers to entry

- Retaining market share: no if results from effective competitive behavior
- Production of a wider range of goods: no if each product makes a separate market
- Technological lead of an undertaking over its competitors
- Existence of a highly developed sales network
- Absence of potential competition
- Capital strength of an undertaking (though indicative of efficiency)
- Access of an undertaking to capital markets (though indicative of efficiency)
- Vertical integration
- Legal provisions within Member States
- Conduct of the firm (e.g. price discrimination)

Article 102: Joint Dominance vs Single Firm Dominance

Joint (collective) dominance = the dominant position is held by firms that are part of the same corporate group or economic unit

Issue at question: parallel behavior of undertakings at oligopolistic markets

Case law: 6/72 Continental Can
 7/73 Commercial Solvents

Article 102: Anti-Competitive Acts

Article 102 condemns *abuses* of a dominant market position, not *dominance per se*

Article 102 contains a non-exhaustive list of examples of anti-competitive, abusive conduct (merely examples)

Classic examples: excessive pricing, refusal to supply, arbitrary discrimination, tying schemes (e.g. 201/04 Microsoft), predatory pricing, ect ...

Article 102: Abuse

The concept of abuse was 'objective', and could apply to any behavior which influenced the *structure* of the market and weakened competition.

No need to prove that the abuse had been brought about by the firm's market power.

Article 102: Abuse – Problems with Interpretation

(1) Who is Art. 102 designed to protect?

- Consumers (exploitation)
- Competitors (anti-competitiveness)
- Both

(2) What kinds of behavior are abusive?

- Distinguished from normal competitive strategy: unfair pricing, limits on productive capacity

(3) Abuse of which market?

- Cross-influence between markets (128/98 Aeroports de Paris)

Article 102: Abuse – Particular Examples

- (1) Mergers (6/72 Continental Case): it sufficed that the merger in fact resulted in damage to the competitive market structure
- (2) Refusal to supply (7/73 Commercial Solvents): refusal based on a desire to integrate vertically down into the finished-product market (unless there is some objective justification)
- (3) Price discrimination: goods are sold or purchased at prices which are not related to differences in costs
 - Geographical discrimination;
 - Discounts or rebates;
- (4) Predatory pricing (C-62/86 Akzo): offering lower prices than Akzo's own average total or variable costs to remove ECS from the plastics market
- (5) Selective pricing (T-228/97 Irish Sugar)

Article 102: Defences

- (1) Objective justification;
- (2) Proportionality
- (3) Efficiency

Article 102: Effect on Trade

Abusive conduct by a dominant firm must have a "*community dimension*" to it:

- first question in an Article 102 investigation
- the *potential* to affect trade between two or more Member States ("*de minimus*" principle)
- generally easy to establish if *dominance* established

Article 102: Conclusions

- (1) protection of consumers rather than particular competitors and hence protection of competitive process
- (2) Problems related to market definition, determination of dominance, and the meaning of abuse
- (3) The boundaries of the special responsibility incumbent on dominant firms
- (4) Huge debates on the extent to which Art. 102 should be based on legal form or economic effects