



Introduction to EU Competition Law

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Aims of this course

- Why three arcane, technical, provisions of an international treaty, became the most powerful economic policy instrument at the disposal of the European Union (“EU”)



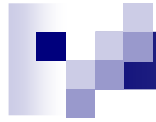
Aims of this course

- Clarify the positive economic effects of competition policy
- Review the various areas of EU competition enforcement
- Describe the scope of application of the EU competition rules
- Briefly discuss the institutional and procedural framework



Outline

1. What is EU competition law?
2. Why care for EU competition law?
3. Where is EU competition law?
4. How is EU competition law enforced?
5. Scope of application of EU competition law



1. What is EU competition law ?



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”*
- 24/03/2004 – *“Commission concludes on Microsoft investigation, imposes conduct remedies and a [497 Million €] fine”*
- 13/05/09 – *“Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices”*
- 22/06/2009 – *“Commission clears proposed takeover of SN Brussels Airlines by Lufthansa, subject to conditions”*
- 27/06/2007 – *“Commission prohibits Ryanair’s proposed takeover of Aer Lingus”*
- 28/11/2008 – *“Final 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 (1)

- In their day-to-day business operations, firms can no longer ignore EU 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.);



Competition law regulates business conduct (2)

- 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 group turnover); customers may sanction negative reputation; investors may sanction share valuation;



Competition law regulates business conduct (3)

- Successful companies that end-up enjoying leadership on the market may be found guilty of abusing a dominant position (Microsoft, Google, and the likes).

FIRST MOVERS?

- Google's settlement with Authors Guild and AAP
- Microsoft's technological integration of OS with browser
- Intel's market growth



Competition law regulates business conduct (4)

- Most of the above examples describe competition law as a strategic threat for companies. In recent years, competition rules are increasingly perceived – and instrumentalized – by companies, as part of their profit-maximization agenda:
 - Illustrations of strategic risk:
 - Cartels – « strategic » leniency may be used to inflict competitive disadvantage
 - JVs – « Raising rivals costs »: *TF1 vs. France 2 and France 3* (joint selling of advertising space)
 - Distribution network – « entry distribution ban » (Mars vs. Unilever in Ireland, also known as « *Masterfoods saga* »)



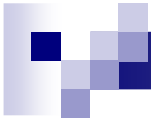
Competition law also regulates governments' conduct

- In their day-to-day policy making activities, 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 – Aid to car industry, on condition that they invest in France)
 - Aids with a strategic purpose (attract FDI – *Ryan Air-Charleroi*)
 - 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 (Article 4§3 TUE)



Overview of EU competition rules

- **Mergers**, proposed mergers, acquisitions and joint ventures involving companies → subject to **Regulation 139/2004 (EUMR)**
- **Cartels** and, more generally, anticompetitive coordination of conduct → covered by **Article 101 TFUE**
- **Abuse of dominance** market positions → covered by **Article 102 TFUE**
- **State aid**, State-owned firms and anticompetitive regulations → covered by **Article 106, 107, 108 TFUE as well as Article 4§3 TEU**



2. Why care for competition law ?



The Virtues of Competition Law

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



Competition Increases Economic Welfare

- General consensus over positive macroeconomic effects of competition (on growth, consumption, employment, productivity 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 (**20 billions of avoided consumer harm through cartel enforcement**).
 - Identification problem
- Hence, the welfare effects of competition law are generally envisaged from a **microeconomic** standpoint.



Competition as a Driver for Economic Efficiency

1. Allocative efficiency
2. Productive efficiency
3. Dynamic efficiency
4. Other forms of efficiencies



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, some customers, those that cannot pay more than the producer’s costs, are excluded from consumption (“**deadweight loss**”). The problem come from the fact that 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 the price which would prevail under competitive conditions. There is again allocative inefficiency, because the revenue transferred to the monopolist could have been invested elsewhere.
 - Illustration – OPEC (Organization of the Petroleum Exporting Countries)



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.) => The “*we try harder*” Avis motto
 - Insulated from competition, monopolies (and cartels) are under no pressure to achieve economies in production (HICKS: “*The best of all monopoly profits is a quiet life*”). Monopolies thus make inefficient decisions in terms of production techniques (technical inefficiency). To make things only worse, monopolies performance cannot be benchmarked – and sanctioned – by investors



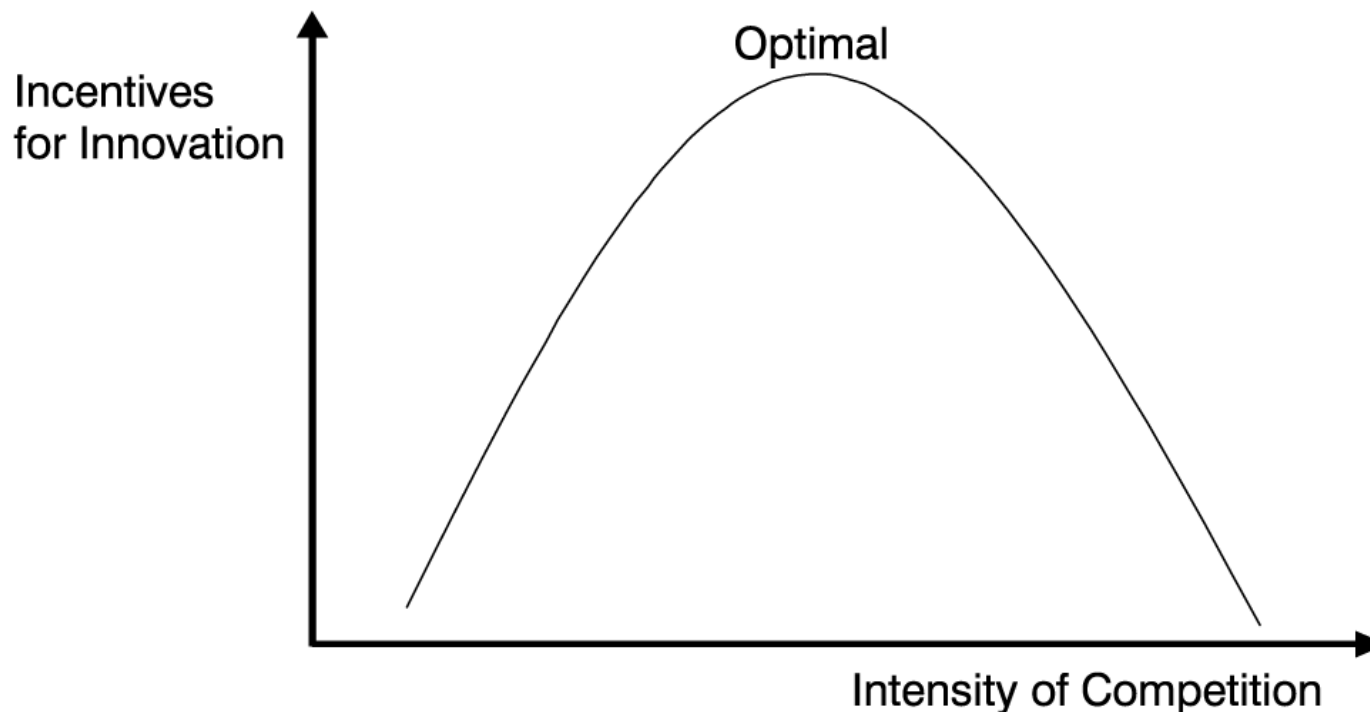
Competition as a Driver for Economic Efficiency

□ 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 would be a major innovation stimulus (as only they could afford capital-intensive R&D investments); ARROW notes that many small firms also innovate + monopolists lose incentives to innovate. New release may “reinitialize” the market and kill the rent: sends signal to customers that product is obsolete, and incentivizes them to look for new, alternative, solutions.

■ Competition delivers **Dynamic Efficiency**

- Aghion *et al.*: a certain degree of competition is required to spur innovation. Too little (monopoly), too much (perfect) competition kills innovation





Competition as a Driver for Economic Efficiency

- Other forms of efficiencies/inefficiencies:
 - Managerial efficiency (HR, decisional processes, etc.), slack inefficiency, rent-seeking behaviour (Bastiat, Posner, Tullock, etc.), 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 necessarily minimized)
 - Productive efficiency alone is not optimal (low costs, but risk of deadweight loss)



Competition Law as a Driver for European Market Integration

- 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, which triggers two consequences (Cecchini, 1992):
 1. Increase scope for economies of scale
 2. Dislocates situational rents



Competition Law as a Driver for European Market Integration

- Yet, risks:
 - That firms discretely reestablish obstacles to trade through market partitioning agreements (“*domestic producer*” rule), exclusive distribution agreements (e.g., *Consten & Grundig*), bans on parallel trade (e.g., *Nintendo*), etc.
 - That firms with entrenched, local, positions seek to prevent entry of new firms through abusive behaviour
 - That States seek to protect national incumbents from foreign entrants (see *airport charges*)
 - To take full benefit of market-integration, firms may engage into M&A transactions => market structures might become overly concentrated



Competition Law as a Driver for European Market Integration

- Often said to be a specificity of EU competition law (no equivalent under US antitrust law), but is it?
 - Sherman Act of 1890 also arose from market integration
 - Ultimate purpose of market integration is to spur competition
- At any rate, the wording of the TFUE: agreements, abuses and mergers are said “**incompatible with the internal market**”, rather than unlawful.

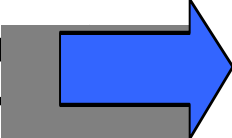


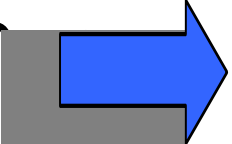
Competition Law as a Driver for European Market Integration

- 4 practical consequences:
 - Conduct frustrating market integration is sanctioned as a “**hardcore infringement**” of EU competition law (hefty fines, see *Nintendo* case, €167.8 million);
 - Sectors where parallel trade is important are **enforcement priorities** (cars, pharmaceuticals)
 - Legal **interpretation principles** are very flexible (concept of an agreement) (see *Bayer* case)
 - Infringements **may be proven absent observed anticompetitive effects** (“*per se*” prohibition)

Lisbon Treaty – What changes?

- Treaty of Lisbon entered into force on 1 December 2009
- Treaty of Lisbon is an amending treaty

Treaty on European Union ("TEU")  Treaty on European Union ("TEU")

Treaty establishing the European Community ("ECTreaty")  Treaty on the Functioning of the European Union ("TFEU")



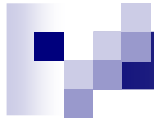
Lisbon Treaty – What changes?

- Sarkozy repeals Article 3(&) g reference to « ***a system ensuring that competition in the internal market is not distorted***»
- **PROTOCOL ON THE INTERNAL MARKET AND COMPETITION**

THE HIGH CONTRACTING PARTIES, CONSIDERING that the internal market as set out in Article 2 of the Treaty on European Union includes a system ensuring that competition is not distorted, HAVE AGREED that:

« to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union ».

In practice => Protocol has same value, so same degree of protection. General principle of EC law, safeguarded by the Courts. Possible use of « flexibility clause » (Council, upon proposal of Commission, with consultation of EP)



3. Where is EC competition law ?



Treaty Provisions

(1) Rules governing firms' conduct

- Article 101 and 102 TFUE**

(2) Rules governing members States' conduct

- Articles 106, 107 and 108 TFUE**

(3) Enforcement rules

- Article 103, 104, 105 EC (Council to adopt Regulations for the implementation of the substantive provisions)**



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 EU Merger Regulation (4064/89, now 139/2004).



Case-Law (1)

- **Case-law of the Court of Justice (« CJ », former ECJ) and, more importantly, the General Court (« GC », former CFI)**
 - Primarily annulment proceedings + preliminary references, as well as other actions (full jurisdiction of Court on penalties, increasing popularity in cartel cases)
 - GC sits in chambers of 3 or 5 judges
 - No Advocate General
 - Enormous output
 - Important judgments in 2003
 - GC is 20 years old, well respected in certain areas, but at the target of hefty criticism in other (deference in Article 102 TFUE, to contrast with judgments handed down under EUMR)

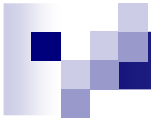


Case-Law (2)

- **Decisional practice of the European Commission**
 - Formal decisions (polymorphous: infringement decisions, commitments decisions, inapplicability decisions, etc.)
 - Communications and guidelines
 - Annual reports on competition policy
 - Replies to parliamentary questions
 - Competition policy newsletter
 - « Sunshine enforcement » (press release, speeches, etc.)
 - Proliferation of soft law instruments (reports, discussion papers, enforcement papers, etc.)

- **National case-law**

- **Scholarship**



4. How is EU competition law enforced?



Institutions – The basic enforcement structure

- EU 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 devise 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. Courts may also have jurisdictions over other legal aspects of a case (IP, corporate, etc.)
- 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 (punitive and treble damages – uncorrelated to the actual damage)



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.)
- **Increased fervor for *ex ante* intervention through legal presumptions (101 and 102 TFUE) – Risk of false positives**



Intensity – The Harvard/Chicago divide

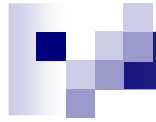
- Harvard school (Turner, Areeda, etc.)
 - Supports heavy-handed antitrust enforcement in all markets where there concentration levels are high (SCP and significant market power). Structural remedies, etc.

- Chicago school (Posner, Stigler, etc.)
 - “Small” antitrust. Industrial concentration often delivers efficiency. Perils of structural interventions. Focus only on hardcore cartels.



Is Europe Harvardian or Chicagoan?

- None
- EC 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*)
 - Bottom-line, when used to combat economic inefficiency (cartels)
- Should competition law be enforced less vigorously in tough economic times (current debates re. financial crisis)? *Opel, Fortis, etc.*



5. Scope of application of EU competition law



Ratione Personae

- The primary addressees of EC competition rules are « **undertakings** » both directly (article 101 & 102 TFUE) and indirectly (art 107-109 TFUE)
- 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 Personae

- This definition covers a large number of entities : self-employed persons, multinational corporations, state-owned companies, universities, research centres, etc. ECJ case-law provides illustrations (opera singers, football players, employees in the context of side projects, etc.)
- Case-law brings two qualifications. Are not covered :
 1. Activities that fall within the « *essential prerogatives of the State* », i.e. air traffic (*Eurocontrol*), antipollution services (*Diego Cali*), etc.
 2. Activities that consist in providing social security services, provided three conditions are met: affiliation to the scheme is compulsory, contributions are proportionate to income and benefits are unrelated to payments.



Ratione Materiae

- All industrial sectors are equally covered, some with 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
 - In cases of regulatory capture (see STIGLER)
 - Because SSR does not cover mergers and anticompetitive agreements (See *02 v. Commission*)
 - Because the removal of exclusive rights does not alter incumbents' dominant positions



Ratione Loci

- EC competition rules apply to all practices that harm competition « *within the internal market* » (Article 101 and 102 TFUE).
 - 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 EU markets);
 - Contrast with export cartels

- Problems: investigative measures on foreign soil; enforcement measures (what about firms without EU-located assets?)



Ratione Loci

- In addition, to fall within the purview of the EU competition rules, the practice must have an **effect on trade between Member States:**
 - Does not imply that EU Commission will deal with the case (also NCAs and national courts). Only three settings for Commission action (hardcore cases, novel issues and/or risks of discrepancies);
 - Does not eradicate the applicability of national competition law. National competition law may also apply, but must be interpreted consistently
- Absent an effect on trade between Member States, the practice may be simply dealt with on the basis of national law