

European Competition Policy



References

- Faull & Nikpay: The EC Law of Competition. 2nd Ed. Oxford University Press, 2007
- Bellamy, C., Child, G. European Community Law of Competition. 6th Ed. London: Sweet & Maxwell, 2008.
- European Commission > Competition
http://ec.europa.eu/competition/index_en.html

European Competition policy

- **Competition policy** is one of policy areas of the European Union
- **Competition:**
 - puts businesses under constant pressure to offer the best possible range of goods at the best possible prices
 - is beneficial for consumers
- To preserve well-functioning competition the European Commission monitors these areas:
 - **Antitrust + Mergers**
 - **Liberalisation**
 - **State aid**
 - **International**

Competition Policy area: **Liberalisation**

- An attempt to open up certain markets (transport, energy, postal services, telecommunication, ...) to competition.
- Liberalisation allows consumers to benefit from lower prices and from a number of alternative services and products.
- In the railway, electricity and gas industries, the network operators are required to give competitors fair access to their network. → It allows the consumer to choose the supplier offering the best conditions.

Competition Policy area: State Aid control

- **Article 107 of TFEU**
 - *any aid granted by a Member State or through State resources in any form whatsoever which **distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.***
- **State Aid** = an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities
- The aim of State Aid control = to ensure that government interventions in the form of the state aid do not distort competition and trade inside the EU

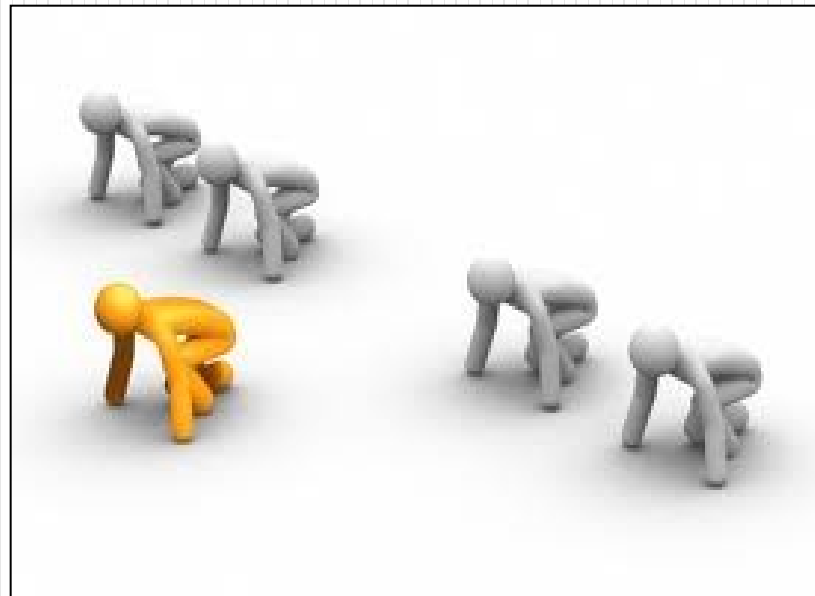
Competition Policy area: **International**

- The European Commission cooperates closely with competition authorities of countries outside the EU
- The main aim of international cooperation is to promote convergence of competition policy instruments and practices across borders
- Two levels of international cooperation:
 - Cooperation at **bilateral level** is based on bilateral agreements or memoranda of understanding
 - Cooperation at **multilateral level** → European Commission participates in a number of multilateral organizations : **International Competition Network (ICN), OECD, UNCTAD, WTO**

Competition Policy area: **Antitrust**

- **Cartels** → Article 101 of TFEU
- **Abuse of Dominant position** → Article 102 of TFEU
- **Merger Control** → EC 139/2004 Regulation on the control of concentrations between undertakings

European Competition Policy in area of Antitrust



Legislation:

- **Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty**
- Commission Notice on cooperation within the Network of Competition Authorities
- Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty
- Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC
- Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

Regulation 1/2003

- A part of modernization reform
 - The aims of modernization:
 - Increased application of Art. 81 and 82 of Treaty at Member State Level
 - Commission focus on Enforcement
 - Self-assessment (undertaking themselves must assess the compatibility of their agreement with TFEU) and Legal Certainty (Commission issues Notices on guidance letters – informal guidance of novel questions)
- Established enforcement system based on direct application of Articles 101 and 102 TFEU as a whole (x centralized notification and authorization system under the previous Regulation 17/62)
→ Commission, competition authorities and national courts have the power to apply these articles in full

Competition authorities

- **European Commission (“EC”) – Directorate General for Competition (“DG Comp”)**
 - Its aim is to enforce the competition rules of the Community Treaties → to ensure that competition in the EU market is not distorted and that markets operate as efficiently as possible, thereby contributing to the welfare of consumers and to the competitiveness of the European economy
- **National Competition Authorities („NCA“)**
 - E.g. CZ - Office for the Protection of Competition, GB – Office of Fair Trading, Ger - Federal Cartel Office
 - Representatives of the NCAs are members of Advisory Committee → The European Commission must consult with the Advisory Committee before taking any decision under Art. 101 and 102 TFEU
- **European Competition Network (“ECN”)**
 - NCAs + European Commission

European Commission

- responsible for defining and implementing the orientation of Community competition policy
- once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same potential anticompetitive conduct by the same undertaking(s) on the same relevant geographic and product market.
- „primacy“ of Commission's investigation → possibility to take the case from NCA



European Competition Network

- ECN provides means to ensure effective and consistent application of European competition law.
- Through the ECN, the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities
- NCAs can share their experience and identify best practices within ECN.



EC or NCA?

- NCAs and Commission apply competition rules in close cooperation
- cases will be dealt with by:
 1. **a single NCA**, possibly with the assistance of NCAs of other Member States
 2. **several NCAs acting in parallel**
 3. **the Commission.**



1. NCA

- **“Well-placed” NCA to deal with a case**
 - the agreement or practice has **substantial direct actual or foreseeable effects on competition within its territory**, is implemented within or originates from its territory;
 - the authority **is able to effectively bring to an end the entire infringement**
 - i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate and sanction the infringement adequately
 - it **can gather**, possibly with the assistance of other authorities, **the evidence required to prove the infringement**

Community Competition law or National Competition law?

- European and National Competition laws have coexisted
- System of parallel competences → all competition authorities have the power to apply Articles 101 and 102 TFEU
- Where the NCAs apply national competition law to the conduct referring to Art. 101 or Art. 102 TFEU which may affects trade between Member states within the meaning of that provisions, they shall **also** apply Art. 101 and 102 TFEU → **parallel application** of national and European law



Parallel application of European and National Competition law

- Which law prevails in case of conflict?
 - Until the adoption of Regulation 1/2003 – principle of primacy of Community law (Court of Justice decision in *Walt Wilhelm*)
 - the **stricter national rule** to unilateral conduct (which does not constitute an abuse prohibited by **Art. 102**) is applied instead of the community rule
 - **Convergence rule** – agreements which may affect trade between Member States and which are not prohibited under Community law cannot be prohibited under national law

2. Parallel action of NCAs

- may be appropriate where an agreement or practice has **substantial effect** on competition mainly in their respective territories and the action of **only one NCA would not be sufficient** to bring the entire infringement to an end and/or to sanction it adequately.
- Example
 - Two undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B
 - The NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory.

Cooperation in ECN

- **Information at the beginning of the procedure**

- the members of the network have to be informed at an early stage of the cases pending before the various competition authorities → in order to detect multiple procedures and to ensure that cases are dealt with by a well placed competition authority

- **Suspension or termination of proceedings**

- suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case

- **Exchange and use of information**

- Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information → it is a precondition for efficient and effective allocation and handling of cases.

- **Investigations**

- an NCA may ask another NCA for assistance in order to collect information on its behalf

NCA's obligations towards Commission

- Notification of proceeding
 - to inform the Commission in writing before or without delay after commencing the first formal investigative measure, when **acting under Art. 101 or 102 TFEU**
 - to inform the Commission no later than 30 days before **adoption of decision** under Art. 101 or 102 of TFEU



- All this information may also be made available to the other NCAs.

3. Commission as a well-placed competition authority

1) 3 + principle

The infringement affects more than three states

2) The case is closely **linked to other Community provisions** applied by the Commission

3) „Principal“ cases

Community interest requires Commission decision to develop EC Competition policy when a new competition issue arises or to ensure effective enforcement.

Application of European competition law by National Courts

- If national courts apply national competition law, they also have to apply EC competition law where there is an effect on trade between Member States
- When national courts rule on conduct under Art. 101 or 102 of TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission
- **Cooperation between national courts and Commission**
 - the transmission by the Commission of information in its possession
 - the giving of opinions by the Commission on questions concerning the application of the Community competition rules
 - the possibility for the Commission to submit observations to national courts as *amicus curiae*

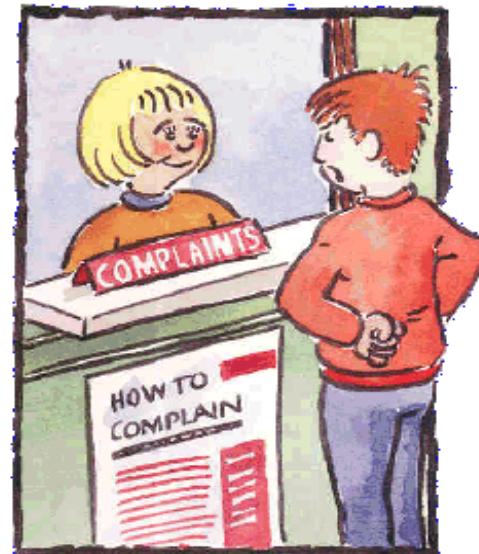
Enforcement of the Competition rules by European Commission

- The Commission is empowered to find an infringement and order the undertaking concerned to bring it to an end.
- Commission can started to act on:
 - A complaint
 - Its own initiative
- Statement of objections
- Commission Decision + Fines
- Review of Competition decisions by European Courts

Complaint

- **Complainant**

- Member states or natural or legal persons who can show **a legitimate interest**
 - Legitimate interest should be significant and reasonably direct
 - Examples of persons with legitimate interest: competitors, an undertaking injured by predatory pricing, a distributor bound by an export ban



Statement of objections

- Contains the preliminary position of the Commission regarding the alleged infringement of Articles 101 and/or 102 TFEU, after its in-depth investigation.
- **Purpose:**
 - to inform the parties concerned of the objections raised against them
 - right of the parties to be heard is ensured → undertaking concerned shall be provided with all the information the need to defend themselves effectively
- **Content:**
 - description of the facts regarded as relevant + supporting evidence, essential facts for the final decision, imposition of fines + amount of fine, the criteria for calculation of fine, duration of alleged infringement, its gravity, level of intent

Commission Decisions

- **Finding and termination of infringement**
 - Where the Commission finds an infringement of Art. 101 or 102 of TFEU → it issues a decision requiring the party(ies) to bring such infringement to an end.
- **Interim measures**
 - In cases of urgency (risk of serious and irreparable damage to competition)
- **Commitments**
thereinafter
- **Finding of inapplicability**
 - Where the Community public interest relating to the application of Art. 101 or 102 so requiresm Commission may find those articles inapplicable to the conduct concerned

Fines

- Fine for substantive infringements
 - Fines for intentional or negligent infringement of Art. 101 and 102 TFEU
 - Maximum 10 % of turnover of the undertaking concerned in the preceding business year – the amount of the fine depends on the gravity and duration of the infringement
 - Immunity from fines – Leniency notice in cartel cases
- Structural and behavioral remedies
 - Fines for the infringement committed and necessary to bring the infringement effectively to the end

Commitments

- Commission decision under the Article 9 of Regulation 1/2003
- The possibility for undertakings to submit voluntarily commitments that are intended to address the competition concerns identified by the Commission
- If the Commission accepts these commitments → if they are sufficient to end an anticompetitive conduct → it adopts a decision which makes them binding on the parties subject to the proceedings



Review of Commission decision by EU Courts

- **General Court** (ex Court of First Instance)
 - Natural or legal person or Member states can bring an action against European Commission decision
- **European Court of Justice**
 - Appeals from judgments of the General Court
 - Grounds for an appeal:
 - lack of competence of the Court of First instance
 - a breach of procedure before General Court which adversely affects the interests of the appellant
 - Infringement of Community law
 - An appeal must be brought within two months of the notification of the General Court decision