Course: Law of the European Union

[09] EU Competition Law

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National competition laws

- Many rich developed countries protect and restore economic competition on their markets with their interventions.
- Absolutely free bussiness and trade is regarded to be insufficient. Market distortions can result from behaviour of competitors.
- Public competition law (antitrust law) is enforced by state authorities with fines and restrictions.
- Prihibited agreements among undertakings and abuse of dominant position are sanctioned. Mergers need to be officially approved.

European and member state laws for competition

- EU (EC) has developed similar law for protection of competition at the beginning of its existence.
- EU law is applicable, if anti-competitive practices create danger for competition in integrated markets of two or more member states.
- EU law is also applicable to if source of distortion is abroad (judgement „Wood Pulp“).
- Countries in general try to supress practices dangerous for competition caused by competitors operating abroad.

National competition laws of member states

- On the other hand, if practices against competition cause only internal effects, member state competition law is applicable.
- Member states are not obliged to introduce and to enforce national competition law. There is no harmonization of competition law.
- Nevertheless, all member states have now their own competition laws.
- Member states often follow EU standards and practices – especially new member states.

Agreements and decisions threatening competition - form

- Case-law and teachings of competition law (in EU and other countries) defines broadly: both written and oral agreements of competitors and publicised and covert decisions of associations are punishable.
- Oral agreements and decisions are more usual (documents will provideevidence of illegal practice).
- It is allowed to identify illegal agreement and decision in behavior of competitors (concerted practices).
- It is possible to identify agreement compromising competition in agreements between producer and distributor (judgement Consten and Grundig).

Agreements and decisions threatening competition - practices

- EU law contains non-exhaustive list of restrictive practices:

- division of markets among competitors
- agreements or decisions on prices
- agreements or decisions on amount of production (i.e. restrictions on production resulting in increase of prices).
- other practices

Nevertheless, threat to competition must be identified.

Exemptions

- However, the prohibition of agreements and decisions which restrict or distort competition is not absolute.
- EC law allows so called block exemptions (established by regulations of the Commission).
- Agreements restricting and preventing competition can be allowed if contribute to improving the production or distribution of goods or services, promoting technical or economic progress if consumers share benefits.
- Broad definition of prohibited agreements and concerted practices requires this limitation. Antitrust law shall not discourage cooperation of undertakings.

Abuse of dominant position

- Abuse of dominant position is also prohibited.
- The abuse is unilateral action of undertaking which enjoys dominant position can be:

- required unfair prices
- limiting production causing increase of prices
- applying dissimilar conditions on equivalent transactions (discrimination of suppliers or customers)
- imposing unusual suplementary obligations („coupling“).

Other practices can be also labelled as abuse of dominant position – the list is non-exhaustive too.

Relevant markets

- Both agreements and decisions threatening competition and abuse are dangerous and thus prohibited if dominant position is really achieved by competitors and competitor.
- Relevant market must be identified. Relevant market includes goods and services which can be easily replaced.
- There are often disputes about extent of relevant merket (judgement Chiquita).

Enforcement of competition law by the Commssion

The Commission enforces competition law of the EU. On member of the Commission is in charge for competition issues. There is Directory-General Competition.

Commission has wide competence for investigation of practices dangerous for competition (it can enter premises, investigate documents, mail, interrogate persons etc.).

Practices are sanctioned with big fines (fines must be big to be real sanction for powerful competitors – mostly companies).

Details are established with regulation 1/2003.

Involvement of authorities of member states

- Member states are expected to privide adequate assistance for investigation (police).
- Member states are required to enforce decisions imposing of fines if not paid voluntarily by sanctioned competitors.
- Since 2004, competition authorities of member states are expected also to enforce EU competition law together with the Commission. They can also impose fines according to EU law.
- Member state courts shall also contribute with avards for damages.

Judicial control

- Competition law in every country and also in the EU is frequently adjudicated.
- Competitors which face heavy fines try to avoid it with actions and complaints available.
- In modern democratic countries, there must be control of administrative sanctions by independent courts.
- Best lawyers are engaged. Excellent argumentation is often heard, inspired with foreign laws and practices.
- In the EU, control is provided now by the Court of the First Instance. In the past, it was provided by the Court of Justice. Most landmark judgements related to competition law have been adopted by it.

Merger control – idea

- Extensive application of antitrust law against some mergers (judgement Continental Can) was perceived as troublesome due to legal uncertainty.
- Merger control was therefore developped as additional tool for support of competition.
- It shall prevent abuse of dominant position (no dominant position – no abuse will be possible).

Merger control – framework

There is special regulation 139/2004 for merger control in the EU.

Mergers can result from various transactions: fusion of companies, acquiring of an important part of shares etc.

All mergers above some thesholds (turnover and proportion on relevant market) shall be approved by the Commission.

Merger without approval is illegal and void.

State aid control - grounds

- Member states of the EU can distort competition in internal market with their state aid.
- The most important ground for state aid is threat of unemployment or effort to create more jobs.
- Social-democratic politicians are more tempted to provide state aid than right-wing politicians.
- In Europe, member states have sufficient ressource for state aid.
- The European Union provides huge subsidies in framework of common agricultural policy: unfair competition can be thus reduced too and agriculture is thus exempt from EU restrictions on state aid.

State aid control - definition

- State aid must be selective – for one or several competitors or for one branch of economy.
- State aid can be awarded by many public institutions: central, regional and local governments, by funds established for it, by contracted banks etc.
- State aid can be distributed in many forms: subsidy, guarantee, loan with favourable interests, tax exemptions and respites, delivery of goods and provision of services for free or with favourable conditions, real estate for unrealistic price, or investment without expectation of profit (judgement Boussac).
- State aid must be distinguished for reimbursement for services and goods provided cheaper than costs for them are (services of general economic interest).

State aid control - policy

- In general, state aid is prohibited.
- Illegal state aid must be recovered.
- Nevertheless, according to primary law, some state aids are exempted after recognition
- Many other state aids can be approved by the Commission.
- The Commission informs about its policy on state aid for various branches and competitors in various documents.
- In period of economic slowdown and financial crisis, number and amount of state aid increased. EU policy has become more lenient towards state aid due to political reasons.

Public procurement

- EC law must take care for natural tendency of member states to support domestic bussiness by public procurement.
- No discrimination of foreign providers is allowed.
- EC directives provide for detailed harmonisation of national laws governing public procurement. For example, some tenders (calls for proposals) must be publicized on European level.
- To what extent EU involvement in public procurement contributes to reduction of corruption related with use of public money in many countries?

Demonopolisation

- Many developped countries demonopolize different branches of their economy (electricity, gas, telecommunication, modes of transportation, mail etc.).
- EU requires this demonopolization for above-mentioned sectors of economy with several directives.
- However, the level of demonopolisation achieved in member states is different, and experience is mixed (reduction of security and decreased price transparency etc.).

Anti-dumping and anti-subsidy

- There are special rules against importation of goods from the third countries if manufactured abroad with state aid (subsidies), or delivered for price which are below costs with effort to achieve dominant position (dumping).
- Special duties are imposed by the Commission to balance subsidies and dumping.
- Measures against foreign dumping and foreign subsidies must comply with standards of WTO.