

Antitrust Law, its substance and impact



O mé zboží byl takový zájem, že jsem mohl stanovit ceny vysoko nad výrobními náklady. Zavřeli mě ale za zneužívání monopolního postavení.

To byla příležitost. Stanovil jsem ceny pod náklady, abych získal víc zákazníků. Zavřeli mě za dumpingové ceny a ničení konkurence.

My ostatní jsme nechtěli dopadnout jako vy, tak jsme radši drželi všichni stejné ceny. Obvinili nás z cenových dohod.



References

- Faull & Nikpay: The EC Law of Competition. 3 rd Ed. Oxford University Press, 2014
- Bellamy, C., Child, G. European Community Law of Competiton. 7th Ed. London: Oxford University Press, 2013

Antitrust Law / Competition Law

- The aims of competition law
 - to condemn anticompetitive behavior
 - to ensure free and fair competition
 - to ensure that all companies play by the same rules
- The main goal of regulation (regulatory interventions) of competition
 - the protection of the interests of consumers (consumer welfare)
 - the protection of competitive processes
 - The primary aim is to prevent distortion of competition – rather than protect the position of particular competitors.

Competition

- Competition is a process that forces firms to be responsive to consumers needs with respect to price, quality, variety, etc.;
 - Over time it also acts as a selection mechanism → more efficient firms replacing less efficient ones
 - Competition is a key element in the promotion of a faster growing, consumer-oriented and more competitive economy.
- Competition tends to lead to **cost efficiency**, **low prices** and **innovation**.
- Competitive markets tend to lead to a higher level of **consumer welfare** in both the short-run and the long-run than a market that are not competitive.



Economic models of competition

- Perfect competition
 - Participants are price-takers (they cannot influence a price level), many suppliers and buyers in the market, perfect information (about prices, quality of product,...), no entry and exit barriers, homogenous product
- Monopoly
 - Only one supplier in the market, insuperable barriers entry
 - Allocative inefficiency (monopoly price is higher than a competitive price), productive inefficiency
- Oligopoly
 - The market is controlled by a few suppliers (two or more), each of whom is able to influence prices and thus directly affect the position of competitors

Effective competition – potential definitions

- **The process of rivalry?**
 - Competition law investigations often arise in those situations in which rivalry is eliminated (mergers, cartel agreements) and when the elimination of rivalry has any substantive negative effect on consumer welfare.
- **The absence of restraints?**
- **Where no firm can influence the market price?**
 - stems from the economic model of perfect competition

The areas of antitrust law

1. Agreements between two or more firms which restrict competition = **cartels**
 - group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.
2. Anticompetitive dealing of dominant undertaking = **Abuse of dominant position**
 - exclusionary conduct (predatory pricing, margin squeezes, refuse to deal,...)
 - exploitative conduct (excessive pricing, ...)
3. Concentration of undertakings – **merger control**
 - assessment whether a notified concentration is compatible with the common market → whether it would not significantly impede effective competition

The main sources of the EU competition law

1. Primary law:

Treaty on the Functioning of the European Union („TFEU“)

- **Article 101 (ex Art. 81 TEC) – cartels**

„... 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 ...“

- **Article 102 (ex Art. 82 TEC) – abuse of dominant position**

„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.“

2. Secondary law (regulations):

- **EC 139/2004 Regulation on the control of concentrations between undertakings**
Art. 2/3: „A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.“
- **EC 1/2003 Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty**
- Block exemptions:
 - **Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices**
 - **Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements**
 - **Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements**
 - **Commission Regulation on the application of Article 101(3) of the Treaty to categories of technology transfer agreements**
 -

3. Soft law (non regulatory documents) – notices, guidelines:

Cooperation within EU

- Commission Notice on cooperation within the Network of Competition Authorities
- Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 (101) and 82 (102) EC (TFEU)

Procedure before the European Commission

- Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty
- Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)
- Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty
- Commission Notice on the definition of relevant market for the purposes of Community competition law

Leniency and fines

- Commission Notice on Immunity from fines and reduction of fines in cartel cases (Leniency notice)
- Guidelines on the method of setting fines

3. Soft law (non regulatory documents) – notices, guidelines:

Abuse of dominant position

- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings
- Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004

Cartels

- Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

Block exemptions (notices) and guidelines (soft law) – e.g.

- Guidelines on the application of Article 101 (3) - ex 81(3) of the Treaty
- BER – see above
- **Is competition ALWAYS good?**

Goals of the EC Competition Law

1. Economic goal

“market based competition rewards strong firms that offer better goods and services at lower prices. And it penalizes those which make less efficient choices about how they organize themselves and what they produce... Companies which face strong competition in their home market are more likely to become successful on a global scale.”

Former Commissioner for Competition, Neelie Kroes (2004 EC Competition Policy Newsletter)

2. Integration goal

„an agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental object of the Community.”

Cases 56, 58/64 Costen and Grunding v. Commission [1966]

1. Economic goal

- The promotion of competitive market economy → the promotion and protection of effective and undistorted competition
 - Competitive market = the best mean of securing economic efficiency (efficient allocation of resources and efficient production)
 - The primarily purpose is to prevent distortion of competition – rather than protect the position of particular competitors

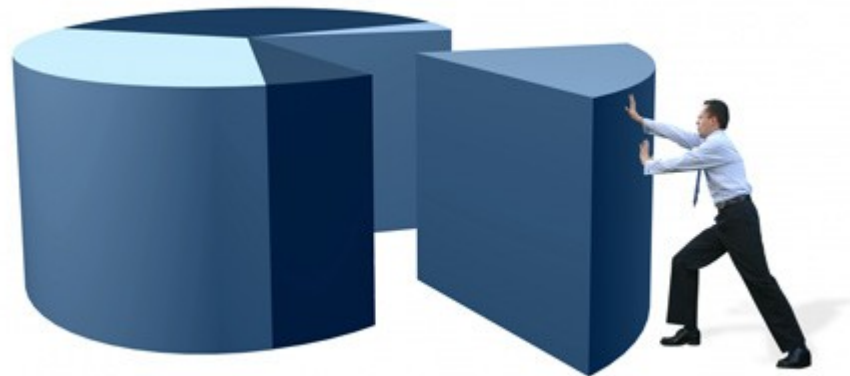


1. Economic goal

- The protection of consumers welfare by maintaining a high degree of competition in the common market
 - The encouragement of efficiency, innovation and lower prices → the competition (rather than state or private monopoly) brings greater efficiency, increased innovation and lower prices, which lead in turn to the optimal allocation of resources, rising standards of living and, at least in the long term, the protection of employment.

2. Integration goal

- The prevention of barriers to integration of the single market (which presupposes the free flow of goods and services throughout that market)→ the consumer should be able to buy goods from the cheapest source anywhere in the Community
- To prevent barriers to trade being erected by private agreements between undertakings, abuse of monopoly power, or state subsidies.



Definitions of the basic terms

- Undertaking (competitor)
- Relevant market
 - Product market
 - Geographic market
- Market power
- Entry barriers

Undertaking

- No definition in TFEU
- Entity engaged in an economic activity
 - Economic activity = any activity consisting in offering goods and services on a given market
 - The Tribunal of the European Court: Art. 81 is addressed to economic entities made up of a collection of physical and human resources being capable of taking part in the... infringement ... referred to in that Article.
 - Legal or natural persons, their associations, associations of such associations

Undertaking - examples

- Limited companies, partnerships, agricultural cooperatives, State corporations,... (it is not necessary for the entity to have legal personality for the purpose of being an undertaking)
- Trade association – can be both an association of undertakings and an undertaking itself by virtue of the economic activity it pursues
- Individuals as an undertakings
 - If he engages in economic or commercial activity in his own right → sole trader, ...
 - **Case C-309/99 *Wouters*** - Members of Dutch Bar (lawyers) were held as undertakings for the purpose of Art. 81

Relevant market

- The question is: **what options are open for the customers to acquire the product they wish to acquire?**
- Relevant market definition:
 - is necessary to assign market shares to the various companies active in the market
 - allows a first screening of cases
- **Product dimension**
 - 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
- **Geographic dimension**
 - comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous

Relevant market - example

Case 27/76 *United Brands Co v Commission* - Chiquita Bananas



- **Product market**

- Banana market as a relevant market (bananas were found sufficiently distinct from the fresh fruit market).
- *„The banana has 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“*

- **Geographic market**

- Germany, Denmark, Ireland, Netherlands, Belgium, Luxemburg
- *„The conditions for the application of Article 86 to an undertaking in a dominant position presuppose the clear delimitation of the substantial part of the EC in which it may be able to engage in abuses which hinder effective competition and this is an area where the objective conditions of competition applying to the product in question must be the same for all traders.“*

Market power

- General definition: **The power to raise price above the competitive level**
 - price above competitive level:
 - in short-term perspective – higher than marginal costs
 - in long-term perspective – higher than average costs
- Market power can manifest itself in a number of dimensions:
 - High prices, reduced output, reduced choice and quality, diminished technological innovation, ...
- Market power usually tends to inefficiency → there is a certain welfare loss
- **Market shares** are indicators of market power

Market power - dominance

- Dominance = a strong form of market power



- Dominance
 - single dominance – a single company has substantial market power
 - an undertaking have a power to behave independently of its competitors and customers
 - collective dominance – a group of companies jointly holding such market power giving rise to collusion
- DMA and DSA (since 2022): regulation affect large tech companies —gatekeepers— that control a lot of online activity and process massive amounts of consumer data. Per-se principle, ex ante, some conduct prohibited „as such“. safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses. (Rather regulation of unfair trade practices of technological giants, based on case law (to prevent repetition))

Barriers to entry

- The various difficulties which new undertakings may face in entering the market
- Advantages of established sellers in an industry over potential entrant sellers → the incumbent companies have certain advantages that allow them to increase their price above competitive price without attracting entry of newcomers
- Existence of entry barriers
 - It has to be taken into account in determining whether an agreement or practice may affect the trade



Barriers to entry - examples

Structural barriers

- are related to basic industry conditions such as cost and demand
 - economies of scale, technological advantage, switching costs for consumers, sunk cost
 - legal protection (legal monopoly → ownership of intellectual property)
 - brand loyalty

Strategic barriers

- are intentionally created or enhanced by incumbent firms in the market - usually for the purpose of deterring entry
 - exclusive dealing arrangement
 - predatory pricing
 - investment in advertising

Effect on Trade between Member States

- Expression contained in both art. 101 and 102 TFEU as a rule of jurisdiction
 - enabling Community law to regulate all anticompetitive conduct of undertakings having appreciable repercussion at Community level
- The concept of **trade** have “a wide scope”

Trade = all economic activity → supply of goods or services (such as banking, insurance, loss adjustment, public services such as ambulance services, economic aspects of sports,...)
- Where an agreement or practice has an effect on inter-state trade, a national court or competition authority is obliged to apply EC competition law as well as national competition law (Art. 3 EC 1/2003 Regulation)

Effect on Trade between Member States

- Potential effect
 - It is enough to show that the agreement or conduct is **capable** of having an effect on interstate trade → sufficient degree of probability must be demonstrated (trade **could be** affected)
- Appreciable effect
 - “**de minimis**” principle in respect of Art. 101 TFEU → the influence on trade must not be insignificant
 - presumption of appreciable effect in relation to certain agreement - “hard-core” cartels („de minimis“ not applied)