

Recent developments in EU Law and enforcement

Session 3

Recent issues

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Cartel Enforcement-1

Cartel are secret agreements/concerted practices between competitors to coordinate their conduct on the market

Major enforcement issues are:

-expressing in the law the prohibition of hardcore cartel conduct as a restriction by object

-the evidential threshold that has to be met to meet the burden of proof

-detecting cartel conduct

Cartel Enforcement-2

Methods of detection:

- >Historically emphasis has been to uncover communications between oligopolists in the same business**
- >follow up complaints is also a traditional tool that exploits to the full the basic investigative mode of Competition authority**
- >follow up of parallel cartel investigations in other jurisdictions when the same business operators are also in domestic jurisdiction**
- >Leniency programme using a carrot and stick approach in a prisoner's dilemma game to stimulate voluntary applications for leniency**
- >more sophisticated economic/ econometric approaches involving screening of data on prices and quantities in suspect market: this Method is of some value in suspect tendering and auction procedures but is dependent to creating a databank of tenders**

Cartel Enforcement-3

Studies of actual cartel discoveries in US and EU suggest a past detection rate of 15%.

EU's recent anti-cartel enforcement suggests that successful cartel prosecution results in 1 in 3 investigations started by leniency applications

Hence critical to develop and structure a leniency programme to improve the percentage of successful prosecutions by ensuring that applicants submit evidence of high probity

Success of leniency programme is not ONLY measured by number of applications for immunity but by the number of successful prosecutions

Cartel Enforcement-4

Key elements for a leniency programme

- **A preliminary requirement is for the authority to be able to impose a fine. An effective programme could then build with fines at more serious and deterrent levels**
- **Authority empowered to grant immunity against clear incriminating evidence of cartel conduct. Threshold for granting immunity is a crucial element of the programme – too low a threshold generates applications of poor quality**
- **Immunity has to be granted up front for legal security; fine reductions for subsequent applicants dependent on transparent criteria**

Cartel Enforcement-5

- >essential to put in place an expeditious procedure for assessing applications for immunity and leniency**
- >ensuring confidentiality to applicants an important consideration ; equally important to maintain secrecy for the first investigative measure**
- >evidence of cartel conduct can only be unearthed if investigators have knowledge of the other participants and the nature of conduct. Having court mandated power to inspect business premises is thus valuable ..**
- >Evidence of high probity: contemporary documents, minutes of meetings, exchange of communications, implementation of conduct, voluntary self incrimination, admissions contrary to self interest, first hand knowledge of cartel workings, corroborative statements**

Cartel Enforcement-6

Sustained anti-cartel enforcement depends on

- ensuring that the incentives to report remain valid**
- important to note the leniency works well in competition law systems where there is merger control. Most immunity applications come from due diligence prior to merger filings**
- recognise the interplay between fines and leniency**
- fines beyond deterrent levels are disproportional and even can have negative impact on post-fine market structure**
- importance of private litigation implies adaptation of fine levels**
- due process consideration highly important**
- stringent compliance by corporations is rewarded in some jurisdictions – this ensures continuing incentive to maintain high levels of internal audit**

Cartel case Law

- **Agreement:**
 - Case T-7/89 *Hercules Chemicals* (1991) E.C.R. II-1711; T-41/96 *Bayer* (2000) E.C.R. II-3383; Joined Cases C2&C3/01, *Bayer/Commission & Bundesverband der Arzneimittel-Importeure* (2004) E.C.R. I-23.
- **Publicly distancing:**
 - Case 204-5 etc/00 *Aalborg Portland v Commission* (2004) E.C.R. I-123; Case C-199/92 *Hüls v Commission* (1999) E.C.R. I-4287.
- **Parental liability:**
 - Case T-112/05 (*Choline Chloride*) *Akzo Nobel v Com* (2007); Case T-109/02 etc *Bolloré* (2007) E.C.R. II-947.
- **Single, complex, continuous infringement:**
 - Case C-49/92 *Anic Partecipazioni* (1999) E.C.R. I-4125.
- **Discretion in fining:**
 - Case T-224/00 *Archer Daniels* (2003) E.C.R. II-2597; Case T-15/02 *BASF v Com* (2006) E.C.R. II-497; Case T-279/02, *Degussa* (2006) E.C.R. II-897.
- **Limits to discretion:**
 - Case T-26/02 *Daichi Pharmaceuticals* (2006) E.C.R. II-713; Case T-38/02 *Groupe Danone* (2005) E.C.R. II-4407.
- **Effective role:**
 - Case C-49/92 *Anic Partecipazione*; Case T-71/03 *Tokai Carbon* (2005) E.C.R. II-10.
- **Recedivism:**
 - Case T-201/01 *Michelin* (2003) E.C.R. II-4071
- **Ne Bis In Idem:**
 - Case T-236/01 etc *Tokai(I) (Graphite electrodes)* (2004) E.C.R. II-1181;

Developments in Guidance for Restrictive agreements-1

EU approach has been to provide guidance through block exemptions that set out safe harbours based on market shares and a list of hardcore restrictions that are excluded to benefit from block exemptions

- **A notice on market definition is useful to permit the business sector to self evaluate the relevant market and determine their own individual market share**
- **Hardcore restrictions are precisely those that are retained in the jurisdiction as restrictions whose sole objective is to restrict competition.**

Restrictive agreements -1

Typology of Restrictive agreements

Vertical Agreements

- **Exclusive distribution** (*restriction on suppliers*)- **one reseller in a particular territory;**
- **Selective distribution** (*restriction on suppliers*) - **distributors selected for costly items-perfumes, cameras etc.;**
- **Exclusive supply** (*restriction on suppliers*) - **agreement to only supply one buyer in territory;**
- **Exclusive and selective distribution** - e.g. for cars where distributor selected on specific criteria, and can resell only to authorised dealers;
- **Exclusive dealing** (*restriction on buyers*) - **reseller only stocks the brands of the supplier;**
- **Quantity forcing** - a type of exclusive dealing;
- **Exclusive customer allocation** - similar to exclusive distribution but instead of allocated territory there is allocated customer group;
- **Franchising** - Combination of selective, exclusive and single branding.

Restrictive agreements-2

Competition concerns of vertical restraints

There are 3 main concerns:

- **by limiting distributors or suppliers there are increased barriers to entry. Foreclosure of suppliers or distributors. Thus possible reduction of inter-brand and/or intra-brand competition** (*however most vertical restraints are meant to align the incentives of the sellers along the vertical chain*);
- **there is possibility of inefficient price discrimination where territories or customers are allocated and passive sales are restricted;**
- **vertical restraints may, though rarely, facilitate collusive pricing if there is a system of maximum pricing.**

In general where there exists considerable inter-brand competition vertical restraints are not a problem; and obviously where intra-brand competition is fierce no competition concerns.

Restrictive agreements-3

Quick Evaluation Screen

- **check the vigour of inter-brand competition on the market;**
- **safe harbour if supplier market share <30%. Similarly for exclusive supply if buyer market share <30%;**
- **black clauses normally prohibited irrespective of market share;**
- **resale price maintenance;**
- **absolute territorial or customer protection;**
- **restriction of cross supplies within a selective distribution network;**
- **exclusion of passive sales, exclusion of parallel imports/exports;**
- **Conclusion: Cases that present no concerns by this screen can be closed.**

Restrictive agreements-4

Recent enforcement by EU are all in relation to hardcore restrictions. Thus in the EU market of several trillions of euros the principal cases of vertical restraints have the objective to promote parallel trade or passive sales (market integration objective). In USA these types of cases are not prosecuted .

- . **Yamaha(2003) selective distribution of pianos;**
- **Case T-67/01 JCB (2004) ECR II-00049 exclusive distribution of earth moving machinery;**
- **Nintendo case T-13/03 OJ C70 of 22.03.03 about discriminatory prices of video games;**
- **Case COMP/37.980 Topps about impeding parallel trade in Pokemon cards.**

Restrictive agreements-5

Horizontal agreements - agreements between competitors:

- **Production specialisation, common production of intermediates, subcontracting;**
- **Contractual assembly, outsourcing, bespoke input supply;**
- **Joint R&D, technology transfer, licensing of patents and knowhow;**
- **Cooperation in marketing, sales, customer support;**
- **Joint ventures covering some or all business operations;**
- **Joint purchasing, joint transport and logistics support;**
- **Product swaps;**
- **Code share agreements, shipping liner conferences;**
- **Sharing capacity;**
- **Consortia agreements;**
- **Standardisation cooperation.**

Restrictive Agreements- 6

Competition concerns of horizontal agreements:

•There are several concerns; all become serious when the cooperating competitors have an important part of the market:

- foreclosure, raising rivals' costs by excessive pricing of access or inputs;**
- reduced competition in innovation;**
- market and/or customer sharing;**
- reducing or fixing supply or capacity;**
- price discrimination, tying, leveraging of market position from one market to neighboring market;**
- margin squeeze;**
- denying market entry, forcing exit of competitors;**
- refusing to license, filing patent thickets.**

Restrictive Agreements- 7

Quick evaluation screen:

- **Primarily examine the joint market share of the cooperating competitors and market concentration;**
- **Safe harbor of a joint market share of 20% has been adopted, higher up to 25% for joint purchasing and up to 40% for R&D cooperation. In R&D better to count the poles of technology than market share, as market difficult to define.**

Hardcore restrictions

- **Outside of joint ventures, hardcore or black clauses raise competition concerns. Such clauses are:**
 - **any clauses in the Agreement on prices, capacities, production, on discounts, customer allocation or territorial allocation and market sharing.**
 - **Cross licensing between direct competitors with royalty set as a proportion of respective product price**

Restrictive Agreements -8

Guidelines and Block exemptions made possible end of notification system

>Economic approach of these guidelines better takes into account business and market realities

>In the new vertical block exemption main issue is can internet based distribution have restrictions familiar in selective distribution and in exclusive distribution as in “brick and mortar” set up. If passive sales is not impeded then yes.

>in standardisation benefit of block exemption accrues when IPRs are disclosed unless they will be available royalty- free. IPRs would be made part of standard if licensed on FRAND terms (fair, reasonable, non-discriminatory)

Significant Case Law -Restrictive Agreements -9

- Agreement, decision:
 - Cases 56,58/64 *Consten and Grundig* C.M.R. 299(1964); Case T-41/96 *Bayer* E.C.R.-3383(2000); Case C-67/96 *Albany International* E.C.R. I-5751(2000); Case 107/82 *AEG Telefunken* (1983) E.C.R. 3151; Case T-41/96 *BayerAdalat* E.C.R. II-3383(2000).
- Concerted practice:
 - Case 48,49,51-57/69 *ICI v Com* E.C.R. 619 (1972)
- Selective distribution:
 - *Metro v Commission* (1977) E.C.R. 1875
- Franchise agreement:
 - Case 161/84 *Pronuptia* E.C.R. 353(1986)
- Object or effect:
 - Case 388/94 *European Night Services* (1998) E.C.R. II-3141; Case 56/65 *STM v Machinebau* E.C.R. 234 (1966).
- Appreciability:
 - Case 5/69 *Volk v Vervaeck* E.C.R. 295 (1969)
- Rule of reason rejected:
 - Case 528/93 *Metropole Television* E.C.R. II-649 (1996); Case 65/98 *Van Den Bergh Foods* (2004) 4 C.M.L.R. 1.; Case C-309/99 *Wouters* (2002) E.C.R. I-1577.
- Inter & intra brand:
 - Case C-234/89 *Delimitis v Henninger Brau* (1991) E.C.R. I-945
- Affectation of trade:
 - Case 56/65 *STP v Machinebau*; Case C-215/96 *Bagnasco & others* (1999).

Priorities in Abuse cases

- **Article 102 of the Treaty prohibits abuse of dominance. The article contains a list of not exhaustive possible abusive practices:**
 - (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**
- **The list refers mostly to exploitative abuses. In practice article 102 has always been applied to exclusionary abuses!**

The relevant market

- **The hypothetical monopolist test fails in abuse of dominance cases because a firm holding market power will always price in the elastic portion of its residual demand (leading to a situation where a price increase is not profitable).**
- **This is why the relevant market is defined in the Guidance as one where the dominant firm could maintain its high price for a significant period of time (the price increase has to be calculated starting from the competitive price)**

How dominance is evaluated

- **The assessment of dominance is based upon an evaluation of the following factors:**
 - **constraints imposed by the existing supplies from, and the position on the market of, actual competitors;**
 - **constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors;**
 - **Constraints imposed by the bargaining strength of the undertaking's customers**
- **In the 1979 Hoffman Laroche decisions the ECJ maintains that high market shares (relative to to the market shares its competitors) held for some time are an evidence of dominance, imposing a reversal of the burden of proof on the dominant firm itself**
- **What matters for dominance is the existence of barriers to entry: economies of scale, privileged access to factors of production, control over important technologies, etc.**

Convergence between the US and the EU?

EC

- **Until 2005 the provision against abuse of dominance is applied without much consideration on the actual exclusionary effects of the alleged abuse and without much consideration on the incentives to innovate and to invest on the part of the dominant company.**
- **One of the reason is that the dominant companies are often legal monopolies that have invested risk free**
- **European antitrust was defined as protecting competitors, not competition**

US

- **Starting from the mid 1960s greater and greater emphasis on economic analysis and great care in avoiding false positives. The objective of antitrust enforcement is to protect competition**

What does it mean to integrate economic analysis in antitrust law

- **In order to identify an anti-competitive practice you need to verify its effect on the market (not only on the parties involved in the practice)**
- **This is not always straightforward: sometimes a competitive practice is undistinguishable from an anticompetitive one (i.e. price discrimination)**
- **Only practices that have the effect of excluding an equally efficient competitor are excluded (form does not matter)**
- **Very difficult to accept for a (European) lawyer: not much legal certainty.**
- **While for a European economist it is very difficult to accept that not everything that is restrictive of competition is actually prohibited. (i.e. co-operative oligopolies). The reason is that firms have to know what not to do in order to comply with the law**

Monopoly and dominant position

- **Legal definition in the EC: A firm enjoys a dominant position when it is able to behave substantially independently from competitors, its customers or its suppliers.**
- **According to economic analysis a firm enjoys a dominant position when it is able to increase prices substantially above their competitive level and reduce quantities (because of lack of competition and because of barriers to entry, sometimes originating in the behavior of the dominant company) and continue to do so for quite some time.**
- **Not much difference between the two definitions**

Dominance and market shares

- **High market shares are certainly not a sufficient indication of dominance. However low market shares might exclude dominance. (Economic analysis is full of asymmetries!)**
- **Giving an indication to companies on when they become dominant is very important especially in the EC (we have very few cases)**
- **According to the EC guidance on article 82 dominance is (almost) excluded below 40% market share.**
- **Even at the cost of duplicating the analysis, dominance should be proved separately from the abuse (for legal certainty).**
- **Given the importance truncated analysis has in the EU, dominance should be identified also by its degree (40% dominance is different from 90% dominance). The guidance acknowledges it. The higher the degree of dominance the lower the necessity of proving the exclusionary effects of an abuse.**

Type of abuses

- **How can a dominant company exclude competitors?**
 - Refusal to supply
 - Margin squeeze
 - Predatory pricing
 - Discounts
 - Tying
 - Bundling
- **Contrary to the US the EU law prohibits also exploitative abuses:**
 - Excessively high prices
 - Price discrimination

Predation

- **Akzo: prices <AVC (sufficient for proving the abuse); AVC < prices < ATC (necessary for proving the abuse, but not sufficient. The Commission has also to prove intent). Recoupment was considered implicit since the company is dominant.**
- **Should a proof of intent be found in an internal memorandum, the standard is over inclusive**
- **Tetra-Pak II: The Court said: “in the circumstances of the present case,” it is not necessary to prove recoupment**
- **Wanadoo: The Commission in its decision does a thorough analysis of recoupment possibilities. The Court does not refer to it.**
- **In the Guidance the Commission suggests that it would intervene against predation only if it is likely to create consumer harm (foreclosure). In the analysis of entry barriers the Commission will “consider the possibility of re-entry”.**

Discounts I

- **Until the Guidance was issued in 2009, discounts were legal if objectively justified (United Brands, Virgin-British Airways). What does it mean?**
- **In Michelin the illegality is defined right at the point where the discount is granted. Although Michelin was actually granting a 2% discount, the Court spoke of a 10000% discount!**
- **BA discounts would have led a competitor that wanted to match them to reduce prices by 20%. Only implicit proof that this would have been unprofitable. Evidence that Virgin was growing in the market did not matter. In the US case this was the proof that the practice was not exclusionary.**
- **Very similar arguments in Le Page (discounts to big supermarkets were huge) Competitors market shares were decreasing (no proof, not even implicit, that matching 3M discounts was unprofitable)**

Discounts II

- **In the abuse Guidance the EC writes that “*For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer’s purchase requirements can realistically be switched to a competitor (the ‘contestable share’ or ‘contestable portion’)*” and whether that quantity is sufficient for a competitor to sell at a profit given that the customer loses the discount.**
- **The 2010 Intel decision is full of technical details on the contestable share and on the cost of production of Intel. What matters is: 1) Contestable share: quite low; 2) Relevant time horizon: 1 year; 3) Relevant costs: Average avoidable costs: big discussion (spending that can be attributed directly to the production of microprocessors, including sales and marketing, and potential avoidable costs from savings in equipment usage and potential opportunity cost of production facilities).**

Discounts III

- **The FTC opened a procedure against Intel on similar grounds than the EC based on section 5 of the FTC Act (unfair methods of competition). The language is similar to article 102 and a bit broader than Section 2 of the Sherman Act (monopolization).**
- *“concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a “free pass” under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason, we have seen an increasing amount of potentially anticompetitive conduct that is not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5.13”*

Discounts IV

- **Pricing is particularly complex in a market with high fixed costs and short product cycles, as is the case for processor chips. The combination of high R&D costs plus high fixed setup costs, plus relatively low production costs, means that the key to success in the microprocessor market is high volume. Further, prices are generally set at the beginning of a chip cycle, which is relatively short, but longer than a year.**
- **What are the risks of a chip manufacturer? market demand risk and customer defections risk. Market demand is not under Intel control. Intel reduces the risk of costumers defections by using target discounts.**
- **In principle market share discounts are better than quantity discounts because quantity discounts tend to discriminate against smaller firms who are unable to purchase enough to obtain the quantity discounts.**

Refusal to deal

- **Oscar Bronner 1998: indispensability; lack of objective justification for a refusal; likely to eliminate competition in the market. Access was not indispensable. Similar to Aspen**
- **Magill 1995: a new product of which there is potential demand must be denied to consumers**
- **IMS had to share the brick structure aggregating German pharmacies so that no individual pharmacy could be identified. It is difficult to claim that this is indispensable. Plus the new product could well be the same as that provided by IMS.**
- **Microsoft interoperability: along the lines of Magill and IMS. Plus the Commission identifies a new element for the existence of the abuse (the same as in the Netscape case): “An evolution that would lead the IT industry to a more server-centric approach could in the long term threaten to strip Microsoft’s overwhelming dominance on the client PC operating system market of its competitive importance”. The CFI ignores this statement**

Refusal to deal in the US

- **In *Trinko v. Verizon* (2004) the Supreme Court held that when a binding regulatory obligation to deal is in place and at a price reflecting long-run incremental costs, refusal to deal should not be considered an antitrust law violation.**
- **After *Trinko* people have concluded that refusal to deal by dominant players will always be legal in the US. For example Eleanor Fox suggests that “*Trinko* has ... opened wide the door to argument ... that the starting point is scepticism about Section 2 based on fear that courts will condemn ambiguous conduct that is in fact efficient”.**
- **The Supreme Court suggests that a regulated monopolist is not subject to an antitrust obligation to deal. The Court does not tell us under what conditions such an obligation to deal actually exists, if ever.**

Bundling and tying

- **Mixed bundling is addressed with the same tools as discounts. Pure (technological) bundling may exclude competitors from the market (EC Media Player case) but may also benefit consumers. But how can we know?**
- **Elhauge (2002) suggested that consumer benefits be calculated in an objective way and that pure bundling should be prohibited when it excludes an equally efficient competitor and its technological benefits are not demonstrated. Difficult and discretionary to apply**
- **The EC Media player decision makes it mandatory to offer an unbundled version of the system (since pure bundling is not essential). Such unbundled version should be priced at P minus avoided costs. Entry would occur in the case competitors develop a superior product. Otherwise why should they enter?**

Margin squeezes

- **Deutsche Telekom was subject to a price cap regulation. Nonetheless, according to the Commission 2003 decision, it excluded competitors in Adsl services because “the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market”.**
- **In the US linkLine case lower courts had identified a less stringent standard than in the EC. Instead of alleging retail prices below some measure of costs, the District Court concluded that SCB was “deliberately sacrificing profits” in order to “impede and exclude competition”. A much more controversial standard to administer.**
- **The good point of linkLine is that it clarifies that a margin squeeze case can only exist if the dominant company is subject to an antitrust duty to deal (full symmetry in antitrust).**

Conclusions on exclusionary abuses

- **The EC and the US are no longer two different worlds. The effect-based approach is the standard in both jurisdictions. However in recent years the US seems to have given up on Section 2 cases, while quite a number of article 82 cases in the EC.**
- **In the EC exit is not a prerequisite for an abuse. It is sufficient that competitors are forced to operate at a loss (at the cost structure of the dominant company). In the US the simple fact that competitors did not exit has been considered proof that the practice is not abusive.**
- **In the EC complementarity between antitrust and regulation: refusal to deal often abusive. In the US very difficult to prove that a regulated company is also subject to an antitrust duty to deal.**
- **Because there so few decisions in the EU and the Courts stay away from complex economics, having issued the article 82 guidance is a very important steps toward clarification.**

Exploitative abuses

- **The examples of abuse identified in the text of article 102 are mainly exploitative. However article 102 is less and less enforced against exploitative abuses.**
- **Economists are very much against exploitative abuses. This is strange. The biggest inefficiency identified by economic theory in the case of monopoly is excessive pricing!**
- **According to the ECJ in United Brands (1978) prices are excessive when they are out of line with costs. Furthermore it is necessary to show that the prices of the dominant firm are much higher than those of competitors.**
- **The reason why a case of excessive prices is unnecessary is that the high profits are a signal to competitors that entry is profitable**
- **Article 102 has been often applied to cases of price discrimination (across countries)**

Judicial Review

Session 4

Standard and Burden of Proof

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Appeal procedure and extent of Review- 1

- **All Commission decisions can be appealed to the Court of First Instance and then ultimately to the European Court of Justice. According to the Treaty, the Courts may intervene against the Commission for failing to act, by annulling its decisions, or by recalculating the fines**
- **Every undertaking may challenge a decision addressed to it if it is of direct and individual concern to it.**
- **Every act may be challenged, not just a decision, but every act that produces binding legal effects. An SO cannot be challenged because it is preliminary. However letters rejecting complaints are challengeable.**

Appeal procedure and extent of Review- 2

- **The Community Courts must assess the legality of the Commission decisions by verifying “ lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers” (article 263 of the TFEU). These grounds of review are very similar to those available in administrative law in most countries.**
- **Particularly important will be the failure to give a fair hearing, to articulate properly the reasoning of the decision, or to base the decision on adequate evidence**
- **The Courts have tended to review the decisions of the Commission with a margin of appreciation on economic and technical matters. However However, that does not mean that they must decline to review the Commission’s interpretation of economic or technical data.**

Appeal procedure and extent of Review- 3

- **In the Microsoft decision the CFI says that the review “is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. In so far as the Commission’s decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission’s**
- *The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it”*

Appeal procedure and extent of Review- 4

- **As examples of thorough review one can cite a number of judgements in the merger area where the reasoning behind the Commission decisions has been considered insufficient: Airtours First Choice (collective dominance had not been established), Schneider Lagrand (dominance had not been established precisely in all the geographic markets where the merger would produce its effects) and Tetra Laval (prohibiting the merger was considered excessive considering that any possible harm could have been disciplined by enforcing the provision against abuse of dominance).**
- **Under article 261 TFEU the Courts have unlimited jurisdiction with regard to penalties . This means that the Courts can annul, reduce or increase the sanctions as much as they consider it necessary. However such reassessment has rarely been undertaken.**

EU Case Law developments- 1

- >Case law in the EU is highly developed and has provided the legal standard for many of the terms and concepts used in the legal provisions.**
- >Cartel case law presented above settled questions in regard to a number of issues- agreement, evidential threshold, discretion of the Commission, inspection procedures, fines ...**
- >Similarly as regards Restrictive agreements and transactions including joint ventures there is now substantial settled case law in regard to the application of art 101(1) and 101(3).**
- >Attached provides some salient case law on Merger Control and on Abuses of dominance.**

EU Case Law developments- 2

Case law from Abuse cases

Predation- case C-62/86 Akzo Chemie (1991) ECR I-3359

Exclusive Dealing- case C85/76 Hoffman-la Roche(1979) ECR 461

Loyalty Rebates- cases T219/99 British Airways(2004) 4 CMLR 1008, Michelin II (2003) T 201/01 ECR II -4071

Refusal to Supply - case C6,7/73 Commercial Solvents(1974) ECR 223

Tying- cases C333/94 P Tetra Pak (1996) ECR I-5951 , case T-201/04 Microsoft ECR II-2977

Essential facilities- case C-4180 Oscar Bronner (1998) ECR I-7791

(comparable US case Law) **Verizon Communications v Trinko LLP 124 S.Ct. 872**

Excessive/ discriminatory pricing- case 27/76 United Brands (1978) ECR 207.

Margin squeeze – Telefonica(2010) etc

EU Case Law developments- 3

Merger case law shows a string of 5 annulments between 1999-2004 but also some successes.

Airtours/First Choice	Case T-342/99	6 June 2002
Schneider	Case J-310/01	22 October 2002
Tetra-Laval	Case C-12/03-P Case T-05/02	15 February 2005 25 October 2003
Seb/Moulinex (Babyliss)	Case T-114/02	3 April 2003
Impala	Case T-464/04	13 July 2005

Endesa S.A.	Case T-417/05	14 July 2005
G.E.	Case T-210/01	14 December 2005
E.D.P.	Case T-87/05	21 September 2005

EU case Law Developments -4

Cartels -due process rights

- oligopolistic parallel conduct distinct from cartel conduct**
- proportionality and non-discrimination in fines**
- evidential threshold**

Agreements -restriction by object and y effect

- rule of reason**
- assessment under 101(3) always required**
- affectation of trade**

Mergers -Standard for review of prospective developments

- collective , joint dominance**

Abuse -definition

- special responsibility of dominant undertaking**
- market share threshold for dominance**

Competition law, Developing Economies & Competitiveness

Session 5

Competition Law and Competitiveness

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Competition and Competitiveness - 1

- >process of competition – rivalry between businesses to gain customers through low prices and innovation essential for efficiency and growth**
- >competitiveness results from optimizing allocation of resources – physical, human, technological to exploit market opportunities**
- >competition thus vital role in competitiveness as it works essential through efficient markets**
- >what about competition law? Just having a law is not equivalent to generating competition in the economy**

Competition and Competitiveness -2

- **Historically competition law introduced to deal concentration and growth of Trusts**
- **Competitiveness of the economy not the primary rationale; competitiveness is not about competition between nations but about making efficient use of endowments technologies to develop products and markets**
- **Competition law thus has a role in making markets work better and thereby influencing competitiveness**

Competition and Competitiveness -3

- >scope of the Law and the legal provisions have an important influence in making markets work well**
- >in this respect the bench mark legal provisions that have track record are good models**
- >role of competition policy is to guide and to focus enforcement on the key competition concerns in the economy given its developing nature**
- >developing economies have often under performing markets but have tremendous potential since the entrepreneurial factor is vast**
- >tackling market distortions, enforcing against cartels and bid rigging contributes to vigorous competition**

Competition and Trade -1

- >trade is generates competition from imports in the domestic economy**
- >offers domestic producers competitive opportunities in export market**
- >economies of scale – internal but also external scale economies become possible**
- >inward investment is a mechanism for technology transfer**
- >in a relatively open economy what need for competition law?**

Competition and Trade -2

Some caveats

- >much of this logic is about trade in goods and markets domestic and international are perfectly competitive and ignores nominal tariffs**
- >situation of trade in services is quite different**
- >even for goods issues are different for manufactured and complex goods as compared to raw materials**
- >how do imperfectly competitive markets in most of the manufactured goods and above all in services change the argument?**

Competition and Trade -3

- >Openness to trade is not in all cases a substitute for domestic competition law and policy**
- > customs unions where by definition within the union there is free trade and free movement of businesses nevertheless have domestic competition law and policy**
- >competition law a better instrument for preventing negative structural changes through anti competitive joint ventures and combinations or abuses of market dominance or highly restrictive and anti-competitive agreements that foreclose domestic markets**

Competition Law and Economic competitiveness

Session 5

Competition law in small economies

A.Heimler & K Mehta

Competition policy in fast growing small economies

- **Cartels and other hard core restrictions are as bad in a small economy as in bigger ones.**
- **The same for abuse of dominance cases put in place by public utilities in the process of liberalization**
- **In a small economy there must be care in defining the relevant market. Very often it goes much beyond the administrative borders. For example Phillips is a Dutch multinational.**
- **Specific considerations for competition law :**
openness to trade, the size of public sector , network sectors under public monopoly, proportion of economy subject to price regulation, size distribution of firms and business concentration

Relevance of competition law

- **Complementary policy to market opening initiatives**
- **Making markets function efficiently**
- **Framework for facilitating pro competitive structural changes to exploit growth of entrepreneurial factor**
- **Framework policy for economic competitiveness and international and regional trade integration**

Merger control and small economies I

- **The same for merger: there is no need for additional or different powers with respect to merger control in small economies (neither on standards for assessment, nor on notification duties)**
- **What options are available when an international merger has local effects? Not necessarily prohibition. In Australia, in the case of the Rothmans-British American Tobacco merger (cleared in a number of big jurisdictions) the ACCC imposed that the Australian assets be sold to Imperial Tobacco.**
- **A Problem:** The characteristics of a small economy is that everybody knows everybody else and there is a lot of continuity between the economy and politics. Furthermore the competition authority is generally small and weak.

Flexible rules on procedures and substance

- **In a small economy the more rules are flexible the more the position of the Authority is weak and subject to political pressure. The best for a well connected company is not to have a case at all.**
- **A few years ago a small economy agency claimed that “Since in a small economy everybody knows everything there is no need to introduce an ex ante notification system.” To the contrary, notification makes the Authority more independent**
- **The same can be argued for presumption of dominance. Market shares (rebuttable) presumptions strengthen the independence of the competition Authority. “If you do not like the results change the law” should be the answer to a request for a more lenient enforcement approach.**

Substantive analysis in small economies

- **No problem with the substantive analysis. It is the same as in bigger economies.**
- **As Bill Baumol suggests, oligopolies are the greatest source of innovation and of economic progress, much more than monopolies.**
- **Oligopolies should be looked at with favor. Sometimes oligopolies, especially in mature, stable demand industries, face strong incentives to collude, not only via fully established cartels.**
- **This is a danger especially for local industries like banking, finance or insurance. The more so in a small economy**
- **Liberalization in these industries is therefore very important, especially in a small economy**

conclusions

- **benefits of competition law even in small economies with great location advantages and openness to trade**
- **No impediments created to growth**
- **Specific adaptations made to application of law**
- **Focus of competition policy more on distortions such as cartels, bid rigging, anti-competitive awards of contracts, public assets and property**
- **Other focus-issues relating to regulation and competition of public utilities**

Issues for consideration

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Final thoughts

- > Competition Law framework: scope, coverage, exemptions and exceptions**
- > Institutional form of Competition authority**
- > Feasibility evaluation**
- > Developing an agenda for enforcement of law**
- > Importance of Interactions with stakeholders**
- > Decisional practice and its impact on developing competition policy**
- > Regional and international cooperation**