European Economic Law

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Course by

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Overview of the course

I. Principles of European Economic Law – The Economic Constitution of the European Union and the Foundations of the Internal Market

II. Fundamental Freedoms

III. **EU Competition Law**

IV. The Role of the State/Subsidies

V. EU Policies

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Compulsory Reading

Paul Craig/Gráinne de Búrca

EU Law - Text, Cases, and Materials

5th Edition, Oxford University Press 2011

➔ The passages indicated in the course outline have to be read beforehand.

III. EU Competition Law

Introduction

- Why competition?
- Competition
  - brings prices down;
  - guarantees choice;
  - promotes better quality of products;
  - yields innovation.
- An economic system based on effective competition maximizes consumer welfare.
- Effective competition between enterprises is a cornerstone of a market economy.

Competition Law: Introduction

- Why competition law?

- See *Adam Smith*, Wealth of Nations, 1776 (First Volume, Book I, Chapter X, Part II):

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

Competition Law: Introduction

- However, *Adam Smith* considered this inevitable:

  > "It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."

- Today, there is an international consensus that restrictions of competition have to be subject to strict regulations.
- The first competition law was the US-American *Sherman Act* in 1890.

Competition Law: Introduction

- In the EU, another argument militates for a strong protection of competition: The abolition of state barriers to trade shall not be foiled by private restrictions established by undertakings.

➔ EU competition law has the additional function of market integration. It complements the rules on free movement.

Competition Law: Introduction

In most jurisdictions, competition law is based on three pillars:

1. Restrictive Agreements ("Cartel interdiction")	**2. Abuse of a dominant position**	**3. Merger Control**
Art. 101 TFEU	Art. 102 TFEU	EU Merger Regulation

Competition Law: Introduction

In the EU, there is a fourth pillar:

4. State monopolies
Art. 106 TFEU

In addition, there are rules on state subsidies, Art. 107 – 109 TFEU. They are part of the "Rules on Competition" of the TFEU. However, they are not "competition law" in the proper sense.

Competition Law: Introduction

Legal sources

- Art. 101 – 106 TFEU
- EC Merger Regulation 2004
- Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
- Block exemption regulations
- Notices and Guidelines of the European Commission
  (on the definition of relevant market, on agreements of minor importance, on the method of setting fines, on leniency etc.)

Competition Law: Introduction

Who applies European competition law?

1. Public Enforcement

a) European Commission (under the supervision of the General Court and the ECJ)

b) National competition authorities in the EU and in the EEA (under the supervision of the national courts)

Competition Law: Introduction

2. **Private Enforcement** (before national courts)

- on the defendant's side (*Eurodefence*)
  - voidness of a contract, Art. 101 (2) TFEU
- on the plaintiff's side
  - injunctive relief
  - in particular: refusal to deal
  - damages claims

➔ The rules on private international law apply. Accordingly, any court in the world can be competent to apply European competition law!

Competition Law: Introduction

Therefore, also Swiss courts may be competent to apply European competition law. See:

Art. 137 of the Swiss Code on Private International Law (IPRG)

1 Claims based on a restraint of competition are governed by the law of the state in whose market the restraint has direct effects on the injured party.

2 […]

Competition Law: Introduction

On which procedural way do competition law cases arrive at the ECJ?

- Appeal against decisions of the European Commission and the General Court

- Preliminary questions according to Art. 267 TFEU coming from a national court (no matter if public or private enforcement)

Competition Law: Introduction

The International Dimension

- Swiss law explicitly provides for a rule on the international applicability of Swiss competition law:

Art. 2 (2) of the Cartel Act

"The present law applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country."

➔ **"effects doctrine"**

Competition Law: Introduction

- European competition law does not contain such a rule.
- In public international law, there is the distinction of "subject-matter jurisdiction" and "enforcement jurisdiction".
- "subject-matter jurisdiction": A state has the **jurisdiction to prescribe** whenever acts originate in its territory ("subjective territoriality") or when acts originate abroad but are completed within its territory ("objective territoriality").
- "enforcement jurisdiction": States do not have the **right to enforce** their laws abroad. This refers to all authoritative acts including investigations, information requirements or serving a summons.

Competition Law: Introduction

- **ECJ – *Dyestuffs*** (1972): The *economic entity doctrine*. If subsidiary companies are located in the EC, EC competition law is applicable to non-EC parents.

- **ECJ – Wood Pulp** (1988): EC competition law is applicable if a restrictive agreement is *implemented* in the EC.

Competition Law: Introduction

- So far, the ECJ has not yet endorsed the effects doctrine.

- By contrast, the European Commission applies the effects doctrine. The General Court at least tends to it (*Gencor* case).

➔ The generous definition of jurisdiction triggers the simultaneous application of several national competition regimes to the same case (problem of *extraterritoriality*).

Competition Law: Introduction

- There is a considerable risk of contradictory decisions.

  Examples:

  - Merger of *Boeing* and *McDonnell Douglas* (1997): Approved in the US, authorization by the European Commission only after long discussions
  - Merger of *General Electric (GE)* and *Honeywell* (2001): The US authorities approved, the European Commission prohibited the merger

➔ Risk of economic sanctions and trade wars

Competition Law: Introduction

- There is an urgent need to coordinate competition policy on the international level.
- The EU has concluded bilateral cooperation agreements with the US, Canada and Japan.
- These agreements contain rules on negative comity, sometimes also on positive comity.

Competition Law: Introduction

Comity

Principle applied in the field of international cooperation on competition policy. By negative comity, every country that is party to a cooperation agreement guarantees to take account of the important interests of the other parties to the agreement when applying its own competition law. By positive comity, a country may ask the other parties to the agreement to take appropriate measures, under their competition law, against anti-competitive behaviour taking place on their territory that affects important interests of the requesting country.

European Commission, Glossary

Competition Law: Introduction

- However, problems can only be solved in a multilateral context.
- The most important forums are:
  - OECD
  - UNCTAD
  - WTO
  - ICN (International Competition Network)
- Efforts to conclude an international antitrust agreement have failed so far.

Competition Law: Introduction

Relationship between European and national competition law

- EU Member States have their own competition laws, see for example:
  - France: Code de commerce, Livre IV
  - UK: Competition Act 1998/Enterprise Act 2002
  - Germany: Gesetz gegen Wettbewerbsbeschränkungen (GWB)
  - Italy: Legge 10 ottobre 1990 – Norme per la tutela della concorrenza e del mercato
  - Spain: Ley de Defensa de la Competencia

Competition Law: Introduction

- EU competition law is only applicable if trade between Member States is affected
- In case of cross-border effects, EU competition law and the competition law of the affected Member States are to be applied simultaneously.
- An exception is merger control: National competition law is not applicable to concentrations having a Community dimension (see lesson 11).
- For the relationship of Articles 101 and 102 to national competition law see Art. 3 of Regulation 1/2003.
- The basic principle is: In case of divergence, EU competition law takes precedence over national law.

Competition Law: Introduction

Art. 3 Regulation 1/2003: Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81 (3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

Art. 101 TFEU
Horizontal Agreements

- End of introduction
- Application of Art. 101 TFEU

Art. 101 TFEU
Horizontal Agreements

- Art. 101 TFEU

  (1) *prohibition*
  (2) *voidness*
  (3) *exceptions*

  - block exemption regulations
  - individual exemptions

Art. 101 TFEU
Horizontal Agreements

Landmark Reform of Procedural Rules

- Until 1 may 2004: **Centralised notification and authorisation system** (Regulation 17/62)

  - The European Commission had a monopoly over the grant of individual exemptions under Art. 101 (3) TFEU (former Art. 81 (3) EC).
  - Whenever an agreement was caught by Art. 101 (1) TFEU, and not covered by a block exemption regulation, the parties had to notify the agreement to the Commission and to wait for authorization.

Art. 101 TFEU
Horizontal Agreements

- Since 1 may 2004: **System of legal exception** (Regulation 1/2003)
  - The European Commission was faced with numerous notifications; it rather preferred to focus on serious violations of Art. 101 TFEU.
  - Therefore, Art. 101 (3) TFEU has been declared directly applicable by Art. 1 (2) Regulation 1/2003.
  - No more exemption monopoly of the European Commission; national authorities and courts have to apply Art. 101 (3) TFEU by themselves.
  - "self-assessment" by enterprises under Art. 101 (3) TFEU
  - In order to compensate the loss of legal certainty, there is a stronger role of notices and guidelines.

Art. 101 TFEU
Horizontal Agreements

- Horizontal agreements: agreements or concerted practices between competitors, i.e. enterprises operating at the same level of the production or distribution chain

- Vertical agreements: agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services
  (see definition in Art. 2 (1) block exemption regulation on vertical agreements)

Art. 101 TFEU
Horizontal Agreements

- Hardcore cartels are so serious that they will normally not fulfil the conditions of Art. 101 (3) TFEU. Therefore, they almost always infringe competition law.

- <u>Hardcore cartels</u>

  - price fixing
  - limitation of output
  - market allocation/division (geographical or clients)
  - collective boycotts
  - bid rigging

Bid rigging

Particular form of coordination between firms which can adversely affect the outcome of any sale or purchasing process in which bids are submitted. For example, firms may agree their bids in advance, deciding which firm will be the lowest bidder. Alternatively, they may agree not to bid or to rotate their bids by number or value of contracts.

European Commission, Glossary

Art. 101 TFEU
Horizontal Agreements

- Restrictions which are not hardcore, are called "simple restrictions". The conditions for an exemption under Art. 101 (3) TFEU have to be examined carefully.

- <u>Simple restrictions</u>

  e.g. cooperation agreements in the fields of
  - Research & Development (R&D)
  - production/specialisation
  - joint buying of products
  - commercialisation
  - standard setting
  - environment

Art. 101 (1) TFEU: Conditions of prohibition

1. Undertaking
2. Agreements, decisions, concerted practices
3. Restriction of competition
4. Relationship between agreement and restriction of competition
5. Effect on trade between Member States

1. Undertaking

- **Definition:** Any entity engaged in an economic activity, that is, an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed

- **including:** individuals and corporations, public bodies, liberal professions, professional sport
- **excluding:** consumers, employees, organisations representing employers and workers (e.g. trade unions), bodies with an exclusively social objective (e.g. social security)

2. Agreements, decisions, concerted practices

- agreement: including gentlemen's agreements, void agreements
  - ↔ agreements between parent and subsidiary
  - ↔ unilateral conduct

- decision by an association of undertakings

Art. 101 TFEU
Horizontal Agreements

- concerted practices: coordination between undertakings which, without having reached the stage of concluding a formal agreement, have knowingly substituted practical cooperation for the risks of competition.
  - ➔ The term covers forms of coordination which are practiced without an agreement.
- ➔ concerted practices ↔ parallel pricing as a rational response to exogenous factors

- for an example see the *Dyestuffs* case in Craig/de Búrca, p. 966-68

Art. 101 TFEU
Horizontal Agreements

- See also ECJ – *T-Mobile Netherlands*, 4 June 2009, C-8/08

  "The Court points out that any exchange of information between competitors pursues an anti-competitive object if it is capable of removing uncertainties as to the anticipated conduct of the participating undertakings, including where, as in the present case, the conduct relates to the reduction in the standard commission paid to dealers."

  "A *single meeting* between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve."

- ➔ When meeting with competitors, undertakings have to be extremely cautious!

3. Restriction of competition

- *Large definition:* Restrictions on the conduct of at least one party with respect to a competitive parameter (e.g. product, price, quality, quantity, customers or geographical activity)

  ➔ restriction of competition = restriction on freedom of action?

Art. 101 TFEU
Horizontal Agreements

- *Narrow definition:* A restriction of competition only occurs if the anti-competitive effects of an agreement outweigh its pro-competitive effects.

  ➔ This comes close to a *rule of reason* approach modelled on U.S. antitrust law.

Art. 101 TFEU
Horizontal Agreements

- In view of Art. 101 (3) TFEU, a general weighing of pro- and anticompetitive effects within Art. 101 (1) TFEU is doubtful.
- However, the case law of the ECJ shows that the entire legal and economic context should be taken into account when establishing a restriction of competition.
- The definition of the "restriction of competition" is one of the most difficult tasks of competition law!
- At least, there is the list of examples in Art. 101 (1) (a) – (e) TFEU.

Art. 101 TFEU
Horizontal Agreements

- Appreciability: See the European Commission's Notice on agreements of minor importance (*de minimis*) of 2014

No appreciable restriction of competition

- agreements between competitors: aggregate market share ≤ 10 %
- otherwise: aggregate market share ≤ 15 %
- special rules on cumulative effects
- The notice does not apply in case of hardcore restrictions.

Art. 101 TFEU
Horizontal Agreements

- **Ancillary restraints**: restrictions which do not constitute the main object of an agreement, but which are necessary for the proper functioning of its objectives.

  Example: A non-competition clause included in an agreement for the transfer of an undertaking if limited in scope and duration (ECJ – *Remia*, 1985)

➔ Ancillary restraints are not caught by Art. 101 (1) TFEU if they go not further than necessary.

4. Relationship between agreement and restriction of competition

- The restriction of competition must be the object or effect of the agreement.
- It is not necessary to take account of the effects of an agreement once it appears that it has as its object the restriction of competition.

5. Effect on trade between Member States

- This condition is interpreted in a large sense.
- The cross-border effect may be direct or indirect, actual or potential.

Exceptions to Art. 101 (1) TFEU

- Agriculture: see Art. 38 (3), 42 TFEU
- Art. 106 (2) TFEU: Undertakings entrusted with the operation of *services of general economic interest*
- **Art. 101 (3) TFEU**
  - block exemption regulations
  - individual exemptions

Block exemption regulations

- horizontal relationships -

- ➢ specialisation agreements
- ➢ research and development agreements
- ➔ relevance of market shares; no "black clauses"

Individual exemption under Art. 101 (3) TFEU

Conditions

1. Efficiency gains: Improvement of production, distribution or technical or economic progress
2. Consumers get a fair share of the resulting benefit.
3. Restrictions are indispensable to attain the objectives.
4. No elimination of competition in respect of a substantial part of the products in question

Individual exemption under Art. 101 (3) TFEU

- May non-competition considerations be taken into consideration within Art. 101 (3)?

  Examples: aspects of environmental, industrial, regional or cultural policy

- This question is much debated. The European Commission is rather hostile. The wording of Art. 101 (3) does not give a hint to include general policy arguments.

Summary Art. 101 TFEU

An agreement is prohibited if

1. it is caught by Art. 101 (1) TFEU;

2. it is not covered by a block exemption regulation;

3. it does not fulfil the conditions of Art. 101 (3) TFEU (or another exception, e.g. Art. 106 (2) TFEU).

Art. 101 TFEU
Horizontal Agreements

The ten largest fines in cartel cases by sector (since 1969, in Euro):

- 2012 **TV and computer monitor tubes** 1.470.515.000
- 2008 **Car glass** 1.189.896.000
- 2013 **Euro interest rate derivatives (EIRD)** 1.042.749.000
- 2014 **Automotive bearings** 953.306.000
- 2007 **Elevators and escalators** 832.422.250
- 2010 **Airfreight** 799.445.000
- 2001 **Vitamins** 790.515.000
- 2007/2012 **Gas insulated switchgear** 675.445.000
- 2013 **Yen interest rate derivatives (YIRD)** 669.719.000
- 2009 **E.ON/GDF collusion** 640.000.000

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The ten largest fines in cartel cases by company (since 1969, in Euro):

- 2008 **St. Gobain** car glass 715.000.000
- 2012 **Philips** monitor tubes 705.296.000
- 2012 **LG Electronics** monitor tubes 687.537.000
- 2013 **Deutsche Bank AG** Euro interest rate derivatives (EIRD) 465.861.000
- 2001 **F. Hoffmann-La Roche AG** vitamins 462.000.000
- 2013 **Société Générale** Euro interest rate derivatives (EIRD) 445.884.000
- 2007 **Siemens AG** gas insulated switchgear 396.562.500
- 2014 **Schaeffler** automotive bearings 370.481.000
- 2008 **Pilkington** car glass 357.000.000
- 2009 **E.ON** and **GDF** collusion 320.000.000 (each)

Art. 101 TFEU
Horizontal Agreements

- Three cases closely linked to Switzerland:
  - European Commission – *Elevators and Escalators*, 21 February 2007,
    upheld in main parts by General Court, 13 July 2011, case T-138/07 et al.,
    pending case C-501/11
  - European Commission – *Organic Peroxides*, 10 December 2003,
    confirmed by General Court, 8 July 2008, case T-99/04
  - European Commission – *Power Cables*, 2 April 2014