

**COMPETITION LAW**

**(IBL)**

**LEIDEN UNIVERSITY**

**FACULTY OF LAW**

**2015-2016**

**2<sup>ND</sup> SEMESTER**

READER PART I

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## WELCOME

Widely believed to stimulate innovation, to promote entrepreneurial freedom and to create more prosperous living conditions, *undistorted competition* has become a keystone of any market economy regime.

Competition *law* regulates businesses' market behaviour in accordance with the prevailing societal beliefs in undistorted or free competition. In the European Union, competition law rules particularly support the creation and functioning of the internal market envisaged by the founding Treaties. EU competition rules additionally also determine the extent to which Member States can intervene in the marketplace to support businesses. Compliance with EU competition law has therefore become an inherent part of any business' commercial strategy.

This course offers an introductory overview of the different types of (EU) competition rules and their roles in the regulation of global business today. During the next five weeks, we will explore the different branches of competition law, assess the rules, enforcement procedures and analytical frameworks applied therein as well as train the skills that ought to form part any business lawyer's toolkit when confronted with an EU competition law problem.

I wish you a most enjoyable course experience!

Pieter Van Cleynenbreugel

Leiden, 9 February 2016



## GENERAL COURSE GOALS

It can hardly be denied that competition law has become *one of the most exciting and dynamic sub-fields* of international business law. Competition law governs all market operators and structures their behaviour accordingly. Technology giants such as Apple, Samsung or Microsoft, large pharmaceutical or chemicals companies such as Akzo Nobel or BASF, telecommunications operators such as KPN, global services providers (e.g. American Airlines and Ryanair or Otis, Schindler and Kone in elevator maintenance), breweries such as ABInbev, former state-owned companies such as Lufthansa, Deutsche Bahn and NS and Member States such as France aiming to support the upgrading of its football stadiums in preparation for UEFA matches... All those very different private and public businesses have more or less recently been subject to *EU* competition law scrutiny.

This course offers an overview of different rules, principles and policies *EU competition law* relies upon to structure businesses' market behaviour. To that extent, it first outlines the goals of competition law and the legal concepts relied upon to attain those goals. By emphasizing the need for 'workable competition' within the 'internal market', *EU* competition law establishes a level playing field in accordance with which businesses and Member States have to structure their activities in the marketplace. Competition law in that regard distinguishes between rules directly addressing private market operators and rules structuring state intervention in the marketplace. In both instances, the *EU* – and most notably the European Commission – has been endowed with significant enforcement and sanctioning powers (lecture 1).

The course subsequently addresses the different specific competition law rules in more detail. It distinguishes between the prohibition and regulation of restrictive practices (lecture 2), the prohibition and regulation of abuse of a dominant economic position (lecture 3), the *ex ante* regulation of envisaged mergers and acquisitions (lecture 4) and the regulation of state interventions in the marketplace (lecture 5). The seminars following upon each lecture are meant for you to practice those techniques in (semi-)real life business settings. To that extent, we will discuss hypothetical and real life case situations that will invite you to think like a competition lawyer.

At the end of this course, you will be able to evaluate to what extent particular market behaviour can be potentially captured by the rules and principles of *EU* competition law. At the same time, you will have gained insight into the particular legal assessments required in competition law, as compared to other fields of *EU* law. The interplay between law, economics and policy and the role of lawyers in that regard will especially have become clear.

More schematically, the course goals can be listed as follows:

- You will be able to identify and apply the key concepts relied upon in *EU* competition law (undertaking, interstate trade, restriction, abuse...) in simplified hypothetical and real-life case settings.

- You will be able to distinguish and choose among one or more of the five branches of EU competition law in a particular case situation (restrictive practices, abuse of dominant position, merger control or state intervention through aid or state-owned businesses) and to argue in favour of a case solution accordingly.
- You will be able to independently find the most relevant Commission decisions and cases that help you develop a well-structured competition law analysis of a given problem.
- You will be able to identify the role of law and its limits versus economics and policy analysis across the different techniques of EU competition law

Each lecture (and accompanying seminar) will outline some more particular learning goals that you should master in any case during that lecture/seminar combination.

On a more practical level, this course seeks

- to familiarize you with the process of finding EU competition law cases in the DG Comp databases and in the Courts' case law.
- to improve your feedback and peer review skills in a lawyerly setting.
- to enable you to spot particular EU competition law issues and to address them accordingly.

As this course deals with EU competition law, basic knowledge of the foundations of EU law and of general EU substantive law – as acquired in other courses – will be presupposed.



## COURSE INFORMATION

### 1. Lecture and Seminar format

Teaching will take place in weekly 2 hour lectures in addition to weekly 2 hour seminars. The course will run for five weeks. You should do the assigned readings before the lecture and the seminar. You are also required to prepare the exercises for the seminars, as they will constitute a starting point for an in-depth and international business law-focused discussion of the materials covered in the lectures. **To stimulate class participation, we kindly ask you to upload your answer preparations on Blackboard, prior to attending the seminar.** Failing to do so will result in you being excluded from participating in the seminar session.

Please note that the seminar is not meant to restate the materials covered in the lecture. It is of vital importance that you attend both lectures and seminars, as materials covered in one session will not necessarily be dealt with in the other.

You need to know all cases included in this reader under the compulsory readings' section for that week. You will be expected to find and read a significant amount of cases (both EU Commission decisions and case law from the General Court and the Court of Justice). As in real (lawyerly) life, your ability to independently locate the relevant cases is one of the more practical skills this course seeks to teach you. **It is therefore of utmost importance that you independently search for the assigned cases and prepare them carefully.** I will of course be of any assistance should you be unable to locate or access a particular case.

### 2. Course materials

This reader contains rudimentary hand-outs for the five lectures and the assignments for the seminars. Each lecture ends with a list of about ten self-study questions, which are meant for you to gain deeper insight in the materials covered in class. In preparation for the seminars, each hand-out is accompanied by four to five seminar assignments. The assignments will be discussed in the seminar session and are meant to enable you to apply theoretical or doctrinal insights gained throughout the course.

**For lectures 2-5, the competition law chapters (Chapters 17-18) in C. Barnard and S. Peers, *European Union Law* (Oxford, OUP, 2014), can be of use. Remember, you already bought this book for your other courses in EU law (Foundations and Internal Market).** Please be aware that competition law is a rapidly evolving field of EU law and therefore subject to constant modifications. **For this course, it is of vital importance that you understand the mechanisms and are able to apply the 'algorithms' in simple case settings. The lectures and seminars are meant to make you think like a competition lawyer and only materials offered and covered therein should be studied for the exam.** I deliberately made the choice not to assign you any specific textbook, as the basic skeleton of competition law can be studied on the basis of the lecture and seminar slides as well. However, for lecture 1, I provide you with some rudimentary notes that may – or may not –

help you in studying the materials. For lecture 2, I will make a reference to my own scholarly work on Article 101 TFEU, which could be a helpful addition to the materials covered. For all other weeks, the slides used should suffice.

Please also be aware that the lecture notes accompanying lecture 1 and the rudimentary hand-outs are a work in progress. Should you have any comments as to the contents or the structure of those notes, do not hesitate to contact me by email or during class sessions. Your input will be a very valuable source for the improvement of the course text in the future. Thank you in advance for your cooperation.

### 3. Primary sources

Relevant EU primary and secondary legislation can be found in The Official Journal of the European Union (OJ), the voluminous official gazette of the EU which has an 'L' series (for legislation) and a 'C' series (for other matters including legislative proposals); you can find those documents on <http://eur-lex.europa.eu>. EU competition law also relies on 'soft law' instruments, such as guidelines, notices and recommendations issued by the European Commission. Whilst those documents are not formally binding on individuals, they create a legitimate expectation that the Commission will in fact consistently apply and follow them. As such, they are being granted some legal value without being binding per se.

An overview of all hard and soft law documents maintained in the field of EU competition law are available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>. Check this website if you need to read (and print) a piece of legislation.

The second part of this reader contains all hard and soft law documents necessary in preparation for the exam. Please bring the second part of the reader with you at all times, also during the exam. You may highlight words within this part of the reader, without however making cross-references. **Please note that all legislation and guidance documents listed under compulsory readings – and those listed under advanced (non-compulsory) readings for each week can be brought to the exam with you. You may highlight particular words or paragraphs, without however annotating those documents. Please also ensure that all documents are stapled, as they will be checked during the exam. Non-stapled documents cannot be used during the exam.**

**Part of the skills trained in this course require that you ACTIVELY search for the case law assigned through the Court's or the Eur-lex website.**

### 4. Course coordinator

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Short bio: Pieter Van Cleynenbreugel is an assistant professor (universitair docent) at the Europa Institute, Leiden Law School. Born and raised in Belgium, he obtained his LL.B

degree *summa cum laude* from KU Leuven-University of Leuven in 2007 and his LL.M (focus EU and economic law) degree also *summa cum laude* from the same university in 2009. During his LL.M, he participated in the Research Master programme jointly organized with Tilburg University and interned at EU competition law departments of different global law firms (including Linklaters and Allen&Overy). In 2010, he obtained an additional LL.M degree from Harvard Law School, where he specialized in U.S. antitrust law and economic regulation and where he was awarded a Dean's Scholar Prize for his performance in the 'Crisis, Globalization and Economics' course. Between 2010 and 2013, Pieter was employed as an 'Aspirant' Fellow of the Research Foundation Flanders at the KU Leuven-University of Leuven Faculty of Law, where he successfully defended his Ph.D on 'Market supervision in the European Union', which has been published subsequently by *Brill Publishing* in its *Nijhoff Studies in European Union Law* series. His work – which won two *best paper awards* – has been published in journals such as the *Common Market Law Review*, the *European Law Review*, the *Columbia Journal of European Law* and the *European Competition Law Review*. Current research focuses on the interactions between administrative/judicial, public/private and supranational/national enforcement layers in EU competition law and on the interaction between state and market in EU law.

## 5. Further materials

Some helpful, yet overly detailed textbooks are

A. Jones and B. Sufrin, *EU Competition Law. Text, Cases & Materials* (Oxford, Oxford University Press, 4<sup>th</sup> Edition, 2010), 1376 pp.

G. Monti, *EC Competition Law* (Cambridge, Cambridge University Press, 2007), 566 pp.

V. Rose and D. Bailey (eds.), *Bellamy and Child: European Union Law of Competition* (Oxford, Oxford University Press 2013), 3736 pp.

P.J. Slot and A. Johnston, *An introduction to competition law* (Oxford, Hart, 2006, 400 pp.)

R. Whish and D. Bailey, *Competition Law* (Oxford, Oxford University Press, 7<sup>th</sup> Edition, 2012), 1088 pp.

## 6. Periodicals

*Common Market Law Review*

*European Law Review*

*German Law Journal*

*Maastricht Journal of European and Comparative Law*

*SEW – Tijdschrift voor Europees en Economisch Recht*

*Yearbook of European Law*

*Concurrences e-journal*

*Competition Policy International*

*European Competition Law Review*

*European Competition Journal*  
*Global Competition Litigation Review*  
*International Review of Intellectual Property and Competition Law*  
*Journal of European Competition Law & Practice*  
*World Competition*

## **7. EU (competition) law on the Internet**

You may find the following links very useful for your studies and research:

The main portal to the Institutions of the European Union contains a mass of materials:

<http://europa.eu/>

It is useful to explore the many links available there.

EU competition law grants the European Commission significant powers of general and individual decision-making. Those decisions can be found in a particular database on the Commission's Directorate-General for Competition (DG Comp in competition lawyers' parlance)

website:

[http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=1](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1)

The database requires you to search by type of competition law case (antitrust, mergers or state aid), case number, name or sector.

Judgments of the Court of Justice and the General Court are available, usually from the day they are delivered, on the website of the Court of Justice of the European Union:

<http://curia.europa.eu/>

The Official Journal of the European Union is available in full text for two months from the date of publication at:

<http://eur-lex.europa.eu/>

In addition, the Eur-lex site contains a database of EU legislation in force (i.e. Regulations, Directives, Decisions and other significant documents), consolidated legislation as well as preparatory documents put forward by the Commission (the COM series).

## **8. Blackboard**

All up-to-date information for this course (such as announcements for class changes, additional readings etc.) is provided on this forum. It is very important that you check Blackboard regularly.

## **9. Evaluation and examination**

Seminar attendance is compulsory, students may miss up to one class. Students can only attend the seminar if they submit in advance their written answers to the exercises through blackboard. *This rule only comes into play from week 2 onwards (as week's 1 seminar will be an intermediate format between lecture and seminar).* Detailed instructions on how to upload your assignments will be communicated via Blackboard and during our first lecture.

As part of the final examination students are required to submit a case note. The grade for this case note will count for 20% towards the final grade and has to be submitted by the end of week 4. The assignment will be handed out in the lecture during week 2. Once again, uploading the assignment will take place through Blackboard. Students will receive feedback on their work in the seminar sessions of week 5.

A written exam will be held at the end of this course. The exam comprises three major questions, each consisting in a significant amount of sub-questions. Two questions will be presented as a hypothetical case study and one will be a more theoretical essay question on a topic discussed during the lectures and seminars. The exam will take place on **Thursday 16 April 2015, 09.00 – 12.00 in the University Sport Centre of Leiden University.**

The exam has the reputation of being longer than you might be used to. Take this into account, as this is intentionally done so that you can show you master a variety of materials throughout the course.

Your exam grade will count towards 80% of your overall mark in this course.

Students who fail the exam are entitled to participate in a re-sit examination. The re-sit will take place on **Tuesday 2 June 2015, 13.00-16.00 in room C131 of the KOG.**

Depending on the number of students failing the exam, the re-sit may also take the form of an oral exam. The 20% written assignments and feedback grades will remain valid for the re-sit. If a student has not passed the course by the end of the academic year, partial grades for written exam or paper are no longer valid.



## COURSE CALENDAR

Both lectures and seminars will start a quarter past the hour. You are expected to be present at that time.

Please pay close attention to the roster, as rooms and seminar times tend to change (. Please make sure to attend the correct group (either 1 or 2), i.e. the group for which you registered in Usis.

**Please be reminded that seminar attendance is compulsory and that you can only miss up to one class.** This will allow you to benefit more fully from the materials covered. Competition law is a field you can only learn by doing. So you are kindly invited to participate actively.

Session	Date	Day	Time	Room	Topic
<b>Lecture 1</b>	<b>April 5</b>	<b>Tue</b>	<b>09.00 –11.00</b>	<b>KOG B031</b>	<b>Introduction; Competition, competition law and EU competition law</b>
Seminar 1	April 6	Wed	15:00-17:00 (1) 17:00 -19:00 (2)	KOG B014	
<b>Lectures 2 and 3</b>	<b>April 12</b>	<b>Tue</b>	<b>09.00 –12.00</b>	<b>KOG B031</b>	<b>Article 101 TFEU restrictive practices – Article 102 TFEU</b>
Seminar 2	April 13	Wed	15.00-17.00 (1) 17.00-19.00 (2)	KOG B014	
Seminar 3	April 20	Wed	15.00-17.00 (1) 17.00-19.00 (2)	KOG B014	
<b>Lectures 4 and 5</b>	<b>May 3</b>	<b>Tue</b>	<b>09:00-13:00</b>	<b>KOG B031</b>	<b>Mergers and acquisitions in EU competition law – State aid</b>
Seminar 4	May 4	Wed	15.00-17.00 (1) 17.00-19.00 (2)	KOG B014	
Seminar 5	May 11	Wed	15:00-17:00 (1) 17.00-19.00 (2)	KOG B014	

**KOG = Kamerlingh Onnes Gebouw (Steenschuur 25)**



## WEEK 1: COMPETITION, COMPETITION LAW AND EU COMPETITION LAW

*Week 1 reading assignments:*

### ***Rudimentary lecture notes attached to this reader***

Compulsory reading legislation:

- Carefully read Articles 101-109 of the Treaty on the Functioning of the European Union (TFEU).
- Carefully read Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, [2004] O.J. C101/81, also available at <http://ec.europa.eu/competition/antitrust/legislation/trade.html>.
- Skim through 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 [2004] O.J. L1/1
- Carefully read Articles 3-6 and 23 of the aforementioned Regulation 1/2003.
- Read the leniency notice, known as Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] O.J. C298/17, also available at [http://ec.europa.eu/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html).

Compulsory reading case law:

Find the following cases online (using Eur-lex and/or the Curia-website) and read them accordingly:

- Case C-73/95 P, *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457.
- Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECR I-8237.
- Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297.

*Advanced (non-compulsory) reading: only to be read if you want to know more!*

- Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] O.J. C210/2.
- Joined Cases C-159 and 160/91, *Poucet and Pistre v Assurances Générales de France* [1993] ECR I-637.
- Case C-434/95, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, [1997] ECR I-1547.
- Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] O.J. L349/1.

*Week 1 learning goals:* At the end of this week, you should be able to:

1. *In terms of knowledge*

- distinguish the economic notions of market, demand and supply undistorted competition, allocative efficiency, x-inefficiency, monopoly and oligopoly and explain their relevance for the emergence of competition law
- classify competition law as a societal response to powerful and potentially distortive market conditions and as the embodiment of the state's intervening role in the marketplace
- identify the distinctive market integration purpose of EU competition law and its role in the establishment of the EU common – later internal – market compared to other competition law systems
- differentiate five branches of EU competition law: restrictive collusive practices, abuse of dominance, mergers, state aid and public undertakings and distinguish the underlying two different functions of EU competition law (directly regulating businesses' market behaviour versus regulating state intervention in the internal market aimed at influencing businesses' market behaviour)
- distinguish three characteristic features of concepts common to all EU competition law branches: undertaking, interstate trade, competition within the internal market/'de minimis'
- understand and illustrate the problematic cumulation of investigative, prosecutorial and decision-making roles by European Commission in EU competition law enforcement
- criticise the leniency system applied at the EU level and distinguish the concepts of immunity, reduction and leniency marker
- understand the supporting role of national authorities and national courts in general and in relation to the first two branches in particular, as outlined in Regulation 1/2003;
- specify the double role of the Court of Justice in EU competition law
- distinguish between public and private enforcement of EU competition law

2. *In terms of skills*

- independently find the relevant assigned cases on eur-lex or the *curia* website
- read an EU competition law case and distinguish between the facts and the law addressed by that case
- determine whether or not EU competition law in general applies to a particular hypothetical set of facts
- assess whether or not an undertaking could benefit from a leniency application
- determine to what extent public and private enforcement of EU competition law interact with each other in specific case settings
- develop a coherent argumentation as to why competition law should or should not have a broad scope of application

## LECTURE 1 OUTLINE AND SELF-STUDY QUESTIONS

*Please also refer to the detailed lecture notes accompanying this first lecture. Those notes can be found in the next section of this reader.*

### 1. Outline

Competition law builds upon a fundamental belief that undistorted competition and the underlying ideal of a *free market economy* should either be promoted, or at least be maintained or preserved. From that point of view, the concept of free competition serves as a quintessential starting point for any understanding of competition law. Competition law comprises the *translation* of particular economic policy preferences maintained by policymakers into enforceable legal standards. This lecture provides the very basic economic background concepts that give shape to competition law provisions. Building upon a belief that a free market economy represents a fair way to ensure allocative efficiency and realising that the ideal of a free market does not function perfectly in practice, public authorities have consistently relied on the law to maintain and establish undistorted competition as a policy ideal. In doing so, policymakers have come to reflect different visions of state intervention in and regulation of the marketplace. Over time, competition law shifted from being an extension of private (contract and non-contractual liability) law to public (administrative) law. At the same time, it always represents a means towards realising ‘workable’ rather than ‘perfect’ competition.

EU law reflects this search for a ‘workable competition’ regime within the particular context of European ‘internal market’ integration. Quite unconventionally, the founding Treaties directly incorporate competition law provisions directly addressed to individual businesses (and to Member States, which is more conventional, as you know from your Foundations and Substantive EU law courses and as the free movement provisions particularly showcase). More specifically, competition law provisions governing the internal market belong to the small category of *exclusive competences* attributed to the European Union by the Member States. Articles 101-109 TFEU incorporate and shape those exclusively attributed competences. Two types of EU competition law provisions can be distinguished, encompassing no less than five branches of EU competition law. Whilst all five branches differ in scope and ability for EU institutions to intervene, they rely on a common set of concepts that will re-appear throughout our study of the particular branches in the upcoming weeks. Relying on those concepts and on the specific conditions and instruments underlying each of the branches, the European Commission maintains significant and extensive enforcement powers across all five branches. At the same time, national authorities and courts are effectively included into the system of EU competition law enforcement. In relation to national courts, the recent emergence of so-called *private enforcement* of EU competition law is an evolution that warrants specific attention and is likely to remain at the forefront of judicial and political evolutions in this field for years to come.

#### 1. Competition

- a. *Free market economy as starting point*
    - I. Elastic supply and demand as least imperfect method for allocating scarce societal resources
    - II. Undistorted competition as tool to avoid X-inefficiencies that result from monopolistic or oligopolistic behaviour
  - b. *Free market economy does not necessarily materialise in reality*
  - 2. Competition law
    - a. *Law as an instrument of behavioural regulation in the marketplace*
    - b. *From private to public law*
    - c. *Ensuring ‘workable’ competition*
  - 3. EU competition law: a bird’s eye view
    - a. *Exclusively attributed competition law competences*
      - I. Competition as an object of EU integration
      - II. EU competition rules as EU ‘economic constitutional law’
      - III. EU competition law as European Union law
    - b. *Five branches of EU competition law*
      - I. Rules applying to ‘undertakings’ or private market operators
      - II. Member States and EU competition law
    - c. *Conditions for the application of EU competition law rules: ‘undertakings’ involved, ‘effect on trade between Member States’ and ‘competition within the internal market’ being distorted*
      - I. Applicability *ratione personae*: The concept of ‘undertaking’
        - I.a. The entity component and its legal consequences
        - I.b. The economic activity component and its consequences
          - i. The offering of goods and services on a given market
          - ii. Potential to make profit from the offer of goods or services without State intervention
        - I.c. Summary
      - II. Applicability *ratione materiae*: market behaviour that has an effect on interstate trade
      - III. Applicability *ratione loci*: affect competition *within the internal market*
  - d. *A strong Commission-oriented (public) enforcement system, supported by national authorities and courts*
    - I. The European Commission as *primus super pares*
    - II. Detecting competition law infringements: notifications, leniency (, commitments and settlements)
    - III. Gradual involvement of national authorities and courts
    - IV. The Court of Justice as general overseeing institution
- e. *The emergence of private enforcement across (almost) all branches of EU competition law*
  - I. From public to private enforcement
  - II. Private enforcement 2.0.: involving the national courts
  - III. Private enforcement 3.0.: the Damages Directive

## 2. Self-study questions

**After the lecture and seminar sessions this week, you should be able – on the basis of the lecture notes mentioned here and the class sessions – to develop a response to the following ten questions. Use those questions as guidance when studying the materials for the exam**

- Why do we need competition law? Use the concepts of allocative efficiency, X-inefficiencies and oligopoly in your answer and explain those concepts.
- What is the specific purpose of *European Union* competition law? How does EU competition law fit within the project of EU internal market integration?
- To what extent is EU industrial policy possible under EU law? Can national industrial policies be maintained?
- What are the implications of EU competition law being an exclusive competence of the Union? Describe the role of national authorities and courts across the different branches of EU competition law.
- Explain the scope and consequences of the leniency programme. Does it apply to all branches of EU competition law?
- Does the EU undertaking notion encapsulate all national corporate legal persons?
- To what extent does the notion of ‘economic activities’ serve as a meaningful boundary for the application of EU competition law? Explain in the light of the case law.
- Distinguish the effect on trade criterion from the competition within the internal market requirement. Use the concept of ‘de minimis’ in your explanation
- Define and distinguish public and private enforcement. Do you find any clashes between both types of enforcement? Refer to leniency in your answer.
- Develop a scheme outlining the role of the Court of Justice in the EU competition law system. Analyse the division of tasks between national courts, the General Court and the Court of Justice.

## SEMINAR 1

In this first seminar, we particularly delve deeper into the basics of EU competition law. Throughout the cases highlighted here and building upon your reading of the assigned cases, we will discuss the concept of ‘undertaking’ more in-depth. In addition, we will explore the consequences of the application of EU competition law. The seminar particularly endeavours to demonstrate that falling within the scope of application of EU competition law is not necessarily a bad situation, as it allows particular market operators to be more fully included within the system of EU internal market integration. The concepts discussed here (undertaking, effect on trade and competition within the internal market) especially guarantee a very wide scope for EU competition law and EU law intervention overall. The undertaking concept is particularly interesting, but also dangerous, as it allows the Commission to extend the scope of the market operators subject to EU competition law and the resulting increase of fines imposed on those undertakings.

### **Case 1: Better Safe than Sorry**

NV ‘Better Safe than Sorry’ is the largest provider of health insurance in the Netherlands. Now a private corporation under Dutch law and incorporated in Arnhem, it originally functioned as a department within the Ministry of social security, tasked with providing mandatory health care coverage to every employee in the Netherlands. Following a much contested privatisation of health care insurance, the department was transformed into a corporation, offering health care packages to Dutch employees, in competition with other private healthcare insurance providers. Dutch social security law requires Dutch citizens to participate in a health care insurance system offered by any approved private health care provider. Failure to do so will result in administrative penalties being imposed.

Since every employee had originally been subscribed to Better Safe than Sorry’s packages, potentially competing health care providers find it difficult to enter the market. ‘Never Sorry to be Safe’, a newly established health care provider created under Dutch law, argues that ‘Better Safe than Sorry’ employs misleading marketing techniques and abuses its dominant position in the healthcare market under both EU and Dutch competition law and requires the European Commission to initiate an investigation. Better Safe than Sorry replies to these allegations by stating that EU competition does not apply to its operations. Its activities only taking place in the Netherlands and its role in providing health care insurance, based upon the principle of capitalisation, yet with a social aim in mind and therefore not an economic activity, as well as its State-backed healthcare provision mandate would impede EU competition rules from applying.

You are Never Sorry to be Safe’s legal counsel. Assess the claims made by Better Safe than Sorry from the vantage point of EU competition law.

In case EU competition law would apply, what branch of that law would you rely upon? Can Dutch competition law also be applied in that regard?

Suppose that EU competition law does not apply to the case at hand. Can Dutch competition law in that instance offer an alternative?

## **Case 2: Pen pals**

Bicpens Ltd. is a large multinational corporation responsible for the production of its famous and high-quality Bicpencils. In order to streamline its deliveries across different EU Member States, Bicpens established in each Member State's territory a single and exclusively competent distributor, responsible for the distribution and sales of pencils to all stores located within that Member State. The Dutch distributor, Bicpens Heijn, is responsible for distribution within Dutch territory. Incorporated in accordance with national law, those distributors are 100 % owned subsidiaries of Bicpens Ltd. Under the terms of the distribution agreement concluded between Bicpens and the national distributors, the latter may only sell Bicpencils delivered by Bicpens to distributors within their allocated territory. Albert Jumbo, a Dutch hypermarket chain, finds out that the price for Bicpencils appears to be significantly lower in Belgium compared to the prices offered by the Dutch distributor. Jumbo decides to buy the pencils in Belgium and to subsequently sell them in the Netherlands at a larger profit than would be possible if he bought them from the responsible Dutch distributor.

The Belgian distributor refuses to sell his Bicpencils to Albert Jumbo, citing that he would infringe the terms of his exclusive distribution agreement concluded with Bicpens Ltd. Albert Jumbo thinks that the agreement between Bicpens and the distributors could be a prohibited restrictive practice on the basis of Article 101 TFEU and asks for your advice whether or not EU competition law would indeed apply in this case. In case it does apply, it asks you what branch of EU competition law would particularly be applicable here.

Responding to Albert Jumbo's concerns, Bicpens Heijn approaches Jumbo and offers a deal, promising the exclusive distribution of the very popular Bicpencils at a fixed price. An agreement on price and quantity of Bicpencils is reached. At a certain point in time however, Albert Jumbo decides that this agreement may be contrary to EU competition law and would put it at risk of having to pay a large fine. It approaches the European Commission with a view to provide information on the existence of the pencil distribution agreement. Could Jumbo apply for immunity from fines? What if Bicpencils Heijn almost simultaneously decides to approach the European Commission? Can the Dutch competition authority initiate an investigation once the European Commission is considering the case.

Suppose that the European Commission adopts an infringement decision vis-à-vis the pencils distribution agreement and additionally decides to impose a fine. To whom will the fine be addressed and whose turnover will be taken into account?

Boer Supper, Albert Jumbo's direct competitor is disgruntled upon hearing from the agreement between AJ and Bicpencils Heijn. It feels that it encountered significant damages (loss of pencil sales and the resulting loss of clients that would primarily have bought pencils and other items from Boer Supper) because of the price and quantity fixing arrangement with Bicpencils. Boer Supper therefore starts a damages claim under Dutch law before a Dutch civil judge. To ensure that it can obtain correct data and to quantify the damages properly, it

asks the Commission for the information Albert Jumbo provided. The Commission refuses to provide the information. Has the Commission grounds to do so? Boer Supper's in-house counsel nevertheless knows that the Dutch competition authority also had a file composed on the agreement, which also contains materials voluntarily provided by Albert Jumbo. It therefore asks the Dutch judge to order the transmission of those documents. Is the judge obliged under EU law to grant such access? Would the implementation and transposition of the draft Directive on damages alter your answer?

### **Case 3: Whose waste?**

AC De Sluijs is a private corporation responsible for removing waste within the Port of Rotterdam. NS Connexion, a competing waste removal company argues that De Sluijs abuses its dominant position in the Port of Rotterdam to foreclose access to the harbour waste removal market, on which NS Connexion would like to extend its activities. De Sluijs is only active within the Port of Rotterdam and has built specific expertise in harbour waste removal. It is additionally also active in household waste removal in Friesland. Does AC De Sluijs' activities within the Port of Rotterdam fall within the notion of economic activities?

### **Case 4: Books, books, books**

The business of distributing and selling paper books is in disarray. Facing increasing competition from electronic devices such as E-readers, kindles and other kinds of tablets, the European Association for the Promotion and Preservation of Paper Books (EAPPPB) – a professional association comprising the major publishing companies within the European Union, together representing 83 % of the market in paper books – calls upon its members to take action to maintain profitability in an evolving European market place. To that extent, it proposes – without imposing – a fixed minimum retail price that should be adhered to when selling the books within the European Union.

The European Commission starts an investigation into this practice and formulates a statement of objections against EAPPPB's practices. Fearing that its practice may be deemed in violation of EU competition law, the EAPPPB decides to adopt a different technique: it incites national legislators to adopt *national legislation* imposing a minimum resale price on books, to the extent that this did not already happen (see e.g. the case of France, where such practices have already been mandated as a matter of national law).

- Should EAPPPB be afraid of competition law scrutiny? Could it be considered to be an 'undertaking'?
- Does national legislation provide a safe haven for such practices? Can the Commission act against national legislation on the basis of EU competition law? Can national competition law play a role in this regard?



## WEEK 2: ARTICLE 101 TFEU (and Article 6 Mw.) RESTRICTIVE PRACTICES

### *Week 2 reading assignments*

**P. Van Cleynenbreugel, “Article 101 TFEU and the EU Courts: adapting legal form to the realities of modernization?”, 51 *Common Market Law Review* (2014), 1381-1436**

Compulsory reading legislation:

- Carefully read Article 101 TFEU. What does each paragraph state? How do the paragraphs relate to each other?
- Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), [2014] O.J. C291/1.
- Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] O.J. C372/5.
- Commission Regulation (EU) No 330/2010 of 20 April 2010 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, [2010] O.J. L102/1.

Compulsory reading case law:

- Case T-168/01, *GlaxoSmithKline v Commission*, [2006] ECR II-2969.
- Case C-309/99, *Wouters*, [2002] ECR I-1577.
- Case C-8/08, *T-Mobile*, [2009] ECR I-4529.
- Commission Commitment Decision on *E-books* of 25 July 2013, available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=1](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1).

*Advanced (non-compulsory) reading: only to be read if you want to know more!*

- Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, [2004] O.J. C101/97.
- Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] O.J. C11/1.
- Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited (C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEP) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P)*, [2009] ECR I-9291.

- Case T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission*, [2001] ECR II-2459.

*Week 2 learning goals:* At the end of this week, you should be able to:

1. *In terms of knowledge*

- distinguish the jurisdictional and constitutive elements triggering the Article 101 TFEU prohibition
- outline the definitional and evidentiary requirements underlying the concept of ‘agreement’ in EU competition law and distinguish them from a decision of an association of undertakings
- understand the concept of concerted practices and the particular burdens of proof established by the Court of Justice in this context
- distinguish the object and effect requirements and situate their mutual interaction
- highlight the differences between horizontal and vertical restrictive practices and the differences in treatment of both practices under EU competition law
- understand the role of Article 101(2) TFEU and its impact on national private law regimes
- enumerate and apply the four conditions of Article 101(3) TFEU
- distinguish Article 101(3) TFEU exceptions from Rule of Reason analysis in U.S. antitrust law
- address and evaluate the interrelationship between Article 101(3) TFEU and non-economic considerations as part of EU competition law analysis
- understand the role of Block Exemption Regulations and their application in practice as opposed to Article 101(3) assessments
- identify the concepts of market definition, relevant market, product and geographical market and chains of substitution accordingly

2. *In terms of skills*

- apply the ‘de minimis’ thresholds applicable to Article 101 TFEU in any hypothetical case situation
- assess to what extent particular collusive behaviour can be classified in accordance with Article 101 TFEU and juridify the object/effect distinction in a hypothetical case
- identify and apply the legal presumptions regarding the proof of a concerted practice
- link the object/effect requirements with the jurisdictional elements identified in the previous lecture
- apply the Block Exemption Regulation thresholds to a hypothetical case
- to distill relevant information from hypothetical cases regarding the relevant market and its impact on your assessment of Article 101 TFEU cases
- construct a coherent and brief memorandum, in which the relevant elements of an Article 101 TFEU analysis have clearly been distinguished and addressed

## LECTURE 2 OUTLINE AND LECTURE NOTES

### IT TAKES TWO...

The extensive enforcement powers entrusted to the European Commission and the overall liberal jurisdictional requirements underlying EU competition law obviously serve the purpose of giving access to a more enhanced substantive EU competition law framework. This lecture examines the first branch of that framework, i.e. the prohibition on restrictive anticompetitive practices under EU law. Market operators are limited in their ability to cooperate or streamline their business arrangements, to the extent that competition would be put at risk. Those arrangements include all kinds of cooperative endeavours, such as agreements between competitors or vertical agreements between non-competitors that nevertheless risk foreclosing the market. At the same time, apparently restrictive practices could nevertheless be exempted or excepted from the EU law prohibition if they contribute to *other goals that are worthy of EU law's protection*. The leniency programme discussed last week is particularly – and only – prevalent here, as it serves as a means to discourage participating undertakings to avoid fines by making secretive trade agreements known to the responsible enforcement bodies. Without a clear body of EU substantive law however, those enforcement tools remain meaningless. This lecture particularly focuses on the substantive arrangements. Throughout the seminar, we will seek to bridge substantive law and competition law enforcement mechanisms.

### 1. Outline

#### a. Overview

Article 101 TFEU reads as follows:

*1. The following shall be prohibited as incompatible with the internal market: 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**, and in particular those which:*

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

*(b) limit or control production, markets, technical development, or investment;*

*(c) share markets or sources of supply;*

*(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(e) make 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.*

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Note the underlined parts of the provision, indicating the three key jurisdictional concepts that we already considered/discussed in the previous lecture. In relation to the concept of competition within the internal market, we highlighted that EU competition law provided for particular thresholds within its different branches, referred to as *de minimis*. Those thresholds are also available here in the so-called *de minimis* notice. In addition, the bold sections of the provision all refer to particular substantive law conceptions that are worth exploring further in this lecture. Together, those concepts will provide you with the legal tools to assess undertakings' market behaviour from the point of view of EU competition law.

b. *De minimis*

- a. Thresholds
- b. Market and market definition
- c. Legal value of *de minimis* notice
- c. Agreements, decisions and practices
  - a. Agreements
    - a. Horizontal agreements
    - b. Vertical agreements
    - c. Mixed agreements
  - b. Decisions of associations of undertakings
  - c. Concerted practices
  - d. 'Single and continuous infringement'
- d. Restrictive object or effect on competition
  - a. The object/effect distinction: rationale
  - b. Restrictions by object
  - c. Restrictions by effect
  - d. Shifts in the object/effect distinction: towards complementary presumptions
- e. Prohibition and sanctions
  - a. Prohibition and public enforcement

- b. Voidness and private enforcement
- c. Joint and several liability in fines
- f. Exceptions to the prohibition
  - a. Towards self-assessment
  - b. The regime of BER
  - c. Individual exceptions
  - d. Negative clearances (comfort letters)

## 2. Self-Study questions

At the end of this lecture, the following questions could serve as a guiding tool in your reading and study of this part of the course:

- What is the legal difference between agreement, decision and concerted practice? Does the difference matter in terms of competition law enforcement or in terms of standards and burdens of proof?
- Describe the relationship (if any) between voidness and fines imposed under Regulation 1/2003.
- How are markets defined under EU competition law? What role does market definition play in relation to Article 101 TFEU assessments?
- Are horizontal agreements more ‘dangerous’ from a competition law perspective than vertical agreements? Explain your answer.
- What types of vertical agreements – if any at all – are *per se* prohibited under Article 101(1) TFEU? Should those agreements always be prohibited?
- What are hard-core restrictions? Can they be justified under Article 101(3) TFEU?
- Distinguish object and effect requirements. How do they affect the burden of proof of individuals and competition authorities?
- What are the implications of the *Wouters* judgment for the definition of agreements having as their object/effect the prevention, restriction or distortion of competition within the internal market?
- What are block exemptions? How do they relate to Article 101(3) TFEU?
- Does EU competition law rely on its own *rule of reason*?
- Does Article 101(3) TFEU allow for non-economic goals to be taken into account at the justification stage?

## SEMINAR 2

The assignments for this week build upon the hypothetical cases discussed during last week's seminar session. In these cases, we particularly inquire into the possibilities of identifying and justifying *collusive behaviour* under EU competition law. In order to do so, you should always remember to identify whether EU competition law applies to the particular case at hand.

*As a reminder, the seminar cases are meant for you to apply the theoretical insights provided during the lecture. At the same time, new theoretical issues will be discussed or touched upon in the seminar. It is therefore essential that you attend both lecture and seminar, as the combined learning experience will allow you to understand and frame the role and scope of Article 101 TFEU analysis.*

### **Case 1. How to read a Commission Decision – linking weeks 1 and 2**

Carefully read the Commission Decision on E-Books, rendered 25 July 2013 and available on [http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=1](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1).

On the basis of your reading, you should be able to answer the following questions:

- What kind of decision did the Commission adopt? Which provision in Regulation 1/2003 provided a basis for the Commission doing so?
- Describe – in your own words – the relevant facts of the case on the basis of the information available in the decision and its supporting documents.
- How did the Commission go about in determining the relevant market?
- Did the Commission establish an infringement of EU competition law?
- Did the Commission take particular non-economic values or goals into account? At what stage of its analysis?
- How does the Commission determine the scope of the commitments offered and accepted?
- What are the legal consequences of the commitments offered? Can individuals having suffered damages from the agreement claim compensation under EU and/or national law for those damages?

### **Case 2. Pen Pals II**

During last week's session, we encountered the curious case of Bicipens Ltd. and its ingenious distribution system, which was implemented and operated by Bicipens Heijn, a Dutch corporation. As you may remember from last week, Bicipens Heijn – the Dutch distributor of Bicipensils – approached Albert Jumbo with a proposal to agree on the distribution of a fixed number of Bicipensils for a fixed price. Whereas we did not discuss the specifics of this agreement last week, they comprise the core of our analysis this week.

Albert Jumbo decides to accept the offer by Bicipens Heijn to act as an *exclusive distributor of Bicipensils to final consumers* within the territory of the Netherlands. Under the terms of the contract concluded, Albert Jumbo is obliged to charge at least 0,12 € per Bicipensil sold and to buy at least 2,560,000 Bicipensils from Bicipens Heijn at a rate of 0,11 € per item bought. The terms of this contract have been fixed in writing and have been published on both companies' websites.

As a result of the new agreement, Supper de Boer is no longer able to receive Bicipensils from Bicipens Heijn; it asks you – its in-house counsel – to look at the agreement. *Assess the abovementioned contract under Article 101 TFEU. Are we dealing with an agreement? What kind of agreement? Does this agreement restrict competition on the basis of the facts provided to you?*

Would your answer be the same if the following information was available to you: In the market of non-refillable writing instruments, Bicipens Heijn has a market share of 29%, whereas Albert Jumbo enjoys a market share of 32% in the market of supermarket distributors.

Would your answer be different if Bicipens Heijn had a market share of 48% of the non-refillable writing instruments market? Suppose that the agreement did not contain a minimum resale price, would your answer to the previous questions have been different?

Under what conditions could a *prima facie* restrictive agreement between Bicipens Heijn and Albert Jumbo be justified? Explore all options in this regard.

### **Case 3. Meeting without greeting? Dutch telephone providers**

KBN, Vadofone and P-Mobile are the three largest mobile telephone services providers in the Netherlands. Together, they maintain a market share of 98% within the telephone services market (KBN has a market share of 35%, Vadofone a market share of 29% and P-Mobile a market share of 34%). All companies operate independently from each other. During the world famous Breda Broadband Convention, the three CEO's happen to be seated next to each other. During a break between Convention presentations, the KBN CEO confides in his colleagues that prices for mobile telephone services have been rather low over the past years and that a price increase could be justified, given the intensified ancillary services offered to consumers. The CEOs do not however agree to raise prices, nor to adapt their commercial pricing policies in relation to mobile telephone services during the conference.

Two days after the conference however, KBN decides to raise the average price for its mobile telephone services with 2 euros per month. Two and three days later, P-Mobile and Vadofone also raise their prices to the same level. Joep works as a case handler at the Dutch Competition Authority and is a loyal KBN customer. His girlfriend Maartje on the other hand remains faithful to P-Mobile. Surprised by the coincidental identical raise in mobile telephone services fees for both services, Joep decides to investigate the matter and brings the case to his superior at the ACM.



You are Joep's superior and a responsible prosecuting official within the ACM. Assess whether or not an infringement of EU or Dutch competition law can be found here that is worth prosecuting. Would your answer to this question be different, if KBN had a market share of only 9%, Vodafone a market share of 6% and P-Mobile a market share of 10%?

Suppose that you have been able to establish that the three mobile telephone services providers engaged in actions that fall within the Article 101 TFEU 'collusive behaviour' remit? Do their actions have as their 'object' the restriction of competition or do they rather have such effect? From the point of view of you being a prosecutor, what is the difference between object and effect requirements?

#### **Case 4. Beer and more**

In an attempt to make its products more attractive for premium customers and to maintain its position on the Dutch beer market, Henken Breweries NV decides to conclude an agreement with the Belgian-American Brewery Inter-AB to exchange information on the production processes and to streamline the production and distribution processes. Henken has a market share of 66% on the Dutch beer market, where Inter-AB maintains a share of 13%. In the Benelux market, Inter-AB has a share of 42%, whilst Henken has a share of 24%. Although no agreement has been concluded on the price of beers produced by both companies and no specific output quota have been imposed, Article 4.3 of the agreement seeks to '*make transparent, in as much as possible, the processes relied upon in the manufacturing, production and distribution of all alcoholic beers generated by either party.*

Inter-AB's in-house counsel warns Inter-AB about previous encounters with the European Commission and the adoption of its Beer Decision, which resulted in Inter-AB being fined heavily for price-fixing. Since this agreement does not appear to amount to price-fixing however, the in-house counsel contacts you – a freshly minted junior associate in the competition law department of a large law firm – for an advice on this agreement.

Can this agreement be captured by EU competition law? What kind of agreement are we dealing with in this case? Can such agreement benefit from exceptions to the prohibition in Article 101 TFEU? Draft a *brief memorandum* in which all those questions are coherently and clearly addressed.

#### **Case 5. Joint Ventures in professional services**

Jan and Jaap have been friends since elementary school and have always lived in Voorschoten. Jan obtained an accountancy qualification and Jaap studied law. After having finished their studies, they both established their own accountancy c.q. law firm in their hometown. Whilst both soon become big players within the Voorschoten business community, they believe that by joining forces, they would better be able to offer a complete packages of business services (accountancy and legal advice) tailored to the Voorschoten business community. When Jan and Jaap decide to establish a 'joint venture' called Jan-Jaap Accountants and Lawyers, the Dutch Bar Association argues that it is against professional ethics rules for lawyers to engage upon an association with accountants. Those rules are

meant to preserve the integrity of the lawyerly profession and to avoid conflicts of interest from emerging. When Jan and Jaap decide to proceed, the Dutch Bar Association brings the matter before the Dutch court.

Jaap, who represents himself and Jan in the suit, argues that the Dutch Bar Association rules – which are binding upon him after having been admitted to the bar as a practicing lawyer – infringe Dutch and EU competition law. The Dutch Bar Association claims that EU competition law does not apply to the case at hand, given the regional or even local nature of the Jan-Jaap joint venture. Discuss both arguments from the vantage point of competition law.

Jaap, who spent a semester on exchange in the United States and took a course in antitrust law there, additionally remembers something vaguely about the rule of reason, where pro- and anti-competitive reasons have to be weighed against each other, as a means to determine whether any potentially restrictive agreement could stand. He would like to invoke this argument before the Dutch judge in order to maintain that his joint venture better serves the needs of the Voorschoten business community, using EU competition law as a sword to do away with Dutch Bar Association rules. Can this argument succeed under EU law? Does Jaap have alternative arguments on the basis of EU law to make the same argument?

## WEEK 3: ARTICLE 102 TFEU (and Article 24 Mw.) ABUSE OF A DOMINANT POSITION

### *Week 3 Reading assignments*

#### Compulsory reading legislation:

- Carefully read Article 102 TFEU and compare it to Article 101 TFEU. Does the provision contain a particular sanction? Does it allow for justifications to otherwise prohibited practices? Does it only address monopolies?
- Re-read **Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] O.J. C372/5.**
- **Carefully read** Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] O.J. C45/7. Distinguish exploitative from exclusionary conduct.

#### Compulsory reading case law:

- 2002/405/EC: Commission Decision of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/E-2/36.041/PO — *Michelin*), [2002] O.J. L143/1.
- Case 27/76, *United Brands v Commission*, [1978] ECR 207.
- Case T-203/01, *Michelin*, [2003] ECR II-4071.
- Commission Commitment Decision in Case COMP/C-3/39.939, *Samsung* (available on DG Comp's website).

#### *Advanced (non-compulsory) reading: only to be read if you want to know more!*

- A. Straetemans, 'The EU Microsoft Case. Not as Soft a Case', *Jura Falconis* 2007-2008, 563-586, available at <https://www.law.kuleuven.be/jura/art/44n4/straetemans.pdf>.
- T. van der Vijver, 'Objective Justification and Article 102 TFEU', 35 *World Competition* (2012), 55–76, available in the library.
- Commission Proposal for Commitments in Case COMP/C-3/39.740, *Google*, May 2013, available on DG Comp's Website. Statement on the Google Investigation by Joaquin Almunia, Commissioner for Competition, 5 February 2014, [http://europa.eu/rapid/press-release\\_SPEECH-14-93\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm).

*Week 3 learning goals:* At the end of this week, you should be able to:

1. *In terms of knowledge:*

- distinguish and apply the different constitutive elements of the abuse of dominance prohibition in EU competition law and in the context of Article 102 TFEU enforcement: dominant economic position, relevant market, abuse and prohibition
- relate the notion of dominant position to market share thresholds and determine the relevant market within a particular factual setting, building upon the approach taken by the Court in the *United Brands* judgment
- critically evaluate the notion of joint or collective dominance and situate its position vis-à-vis concerted practices under Article 101 TFEU
- analytically distinguish and correlate Article 102 TFEU practices and Article 101 collusive behaviour
- classify types of abusive behaviour into exclusionary and exploitative abuses and relate particular consequences to particular abuses
- understand the notion of predatory pricing
- distinguish between permissible and impermissible rebates under EU law
- understand the notions of tying, bundling and their interrelationship in relation to abusive practices under Article 102 TFEU
- criticise the abuse concept and its (ir-)relevance to assess the nature of particular commercial practices (such as tying, rebates,...)
- understand the role and position of the essential facilities concept in relation to Article 102 TFEU
- outline the conditions underlying the ‘essential facilities’ justification
- understand and criticise the open-ended nature of the ‘objective justification’ concept relied upon in Article 102 TFEU analysis
- understand the relevance of the *Microsoft* judgment for the development of Article 102 TFEU case law
- identify the market definition and abuse difficulties relating to new technologies, in particular in the *Google* and *Samsung* cases

2. *In terms of skills:*

- find the relevant Commission decisions and case law using the databases on the DG Comp and Court of Justice websites
- independently find additional literature, press releases and documents relating to Article 102 TFEU and new technologies
- formulate a constructive opinion on the suitability and limits of current Article 102 TFEU legal principles to new technologies, in the light of the *Google* and *Samsung* investigations

- distinguish objective elements of abuse from non-relevant subjective elements of abuse
- apply and evaluate hypothetical fact-settings in which the existence of a (jointly) dominant position has to be determined
- distinguish Article 101 concerted practices from Article 102 collective/joint dominance elements and apply both frameworks as potential solutions for a particular antitrust problem
- construct an analytical scheme – a lawyerly algorithm – in accordance with which potential abuses of dominance should be structured or assessed, relying on the concepts of dominance, abuse, type of abuse and justification
- develop your own reasoning as to why particular *prima facie* abusive practices could (sometimes) be objectively justified within a particular factual setting
- develop a structured argument as to why rebates could in some instances be justified
- link the substantive law discussions on Article 102 TFEU with the enforcement realities of EU competition law discussed in week 1

## LECTURE 3 OUTLINE AND SELF-STUDY QUESTIONS

### DO IT YOURSELF...

During our lecture last week, we discussed the scope of EU competition law in relation to *collusive behaviour* between two or more independent market operators. Competition law does not only address collusive behavioural practices between two or more market operators, but also addresses particular market behaviour by single undertakings. One undertaking can indeed have a dominant position on a relevant market, which could potentially threaten or at least render difficult workable competition within that market. Although having a dominant position is not as such problematic from an EU law point of view, one could be enticed to abuse this dominant position. For those reasons, EU law directly *prohibits* abuses of a dominant economic position. The Commission, national competition authorities and national courts will indeed apply the prohibition and impose fines or other penalties in relation to undertakings engaging in such abuse. Contrary to what one may think however, abuse is an objective concept that can be manifested throughout different commercial practices, such as tying, bundling, rebates, predatory pricing or refusing access to essential facilities. In this lecture, we explore those concepts as constituent elements of the Article 102 TFEU prohibition.

Whereas Article 102 TFEU in principle targets only single undertakings abusing their dominant position, two or more undertakings can also hold a joint dominant position on a relevant market, which they can jointly abuse. Throughout the Court's case law, the notion of joint or collective dominance has gradually been developed and related to Article 101 TFEU concerted practices, as will be explored in this lecture as well.

More recently, Article 102 TFEU has particularly gained momentum in relation to new technologies and emerging technology giants such as Microsoft, Google, Samsung and others. The newfound realities of technology markets trigger a renewed interest in concepts such as relevant market, dominance and abuses, particularly tailored to those new realities. Those recent developments will also and additionally be discussed throughout the lecture.

### 1. Outline

#### a. Overview

Article 102 TFEU reads as follows:

*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.*

*Such abuse may, in particular, consist in:*

(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.*

Once again, please note the underlined jurisdictional elements, discussed throughout our first lecture, that remain of relevance for our discussions today. In addition, it should be clear that EU law does not rely on specific *de minimis* thresholds in this regard, as Article 102 TFEU only addresses abusive behaviour by undertakings having a *dominant position on the relevant part of the EU internal market*.

It should also be clear that although Article 101 and 102 TFEU differ in scope and scale, nothing impedes their joint application to the same set of commercial practices, as long as the conditions for each of the provisions have individually been met. As a result, the same market behaviour can simultaneously infringe Article 101 and Article 102 TFEU, resulting in the Commission, national competition authority or national court adopting a decision or rendering a judgment finding an infringement of both provisions (see e.g. the situation in the *Viho* case discussed in lecture 1).

- b. Dominant economic position within the relevant market
  - a. Dominance v. monopoly
  - b. Dominance v. monopolisation
  - c. Determination of relevant market
  - d. Market threshold presumptions
- c. Collective or joint dominance
  - a. The notion of collective dominance
  - b. Collective dominance: conditions
  - c. Collective dominance: presumptions
  - d. Collective dominance and concerted practice: the missing link between Articles 101 and 102 TFEU?
- d. Abuse
  - a. Abuse as an objective concept
    - i. Objective requirements
    - ii. Relevance of subjective intent
  - b. Typologies of abuse and their treatment under EU law
    - i. Exclusionary abuses
    - ii. Exploitative abuses
  - c. Specific examples of abuse
    - i. Predatory Pricing

- ii. Rebates
  - iii. Tying and bundling
  - iv. Access to essential facilities
- e. Article 102 TFEU and new technologies: Microsoft, Google, Samsung
  - a. Determining a relevant market and dominant position
  - b. Abuses in a technological context
  - c. Re-imagining essential facilities?
- f. Prohibition and Enforcement
  - a. Prohibition
  - b. Enforcement under Regulation 1/2003
- g. Exceptions to the prohibition? Objective justification
  - a. The notion of 'objective justification'
  - b. 'Objective justification' presumptions and their rebuttal

## 2. Self-study Questions

At the end of the lecture and seminar session, you should be able to provide an answer to the following self-study questions. Use these questions when revising the materials in preparation for the exam:

- Distinguish dominant economic position from monopoly and monopolization. What are the essential characteristics between those concepts?
- Define collective or joint dominance. (How) does it differ from single undertaking dominance? Who carries the burden of proof and what standard of proof is required?
- Explain how Articles 101 and 102 TFEU interact and interrelate. Your answer should at least refer to the notions of concerted practices and collective dominance.
- Abuse is an objective concept under EU law, yet subjective intentions can serve to give content to that concept. Explain with references to case law and materials discussed in this lecture.
- Explain the differences between exclusionary and exploitative abuses. Classify the examples given throughout the lecture and reading materials in one (or both) categories. Are both types of abuses considered equally harmful to competition?
- Distinguish quantity and loyalty rebates. Are both types of rebates treated differently under Article 102 TFEU?
- What is predatory pricing? Under what circumstances can predatory pricing constitute an abuse in accordance with Article 102 TFEU?
- Distinguish tying and bundling and assess the impact of both practices from the point of view of Article 102 TFEU. Refer to *Microsoft* in your answer.
- What are *essential facilities*? How do they relate to Article 102 TFEU analysis? Explain using the Commission's *Samsung* commitment decision.
- Do you think that the current analytical framework of Article 102 TFEU is able to structure and regulate rapidly developing new technologies? Use the legal concepts and analysis highlighted in this lecture to make a sustained argument.



- Define objective justification in Article 102 TFEU. To what extent can non-economic justifications be considered objective? Refer to the ‘theory of harm’ in your answer.

## SEMINAR 3

A major difficulty in developing a coherent Article 102 TFEU analysis lies in the fact that the actual ‘legal standards’ and presumptions – the usual toolkit an EU competition lawyer relies upon – is rather limited in this field. It goes without saying that establishing abuses of a dominant economic position require even more sophisticated economic analysis than the establishment of some collusive behavioural practices. At the same time however, the materials covered throughout the lecture establish some legal rules and principles that you should keep in mind when developing an Article 102 TFEU argument. This seminar is particularly meant to help you in constructing a proper ‘analytical scheme’ that would serve as an algorithm for you to resolve Article 102 TFEU cases. You should obviously also remember that the general jurisdictional requirements that trigger the application of EU competition law – undertaking, effect on trade and effects on the internal market – always have to be checked and tested throughout these cases as well.

### **Case 1. How to read an Article 102 TFEU case?**

Carefully read the assigned 2001 Commission *Michelin* Decision. Analyse and summarise the decision by answering the following subquestions:

- What criteria did the Commission rely upon to establish *Michelin*’s dominance? How did it calculate and/or determine the relevant market?
- Did the Commission use particular economic tests, data or other materials to substantiate its market findings?
- Did the Commission distinguish between/classify particular abuses?
- How did the Commission classify *Michelin*’s rebate system? Why was this rebate system particularly problematic?
- Did the Commission only issue a prohibition decision?
- To what extent did the General Court agree with the Commission? Refer to the relevant paragraphs in Case T-203/01 to substantiate your opinion.
- Both the Commission and the General Court refer to *market foreclosure*. Does the concept play the same role in both the Decision and the judgment? Does it reflect a particular ‘theory of harm’ underlying Article 102 TFEU analysis?

### **Case 2. Pen Pals III**

In the wake of its issues and the failed exclusivity agreement with Albert Jumbo concerning the distribution of Bicpensils in the Netherlands, Bicpens Ltd. decides to re-develop its commercial strategy across the European Union. After having abandoned its pricing policies where it imposed minimum prices on its distributors, it seeks to adapt to the changing realities of the new free pricing market environment. Whilst it maintains fully owned nationally incorporated distributors in each Member State – Bicpens Heijn in the Netherlands – it decides to enhance its suppliers’ commercial experience and to ensure customer loyalty by introducing a complex system of rebates that are both quantity and fidelity related. For every

1,000,000 Bicipensils bought from one of the nationally incorporated distributors, customers receive 10,000 Bicipensils for free. In addition, the unit price of 0.10€ per Bicipensil will gradually decrease once customers buy more than 1,500,000 Bicipensils. Upon buying 1,500,000 units, the unit price decreases to 0.99 €, which further decreases by 0.01€ for every 1,000,000 units bought, up to the threshold of 0.90€.

Keeping in mind that Bicipens Ltd. is the largest pencil producer in Europe with a market share of 28% and a market in which one competitor has a market share of 15%, another a share of 11% and the rest of the market being divided among numerous small producers having no more than 4% market share at best, would you consider Bicipensils' rebate system problematic from the point of view of Article 102 TFEU? Would your answer be different if Bicipens' market share was 60 %?

Given the high success rates of its rebate programme, Bicipens Ltd.'s CEO decides to add an additional layer to the rebate programme: if and to the extent that a buyer attains the 0.90€ unit price benchmark for two years in a row, receives an additional credit of 2,500€ in its account, meaning that this amount does not have to be paid. This benefit is conditional upon maintaining a consistent 0.90€ unit price. Would this system be problematic in the light of the 28% and/or the 60% market share threshold? Would your assessment be different if Bicipens Ltd. particularly stated that this was a means to better position themselves in the market and to gain market share from other competitors?

The rebate programmes established by Bicipens appear to be a major success. Within a rather limited time frame, Bicipens Ltd. succeeded in becoming the largest pencil producer in the European Union, with a firm and established market share of 37%. Whilst its other major competitors managed to hold on to their shares, numerous small competitors have been forced out of business or saw their market shares drastically reduced against the backdrop of Bicipens' rebates programmes. In yet another attempt to maintain and possibly even expand its position on the market, Bicipens decides that it would be a good idea no longer to sell its Bicipensils as individual units, but to make their sale conditional upon the buying of additional Bicipens Ltd. items. To that extent, Bicipens proposes three 'packages'. The first package includes Bicipensils and BicipensilsSoft, a pencil variant. The second package includes Bicipensils and BicSharper, a specifically tailored pencil sharpener. The third and final package includes all three items. From July 2014 onwards, customers will be forced to buy one of the packages from Bicipens. Bicipens argues that in doing so, it responds to customer demand, as both products were bought in almost the same capacities as separate products. By bundling those products, Bicipens would be able to offer even better pricing conditions by extending its rebate programmes to those items as well. Albert Jumbo is displeased with this change in conditions, as it bought its sharpeners and soft pencils from one of Bicipens' competitors which recently went bankrupt. Jumbo therefore seeks your advice on the matter.

### **Case 3. New Technologies: Yours, mine, ours?**

Describe – in your own words – the problematic issue the Commission is currently investigating in relation to *Samsung*. This issue forms part of a much wider debate on the use of 'essential' patents or other intellectual property requirements for the development of new

technologies. Compare the argument in *Samsung* with the Court's previous case law on essential facilities.

What purpose does the essential facilities doctrine serve? Should it serve that purpose in the same way in relation to new technologies? In the light of both *Google* and *Samsung* cases, do you agree that Article 102 TFEU analysis is not completely attuned to the realities of new technologies? Why (not)? Use specific examples/cases/arguments from the reading materials and try to find additional literature on the issue that helps you in formulating a clear opinion in this regard. Please bring your additional literature to the seminar session.

#### **Case 4. Loyalty programmes**

DLM, the Dutch LuchtvaartMaatschappij, is a well-established passenger air transport carrier offering passenger services across the globe and predominantly in Europe from its hub airport at Amsterdam. At Amsterdam Schiphol airport, it is the dominant air carrier with a market share of 33 %. The other 67% is divided among various air carriers, none of which maintains a share of more than 9%. Facing increasing competition from European, Asian and Middle-Eastern airliners and from cheap low cost carriers operating from nearby Rotterdam Airport, DLM decides to finally – just like all other carriers did years before – introduce a frequent flyer programme, *HollandsMiles*. Upon flying DLM, enrolled passengers particularly receive status points – which they retain for six months – and flymiles – which they retain for one year. Both points expire at some point, inducing customers to frequently fly on DLM. Every passenger can enroll in *HollandsMiles* free of charge; the programme comprises different 'loyalty tiers' through which more frequent fliers can effectively progress, ultimately maintaining – and in some situations retaining – *DutchPlatinum*, the most elite status within the programme. Frequent flyer status entitles passengers to amenities such as free upgrades to businessclass, access to a fast track security and check in process and additional flymiles, which can be traded for free award tickets.

In addition, all *HollandsMiles* members are exempted from paying baggage fees and receive free meals and drinks on board (whereas non-members have to pay extra for those services). At first sight, the *HollandsMiles* programme is modelled after existing programmes in place by traditional air carriers such as British Airways, Lufthansa or Air France (all also active at Amsterdam airport, with a market share of 5%, 4% and 4%).

You work for *Triple-A Airlines – Luchtvaartmaatschappij van het Zuiden*, a Belgian-incorporated low cost carrier with a market share of 9% at Amsterdam Airport, a market share of 43% at Rotterdam Airport, 56% at Eindhoven Airport and 89% at Antwerp airport in Belgium, which predominantly targets Dutch and Flemish passengers looking for cheap flights within Europe. Your CEO thinks that DLM's sudden introduction of its new frequent flyer programme represents an attempt by DLM to get rid of its competitor and therefore comprises an abuse under Article 102 TFEU. The CEO asks you whether that could indeed be true and what actions Triple-A Airlines could take against DLM. Focus on both substantive law and enforcement aspects in your answer.

Taking a closer look, *HollandsMiles* also offers additional rewards not typically found among its competitors. The programme offers passengers having a registered address in Zuid-Holland, Brabant and the Belgian provinces of Antwerp and Limburg free coach transport from their homes to Amsterdam airport, access to a particular ‘Southerners’ lounge’ at Amsterdam airport with typical Southern products to make those travellers feel at home. In addition, travellers registered in those geographical areas will attain *DutchPlatinum* status if and to the extent that they fly DLM twice a year. In addition, they will receive double status miles and triple flymiles upon choosing DLM. Those additional advantages notwithstanding, DLM does not provide specific or targeted rebates for customers living in the abovementioned areas. Would this information affect your answer to the previous question?

Would your answer – at least from the substantive law point of view – be different if DLM offered the additional status and mileage amenities only in relation to bookings of flights to destinations also served by Triple-A? Would your answer be different if it did so only in relation to destinations also served by Triple-A from Amsterdam airport?



## WEEK 4: MERGERS AND ACQUISITIONS UNDER EU COMPETITION LAW

### *Week 4 Reading assignments*

#### Compulsory reading legislation:

- Carefully read Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] O.J. L24/1. Specifically look for procedural and substantive law provisions and distinguish them from each other.
- Commission Notice on Case Referral in respect of concentrations, [2005] O.J. C56/2.

#### Compulsory reading case law:

- Summary of Commission Decision of 27 February 2013 declaring a concentration incompatible with the internal market and the EEA Agreement (Case COMP/M.6663 — *Ryanair/Aer Lingus III*), [2013] O.J. C216/22.
- Commission Decision in Case COMP/M.6967 — *BNP Paribas Fortis/Belgacom/Belgian Mobile Wallet*, available on the DG Comp website (the O.J. Publication only contains a summary; you should read the entire Decision here).
- Case C-12/03, *Commission v Tetra Laval*, [2005] ECR I-987.

#### *Advanced (non-compulsory) reading: only to be read if you want to know more!*

- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] O.J. C31/5.
- Commission Notice on restrictions directly related and necessary to concentrations, [2005] O.J. C56/24.
- Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, [2008] O.J. C267/1
- Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, [2013] O.J. C366/5.
- Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [2008] O.J. C95/1. This notice provides an explanatory overview as to how the Commission will apply the Merger Regulation.
- Commission Decision of 27 February 2013 declaring a concentration incompatible with the internal market and the EEA Agreement (Case COMP/M.6663 — *Ryanair/Aer Lingus III*), available on DG Comp's case law search engine.

*Week 4 learning goals:* At the end of this week, you should be able to:

*1. In terms of knowledge*

- understand why EU competition law needs an additional regulatory instrument governing structural changes in the market in addition to the mere application of Articles 101 and 102 TFEU
- evaluate why a Regulation – a generally applicable instrument of EU secondary legislation – was chosen over other alternative solutions
- understand the difference between ‘merger’ and ‘concentration’ and both concepts’ roles in the system established by Regulation 139/2004
- adopt a nuanced position on the European Commission’s ‘monopoly’ in approving mergers with a community dimension
- explain the notions one-stop-shop, community dimension, turnover thresholds and significant lessening of competition and indicate their respective functions within the Merger Control Regulation (MCR) system
- identify the function and role of pre-notification informal and post-notification State of Play meetings between merging undertakings and the European Commission
- understand, restate and apply the different systems of case referral in relation to the MCR
- classify different formats of ‘concentrations’ captured by the MCR and explained by the Commission in its Notices
- relate the market definition approach adhered to by the MCR to market definition approaches in Articles 101 and 102 TFEU
- understand the difference between horizontal and non-horizontal mergers and the different treatment of both types of mergers under EU competition law
- identify the difference between concentrative and cooperative full function joint ventures and apply the different concepts in hypothetical case studies
- frame the notion of ancillary restraints and its role in the substantive analysis of mergers
- understand how and why public policy concerns can be invoked in relation to mergers
- distinguish the two-phased Commission investigation procedure and the Commission’s decision-making powers
- interrelate the substantive MCR tests to the legal frameworks of both Articles 101 and 102 TFEU as discussed in previous lectures
- frame the scope of review maintained by the Court of Justice against MCR decisions, especially in the wake of the *Tetra Laval* judgment

*2. In terms of skills*

- find the relevant Commission MCR decisions in the database and in the Official Journal
- distinguish between summaries and full decisions
- distinguish between Phase I and Phase II decisions



- intelligently read a more than 500 p. Commission decision in this field
- calculate – on the basis of simple hypothetical turnover data – whether or not an envisaged concentration falls within the ambit of the MCR
- assess whether and to what extent a joint venture can be captured by MCR procedure and substantive analysis
- construct – on the basis of the analytical frameworks offered in the previous two weeks – an argument as to why an envisaged concentration (does not) significantly lessen(s) competition
- apply the case referral system as envisaged by the case referral notice
- develop a sustainable public policy defence in relation to a hypothetical envisaged concentration
- apply the thresholds and requirements tailored to horizontal mergers

## LECTURE 4 OUTLINE AND SELF-STUDY QUESTIONS

### STRUCTURAL CHANGES IN THE MARKETPLACE...

Articles 101 and 102 TFEU seek to regulate – or at least structure – undertakings’ market behaviour. In doing so, both provisions presuppose that those undertakings are somehow stable and existing market actors existing independently and concluding agreements or engaging in potentially abusive practices. From that perspective, Articles 101 and 102 maintain a rather *static* vision vis-à-vis the market place. It is well-known however that markets are dynamic: undertakings come and go, transform into new entities, merge, split, create subsidiaries or joint ventures with other undertakings. At the time of the inception of competition law provisions in the Treaties, it was envisaged that Articles 101 and 102 would be sufficient to govern and control *those structural changes within and between undertakings in the European Union*. The Court’s early case law made clear however that an alternative system should perhaps be envisaged in that regard. In 1989, the European Commission therefore adopted a particular system tailored at ruling on the compatibility of envisaged structural changes with EU competition law. That system was established by means of Regulation 4064/1989 and provided for an *obligatory notification procedure* for envisaged structural changes. Parties could not implement those changes until the Commission approved them – within a tightly constructed procedural framework. Contrary to ‘decentralisation’ tendencies in the enforcement of Articles 101 and 102, that system remains in place until today. Regulation 139/2004, which replaced the 1989 Regulation, thus provides a framework governing structural changes in the internal market as a matter of EU competition law.

In this lecture, we will explore the system established by Regulation 139/2004. We will pay attention to the procedural conditions, to the Commission’s substantive analysis in this field and to the complex yet fascinating interaction between the Commission and national competition authorities. In addition, we will also look into the special case of joint ventures, which are captured by Regulation 139/2004, but potentially and simultaneously also by Article 101 TFEU. At the outset, it should be clear that the Commission can in principle only adopt a decision on concentrations with a community dimension. Concentrations lacking such dimension have to be notified to national authorities in accordance with national requirements. To establish a community dimension, Regulation 139/2004 relies on a set of presumptions based on turnover numbers in the EU and across Member States. If the Commission is the competent authority to decide on a concentration, it will have to proceed in accordance with the Regulation, resulting in the adoption of a Commission Decision, which can subsequently be reviewed by the Court of Justice.

#### **1. Outline**

- a. Why a particular concentration control regime in the European Union?
- b. The MCR
  - a. Legal basis

Article 103 TFEU

Article 352 TFEU

Commission implementing Regulations and notices

- b. Concentration
  - 1. Mergers
  - 2. Acquisitions
  - 3. Any other structural change in control
- c. Community dimension
  - 1. Turnover thresholds – Calculation of turnover thresholds
  - 2. First set of thresholds
  - 3. Second set of thresholds
  - 4. Why two sets?
- d. Joint ventures
  - 1. Concept
  - 2. Full-function Joint Venture
  - 3. Concentrative v. cooperative joint ventures
- e. Procedure: two stages
  - 1. Phase I procedures and simplified procedure: Form CO A/B
  - 2. Phase II procedures
- f. Case referrals
  - 1. Individuals, national competition authorities, to and from the Commission
  - 2. Individuals to the Commission
  - 3. Individuals from the Commission
  - 4. National competition authorities to the Commission
  - 5. National competition authorities from the Commission
- g. Substance: substantive lessening of competition
  - 1. SLC test and collective dominance – importance of market shares – ancillary restraints
  - 2. Relationship between Articles 101-102 and MCR
  - 3. Horizontal mergers
  - 4. Non-horizontal mergers
- h. Commission decisions and remedies
  - 1. Types of decisions
  - 2. Remedies included in decisions
- c. MCR and national public policy
  - 1. Mergers and public policy, i.e. non-economic considerations
  - 2. Exceptions for the sake of public policy
- d. Judicial review over merger decisions
  - 1. Review on the basis of Article 263 TFEU
  - 2. Limited scope of review?
  - 3. End of limited review after *Tetra Laval*?

## 2. Self-Study Questions

At the end of the lecture and seminar session, you should be able to provide an answer to the following self-study questions. Use these questions when revising the materials in preparation for the exam:

- Why does the European Union need a particular concentration control regime? What is the added value of this regime compared to Articles 101 and 102 TFEU?
- How does the EU define the concept of concentration? When should it be notified?
- Explain the following concepts: one-stop-shop, community dimension, full function joint venture and remedies in the context of the MCR.
- Distinguish and explain the thresholds relied upon to determine the community dimension of an envisaged concentration. How are turnover numbers calculated?
- Describe the substantive lessening of competition test. How does it apply to horizontal mergers?
- How does the EU concentration control test relate to the notions of collusive behaviour and abuse of (collective) dominance discussed in the previous weeks?
- What are ancillary restraints? How are they treated under the MCR?
- Discuss the case referral mechanism. Can national authorities apply EU concentration control tests or do they always have to apply national law? Who can ask for a referral from the Commission to the national level and vice versa?
- What role – if any – do national public policy considerations play in relation to EU concentration control?
- Describe the simplified procedure mechanism. When is that mechanism used and what are its typical characteristics?
- Does the Court review concentration control decisions? Does it rely on a particular standard of review in doing so?

## SEMINAR 4

EU concentration control constitutes a highly technical branch of EU competition law, where calculation of thresholds and the definition of relevant markets represent particular techniques that allow for the Commission to make an informed assessment of the envisaged concentration. During this seminar session, we will consider a hypothetical case in which those thresholds have to be calculated. In addition, concepts such as joint venture, concentration and public policy have a particular meaning and scope in relation to this field of law. Throughout the questions raised here, we will discuss those concepts. In addition, we will devote particular attention to the allocation of powers between the European Commission and the national authorities in relation to merger control. In doing so, we will uncover the highly complex yet practically relevant playing field Regulation 139/2004 establishes in that regard.

The second part of our seminar will be devoted to the correction of and discussion on your first assignment and the feedback you have been asked to provide on such assignment. At the end of this discussion, your grades obtained for your first assignment will be distributed.

### **Case 1. TV Ventures**

Six French undertakings operating in the television-, telecommunications- and cable distribution sectors decide to set up a joint undertaking. The joint undertaking envisages to offer a variety of tv programmes and services via internet streaming and for additional payment to French-speaking viewers across Europe. The joint undertaking is jointly controlled by all six participating undertakings and will offer a particular product, have its own capital and management structure and will be established for an indefinite time period. The newly created undertaking would be a new entrant on the market for paid stream-TV and would directly compete with the incumbent dominant market player in that regard, Nixflix.

Each of the participating French undertakings obtains a 500 million € annual turnover. Four undertakings are exclusively active on the French market. The fifth undertaking maintains a turnover of 50 million € in France, 350 million in Germany en 100 in Belgium. The sixth undertaking maintains a turnover of 50 million in France, 350 million in Belgium en 100 million in Germany.

Do the undertakings involved have the right or the obligation to notify their envisaged transaction to the Commission on the basis of the Merger Regulation? What tests will the Commission – or the national authorities – have to rely upon when judging the compatibility of the envisaged transactions with EU competition law?

### **Case 2. How to read a merger decision?**

Carefully read the Aer Lingus/Ryanair III summary decision as published in the Official Journal. On the basis of your reading, answer the following questions:

- Does the decision comprise a phase I or phase II decision?
- What did the Commission conclude?
- How did the Commission define the relevant market in the airline industry?
- Why was the envisaged merger potentially problematic? Do you agree with the Commission's position in that regard?
- What test did the Commission rely upon?
- Did the Commission refer to particular public policy elements? Do you think that such public policy elements could play or could have played a role in relation to this decision?

### **Case 3. Referring your case**

BWM and IDAU are two German undertakings, established in Germany and active across the globe in the manufacturing, distribution and maintenance of cars and trucks. In order to face competition from cheap Asian and Russian cars, both undertakings decide to merge their interests and become a new market player called BWMID. The undertakings claim that their merger would save thousands of German jobs and would keep the production of both BMW9 and IDAU I14, their best-selling high-quality models, in Germany. BWM has an annual turnover of 5.1 billion Euros per annum, 68% of which is realised within Germany. IDAU maintains a turnover of 5.3 billion Euros per annum, 70% of which is realised in Germany.

*Should BWM and IDAU notify their transaction to the Commission? Both undertakings argue that – given their presence in the German market, the German federal competition authority (the Bundeskartellamt) would better be suited to rule on the concentration. Can the undertakings ask for a referral to the Bundeskartellamt? If so, under what conditions? Can the Bundeskartellamt itself request such referral? Can the German government request such referral? What legal consequences would emerge from such referral? Can a case partially be referred – i.e. only for the activities developed in Germany? How will the case proceed after such partial referral?*

*During pre-notification discussions, the Commission considers that this case should better be considered at national level. Can the Commission refer the matter to the competent national competition authorities? Which authorities should be deemed competent in this regard? What consequences need to be attached to a Commission-initiated referral?*

In case the Commission decides to refer the matter to the national level, can BWM and IDAU still request the allocation of decision-making powers to the Commission level?

**Refer to the relevant MCR provisions and considerations in the Case Referral Notice throughout your answer.**

## WEEK 5: MEMBER STATES AND EU COMPETITION LAW

### *Week 5 Reading assignments*

**Chapter 18 in C. Barnard and S. Peers (eds.), *European Union Law* (Oxford, OUP, 2014), 928 pp.**

Compulsory reading legislation:

- Read Article 106 TFEU
- Read Articles 173 and 345 TFEU. How do they relate to competition law provisions?
- Carefully read Articles 107-109 TFEU. Distinguish the substantive and procedural aspects in those provisions.
- **Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [1999] O.J. L83/1 (consolidated version as adapted by subsequent Regulations).**
- **Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, [2013] O.J. L352/1.**
- Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ( 'Banking Communication' ), [2013] O.J. C216/1.

Compulsory reading case law:

- Case **C-434/95, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)***, [1997] ECR I-1547.
- Case **C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrs-gesellschaft Altmark GmbH and Oberbundesanwalt Bundesverwaltungsgericht*** [2003] ECR I-7747
- Case **T-29/10 *Netherlands v. Commission and ING v Commission*** [2012], judgment of 2 March 2012.
- Case **C-284/12, *Deutsche Lufthansa v Flughafen Frankfurt-Hahn***, [2013] ECR I-0000

*Advanced (non-compulsory) reading: only to be read if you want to know more!*

- Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] O.J. L123/36.
- **Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version), [2006] O.J. L318/17.**

- Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, [2008] O.J. C155/10.
- Joined Cases C-105/12 to C-107/12, *Staat der Nederlanden v Essent NV (C-105/12)*, *Essent Nederland BV (C-105/12)*, *Eneco Holding NV (C-106/12)*, *Delta NV (C-107/12)*, judgment of 22 October 2013, nyr



*Week 5 learning goals:* At the end of this week, you should be able to:

*1. In terms of knowledge:*

- distinguish three different roles of states in relation to EU competition law (states as market operators – states as market ‘regulators’ and states as market ‘correctors’)
- understand the concepts of public service, public service compensation, services of general (economic) interest, public undertaking and the roles of those concepts in the system of EU competition law
- identify the subsidiary roles of Articles 173 and 345 TFEU in relation to state intervention in the market
- differentiate between the different parts of Article 106 TFEU, understand their interrelationship and the direct effect attributed to the different paragraphs of that provision
- understand and apply the *Altmark* criteria in relation to Services of General Economic Interest
- summarise and re-construct the loopholes in the State action doctrine in relation to Articles 101 and 102 TFEU infringements supported – or maintained – by Member States
- identify the particular rationale for State aid in the EU competition law system and distinguish State aid from antitrust (collusive behaviour – abuse of dominance – merger control)
- structure and understand the difference between illegal or unlawful and incompatible aid
- acknowledge exempted aid, in particular in relation to banks in the wake of financial crisis
- distinguish between existing aid and new aid and infer appropriate procedural consequences from that distinction
- understand how State aid and SGEI rules interact and intertwine

*2. In terms of skills:*

- identify and assess the nature of a particular state intervention in the market economy (either through state aid – public services or public undertakings – regulation of property or industry – state action) on the basis of a hypothetical case study; be able to infer the legal consequences to be drawn from such identification
- construct a reasoned argument as to how state and market should intertwine within a specific case setting, in the light of the Treaty provisions and secondary legislation on State aid and SGEI
- apply the state action doctrine to and uncover its limits within a hypothetical set of facts
- justify whether and to what extent the State aid prohibition applies in relation to financial institutions that suffered in the context of crisis – as evidenced in a hypothetical case setting

- construct a scheme in which the responsibilities of the European Commission and the Member States' authorities in the field of State aid have been laid out
- develop a reasoned argument as to why nationalised industries or particular nationalised or publicly owned undertakings can actually benefit the EU's competitive market project (in the wake of and in some ways building upon the non-compulsory *Essent* judgment reading for this week)
- evaluate – on a more abstract level – to what extent state and market play mutually supportive roles in the system of EU competition law

## LECTURE 5 OUTLINE AND SELF-STUDY QUESTIONS

### GOING PUBLIC AND AID BY A STATE

This lecture seeks to conceptualise the particular roles, responsibilities and market intervention possibilities left to Member States under EU competition law. To that extent, it discusses the roles of States as a market regulator against the backdrop of EU competition law provisions, as a market operator or market participant in its own right by means of public undertakings and as market corrector by granting aid to particular undertakings.

EU competition law provisions seemingly conflict with other Treaty provisions that seek to regulate or at least tolerate Member States' direct interventions in their national economies and within the internal market. In particular, Article 173 TFEU allows for the development of national – and supranational – industrial policies. Industrial policy implies that the State engages in particular stimulation measures targeted at specific industries (steel, shipping, automotive industries, financial services) in order to attract those industries and to maintain a strong competitive position within such industry. Nationally structured policies are nevertheless rather difficult to reconcile with EU competition law requirements of free and open markets. The same goes for Article 345 TFEU, which proclaims that EU law remains neutral vis-à-vis national property law choices. Such neutrality implies that Member States are allowed to maintain a system in which particular industries or market operators are owned directly by the State (national or public ownership). Such national ownership also appears difficult to square with the requirements posited by EU competition law as discussed in the previous weeks. Both provisions above all demonstrate that the EU State-market balance is not as clear-cut as one may have thought from a mere assessment of EU competition law provisions alone.

Although Articles 173 and 345 TFEU in principle allow for Member States to intervene in the market, EU competition law provides for limits in that respect. Those limits can be found in Article 106 TFEU, which directly addresses activities engaged upon by public undertakings (i.e. undertakings (partially) owned by the State) or private undertakings benefiting from public compensation (i.e. undertakings that engage upon tasks in the general interest receiving compensation they would not otherwise receive under normal market conditions). As a matter of course, EU competition law applies in full to such undertakings. In some instances, exemptions can nevertheless be provided for. The EU also extensively regulated the compensation mechanisms for services of general (economic) interest relied on by Member States. In doing so, it built upon the Court's proclamation in that regard in the *Altmark* judgment. Article 106 TFEU additionally also allowed the EU to induce Member States to bring competition in sectors that used to be devoid of such competition (such as telecommunications, postal services, electricity and natural gas distribution etc.). The techniques thus offered by the EU Treaties have allowed the EU to circumscribe and restrict Member States' direct market participation opportunities as a matter of EU competition law.

The judicially developed ‘State action’ doctrine – albeit rather imperfect – also attests to such finding.

EU competition law also addresses Member States’ attempts at ‘correcting’ an otherwise efficiently operating market environment by providing financial assistance or aid to specific undertakings, to a disadvantage of other undertakings operating in the same economic sector as the beneficiary of such assistance or aid. EU State aid rules – Articles 107-109 TFEU – in that image provide for a substantive and procedural framework governing such aid. In principle, all aid measures have to be notified prior to being granted; if they are not notified, any aid would be deemed ‘illegal’ and could be recovered. Notified aid will subsequently be tested on its compatibility with EU law requirements; if incompatible, it should also be recovered. The European Commission maintains a strong ex ante and ex post enforcement role in relation to State aid, supported and structured by the Court of Justice.

## 1. Outline

- a. Overview
  - a. The State as market regulator and EU competition law
  - b. The State as market participant and EU competition law
  - c. The State as market corrector: State aid
- b. The State as market regulator and EU competition law
  - a. ‘Market regulation’
  - b. Article 173 TFEU: Industrial Policy
  - c. Article 345 TFEU: Property ownership systems
- c. The State as market operator or market participant
  - a. State and market intertwined: public undertakings
  - b. Article 106 TFEU: Public undertakings and EU law
    - i. Principle
    - ii. Exemption
    - iii. Regulation and liberalisation?
  - c. From public undertakings to public services
    - i. Public Services in EU law
    - ii. Services of General (Economic) Interest or SGEI
    - iii. SGEI compensation after *Altmark*
    - iv. Future of SGEI?
  - d. Member States and EU competition law: the State action doctrine
    - i. State action
    - ii. Limits to State action
- d. The State as market ‘corrector’: State aid
  - a. Concept of State aid
  - b. Framework governing State aid
    - i. Articles 107-109 TFEU
    - ii. Procedural regulations and implementation
    - iii. Supranational enforcement supported by national courts
  - c. Substantive law on State aid

- i. Aid
  - ii. From a State or funded by public resources
  - iii. Selectivity
  - iv. De Minimis
  - v. Compatible aid
    1. Conclusively compatible
    2. Presumably compatible
  - vi. State Aid rules and the financial crisis
- d. Procedural rules on State aid
  - i. Existing v. New aid
  - ii. Notification Obligation for New Aid
  - iii. Illegal v. Incompatible Aid
  - iv. Commission decisions and remedies
  - v. Judicial review of Commission decisions
  - vi. Recovery obligations under national law
- e. What role for States in an EU internal market based upon EU competition law? State aid and Services of General Economic Interest
  - a. Europe's competition-focused economic constitution
  - b. States as supervisors rather than participants
  - c. EU-induced policy corrections
    - i. EU-provided aid or support
    - ii. Financial assistance in the wake of crisis

## 2. Self-Study Questions

At the end of the lecture and seminar session, you should be able to provide an answer to the following self-study questions. Use these questions when revising the materials in preparation for the exam:

- How does Article 173 TFEU relate to EU competition law provisions?
- Can EU competition law really be deemed neutral vis-à-vis national property law choices?
- What is the State action doctrine? Where can it be found in the Treaties? Has it proven to be a sound doctrine in the delineation between state intervention and free market premises?
- What are Services of General Economic Interest? To what extent can such services be provided by public undertakings?
- Does EU competition law apply to public undertakings?
- What criteria determine how Services of General Economic Interest can be compensated for? Refer to the *Altmark* judgment in your answer.
- What is the relationship between rules on Services of General Economic Interest and State aid provisions? Are they mutually exclusive or interrelated? Explain your answer by reference to the assigned legislation and guidance documents.

- Define the notions of aid, selectivity, unlawful aid, incompatible aid, recovery and make a scheme in which they coherently appear as the backbones of the EU State aid procedural system.
- Does EU State aid law allow for the development of a specific EU policy in relation to Small and Medium-Sized Enterprises?
- Can fiscal advantages or State guarantees be considered aid under EU law?
- Can aid to failing banks be allowed under EU competition law?
- Can a Member State enforce EU State aid law? How are responsibilities allocated between the supranational and national levels?
- Do the EU State aid provisions impede the EU from granting support to particular undertakings or sectors? Can the EU provide financial assistance to failing financial service providers in that regard?

## SEMINAR 5

This seminar focuses on the three interrelated roles of Member States from the point of view of EU competition law: states as market regulators, states as market participants and states as market ‘correctors’ within the confines of the EU Treaty framework. The Seminar particularly endeavours to enable you to identify which of the three abovementioned situations should be taken as a starting point in a hypothetical case situation and to develop a coherent and well-structured argument on the basis of that situation.

### **Case 1: Triple A Airways – Luchtvaartmaatschappij van het Zuiden**

Facing a decline in passenger numbers in the wake of DLM’s commercial expansion to the South (see our case in week 3), Triple A Airways is facing significant losses that – if continued – could trigger the rapid deterioration and potential bankruptcy of the airline. If that were to happen, both Antwerp and Eindhoven airports would lose their dominant carrier, resulting in significant losses in employment, public revenue and infrastructural expenses made by both the Flemish Region (in relation to Antwerp) and the Province of Noord-Brabant (in relation to Eindhoven). Both public authorities decide to provide additional support to Triple A Airways, in order to allow it to continue its operations as the most important airline ‘of the South’. Each authority uses a particular strategy in doing so.

The community of Eindhoven – full owner of the Eindhoven Airport Operating Company – decides that lowering the landing and handling fees with almost 20%, in addition to an extension of payment of those fees by 18 months will serve Triple A in maintaining and perhaps expanding its competitive market position. Transvia, a competing air carrier at Eindhoven, does not benefit from those lowered fees and payment extensions. The Eindhoven Airport Operating Company argues that it could grant such advantages to Triple A, since it is the dominant carrier at the airport, thus generating more traffic and revenue for the Operating Company and the community of Eindhoven. Transvia argues that the reduction of fees and extensions of payments amount to unlawful State aid that is potentially also incompatible. Can Transvia’s claim be maintained?

The Flemish region owns the airport, but leaves the operation of runway and ramp activities with a private undertaking called Antwerp Ground Services (AGS). AGS won a public procurement competition and gained the exclusive ramp and runway operations contract for the 2011-2015 time period. AGS concludes a particular and individualised contract in relation to ramp and runway services with each airline serving Antwerp airport. In the light of Triple A’s recent problems and its overwhelming market share at Antwerp Airport, the Flemish region wants to do something. One of its top lawyers did however warn about the strict approach the European Commission takes in relation to State aid, vividly remembering problems the former national Belgian air carrier Sabena had in that regard. The Flemish region therefore decides not to grant any kind of rebates, reductions in fees or direct advantages to Triple A, but instead comes up with a more subtle idea. The AGS CEO is summoned to the Flemish Minister-President’s office, where he is told that – should AGS

even be willing to be considered for an extension of its Antwerp ramp and runway contract in the 2015 procurement competition (for the time frame 2016-2020), it should alter the terms of its contract with Triple A. Two options are proposed in that regard. AGS is either to grant Triple A significant benefits, or to set the prices for ramp and runway activities at an appropriate level so as to allow Triple A to maintain a profitable presence there. Given the strange nature of this contact, AGS' CEO calls on you to assess the proposed terms by the Flemish Minister-President from the point of view of EU competition law.

*In the current framework of EU competition law, which technique described above is most likely to escape serious EU competition law scrutiny? Refer to case law and developments discussed in the lecture and your reading materials.*

### **Case 2: No privatisation?**

In order to make markets work effectively and to ensure that competition is maintained, the Dutch government decides that telecommunications network operators cannot be privately owned. Shares in those companies can effectively be transferred, but only among and between Dutch public authorities, a definition of which is provided in the relevant Dutch legislation. The Dutch government argues that Article 345 TFEU allows for such measures to be adopted. Is the Dutch government correct in its assertion?

Suppose that one of those network operators begins to charge different tariffs to different companies with a view to reward loyalty in using its network, could such action be captured by EU competition law? Does Article 345 TFEU provide a shield against such actions?

### **Case 3: Publicly funded private transport**

The community of Venlo would like to subsidise cross-border bus transport to Germany and within the Netherlands. Voituria, the operating company, intends to cancel these services for lack of interest. Venlo nevertheless argues that 250 cross-border workers every day use the transport to reach their workplace in the Netherlands. It therefore wonders to what extent it can subsidize bus transport without infringing EU competition law. Provide an advice to Venlo. Explore all different options in your answer

### **Case 4: Help me, I am a banker**

KSA is a Dutch established credit institution (bank). Heavily indebted because of its extensive mortgage-backed securities portfolio, it risks going bankrupt. The government decides to intervene by bailing in the bank's capital and becoming the largest shareholder of the bank. Could the government do so under the current legislative regime? Also pay attention to the Commission's particular approach to State aid vis-à-vis banks in that respect.

### ***Q&A Session IBL Competition Law Course***



## LECTURE NOTES LECTURE 1

*These lecture notes make up for the lack of textbook materials for week 1. As such, they complement the hand-out which forms the basis of your lecture 1 materials provided in the previous section of this reader. You will find most relevant information and references to materials covered in class in this section.*

### **Competition**

Competition law builds upon a fundamental belief that undistorted competition and the underlying ideal of a *free market economy* should either be promoted, or at least be maintained or preserved. The economic notion of free competition serves as a quintessential starting point for any understanding of competition law. From that point of view, it could indeed be argued that competition law comprises the *translation* of particular economic policy preferences maintained by policymakers into enforceable legal standards. This sub-section provides the very basic economic background concepts that give shape to competition law provisions.

#### *a. Free market economy as starting point*

##### I. Elastic supply and demand as least imperfect method for allocating scarce societal resources

Resources are scarce and need to be allocated: market as meeting point between supply and demand (A. Smith: *invisible hand*)

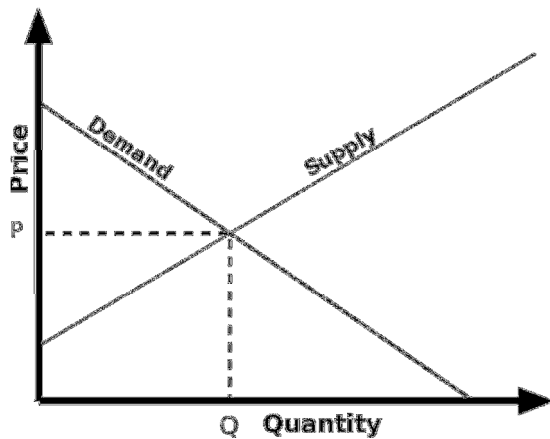
<-> alternative methods: e.g. centralised body – one company – state decides on allocation and distribution of scarce resources

[market liberalism <-> communism]

Free competition as *means* towards price equilibrium

Price equilibrium emerges where optimal demand and optimal supply meet

This meeting point can best be attained with free (or undistorted) competition (basic micro-economic presumption) under optimal conditions



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*Undistorted competition* as means to attain allocative, technical and dynamic efficiency

Allocative efficiency: scarce goods or services are allocated to such extent that price exactly meets demand

Technical efficiency: suppliers are invited to produce at minimum cost (requires perfect information)

Dynamic efficiency: elastic market conditions result in innovation continuously being promoted and spurred

*Efficiency* in this understanding implies:

Multiple suppliers (elasticity of supply): ensures optimal allocation and removal of technically inefficient or inapt suppliers (technical efficiency).

Multiple demand (elasticity of demand): ensures that suppliers are challenged to create better products or services that meet demand requirements (technical efficiency) and that are allocated to those that demand the product (allocative efficiency).

No (artificial or natural) barriers to entry for new supply and/or demand and accompanying market transparency: creates dynamic market conditions for those involved to ensure that markets continue to function optimally (dynamic efficiency)

II. Undistorted competition as tool to avoid X-inefficiencies that result from monopolistic or oligopolistic behaviour

*Monopoly* = the ability of one supplier to determine quantity and price of products and services offered

Artificially created monopoly: monopolization/coercion (cf. crime syndicate)

Publicly created and maintained monopoly: regulated industries/professional bodies (cf. traditionally postal services, public transport, air traffic control)

Natural monopoly: for various reasons (e.g. significant infrastructural expenses such as railway tracks, communication equipment, postal distribution networks that all require significant expenditures that could not efficiently be undertaken by each different business alike), offering of goods/services and accompanying price-setting is more efficiently left to a single business or firm

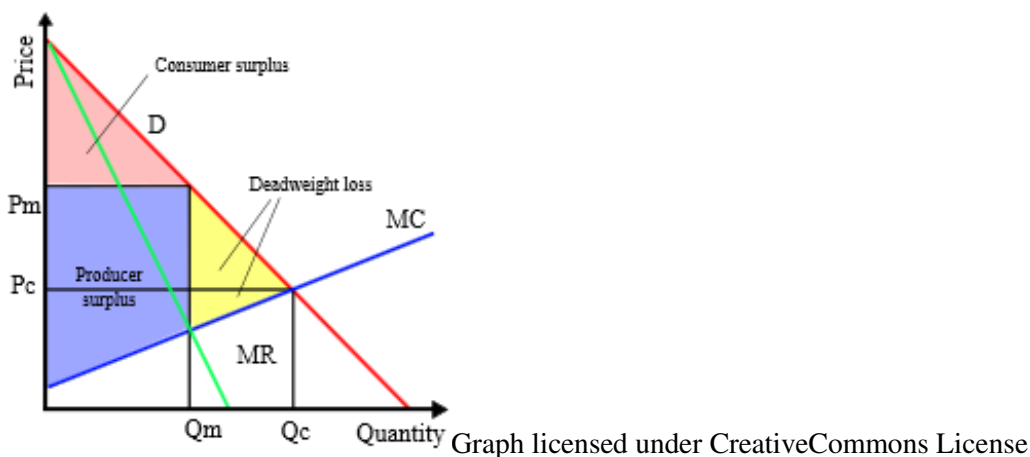
Monopolies are deemed undesirable for a number of reasons

Power vested in one supplier: averseness to power, trumps ideal of free choice of supply and accompanying ideal of ‘consumer choice’ that pervades classical micro-economic thought

Monopolist would not – or at least to a limited extent only – be challenged to innovate, as there is no choice among suppliers

Monopolist would seek to maintain its power status: creating barriers to entry that would impede potential market entrants from engaging in meaningful supply competition with the monopolist.

Result of those tendencies: X-inefficiencies and costs that have to be borne by society (so-called deadweight loss)



In addition to economic considerations, political uprising against powerful suppliers (anti-trust movement in the United States) further results in monopolies being treated with suspicion in many polities.

‘Crony capitalism’, ‘Oligarchies’...

*Oligopoly* = a very limited number of suppliers responsible to meet demand – temptation to cooperate/collude => re-creating the effects of a monopoly through cooperation and re-creating the effects of X-inefficiencies...

Cartel behaviour => problematic if policy aim is to create free market with undistorted competition as a means to establish or at least to try to realize a perfect price equilibrium...

*b. Free market economy does not necessarily materialise in reality*

Free market economy remains a background ideal-typical governance setting, but markets are *imperfect*

Perfect information/transparency hard to maintain in practice

Competition incites opportunistic and power-preserving behaviour

Power-preserving behaviour by suppliers also thwarts any public authority's initiatives to intervene in and structure a free market in accordance with particular public policy considerations (social solidarity, equality of access) => impedes effective market oversight and public regulation that is often used as a tool by states to correct markets.

Markets are a political instrument: market concept relied upon by state to place particular accents

in the organisation and enforcement of markets e.g. protection of small corporations, protection of consumers and of weaker members of society (*Soziale Marktwirtschaft* – Social Market Economy)

in the maintenance of meaningful participation of state in the market system (e.g. *service public* in France)

in the determination of a *socially* optimal equilibrium (*maatschappelijk verantwoord concurreren* (T. Ottervanger) – *competitive social responsibility?*)

Regulatory accents on how to organise a market economy

Law is considered an instrument to remedy imperfectness in market functioning

Policy attention to competition therefore backed up by *competition law*

Public expression of a socially desirable market environment

## Competition law

Building upon a belief that a free market economy represents a fair way to ensure allocative efficiency and realising that the ideal of a free market does not function perfectly in practice, public authorities have consistently relied on the law to maintain and establish undistorted competition as a policy ideal. In doing so, policymakers have come to reflect different visions of state intervention in and regulation of the marketplace. Over time, competition law shifted from being an extension of private (contract and non-contractual liability) law to public (administrative) law. At the same time, it always represents a means towards realising ‘workable’ rather than ‘perfect’ competition.

### *a. Law as an instrument of behavioural regulation in the marketplace*

Addressing market distortions by clear-cut *rules* (prohibitions, detailed exceptions) or vague *standards* (guidelines, good practices etc.)

Hard law prohibitions enjoy preference, generally vague, combined with additional guidance instruments explaining how those vague prohibitions should further be applied.

*Ex ante or ex post* rule-based intervention → *Control of abuse v. authorization system*

Control of abuse: anticompetitive actions are in principle allowed or tolerated (sometimes even encouraged), unless they breach a certain threshold (e.g. abuse): subjective assessment of abuse by authority or court necessary: believed to be cartel-inducing. French system post WWII

‘Authorization’ system: all anticompetitive actions are prohibited by law, unless they have been authorized, exempted or made subject to an exception by an appropriate authority. German system post WW II.

Most systems combine elements of both control of abuse and authorization

Cf. U.S. system of *rule of reason* analysis

Cf. EU enforcement system of Article 101(3) (Lecture 2)

Sanctions: fines, imprisonment, damages...

Depends on the choices and preferences of each legal system alike

E.g. U.K. and Ireland impose criminal sanctions

### *b. From private to public law*

Competition law as a form of market regulation correcting excesses of private law, but private law already contained tools to regulate anti-competitive market behaviour

Contract law: contracts ‘in restraint of trade’ null and void under English common law

Abuse of dominant position/monopoly could be challenged under non-contractual liability, if dominant business violated a particular duty of care

Dependent on private – and often weaker market participants’ – initiative and knowledge

Specific administrative law regime allowed States more directly and pro-actively to intervene in the organisation of particular business practices deemed anti-competitive

Publicly imposed and enforced prohibitions: administrative fines payable to the State and benefiting the general budget

Criminal sanctions

Need for particular guarantees against public intrusion of individual market participants’ rights

*c. Ensuring ‘workable’ competition*

Competition law as an instrument of regulation (P. Nihoul): intervening in the marketplace through law.

Protecting and maintaining pure competition: could be a policy goal – according to ordoliberal and neo-liberal thinkers, it should be the only policy goal of state intervention and supervision (competition law as *Wirtschaftsverfassung – economic constitution*) protecting the process of competition for the sake of competition. Over time evolved into protecting the process of competition for other higher goals – such as protecting human freedom, equality and social cohesion among others (creation of a social market economy as identifying part of a nation state, e.g. post-WWII Germany)

Instrumental use of law as a tool to encourage other policy goals: consumer protection, consumer *welfare*, protection of particular businesses, competitor protection against unfair methods...

In both instances, competition law is never *an end in itself*. It rather represents a *means to ensure that a society based upon a free market economy can function properly*. As such, competition law is above all an instrument to maintain and structure values a society holds dear. Competition is not an end, it is a means to a workable society, based upon either only competition or on other more distant policy goals.

[workable competition usually only associated with second reading; Harvard v. Chicago School of thought in antitrust law]

Result: *workable competition* as standard to be ensured by competition law; cf. ECJ, Case 26/76, *Metro*, [1977] O.J. 1875, para 20: *the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.*

## EU competition law: a bird's eye view

EU law reflects this search for a 'workable competition' regime within the particular context of European 'internal market' integration. Quite unconventionally, the founding Treaties directly incorporate competition law provisions directly addressed to individual businesses (and to Member States, which is more conventional, as you know from your Foundations and Substantive EU law courses and as the free movement provisions particularly showcase). More specifically, competition law provisions governing the internal market belong to the small category of *exclusive competences* attributed to the European Union by the Member States. Articles 101-109 TFEU incorporate and shape those exclusively attributed competences. Two types of EU competition law provisions can be distinguished, encompassing no less than five branches of EU competition law. Whilst all five branches differ in scope and ability for EU institutions to intervene, they rely on a common set of concepts that will re-appear throughout our study of the particular branches in the upcoming weeks. Relying on those concepts and on the specific conditions and instruments underlying each of the branches, the European Commission maintains significant and extensive enforcement powers across all five branches. At the same time, national authorities and courts are effectively included into the system of EU competition law enforcement. In relation to national courts, the recent emergence of so-called *private enforcement* of EU competition law is an evolution that warrants specific attention and is likely to remain at the forefront of judicial and political evolutions in this field for years to come.

### a. Exclusively attributed competition law competences

#### I. Competition as an object of EU integration

Preamble TFEU: RECOGNISING that the removal of existing obstacles calls for concerted action *in order to guarantee steady expansion, balanced trade and fair competition*

Art. 3(1)(b) TFEU: 'The Union shall have exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market'

Establishing of competition rules object of EU integration?

Not mentioned in TEU: Art. 3(3) TEU only states that [t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

EU competition law as means to social market economy? Yes, see Protocol 27 accompanying TEU and TFEU on the internal market and competition:

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

Why a protocol?  
Treaty negotiations

France (and French President Sarkozy) during Lisbon

Compare to Article 3(1)(g) EC Treaty (prior to Lisbon amendments in 2009)

Protocol nevertheless *same legal value* as Treaty provision; merely attached instead of included

Legal consequences v. policy consequences

Implications of 'exclusive' competence characteristics

No subsidiarity/proportionality as meant in art. 5(3) and (4) TEU

No Member State involvement, unless explicitly *delegated* by Treaty (see Art. 103 TFEU) or secondary law (see e.g. Art. 35 Regulation 1/2003)

Supranational level responsible for determination and implementation of EU competition rules

Supranational level primarily responsible for application and enforcement of those rules

## II. EU competition rules as EU 'economic constitutional law'

Directly incorporated in TFEU, Part III, Title VII, Chapter I: Articles 101-109 TFEU

Rules applying to 'undertakings' (Art. 101-106 TFEU)

Rules applying to Member States (Art. 107-109 TFEU)

Rules applicable across all sectors covered by the TFEU

See however art. 42 TFEU (agriculture); art. 93 TFEU (transport); art. 173 TFEU (industry); art. 345 TFEU (national property regimes and choices)

Competition law versus EU industrial policy?

Industrial policy = public measures to support or maintain the effective and competitive functioning of a particular industrial sector in a particular region

Competition law as EU industrial policy



## Competition law vis-à-vis EU free movement law

*Prima facie* different addressees

Nevertheless potential overlap: see e.g. Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, [2006] ECR I-6991.

### III. EU competition law as European Union law

Primacy of EU competition law over national rules applying to the same behaviour

Direct effect if the conditions for direct effect have been met

Not all EU competition rules have direct effect and are thus invocable before a national judge, yet most of them have. See discussion of specific provisions in specific lectures.

#### *b. Five branches of EU competition law*

##### I. Rules applying to ‘undertakings’ or private market operators

**Branch 1:** *It takes two...* Collusion: ‘cartel prohibition’ or agreements that have as their object or effect the prevention, restriction or distortion of competition (Article 101 TFEU): considered prohibited and void unless exceptions applicable in particular circumstances.

**Branch 2:** *Do it yourself...* Abusing a dominant economic position with a view to exclude or exploit other market operators: prohibited under EU law (Article 102 TFEU).

**Branch 3:** *Structural changes in the market...* Creating or modifying market operators that potentially exclude, prevent or distort competition in the internal market (particular mergers between previously existing operators, other changes in ownership): such structural changes should be avoided and therefore have to be notified to the European Commission *prior to their implementation* and have to gain *approval* by the latter within strict deadlines; not in the Treaty itself, but in Regulation 139/2004 (adopted on the basis of Article 103 and Article 352 TFEU).

##### II. Member States and EU competition law

**Branch 4:** *Going public...* Applicability of EU competition law rules (most notably Article 101 and 102 TFEU – Branches 1 and 2) to *publicly owned enterprises*: Art. 101 and 102 in principle apply, yet exceptions possible in relation to *services of general economic interest*.

**Branch 5:** *Aid by a State...* Member States themselves can distort competition by granting particular or selected market operators an advantage over others. Art. 107-109 prohibits such *State aid* and develops a procedure structuring the granting of aid to particular operators. As such, States cannot distort the competitive processes by protecting undertakings that would

otherwise not have survived – at least in the same fashion – under normal competitive market conditions.

- c. *Conditions for the application of EU competition law rules: ‘undertakings’ involved, ‘effect on trade between Member States’ and ‘competition within the internal market’ being distorted*

Despite the widely diverse types of behaviour governed by the five different branches of EU competition law, all branches rely on a set of three *identical concepts* that have the *same legal value* throughout all five branches. As such, these concepts have come to determine to what extent EU competition law is applicable to the case at hand. **In any case you will be confronted with (in an exam or real life setting), your first task will be to determine whether EU competition law is effectively applicable to the case at hand. Doing so requires you to respond to three preliminary questions related to the three common concepts appearing throughout the Treaty framework. Those questions relate to the subjects of EU competition law (scope of applicability *ratione personae*), the competition-oriented dimension of the problem at hand (scope of applicability *ratione materiae*) and the geographical dimension of the problem concerned (scope of applicability *ratione loci*).** All three dimensions of EU competition law applicability have generously been interpreted by the Court of Justice. As a result, it is oftentimes not difficult to assert that EU competition law applies to a given fact situation related to market behaviour and – in some way – to the EU internal market.

I. Applicability *ratione personae*: The concept of ‘undertaking’

The notion of undertaking is pivotal for the scope of application of EU competition law and appears throughout all five branches of EU competition law. The Court of Justice ensured that the concept of undertaking has consistently been interpreted across all branches. The presence and scope of an undertaking depends on judicially established conditions and limits.<sup>1</sup> Following the 1991 *Höfner* judgment<sup>2</sup>, the European Court of Justice (ECJ) consistently set forth a single definition of undertaking: ‘the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’.<sup>3</sup> This definition comprises two components: entity and economic activity.<sup>4</sup>

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<sup>1</sup> The Court initially equated the existence of an undertaking with legal personality. Different legal persons would thus comprise different undertakings, see among others Joined Cases 17/61 and 20/61, *Klöckner Werke AG and Hoesch v High Authority of the European Coal and Steel Community*, [1962] ECR 345, holding that *the close ties between the parent company and its subsidiaries, in particular by reason of ‘organschaft’ (inter-group) contracts [...] are of no significance in the present cases because they can in no way eliminate the fundamental difference which has been declared to exist between a group of undertakings and an undertaking considered as a single entity.*

<sup>2</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*. [1991] ECR I-1979 (hereafter referred to as *Höfner*).

<sup>3</sup> *Höfner*, note 2 above, para 21.

<sup>4</sup> Case C-55/96, *Job Centre coop. Arl*. [1997] ECR I-7119, para 21; Case C-35/96, *Commission of the European Communities v Italian Republic* [1998] ECR I-3851, para. 36; Case T-9/99, *HFB Holding für Fernwärmetechnik*

## I.a. The entity component and its legal consequences

The basic elements of the (single) entity component have been interpreted quite consistently over time.<sup>5</sup> In the *Shell*-case<sup>6</sup> the EU General Court stated that a single entity is an ‘economic unit which consist of an unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision’.<sup>7</sup> Earlier ECJ case law stated that an entity could consist of ‘several persons, natural or legal’.<sup>8</sup> In particular, multiple legal persons could be considered a single entity if business or personal links exist between those legal persons. The notion of business links refers to a parent company effectively influencing commercial policy, personal links relate to the sharing of directors or executives among different legal persons.<sup>9</sup> Not unlike US antitrust law, the single entity concept is thus approached from a functional perspective. Legal personhood does not play a determining role in establishing the limits of the undertaking concept.

The entity concept thus determines the scope of application of EU competition law. To the extent that a particular business structure does not fit the entity definition, EU competition prohibitions will not apply to that structure’s behaviour. Simultaneously, the single entity notion also determines the scope of the structure ‘to which a certain behaviour is attributable’.<sup>10</sup> The latter function allows competition authorities to develop single entity claims in order to impose fines on groups of corporate entities. Single entity claims in that respect enhance competition law prosecution. According to Regulation 1/2003, the fines

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*Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities* [2002] ECR II-1487, para. 66; **Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap** [2002] ECR I-1577, para. 46; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others* [2004] ECR I-2493, para. 46; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v Commission of the European Communities* [2005] ECR I-5425, para. 112; The definition had already been used by the Commission in an earlier case: Commission Decision 86/398/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 - Polypropylene) [1986], para. 99.

<sup>5</sup> In the following, we mainly focus on Court decisions rather than on Commission decisions. Although the European Commission is the first antitrust enforcement authority to apply and develop a single entity test, the latter has to be sanctioned by the Courts. These judicial tests therefore possess (at least in theory) more finality as they guide the Commission in its enforcement endeavors.

<sup>6</sup> Case T-11/89, *Shell International Chemical Company Ltd v Commission of the European Communities* [1992] ECR II-757 (hereafter referred to as *Shell*).

<sup>7</sup> *Shell*, note 6 above, para. 311; This definition had already been set out by the ECJ in former cases e.g. Joined cases 17/61 and 20/61, *Klöckner-Werke AG and Hoesch AG v High Authority of the European Coal and Steel Community*, [1962] ECR. 325, 341 (Hereafter referred to as *Klöckner*).

<sup>8</sup> Case 170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR 2999, para. 11 with this the ECJ overruled its earlier case law in which it stated that «An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim. According to this concept the creation of every legal entity in the field of economic organization involves the establishment of a separate undertaking» (see *Klöckner*, note 7 above, 341)

<sup>9</sup> A. Montesa and A. Givaja, ‘When Parents Pay for their Children’s Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios’, *W. Comp.* 29 (2006), 569.

<sup>10</sup> Advocate General Jacobs in his Opinion to case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999], para 206.

imposed on undertakings or associations of undertakings when infringements of the articles 101 and 102 of the Treaty are committed intentionally or negligently, shall not exceed 10% of the total turnover in the preceding business year of each undertaking and association of undertakings participating in the infringement.<sup>11</sup> Group members can thus be held jointly and severally liable for competition law infringements.<sup>12</sup> A more extensive entity conception that integrates different legal entities into a single economic entity allows for higher fines to be calculated on the turnover of every component of that single entity.

The single entity concept has long provided groups of corporate legal persons with an escape from EU competition law. In 1971, the ECJ held that one undertaking could comprise several corporations which can be organized in a simple parent company and subsidiary scheme or in even more complex schemes with several levels of subsidiaries.<sup>13</sup> When dealing with a group of undertakings, the constituent factor one should bear in mind is not whether those undertakings have a separate legal personality, but whether or not they act together on the market as a single unit.<sup>14</sup> Single unit market conduct implies that a subsidiary or affiliate has no real freedom to determine its course of action on the market.<sup>15</sup> The assessment of single economic unit status crucially depends on control and conduct factors, including among others parental control over the board of directors, instructions imposed on the subsidiary to be carried out, the amount of profit taken by the parent and other elements referring to real decisive influence by a parent over its subsidiary.<sup>16</sup> The exact weight attributed to either ownership, non-ownership control or additional conduct factors has been the subject of intense discussions and divergent interpretations.

The interrelations between control and conduct are most readily apparent from the case law on the single entity status of hybrid affiliations involved in distribution, commercial agency and other intermediary agreements.<sup>17</sup> Commercial agency agreements potentially benefit from

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<sup>11</sup> Article 23 (2) of the Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1, 1.

<sup>12</sup> L. La Rocca, 'The controversial issue of the parent company liability for the violation of EC competition rules by the subsidiary', *ECLR*. 32 (2011), 71.

<sup>13</sup> See case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949, para. 8.

<sup>14</sup> Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities* [2002] ECR II-1487, para. 66; Case T-66/99 *Minoan Lines SA v Commission of the European Communities* [2003] ECR II-5515, para. 123; Case T-325/01, *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319, para. 85; J. Briggs and S. Jordan, 'Developments in the law: the presumption of shareholder liability and the implications for shareholders in private damages actions and otherwise', *Global competition litigation review* 2009, 2(4), (203) 203-204.

<sup>15</sup> Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR 619, para. 134; Case 15/74 *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.* [1974] ECR 1147, para. 41; Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR 803, para. 35.

<sup>16</sup> Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities* [1983] ECR 3151, para. 50-52; Case C-286/98 P, *Stora Kopparbergs Bergslags AB v. Commission* [2000] ECR I-9925, para. 21-30; Case T-314/01, *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities* [2006] ECR II-3085, para. 135-142.

<sup>17</sup> Scholars distinguished acquired undertakings, groups of undertakings and controlling undertakings, the latter including both parent – subsidiary and alternative control arrangements, see A. Montesa and A. Givaja, note 9above, 559-560.

single entity immunity, as the conduct of ‘independent’ commercial agents<sup>18</sup> is often quite dependent on instructions received from a principal.<sup>19</sup> In the pilot case of Suiker-Unie<sup>20</sup>, the ECJ affirmed what already had been established in earlier decisions of the European Commission.<sup>21</sup> It stated that ‘if an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter’s undertaking, who must carry out his principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking’.<sup>22</sup> The Court of Justice presented a two-step test relying on market conduct in order to verify the degree of autonomy of the agent. First the agent may not bear any financial risk. Second, the agent may not engage in activities of both agent and independent trader in respect of the same market.<sup>23</sup> In the Suiker-Unie case the ECJ decided that article 101 TFEU was applicable since ‘(...) it is not disputed that the agents in question are large business houses, which at the same time as they distribute sugar for the account of the applicant, (...) undertake a very considerable amount of business for their own on the sugar market<sup>24</sup> (...) Thus these representatives are authorized to act as independent dealer<sup>25</sup> (...) The integration of representatives in its sales organization ‘did not rule out the possibility that agents may also compete with independent dealers, in particular when they sell for their own account (...)’.<sup>26</sup>

The Court subsequently extended this reasoning to wholly owned subsidiaries in the important *Viho* case.<sup>27</sup> According to the court, ‘where, as in this case, the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, Article [101] does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit’.<sup>28</sup> The distribution subsidiaries

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<sup>18</sup> The definition of commercial agency agreements: « *they cover the situation in which a legal or physical person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name, or in the name of the principal for the purchase of goods or services by the principal or the sale of goods or services supplied by the principal* » (see Commission Notice on Guidelines on Vertical Restraints, OJ C 230/1, 19 May 2010, para. 12)

<sup>19</sup> Case 311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, para. 20; Case C-266/93 *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH*. [1995] ECR I-3477, para. 19; Case T-66/99 *Minoan Lines SA v Commission of the European Communities* [2003] ECR II- 5515, para. 125; Case T-325/01 *Daimler Chrysler AG v Commission of the European Communities* [2005] ECR, II- 3319, para. 86; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987, para. 42; I. Lianos, ‘Commercial agency agreements, vertical restraints, and the limits of Article 81(1) EC: between hierarchies and networks’, *J.C.L. & E.*2007, 3 (4), (625) 628.

<sup>20</sup> Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 1663 (hereafter referred to as Suiker Unie).

<sup>21</sup> Commission, *Pittsburgh Corning Europe O.J.* 1972 L 272/35; I. Lianos, note 19 above, 632.

<sup>22</sup> Suiker Unie, note 20 above, para. 480.

<sup>23</sup> I. Lianos, note 19 above, 633.

<sup>24</sup> Suiker Unie, note 20 above, para. 544.

<sup>25</sup> Suiker Unie, note 20 above, para. 546.

<sup>26</sup> Suiker Unie note 20 above, para. 547.

<sup>27</sup> Case C-73/95 P, *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457 (hereafter referred to as Viho).

<sup>28</sup> Viho, note 27 above, para. 6.

did not enjoy real autonomy in determining their course of action in the market, as they merely had to carry out the instructions of the controlling parent company.<sup>29</sup>

*Suiker Unie* and *Viho* present an EU single entity test relying on control and conduct. Whereas *Suiker Unie* presumes non-ownership based control, *Viho* distinguishes elements of ownership-based control (intra-enterprise behaviour or potentially decisive influence) and market conduct (extra-enterprise behaviour or actual decisive influence<sup>30</sup>) as two fundamental variables to establish single entity claims in EU law. Neither *Suiker Unie* nor *Viho* did however establish a clear hierarchy among these elements. The degree to which ownership based control, alternative control elements or specific market conduct determine single entity claims remains unclear.<sup>31</sup>

In addition to providing a shield against applying EU competition rules, single entity claims have more recently been rediscovered as swords to extend the scope of enforcement of these rules.<sup>32</sup> In so doing, similar criteria also relied on to exclude single entities from the scope of competition law have resurfaced to ensure a more inclusive entity subject to competition law fines. The prosecutorial perspective provides fundamental insights into how the ECJ operationalizes or could further operationalize the weight attached to ownership, control and conduct requirements in a general EU single entity test.

The ECJ established that infringements committed by subsidiaries could be attributed to the parent company or to other “related” companies<sup>33</sup>, to the extent that the latter exercise direct or actual influence over the subsidiary’s decisionmaking practices.<sup>34</sup> In those instances, an undertaking will often be held to have engaged in restrictive practices with another undertaking, represented by a subsidiary corporate entity. Parent companies can thus be held liable for restrictive practices engaged in by subsidiaries.

The conditions for attributing competition law infringements to parent companies – and thus to establish single entity status – rely on control and market conduct variables. According to the ECJ, ‘the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the

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<sup>29</sup> *Viho*, note 27 above, para 16.

<sup>30</sup> At the very least, the subordinate (subsidiary or affiliated corporation or employee) should itself enjoy no market autonomy at all, *A. Montesa and A. Givaja*, note 9 above, 560.

<sup>31</sup> That could also be said of individual employees who constitute a single entity with the corporation that employs them, see

<sup>32</sup> On the particular combination of prosecutorial and adjudicative rules, see W. Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’, *W.Comp.*27 (2004), 201-224.

<sup>33</sup> In *C-196/99, Aristrain*, the ECJ debunked the claim that sister corporate legal entities should always be considered part of a single entity because they are controlled by the same person.

<sup>34</sup> *Case C-97/08 P Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECR I-8237, para. 59 (hereafter referred to as *Akzo*). For earlier cases along the same lines, see among others *Case 48/69, Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR 619, para. 135; *Case 107/82, Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities* [1983] ECR 3151, para. 49; *Case T-77/92, Parker Pen Ltd v Commission of the European Communities* [1994] ECR, II-549, para. 57; *Case T-9/99, HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities* [2002] ECR II-1487, para. 66; *Case T-66/99 Minoan Lines SA v Commission of the European Communities* [2003] ECR II-5515, para. 123.

subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'.<sup>35</sup> The ability to influence market conduct is in the first place assessed in light of present control rights, rather than the actual exercise of control as such.<sup>36</sup> In that respect, particular attention is paid to 'the economic, organisational and legal links between [different] legal entities'.<sup>37</sup> The concept of control nevertheless presents operational difficulties in determining a correct standard to assess whether or not economic, legal or organizational links are sufficient. With a view to operationalize control, the Courts have regularly relied on *ownership* presumptions to substantiate corporate control claims.

In *Akzo*, the ECJ held that 'in the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary'.<sup>38</sup> Full ownership does not only presume corporate control, it also presumes decisive market conduct influence.<sup>39</sup> The fact that other circumstances had been taken into account in earlier case law<sup>40</sup>, does not however make the application of the presumption 'subject to the production of additional indicia relating to the actual exercise of influence by the parent company'.<sup>41</sup>

*Akzo* is particularly controversial because the Court took sides in a debate that included two approaches to single entity prosecution. The first approach entailed a full blown (belts and braces) inquiry of single entity, requiring the European Commission to establish both control and conduct parameters being fulfilled in order to attribute anticompetitive conduct to a parent company. The second approach requires the Commission merely to establish control and imposes the entire burden of proof on the defendant parent company to establish its non-single entity status.<sup>42</sup> It requires the parent company to establish that it did not influence the subsidiary's conduct or did not fully control the subsidiary's decision making process.

The burden of proving the absence of influence on conduct or lack of control has generated controversy, as two readings can be adduced to rebut a presumption of single entity based on

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<sup>35</sup> *Akzo*, note 34 above, para. 58, referring to established case law. Case T-354/94, *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, [1998] ECR II-2111, para 79 (hereafter referred to as *Stora*).

<sup>36</sup> Wils, note 2 above, 106-107, referring to the undertaking concept in mergers as well.

<sup>37</sup> *Akzo*, note 34 above, para 58. A wide conception of these links could be incorporated in a Commission mindset based on prosecuting. That prosecutorial bias would allow competition authorities to engage more easily in establishing single entity status. On prosecutorial bias in EU competition law, see W. Wils, note 32 above, 212-217.

<sup>38</sup> *Akzo*, note 34 above, para 60

<sup>39</sup> *Akzo*, note 34 above, para. 63.

<sup>40</sup> Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949, para. 8; Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities*. [1983] ECR 3151, para. 50; *Stora*, note 35 above, para. 29; *Akzo*, note 34 above, para. 60; J. Briggs and S. Jordan, note 14 above, 204.

<sup>41</sup> *Akzo*, note 34 above, para 62.

<sup>42</sup> The belts and braces approach was long adhered to by the General Court, see T-109/02, *Bolloré e.a. v. Commission*, [2007] ECR II-947, para. 132; T-69/04, *Schunk v. Commission*, [2008] ECR, II-2567, para. 57; T-301/04, *Clearstream Banking en Clearstream International v. Commission*, [ 2009] ECR II-3155, para. 199-200; T-112/05, *Akzo Nobel e.a. v. Commission*, [2007] ECR II-5049, para. 60.

parenthood. According to the General Court and confirmed on appeal by the Court of Justice, the parent company should establish that it was not ‘able to influence pricing policy production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing’.<sup>43</sup> A parent could thus rebut single entity presumptions by demonstrating that it did not influence the subsidiary’s market behaviour in its specific niche of operations. At the same time, the ECJ in *Akzo* held that parent companies could also bring forward alternative relevant factors. These factors relate to all economic, organizational or legal links established between subsidiary and parent.<sup>44</sup> Scholars have read that requirement to impose on parent companies the burden to establish lack of management influence on the conduct of the subsidiary in general and not merely on the market related to competition law infringements.<sup>45</sup> More specifically, it would require a parent company to establish that it did not have control over the subsidiary’s operations, which would in practice be impossible to achieve, because a parent – subsidiary relationship precisely by nature implies some level of control.

#### I.b. The economic activity component and its consequences

The second component mainly determines the extent to which particular activities can be considered ‘economic’. Once again, the Court of Justice played a pivotal role in outlining how an economic activity should be defined. Two characteristic features of what constitutes an economic activity can be distinguished from the Court’s case law. It is any activity consisting in the offering of goods and services on a given market (i) ‘*which at least in principle, can be carried out by a private undertaking in order to make profits*’ (ii).<sup>46</sup>

- i. The offering of goods and services on a given market

An activity is deemed ‘economic’ if goods and services are offered on a given market.<sup>47</sup> This condition was established for the first time in the *Commission v. Italy*-case where the Court decided that although the *Amministrazione Autonoma dei Monopoli di Stato (AAMS)* did not have a separate legal personality from that of the state, it was an undertaking for the manufacturing and selling of tobacco, which was according to the court an offer of goods and services on a given market, thus an economic activity.<sup>48</sup> This criterion has also been applied in later rulings. For instance in the *FENIN*-case the Court ruled that the purchase of goods can only be seen as an economic activity when the use of those purchased goods also amounts to

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<sup>43</sup> *Akzo*, note 34 above, para. 64, with references made to the CFI *Viho* judgment (CFI, T-102/92 *Viho v Commission* [1995] ECR II-17, paragraph 48).

<sup>44</sup> *Akzo*, note 34 above, para. 65.

<sup>45</sup> F. Wenner and B. Van Barlingen, “European Court of Justice confirms Commission’s approach on parental liability”, *Competition Policy Newsletter* 2010, 26-27: *What matters is the overall distribution of responsibilities within the group*.

<sup>46</sup> Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] AG’s opinion at para. 311

<sup>47</sup> Case 118/85 *Commission v Italy* [1987] para. 7.

<sup>48</sup> Case 118/85 *Commission v Italy* [1987] para. 3



an economic activity.<sup>49</sup> Also differing from the offering of goods and services is regulating that offering. In the Bodson-case, the Court considered that when regional authorities require a license to provide funeral services and charge a fee to obtain that license, this cannot be considered as an economic activity.<sup>50</sup>

Applying the aforementioned reasoning, the Court considered the offering of customs services,<sup>51</sup> the offering of specialist medical services<sup>52</sup> and emergency transport services and patient transport services to be economic activities.<sup>53</sup>

ii. Potential to make profit from the offer of goods or services without State intervention

The second characteristic of an economic activity has been derived from the Court's statements in the pilot case Höfner<sup>54</sup> and in the Van Landewyck-case.<sup>55</sup> In Höfner, the Court held that '*the fact that employment procurement activities are normally entrusted to the public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities*'.<sup>56</sup> In addition in the Van Landewyck-case, the Court affirmed that the fact that the entity is a non-profit-making body does not deprive the activity which it carries out from its economic character.<sup>57</sup> In later cases both statements were combined and translated to the second aspect of an economic activity namely there has to be potential to make a profit from the offer of goods or services without state intervention. Thus it is not required that the activity is carried out by a private undertaking, only should there be a possibility that a private undertaking could carry it out. In addition, neither actual profit nor a profit-making motive is essential for an activity to be considered economic *in nature*.<sup>58</sup> In other words, the actual object of a particular activity is not important in this setting.

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<sup>49</sup> Case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] para. 26.

<sup>50</sup> Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] para. 18;

<sup>51</sup> Case C-35/96, *Commission of the European Communities v Italian Republic*. [1998] para. 37

<sup>52</sup> Joined cases C-180/98 to C-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] para. 76

<sup>53</sup> Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] para. 20

<sup>54</sup> Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991]

<sup>55</sup> Joined cases 209 to 215 and 218/78, *Heintz van Landewyck SARL and others v Commission of the European Communities* [1980]

<sup>56</sup> Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] para. 22; This was again confirmed in the Case C-55/96, *Job Centre coop. Arl*. [1997] para. 22 and in a case concerning emergency transport services and patient transport services: Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] para. 20

<sup>57</sup> Joined cases 209 to 215 and 218/78, *Heintz van Landewyck SARL and others v Commission of the European Communities*. [1980] para. 88; This view has also been expressed in later case-law e.g. Case C-244/94, *Fédération Française des Sociétés d'Assurance (FFSA), Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche*. [1995] para. 21

<sup>58</sup> Joined cases C-159/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc* [1993] AG's opinion at para. 7-8; Case C-364/92, *SAT Fluggesellschaft mbH v Eurocontrol*. [1994] AG's opinion at para. 9; Case C-343/95, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] AG's opinion at para. 32; Case C-67/96, *Albany International BV v Stichting*

The notion of economic activities has proven to be especially controversial in situations where the activities are carried out by entities in some ways supported by the state. For the application of the competition rules, a distinction is drawn between on the one side entities performing economic activities and on the other side entities performing activities in the exercise of official authority.<sup>59</sup> In case of the latter, the Court argued that no economic activities were being conducted and as a result, no undertakings were involved.

This distinction is especially difficult to make when the state has contracted its public tasks out to private undertakings. The Court's approach to certain questions concerning these entities is not always that transparent or predictable. It is clear from the case-law that the decisive factor is whether there is an offering of goods and services on a market which could be carried out by a private undertaking to make a profit.<sup>60</sup> The test which is applied by the Court focuses on the *nature* of the activity carried out by the entity. However these activities are assessed separately in order to verify whether they are economic or non-economic. Thus in that sense the concept of undertaking is a relative one, since one and the same entity can be classified as an undertaking for one part of its activities whereas it falls outside the scope of competition law for the other part.<sup>61</sup> However the Court will not apply the competition rules to an entity which, although it performs economic activities, is not considered being an undertaking since its economic activities are inseparably connected to its exercise of public powers. This was also the Courts assessment in *SELEX Sistemi Integrati SpA v Commission*.<sup>62</sup> Eurocontrol (European Organization for the Safety of Air Navigation) was engaged in the creation and collection of route charges on behalf of the Contracting States from the users of the air navigation services, assisting the national administrations and technical standardization. Some of these activities clearly are an exercise of public authority others are more economical activities. However the ECJ held, in contrast to the General Court of appeal,<sup>63</sup> that all the activities were inseparable from the activity of assisting the national administrations which was connected with the exercise of public powers. Consequently Eurocontrol was not acting as an undertaking.<sup>64</sup> Whereas in the *MOTOE*-case,<sup>65</sup> *ELPA*, a

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*Bedrijfspensioenfondsvestiging Textielindustrie*. [1999] AG's opinion at para. 311; Case T-128/98 *Aéroports de Paris* [2000] para. 124; Case C-218/00, *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] AG's opinion at para. 38; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others* [2004] AG's opinion at para. 27; Case T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] para. 77 and 88-89.

<sup>59</sup> Case 118/85, *Commission of the European Communities v Italian Republic* [1997] para. 7; Case C-343/95, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] para. 16; Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] AG's opinion para. 72; Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] para. 25; Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2009] para. 70.

<sup>60</sup> Case 118/85, *Commission of the European Communities v Italian Republic*. [1987] para. 7

<sup>61</sup> Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] AG's opinion para. 72; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others*[2004] para. 58; Case C-49/07, *MOTOE* [2008] para. 25.

<sup>62</sup> Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2009]

<sup>63</sup> Case T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006]

<sup>64</sup> Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2009] para. 65-100

non-profit-making association which was not only concerned with the authorization of motorcycling events in Greece, but also with organizing the events itself and entering into sponsorship, advertising and insurance contracts designed to exploit these events commercially and serving as a source of income for ELPA, was judged to be an undertaking for the application of article 101 TFEU.<sup>66</sup> However the Court did draw a distinction between ELPA's participation in the decision-making process of the public authorities and its economic activities.<sup>67</sup> Only for the latter, ELPA is treated as an undertaking.<sup>68</sup>

Applying the same principles, the Court has ruled that a State-run employment agency is an undertaking, independent customs agents,<sup>69</sup> public broadcasting institutions, a voluntary old-age pension scheme for agricultural workers,<sup>70</sup> a sectoral pension fund to which workers were compulsorily affiliated by government regulation,<sup>71</sup> medical aid organizations providing ambulance services,<sup>72</sup> the Spanish post office,<sup>73</sup> and public television broadcasting organizations.<sup>74</sup>

In the cases concerning pension funds and social security schemes the decisive factor for the ECJ is not the social objectives of the entity, but the application of the principle of social solidarity by the entity. This solidarity principle was defined in the 'Poucet et Pistre'-case. The 'Caisse Mutuelle Régionale du Languedoc-Roussillon', which manages the sickness and maternity insurance scheme for self-employed persons in non-agricultural occupations, is not an undertaking, since it embodies the solidarity principle. This solidarity principle entails '*the redistribution of income between those who are better off and those who, in view of their resources and state of health would be deprived of the necessary social cover*'.<sup>75</sup> INAIL, an entity which provides in a compulsory insurance against accidents at work and occupational diseases, pursues a social objective. However '*the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity*'.<sup>76</sup> The constituent factor is the application of the solidarity principle. In this case the Court derived the application of this principle from the fact first that '*the scheme is financed by contributions the rate of which is not systematically proportionate to the risk insured*'<sup>77</sup> and second '*the amount of benefits paid is not necessarily proportionate to the persons*'

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<sup>65</sup> Case C-49/07, *MOTOE* [2008]

<sup>66</sup> Case C-49/07, *MOTOE* [2008] para. 53

<sup>67</sup> Case C-49/07, *MOTOE* [2008] para. 26

<sup>68</sup> Case C-49/07, *MOTOE* [2008] para. 29

<sup>69</sup> Case C-35/96, *Commission of the European Communities v Italian Republic*. [1998] para. 36-38

<sup>70</sup> Case C-244/94, *Fédération Française des Sociétés d'Assurance (FFSA), Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche*. [1995] para. 22

<sup>71</sup> Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*. [1999] para. 87

<sup>72</sup> Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] para. 22

<sup>73</sup> *Spanish Courier Services* [1990]

<sup>74</sup> Case 155-73, *Italy v. Giuseppe Sacchi* [1974] para. 14

<sup>75</sup> Joined cases C-159/91 and C-160/91, - *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc* [1993] para. 10

<sup>76</sup> Case C-218/00, *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] para. 37

<sup>77</sup> Case C-218/00, *INAIL* [2002] para. 39

earnings'.<sup>78</sup> Thus 'the absence of any link between the contributions paid and the benefits granted entails solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed'.<sup>79</sup> A second element which is detrimental for the Court to determine if an entity engaged in a pension fund or social security scheme does not constitute an undertaking is the fact that 'amount of benefits and amount of contributions (...) are subject to supervision by the state'.<sup>80</sup>

The same reasoning was applied in the AOK Bundesverband-case, which dealt with sickness funds that were direct providers of statutory sickness insurances. The funds applied the solidarity principle however they fixed the maximum contribution rate. Nevertheless it was ruled that they were not undertakings, since in fixing that maximum they merely performed a task of management of the German social security which was imposed upon them by legislation.<sup>81</sup>

On the contrary, a body governed by private law but entrusted by the public authorities with anti-pollution surveillance and control of the port of Genoa,<sup>82</sup> a municipal authority giving exclusive concessions in respect of funeral services,<sup>83</sup> an institute providing insurance against accidents at work and occupational diseases,<sup>84</sup> organizations including three ministries of the Spanish government which run the Spanish national health system,<sup>85</sup> groups of sickness funds<sup>86</sup> and a body running a compulsory social security scheme<sup>87</sup> were not considered to engage in economic activities.

Some social security schemes and pension funds have also been categorized as economic activities. In the FFSA-case, a non-profit-making organization managing an old-age insurance scheme was regarded as conducting economic activities since it was an optional scheme that operated according to the principle of capitalization and the benefits depended solely on the amount of contributions paid by the beneficiaries and on the financial results of the investments made by the managing organization<sup>88</sup> or in the Albany-case concerning a sectoral pension fund to which workers were compulsorily affiliated by government regulation. The fund was an undertaking since it determined the amount of contributions and benefits itself,<sup>89</sup>

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<sup>78</sup> Case C-218/00, *INAIL* [2002], para. 40

<sup>79</sup> Case C-218/00, *INAIL* [2002], para. 42

<sup>80</sup> Case C-218/00, *INAIL* [2002], para. 44

<sup>81</sup> Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others* [2004] para. 64

<sup>82</sup> Case C-343/95, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] para. 22-25

<sup>83</sup> Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] para. 35

<sup>84</sup> Case C-218/00, *INAIL* [2002] para. 45

<sup>85</sup> Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [2006].

<sup>86</sup> Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others* [2004] para. 57.

<sup>87</sup> Joined cases C-159/91 and C-160/91, *Poucet et Pistre*, para. 19.

<sup>88</sup> Case C-244/94, *Fédération Française des Sociétés d'Assurance (FFSA), Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche* [1995] para. 22

<sup>89</sup> Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] para. 81

the amount of benefits depended on the financial results of the investments made by it<sup>90</sup> and the fund was entitled to grand exemptions.<sup>91</sup> Thus social security schemes and pension funds which apply the principle of capitalization, for which affiliation is optional and where the benefits depends solely on the size of the contributions paid by the beneficiaries and the financial results of the investments made by the managing organization are qualified as an economic activity and thus is the performing entity an undertaking subject to competition law.

The foregoing analysis thus demonstrates that a clear line has not always been drawn between economic activities and activities directly related to the exercise of official authority. In practice, the Court's economic activity standards do not reflect a predictable and readily applicable test to assess the economic nature of activities. Case-by-case analysis grounded in the particularly relevant facts of the case seem to be more important in that regard. It could even be argued – and more recent case law appears to confirm that tendency – that the Court is willing to include as many market operators under the economic activity barrel, in order for the competition law provisions to apply and the resulting analytical frameworks to take shape.

#### I.c. Summary

In order to determine whether a market operator should be considered an undertaking, two questions need to be asked:

Are we dealing with an entity? National legal personhood may be guiding, but should not be considered the only guiding criterion: *functional approach*

Shield and sword function of the entity concept: single entity v. parent company liability

Does the entity develop an economic activity? Offering of goods and services on a market; potential to be carried out in a for profit market setting

Highly factual and difficult to apply in a predictable and clear fashion

Solidarity within social security system as guarantee for non-intervention

II. Applicability *ratione materiae*: market behaviour that has an effect on interstate trade

EU competition law is only concerned with market behaviour that affects trade between Member States. In order for EU competition law to be applicable, effects of (future) market behaviour on *interstate trade* are therefore deemed essential.

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<sup>90</sup> Case C-67/96, *Albany* para. 82

<sup>91</sup> Case C-67/96, *Albany* para. 83

Broad definition in *Société Technique Minière* judgment: *it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*

In theory, any kind of behaviour could fall within this category. As a result, effect on interstate trade is quite rapidly presumed to be present and competition law to apply from the moment that any – even hypothetical- effect on interstate trade can be detected. Interstate trade should not be considered a synonym for the geographic market which can be located in (a part) of a Member State. The only requirement here is that in some way trade flows between Member States have been affected.

The April 2004 Commission notice on the effect on interstate trade in relation to Articles 101 and 102 TFEU (branches 1 and 2) confirms this:

- Para 20 states that according to settled case law the concept of "trade" also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the EU by eliminating or threatening to eliminate a competitor operating within the EU may be subject to the EU competition rules(12). When an undertaking is or risks being eliminated the competitive structure within the EU is affected and so are the economic activities in which the undertaking is engaged.

This is translated in a specific pattern of trade test, see *Commission Notice*.

To the extent that patterns of trade have been affected, EU competition law requires that those patterns have also *appreciably* been affected. Appreciability is nowadays often quantified and expressed as a percentage of market share within a relevant market. To that extent, different branches of EU competition law, more specific criteria have been established that determine whether and to what extent particular market operators fall within the scope of EU competition law. These criteria determine whether or not particular behaviour or operators are *worthy of EU competition law's attention* and are usually referred to as 'de minimis' requirements. They appear within notices by the Commission and thus comprise soft law, that nevertheless determines the scope of EU competition law. In those regimes, the relevant market will have to be determined and assessments of the power of undertakings within that market will have to be made. We will return to those assessment in our discussion of the different branches of EU competition law.

### III. Applicability *ratione loci*: affect competition *within the internal market*

Referring to competition within the internal market implies that activities have to be developed in the internal market, or at least have effect on that market. Market behaviour originating from outside the internal market's territory could still be considered to affect competition within the internal market. As long as the *effects* of particular behaviour can be located within the internal market, or within a part of it, this criterion would be fulfilled. See

*Craig & De Búrca*, p. 983 for more examples throughout the Court's case law. Events taking place in (part of) a single Member State could even fall within the broad definition of competition *within the internal market* and should be distinguished from a geographical market definition that includes at least (parts of) two Member States. Once again, the abovementioned *de minimis* requirements mitigate the overall application of EU competition law to all structures and features.

The Court's reference in Case 23/67, *Brasserie De Haecht*, is instructive in that regard, see p. 415 of that judgment in [1967] ECR 405: *it is only to the extent to which agreements, decisions or practices are capable of affecting trade between member states that the alteration of competition comes under community prohibitions. In order to satisfy this condition, it must be possible for the agreement, decision or practice, [...] of being conducive to a partitioning of the market and of hampering the economic interpenetration sought by the Treaty.*

It is also important to realise that the question whether competition *within the internal market* is affected raised here is a JURISDICTIONAL question, seeking to determine whether or not EU competition law applies to a particular fact setting. The precise extent to which competition law is in effect affected remains to be studied in the context of the particular branch concerned and in accordance with the requirements posited by EU law within those branches.

#### IV. Interim conclusion

Comparable to the definition of an undertaking, the effect on interstate trade and competition within the internal market criteria are broadly interpreted and serve as a means primarily to include as much market behaviour as possible under the umbrella of EU competition law. Only once it has been established that EU competition law potentially applies to a particular case will one have to start to analyse whether or not a case can nevertheless escape competition law scrutiny. That assessment forms part of the actual substantive assessment of an EU competition law case and does not as such feature here. Preliminary jurisdictional questions – and especially the undertaking question – nevertheless have to be asked as they directly open the door towards the potential full application of competition law provisions, prohibitions and enforcement mechanisms.

*d. A strong Commission-oriented (public) enforcement system, supported by national authorities and courts*

Once EU competition law is – potentially – applicable to a given factual situation, the complete enforcement system established at the supranational level comes into vogue. Since the overall features of the EU competition law enforcement system – most notably the Commission's role – are particularly relevant across all five branches, enforcement also deserves to be mentioned in this first lecture. Whereas the Commission remains the stronghold of EU competition law enforcement, national authorities, courts and private individuals have come to play an ever increasing role in the competition law system.

I. The European Commission as *primus super pares*

Article 105 TFEU claims that

*1. [...] the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. 2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation. 3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).*

Commission as responsible enforcement body in individual cases

**Investigator:** Directorate-General for Competition (DG Comp) within European Commission

**Prosecutor:** DG Comp

**(Administrative) judge:** imposes fines on undertakings breaching EU competition rules across all five branches (e.g. Art. 23 Regulation 1/2003; Article 14 Regulation 139/2004). Decisions adopted by the College of Commission Members (Article 17 TEU) on the basis of the file prepared by DG Comp.

Different manuals of procedure are available. Outline different procedural steps and rights of investigated parties and of third parties throughout the processes. See among others the Commission document in relation to Articles 101 and 102 TFEU at [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf), outlining the different steps and phases a Commission investigation goes through.

Adopts individual enforcement decisions: prohibits restrictive practices, abusive market behaviour by a dominant undertaking, envisaged merger or Member States' decision to grant financial advantages to particular undertaking

Enforcement decisions reviewable before General Court/Court of Justice on the basis of Article 263 TFEU; full review in relation to fines imposed (Article 261 TFEU)



Commission as 'legislative body' (oftentimes in conjunction with Council but without significant involvement of European Parliament)

Adoption of 'block exemption Regulations' (see Lecture 2)

Soft law guidance instruments: communications, notices, recommendations, guidelines...

Legitimate expectations: legal force without being formally legally binding (see e.g. recital 38 in the 2006 Leniency Notice discussed below)

## II. Detecting competition law infringements: notifications, leniency (, commitments and settlements)

In addition to jurisdictional requirements, cases also have to be brought to the attention of competition authorities in general and the European Commission in particular.

Bringing to attention can take several forms

Complaint by individual or undertaking considering itself disadvantaged by anti-competitive practices; complainant will only play a marginal role in the ensuing enforcement procedure, which is believed to take place in the public interest.

Starting an investigation on the Commission's own initiative: DG Comp servants reading something suspicious, deciding to target a particular sector (it often happens on the basis of responsible enforcement officers reading something somewhere, S. Calkins, Irish Competition Authority).

In case of collusive restrictive practices (Article 101 TFEU), most regularly however, one of the parties to a restrictive agreement (one cartel member) decides to come out and inform the Commission of its participation to an illicit agreement on the basis of a so-called *leniency programme*. In return for providing the Commission specific information, immunity from or a reduction of fines can be guaranteed. See to that extent *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, [2006] O.J. C298/17.

Allows participants in cartel agreements to submit evidence on the basis of which the Commission can grant them immunity from fines

Information and evidence allowing the Commission to carry out a targeted inspection or to find an infringement of Article 101 in relation to the cartel concerned

Providing a corporate statement, i.e. a detailed description of the alleged cartel arrangement

Applicant for immunity must be the first one to provide such evidence

Can apply for marker, i.e. position in the line of leniency applicants, without directly providing the evidence. Promising to deliver evidence within an agreed time frame without losing out on other applicant.

Only one applicant can be granted immunity

Conditions attached to immunity (see recitals 12 and 13)

#### Reduction of the fine

Bringing significant added value to the evidence already in the Commission's possession, i.e. evidence that strengthens by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel

Maximum of three undertakings (1. Reduction of 30-50 %; 2. Reduction of 20-30 %; 3. Reduction of up to 20%)

Once the Commission has effectively engaged upon particular inquiries, it maintains different techniques to 'settle' infringement procedures and to avoid infringement decisions or elevated fines from being adopted

Commitment procedure in relation to Articles 101 and 102 TFEU (Article 9 Regulation 1/2003)

Investigated undertakings offer particular commitments, i.e. obligations with which they will comply in order to avoid being fined. The Commission can (partially) accept those commitments and will supervise their implementation and application.

No formal infringement decision taken; Commission could nevertheless re-open procedure

Rights of third parties? Consequences of commitment decision?

Once finding of infringement appears inevitable, Commission can nevertheless initiate a settlement procedure under Regulation 622/2008.

Early disclosure of case file by Commission to investigated parties concerned: *It should be possible for the Commission to disclose to those parties, where appropriate, the objections which it intends to raise against them on the basis of the evidence in the file and the fines that they are likely to incur. Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability.*

Acknowledging liability by undertakings concerned

10% Reduction in fine imposed can be accommodated for

Infringement nevertheless remains in place and no negotiations between Commission and investigated parties concerned (<-> commitments)

Differences according to Commission, see [http://ec.europa.eu/competition/cartels/legislation/cartels\\_settlements/settlements\\_en.html](http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html):

- *'a settlement decision does establish an infringement and requires an admission of guilt from the parties, whereas a commitment decision does not establish an infringement and does not require any admission by the parties;*
- *a settlement decision simply requires a "cease and desist" of past behaviour, whereas commitments decision requires commitment to future behaviour;*
- *a settlement procedure is only available for cartels whereas commitment decisions are appropriate in all antitrust cases except for cartels'.*

Meant to allow a more efficient conclusion of procedures

### III. Gradual involvement of national authorities and courts

See already Article 104 TFEU: basically empty shell at time of its adoption (D. Gerber)

National competition authorities as supporting agents of EU competition law across all five branches

Articles 101 and 102 TFEU: Regulation 1/2003; notice national authorities; notice national courts

Mergers and Acquisitions: Articles 4 and 22 Regulation 139/2004: referrals pre- and post-notification

State aid: National authorities are less involved, as the Commission controls Member State behaviour; national courts nevertheless strongly relied upon to enforce State aid decisions in the national legal orders and to ensure that illegal (and incompatible) aid will be reimbursed from the advantaged undertakings concerned.

Regulation 1/2003 particularly 'decentralized' enforcement of EU competition law, meaning that national authorities and national courts are under a legal obligation imposed by EU law to apply EU competition law in instances where all jurisdictional preconditions (undertaking-effect on interstate trade- effect on competition *within the internal market*) have been met. As a result, national competition authorities effectively have to apply those provisions in their entirety, without having to await a decision by the European Commission

In relation to mergers and State aid, particular notifications have to be made to the European Commission. The Commission is then obliged to adopt a decision or to classify the case. Only once the Commission has adopted a decision – or in particularly regulated instances throughout the procedure following notification will national authorities and courts be able to intervene.

As a result, national authorities and courts maintain a more independent role in relation to the application and enforcement of Articles 101 and 102 than they do in relation to the other branches of EU competition law. In all branches however, national authorities and courts are subordinate to the Commission's enforcement powers.

### **Extended and somewhat independent powers of national authorities and courts in relation to the enforcement of Articles 101 and 102 TFEU.**

Authorities and courts

Article 3

'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 101(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they *shall also apply* Article 101 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 102 of the Treaty, they shall also apply Article 102 of the Treaty.'

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 101(1) of the Treaty, or which fulfil the conditions of Article 101(3) of the Treaty or which are covered by a Regulation for the application of Article 101(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'.

See also Article 16

'When national courts rule on agreements, decisions or practices under Article 101 or Article 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. *They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.* To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty'.

Specific to national competition authorities:

*Member States authorities can adopt decisions on the basis of EU competition law, but cannot deviate from what the Commission already stated in the existing body of competition law decisions -> limited room for truly independent decision-making*

Article 11: Commission can revoke case from Member States' authorities and continue the investigation on its own

Article 12: informal network of national competition authorities (European Competition Network – ECN) has been created to allocate cases to most appropriate national authority or to the Commission: ECN operates in near secrecy and allocation decisions are not considered to be binding decision under EU law.

Rules on the exchange of information between the national authorities and the European Commission demonstrates that the Commission firmly remains on top of EU competition law investigations and enforcement.

Article 35: Member States are free to establish and designate national competition authorities of their choice, but those authorities have to 'fit' the EU enforcement scheme! (cf. Case C-439/08, *Vebic*).

No obligation to provide for leniency, commitments or settlements. In reality, all competition authorities have established a leniency system...

#### National courts

Required to somehow suspend their decision in cases where the Commission contemplates a similar decision: avoiding conflicting decisions

called upon to apply both Articles 101 and 102 (Article 6 Regulation 1/2003)

Obligation to inform Commission of national courts taking EU competition law decisions (Article 15(2) Regulation 1/2003)

Commission can intervene as friend of the court (*amicus curiae*): has to be accommodated for across all national legal systems (Article 15(1) Regulation 1/2003).

In cases of doubt, national courts can also rely upon the reference for a preliminary ruling system in Article 267 TFEU

*Are national courts still really independent?*

Commission remains at helm of EU competition law enforcement

#### IV. The Court of Justice as general overseeing institution

Review court on the basis of Article 261 and Article 263 TFEU.

Interpretation of EU law in national context on the basis of Article 267 TFEU.

Motor for 'institutional assimilation' in relation to national authorities and courts: providing organisational standards that make the national authorities fit into the system

Common standards on due process

Single idea on effectiveness of supervision

*e. The emergence of private enforcement across (almost) all branches of EU competition law*

EU competition law enforcement has consistently focused on public enforcement, i.e. enforcement of competition rules by a public authority in the public interest, resulting in infringement decisions being adopted and cease-and-desist orders or fines being imposed. The direct effect of many EU competition law provisions additionally also provides an opportunity for EU competition law provisions to be invoked in private law disputes. As is well-known, direct effect indeed implies that any individual can invoke that provision against another individual in one's own interest. As such, room has been created for the private enforcement of EU competition law. Whereas private enforcement was originally confirmed and established by the Court of Justice, subsequent developments relating to the interaction between public and private enforcement have resulted in the Commission proposing legislative action.

#### I. From public to private enforcement

In Case C-453/99, *Courage v Crehan*, the Court of Justice held that

*26 The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*

*27 Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.*

*28 There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.*

*29 However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).*

*30 In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 *Ireks-Arkady v Council and Commission* [1979] ECR 2955, paragraph 14, Case 68/79 *Just* [1980] ECR 501, paragraph 26, and Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, paragraph 31).*

Considerable room for national law and national procedural autonomy

National law determines

the extent to which one party has to demonstrate a fault (a decision by the Commission, a decision by a national competition authority as sufficient evidence of such fault + national standards of proof)

the calculation of damages and the extent to which damages can only compensatory or also punitive. See Joined Cases C-295/04 to C-298/04, para 100: 'it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest'; passing-on defence and indirect purchasers' standing?

causal link between fault and damages also to be determined under national law

Could theoretically apply across all five branches of EU competition law

In practice most likely in relation to Article 101 and 102 TFEU infringements

## II. Private enforcement 2.0.: involving the national courts

To the extent that a right to damages is recognized as a matter of EU law, it remains to be seen whether such right can effectively be invoked to gain access to documents that undertakings have entrusted to the Commission or another competition authority in a leniency application: requesting immunity in public enforcement yet repercussions for private liability?

According to Commission leniency notice, recital 33, access should be restricted to those directly addressed as potential infringers of EU competition law

Yet, national competition authorities are by virtue of Article 3 Regulation 1/2003 also obliged to apply EU competition law. In response, many national legal orders also rely on similar national leniency programmes. Do the same guarantees apply there as well?

Not according to the Court of Justice in Case C-360/09, *Pfleiderer*. The facts in *Pfleiderer* can be summarised as follows. *Pfleiderer*, a manufacturer of engineered wood, surface finished products and laminate flooring considered itself damaged by a restrictive agreement between different decor paper suppliers. These suppliers had been prosecuted and fined for actions in violation of Article 101 TFEU by the German *Bundeskartellamt*.<sup>92</sup> *Pfleiderer* wanted to obtain compensation for its overpayments made as a result of the restrictive agreement and sought

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<sup>92</sup> Case C-360/09, *Pfleiderer*, para 9.

access to the Bundeskartellamt's file with a view fully to prepare an impending private action for damages. The Bundeskartellamt only provided Pfleiderer with a confidential and restricted version of its file, leaving out voluntary, self-incriminating statements applying for fine immunity or reduction under the German leniency programme.<sup>93</sup> Since the Bundeskartellamt refused to divest of more information to *Pfleiderer*, the latter asserted the illegality of the Bundeskartellamt's refusal before the Bonn Amtsgericht.<sup>94</sup> In a first order, the Amtsgericht basically agreed with Pfleiderer's position and ordered the transmission of the entire file, including voluntary self-incriminating statements made by cartel participants. The Amtsgericht mainly relied on a provision in German law that required an 'aggrieved party's' lawyer to be granted access to the file. Since Pfleiderer should be considered an aggrieved party, it should therefore be granted access to the entire file.<sup>95</sup> In a subsequent stay of its order however, the Amtsgericht considered whether this regime was compatible with the system of information exchange created by Regulation 1/2003 and more particularly, the provisions on close cooperation and the mutual exchange of information.<sup>96</sup> More specifically, the Amtsgericht inquired whether the provisions of EU competition law should be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article [101 TFEU].<sup>97</sup>

The Court stated that the competition authorities of the Member States and their courts or tribunals applying Articles 101 and 102 TFEU have to ensure that those articles are applied in the general interest.<sup>98</sup> That obligation nevertheless only relates to binding legal instruments, thus excluding an informal model leniency programme from its scope.<sup>99</sup> In the absence of binding regulation under European Union law on the subject, it is for Member States to establish and apply national rules on the right of access by persons adversely affected by a cartel, to documents relating to leniency procedures.<sup>100</sup> The Court went on to state that these national rules cannot however jeopardize the effective application of EU competition law.<sup>101</sup> The effective application of Article 101 TFEU through leniency programmes could be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant the applicant for leniency exemption from the fine which they could have imposed.<sup>102</sup> As a result, a person involved in an infringement of competition law would be deterred to pass on

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<sup>93</sup> Case C-360/09, *Pfleiderer*, para 11.

<sup>94</sup> Case C-360/09, *Pfleiderer*, para 13.

<sup>95</sup> Case C-360/09, *Pfleiderer*, para 15.

<sup>96</sup> Case C-360/09, *Pfleiderer*, para 16-17.

<sup>97</sup> Case C-360/09, *Pfleiderer*, para 18.

<sup>98</sup> Case C-360/09, *Pfleiderer*, para 19.

<sup>99</sup> Case C-360/09, *Pfleiderer*, para 22.

<sup>100</sup> Case C-360/09, *Pfleiderer*, para 23.

<sup>101</sup> Case C-360/09, *Pfleiderer*, para 24.

<sup>102</sup> Case C-360/09, *Pfleiderer*, para 26.



information to public enforcement authorities<sup>103</sup>, resulting in a diminished attractiveness of leniency programmes overall.

The Court did not however follow the Advocate General in identifying an hierarchy between public and private enforcement and in distinguishing between voluntary self-incriminating statements and other pre-existing documents. According to the judgment, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union.<sup>104</sup> To that extent, it is necessary for a national judge to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.<sup>105</sup> Weighing should take place on a case by case basis, taking into account all the relevant factors of the case.<sup>106</sup> EU law does not as such preclude a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. However, it is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by EU law.<sup>107</sup>

Weighing different interests, necessarily on a case-by-case basis, see Case C-536/11, *Donau Chemie*.

### III. Private enforcement 3.0.: the Directive on Damages

On 11 June 2013, the Commission adopted a proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, meant to protect leniency applicants and at the same time to ensure the right to full compensation for leniency applicants. The Directive was adopted on 26 November 2014 and is currently being transposed at Member State level

See Art. 6 of the Directive

*1. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:*

- (a) leniency corporate statements; and*
- (b) settlement submissions.*

*2. Member States shall ensure that, for the purpose of actions for damages, national*

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<sup>103</sup> Case C-360/09, *Pfleiderer*, para 27.

<sup>104</sup> Case C-360/09, *Pfleiderer*, para 29.

<sup>105</sup> Case C-360/09, *Pfleiderer*, para 30.

<sup>106</sup> Case C-360/09, *Pfleiderer*, para 31.

<sup>107</sup> Case C-360/09, *Pfleiderer*, para 32. The German judge refused access to the requested documents in the national case, see Amtsgericht Bonn, *Pfleiderer/Bundeskartellamt*, judgment of 18 January 2012, 51 Gs 53/09 AG Bonn. For more reflections on disclosure of documents induced by national judges, see A.E. Beumer and A. Karpetas, 'The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality', 8 *European Competition Journal* (2012), 129-130.

*courts can order the disclosure of the following categories of evidence only after a competition authority has closed its proceedings or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003:*

*(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;*

*(b) information that was drawn up by a competition authority in the course of its proceedings.*

*3. Disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in paragraphs 1 or 2 of this Article may be ordered in actions for damages at any time.*

Limits on the use of such information, see Article 7.

Presumption that cartel infringement caused harm, Article 9

Room for consensual dispute resolution, Article 17