Key concepts of EU competition law

Judge Daniel Severinsson
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Objectives of the competition rules

• Enhancing consumer welfare and ensuring an efficient allocation of resources (Guidelines on Article 81.3 TFEU (2004/C 101/08), p. 42)

• Protect competition as such (C-501/06 GlaxoSmithKline, p. 63)

• Establishing a single market (C-501/06 GlaxoSmithKline, p. 61)
Article 101.1

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.
Article 101.1 "undertaking"

- Broad term
- Both public and private entities
- Legal status not decisive
- "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed" (C-41/90 Höfner, p. 21)
- Economic activity: Offering goods or services on the market which, at least in principle, could be carried on by a private undertaking in order to make profits (C-475/99 Ambulanz Glöckner, p. 19, and AG opinion C-67/96 Albany, p. 311)
- The exercising of public powers is not an economic activity (C-309/99 Wouters, p. 57)
- Companies in the same group - single economic entity (C-73/95, Viho)
Article 101.1 "agreements"

- Broad term
- Direct or indirect concurrence of wills (T-41/96 Bayer)
- Form does not matter
- Decisions by associations of undertakings, e.g. trade associations
- Concerted practices
  - Co-ordination between undertakings which has not reached the stage of a concluded agreement but substitutes practical co-operation for the risks of competition
- Parallel behaviour
- Horizontal and vertical agreements (Cases 56 and 58/64 Consten and Grundig)
Article 101.1 "object or effect"

• Restrictions of competition by object
  - Objective meaning of an agreement. Anti-competitive intent not necessary
  - Only certain types of coordination between undertakings that, by their very nature, is being harmful to the proper functioning of normal competition (C-67/13 Cartes Bancaires, p. 58)
  - Horizontal price fixing, market sharing, output reducing, pay for delay
  - Vertical fixed or minimum resale prices
  - Interpreted restrictively

• Restrictions by effect
  - Actual or potential effects
  - Thorough analysis of the economic and legal context
  - Establish the counterfactual
  - Inter-brand / intra-brand competition
Article 101.1 appreciable effect/affect trade between MS

- Appreciable effect
  - Agreements with only an insignificant effect on the relevant market fall outside the scope of Article 101.1 (C-5/69 Völk)
  - Commission De Minimis Notice (2014/C 291/01)
  - Safe harbor for agreements between parties with low market shares
  - No safe harbor for object restrictions (C-226/11 Expedia)
- May affect trade between member states
  - Broad term
  - Commission guidelines on the effect on trade concept (2004/C 101/07)
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
Article 101.3

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,

[1] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, [2] while allowing consumers a fair share of the resulting benefit, and which does not:

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

[4] (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
Article 101.3 individual exemption

• Burden of proof with the undertaking
• Often invoked, rarely successful
• Four cumulative criteria
  • 1) contributes to improving the production or distribution of goods or to promoting technical or economic progress
    - Improvements must be for everyone, not just the parties
  • 2) allowing consumers a fair share of the resulting benefit
    - Direct or indirect users including final consumers
  • 3) restrictions must be indispensable to the attainment of the objectives
    - Must not be any less restrictive means to achieve the objectives
  • 4) no elimination of competition in substantial part of the market
    - Market shares, possibility of entering the market etc.
Article 101.3 block exemptions

- Regulation 330/2010 on vertical agreements
- Valid until 31 May 2022
- Safe haven for vertical agreements where none of the parties’ market share exceed 30%
- Does not apply to hard core restrictions
  - resale price maintenance
  - certain territorial restrictions
Article 102

• 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.
Article 102 "dominant position"

- Substantial market power over a period of time
- The power to behave to an appreciable extent independently of competitors, customers and consumers (Case 27/76 United Brands, p. 65)
- Market definition always necessary
- Important factors
  - Market shares (C-62/86 AKZO, p. 60)
  - Potential competition
  - Countervailing buyer power
Article 102 “abuse”

- A dominant position is never abusive in itself
- Protect competition, not less efficient competitors
- Special responsibility (Case 322/81 Michelin, p. 57)
- Competition on the merits (C-209/10 Post Denmark I, p. 22)
- Economics/effects based approach (C-413/14 P Intel)
- Equally efficient competitors test (C-52/09 TeliaSonera, p. 61)
- Capability of restricting competition
Article 102 “abuse”

- Non-exhaustive list
- Exploitative abuses
  - Unfair prices or trading conditions
- Exclusionary abuses
  - Predatory pricing
  - Exclusivity rebate schemes
  - Refusal to supply/license
Article 102 objective justification

- Abusive conduct may be objectively justified
- Exclusionary effect may (at least in theory) be outweighed by efficiencies (C-209-10 *Post Danmark I*, p. 41-42)
- Dominant undertaking may protect its commercial interests (C-468-478/06 *Sot. Lélos*, p. 69)
- Other objective necessities may be invoked
- Burden of proof with the dominant undertaking (T-201/04 *Microsoft*, p. 688 and 1114)
- Appropriate and proportionate
  - No less restrictive means to achieve the objectives
Discussion

• Questions or comments?
• Thanks
Further reading

- Commission regulation (EU) No 330/2010 on the application of Article 101(3) of the [TFEU] to categories of vertical agreements and concerted practices
- Guidelines on the application of Article [101(3)] of the Treaty (2004/C 101/08)
- Case C-41/90, Höfner, EU:C:1991:161
- Case T-41/96, Bayer, EU:T:2000:242
- Cases 56 and 58/64, Consten and Grundig, EU:C:1966:41
- Case C-67/13, Cartes Bancaires, EU:C:2014:2204
- Case 85/76, Hoffmann-La Roche, EU:C:1979:36
- Case C-413/14 P, Intel, EU:C:2017:632
- Ibáñez Colomo & Lamadrid: On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know (www.ssrn.com/en/)