



# EU Antitrust rules applying to undertakings

## An overview over substantive rules

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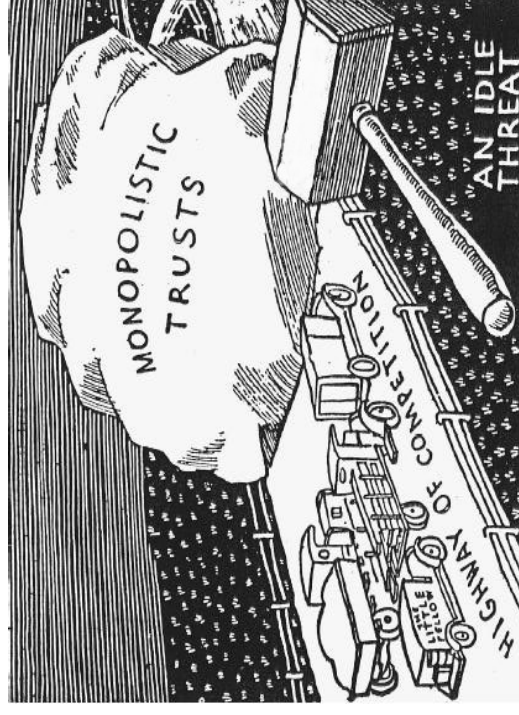
COMP D2: Antitrust – Financial Services

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union.

# Introduction

What is meant by **antitrust** here?

- It is the law of the EU Treaty that aims to
  - **ensure that companies compete fairly with each other...**
  - **so that consumers can enjoy a greater choice of better goods/services at low prices**
- Fight against distortions of competition through
  - **coordination between companies and**
  - **abuses of a dominant position**



# Evolution of Competition Law in Europe

- Competition policy has been a part of the EU legal framework from the very beginning of the European integration.
- Competition rules remained unchanged in EU founding **treaties** (primary EU legal sources), but they were supplemented and refined through secondary acts adopted by the **EU Council and the EU Commission**.
- A major reshuffling occurred in 2004 (two new regulations, resp. on procedure – notably creating the ECN with DG Comp. & NCAs- and on mergers).
- **The Court of Justice** also played a major role in shaping and clarifying the EU competition rules.



## Notices of a general nature

- Leniency Applications (2006/C 298/11)
  - The European Commission has the ability to grant immunity from any fine if an undertaking involved in a cartel submits information allowing the Commission to :
    - carry out a targeted inspection in connection with the alleged cartel, or
    - find an infringement of Article 101 TFEU in connection with the alleged cartel.
  - In order to determine the level of reduction granted to the undertaking, the Commission will take into account the time at which the evidence was submitted and the extent to which it represents added value.
  - This program, inspired by the American system, is more and more used by undertakings in order to escape punishment.

## Notices of a general nature

- Relevant Market (97/C 372/03)
  - **Relevant product market:** “A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.”
  - **Relevant geographic market:** “The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.”

## Article 101 TFEU

*"The following shall be prohibited as incompatible with the internal market: **agreements** between undertakings, decisions by associations **and concerted practices** which have as their **object or effect** the prevention, **restriction** or **distortion of competition**"*

## Restriction by object or by effect: the fish paradigm

- See opinion of Advocate General Bobek in case C-228/18 Gazdasági Versenyhivatal, 5 september 2019

*« If it looks like a fish and it smells like a fish, one can assume that it is a fish.*

*Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such.*

*If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question » (para 51).*



# Restriction of Competition

- A restriction is "by object" if it restricts competition by its very nature (all cartels such as market-sharing and price-fixing agreements).
  - It has such high potential for negative effects that it is not necessary to demonstrate its effects
  - The use of justification (article 101 (3)) is unlikely, but not excluded
- A restriction "by effect" is not typically anti-competitive, but reveals in further analysis likely adverse effects on the parameters of competition
  - An analysis on the effects is necessary
  - de minimis exception available
  - efficiency claims more likely to succeed
  - Restriction of actual or potential competition



# Vertical Agreements

- *What is a vertical agreement ?*
  - Competition issues between non-competitors (undertakings on different levels of the production/distribution chain “upstream – downstream”)
- *Vertical agreements can restrict competition:*
  - Foreclosure of other suppliers
  - Softening distributors’ competition (“intra brand”)
  - Obstacles to market integration
- *Vertical agreements can be beneficial :*
  - Preserving quality or brand value
  - May lead to lower prices in streamlining distribution
- *Typical by object vertical restrictions: fixing minimum resale prices and restrictions which limit sales in particular territories or to particular customer groups*

# Horizontal cooperation agreements

- *What is a horizontal agreement ?*
  - Competition issues between competitors (At the same level of the production/distribution chain)
- *Agreements between competitors can severely restrict competition:*
  - Reduce competition between rivals
  - Facilitate collusion
- *Horizontal Agreements can be beneficial:*
  - Risk sharing / costs savings
  - Combining complementary skills
- *Typical by object horizontal restrictions: price fixing, output limitation, market or customer sharing*



# Block Exemptions: Article 101 (3) TFEU

“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.”



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- *Under four (cumulative) conditions, countervailing efficiencies can justify a restriction of competition:*
  - Efficiency gains outweighing the anti-competitive effects (contribution to technical and economic progress)
  - Fair share for customers (pass-on)
  - Indispensability of the agreement, and of each restriction (proportionality test)
  - No elimination of competition (considering the relevant market and the market shares of each company)
- *The burden of proof is borne by the party claiming exemption*
  - Must provide detailed, robust, and compelling data and facts





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## Article 102 TFEU: Abuse of dominant position

- “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states.”
- ***Prohibits the abuse of economic power on the prejudice of trading partners, consumers and/or competitors.***
- *Main Criterias :*
  - Market shares
  - Barriers to enter the market
  - Countervailing buyer’s power

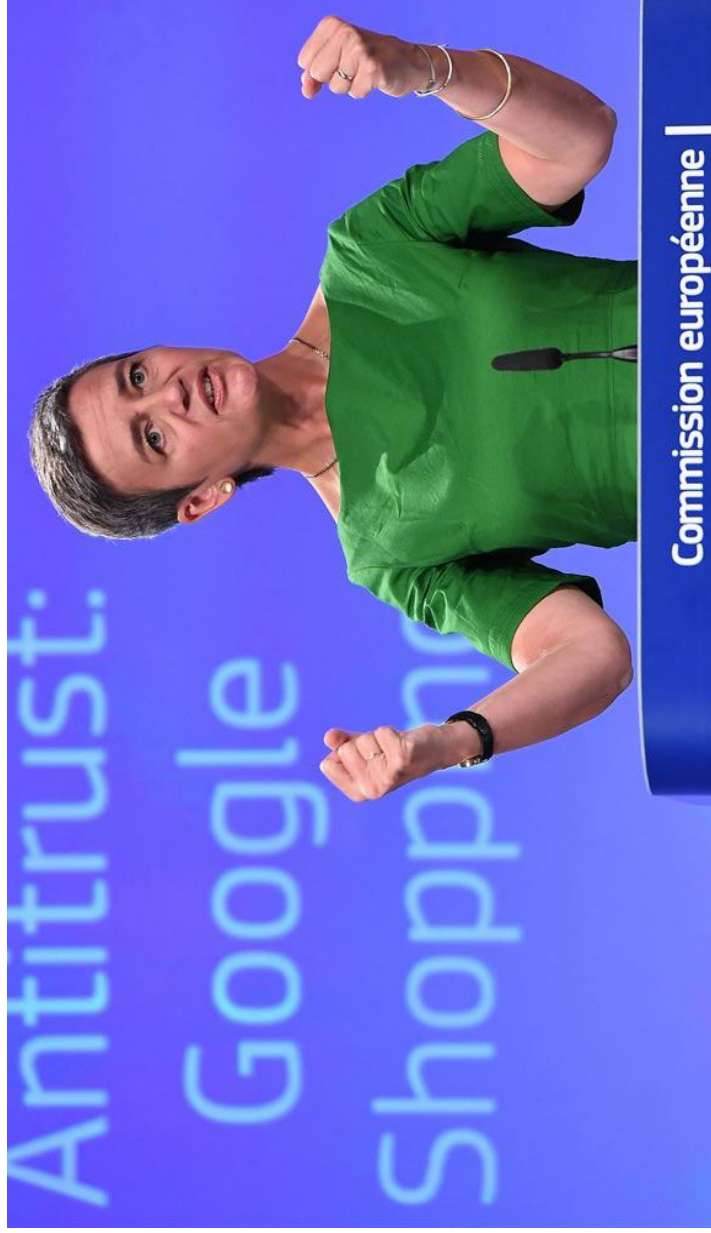




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## Antitrust in the New Economy

“We can’t trade our freedom for better maps, or our democracy for a better social media algorithm.”  
**Margrete Vestager**, VP designate & Commissioner for Competition.





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- Specificities of the **Digital Markets** pose new challenges for Antitrust enforcement: 'multi-sided markets', network externalities, 'winner-takes-all-effect', 'open source & cost-free business model'
- **Google Search (Shopping) Case:** Google abused its dominant position by positioning its specialised shopping services in a favourable way vis-à-vis competing web search services- **€2.42 billions fine**
- **Google Android:** Licensing restrictions of Android helped Google to cement its dominance in search engine market in the form of bundling 'must-have' apps like Play Store and Youtube with Google Search and Browse apps etc.- **€4.34 billions fine**



## Licensing agreements for technology transfer

- IPRs are still generally granted at the national level (although there are some EU rights).
- The existence and exercise of IPRs (especially national rights) has sometimes created tension with the EU rules both on free movement and competition.
- The 2014 **technology transfer block exemption (the TTBER)** provides a safe harbour for bilateral technology transfer agreements Plus **Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements**



## **Article 106 TFEU, Firms entrusted with « exclusive and special rights » : National Monopolies**

- “In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.”
- Competition rules are applied to every commercial entity, regardless of the type of ownership and the source of finance.
- The EU Treaty doesn’t oblige member states to privatise companies owned by state and to divest state monopolies.

# Competition and regulation

- What is meant by **regulation** here?
  - *Any measure adopted by public authorities*
- What is meant by **competition** here?
  - *Only antitrust, not mergers, not state aid*
- Two different angles:
  - Antitrust rules can tackle certain state measures that restrict competition
  - The respective roles of antitrust rules and regulation in addressing a competition problem

# Antitrust & Specific sector legislation

- EU Competition Law applies to regulated sectors (i.e. energy, telecommunications, transport, agriculture) **concurrently** with sector-specific legislation
- **Energy: 3<sup>rd</sup> Energy Package:** 2 Directives, on common rules for the internal market **in gas (2009/73/EC)** and on common rules for the internal market **in electricity (2009/72/EC)** and 3 Regulations, on conditions for **access to the natural gas transmission networks (EC) No 715/2009**, on conditions for access to the **network for cross-border exchange of electricity ((EC) No 714/2009)** and on the establishment of the **ACER**

- **Telecommunications: Directive 2002/21/EC**  
on common regulatory framework for electronic communications networks and services
- **Transport: (a) Council Regulation No 487/2009** on the application of Article 101(3) in **air transport** sector **(b) Council Regulation No 169/2009** of applying competition rules to **rail, road and inland waterway transport**
- **Agriculture: Regulation 1308/2013**  
establishing a common organisation of the markets in agricultural products

# Tackling State measures distorting competition

- **Article 106 TFEU in combination with other articles (101TFEU, 102 TFEU, 34/37TFEU, 56TFEU, others):** for public undertakings and undertakings with special or exclusive rights
- **Article 4(3) TEU ("principle of sincere cooperation") in combination with 101TFEU or 102TFEU**
- **Article 37 TFEU (discrimination based on nationality by monopolies)**
- **Protocol 27 TFEU(former 3(f)):** "A system of undistorted competition"

# Respective roles of competition enforcement and regulation

- Regulation aims at solving a competition distortion that competition rules can't address
- Competition enforcement and antitrust may:
  - **compensate insufficient/deficient regulation**
  - **lead to regulation or can establish regulatory principles**
  - **solve a competition distortion or concern that regulation doesn't address**
- Regulation may still be invoked as a defence in competition and antitrust procedures



# Thank you for your attention!