

Introduction: Competition Policy in the EU and the US

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What is Competition Policy?

Definition

Motta, 2004:

“The set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare.”

Economic background:

- ▶ Competition puts pressure on firms to offer high-quality products at low prices
- ▶ Therefore, competition increases economic efficiency and total welfare. But, promoting competition...
 - ▶ \neq maximizing number of firms
 - ▶ \neq protecting competitors
 - ▶ \neq all market power is bad

Total Welfare \neq Consumer Welfare

Debated issue: should agencies and courts use total welfare, or consumer welfare as a standard?

- ▶ Total welfare aggregates surplus of different groups in the economy
 - ▶ Consumers, downstream firms, upstream suppliers, workers, ...
- ▶ Measure of **efficiency**, not a measure of **distribution**
 - ▶ (Ex. perfectly price discriminating monopolist)
- ▶ Dynamic component

Which is the objective of competition authorities in EU or US?

- ▶ In both jurisdictions clues for protecting **consumers** in the law

Competition Policy \neq Regulation

- ▶ **Regulation** common in sectors in which structural conditions not compatible with normal functioning of market
 - ▶ Very high fixed costs (electricity, telecommunication)
 - ▶ Transitory
- ▶ Regulation done ex ante (vs. comp policy: ex post)
- ▶ Long run, continuous involvement with industry
- ▶ Extensive powers (control prices, product choices, investment)
- ▶ Economic theory: principal-agent models (vs. comp policy: oligopoly theory)
- ▶ Risks: regulators' lack of knowledge; regulatory capture.

Competition Policy Institutions Worldwide

In most countries, three 'pillars':

- ▶ merger control,
- ▶ rules against anti-competitive agreements, and
- ▶ rules against abuse of dominance (or monopolisation).

Relatively new in many countries

- ▶ 1975: few jurisdictions actively enforced competition laws; nowadays, >110 jurisdictions have competition policy systems (Kovacic 2008)

Some notable differences across countries

- ▶ Objectives & interpretation of law vary by jurisdiction
- ▶ Competition authorities vary in their degree of independence
- ▶ Call for greater convergence in policies and laws (e.g. Kovacic 2008)

Competition Policy in the EU

Key Actors in EU

Investigating & enforcing competition law:

- ▶ National competition authorities (**NCA**s) of the EU Member States (Autorité de la Concurrence; Bundeskartellamt; Autorità Garante della Concorrenza e del Mercato; ...)
- ▶ Directorate-General for Competition (**DG COMP**) of the European Commission
 - ▶ Focus on cartels, new questions of law, cases with significant transnational interest

Rationale: Need expert knowledge; investigations and monitoring of markets cannot be taken over by courts.

Litigation before courts

- ▶ **European General Court**
- ▶ European Court of Justice (**ECJ**)

Historical Context of EU Competition Law

- ▶ Roots: **pro-competitive measures** adopted in Treaty of Paris in 1951
- ▶ Treaty of the Functioning of the European Union (**TFEU**)
(Treaty of Rome, 1957) (Articles 101 & 102)

Norms & values behind EU Competition Law

- ▶ Competition policy = one of several instruments to advance the aims of the EU (Ezrachi 2018):
 - ▶ E.g. establish internal market, open to free competition; sustainable growth; well-being of citizens
- ▶ Enhance **consumer welfare**; promote **European market integration**; protect not only interests of market participants, but also **market structure**. **Relatively wide set of norms**

Case law has clarified & interpreted legal text over years

Overview of Relevant EU Law

EU-wide law

- ▶ Article 101 TFEU [Anticompetitive Agreements]
- ▶ Article 102 TFEU [Abuse of Dominance]
- ▶ (Article 107 TFEU [State Aid])
- ▶ Regulation, e.g.
 - ▶ EU Merger Regulation
 - ▶ Regulation 1/2003 [relation with NCAs, procedures, investigative powers]
- ▶ Guidelines, Case Law [interpretation, procedural issues]

National law

- ▶ Cannot contradict but only complement EU law on areas not covered by EU law

Article 101 TFEU: Anticompetitive Agreements

1. Forbids

- ▶ 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
(e.g. price fixing; limiting supply; share supply markets; discrimination)

2. Forbidden contracts are legally void

3. Paragraph 1 does not apply to agreements that:

- ▶ Improve the production or distribution of goods or promote technical or economic progress, while allowing consumers a fair share of the resulting benefit,
and that are indispensable for achieving these objectives.

Article 101 - Exemptions

Block exemptions for **vertical** agreements (Regulation 330/2010)

- ▶ If market share $\leq 30\%$
- ▶ If agreement is not “hardcore” practice (e.g. resale price maintenance considered so harmful that block exemption does not apply)

Block exemptions for **vertical** agreements in the **motor vehicles** sector (Regulation 461/2010)

Block exemptions for **horizontal** agreements

- ▶ R&D agreements (Regulation 1217/2010)
- ▶ Specialization agreements (Regulation 1218/2010)

Exemptions for **technology transfer** agreements (Regulation 316/2014)

Article 101 - Procedures

1. Case starts

- Complaint
- Own-initiative investigation
- Whistleblower tool
- Leniency program



2. Investigation

- Information requests
- Inspection



3. Statement of objections

- Rights of defence
- Prohibition decision (or Art. 9 commitment decision)



4. Fine

- Up to 30% of annual sales * duration
- [More e.g. in cartel cases (deterrent), repeat offender]



5. Right of Appeal

- EU General Court
- ECJ

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:

- ▶ Unfair purchase / selling price, unfair trading conditions;
- ▶ Limiting production, markets or technological development to the prejudice of consumers;
- ▶ Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- ▶ Making the conclusion of contracts subject to acceptance of supplementary obligations which have no connection with the subject of such contracts

How to assess dominance?

- ▶ Requires defining the scope of the relevant market (product market / geographic market)
- ▶ How competitive is the market?
 - ▶ Market shares ($\leq 40\%$ = unlikely to be dominant)
 - ▶ Barriers to entry; countervailing buyer power etc.

Dominance not illegal - abuse of dominance is

- ▶ Dominant company has a special responsibility to ensure that its conduct does not distort competition
- ▶ E.g. exclusivity, predation, excessive pricing etc.

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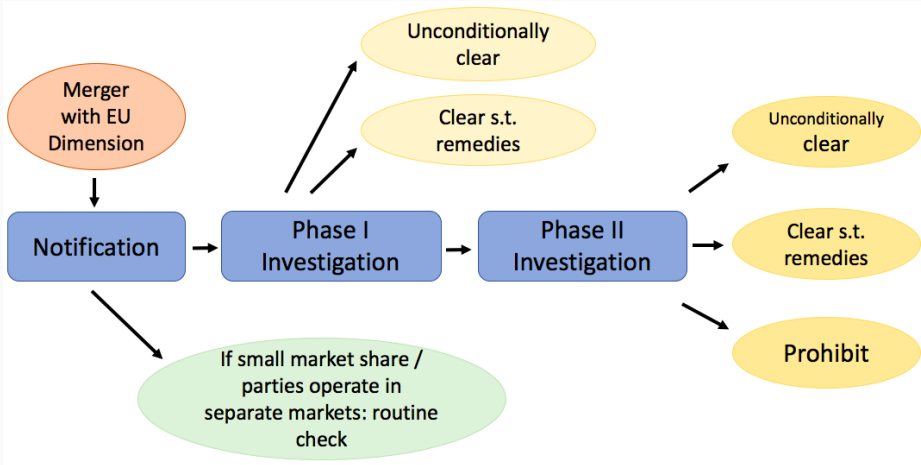
EU Merger Control

- ▶ Mergers may reduce competition (e.g. by strengthening dominant player)
- ▶ Therefore, mergers going **beyond the national borders** of any one Member State are examined at **European level**

A proposed merger with **EU dimension** must thus be **notified** to Commission:

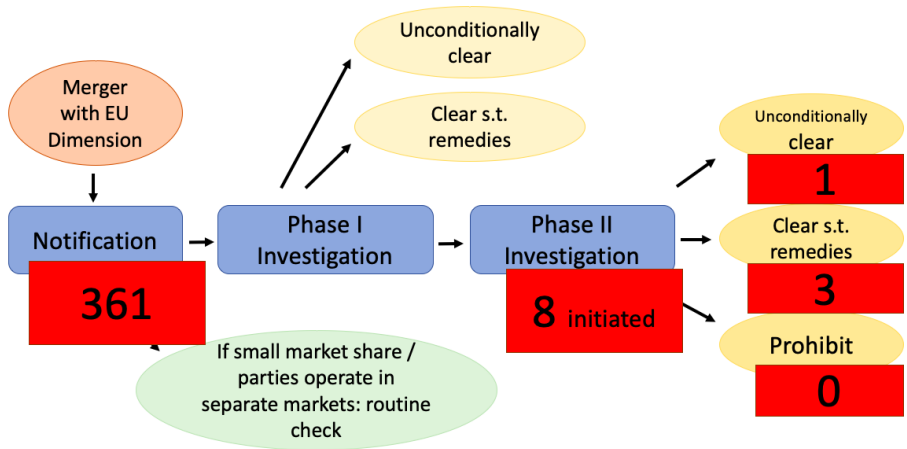
- ▶ Based on **turnover thresholds** [▶ More](#)
(No matter where companies have registered offices / HQs / production facilities...)

EU Merger Control: Process



Appeal possible within 2 months (General Court → ECJ)

EU Merger Control: Stats (for 2020)



Antitrust in the US

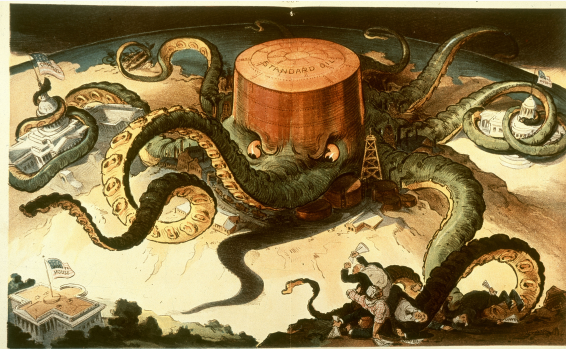
Historical Context of US Antitrust Law



19th century:

- ▶ Technological developments (transport, communication) linked together previously insular markets
- ▶ Allowed for expansion of business and increased the benefits of scale

Historical Context of US Antitrust Law



- ▶ Concentration of business in the hands of few
- ▶ Formation of “trusts” (Standard Oil, American Tobacco, US Steel...)
- ▶ “Antitrust” became movement that inspired public agitation
→ 1890 Sherman Act

Overview: US Competition Law

- ▶ **Sherman Antitrust Act (1890)**

- ▶ Prohibits contracts that unreasonably restrain trade, as well as attempts to monopolize

→ Ensuing merger wave after 1897 made clear need of regulating **mergers**

- ▶ **Clayton Act (1914)**

- ▶ Prohibits mergers or acquisitions that are likely to lessen competition
 - ▶ **Treble damages** for private antitrust suits

- ▶ **Federal Trade Commission (FTC) Act (1914)**

- ▶ Created FTC; bans “unfair methods of competition” and “unfair or deceptive acts or practices”

Courts interpret & adjust antitrust rules

Antitrust Law Enforcers in US

1. Federal government

- ▶ Department of Justice (**DOJ**)'s Antitrust Division,
(Industries where consumer spending is high - health, pharma, food...; & all criminal enforcement)
- ▶ Federal Trade Commission (**FTC**),
(Telecom, banks, railroads, airlines...)

2. State governments

- ▶ State attorneys general
(Matters of particular concern to local businesses or consumers)

3. Private parties

- ▶ (The case for most antitrust suits!)

may bring cases to **courts**, which review enforcement action.

Section 1 Sherman Act

- ▶ Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
- ▶ Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony [...]

Anticompetitive agreements contracts that unreasonably restrain trade
(price fixing, market sharing agreements)

Section 2 Sherman Act

- ▶ Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Unilateral conduct that monopolizes or attempts to monopolize the relevant market

Criminal and Civil Nonmerger Enforcement

- ▶ Section 1 & 2 Sherman Act, and Robinson-Patman Act of 1936 (forbidding certain types of price discrimination) can be prosecuted **criminally**
- ▶ Criminal enforcement can result in **finest for individuals and incarceration**, and is the primary tool for preventing and halting cartels
- ▶ In practice, fed gov't reserves criminal cases for hard-core price fixing, market allocation, or bid-rigging
- ▶ Critical tool: leniency program

“Illegal per se” and “rule of reason”

Alleged violations of the antitrust laws are analyzed in one of two ways.

1. Some practices are so inherently harmful that they are always illegal:
illegal per se
 - ▶ E.g. price fixing, bid rigging, market division
2. For other agreements, case is not as clear-cut → fact-intensive inquiry into purpose and effect of the collaboration is necessary:
rule of reason
 - ▶ E.g. possession of monopoly; non-price vertical restraints; RPM

Section 7 Clayton Act:

- ▶ Prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly”

Hart-Scott-Rodino Antitrust Improvements Act (1976):

- ▶ Requires companies planning large mergers or acquisitions to notify the government of their plans in advance

Merger Guidelines (latest version: 2010)

Litigation Process - US

US → **Judicial** system (plaintiff must file action in courts);
adversarial process of gathering evidence

EU → **Administrative** system;
inquisitorial process of gathering evidence

1. **Trial Court:**

Generalist **district court**

2. **Appellate Court:**

Either side may appeal to a generalist **Circuit Appeals Court**

3. Possible to appeal to **US Supreme Court**

(but takes on only few cases per year)

Interpretation of Antitrust Rules

US courts have interpreted antitrust rules differently at different times in history.

Some change is inevitable:

- ▶ Improved understanding of econ consequences of certain practices;
- ▶ New forms of business conduct;
- ▶ We alter our evaluation of the suitability of existing rules

Developments in US Antitrust over the Decades

1940s-1970s: “structural era” (Baker 2019); strict enforcement of antitrust

- ▶ E.g. Von's Grocery vs. US (1966): merged firm would have held 7.5% market, but Supreme Court held merger as illegal
- ▶ Not only economic, but also political objectives

1970s-80s: influence of **Chicago school** & Reagan Administration

- ▶ Authors from UoC (e.g. Robert Bork) heavily criticised interventionism
- ▶ Favor of more laissez-faire approach
- ▶ Previously *illegal per se* conduct became subject to a *rule of reason*
- ▶ “More economic” approach (consumer welfare)

2010s: growing concerns about Big Tech, and about industry-wide increase in margins

US vs. EU System: Main Differences

EU Competition Policy	US Antitrust
Administrative system	Judicial system
Civil law	Civil & criminal law
Little private enforcement	Most cases brought by private citizens seeking redress from courts
Additional, different laws across Member States	More homogeneous across US States
Object vs. effects based (Art. 101)	Rule of reason / illegal per se
More focus on EU market integration	Stronger focus on consumer surplus (?)
Penalties: focus on compensation	Focus on deterrence & desistance

Other Jurisdictions

Other Jurisdictions

- ▶ France: Autorité de la Concurrence
 - ▶ An independent administrative authority
- ▶ Australia: Australian Competition and Consumer Commission (ACCC)
 - ▶ Regulatory commission of Austr' gov't; under Treasury
- ▶ UK: Competition and Markets Authority (CMA)
 - ▶ Non-ministerial government department
- ▶ Germany: Bundeskartellamt (Federal Cartel Office, BKartA)

One interesting peculiarity in France and Germany:

Minister of Economic affairs may overturn merger decisions made by authority.

Conclusion

A few questions under debate to spur your interest

- ▶ Does the digital economy require new antitrust rules?
- ▶ US markets are becoming more concentrated - to what extent is this due to a lack of antitrust?
- ▶ To what extent are market shares or concentration measures informative? Is bigness bad?
- ▶ How to best balance multiple potential objectives (protecting competitive landscape vs. protecting consumers)?
- ▶ How to deal with algorithmic collusion?
- ▶ Do remedies in merger cases achieve their purpose?
- ▶ Regulation vs. competition policy enforcement?

Some (mostly non-academic) links to spur your interest

- ▶ Thurman Arnold project at Yale

https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale/digital-platforms-and-antitrust?fbclid=IwAR1tZa0dwNRucaPAFBo0VaMJ_DDN1IMNQ02ZKepnM3gB-rYs3R5eqn87FzE

- ▶ Washington Center for Equitable Growth

<https://equitablegrowth.org/insights-expertise/competitive-edge/>

Series of podcasts on Antitrust:

- ▶ Capitalisn't <https://capitalisnt.simplecast.com/episodes/a2603962>

- ▶ Planet Money

<https://www.npr.org/sections/money/2019/02/15/695131832/antitrust-1-standard-oil?t=1599759470410>

- ▶ Competition Lore <https://competitionlore.com/podcasts/>

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Appendix

Turnover thresholds for merger notification

The first alternative requires:

- (i) a combined worldwide turnover of all the merging firms over €5 000 million, and
- (ii) an EU-wide turnover for each of at least two of the firms over €250 million.

The second alternative requires:

- (i) a worldwide turnover of all the merging firms over €2 500 million, and
- (ii) a combined turnover of all the merging firms over € 100 million in each of at least three Member States,
- (iii) a turnover of over €25 million for each of at least two of the firms in each of the three Member States included under ii, and
- (iv) EU-wide turnover of each of at least two firms of more than €100 million.

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