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JEAN MONNET CHAIR IN DIGITAL TRANSFORMATION AND AI POLICY

DATA REGULATIONS AND FUNDAMENTAL RIGHTS

Course Market Law and Regulation a.y. 2023-2024

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Module 1.

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The rise of digital economy

1. What is Competition Law?

- Broadly, involves the use of legal tools to control the exercise of **market power**, in order to **protect competition** in the market.

> *Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition… The exercise of market power leads to reduced output and loss of economic welfare.* (OECD, 1993)

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- **Competition** between economic actors is the **best** way to organise any market (at least in *most* instances);
- Market power held by one or more firms is not problematic in itself, but may be liable to **abuse**, which should be **prohibited**; *and*
- Competition law provides the state with a **public counterbalance to control private power**, without prohibiting private power entirely.

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"Antitrust law was, as we know, invented neither by the technicians of commercial law (though they became its first specialists) nor by economists themselves (though they supplied its most solid cultural background). It was instead desired by politicians and (in Europe) by scholars attentive to the pillars of the democratic systems, who saw it as an answer (if not indeed 'the' answer) to a crucial problem for democracy: the emergence from the company or firm, as an expression of the fundamental freedom of individuals, of the opposite **phenomenon of private power**; a power devoid of legitimation and dangerously capable of infringing not just economic freedom of other private individuals, but also the balance of public decisions exposed to its domineering strength."

Amato, *Antitrust and the Bounds of Power* (1997)

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- **Article 101 TFEU** (ex Art. 81 EC, Art. 85 of the EEC Treaty):
  - Prohibits anticompetitive agreements and other forms of coordination between undertakings; provides an express exemption for forms of coordination that satisfy four cumulative conditions for exemption
- **Article 102 TFEU** (ex Art. 82 EC, Art. 86 of the EEC Treaty
  - Prohibits abusive conduct by one or more undertakings holding a dominant market position
- **Regulation 139/2004**: merger control

Objectives of EU Competition Law

- **Ordoliberalism**
  - emphasis on importance of economic freedom as value in itself – protection of right to participate in economy
- **Market integration**
  - Facilitating market interpenetration
- **Efficiency** (consumer welfare)
  - “more economic approach” to EU competition law

Objectives of EU Competition Law: *GlaxoSmithKline*

"the objective assigned to Article [101 TFEU], which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market…is to prevent undertakings, by restricting competition between themselves or with third parties, from **reducing the welfare of the final consumer** of the products in question…

Case T-168/01 *GSK*, para.118

"…like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the **structure of the market** and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price…

Case C-501/06 P *GSK*, para.63

Enforcing EU Competition Law

- Centralised **public** enforcement by the European Commission
- Decentralised public enforcement by the National Competition Authorities
- Notable push to increase levels of **private** enforcement at Member State-level

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- *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

Art. 102 TFEU

- *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

Goal of the provision

What are the goal of this provision:

- *consumers?*
- *competitors?*
- *competition itself?*

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The protective purpose of Art. 102 TFEU

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"Article 82 EC […] is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the ***structure of the market and thus competition as such (as an institution)*** *which has already been weakened by the presence of the dominant undertaking on the market."*

(Avv. Gen. Kokott, British Airways v. Commission, Case C 95/04 P, §68)

On goals and tools

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Protection of competition as means to other ends.

Trust in competitive markets leading to scenario where society as a whole is better off thanks to lower prices, products available to all consumers, better quality of products and services, more innovation.

How does Art. 102 tries to achieve such goal?

1. Distinction between dominance and abuse;

- *Mere creation of dominance is not punished.*
- *Difference with US antitrust.*

2. Punishment of abuse of dominant position when such conduct ***may*** *affect trade between Member State in the internal market or a relevant sub-portion of it.*

Art. 102 TFEU

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- To be subject to EU Competition Law, an entity must be an '**undertaking**'.

- The concept of an undertaking includes **every entity engaged in an economic activity**, regardless of the legal status of the entity and the way in which it is financed.

Art. 102 TFEU

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- If two or more connected businesses (businesses within the same corporate group, multi-national companies with subsidiaries) influence the structure of a market through their conduct or through concerted strategic decisions, we might have **collective dominance**.

- In practice, a relationship between entities has been found on the basis the presence of identical conducts on the market.

- Collective dominance, as demonstrated through case law, is often associated with an **oligopoly**.

Art. 102 TFEU

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- The EU case law sets out a legal test that must be satisfied for collective dominance to be established (conditions are cumulative).
  - each member of the group must have the **capability of being aware of how the other members are behaving;**
  - **tacit coordination must be sustained over a period of time;**
  - it must be **proven that the potential reaction of consumers and competitors will not affect the competition** against the dominant entities.

How does the assessment proceed?

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1. *Definition of the relevant market;*
2. *Assessment of dominance;*
3. *Assessment of abuse:*
   - *– Presumptively abusive conduct listed in art. 102*
   - *– Presumptively abusive conduct theorized by the case law (ex. Loyalty rebates);*
   - *– Assessment on a case by case analysis of abusive conduct not expressly listed.*

How does the assessment proceed?

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- Before assessing dominance it is necessary to define a relevant market.
- It comprises of both a:
  - **Product Market** (a market that comprises all 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).

and a

  - **Geographical Market** (which 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 neighboring areas because the conditions of competition are appreciably different in those area).

Again: on the difference between dominance and abuse

Dominance = situation where the competitive structure of the market is already weakened because of the very same presence of the dominant undertaking.

allowed

Abuse = subsequent moment where the dominant undertaking takes advantage of its position of strength in the market and put into practice a conduct to further increase it, to the detriment of competitors and consumers.

prohibited

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How does the assessment proceed?

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- A finding of dominance derives from the analysis of a combination of factors, the most relevant of which are:
  - constraints imposed by the existing suppliers from, and the position on the market of, **actual competitors.**
  - constraints imposed by the credible threat of future expansion by actual competitors or entry by **potential competitors.**
  - constraints imposed by the bargaining strength of the **customers (countervailing buyer power).**

How does the assessment proceed?

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Market share %	Assessment
100%	Monopoly or de facto monopoly
85-90%	Usually conclusive of market dominance
75%	Indicative of dominance
50%	Strong evidence of dominance
40% or more	Evidence of dominance, to be considered with other factors
25-40%	Single dominance is unlikely unless there is a fragmented market. Other factors might come into play
20%	Possibility of dominance left open but unlikely.
10%	No dominance

How does the assessment proceed?

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- Under a factual point of view, the "abuse" can be defined as a conduct by one or more undertakings that are not competing on the merits (on prices, quality etc.) and is likely to impair effective competition.
- There is **no legal definition of abuse** provided by the Treaty or any legislation. Article 102 was interpreted as to supervise the dominant undertaking's '**special responsibility**' not to allow its conduct to impair undistorted competition.
- There are **three forms of abuses** that could occur from anti-competitive practices: **exclusionary, exploitative;** and **single market abuse.**
- Exclusionary and exploitative abuses may be considered separately, this does not mean there is a rigid category that abuse falls into. **An overlap** of different abuses is a common occurrence.
- An effect-based analysis will normally be required for finding an abuse. However, the Commission retains the right to conclude the existence of consumer harm without carrying a detailed assessment.

Exclusionary abuses

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These are conducts engaged in by a dominant undertaking which are capable of **preventing competitors from entering or remaining active in a given market** .

- **Limiting production**: under Article 102(b), "limiting production, markets or technical development to the prejudice of consumers" is considered an abuse by a dominant undertaking.
- **Price discrimination**: under Article 102(c), an abuse is "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".
- **Tying**: under Article 102(d) "tying" is defined as "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."

Exclusionary abuses

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- **Bundling**: arises in a situation where two products are sold together in a single package at a single price.
- **Predatory pricing**: this is the practice of dropping prices of a product below costs so that one's smaller competitors cannot cover their costs and leave the market.
- **Margin squeeze**: spread between the dominant undertaking's prices for wholesale access and its retail prices and the fact that the undertaking's wholesale products are indispensable to competition on the downstream market.
- **Granting rebates**: not an abuse in themselves, but need to analyze the effects on competition.

Exclusionary abuses

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- **Exclusive dealing**: an agreement whereby a customer is required to purchase all or most of a particular type of goods or services from a dominant supplier and is prevented from buying from any supplier other than the dominant firm.
- **Refusal to Supply**: happens when an undertaking which has a dominant position in the upstream market refuses to supply a new or existing customer on a downstream market on which it is also present
- **Refusal to supply intellectual property rights**: refusing to license intellectual property rights or providing interoperability information, regarded as improper exercise of intellectual property rights by a dominant firm.
- **Miscellaneous other non-pricing abuses**: conduct that does not fit within the scope of the aforementioned categories, such as sham litigation and regulatory gaming.

Exploitative abuses

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This type of abuse occurs when a dominant undertaking uses its position to **exploit consumers without losing them through conduct like price increase and production limitation.** Assumes barriers to entry.

- **Unfair trading conditions:** Imposition of conditions on its customers that directly harm them.
- **Excessive pricing:** price set significantly above the competitive level. The charged price must be excessive and unfair to be abusive. That is, the charged price has no reasonable relation to the economic value of the product supplied and exceeds what the dominant undertaking would have obtained in a normal and sufficiently competitive market.
- **Collecting societies:** organizations empowered with the authority to license copyrights and collects royalties from users of the copyright and distributes them to copyright owners for a fee. Abusive behavior when they discriminate undertakings from other MS.

The theory of the Special Responsibility of the dominant firm

- *"[…] a dominant undertaking is subject to certain limitations that do not apply to other undertakings in the same form. Because of the presence of the dominant undertaking, competition on the market in question is weakened. Therefore […] that undertaking has a* ***particular responsibility*** *to ensure that its conduct does not undermine effective and undistorted competition in the common market.*

(Avv. Gen. Kokott, British Airways v. Commission, Case C 95/04 P, §23)

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Caveat of the theory

- *"[…] A practice which would be unobjectionable under normal circumstances can be an abuse if applied by an undertaking in a dominant position".*

(Avv. Gen. Kokott, British Airways v. Commission, Case C 95 04 P, §23)

- *This caveat has historically found confirmation in the lack, within the text of the provision, of a legal mechanism to save the allegedly dominant firm.*

– No balancing mechanism such as Art. 101, 3 TFUE;

– Only the recourse to objective justification in some cases.

Objective justification

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- Dominant firms **may justify their behavior** either by demonstrating that their conducts are **objectively necessary** or by demonstrating that the concerned conducts **produce substantial efficiencies** which outweigh any anti-competitive effects on consumers.
- For objective justification to be applicable the conduct must be proportionate and founded on external factors (e.g. safety measures).
- To defend the conduct on efficiency grounds, **four cumulative conditions** must be satisfied:
  1. the efficiencies would have to be realized, or be likely to be realized, as a result of the conduct in question;
  2. the conduct would have to be indispensable to the realization of those efficiencies;
  3. the efficiencies would have to outweigh any negative effects on competition and consumer welfare in the affected markets; and
  4. the conduct must not eliminate all effective competition.

Further details on the doctrine of abuse

- ***Abuse as objective concept****: no prove of intent to restrict competition;*
- ***Abuse and capability to restrict competition****:*

  – The restriction of competition may be simply potential;

  – Goal of the provision: stop a conduct before it could irrevocably damage the competitive structure of the market (i.e. before actual effects have been produced).

The Discussion Paper of the EU Commission

Main goals:

- *Replacing the concept of dominance with the concept of substantial market power;*
- *Elimination of prima facie case of abuse for conduct listed in Art. 102, 2 prong;*
- *Methodology based on the effects of the conduct on the market (no presumptions);*
- *Efficiency defence for the allegedly dominant firm violating art. 102*

Guidance Paper of the EU Commission (2008)

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Discussion Paper	Guidance Paper
1. Replacing the concept of dominance with the concept of substantial market power;	1. Failed
2. Elimination of presumption of abuse for conducts listed in art. 102, 2 prong and those theorized by the case law.	2. Failed

Guidance Paper of the EU Commission (2008)

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Discussion Paper

3. Introduction of a methodology based on the effects of the conduct on the market (no presumptions);

4. Efficiency defence for the allegedly dominant firm violating Article 102

Guidance Paper

3. Introduction of the concept of anticompetitive foreclosure

   3.1. AEC test;

   3.2. Specific methodologies with economic tools for specific conduct.

4. Possibility to rebut a *prima facie* presumption of abuse with recourse to objective justifications or efficiency gains.

The notion of anti-competitive foreclosure

What is anti-competitive foreclosure?

- *"a situation where **effective access of actual or potential** competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers".*

Guidance Paper, §19

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The notion of anti-competitive foreclosure

The Commission will normally intervene under Art. 102 where "[…] on the basis of cogent and convincing evidence, the ***allegedly abusive conduct is likely to lead*** *to anti competitive foreclosure" §20.*

- *Duty to provide cogent evidence, but*
- *On the likelihood to lead to anti competitive foreclose (no proof of actual foreclosure).*

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Factors to be taken into account

- *The position of the dominant undertaking*
- *The conditions on the relevant market*
- *The position of the dominant undertaking's competitors*
- *The position of the customers or input suppliers*
- *The extent of the allegedly abusive conduct*
- *Possible evidence of actual foreclosure*
- *Direct evidence of any exclusionary strategy*

AS EFFICIENT-COMPETITOR benchmark

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Always a duty to investigate on the existence of anticompetitive foreclosure

- *There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment […]*

- *If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti competitive effect may be inferred §21*

→ *Prima facie case of abuse still safe!*

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Defenses available for the dominant firm to rebut a finding of abuse

- *Objective justification*
  - *– existence of sound reasons (normative, technical, economic) justifying the conduct*
  - *– Often exogenous to the undertaking (normative prescriptions), sometimes proper to the firm (defense of IPR)*
- *Efficiency gains*

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Real novelty: Efficiency gains

The Guidance Paper seems to introduce a four factor balancing exercise (echoes Article 101(3)):

– the efficiencies have been, or are likely to be, realized as a result of the conduct;

– the conduct is indispensable to the realization of those efficiencies;

– the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare;

– the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

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Prohibiting Anticompetitive Coordination (Generally)

- Anti-competitive agreements (and other forms of coordination) are prohibited by both EU and US competition law.
  - **Article 101 TFEU** (EU)
  - **§1, Sherman Act** (US)

- Whilst the format of these two prohibitions varies a little, in essence both require the antitrust enforcer to establish:
  1. The existence of some form of **coordination** between two or more distinct enterprises, *with*
  2. Either an **anticompetitive** objective or an anticompetitive impact on the market in practice.

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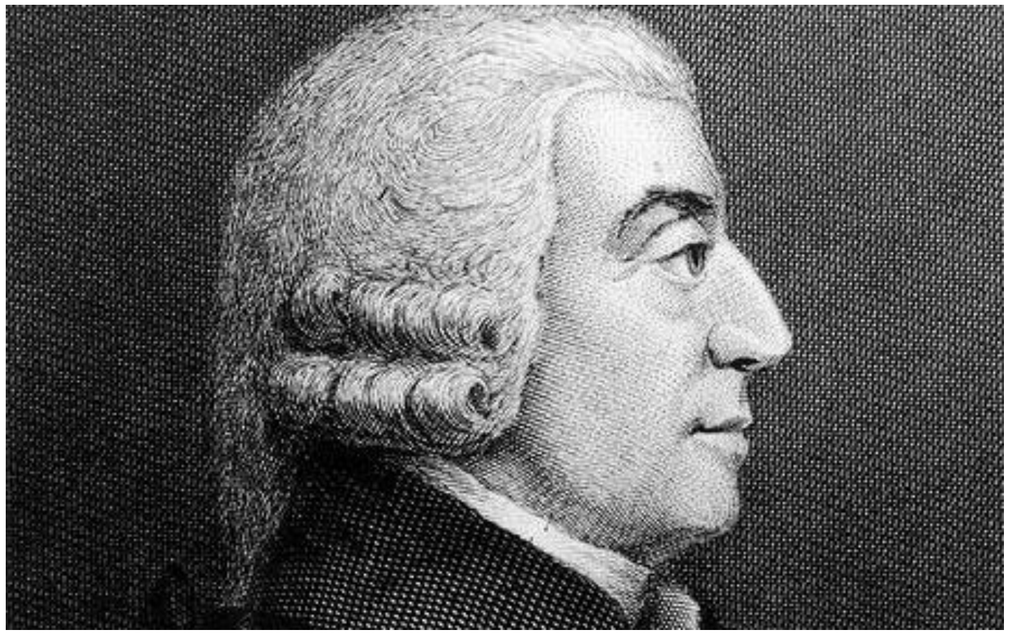
Why Do We Scrutinise Agreements under Competition Law?

- **Market power** rationale: by combining, firms increase their market power and thus *influence the functioning of the market* in concert in a way that they cannot do singly

- **Conspiracy** rationale: combination of firms viewed as akin to a *morally reprehensible* group enterprise or conspiracy



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

Smith, *Wealth of Nations*, 1776

Prohibiting Anticompetitive Coordination (Generally)

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➢ ***Article 101 TFEU reads:***

"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.

EU Law: Article 101 TFEU

Article 101(1) – Prohibition

"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…

Article 101(3) – Exception Rule

The provisions of paragraph 1 may, however, be declared inapplicable in the case of…[coordination]…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.

Establishing Anticompetitive Agreements

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Article 101 TFEU

1. **Agreement** between undertakings, **decision** by associations of undertakings or **concerted practices;**

2. Which has the **object** or **effect** of restricting competition (para.1), without sufficient countervailing **efficiency justifications** (para.3)

§1, Sherman Act

1. **Contract, combination** or **conspiracy**;

2. Which amounts to a **restraint of trade** (either because it is ***per se*** illegal, or is found to be so after a '**rule of reason**' analysis)

Coordination within the Competition Rules

- Application of Article 101(1) is premised upon some form of coordination between two or more separate undertakings: either **agreement**, **concerted practice**, or **decision of an association of undertakings**
  - cf. Article 102 TFEU, which applies to the unilateral conduct of single undertakings

- Similarly, application of §1, Sherman Act, requires the identification of some "**contract**, **combination** in the form of trust or otherwise, or **conspiracy**" involving two distinct enterprises
  - cf. §2, Sherman Act, which requires only the identification of a single legal "person" engaging in monopolisation

What is a cartel?

"A "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce…"

OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels* (1998)

The ‘Supreme Evil’ of Antitrust?

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“…CONSIDERING that hard core cartels are the most **egregious** violations of competition law and that they injure consumers in many countries by **raising prices** and **restricting supply**, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others…

…effective action against hard core cartels is particularly important from an international perspective, because their distortion of world trade **creates market power, waste,** and **inefficiency** in countries whose markets would otherwise be competitive…”

OECD (1998)

“The **primary target** of the antitrust rules is to make certain that companies compete rather than collude. Cartels and other similar restrictive agreements distort resource allocation and encourage inefficiency”

European Commission, COM(2004) 293 final, p.6

The ‘Supreme Evil’ of Antitrust?

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Article 101 TFEU

- Hard core cartel offences (secret price-fixing, market-sharing, customer allocation etc.) are **object** restrictions of competition, contrary to Article 101(1)…
- …and such arrangements can, in practice, **never be justified** under Article 101(3).

§1, Sherman Act

- Hard core cartel offences are ***per se*** illegal under §1 – meaning that such arrangements are always prohibited by antitrust, regardless of any potential pro-competitive justifications for the behaviour.

Enforcement Challenges of Cartels

- Since the prohibition on hard core cartels is clear and unequivocal, most cartel behaviour these days takes place in **secret**, and cartelists often go to considerable lengths to conceal their anticompetitive arrangements

- This creates a particular challenge for anti-cartel enforcement: how can competition agencies (a) uncover the **existence** of secret cartels; and (b) gather sufficient **evidence** to mount a prosecution against such arrangements?

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- Does competition law prove to be effective when it comes to digital markets?

- The answer relies on the analysis of the Digital Service Act Package and the Digital Single Market…

Peculiarities of digital markets

• Competition ‘for’ the market, rather than competition ‘in’ the market ➢**winner takes all**.

• **Extreme returns of scale**: marginal cost to produce digital service is close to zero ➢entry barrier.

• **Direct and indirect network effects** ➢ entry barriers.

• Role of data:

1) **’Free’ digital services**: consumers ‘pay’ the majority of digital services with personal data.

2) Data are non-rivalrous, BUT network effects limit data portability and multi-homing.

3) Data accumulation improves the services personalization ➢ competitive advantage.

• **Digital markets tend to ‘tip’ ➢dominant online platforms subject to competition law investigations**.

Common features antitrust investigations in digital markets

• Companies subject to investigations: Google, Facebook, Apple, Amazon ➢**GAFAM – Microsoft**

• **Parallel investigations by:**

1) EU Commission.
2) NCAs of the 'big' EU MS (i.e. Germany, France, Italy) + UK.

• **Categories of sanctioned conducts:**

1) 'Traditional' exclusionary abuses: tying.
2) 'New' exclusionary abuses: self-preferencing; preferential access to customers data; platform envelopment.
3) Revival of exploitative abuses: unfair trading conditions; exploitative use of personal data.

• **Limited judicial review… so far:**

1) Google Shopping: ruling EU General Court on 9th November 2021.
2) Google Android: ruling of the EU General Court on 14th September 2022.
3) Facebook (DE): preliminary ruling by EU Court of Justice (C-252/21) – ruling of the CJEU on 4th July 2023.

Shift from competition policy to sector regulation

- **Antitrust enforcement is NOT effective:**

1) NO deterrent effect: € 6 billion fine imposed by EU Commission on Google ➢small fraction of Alphabet worldwide turnover.

2) Lenghty antitrust investigations and judicial proceedings (e.g. Intel, Microsoft).

- **Political reasons**

1) DMA: preventing legislative initiatives by EU MS.

2) Europe lags behind China and the USA in digital innovation ➢ asymmetric regulation on 'big' platforms favours the entry of 'small' European platforms.

Sector regulation

• **Determines ex-ante the behaviour of firms** (e.g. price regulation, universal access obligation...) ➢ **obligations rather than prohibitions.**

• It is common in **network industries** (e.g. electricity, gas, railways, posts...):

1) Markets liberalized since 1980s, BUT still characterized by imperfect competition

2) Former State owned company remains incumbent in the market

3) Sector regulation incentivizes competition in the market (e.g. incumbent has to grant access to its network to its competitors)

• Legislation: EU Directives implemented at the national level.

• Enforcer: National Regulatory Authority (NRA) supervizes a specific network industry.

• **Sector regulation for digital platforms➢ex-ante obligations for digital platforms.**

Emergence of sector regulation of digital platforms in Europe

• EU Digital Markets Act (DMA):
a) 15.12.2020: proposal by EU Commission.
b) March 2021: political agreement between EU Parliament and Council.
c) 12.10.2022: final version DMA published on EU Official Journal.
d) 2.5.2023: DMA enters into force.

• UK Digital Market Unit (DMU):
a) April 2021: DMU established within CMA ➢advisory body, NO enforcement power.
b) UK Government has not submitted DMU bill to the House of Commons.

• Sec. 19(a) GWB:
a) 14.01.2021: German Parliament adopts 10th amendment to the GWB ➢new sec. 19(a).
b) Section 19(a) GWB: the Bundeskartellamt can prohibit conducts by **companies of 'paramount significance for competition across markets' (i.e. digital conglomerates)** without the need of proving a competition law infringement.
c) Companies subject to Sec. 19(a) GWB ➢NO remedies adopted yet:
Ø28.01.2021: Facebook.
Ø18.05.2021: Amazon.
Ø25.07.2021: Google.
Ø25.4.2023: Apple

Digital Single Market Overview

Co-funded by the Erasmus+ Programme of the European Union

What is the Digital Single Market?

- The Digital Single Market designates the 2014-2019 strategy of the European Commission for the best possible access to the online world for individuals and businesses.
- A Digital Single Market (DSM) is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.
- The 2014-2019 Commission had identified the completion of the DSM as one of its 10 political priorities.

The Pillars

- The DSM Strategy was built on three pillars:
- Access: better access for consumers and businesses to digital goods and services across Europe;
- Environment: creating the right conditions and a level playing field for digital networks and innovative services to flourish;
- Economy & Society: maximising the growth potential of the digital economy.

EU Digital Agenda

List of Actions on the Digital Agenda (launched in 2010 under the Europe 2020 strategy) include:

- Simplifying pan-European licensing for online works
- Stakeholder debate on measures to stimulate a European online content market
- Simplifying the distribution of creative content
- Protecting intellectual property rights online

Creating a connected Digital Single Market is one of the ten priorities of the Juncker Commission.

The Digital Single Market

President Juncker
Head of European Commission

"My **first priority** will be to put policies that create growth and jobs at the centre of the policy agenda. Key to this **is creating a digital single market for consumers and businesses** – making use of the great opportunities of digital technologies which know no borders. **To do so, we will need to have the courage to break down national silos** in telecoms regulation, **in copyright** and data protection legislation, and in competition law."

Vice-President Ansip
Digital Single Market

"Take copyright, for example. Today's rules are a mess, so we need to act with some urgency. They date back to 2001. They are not suited to the digital age, for responding to new technologies, consumer behaviour and market conditions."

Commissioner Vestager
Competition

"Geo-blocking is a technical hurdle that e-commerce companies erect to make cross-border trade difficult or impossible. I have a subscription to a streamed TV package. When I am abroad I get a message saying 'Sorry, the content can only be watched from within Denmark'. Messages like this are not easy to comprehend, are they?"

Commissioner Oettinger
Digital Economy & Society

"I am quite convinced that portability on the one hand and maintaining a degree of territoriality on the other are necessary if we want to preserve cultural diversity in cinema in Europe."

EU Digital Single Market

- Communication “A Single Market for IP Rights” (24.5.2011)
- Green Paper on online distribution of audiovisual works (13.7.2011)
- Communication on content in the Digital Single Market (18.12.2012)
- Licences for Europe (5.11.2013)
- EU Copyright Review (5.12.2013)
- Digital Single Market Strategy (6.5.2015)
- Consultation of the review of the Satellite and Cable Directive (24.8.2015) and Proposed Regulation (14.9.2016)
- Communication towards a modern, more European copyright framework (9.12.2015)
- Regulation 2017/1128 on ensuring cross-border portability of online content services in the internal market (14.6.2017)
- Directive 2019/790 on Copyright in the Digital Single Market (17.4.2019)
- Directive 2019/789 on broadcasters’ online transmissions and retransmissions of television and radio programmes (17.4.2019)

Digital Single Market Strategy (6.5.2015)

- Preventing unjustified geo-blocking:
  - legislative proposals in the first half of 2016
- Competition sector inquiry on the application of competition laws to e-commerce (June 2015)
- Better access to digital content:
  - Legislative proposals before the end of 2015 to reduce differences between national copyright regimes and allow for wider online access
  - Portability of legally acquired content
  - Ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector
  - Harmonised exceptions for greater legal certainty for cross-border use of content for research and education
  - Clarifying rules on the activities of intermediaries in relation to copyright-protected content

E-commerce Sector Inquiry

The main findings of the Final Report (10 May 2017)

The report confirms that the growth of e-commerce over the last decade and, in particular, increased online price transparency and price competition, had a significant impact on companies' distribution strategies and consumer behaviour.

The final results of the sector inquiry highlight the following major market trends:

- a large proportion of manufacturers decided over the last ten years to sell their products directly to consumer through their own online retail shops, thereby competing increasingly with their distributors;
- increased use of selective distribution systems, where the products can only be sold by pre-selected authorised sellers, allows manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price;
- increased use of contractual restrictions to better control product distribution - depending on the business model and strategy, such restrictions may take various forms, such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks.

http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

E-commerce Sector Inquiry

The main findings of the Final Report (10 May 2017)

Some of these practices may be justified, for example in order to improve the quality of product distribution, others may unduly prevent consumers from benefiting from greater product choice and lower prices in e-commerce and therefore warrant Commission action to ensure compliance with EU competition rules.

Digital content

- The results of the sector inquiry confirm that the availability of licences from content copyright holders is essential for digital content providers and a key factor that determines the level of competition in the market.
- The report points to certain licensing practices which may make it more difficult for new online business models and services to emerge. Any assessment of such licensing practices under the EU competition rules has however to consider the characteristics of the content industry.
- One of the key findings of the sector inquiry is that almost 60% of digital content providers who participated in the inquiry have contractually agreed with right holders to "geo-block". Geo-blocking prevents consumers from purchasing consumer goods and accessing digital content online from other EU Member States.

http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

Communication Towards a Modern, more European Copyright Framework (9.12.2015)

- Ensuring wider access to content across the EU:
  - EU draft regulation on cross-border portability
  - Legislative proposals in 2016 to enhance cross-border distribution of content in light of the SatCab review
  - Supporting rights holders and distributors to reach agreement on cross-border access to content including through mediation
  - Facilitating digitisation of out-of-commerce works and making them available online
  - Development of licensing hubs
- Adapting exceptions to digital and cross-border environments
  - Text and data mining, illustration for teaching, preservation by cultural heritage, "panorama"
- Achieving a well-functioning marketplace for copyright:
  - Definition of the rights of "communication to the public" and of "making available"
  - Remuneration of authors
- Providing an effective and balanced enforcement system: "follow the money"

Portability Regulation 2017/1128

Obligation on online content service providers to offer cross-border portability to the subscribers who are temporarily outside their home country

- Scope: services that are already portable in the home country; both Free and Pay services;
- ***Legal fiction that the subscriber is accessing his/her subscription from Member State of residence***
- Platform mandate
- Authentication of Member State of residence
- Temporariness
- Transition period

Entry into effect 1 April 2018

http://europa.eu/rapid/press-release_IP-15-6261_en.htm

http://europa.eu/rapid/press-release_IP-17-225_en.htm

https://ec.europa.eu/digital-single-market/en/news/regulation-cross-border-portability-online-content-services-internal-market

EU Copyright Reform Package (14.9.2016)

- Proposed regulation on online transmissions of broadcasting organisations and retransmissions of TV and radio programmes
  - Sat Cab Review
- Proposed Directive on Copyright in the Digital Single Market
  - Mandatory exceptions/out of commerce works
  - Voluntary scheme for licensing AV works on VOD platforms
  - Related right for press publishers
  - Levies for publishers
  - New duty on platforms (value gap)
  - Transparency and remuneration for authors and performers
- Proposed regulation and Directive on Marrakech Treaty

http://europa.eu/rapid/press-release_IP-16-3010_en.htm

EU Satellite and Cable Directive Review (24.8.2015)

- The SatCab Directive facilitates clearing of copyright and related rights for satellite broadcasting and cable retransmission to improve cross-border transmission and reception of broadcasting services
- Country of origin principle: rights are acquired for the EU country where the uplink takes place
- Rights cleared in one country allow broadcasters to broadcast to the whole of the EU, subject to contractual freedom
- For cable retransmission rights have to be cleared through collective management organisations

EU Satellite and Cable Directive Review (24.8.2015)

Questions for consultation:

- Are the EU rules up to date in the digital age?
- What would be the impact of extending the SatCab Directive to cover broadcasters'services over the internet (catch-up, simulcast)?

- https://ec.europa.eu/digital-single-market/en/news/eu-seeks-views-satellite-and-cable-directive

Report on the responses to the consultation:

- https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive

EU Directive 2019/789

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- Vice-President for the Digital Single Market Andrus **Ansip** said: "*I am very pleased we reached yet another agreement that brings us closer to a functioning Digital Single Market. The updated broadcasting rules are a big part of the puzzle. This regulation has the potential to unlock a large amount of broadcast content across borders, benefitting the 41% of Europeans who watch TV online but also the 20 million EU citizens who were born in a different EU country from the one they live in*".

What will the directive change for the distribution of TV and radio programmes?

- **The Principle of the country of Origin (COO):** the Directive introduces the country of origin (COO) principle to facilitate the licensing of rights for certain programmes that broadcasters may wish to offer on their online services (simulcasting, catch-up services and other services that complement the main broadcast, such as previewing). Thanks to this mechanism, broadcasters will be able to make radio programmes, TV news and current affairs programmes as well as their fully financed own productions, available online in all EU countries.
- **Retransmission**: the Directive provides a mechanism to facilitate the licensing of rights in the case of retransmission of radio and TV programmes, which includes retransmission services provided over the internet under certain conditions. This measure is expected to contribute to a wider distribution of radio and TV channels.
- **Direct injection:** Direct injection is a process increasingly used by broadcasters to transmit their programmes to the public. The new rules will make sure that right holders are adequately remunerated when their works are used in programmes transmitted through direct injection. They will provide legal certainty to broadcasters and distributors involved in the process.

The final text of Article 4(1)(b) of the Geo-Blocking Regulation, approved by the European Parliament on 6 February 2018 and adopted by the Council on 27 February 2018, specifically carves out from its scope the provision of access to copyright protected works:

Article 4

Access to goods or services

1. A trader shall not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, where the customer seeks to:

(a) …

(b) receive electronically supplied services from the trader, ***other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form***

REVIEW OF THE GEO-BLOCKING REGULATION?

Directive on Copyright in the Digital Single Market (8.4.2019)

- In September 2016 the European Commission proposed changes to copyright law including introducing a Directive on Copyright in the Digital Single Market with the intention "to create a comprehensive framework where copyrighted material, copyright holders, publishers, providers and users can all benefit from clearer rules, adapted to the digital era".
- To this end, on 13 February 2019, the European Parliament, the Council of the EU and the European Commission reached an agreement on this Directive. The Directive was subsequently passed by the European Parliament on 26 March 2019 and came into force from 2021.
- The Directive includes new copyright exceptions and limitations, rights for press publishers (and content creators) as well as regulating the position between content platforms and the respective rights holders.

Directive on Copyright in the Digital Single Market (8.4.2019)

- The Directive has caused considerable controversy with critics believing that its permissions introduce legal uncertainty and will ultimately harm the creative and digital economies.
- Some users are also concerned that content will not be as readily accessible.
- Some concessions have been made, for example, with news aggregators able to include very short pieces of news reports, although exactly what that means still must be agreed upon.
- The Directive is not enforcing upload filters on user generated content platforms and it appears that memes and gifs will be able to be shared on these platforms.
- On the other hand, the Directive's supporters believe that it will increase revenues to publishers and creators of content, which will protect and promote the publishing and creative industries.
- There is considerable uncertainty as to how the Directive will work in practice and what the commercial consequences will be for platforms, publishers/creators and users.

Directive on Copyright in the Digital Single Market (8.4.2019)

Right for publishers of press publications

- In the Directive, the new press publishers right (Article 15) gives the publishers of 'press publications', which are defined as a 'collection composed mainly of literary works,' rights to reproduce and make their works available online, for the use of their press publications by information society service providers (ISSPs). These rights will expire 2 years after the press publication is published.
- This will be relevant to online press articles by ISSPs, as Member States must provide that authors of the works, which are used in press publications, obtain an appropriate proportion of the amount that press publishers receive from the ISSPs.
- Provisionally, the use of individual words, short phrases and hyperlinks of publications will still be allowed without authorisation from press publishers.

Directive on Copyright in the Digital Single Market (8.4.2019)

Hosting user generated content

- The Directive seeks to regulate the payment received by writers and performers and the revenues enjoyed by the online platforms when they share their output. Article 17 considers that an "online content sharing provider" is communicating with the public when it allows them access to works that are protected by copyright. Sites which host user generated works will need to apply for a licence in order to present copyright protected content uploaded by users unless it complies with conditions set out in the Directive. Where no licensing agreements exist with rights holders, the platforms, under Article 17(4) will have to:
- make all efforts to obtain an agreement
- ensure the unavailability of unauthorised content where rights holders have provided the appropriate information and
- act quickly to remove any unauthorised content once notified and stop future activity.

Directive on Copyright in the Digital Single Market (8.4.2019)

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Hosting user generated content

- Whether the platform has observed these obligations above is determined by the principle of proportionality, the audience and types of work that users upload and the methods and costs for the platforms. At the right holder's request, platforms are obliged to provide the right holders with information regarding how they comply with their obligations set out under Article 17(4).
- For less well-established platforms, that have not been available to the public for three years and that have a turnover of less than €10 million and 5 million monthly users, they will only have to adhere to the conditions that they have made best efforts to receive authorisation and that if notified they act as quickly as possible to remove the content. If the users increase to above 5 million they will also have to make certain that notified content does not re-emerge later.
- The Directive has also set out that platforms must set out an effective complaints process that all users can access in the event that there is a dispute over removal or suspension of access to works that are uploaded. All complaints must be examined expeditiously and by human review. To further the relationship between the user and the platform, the Commission, with the help of consultations with platforms and rights holders, will discuss best practice for the parties' cooperation.

Directive on Copyright in the Digital Single Market (8.4.2019)

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Remuneration for authors/performers

- The new Directive gives authors and performers rights to proportionate payment on the licensing of their rights. Under the Transparency obligation in Article 19, authors have the right to detailed information about the exploitation of their work. This article sets out that Member States should ensure that the licensee to the author's work provides to the author up to-date information on the exploitation of their work at least once a year. However, the licensee can limit the burden in 'duly justified cases' where the time or administration spent on the information would be disproportionate to the amount of remuneration for the author.
- If a piece of work becomes hugely successful and the fee originally paid was too low, the Directive provides for a contract adjustment correction.
- The Directive also includes a mechanism for writers/performers to reclaim their rights when their work is not being used, although this mechanism does not apply where the lack of exploitation can be remedied easily by the author or performer.

Directive on Copyright in the Digital Single Market (8.4.2019)

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Exceptions and limitations

- Text and Data mining exceptions - Articles 3 and 4
- Teaching and Cultural Heritage exception - Article 5 (an online education exception for the use of online teaching), and Article 6 (a conservation and dissemination of cultural heritage exception)

Use of Out-of-commerce works (that, through a presumption of good faith, are not available through the usual channels of commerce after a "reasonable" search has been undertaken to identify whether it is publically available)

- Article 8(1) provides for Collective Management Organisations (CMOs) to be able to grant to non-CMO members, for non-commercial reasons, licences to institutions with regards to out of commerce works which reside in the collection of the institution on a permanent basis.

Appointing parties for negotiations for audio-visual works on video-on-demand (VOD)

- Where there are disputes between those who are attempting to grant licences for audio-visual works for VOD, member states are now obligated to appoint a mediator, official or impartial body to facilitate the conclusion of the licences.

Digital Single Market achievements

- Under the Juncker Commission, 30 legislative proposals on the Digital Single Market were made.

- At the end of the mandate, 28 of these legislative proposals have been agreed upon by the co-legislature.