

Handout № 15

Competition

1. Structure

- Basis: Art. 3(g) and 81–99 EC
- focus on government activities (state aid); on private (some public) undertakings (anticompetitive agreements/concerted practices; prohibition on abuse of a dominant position; anti-dumping rules)
- essential for free play of market forces
- principal aim to encourage economic activity and maximise efficiency; also protect/encourage SME

2. Economic theory

- perfect competition: idealised concept assuming
 - a large number of buyers and sellers
 - identical or homogenous products
 - perfect information
 - strive for maximum utility
 - free flow of resources
 - no impediments to the emergence of new competition
 - strive for maximum profits→ maximum efficiency, optimum allocation (polar opposite to monopoly)
- market failure
 - rival undertakings choose to cooperate rather than compete
 - markets can be divided→ intervention necessary (Chicago School: only minimum intervention necessary to curb the most blatant form of anticompetitive activity)

3. EC competition policy

- strict approach: no differentiation between 'vertical' and 'horizontal' agreements, *ancillary restraints* and *naked restrictions*
- market integration vs economic objectives: subordination of other goals to market integration (*intra-brand* competition protected at the expense of *inter-brand* competition)

4. Relation to other policies

- environment
- protection of cultural diversity
- social factors

5. Enforcement

- Commission in accordance with Reg 17/62 (now 1/2003)
- Court of First Instance
- Art. 81 and 82 directly effective → national courts
- fines and penalties levied by the Commission

Anti-competitive agreements, decisions and concerted practices

1. General

- agreements on pricing, output and markets
- strong mandate to pursue anti-competitive practices

2. Art. 81

- originally: agreement under Art. 81(3) had to be notified or 'negative clearance' be requested; 'notices' (interpretation, non-binding) and 'block exemptions' (breach of Art. 81(1) exempt due to beneficial nature on grounds of Art. 81(3)) from the Commission
- as of 1. May 2004: Art. 81 directly applicable, agreements fulfilling criteria automatically exempt, national authorities/courts will be able to consider whether criteria are satisfied (Art. 81(3) as defence in Art. 81(1) infringement)

3. Infringement elements

- Undertakings: widest possible sense → any legal or natural person engaged in some form of economic or commercial activity (not necessarily profit oriented)
- Agreements: not only binding agreements but also 'gentleman's agreement' (s.a. 'concerted practices')
- Decisions by associations/undertakings: widely interpreted, not only binding decisions but also recommendation usually complied with (*NV IAZ International Belgium (case 96/82)*)
- Concerted practices: wider than 'agreements' and 'decisions', form of co-operation between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of the competition, enough to have an obligation to inform each other of intended attitude so that each can regulate its conduct in the knowledge that competitors act the same way, parallel behaviour provides strong evidence of concerted practice if leading to conditions that are not normal for the market
- Public authorities: distinguish commercial and executive activities

4. Field of application

- Group companies: agreements/decision/concerted practices on horizontal and vertical level (not parent and subsidiary: no competition)
- Undertakings outside the EC if agreements/practices are implemented inside common market

5. Affecting trade between MS: direct or indirect, actual or potential *effect* on flow of trade

- Agreements within MS may affect trade between MS if they operate across whole national market (compartmentalisation)
- Combined effect (sealing off if taken as a whole)
- Actual/potential effect (deviation from normal pattern whether increase or decrease of trade)

6. Prevention, restriction or distortion as object or effect

- horizontal and vertical agreements (inter-brand and intra-brand competition), *Consten (case 56/64)*
- object or effect:
 - nature and quantity of products concerned (market share)
 - position and size of parties concerned (turnover and relative market share)
 - isolated nature of the agreement or its position in a series

- severity of the clauses
- possibility of other commercial concurrents acting on the same product (parallel imports or exports)

7. *de minimis* principle: *Völk v. Vervaecke* (case 5/69) → trade must be affected to a noticeable extent (positions of the parties on the market in question); Commission notices on *de minimis*: aggregate share below 10%, no price-fixing, territorial or output restrictions

8. Agreements according to

- Art. 81(1)(a)
 - price-fixing: price maintenance for books
 - minimum prices and recommended prices
 - other trading conditions (premise requirements, stock holdings, after-sales service): selective distribution system do not breach Art. 81(1) if dealers are chosen on the basis of objective and proportionate criteria applied in non-discriminatory manner
- Art. 81(1)(b): normally horizontal agreements invariably in breach, except where desirable for specialisation (SME) or R&D
- Art. 81(1)(c): normally horizontal agreements, may qualify for exemption under similar considerations as for Art. 81(1)(b)
- Art. 81(1)(d): no breach if difference is objectively justified ('quantity' discounts are permissible when cost-saving whereas 'fidelity' or 'loyalty' rebates tied to volume of transaction are not)
- Art. 81(1)(e): conditions based on necessary objective criteria are essential, quantitative criteria are not
- others (mergers)