

EU Competition Law: Basic Concepts and Case Studies



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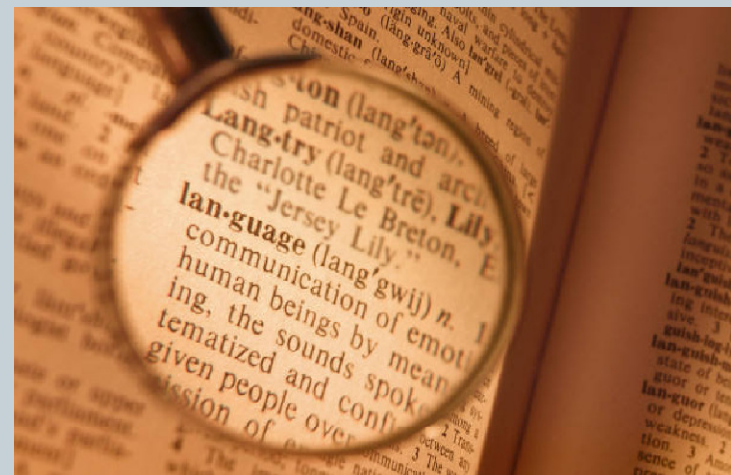
11 JULY 2011

SUMMER PROGRAM IN EU AND
INTERNATIONAL BUSINESS LAW

Purpose of this lecture

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- Help you to “spot” EU competition issues
- Introduce the “language” of EU competition law and economics
- Methodology => theory + practical examples



Structure

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- Introduction
- Article 101 TFEU + case studies
- Article 102 TFEU + case studies
- Brief overview of EU merger control

Useful sources

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- <http://chillingcompetition.com/>
- http://ec.europa.eu/competition/index_en.html
- <http://www.ssrn.com/>
- <http://www.concurrences.com/sommaire.php3?lang=fr>

1. Introduction

(the What, the Why, the
How, the Who and
the Where?)

The “*What*”

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- **A set of rules of the Treaty**
 - Antitrust (Article 101 + 102 TFEU)
 - Mergers
 - State aids (Article 107 TFEU)
- **Many other instruments:**
 - Regulations (1/2003), soft law (Communications, Notices, etc.)
- **A significant risk for businesses**
 - Fines (*Intel*, €1,060,000,000)
 - Remedies (structural and behavioral)
 - Damages (*Courage and Crehan* (C-453/99))

The “Why”

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- Competition is deemed to increase economic welfare
 - Allocative efficiency (prices \searrow costs)
 - Productive efficiency (costs \searrow)
 - Dynamic efficiency (investments \nearrow)
- Competition rules are needed to help achieve market integration
 - Through private conduct, firms can deprive customers of the benefits of market integration (market partitioning agreement, exclusive distribution)
 - Member States may protect domestic operators with subsidies

Wording of the TFEU: agreements, abuses and mergers are “*incompatible with the Internal market*”, rather than unlawful

The “*How*”

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The “*How*”

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- EU competition law is primarily enforced by specialized administrative agencies at the European – the Commission – and the national levels – NCAs
 - *Rationale*: Need for expert knowledge; constant monitoring of markets and investigations cannot be carried out by courts; need to devise policy orientations, which falls beyond the remit of courts; ability to focus on priorities (cases that matter) and build market expertise
- EU competition law is also enforced in the context of ordinary litigation before courts (provisions with direct effect)
 - *Main interest*: Courts may award injunctive relief (suspension, etc.) as well as damages. Courts may also have jurisdiction over other legal aspects of a case (IP, corporate, etc.)
- Different from US law where private enforcement prevails over public enforcement (with punitive and treble damages, jury trials (occasionally), etc.)

The “*How*”

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The Commission

- [DG COMP](#)
- Other bodies
 - College of Commissioners
 - Legal service
- Constraints
 - Commission also proposes legislation in other areas

The Powers

- Defined in Regulation 1/2003
 - Investigations (dawn raids, RFI, etc.)
 - Infringement decisions
 - Fines
 - Settlements (art. 9)
 - Remedies
 - Interim measures
 - Powers on NCAs

The “*How*”

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- Interplay with NCAs (article 11, R1/2003)
- Interplay with national courts (article 15, R1/2003)
- Annulment proceedings (Article 263, 261 and 256 TFEU)

The “Who”

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The theory

- EU competition rules applies to “**undertakings**”
- “any entity engaged in **economic activity**, regardless of the legal status of the entity and the way in which it is financed” (C-41/90)
- “Any activity consisting in offering goods and services on a market is economic activity”

The practice

- Wide coverage
 - Corporations, state-owned companies, public employment agencies, football players, central banks, etc.
 - But “political” exclusions (e.g., social security services, etc.) => need to be in exchange of economic consideration

The “Where”

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- EU competition rules apply to practices which affect trade between Member States
 - Impact « *within the internal market* » (« *effects* » doctrine)
 - EU-based firms reach an anticompetitive agreement over price/quantities on US markets – **EU competition law is not applicable**
 - Non-EU based firms reach an anticompetitive agreement over price/quantities on EU markets – **EU competition law is applicable**
 - Cross-border trade effect
 - ✦ Appreciable
 - ✦ Decrease, increase or simply diversion of trade

1. Article 101 TFEU

Article 101 TFEU

§1 – The Prohibition Rule (+ illustrations)

Are 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 (...)”

§2 – The Rule of Nullity

Any agreements or decisions prohibited pursuant to this Article shall be automatically null and void

§3 – The Exception Rule

§1 may be declared inapplicable to agreements which :

1. “contribute to improving the production or distribution of goods or to promoting technical or economic progress,
2. allow consumers a fair share of the resulting benefit,

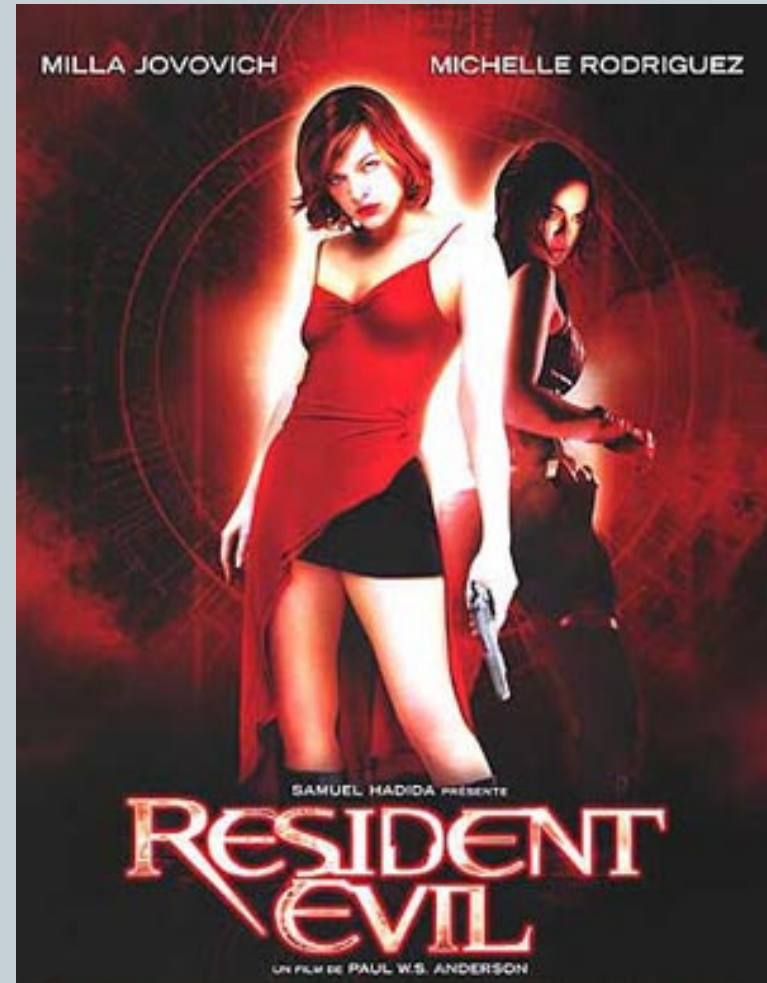
and which do not:

1. impose on the undertakings concerned restrictions which are not indispensable;
2. afford such undertakings the possibility of eliminating competition”

1.1. Cartels

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- Agreements amongst rivals to fix prices, limit output, share markets (customers), limit investments
- “*Cancer of market economies*” (Monti), “*Ultimate evil of antitrust*” (Scalia)
- Inefficient (+25% overcharge)



1.1. Cartels

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- **Three consequences**

- Legal qualification => “*Hardcore restriction*” => lack of anticompetitive effect and intent are no defenses; efficiencies not admissible
- Policy priority for Commission (wide investigation powers, incentives devices (leniency), etc.)
- Sanctions => Heavy fines
 - ✦ 2010=> six LCD panel producers a total of €648 925 000 for operating a cartel which harmed European buyers of television sets, computers and other products
 - ✦ 2008 => Commission fines four car glass manufacturers a total of €1 383 896 000 for unlawful market sharing
 - ✦ 2007 => Otis, KONE, Schindler and ThyssenKrupp fined €992 million for operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands

1.1. Cartels

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- Hungry for more?
 - Director disqualification, criminal punishments, etc.
 - Bounties for individual, wiretaps, etc.



1.2. Horizontal cooperation agreements

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- Agreements between competitors which do not purport to restrict competition, but that may have anticompetitive effects
- Joint ventures, strategic alliances, etc. aiming at making new products, achieving economies of scale, savings on purchases, synergies, etc.
 - Peugeot and BMW recently announced the setting up of a joint venture for the development and production of hybrid and electrical car components (engines, chargers, softwares, etc.)
- May nonetheless have anticompetitive effects (coordination through cost-harmonization, exchange of sensitive information, etc.)

1.2. Horizontal cooperation agreements

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- **Specific texts**
 - Block exemption regulations: R. 1217/2010 (R&D agreements, <25%) and R. 1218/2010 (specialization agreements, <20%)
 - [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#)
 - ✦ Joint production
 - ✦ Joint purchasing
 - ✦ Joint commercialisation
 - ✦ Standardisation
 - ✦ Exchange of information

1.2. Horizontal cooperation agreements

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- Self assessment
- Driven by economics
- Very little cases give rise to prohibition decisions
 - 2006 – O2-T-Mobile Network Sharing Agreements
 - 2010 – Case [COMP/39.596 – BA/AA/IB](#) joint venture covering all passenger air transport services of the parties on the routes between Europe and North America. Covered pricing, capacity and scheduling coordination, as well as sharing of revenues)
=> solved with commitments

1.3. Vertical agreements

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- Agreements between firms that are not competitors
- Very many types
 - Standard supply-purchase relationships => Arcelor Mittal/Coca-Cola
 - Distribution agreements (exclusive distribution, selective distribution, etc.) => Nike/Footlocker
- Agreements that are generally pro-competitive
- Yet, those agreements also yield anticompetitive effects
 - Limited distribution
 - Resale price maintenance
 - Single branding
 - Restrictions on passive sales within territorial distribution networks, etc.

1.3. Vertical agreements

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- **Specific texts**
 - Block exemption regulation: R330/2010
 - Guidelines on vertical restraints
- **Self assessment**
- **Driven by economics**
 - Market-share thresholds, article 3 (MS < 30% for both supplier and purchaser)
 - Compliance with Article 5 conditions (non compete commitments: duration < 5 years)
 - No hardcore restrictions, article 4
 - ✦ RPM
 - ✦ Restrictions of the territory into which buyer can sell
 - ✦ Restrictions of cross supplies within selective distribution systems
 - ✦ ...

1.3. Vertical agreements

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- Many issues arise with the development of online distribution
 - Restrictions on the use of website
 - Refusal to accept pure online players within selective networks

Case studies

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- ECJ, Case 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*
- ECJ, Case C-501/06 P, *GlaxoSmithKline Services Unlimited v. Commission*

2. Article 102 TFEU

Article 102 TFUE

First tier – The Prohibition Rule

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

Second tier – Illustrations (list is not exhaustive)

Such abuse may, in particular, consist in:

- (a) Imposing unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions;
- (d) making the conclusion of contracts subject to acceptance of supplementary obligations

2.1. The Big Picture

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- Provision similar to Section II of the Sherman Act, with nuances
- Over the past decade, increasingly intrusive enforcement of Article 102 TFEU
 - Widespread feeling that market concentration has increased in the EU (external, but also internal growth)
 - Importance of controlling market power in recently liberalized industries
 - New economy: first mover advantages and network effects => ability of firms (Google, Amazon, Facebook) to tip the market in very short timeframes
 - Public choice theory => cases with strong political return for competition authorities (big companies with large exposure) => Intel, Microsoft, IBM and now Google
- 2 components: (i) dominant position; (ii) abusive conduct

2.2. Dominance

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- Legal definition => “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*” (United Brands)
- Economic definition => market power, or the ability to profitably raise prices significantly above the competitive level (costs) for quite some time

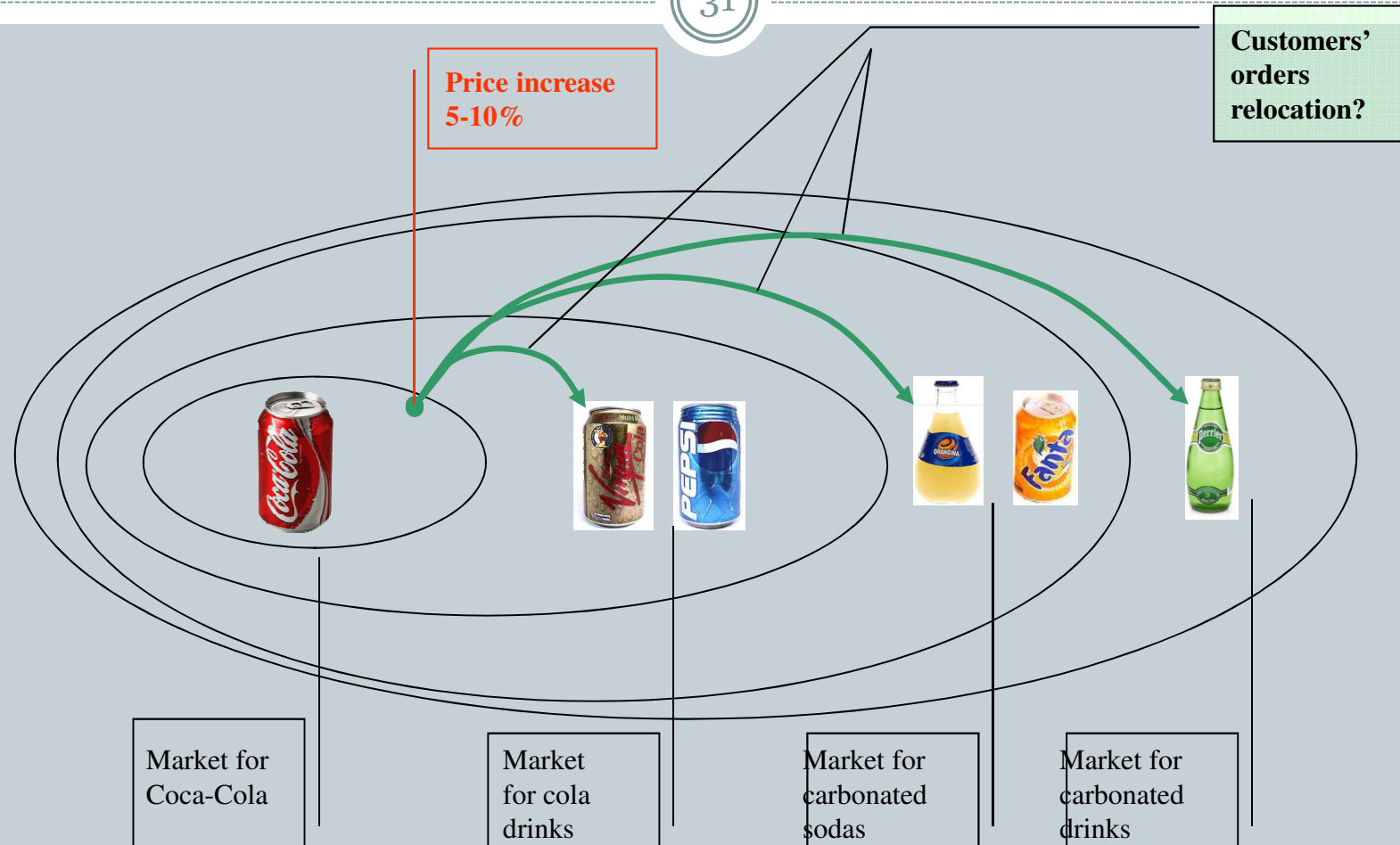
2.2. Dominance

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- **Complex to measure => indirect method**
 - Delineate a relevant market (is Coca-Cola active on the drinks market, on the soft drinks market, on the carbonated soft drinks market, etc.?)
 - Compute a market share to use as a proxy (what is Coca-Cola's position on the carbonated soft drinks market?)
- **A relevant market comprises all those products that are perceived as substitutes by customers**
 - Complex issue: Coca-Cola & Pepsi & other drinks; Eurostar & Ferry & Airlines; Personal computers & Macs; Branded fragrances v. non branded fragrances; iPhones & other mobile phones; Inux & Windows; Theatrical movie distribution & DVD rental distribution; CD-recorded music & digital music files; Low costs carriers & flag carriers
 - Use of quantitative techniques: SSNIP test

2.2. Dominance

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2.2. Dominance

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Market Share (%)	Evidentiary consequences
MS > 50%	Presumption of dominance/SMP – marginal analysis of other (disqualifying) factors
50% > MS > 40%	Multi-factor analysis with burden of proof inversely proportional to the size of the MS
MS < 40%	<i>De minimis</i> rule - market power is not substantial/No dominance

2.2. Dominance

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- **Additional factors**
 - Barriers to entry/expansion (advertisement, economies of scale, trade secrets, IP rights, switching costs, etc.)
 - Absence of countervailing buyer power

2.3. Abuse

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- Dominance is not unlawful, only abuse is unlawful
- Dominant firms have a « *special responsibility* » not to impair competition through their conduct
- Why? **Big is bad**. Markets on which a firm occupies a dominant position are presumed insufficiently competitive. No further restrictions of competition are tolerated



2.3. Abuse

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- Notion not defined in the Treaty
- List of abuses covers exploitative abuses, where a dominant firm directly harms customers (excessively high prices, price discrimination, unfair trading terms, selling two products in lieu of one, etc.)
- Case-law (ECJ, *Continental Can v. Commission*) extends to exclusionary abuses
- In practice, heavy (and paradoxal) emphasis focus on exclusion and not exploitation

2.3. Abuse

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- Abuse and intent

- Neither a necessary condition, nor a sufficient one (all firms want to exclude their rivals)

- Abuse and anticompetitive effects

- Burden of proof under *Michelin I and II*: objective capacity of the conduct to have anticompetitive effects => not only actual, but likely effects (Kroes: « [you cannot resuscitate a corpse](#) »)
- Presumptive reasoning based on cursory examination of firm's formal features as opposed to its actual or potential market impact (forms-based approach)
- Has led to abuses, for instance when procompetitive price cutting practices (rebates) have been sanctioned
- Akin to « *banning the sale of ferrari cars, because highly probable that drivers will not respect the speed limits* »
- New commitment to follow effects-based approach under the Commission's Guidance Communication on Exclusionary Abuses (central concept of « anticompetitive foreclosure »)

2.3. Abuse

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1. Excessive prices (*United Brands*)
 2. Discrimination (*ITT Promedia*)
 3. Refusal to supply/license (*Magill*)
 4. Predatory pricing (*Wanadoo*)
 5. Tying (*Microsoft*)
 6. Rebates (*Michelin*)
- ...

2.4. Case studies

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- ECJ, Case C-53/92, *Hilti AG v. Commission*
- ECJ, Case C-7/97, *Oscar Bronner GmbH & Co KG v. Mediaprint*

3. Mergers

3.1. Overview

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- **The Road to Regulation 139/2004**
 - ECJ, Case 6-72, *Continental can*
 - Regulation 4064/89
 - Revision in 1997
 - Trilogy of annulments in *Airtours*, *Schneider* and *Tetra Laval* judgments
- **Duty to Notify and Mandatory Suspension**
 - “*Community Dimension*”
 - The notion of “*Concentration*”
- **Outcome of Assessment**
 - Clearance
 - Prohibition
 - Conditional Clearance
- **Horizontal Mergers**
 - Unilateral effects
 - Coordinated effects
- **Non-Horizontal Mergers**
 - Vertical Mergers (input and customer foreclosure)
 - Conglomerate Mergers

3.2. Mergers as a genuinely good thing

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- Mergers are presumed pro-competitive (recital 4 of R. 139/2004)
- They often bring efficiencies, and only generate problems in exceptional circumstances (merger to monopoly)
 - Economies of scale/scope
 - Synergies
 - Rationalization
 - Risk limitation
 - Innovation
 - Managerial efficiencies



3.3. List of prohibited transactions

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does not include
unconsummated mergers
e.g., *Alcan/Pechiney*;
EMI/TimeWarner

1. M.5830, *Olympic/Agean Airlines*, (129/2004), 26 January 2001;
2. M.4439, *RyanAir/Aer Lingus*, (139/2004), 30 October 2006;
3. M.3440 - *ENI / EDP / GDP* (4064) – 9 December 2004;
4. M.2416 - *Tetra Laval / Sidel* – 30 October 2001;
5. M.2187 - *CVC / Lenzing* – 17 October 2001;
6. M.2283 - *Schneider / Legrand* – 10 October 2001;
7. M.2220 - *General Electric / Honeywell* – 3 juillet 2001;
8. M.2097 - *SCA / Metsä Tissue* – 31 January 2001;
9. M.1741 - *MCI Worldcom / Sprint* – 28 June 2000;
10. M.1672 - *Volvo / Scania* – 15 March 2000;
11. M.1524 - *Airtours / First choice* – 22 September 1999;
12. M.1027 - *Deutsche Telekom / Betaresearch* – 27 May 1998;
13. M.993 - *Bertelsmann / Kirch / Premiere* – 27 May 1998;
14. M.890 - *Blokker / Toys "R" us (II)* – 26 June 1997;
15. M.774 - *Saint Gobain / Wacker Chemie / Nom* – 4 December 1996;
16. M.784 - *Kesko / Tuko* – 20 November 1996;
17. M.619 - *Gencor / Lonrho* – 24 April 1996;
18. M.553 - *RTL / Veronica / Endemol ('HMG')* – 20 September 1995;
19. M.490 - *Nordic Satellite Distribution* – 19 July 1995;
20. M.469 - *MSG Media Service* – 9 November 1994;
21. M.53 - *Aerospatiale / Alenia / De Havilland* – 2 October 1991

3.4. Remedies

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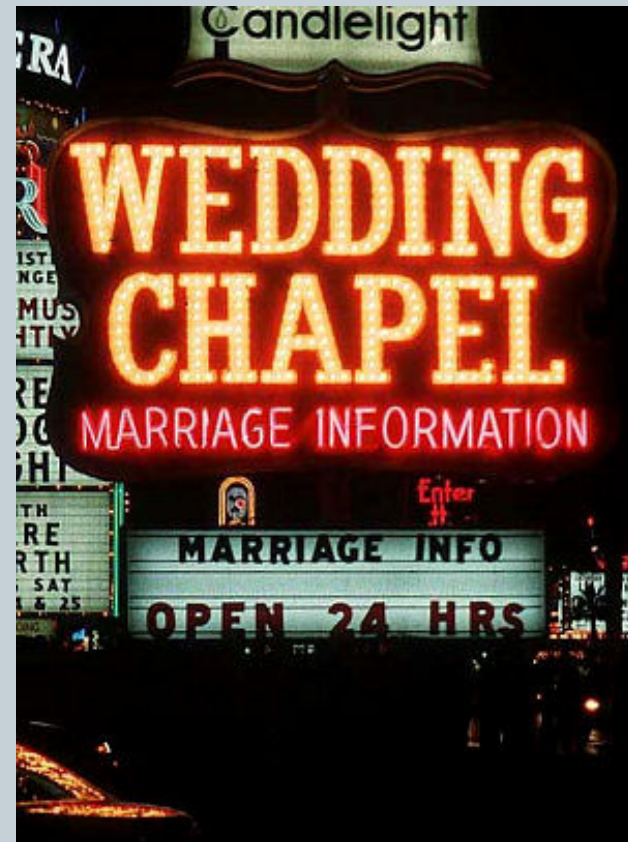
- But the Commission is eager to condition clearance decisions on the submission of structural/behavioral commitments
 - Electricity => Network divestitures, increase interconnection capacity, etc.
 - Airlines => Release take-off/landing slots, etc.

Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	0	91
Art 6.1(b) compatible, under simplified procedure (figures included in 6.1(b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	138	169	211	238	190	143	18	159

3.4. The practice

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- Resource intensive/last minute work (closing targets often do not envisage antitrust issues)
- Tight timeframe under the EUMR (max. 90 days, with extensions under specific circumstances)
- Very economic in nature (forward-looking assessment)



Wrapping-up

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- EU competition law covers a large range of conduct => distribution contracts, cooperation agreements, licensing practices, pricing strategies, M&A transactions, etc.
- EU competition enforcement is increasingly tough, giving rise to significant risks for businesses, hence the need for adequate procedural safeguards/compliance processes
- In substance, EU competition law draws on both law and economics
- EU competition law can in principle apply to all firms doing business with the EU, including non EU-firms

Thank you!