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**HEC EUROPEAN EXECUTIVE CAMPUS**  
**EU Antitrust Law & Policy**

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# Outline

1. A (very) brief history
2. Two main prohibitions:
  - anticompetitive agreements and concerted practices
  - abuses of a dominant position
3. Enforcement:
  - increased investigation powers
  - increased sanctions

# 1. A (very) brief history

# A (very) brief history (1)

- Industrialisation
- Formation of conglomerates

## A (very) brief history (2)

The problem with market power

Purpose of Competition Law:

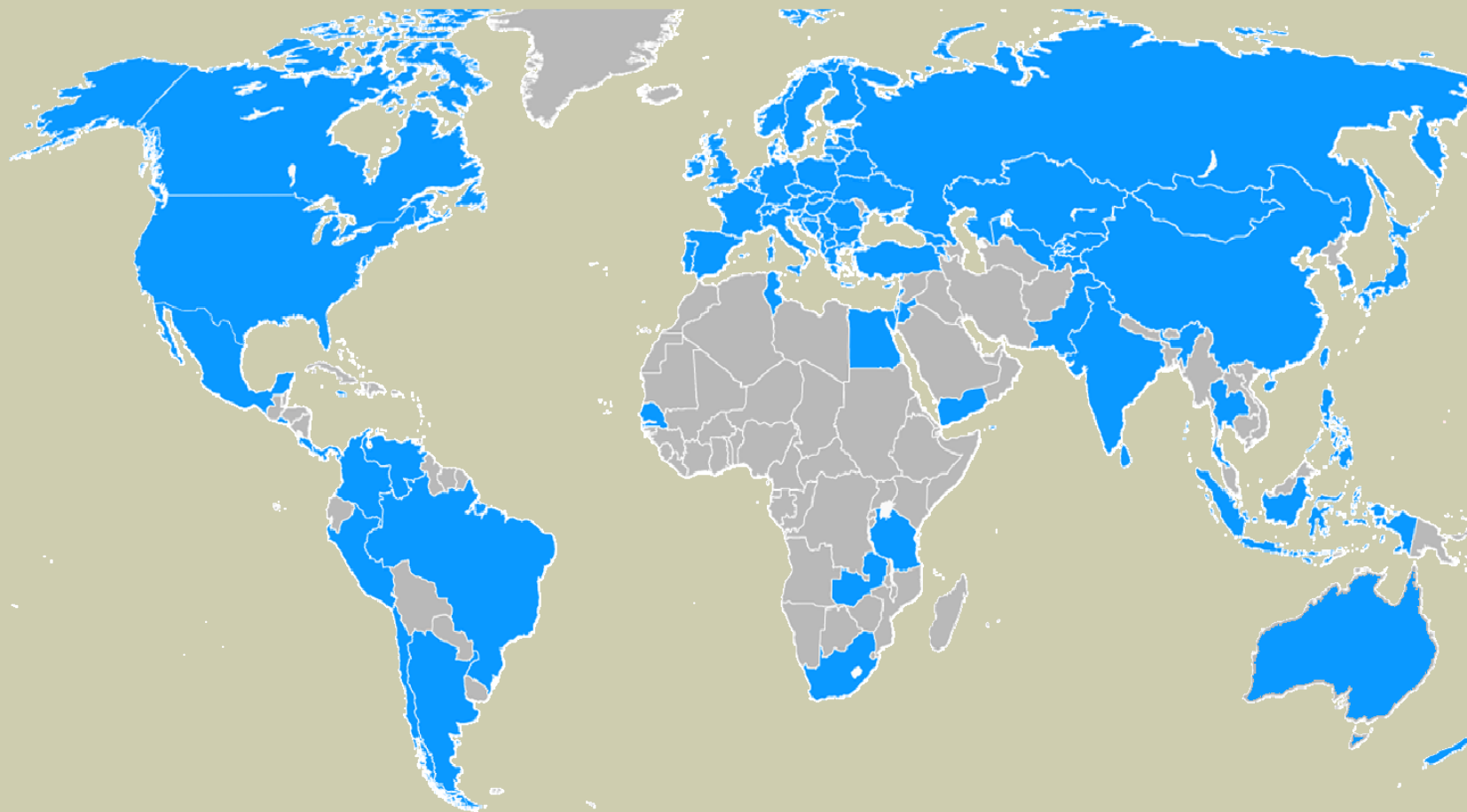
- To promote competition as the basis for a free market
- To maximize consumer welfare and optimal allocation of resources

## **A very brief history (3)**

**US: Shearman Act (1890)**

**Europe: Treaty of Rome (1957)**

# A success story



# Competition law in Europe

- **EU legal system**



- Treaty provisions (Articles 101 and 102 of the Treaty on the Functioning of the European Union) and implementing rules
- Legislation is enforced by the European Commission **and** the 27 national competition authorities at the EU Member State level

- **27 national legal systems**



- Competition rules largely modeled following the EU rules and practice
- Enforced by national competition authorities and national courts

- **Cooperation - The European Competition Network (“ECN”)**



- Exchange of information on new cases and envisaged decisions
- Coordination and mutual assistance (including surprise inspections), exchange of evidence

## 2. Two main prohibitions

# Two main prohibitions

Competition law covers a broad range of company conduct

Three main areas:

- 1. Coordinated conduct between at least two undertakings:** anticompetitive agreements and concerted practices, including cartels (Article 101 TFEU)
- 2. Single-firm conduct:** abuse of dominance (Article 102 TFEU)
- 3. Mergers, acquisitions and joint ventures** (See Robbert Snelder's presentation)

# Article 101 TFEU

Article 101 TFEU prohibits anticompetitive coordination:

*“The following shall be prohibited as incompatible with the common 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 common market”*

# Article 101 TFEU – 5 main elements (1)

## 1. At least two undertakings:

- An “undertaking” is any economic entity engaged in the supply of goods or services, regardless of legal status or ownership
- Two or more legal entities within the same corporate group may collectively form a single “undertaking”

## 2. Coordination:

- **Agreement:** A concurrence of wills or “meetings of minds”, whether legally binding or not, in writing or oral, explicit or tacit (“gentlemen’s agreements”)
- **Concerted practice:** typically information exchanges
- **Decision of association of undertakings** (e.g., trade associations)

# Article 101 TFEU – 5 main elements (2)

## 3. Effect on trade between Member States

## 4. Anticompetitive object or effect:

- No fault requirement
- Object *or* effect : no need to prove effects if anticompetitive “object” (*per se* violation)
- Potential or actual effects

## 5. No redeeming efficiencies (Article 101(3) TFEU)

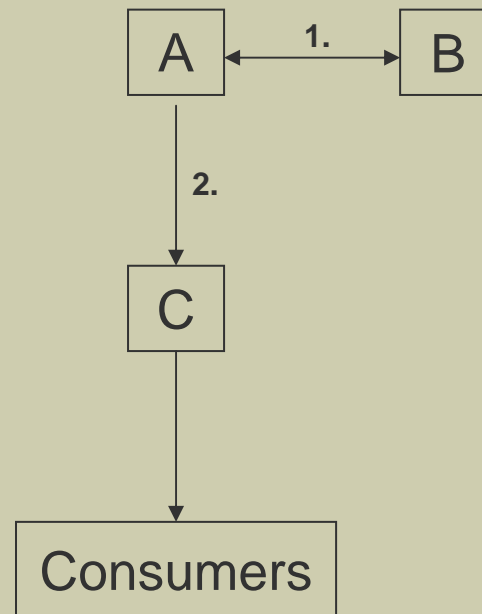
- Agreements that restrict competition can be authorized if they produce enough efficiencies
- 4 strict conditions: (i) contribution to improving the production or distribution of goods or to promoting technical or economic progress; (ii) allow consumers a fair share of the resulting benefit; (iii) do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (iv) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

# Illustrations

## 2 main categories of anticompetitive agreements/concerted practices

1. Horizontal agreements or concerted practices

2. Vertical agreements



# Horizontal agreements and concerted practices

- Coordination between undertakings at the same level of the commercial chain
- Greatest anticompetitive potential
- Certain joint ventures
- Cartels (*“the supreme evil of antitrust”*):
  - price-fixing, bid-rigging, market sharing, customer allocation, output limitation, agreement to exchange competitively sensitive information, etc.
  - Generally, no need to prove anticompetitive effects.

# Horizontal agreements and concerted practices

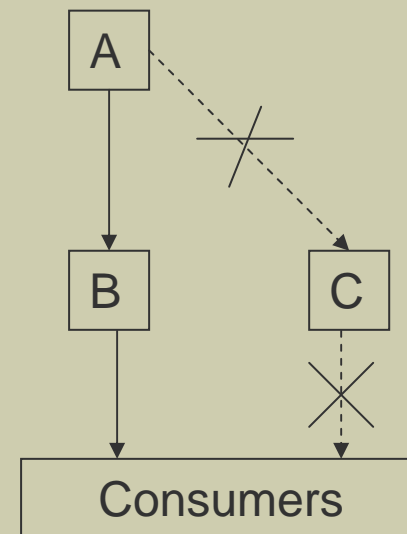
## Commission Decision of 2009 in *E.ON-GDF* (the Gas cartel)

1. Two undertakings: E.ON Ruhrgas and GDF (natural gas sector)
2. Coordination: agreement (two side letters) and concerted practices
3. Anticompetitive object and effect: market sharing
4. Clear effect on trade between Member States: Germany and France
5. No efficiencies

# Vertical agreements

- Coordination between undertakings at different levels of the commercial chain
- Particular importance for distribution agreements
- Lower anticompetitive potential – greater potential for efficiencies
- Example of territorial exclusivity:

May diminish intrabrand competition on the exclusive territory  
but may increase interbrand competition: creates incentives to invest in promotion of the product



# Vertical agreements

## Limitation of parallel imports – the *Nintendo Case* (2002)

1. Several undertakings: Nintendo (game consoles) and several distributors
2. Coordination: combination of agreements and concerted practices
3. Anticompetitive object and effect:
  - limitation of parallel imports
  - companies that resold the products abroad or to companies that would do so were sanctioned
4. Intra-EU parallel trade was reduced
5. No efficiencies

## Article 102 TFEU

Article 102 TFEU prohibits anticompetitive **unilateral** conduct by **dominant** companies

*“Any **abuse** by **one or more** undertakings of a **dominant position** within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may **affect trade** between Member States.”*

# Article 102 TFEU – 4 main elements (1)

- 1. Unilateral conduct by one (or more) undertakings**
- 2. Dominant position**
  - The prohibition only applies to undertakings holding a dominant position within the common market or a substantial part of it
  - Definition: economic power held for a period of time by an undertaking over customers and/or suppliers in a given market – Ability to raise prices without a significant loss of sale
  - Primary indicators: market shares (< 40%: dominant position unlikely unless small competitors) and barriers to entry
- 3. Conduct affects trade between Member States**

# Article 102 TFEU – 4 Main elements (2)

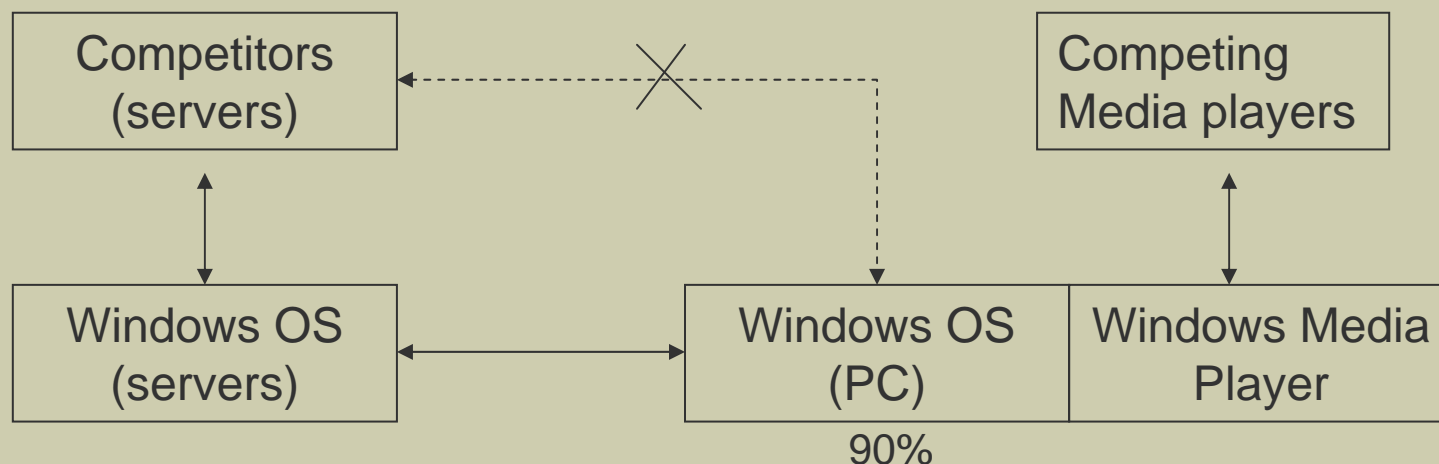
## 4. Abuse

- Article 102 TFEU does not prohibit the mere creation/possession of a dominant position: abuse is necessary
- Prohibits competition that is not “on the merits” without any objective justification
- Abuse is an objective concept: subjective intent is not required
- Special responsibility of dominant companies in markets where competition is limited
- Conduct which can constitute an abuse:
  - Pricing policies such as: (i) excessive pricing; (ii) predatory pricing; (iii) margin squeeze; (iv) discriminatory pricing; and (v) discount and rebate schemes
  - Exclusive contracts
  - Refusals to supply
  - Tying

# Illustration

## Microsoft (2004)

- One undertaking: Microsoft
- Dominant position: market for PC operating systems (around 90%)
- Abusive conduct:
  - refusal to provide interoperability information necessary for competitors to be able to effectively compete in the market for work group server operating systems
  - tying of Windows Media Player with the Windows PC operating system



## 3. Enforcement

# Outline

1. How does a competition case start?
2. Investigations
3. Fines and other sanctions

# How does a competition case start?

1. By a competition authority on the basis of general market surveillance
2. Complaint by a competitor or a customer before a competition authority or directly before a national court
3. In cartel cases only: whistle blowing

# In cartel cases only: Leniency programs

- Purpose: Immunity from, or a reduction of, fines to companies which give evidence of a cartel to the relevant competition authority
- Essential detection and investigation tool of the EC: Leniency was granted to one or more firms in 91% of the cases examined by the EC between 1998 and January 2006
- EC Leniency Notice
  - Full immunity to the “first in” with enough information for the EC (i) to take action against or (ii) establish an infringement
  - Reduction of fines of up to 50% to “second in” with “significant added value” information (lower reductions for “third in”, etc.)
- National Leniency Programs
  - All EU Member States, except for Malta and Slovenia
  - Alignment of rules

# Surprise inspections (“dawn raids”)

- Surprise on-site inspections from the Commission and/or national officials to collect evidence
- Includes documents, files, e-mails, personal agendas, hard-drives and on-the-spot interrogation of relevant personnel

# Highest fines in EU cartel cases

## Per case

Year	Case name	EUR*
2008	<i>Car glass</i>	1.383.896.000
2009	<i>Gas</i>	1.106.000.000
2007	<i>Elevators and escalators</i>	992.312.200
2001	<i>Vitamins</i>	790.515.000
2007	<i>Gas insulated switchgear</i>	750.712.500
2008	<i>Paraffin waxes</i>	676.011.400
2006	<i>Synthetic rubber</i>	519.050.000
2007	<i>Flat glass</i>	486.900.000
2002	<i>Plasterboard</i>	458.520.000
2006	<i>Hydrogen peroxide and perborate</i>	388.128.000

## Per undertaking

Year	Undertaking (Cartel)	EUR*
2008	Saint Gobain ( <i>Car Glass</i> )	<b>896.000.000</b>
2009	E.ON ( <i>Gas</i> )	553.000.000
2009	GDF Suez ( <i>Gas</i> )	553.000.000
2007	Thyssen Krup ( <i>Elevators &amp; Escalators</i> )	479.669.850
2001	F. Hoffmann-La Roche ( <i>Vitamins</i> )	462.000.000
2007	Siemens ( <i>Gas Insulated Switchgear</i> )	396.562.500
2008	Pilkington ( <i>Car Glass</i> )	370.000.000
2008	Sasol ( <i>Candle Waxes</i> )	318.200.000
2006	Eni ( <i>Synthetic Rubber</i> )	272.250.000
2002	Lafarge ( <i>Plasterboard</i> )	249.600.000

\* Amounts corrected following judgments of the European Courts

# Highest fines for abuses of a dominant position

<i>Year</i>	<i>Undertaking</i>	<i>EUR</i>
2009	Intel Corporation	1,060,000,000
2004	Microsoft Corporation	497,000,000
2007	Telefónica SA	151,875,000
1991	Tetra Pak	75,000,000
2006	Astra Zeneca	60,000,000
1999	P&O Nedlloyd	41,260,000*
1999	A.P. Miller-Maersk Line, Sea-Land Service, Inc.	27,500,000*
2006	Tomra Systems	24,000,000
2001	Deutsche Post AG	24,000,000

\* Fines based on  
infringements of Article  
101 TFEU and 102 TFEU

## Civil damages follow-on litigation

- US civil exposure for global cartels fined in the EU (treble damages)
- Civil damages claims are increasing across the EU (UK, Germany)
- The EC is considering legislation to facilitate civil damages claims for antitrust violations

# Criminal enforcement (cartel cases)

- Personal risk of managers organizing or tolerating cartel behaviour of their company
  - Individual criminal fines
  - Imprisonment
  - Extradition to countries with criminal liability
- The UK: at the forefront of EU criminal enforcement
  - Up to 5 years imprisonment and/or a fine, director disqualification
  - First convictions in June 2008 in *Marine hoses* cartel (3 individuals were sentenced to imprisonment for between 2.5 and 3 years, as well as disqualified to act as company directors for 5-7 years)
- Other Member States already provide for criminal sanctions for cartel behaviour

## Conclusion: main trends of EU antitrust policy

- Very harsh policy against cartels
- Increasing fines for both Article 101 and Article 102 TFUE
- Potentially more flexibility for vertical agreements
- Sectors under surveillance: energy, IT and pharmaceutical industry
- Focus on consumer harm