

# Competition Law

Attendance Code:

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## Introductory Remarks

- Objectives of competition law
  - consumer welfare & efficient allocation of resources
- Regulatory intervention
  - *Ex ante* (proactive) and *ex post* (reactive) regulation of the conduct of undertakings
  - regulatory procedures
- Individual rights
  - grounds for claim
    - stand-alone or following regulatory finding
    - on basis of national law or EC law breach
- Unique market features
  - ‘network effect’

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## EU Treaty Provisions

- Article 101: Anti-competitive agreements
  - Art. 101(3) exemptions
  - Art. 101(1) Merger Control Regulations
- Article 102: Abuse of dominant position
- Article 106
  - public undertakings and undertakings granted ‘special or exclusive rights’ providing ‘services of general economic interest’
- Article 107: State aid

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## Competition Authorities

- European Commission, Directorate General Competition
  - national authorities, e.g. Ofcom and Competition and Markets Authority
    - concurrent jurisdiction
  - no EU telecommunications authority!
- International
  - US Department of Justice
    - EU-USA Positive Comity Agreement 1998
  - International Competition Network
    - [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)
  - WTO General Agreement on Trade in Services
    - Article VIII (Monopolies and Exclusive Service Suppliers)
    - Article IX (Business Practices)

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## Regulatory Intervention

- Investigative powers & decisions
  - Articles 101 & 102
  - mergers, acquisitions & joint ventures
  - extraterritorial application
    - “affect trade between Member States...”
    - e.g. *Bellsouth/SBC* (2000)
- Remedies
  - behavioural (e.g. non-discrimination) and structural (e.g. divestiture)
- Punitive
  - fines
- Directly effective and enforceable
  - Directive 2014/104/EU ‘on certain rules governing actions for damages’

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## European Competition Law

- Commission Communications: ‘Soft law’
  - Guidelines on the application of EEC competition rules in the telecommunications sector (1991)
  - Notice on the application of the competition rules to access agreements in the telecommunications sector (1998)
    - substantive & procedural matters
    - enhance legal certainty for undertakings
  - Guidelines for market analysis and the assessment of significant market power (2018)
    - Commission Recommendation (2020/2245/EU) on Relevant Product and Service Markets

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## Regulatory Analysis

- Defining markets
  - product/service
    - customers: retail/wholesale, business/consumers
  - geographic
    - network coverage/reach; regulatory limitations
  - demand substitutability (‘user experience’), supply substitutability, potential competition
- Market impact
  - measured or anticipated (e.g. merger)
  - evidentiary basis for exercise of discretion
    - e.g. SSNIP test (Small but Significant Non-Transitory Increase in Price)

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## Article 101: Scope

- Agreements between undertaking, decisions by associations of undertakings or concerted practice
  - horizontal (e.g. price) & vertical (e.g. exclusive purchasing)
  - ‘joint dominance’
    - existence of economic links or oligopolistic interdependence
- May affect trade in the Community
- Object *or* effect restriction of competition
  - no requirement of intent
  - to an ‘appreciable extent’ (*de minimis*)

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## Article 101: Procedures I

- Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1, 4.1.2003)
  - no notification of agreements to Commission
  - shared competence
    - national authorities to enforce 101(1) and 102 in individual cases
    - application of art. 101(3) powers to national court authorities
  - obligation to apply arts. 101 and 102 where effect on trade between Member States
  - network of competition authorities

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## Article 101: Procedures II

- Article. 101(3) exemptions
  - individual
    - improve production or distribution of goods or promotes technical or economic progress
    - while allows consumers a fair share of the benefits;
    - and restrictions must be indispensable & must not enable elimination of competition
  - block
    - e.g. Commission Regulation (EU) 2023/1006 on the application of Article 101(3) 'to certain categories of research and development agreements
- Remedies
  - interim measures (Art. 8):
    - 'In cases of urgency due to the risk of serious and irreparable damage to competition...'
  - accepting commitments
  - imposing fines or periodic penalty payments

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## Article 101: Examples

- Price agreements
  - *France Telecom/Transpac's Data Transmission Activities* (1999)
  - *Unipart Group Ltd v O2* (2002)
- Co-operation agreements
  - e.g. *O2 UK Ltd/T-Mobile UK Network Sharing Agreement* (2003), Vodafone & Telefonica (2009); *O2 CZ/CETIN and T-Mobile CZ* (2022)
  - Non-compete: *Telefonica and Portugal Telecom* (January 2013): €79m, but CJEU annulled the fine (T-216/13, 28 June 2016)
- Standardisation
  - e.g. *X/Open Group*; OJ L 35/36, 6.2.1987
  - e.g. 3G Patent Platform (2002)
- Indispensable
  - e.g. *Iridium* [1997] OJ L 16/87, 18.12.1996

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## Article 101: Joint Ventures

*Case IV/35.337 (Atlas) & Case IV/35.617 Phoenix/Global One*

- market
  - 'customised packages of corporate telecommunications services'
  - 'packet-switched data communications services'
- competitors
  - telco alliances
  - IT companies (eg. GEIS)

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- contractual changes
  - Atlas as agent
  - non-integration prior to infrastructure liberalisation: exemption dates from 2nd infrastructure licence (BT case)
  - technical cooperation
  - sale of Info AG
- non-discrimination & cross-subsidization
  - accounting records
- restrictive provisions
  - anti-competition provision
  - obligation to obtain services from Atlas
  - exclusive distribution provisions

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## Article 101: Joint Ventures

*Case IV/35.738 (Uniworld) & Case IV/35.830 (Unisource)*

- UniSource NV: Dutch, Swiss, Spanish, Swedish PTTs
- AT&T undertaking, re: access to international facilities
- US government assurances, re: US originating calls
- Member States, re: compliance with liberalisation agenda

*Telecom Italia Mobil / Vodafone / INWIT (2020)*

- Passive sharing: Bundling towers
  - Competitor access in places with a population over 35k
- Active sharing: 2G, 4G & 5G and backhaul
  - Not most densely populated cities: 30% of population

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## Merger Control

- Merger Regulation 139/2004 (OJ L 24/1, 29.1.2004)
  - Merger Control Regulation, 4064/89 (1989)
  - Community dimension
    - aggregate world-wide turnover > €5000 million
    - aggregate Community-wide turnover > €250 million
  - Prior-notification
    - prior to implementation
    - procedure if concurrent jurisdiction: Commission/MS, MS/Commission
    - examination (25 days) & initiation of proceedings (90 days)
      - information requests and investigative powers
    - Commission decision

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## Merger Control II

- Remedies
  - imposition of conditions (structural) and obligations (behavioural)
    - divestment of assets
    - behavioural undertakings
    - other remedies e.g. *Telia/Telenor* (1998)
  - rejection of merger
    - *MSG Media Services GmbH* (1994)
    - *WorldCom / Sprint* (2000) but successful appeal to CFI (28 Sept. 2004)
    - *TeliaSonera & Telenor* (September 2015)
    - *Telefónica O2 and Hutchison's 3* (May 2016)
- Enforcement
  - Commission
  - private claims
    - e.g. *BT and Viag Interkom v Deutsche Telecom* [1998] 2 C.M.L.R. 114

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## Merger Decisions III

*WorldCom/MCI* (1999)

- Product market
  - ‘top level or “universal” Internet connectivity
  - over 50% of the market
    - an essential facility?
- Undertakings
  - divestment of MCI’s internet business (as a single unit)
    - C&W private action
  - guaranteed peering for 5 years
- Regulating Internet interconnection?

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## Merger Decisions IV

*Vodafone Airtouch/Mannesmann* (2000)

- ‘provision of advanced seamless pan-European mobile telecommunication services’
  - eg. location services
  - segmentation into network/service or business/individual customers?
- Mobile handsets & network equipment
  - global market?
- Undertakings
  - divestment of Orange
  - non-discriminatory provision of roaming tariff & wholesale services

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## Merger Decisions V

*Hutchinson & VimpelCom (M.7758)(2016)*

- In Italy – divestment of sufficient assets (spectrum & sites) to enable a new operator to enter the market

*Vodafone & Liberty Global (M.8864)(2019)*

- Cable business in Czech Republic, Germany, Hungary & Romania
- Telefónica as ‘remedy taker’ with access to the merged entity’s cable network in Germany

*Viasat & Inmarsat (M.10807)(2023)*

- Two-way satellite-based communication services: in-flight connectivity
- Viasat has 4 GEOs and Inmarsat has 15 GEOs

*Vodafone & Three (M.11308)(2023)*

- Mobile network operators: £15bn
- UK, Competition and Markets Authority: Phase 1 (Jan. 24), Phase 2 *Provisional Findings* (Sept. 24) & Remedies (Nov. 24)

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## Article 102: Abuse of Dominant Position

- Market power
  - dominance
    - “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors customers and ultimately of its consumers.”
  - joint dominance: ‘abuse by one or more undertakings’
    - France/Commission (Kali und Salz) C-68/94 and C-30/95
    - M.1838 BT/Esat (27.3.2000)

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## Article 102: Examples

- Refusal to supply
  - e.g. *COMP/39.525 – Telekomunikacja Polska* (2011)
- Exclusivity restrictions
  - e.g. *Broadcom (AT.40608)(2019)* re: systems-on-a-chip for TV set-top boxes & Internet modems (Interim measures)
- Predatory pricing: price below average cost (fixed/variable)
  - e.g. *Wanadoo Interactive* (2003), re: retail ADSL-Internet access services (€10.35m); *Qualcomm* (2018), re: LTE baseband chipset (€997m), but the CJEU set-aside decision in T-235/18 (15 June 2022)
- Margin squeeze
  - e.g. *Deutsche Telekom* (2003), re: wholesale access to local loop (fine: €12.6m); *Telefonica* (2007) re: broadband market (fine €151m); *Slovak Telekom & Deutsche Telekom* (2014) re: unfair terms on access to the local loop (fine €38.8m)
- Excessive pricing
  - e.g. mobile telephony investigation

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## 'Essential Facilities' doctrine I

- US Doctrine
  - *MCI Communication v. U.S* (1982)
    - “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”
  - *Verizon Communications Inc. v Trinko* (2004)
    - “indispensable requirement...is the unavailability of access”
    - should not be necessary if regulator exists who can compel
    - nature of disputes mean “difficult for antitrust courts to evaluate”
    - courts should not impose that which they can not ‘adequately or reasonably supervise’

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## 'Essential Facilities' doctrine II

- Commission analysis:
  - access is essential, sufficient capacity, owner fails, blocks or impedes a market, acceptance of non-discriminatory prices, terms & conditions, no objective justification for refusal
- EU case law
  - *Sea Containers v Stena Sealink* (1994), *Magill* (1995), *Bronner v Mediaprint* (1998), *IMS Health v NDC Health* (2004)
    - **But** none in the communications sector!
      - However, see *Slovak Telekom v Commission* (C-165/19), 25 March 2021: “the Commission was not required to demonstrate ‘indispensability’...”
- Application to the telecommunications sector?
  - call termination, incumbent network
- WTO Reference Paper

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## State Aid

- Article 107
  - “distorts competition by favouring certain undertakings or the production of certain goods”
    - e.g. preferential tax treatment, grant of a loan, pensions (e.g. OTE)
  - 90(3) exceptions, e.g. economic development
    - e.g. France: “Unlimited Mobile TV”
  - 106(2): ‘services of general economic interest’
- Commission investigations & decisions
  - France Telecom
    - €9bn loan - Commission investigation (OJ C 57/5, 12.3.2003)
    - Commission decision re: tax relief of €1bn
    - Infringement proceedings re: ‘telecoms tax’ for broadcasters
  - British Telecom
    - Pension guarantees (February 2009)

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## State Aid

- Guidelines on State aid for broadband networks (2022)
  - Simplify rules to assist roll-out of NGNs: ‘grey’ and ‘white’ areas
    - Spain: €680m to support roll-out of 5G in rural areas (15 June 2023)  
([https://competition-policy.ec.europa.eu/system/files/2023-10/stateaid\\_broadband\\_decisions\\_0.pdf](https://competition-policy.ec.europa.eu/system/files/2023-10/stateaid_broadband_decisions_0.pdf))
- *BT3G Limited v Secretary of State for Trade and Industry* (2001) EWCA Civ 1448
  - re: 3G auction process
- ‘Golden shares’ to veto certain corporate decisions
  - *Commission v United Kingdom* [2003] 2 C.M.L.R 19: breach of Art. 56
  - *Commission v Portugal* (C-171/08), 8 July 2010

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## Competition Law & Regulation

- Limitation of scope
  - e.g. *Telecom Corporation of New Zealand Ltd. v Clear Communications Ltd.*, 1 NZLR 1995, 385
- *Murder v ‘Chinese burns’*
- Legal certainty
  - case-based
- Non-economic policy objectives

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