

European Economic Policy

Topic 6. Competition Policy



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



- **Competition policy** may be required to *ensure markets work* – promote competitive structures, police anti-competitive behaviour.
- **In the EU, competition policy:**
 1. Helps prohibit anti-competitive agreements between companies.
 2. Anti-competitive behaviour by companies large enough to harm competition (individually or jointly).
 3. Vetting mergers for their consequences on competition.

- **EU competition policy differs from much of that policy found elsewhere in that:**
 1. Beyond competition it also *promotes market integration*.
 2. It focuses on both private *and* public (MS) distortions on competition (e.g.: state aid).
 3. It operates on a *multi-level* political system: both at the MS and EU levels. (From 2004, centralized policy was rendered more decentralized).

The rationale for competition policy

- First set of modern competition rules go back to the USA's Sherman Act (1890).
Concern over railroad, oil and financial “trusts” emerging in the USA – economic concentration of power.
- In Europe, in the early C20th, national competition rules sought to protect against socially and politically undesirable results of “unfair” competition.
Sometimes this took the form of sector-wide regulation.
- But, critically, *modern competition law came to the EU through US-occupied Germany and Japan after WWII (Americanization of Europe).*

- New anti-monopoly legislation to limit power of the financial-industrial interests which had been seen to have facilitated the war effort in both countries.
- Given the importance of coal and steel, anti-trust provisions introduced into the 1951 Paris Treaty (ECSC) (avoid economic concentration and war).
- Competition rules also introduced into the 1957 EEC Treaty for different reasons.
Here, the idea was to guarantee trade barriers (tariff and non-tariff) removed by governments would not be replaced by cartels.

- So competition rules were introduced addressed to “undertakings”.
- **Original purpose:** complement inter-state trade policy of reducing barriers and promoting integration.
- Since then, competition policy has grown and become more complex – promotes market integration and consumer interest more fully.
- Indeed competition has become so orientated to market integration that there has been criticism it does not always prioritise efficiency.
E. g.: “*Vertical agreements*”, Consten and Grundig (1966). The ECJ ruled in the contract infringed the cartel prohibition of the Treaty, though did this really restrict competition?

- Economic theory has become increasingly influential over the design of competition policy whilst economic influences have changed... starting with the US.
- This deeply influenced its development in the US and beyond
- Originally, competition policy focused on market structure and market behaviour (**Harvard School**).
- Later, focused on anti-trust, efficiency, price effects and self-policing market (**Chicago School**).
- **Game theory** also influences competition policy – problems of collusion, joint dominance in oligopolistic markets.

- Today, it is thought the dominant influence is the **post-Chicago School of competition policy + Ordoliberalism** (individuals need protection against government *and* private economic power)
- **Assumptions** behind today's competition policy:
 1. Market mechanisms are the most efficient instrument to set prices and allocate resources.
 2. But, markets can only work where competition exists.
 3. Perfect competition is unlikely to exist...rather, market imperfections or failures will be common.
 4. Firms will be motivated to collude and avoid competition.

- So, the role of competition policy is to *substitute* for competitive pressure.
- Restrictions to competition that harm the competitive process must be removed.
- But there is disagreement on what amounts to “restricting” competition meriting policy response.
- In the EU context, the key concept is maintaining “**effective**” or “**workable**” competition.
That is, the degree of competition necessary to require attaining treaty objectives.

The Role of Economics

- Effective competition means preventing harm to competition, not to particular competitors. E.g.: *Oscar Bronner v. Mediaprint 1998*.
- Not about protecting particular agents, rather, the overall system.
- Under Mario Monti, competition was primarily to promote efficiency and consumer welfare.
- **Effective competition is measured by:** market power, number of competitors, relative market share, degree of concentration, demand and supply substitution, barriers to entry and exit, potential competition.

- Though guided by economics, competition policy is encribed in law.
- Applies only to “*undertakings*” = every entity engaged in economic activity (i.e.: not non-profit making activities; not public functions; services for social purposes).
- Legislation is in the treaties and secondary regulation (directives, regulations, plus guidelines and notices...).
- Ultimate arbiter of rules.
E.g.: Airtours v. Commission (2002): **ECJ** ruled the Commission had not prepared sound economic reason to prove a proposed merger was anti-competitive.

- The **Commission** is responsible for implementing competition policy.
- Previously, parties had to notify the EC if they were to take potentially anti-competitive agreements.
- Now, this can occur through a complaint by an undertaking or a MS, an undertaking *“trying to come clean”*, or the EC can act on its own initiative.
- The EC has some power here: *“dawn raids”*, significant penalties and fines:
 - Nintendo 2002: territorial restriction - Euro 168 million.
 - Microsoft 2004: 497 million Euros lack of interoperability.
 - Intel 2009: 1 billion Euros exclusionary practices.

- **Modernisation.** 1 May 2004. All national judges and competition authorities have explicit power to apply the exemption provision of the cartel prohibition (previously they had to obtain this from the EC).

Competition: 3 major norms

- 1.** Prohibition of agreements and concerted practices among firms restricting competition.
- 2.** Prohibition of abuse of single firm or joint dominance.
- 3.** Obligation to submit mergers and acquisitions for clearance.

Plus the following rules:

- **Cartel prohibition** (usually more than 1 firm) (e.g.: Consten & Grundig).
- **Prohibition of abuse of dominant position** (e.g.: excessive or discriminatory pricing) (usually 1 firm) (Hoffman-La Roche).
- **Merger control:** pre-notification, vet prior to merger. Mergers above a particular size need approval (e.g.: Nestlé/Perrier).
- **Public undertakings:** competition applies to these *unless* this would damage provision of public services (SGI/SGEI)
- **State aid.**

- Asymmetry between human resources available and competition problems that exist.
- Exacerbated by enlargement.
- Overload, centralization and “burden of proof” on the Commission.
- **Modernisation** (from 2004):
 - More harmonization of EU rules at the national levels.
 - More pro-active Commission investigations.
 - More downward delegation of competition policy (sharing).
- E.g.: European Competition Network.
http://ec.europa.eu/competition/ecn/index_en.html

The public turn

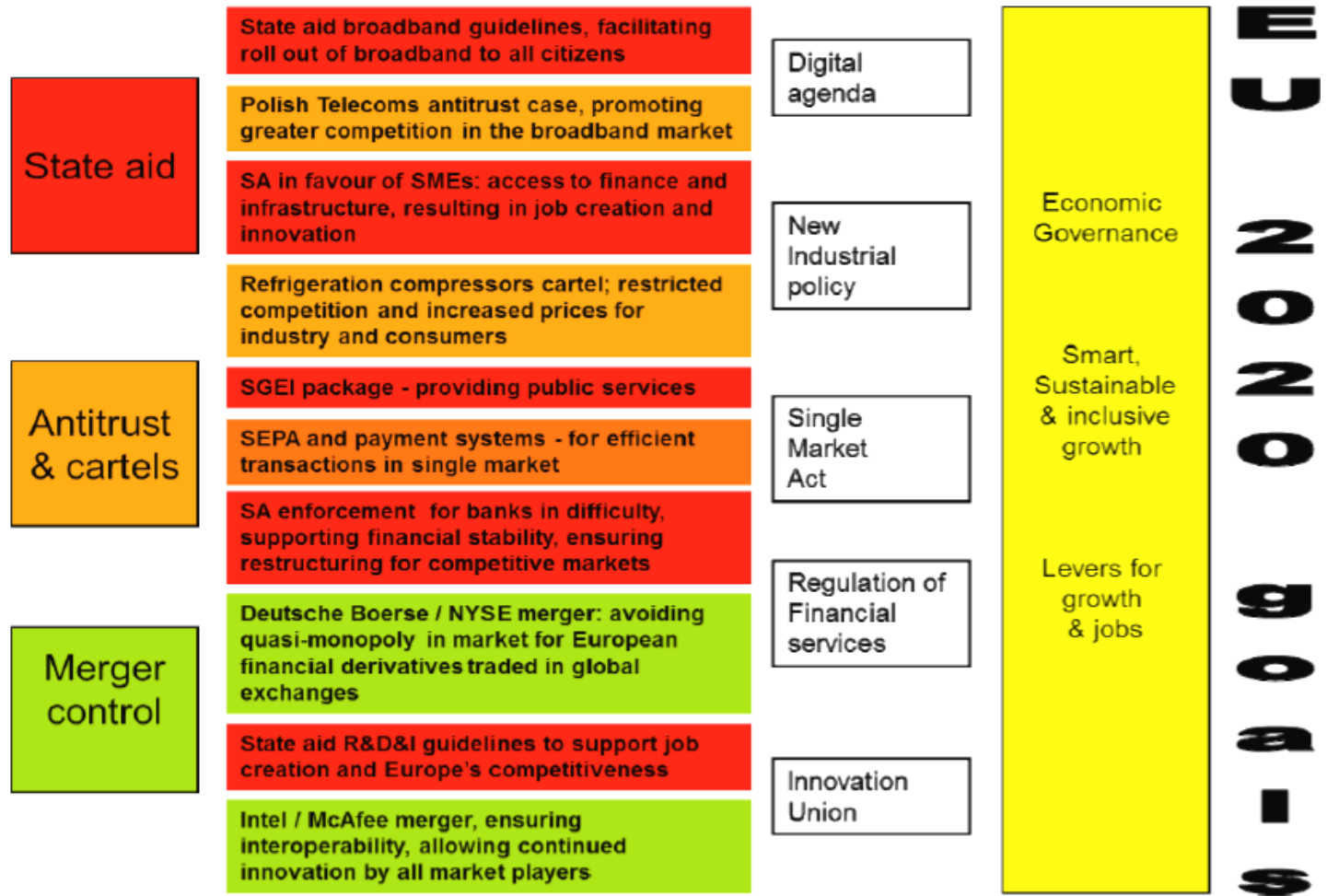
- First three decades: focus on private undertakings.
- 1980s and 1990s – extended to public undertakings also (early mobile licenses, port landing rights); state aid – *Altmark 2003*).

Competition policies of the European Commission

http://ec.europa.eu/competition/index_en.html

- **Key treaty articles:**
 - **101** anti-competitive agreements.
 - **102** abuse of dominant position.
 - **106** public undertakings and exclusive or special rights.
 - **107** state aid.

Competition policy and enforcement contributing to EU2020



Source: «Highlights of Competition Policy 2011». From EC (2012) [Report on Competition Policy](#).

- As competition policy matured, asymmetry between workload and capacity increased.
- Centralization: success or downfall?
- Modernization: downward delegation of much of competition policy “comitology”.
- From private to both private and public undertakings.
- From legal concerns about integration to economic logic.
- More “rationalization” (economic theory to ground decisions).