Introduction to European Business Law

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Module 4 (competition law)

A glossary of key terms and a summary of case notes from week 4

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These notes were prepared by Penny Parker for others who are taking this MOOC course, for personal private use only. Please feel free to comment or submit corrections to pennyparker@me.com.

"as efficient" competitor test – a hypothetical analysis the Commission uses to decide whether a company is abusing a dominant position in the market; basically they take a theoretical company operating at the same cost basis as the alleged abusive company; if the theoretical company would be forced to trade below their costs, then the conduct is judged to be abusive. I got this view of the test from a website called European Economic & Marketing Consultants: "The 'as-efficient-competitor' is a hypothetical competitor having the same costs as the dominant company. Foreclosure of an as-efficient-competitor means that the dominant company is pricing below its own costs. … Other effects need to be considered as well as including the existence of economies of scale and scope, learning curve effects or first mover advantages which may favour declining costs. The exact application of the as-efficient-competitor-test as well as the chosen cost benchmarks vary on a case-by case basis." The doctrine was applied in the **Post Danmark** case summarized below in the case notes for this module.

Abuse of a dominant position or abusive exclusionary conduct – these are practices prohibited by Article 102 TFEU and related case law. The way Article 102 has been interpreted by the courts and the Commission has been quite controversial. And it's still not entirely clear, either for lawyers or economists, how abuse should be interpreted. Article 102 has mainly been applied to what we call exclusionary abuses, while also being applicable in a few cases of what's called exploitative abuses, such as excessive pricing.

Exclusionary abuse is any conduct which impedes effective competition by excluding competitors. It has been applied predominantly in a quite formalistic way, focusing on the former conduct and drawing presumptions from that conduct, rather than actually analyzing the effects on the market. It has been said in some instances that Article 102 has been applied in order to protect competitors rather than to protect the competitive process for the benefit of consumers.

The definition of exclusionary abuses was laid down also in the **Hoffman-La Roche** case from 1979. From that case, the court and the EU courts has developed a difficult distinction between competition on the merits, which is allowed, and conduct that amount to abuse, where dominant firms may have special responsibilities for the competitive process to function.

These generally concern pricing strategies or deal strategies that block or exclude competitors from the relevant market.

The main exclusionary abuses which are prohibited are

- predatory pricing,
- exclusive dealing,
- some forms of discounts and rebates,
- tying one product to another,
- refusal to supply another firm.

Antitrust law -- essentially means the same as competition law; the antitrust term is more commonly used in the US

Appeals – Commission decisions on competition law can be appealed to the general court, and then to the Court of Justice. If the Commission takes a decision not to open the formal investigation procedure or takes a negative, conditional, or even positive final decision, the decision can be appealed to the general court of the EU. The court will make an assessment of the law as well as the facts, but will leave the assessment of complex economic assessments largely to the discretion of the Commission. An appeal can be brought by a member state or by a party concerned. There is ample case law on who may or may not be considered concerned. Beneficiaries, for instance, are generally considered to be concerned, while their competitors find themselves in a gray zone.

Article 101 TFEU – prohibits agreements, decisions, and concerted practices between different undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. This includes price fixing and dividing up markets. A key concept is that of an "undertaking" which can include any company form but also any more loosely formed group acting together in some form of economic activity. The Commission has also issued a guidance document explaining its priorities in enforcing article 101. Article 101(1) describes the elements of an anti-competitive practice. Article 101(2) makes any such practice void and illegal. Article 101(3) sets out some exceptions. See also "breach of article 101" below in this glossary.

Article 102 TFEU – deals with the unilateral conduct of companies with substantial market power, abuse of a dominant position. To establish an infringement of article 102 there are five cumulative elements which must be established: 1. There must be an undertaking, same as defined in article 101. 2. It can be either one or more undertakings, meaning that even if one of them doesn't have a dominant position, two or more could hold a collective dominant position and be subject to this article. 3. There needs to be an affect on inter member state trade. 4. It must be a dominant position, which has been hard for the Commission and courts to define and establish. And 5. There must be some form of abusive tactic, again something that the courts have had difficulty defining. See also the case summaries of the Hoffman La Roche, United Brands, Tomra, TeliaSonera, Intel, and Post Danmark cases below.

Article 101(3) exemption – even if an illegal activity is found to be present under article 101(1), it can be declared permissible if the activity falls under a Block Exemption or it satisfies the elements of article 101(3). These 4 conditions are cumulative, meaning all must apply to qualify for the exemption: 1. The agreement must contribute to improving the production or distribution of goods. 2. Consumers must receive a fair share of the resulting benefit. 3. It must not impose restrictions on others which are not indispensable to the attainment of these objectives. 4. It must not have the effect of eliminating competition in a substantial part of the products in question.

Breach of article 101 TFEU – to establish a breach of Article 101 there are 4 essential questions: 1. Is there an undertaking or association of undertakings involved in some anti-competitive behavior. 2. Is there an agreement or concerted practice between those entities. 3. Is there a potential or actual effect on trade. And 4. Does the behavior either by object or effect prevent or distort competition.

Cartel – a cartel is an agreement between competing firms to control prices or exclude entry of a new competitor in a market. They are the classic type of illegal activity that would be prohibited by a competition law provision such as article 101 of the TFEU.

Chains of substitution – this is a concept that came up in the Commission's guidance document on how to define a relevant market. The problem is that substitute or replacement products might not accurately define the relevant market. The Commission puts it this way in the guidance document:

"57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well." [Official Journal C 372, 09/12/1997 p.0005-0013]

Charter of Fundamental Rights – this came up in this week's materials in relation to the right of accused companies to have a hearing and evidence reviewed when it wishes to challenge a Commission finding on dominant position, abusive practice, etc.

Chicago school of competition analysis – this is one of the four main schools of competition analysis that led to competition law legislation in most states. The other three are the Harvard school, the Post-Chicago school, and Ordo liberalism. The Chicago school is apparently a more purely economic analysis which does not attempt to protect non-economic values like the Ordo liberalism approach does. The Ordo liberalism approach was the one that guided the creation of the competition law system in the European Union.

Communications power – this refers to one of the powers granted to the Commission after 2004 in the new rules contained in Regulation 1/2003, for enforcement of European Union competition rules. It essentially involves the activity of informal negotiations with a company that can lead to voluntary settlements and commitments from the company that are nonetheless legally binding.

Concentration – this refers to the market domination provisions of the new EU Merger Regulation (EUMR), Regulation 139/2004. The regulation declares as incompatible with the dominant market concentrations with the community dimension which could "significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position." A concentration is defined in article 3 as any situation where two or more undertakings merge or when one undertaking acquires control in another.

Concerted practice – this is a form of behavior that can be anti-competitive even if no express agreement was reached. It is as a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. For example in the

Bayer case (T-41/96) this concept centered around the existence of a concurrence of wills between at least two parties. The form in which that concurrence of will is manifested is unimportant, so long as it constitutes a faithful expression of a party's intention.

Conglomerated effect – this is another term used to describe the negative effect of some mergers which tend to consolidate or establish a dominant position in a market. A conglomerate merger is one that is neither strictly vertical or horizontal. The parties are not actual or potential competitors and they have no actual or potential customer-supplier relationship. The focus instead is on the significant degree of commonality in terms of buyers served (e.g., complementary products which might be more valuable to the buyer when consumed together).

Countervailing buyer power – this is one of the types of market responses that the Commission's enforcement guidance document identifies as relevant when looking at whether particular conduct is an abusive exclusionary conduct by a dominant undertaking (article 102 enforcement). 2009/C 45/02. As such it can be used as a defense in dominance cases. Buyer power is defined as the ability of one or more buyers, based on their economic importance in the market in question to obtain favorable purchasing terms from their suppliers. Buyer power is an important aspect in competition analysis, since powerful buyers may discipline the pricing policy of powerful sellers, thus creating a 'balance of power' on the market concerned. Countervailing buyer power can also be relevant in merger analysis. The Commission will consider to what extent customers will be in a position to counter the increase in market power that a merger would otherwise be likely to create. Three sources of countervailing buyer power are identified: 1. Immediately switch to other suppliers. 2. Credibly threaten to vertically integrate into the upstream market. 3. Sponsor an upstream expansion.

Cournot oligopoly – this is the theory that supposedly is the basis for the Harvard school of thought on competition analysis. It is an economic model used to describe an industry structure in which companies compete on the amount of output they will produce, which they decide on independently of each other and at the same time. It is named after Antoine Augustin Cournot (1801–1877).

Court review – it was important in this week's materials to recognize that the Commission's new found merger enforcement powers in Regulation 1/2003 are always still subject to court review. The courts' role in this is to review the Commission's decisions if requested by a party. Has the Commission acted within the confines of the law? Has the Commission respected the rights of defense of companies? Has the Commission imposed the correct level of fine or penalty on the undertakings? So while the Commission has vast powers of investigation, has great powers to impose fines or order commitments, this is not done in isolation. The courts act as a judicial handbrake on the powers of the Commission.

Cumulative – when conditions are cumulative it means that all of them must be satisfied to be eligible for the exemption or infringement referenced.

Cumulative elements of Article 102 -- To establish an infringement of article 102 there are five cumulative elements which must be established: 1. There must be an undertaking, same as defined in article 101. 2. It can be either one or more undertakings, meaning that even if one of them doesn't have a dominant position, two or more could hold a collective dominant position and be subject to this article. 3. There needs to be an affect on inter member state trade. 4. It must be a dominant position, which has been hard for the Commission and courts to define and establish. And 5. There must be some form of abusive tactic, again something that the courts have had difficulty defining. See also the case summaries of the Hoffman La Roche, United Brands, Tomra, TeliaSonera, Intel, and Post Danmark cases below.

Distortion -- A **distortion** is a departure from the most efficient allocation of economic resources in a market. In perfect competition with no externalities, there is zero distortion at market equilibrium of supply and demand where price equals marginal cost for each firm and product. Distortion of the competition in a market is one of the elements of article 101 which identifies the types of agreements, decisions and concerted practices which are illegal.

Distorts trade in object or effect – this refers to the 4th element in article 101 – "and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Agreements, decisions or concerted practices which have this object or effect, and meet the other elements of article 101, are void by the terms of article 102.

Dominant position -- Market dominance is a measure of the strength of a brand, product, service, or firm, relative to competitive offerings. There is often a geographic element to the competitive landscape. In defining market dominance, you must see to what extent a product, brand, or firm controls a product category in a given geographic area. In this week's materials, dominant position figured prominently in the discussion of article 102 TFEU, where a company with dominant market power is accused abusive practices that are excluding other competitors from the market. According to the **Hoffman-La Roche** decision (also summarized below in the case notes section of this document), dominant position factors include: large market share, big disparity between this company's share and the market shares of the next largest competitors, technological advantages, extensive and highly specialized sales network, no potential competition.

Dynamic efficiency -- this is a a term which refers to an economy that appropriately balances short run concerns (static efficiency) with concerns in the long run (focusing on encouraging research and development). This concept came up in the analysis of the objectives of competition law. From the lecture notes: Lately the pursuit of innovation and the idea of dynamic efficiency have become more attractive to lawyers, scholars, and competition authorities. In other words, should competition law pursue not only the goal of static efficiency (where there are low profits), but also innovation, increased production of new and improved products? And in that case how should competition law accommodate the goal of innovation?

Efficiency gains -- Normally measured by looking at the relationship between cost and earnings. If cost goes down and earnings are flat, or if cost is flat but earnings go up, the company has made gains in efficiency. In completion law, efficiency gains can often be expected from greater accumulation of market power and economies of scale, and can help to explain in some cases why a dominant power has been able to operate at lower prices than its competitors. In this sense, efficiency gains become an excuse or defense of practices that might otherwise be viewed as abusive. Efficiency gains are one of four cumulative conditions that must be satisfied to qualify for the exemption under article 101(3). The other three conditions are indispensability, fair share for consumers and no elimination of competition.

EU dimension – This is an important concept in the EUMR, the EU Merger Regulation 1/2003. EU Dimension is defined in Article 1(2)(3)) – ensures that mergers creating structural changes with impact beyond the national borders of their member states are appraised by the Commission under the EUMR. It's a quantitative test. Based on the turnover of the undertakings themselves. In other words, concentrations with an EU dimension are scrutinized at the EU level. One stop shop. Sole jurisdiction. A concentration without this EU dimension occurs on the national level, or elsewhere if the merger occurs somewhere else. Or if it is a small merger, no appraisal is required. In that case the companies can actually merge or purchase each other without having to notify any competition authority.

EU merger regulation (EUMR) – this refers to the "new" EU Merger Regulation (EUMR) adopted in 2004, Regulation 139/2004. It consolidates the prior rules and sets out broader powers of the Commission to investigate and decide on proposed mergers, and also carves out a distinct role for the national competition authorities and a procedure for coordinating between the two levels.

Exclusionary abuse, exclusionary conduct -- Exclusionary abuse is any conduct which impedes effective competition by excluding competitors. It has been applied predominantly in a quite formalistic way, focusing on the former conduct and drawing presumptions from that conduct, rather than actually analyzing the effects on the market. It has been said in some instances that Article 102 has been applied in order to protect competitors rather than to protect the competitive process for the benefit of consumers.

The definition of exclusionary abuses was laid down also in the Hoffman-La Roche case from 1979. From that case, EU courts have developed a difficult distinction between competition on the merits, which is allowed, and conduct that amounts to abuse, where dominant firms may have special responsibilities for the competitive process to function. These generally concern pricing strategies or deal strategies that block or exclude competitors from the relevant market.

The main exclusionary abuses which are prohibited are

- predatory pricing,
- exclusive dealing,
- some forms of discounts and rebates,
- tying one product to another,
- refusal to supply another firm.

Failing firm exemption – this is a permitted exception to the rule against permitting mergers which may concentrate power. It is part of the EUMR, Regulation 139/2004. This applies when one of the merged firms is in danger of exiting and failing in the market. If this applies the merger may be allowed so as to not destroy the assets of the failing firm.

Fair share for consumers – this is one of the four conditions in article 101(3) that a company must satisfy if it is to qualify for the exemption against anti-competitive practices that is specified in article 101(1). The other three are efficiency gains, indispensability and no elimination of competition. The practice must allow consumers a fair share of the resulting benefit.

In a book I found at Google books, Christopher Townley, Article 81 EC and Public Policy (2009), the following was said about this requirement: "This provision raises three key issues: what is a benefit? How much of this consumers should get; and the definition of consumer. ... In relation to the definition of benefit, the Commission now focuses on economic benefits. However, there is widespread agreement that non-economic benefits are also relevant, although only economic benefits are normally considered. … The second issue is, how much of the resulting benefit consumers should get. The Treaty does not define a fair share either. The Commission has said: 'The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under article [101(1].' Even this is not obvious, one could argue that where, for example, an agreement would generate considerable environmental benefits, for society as a whole, it is fair that those that consume pay extra to achieve this. Whatever is ultimately decided, it is hard to produce a precise definition in the abstract and the decision-maker has a lot of discretion."

Finding of non-applicability – this refers to one of the powers the Commission has under Regulation 1/2003, in the enforcement of articles 101 and 102 TFEU. Under this provision the Commission can make a decision finding that articles 101 and 102, are simply inapplicable. Here the Commission has a wide array of reasons for which it may make such a decision. It could be within the public interest. It could be based very specifically on the facts of a particular case. It could well be that the conditions of article 101 are not met. Or, that the Commission is convinced that articles 101(3) are not applicable.

Geographic dimension – the definition of a relevant market includes both a product and geographic dimension. In a preliminary analysis, the Commission attempts to define the product market by investigating whether product A and product B belong to the same market. It also tries to determine the geographic market by producing an overview of the breakdown of the market shares held by the parties in question and by their competitors, the prices charged and any price differentials. In the Commission's notice on the definition of relevant market for Community competition law (Official Journal C 372 of 9.12.1997) it describes the geographic dimension this way: 'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.

Harvard school of competition analysis -- this is one of the four main schools of competition analysis that led to competition law legislation in most states. The other three are the Chicago school, the Post-Chicago school, and Ordo liberalism. The Harvard school is a more formalistic, rigid structure approach, based on the Cournot theory of oligopoly, with somewhat exaggerated notions about barriers and impediments to entry in the market. It is apparently a more rigid, non-economic analysis which does not attempt to protect non-economic values like the Ordo liberalism approach does. The Ordo liberalism approach was the one that guided the creation of the competition law system in the European Union.

Horizontal mergers – these are mergers of competitors. They are addressed in the EU Merger Regulation, 139/2004. Horizontal mergers between competitors reduce the numbers of players on the market and increase the market share of the post-merged firm. They may enable that firm to exercise market power, either individually or collectively for a collusion of coordination with the other firms operating on the same market.

Market Power is initially evaluated based on

1. define the relevant market
2. evaluate the market shares of the concerned undertaking
3. new tests being developed, the upward pricing pressure test (UPP)
4. check coordinated and non-coordinated anticompetitive effects

The UPP test implies that the merging parties effect on each other is analyzed in reference to setting prices post-merger. The offices also look at other aspects of the mergers. For example, will the merged firm be able to coordinated or create non-coordinated effect?

Indispensability – this is one of the four cumulative conditions that must be satisfied to qualify for the exemption from anti-competitive practices in article 101(3). The agreement must not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives. The other three conditions are efficiency gains, fair share for consumers, and no elimination of competition. These conditions are also addressed in the guidelines on application of Article 81(3) (Official Journal C 101 , 27/04/2004 P. 0097 – 0118) which was one of our recommended reading materials this week.

Innovation – the need to better protect innovation was raised this week in connection with EU competition policy and in week 6 on EU tax policy. From the lecture notes on competition: Lately the pursuit of innovation and the idea of dynamic efficiency have become more attractive to lawyers, scholars, and competition authorities. In other words, should competition law pursue not only the goal of static efficiency (where there are low profits), but also innovation, increased production of new and improved products? And in that case how should competition law accommodate the goal of innovation?

Inspection powers of the Commission – these are part of the expanded powers now possible for the Commission under the competition law procedure, Regulation 1/2003.

From the lecture notes on inspections: Perhaps the most spoken about power of the Commission is their ability to conduct inspections. Well what does this mean? Well it means that the Commission can conduct, what they deem to be any necessary inspection of any undertaking or association of undertakings, and more importantly these companies are required to submit to such inspections. So this means in practical terms that the Commission is entitled to enter the premises, the land or any means of transport, of undertakings and associations of undertakings, including the homes of directors, managers, or other staff members. Of course, they can only do so in conjunction with national law, and if a reasonable suspicion exists, that books or other records related to the business and the subject matter of the inspection might be held there.

The Commission is entitled to examine books, other records, to take copies or extracts of books or records, to seal up business premises, for later inspection, to mirror computers and hard drives, servers and to take that information back to the Commission and to go through it as part of their investigations. It doesn't mean that the Commission can simply knock on your door and come in any day they want. They have to exercise their power in accordance with the rights of defense, with this regulation. They have to have written authorization specifying the subject matter, and the purpose of the inspection, and the possible penalties of non-compliance.

The European competition authority also works very closely with national competition authorities. And it may well be that national competition authorities act on behalf of the Commission in carrying out these information gathering investigative duties.

Investigation powers of the Commission -- these are part of the expanded powers now possible for the Commission under the competition law procedure, Regulation 1/2003. From the lecture notes: The Commission has a wide range of powers of investigation. They can conduct sector inquiries. So, they could choose a particular sector, such as the pharmaceutical sector. Where they find that the trade or the trend of trade between member states, suggests that there could be circumstances that lead to an anti competitive or a distorted competition on that particular market, they can request information. They may, by request or by decision, ask undertakings and associations of undertakings to provide them with information that the Commission feels is necessary for them to fulfill their duties and to carry out their investigation, under this regulation.

Market power – market power is important in evaluating potential mergers. Horizontal mergers between competitors reduce the numbers of players on the market and increase the market share of the post-merged firm. They may enable that firm to exercise market power, either individually or collectively for a collusion of coordination with the other firms operating on the same market. Market Power is initially evaluated based on 1. define the relevant market. 2. evaluate the market shares of the concerned undertaking. 3. new tests being developed, the upward pricing pressure test (UPP). And 4. check coordinated and non-coordinated anticompetitive effects

Market share – the measurement of market share is addressed in the guidance document on relevant market. It is important in assessing dominance. From the lecture notes: And the case law seemed to establish that once an undertaking reached 50% of the market or a 50% market share, there's something akin to a presumption of dominance. However as I stated before, dominant firms are allowed to compete and EU law does not prohibit dominant position as such.

Merger, grounds for rejecting – these grounds are specified in the EU Merger Regulation, 139/2004. The regulation declares as incompatible with the dominant market concentrations with the community dimension which could "significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."

Non-horizontal mergers – mergers between companies that are not necessarily competitors to one another, but have either a vertical relationship (potential customer-supplier relationship) or other characteristics which might lead to greater market power (e.g., a conglomerate merger where the products of each company might be combined and sold to customers, as a greater value to the buyer when consumed together). Non-horizontal mergers may in certain cases cause competitive concerns, but usually they cause positive efficiencies. Nonetheless, the Commission is concerned that where one of the merged parties has market power vertically, the merger may actually cause foreclosure or even coordination. The analysis conducted by the Commission also takes into consideration the likely counteraction by customers and suppliers to the proposed mergers, such as what is called countervailing buyer power – will the buyers be able to fend off any price hikes created by the merged firm? Efficiencies created by the merged firm will be taken into account – these synergies may offset any anti-competitive consequences.

Object or effect -- this refers to the 4th element in article 101 – "and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Agreements, decisions or concerted practices which have this object or effect, and meet the other elements of article 101, are void by the terms of article 102. The wording of the article 101 itself, doesn't make clear what we mean by object or effect. But the case law has in some ways tried to illuminate what we mean by these particular notions. I should point out that these are alternative and not cumulative requirements for the finding of an infringement of Article 101. From the lecture notes: when we are speaking of the idea of distorting competition by object, we see, in the case of GlaxoSmithKline services, the court said that in order to decide whether an agreement restricts by object, regard must be had inter alia to the content of its provisions. We need to really look at the agreement. We need to establish the objectives that the agreement seeks to attain, and the economic and legal context, of which it forms a part. According to the court, in T-Mobile Netherlands, it need not cause an anti-competitive effect. It need only potentially distort competition on the market. The concept of effect on the other hand, applies where, from the agreement, it does not have the object of the restriction of competition. In other words it's not clear from the agreement that the intention of the parties is to restrict competition. Here it is a little bit more difficult to establish whether or not there has been an effect on the market. And this requires a higher burden of proof by the Commission to bring before the courts and to bring the evidence, to illustrate the actual effect that the anti competitive behavior or agreement has had, on the relevant market.

Ordo liberalism school of competition analysis -- this is one of the four main schools of competition analysis that led to competition law legislation in most states. The other three are the Harvard school, the Chicago school, and the Post-Chicago school. The Ordo liberalism approach is less economic-based and more aimed to protect non-economic values like welfare and unemployment insurance. Ordoliberalism sees a vital role for the state, in ensuring that markets stay close to some notion of an ideal market. In particular, ordoliberals believe that without a strong government powerful private interests would undermine competition. The Ordo liberalism approach was the one that guided the creation of the competition law system in the European Union. From the lecture: But this way of thinking is undergoing a process of change too. Lately the pursuit of innovation and the idea of dynamic efficiency have become more attractive to lawyers, scholars, and competition authorities. In other words, should competition law pursue not only the goal of static efficiency (where there are low profits), but also innovation, increased production of new and improved products? And in that case how should competition law accommodate the goal of innovation?

Penalties – penalties can be substantial under both the anti-competition and abusive conduct provisions. From the lecture notes anti-competition: However, once the investigation is all done and a decision is taken, and if such a decision means that the Commission is of the view that an undertaking, or an association of undertakings has indeed breached European Union competition law, one of the biggest penalties that the Commission can impose are financial fines. And these can be imposed on undertakings to a total not exceeding 10% of their total turnover realized in the preceding business year. That could be quite substantial amounts. The fine acts as a serious detriment to breaching Article 101 and 102 of the TFEU.

Phase II investigation – this describes the additional investigation that may be required if the Commission determines that a merger proposal requires more than the standard investigation of 25 days. A Phase II investigation follows a rigid step by step procedure and should normally not exceed 90 working days.

Post-Chicago school of competition analysis -- this is one of the four main schools of competition analysis that led to competition law legislation in most states. The other three are the Harvard school, the Chicago school, and Ordo liberalism. The post-Chicago school builds on the economic analysis of the Chicago school and focuses on sophisticated, but stylized theoretical models, producing possibility theorems that largely eschew empirical testing. It does not attempt to protect non-economic values like the Ordo liberalism approach does. The Ordo liberalism approach was the one that guided the creation of the competition law system in the European Union.

Pre-merger notification system – this system is described in the EUMR, now consolidated as Regulation 39/2004. It requires companies who intend to acquire or merge with other companies to first notify the Commission if certain financial thresholds are triggered (small transactions are exempt). The notice must normally be submitted at least 90 days before the proposed merger. The merger must not go forward until the Commission has approved it.

Prima facie – a Latin term meaning “on first encounter” or “at first sight”. It was used in the **Airtours** case in our reading materials this week to explain that the Commission had adequately established a convincing initial argument that competition law has been breached. Now it is up to the defendant to prove the Commission was wrong.

Product market – the product market is one of two elements that go into the definition of a relevant market. The other is the geographical dimension. From the Commission’s notice on the definition of a relevant market (Official Journal C 372 of 9.12.1997): 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. (Article 7)

Regulation 1/2003 – sets out the investigative and decision-making powers of the Commission when investigating potential anti-competitive activities. Article 4 of the regulation, 1/2003, provides that “for the purpose of applying Articles 101 and 102 the Commission shall have the powers provided for by the Regulation.” In other words, Article 4 allows the remaining articles of the Regulation to come alive for the Commission. And what we see in the Regulation, very briefly, is that between Articles 7 and 10 the types of decisions that the Commission is empowered to adopt are set out. It is these provisions, and the powers of investigation vested in the Commission under articles 18 to 21, that are really the drivers enabling the Commission to effectively enforce European Union competition rules.

Relevant market – this is defined in Commission notice on the definition of **relevant market** for the purposes of Community competition law [Official Journal C 372 of 9.12.1997]. It includes both the concept of a product market and a geographic market.

SSNIP test – this refers to a small but significant non-transitory increase in price (SSNIP). It is a measure of dominance for purposes of evaluating violations of article 102. From Wikipedia: In competition law, before deciding whether companies have significant market power which would justify government intervention, the test of **small but significant and non-transitory increase in price** (SSNIP) is used to define the relevant market in a consistent way. It is an alternative to ad hoc determination of the relevant market by arguments about product similarity. The SSNIP test is crucial in competition law cases accusing abuse of dominance and in approving or blocking mergers.

Competition regulating authorities and other actuators of anti-trust law intend to prevent market failure caused by cartel, oligopoly, monopoly, or other forms of market dominance.

Standard investigation – this refers to the type of investigation customarily used by the Commission when reviewing a proposal by companies to merge. The investigation should not exceed 25 working days. If more investigation is needed, a Phase II investigation is ordered.

Static efficiency – static efficiency focuses on minimizing profits in the current market through strong competition. It is concerned with the most efficient combination of resources at a given point in time. Dynamic efficiency, by contrast attempts to balance short term static efficiency with long term goals of innovation and increased production of new and improved products. Most competition laws today are focused on static efficiency, but some tendencies toward dynamic efficiencies are beginning to be discussed. Economists have sought to evaluate which is most important static or dynamic efficiency. Traditionally neo-classical economics has placed greater stress on static efficiency to the detriment of dynamic factors.

Substitution, substitutability – this is a concept important to the determination of the relevant product market in an assessment of market power and market concentration. Questions typically asked include -- Is there substitutability of the product? Can a consumer simply buy another product? How narrow is the market? This issue is also discussed in the Commissions notice on the definition of relevant market for the purposes of Community competition law [Official Journal C 372 of 9.12.1997], which was part of the recommended reading in lecture 1.

Undertaking – this concept is fundamental to the interpretation of articles 101 and 102 on competition law control and dominant market positions. But the treaty itself does not give a definition, so we need to turn to case law. In the first of these cases, the case of Hofner & Elser v. Macrotron GmbH (1991), we see that the court stated that the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed. In other words, we have a very broad definition of what amounts to an undertaking. But in Pavlov, the court added to this by stating that it also includes any activity consisting in the offering of goods or services on a given market. These are all the economic activities for the purposes of being an undertaking. And finally, so as not to labor the point, in the case of Wouters, here we see the court saying that the competition rules do not apply to activity which, by its nature, its aim, and the rules to which it is subject do not belong to the sphere of economic activity, or which is connected with the exercise of the powers of the public authority. Almost the reverse, here we were looking at those undertakings, which are unlikely to fall within the scope of Article 101. And we can see here, that, that it generally means public authorities.

UPP test -- the upward pricing pressure test (UPP). This is one of the criteria for evaluating market power under the merger regulation, 139/2004. The UPP test implies that the merging parties' effect on each other is analyzed in reference to setting prices post-merger.

Vertical mergers – see non-horizontal mergers

Welfare inefficiency – this is the idea that competition law policy should be strictly focused on generating the best competitive efficiencies. It should not strive to protect non-economic goals like social welfare. The belief that competition among undertakings produces the best outcome for society is based on economic theory that employs models as perfect competition, monopoly, and the concept of welfare inefficiencies.

CASE SUMMARIES FROM THIS MODULE

Case law – mergers

- T-342/99 – **Airtours v. Commission** [2002] ECR II-2585. 41 pages. This was an application for annulment to reverse the Court's 2000 judgment deciding that the proposed merger of Airtours and First Choice would be a concentration which was incompatible with the common market and the EEA Agreement. Airtours, a UK tour and package holidays operator, announced in April 1999 its intention to acquire all of the shares in the UK tour operator, First Choice, which was one of its competitors. A pre-merger notice was also filed with the Commission. The Commission decided the case presented serious concerns on competition and initiated the investigation procedure under Article 6(1)(c) of Regulation 4064/89. A statement of objections was sent to Airtours 30 days later, per Article 18, in which the Commission set out the reasons why it took the view, prima facie, that the proposed merger would give rise to a collective dominant position in the UK short-haul foreign package holiday market. Airtours replied in 3 weeks. A hearing was held a week later. Three months later Airtours submitted a set of undertakings per Article 8(2) of the Regulation in order to allay the competition concerns which had been identified. The Advisory Committee met 2 days later and delivered its opinion. Another meeting was held and Airtours responded with a revised set of undertakings. The Commission issued its final decision a week later, declaring the merger incompatible with the common market and the operation of the EEA on the ground that it would create a collective dominant position in the UK market for short-haul foreign package holidays, as a result of which competition would be significantly impeded in the common market. The Commission stated that the undertakings initially proposed by Airtours would not prevent the creation of a collective dominant position and that the undertakings put forward a week later were submitted too late to be considered at that stage in the procedure. Airtours then appealed to this court (the Court of First Instance, now called the General Court).

  Airtours had 4 arguments. 1. Manifest errors in the definition of relevant market. 2. Breach of the principle of legal certainty because the Commission had applied a new and incorrect definition of collective dominance in its assessment. 3. Infringement of Article 2 of EUMR in finding that the transaction would create a collective dominant position. 4. Infringement of Article 8(2) of EUMR and breach of the principle of proportionality because the Commission did not accept the latest undertakings that Airtours had submitted.

  1. First on the question of manifest errors in defining the relevant market, the Court concludes that the Commission's decision to narrowly define the relevant market to be only short-haul trips was appropriate and was not in error. "The Commission found that there was a difference of over 100% between the average brochure price of long-haul package holidays for the 1998 summer season ad that of short-haul packages. It also considered the question comparing similar packages in Florida and Spain and found that the latter cost on average about half the price of the former. A similar comparison between Florida and Greece or the Canaries gave broadly equivalent results .. The decision gives detailed examples of price comparisons between certain short and long-haul tourist destinations offered in the Airtours brochure, which show that significant price differentials exist between the two kinds of destination." … "The Commission devoted a significant part of the Decision (paragraphs 5 to 28) to explaining why it considered the relevant market to be limited to the market for short-haul package holidays. The Decision thus discloses, in a clear and unequivocal fashion, the Commission's reasoning relating to the definition of the relevant market, in such a way as to enable the Community Courts to exercise their power of review and the persons concerned to be aware of the reasons for the measure in order to defend their rights…"

2. Second, on the claim that breach of legal certainty because a new and incorrect definitional scheme of "collective dominance" was used, the Court concludes that this argument essentially merges into claim 3 and decides to address it there. They are not in the business of second-guessing whether the Commission correctly arrived at its findings of fact – only whether the findings of fact were properly applied to the law.

3. On the third point, the Court concludes that the Commission failed to adequately take into account the level of competition before the merger, claiming it didn't need to do so since its finding was that the collective dominance formed after the merger would create anti-competitive effects. The Court disagrees and says that the level of competition both before and after the merger were relevant. It also disagrees with several of the conclusions the Commission draws from the current market tendencies, including the phenomenon of cautious capacity planning that all of the large operators were observing. For example, this was quoted from an outside report in evidence (the MMC report): "The travel trade has been far from static over the last ten years and the picture continues to change, with a trend towards more vertical integration. Of the major participants who featured in our 1986 investigation into foreign package holidays, only Thomson has retained a prominent position. We have received a great deal of evidence to the effect that competition in the trade is strong and we broadly agree with this view. While concentration has increased over the past five years, it is not at a particularly high level. Profits are not excessive taken year on year. Players come and go. There are no significant barriers to entering either the tour operator or the travel agent market." The Commission argues the market has changed since the MMC report was issued; the court doesn't agree – it hasn't changed that much. [The judgement goes on for several more pages, refuting the Commission's arguments. I've not tried to capture them all here.]

4. On the 4th point, the Court concludes it is unnecessary to rule on it since the decision on point 3 makes it moot.

5. The court's final conclusion: "In the light of all of the foregoing, the Court concludes that the [Commission's] Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market."

- T-210/01 – **General Electric v. Commission** [2005] ECR II-5575 [76 pages in html format] GE wanted to acquire Honeywell. Both companies were active in aeronautical markets. They notified the Commission of the merger pursuant to article 4 of Regulation 4064/89. The Commission did not accept the merger and submitted a statement of objections. The companies replied. A hearing was held. Both companies jointly proposed commitments to render the merger acceptable to the Commission. The Commission rejected the merger proposal and claimed it would be incompatible with the common market and EEA Agreement. The decision was then appealed.

  According to the Commission GE was already in a dominant position in the world market for jet engines for large commercial aircraft. Its strong market position, combined with the commercial leverage represented by its financial strength and vertical integration into aircraft leasing were among the factors that led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell was already the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters, in particular for large commercial jet aircraft engines. The combination of the two companies' activities would have resulted in the creation or strengthening of dominant positions on a number of markets. Including on account of the vertical effects of the merger resulting from the integration of GE's activity as a manufacturer of those engines with Honeywell's activity as a manufacturer of starters for those engines. Adverse competitive effects would include "share shifting" – extending dominance into more markets, and "bundling – pure, technical and mixed" through offers incorporating engines and starters in the same proposal.

The Court upheld the Commission's decision, although acknowledging some errors in some findings that were not essential for the final decision:

"It must be held in the context of the present proceedings that the Commission validly found in the contested decision that following the merger the applicant's pre-existing dominant position on the market for jet engines for large regional aircraft would be strengthened and that dominant positions would be created for the merged entity on the markets for engines for corporate jet aircraft and for small marine gas turbines (see, respectively, paragraphs 489 et seq., 566 et seq. and 587 et seq. above). The contested decision also establishes that on each of those markets the creation or strengthening of a dominant position would have resulted in effective competition being significantly impeded in the common market. Furthermore, none of those conclusions is affected by the complaints of a procedural nature submitted by the applicant in the present case (paragraphs 621 to 731 above).

On the other hand, although the Commission validly held in the contested decision that the applicant was in a dominant position, prior to the merger, on the market for jet engines for large commercial aircraft, it has not sufficiently established that dominant positions would be created or strengthened for the merged entity owing to (i) the vertical overlap between Honeywell's engine starters and the applicant's jet engines for large commercial aircraft, (ii) the combination of Honeywell's avionics and non-avionics products and the financial and commercial strength of the GE group or (iii) the possibility of bundling the sale of the applicant's engines with Honeywell's avionics and non-avionics products (see, respectively, paragraphs 286 et seq., 325 et seq. and 399 et seq. above).

The Court holds in this regard that a decision finding a notified concentration to be incompatible with the common market is not to be annulled on the ground that the applicant has established the existence of one or more errors vitiating the analysis adopted in relation to one or more markets, in circumstances where it is nevertheless clear from the same decision that, in relation to one or more other markets, the notified concentration satisfied the criteria under Article 2(3) of Regulation No 4064/89 for declaring it incompatible with the common market (see, inter alia, paragraphs 45 to 48 above). Accordingly, since the Commission validly found in the contested decision that those criteria were satisfied in relation to three separate markets, namely the market for jet engines for large regional aircraft, the market for corporate jet aircraft engines and the market for small marine gas turbines, the contested decision should not be annulled in the present case."

Case law: application of article 102 TFEU

- The definition of "dominant position" and "exclusionary abuse"
  - C-85/76 – **Hoffman-La Roche (1979). 98 pages in HTML format.** The definition of exclusionary abuses was laid down in this case. From that case, the court and the EU courts has developed a difficult distinction between competition on the merits, which is allowed, and conduct that amounts to abuse, where dominant firms may have special

responsibilities for the competitive process to function. The Commission had decided that Hoffmann-La Roche had committed an infringement of Article 86 of the Treaty "by concluding agreements which contain an obligation upon purchasers, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements exclusively, or in preference, from Hoffmann-La Roche." The decision concerns 26 agreements concluded by Roche with 22 named undertakings engaged in the production and/or sale of vitamins in the Common Market for use either in the pharmaceutical industry (25%) or for food (15%) or as an additive in animal feed (60%). Roche is the world's largest manufacturer of bulk vitamins. Based on turnover of various manufacturers, Roche in the European Common Market has at least a 47% market share in Vitamin A (the next largest has slightly more than half this percentage), 86% market share of Vitamin B2, 64% market share in Vitamin B3, 95% in Vitamin B6, 68% Vitamin C, etc. The decision also mentions Roche's technological lead over its competitors because of its pioneering of the synthesis of various vitamins and the existence of a very extensive and highly specialized sales network.

Since 1964 Roche had entered into agreements known as "fidelity agreements" to secure exclusive or preferential agreements with customers. Roche pays a rebate each year or every six months calculated on total purchases to those customers who have obtained all or most f their requirements from Roche. This rebate varies between 1% and 5% although one customer receives rebates from 12.5% to 20%. An "English clause" provides that customers are to inform Roche if any "reputable" manufacturer charges a price lower than that charged by Roche. If Roche does not lower its price to that level customer are free to obtain supplies from the other manufacturer without losing the fidelity rebate on their purchases from Roche.

The Court agrees with the Commission and finds that Roche has been guilty of abuse of a dominant position in the relevant Vitamin markets.

Dominant position factors include: large market share, big disparity between this company's share and the market shares of the next largest competitors, technological advantages, extensive and highly specialized sales network, no potential competition.

Abusive practices included the fidelity clauses, the exclusives, the rebates, and the English clauses.

- C-27/76 – **United Brands vs. Commission** (1978). 103 pages. United Brands was the largest group on the world banana market, accounting for 35% of world exports in 1974. Its European subsidiary was responsible for co-ordinating banana sales in all Member States of the EEC except UK and Italy. The Commission launched an investigation and decided by opinion in April 1975 that United Brands was engaging in an abuse of a dominant position because:
    - it required its distributor/ripeners not to sell bananas while still green,
    - charged its distributors/ripeners prices which differed considerably from state to state without any objective justification, for bananas of the same quality, even though the conditions of the market were to all intent and purposes the same
    - applied to its distributor/ripeners different prices, the difference sometimes amounting to 138%
    - refused to supply the Danish firm Olesen with bananas of the Chiquita brand on the ground that this undertaking had taken part in an advertising campaign for bananas of a competing brand.

After considering evidence from United Brand and conducting a hearing, the Commission affirmed its conclusion that there was an abuse of a dominant position. Its analysis of the structure of the market included the following: Fresh bananas are a highly perishable product grown in the tropics year round. The Member States of the EEC import about a third of the total of world banana exports. They are shipped green and must be artificially ripened once they get to the destination market. UBC is also very strongly placed in banana shipping. It owns or charters more than 40 refrigerator ships and its own vessels alone represent a capacity of nearly 10 million cubic feet. They also have a very solidly constructed distributive network in Europe.

As bananas are a highly perishable product the question of ripening them is extremely important. UBC has its own ripening facilities in certain states. It owns one third of the ripening facilities in Belgium, Luxembourg, UK and Italy. In Germany it sells its bananas mainly to the Scipio Group which owns more than one third of the ripening facilities in that country.

UBC has a 40% market share in the Netherlands, 50% in Belgium/Luxembourg, 35% in Germany, 45% in Denmark, 25% in Ireland, 20% in France, 40% in Italy and 40% in the UK.

The court concluded that United Brands was guilty of abusing a dominant market position and upheld most of the fines and sanctions issued by the Commission. Some of the court's reasoning included the following:

"Thus, by reason of its dominant position UBC, fed with information by its local representatives, was in fact able to impose its selling price on the intermediate purchaser. This price and also the 'weekly quota allocated' is only fixed and notified to the customer four days before the vessel carrying the bananas berths.

These discriminatory prices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered.

A rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been competition had thereby been distorted.

Consequently the policy of differing prices enabling UBC to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, was an abuse of a dominant position."

- C-549/10p – **Tomra & Others vs. Commission** (2012). 12 pages. The confirms that the objectives of competition law are the protection of competitors as well as consumers, and the protection from competition as such. And to prevent competition from being distorted to the detriment of the public interest, individual undertakings, and consumers. The court's reasoning seemingly departs from the conduct of the Commission. And the court has a wide notion of what constitutes abuse, at least from the perspective of what the Commission published in its guideline.

  The case concerns abuse of a dominant position in the market for machines for the collection of used beverage containers. Decision finding an infringement of Article 82 EC and Article 54 of the EEA Agreement based on exclusivity agreements, quantity commitments and loyalty rebates. A competitor, Prokent, had filed a complaint with the Commission, requesting an investigation as to whether Tomra had abused a dominant position by preventing it from entering the market.

Tomra's market share had continuously exceeded 70% in the years before 1997 and 95% after. Tomra devised a strategy preventing new operators gaining market entry, keeping competitors small by limiting their growth possibilities and weakening and eliminating competitors by way of acquisition or other methods. Between 1998 and 2002 it entered into 49 agreements with certain supermarket chains which took the form of exclusivity agreements, quantity commitments and individualized retroactive rebate schemes.

The court agreed with the Commission and upheld the findings of the Commission that Tomra had abused a dominant position.

- C-52/09 – **Konkurrensverket v. TeliaSonera Sverige AB** (2011). 11 pages. Prices applied by a telecommunications operator for ADSL services and broadband connection services to users were abusive of a dominant position, having the effect of a margin squeeze on competitors.

  At the end of the 1990s and the beginning of the 2000s, a growing number of Swedish end users of internet services moved from dial-up internet connections, with low transmission speeds, to various types of broadband connection with considerably higher transmission speeds. At that time the most widespread form of broadband connection was that achieved by asymmetric digital subscriber line ('ADSL'). Those connections used a telephone network, or a cable television network, or a local area network.

  Historically, TeliaSonera, formerly Telia AB, has been the Swedish fixed telephone network operator, the holder in the past of exclusive rights. It has long been the owner of a local metallic access network to which almost all Swedish households are connected. In particular, TeliaSonera owns the local loop, in other words the part of the copper pairs telephone network which connects the telephone operator's exchange to the subscriber's telephone.

  TeliaSonera offered access to the local loop to other operators, in two ways. On the one hand, it offered unbundled access, in accordance with its obligations under Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4).

  On the other hand, without being legally obliged to do so, TeliaSonera offered to operators an ADSL product intended for wholesale users. That product enabled the operators concerned to supply their broadband connection services to end users.

  At the same time, TeliaSonera offered broadband connection services directly to end users.

  In the opinion of the Konkurrensverket, between April 2000 and January 2003 TeliaSonera abused its dominant position to the extent that it applied a pricing policy under which the spread between the sale prices of ADSL products intended for wholesale users and the sale prices of services offered to end users was not sufficient to cover the costs which TeliaSonera itself had to incur in order to distribute those services to the end users concerned.

The Court upholds the finding of abuse of a dominant position and concludes as follows:

"In the absence of any objective justification, the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in asymmetric digital subscriber line input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU.

When assessing whether such a practice is abusive, all of the circumstances of each individual case should be taken into consideration. In particular:

- as a general rule, primarily the prices and costs of the undertaking concerned on the retail services market should be taken into consideration. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of competitors on the same market be examined, and
- it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified.

- T-286/09 – **Intel Corp. vs. Commission** [2014] not yet reported. 162 pages. Abuse of dominant position in the microprocessors market. Decision finding an infringement of Article 82 EC and Article 54 of the EEA Agreement. Loyalty rebates, 'naked' restrictions. The case also discussed the classification of abuse, the as-efficient competitor analysis, the Commission's international jurisdiction, the obligation on the Commission to investigate, limits, rights of defence, the principle of sound administration, fines, single and continuous infringements and application of the 2006 guidelines on the setting of fines.

  In the contested decision the Commission found that in the 10 year period which was examined (1997-2007), Intel consistently held market shares in excess of or around 70%. Furthermore there were significant barriers to entry and expansion in the market, arising from sunk investments in research and development, intellectual property and the production facilities that are necessary. In consequence, all of Intel's competitors, except AMD, have exited the market or are left with an insignificant share.

  The Court upheld the Commission's findings of abuse of dominant position and dismissed the appeal.

- C-209/10 – **Post Danmark A/S v Konkurrencerådet** [2012] not yet reported. 5 pages. The case involves abuse of a dominant position in the "unaddressed mail" market, by virtue of its monopoly in the "addressed mail" market. Post Danmark enjoyed a monopoly in the delivery of addressed letters and parcels not exceeding a certain weight, which, on account of the sole right of distribution, was allied with a universal service obligation to deliver addressed mail under that weight. For that purpose, Post Danmark had a network that covered the national territory in its entirety and that was also used for the distribution of unaddressed mail. Its primary competitor in the distribution of unaddressed mail, Forbruger-Kontakt, had a distribution network covering almost the entire national territory, chiefly through the acquisition of smaller distribution undertakings.

Until 2004 three of Forbruger-Kontakt's biggest customers were SuperBest, Spar and Coop. Towards the end of 2003, Post Danmark concluded contracts with each of those customers to take over the distribution of their unaddressed mail beginning January 1, 2004. The local competition law authority in Denmark investigated and concluded that Post Danmark had abused its dominant position on the Danish market for the distribution of unaddressed mail, practicing a targeted policy of reductions designed to ensure its customers' loyalty, by, first, not putting its customers on an equal footing in terms of rates and rebates ('secondary line price discrimination') and, secondly, by charging Forbruger-Kontakt's former customers rates different from those it charged its own pre-existing customers without being able to justify those significant differences in its rate and rebate conditions by considerations relating to its costs ('primary line price discrimination').

The court notes that Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. However, in this case, the facts did not justify that the lower pricing was in fact was anti-competitive.

"Having regard to all the foregoing considerations, the answer to be given to the questions referred is that Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests."

Case law – application of article 101 TFEU

- The definition of the concept of undertakings

  - C-41/90 – **Hoï̈fner and Elser v Macrotron GmbH (1991). 13 pages.** The court stated that the concept of an undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed. In other words, we have a very broad definition of what amounts to an undertaking. Mr. Hofner and Mr. Elser were recruitment consultants who had assisted Macrotron in recruiting a candidate for a new sales director. Macrotron decided not to hire the candidate and refused to pay their fees. Local German law prohibited recruitment contracts like the one between Hofner, Elser and Macrotron, but this was apparently rendered inapplicable due to the free movement of services guaranteed by the EU Treaty (article 59). Also, since the effect of the German law was to create an exclusive right in a public agency to perform recruitment services, it was contrary to the competition rules of the Treaty, and an infringement of Article 86 of the Treaty.

  - C-180/98 to C-184/98, joined cases – **Pavel Pavlov & others v. Stichting Pensioenfonds Medische Specialisten** (Netherlands) (2000). 15 pages. The court added to the concept of undertaking by stating that it also includes any activity consisting in the offering of goods or services on a given market. Five medical specialists challenged the Netherlands pension system, claiming they had their own pension fund and were entitled to refuse to pay into the national system and that compulsory membership in the Fund was a violation of articles 85, 86 and 90 of the EU Treaty. The question was, is the compulsory pension fund an "undertaking" under the competition rules of the Treaty, and if so, can the compulsory nature of such a Fund be challenged on competition law grounds?

The court concludes: "… that a pension fund, such as that in question in the main proceedings, which itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation, which has been made responsible for managing a supplementary pension scheme set up by a profession's representative body and membership of which has been made compulsory by the public authorities for all members of that profession, is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty." However, the court went on to say that the Treaty does not preclude public authorities from making a public pension fund an exclusive scheme for members of a profession, since it does not abuse a dominant position or generate significant anti-competitive effects.

- C-309/99 – **Wouters vs. Algemene Raad van de Nederlandsche Orde van Advocaten** (2002). 16 pages. The court concluded that the competition rules do not apply to activity which, by its nature, its aim, and the rules to which it is subject to do not belong to the sphere of economic activity, or which is connected with the exercise of the powers of the public authority. So even though the term "undertaking" is to be construed very broadly, this is one situation where it does not apply, essentially cases where a government is acting in its capacity as a public authority.

  The facts involved two lawyers, admitted to the Amsterdam and Rotterdam bar associations respectively. One joined Arthur Andersen and wished to continue to practice law and be admitted to the bar association. The other joined Price Waterhouse, with a similar objective. Each bar association rejected their requests to be admitted as practicing attorneys once they had joined a multidisciplinary partnership whose main purpose was accounting. Partnerships with accountants were not permitted under the local rule. Both lawyers claimed this was an anti-competitive action and that it violated their rights of establishment and free movement of services. They claimed in each case that the bar association was "an association of undertakings" within the meaning of the Treaty.

  The court concluded that the Bar Association was an "association of undertakings" but its actions did not violate Article 85(1) of the Treaty "since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession." For purposes of article 86 of the Treaty, however, the Bar of the Netherlands was not an undertaking or group of undertakings engaged in services of general economic interest since it did not carry on any economic activity and its members were not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated.

- The definition of agreement or concerted practice

  - T-41/96 – **Bayer AG vs. Commission** (2000). 25 pages. The general court reviewed the case law on the meaning of an "agreement between undertakings" and determined this concept centered around the existence of a concurrence of wills between at least two parties. The form in which that concurrence of will is manifested is unimportant, so long as it constitutes a faithful expression of a party's intention.

The case involved the market in pharmaceutical products, specifically nifedipine or Adalat, designed to treat cardio-vascular disease. In most member states the price of Adalat was directly or indirectly fixed by the national health authorities. Between 1989 and 1993 the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom. Because of these price differences, wholesalers in Spain exported Adalat to the UK from 1989 onwards. French wholesalers followed suit as from 1991. According to Bayer, sales of Adalat by its British subsidiary, fell by almost half between 1989 and 1993 on account of the parallel imports. Bayer responded by changing its delivery policy, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France. A complaint was filed and the Commission investigated, issuing a decision concluding that Bayer's practices infringed Article 85(1) of the Treaty.

Bayer claimed it had made no "agreement" with the wholesalers to limit or prevent exports to the UK. Instead it had simply made a unilateral decision to stop fulfilling orders, something which it was entitled to do.

The Court agreed with Bayer and concluded that the Commission had incorrectly assessed the facts of the case and had erroneously concluded that there had been a common intention between Bayer and the wholesalers that would qualify as an "agreement" within the meaning of Article 85(1) to prevent or limit exports of Adalat from France and Spain to the UK. In other words, there was no "concurrence of wills" demonstrated by the Commission.

- C- 48/69 – Dyestuffs case, **Imperial Chemical Industries v. Commission** (1972). 44 pages. This case involved producers of dyestuffs who were accused of *price fixing through concerted practice.* In other words, they came together. They spoke about what prices to put their products out in the market for, and what charges to make for the services they undertook. There was no agreement. There was no conclusion of the contract. And this became common practice, amongst these organizations. This is a concerted practice. And the court said that a concerted practice is "a form of coordination, between undertakings which, without having reached the stage where an agreement properly so-called has been concluded knowingly substitutes practical cooperation between them for the risks of competition."

  Trade associations of the various industries had complained about price fixing. The Commission investigated and found that three uniform price increases had taken place. An increase of 15% affecting most aniline dyes took place between 7 and 20 January 1964 in Italy, the Netherlands, Belgium and Luxembourg and on 1 January 1965 it was extended to Germany. On the same day almost all producers introduced, in Germany and the other countries already affected by the increase in 1964, a uniform increase of 10% on dyes and pigments not covered by the first increase. Finally, on 16 October 1967 an increase of 8% on all dyes was introduced by almost all producers in Germany, the Netherlands, Belgium and Luxembourg. In France this increase amounted to 12%.

  The court explains the type of evidence required to establish a concerted practice:

  "By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behavior of the participants.

Although parallel behavior may not be itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.

This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidated established positions to the detriment of effective freedom of movement of the products in the Common `market and of the freedom of consumers to choose their suppliers."

- Whether an agreement or practice by its object or effect prevents or distorts competition in the internal market

    - T-168/01 – **GlaxoSmithKline Services Unlimited v Commission** (2006). 33 pages. The court in this case said that in order to decide whether an agreement restricts by object, regard must be had inter alia to the content of its provisions. We need to really look at the agreement. We need to establish the objectives that the agreement seeks to attain, and the economic and legal context, of which it forms a part. The case involved the wholesale distribution of medicines. The Commission claimed the General Sales Conditions terms that GlaxoSmith's subsidiary in Spain was using in agreements with its distributors was a violation of competition law. The General Sales terms specified a Clause 4A price and a Clause 4B price for each of the 82 medicines covered. The Clause 4A price applied when Spanish health authorities had specified a maximum industrial price for the medicine. A Clause 4B price applied when this factor was not involved. The practical effect of this 2-class pricing was that the 4A price would apply to sales within Spain but the 4B price would apply to all exported sales.

      The Commission had concluded that the clause 4 pricing was anticompetitive by object. The court disagreed and said nothing in the clause itself expressed an anti-competitive object and instead it was obviously reacting to the local Spanish regulatory pricing that affected sales in Spain. "Accordingly, it cannot be considered that examination of Clause 4 of the General Sales Conditions, which according to GSK is designed to ensure that the wholesale price set by the Kingdom of Spain is actually charged only for the medicines to which it was intended by law to apply, reveals in itself that competition is prevented, restricted or distorted."

      However, the court went on to find that anticompetitive effect was present. "Accordingly, it must be concluded that the Commission was entitled to find, in the light of elements whose relevance has not been validly called in question by GSK, that Clause 4 of the General Sales Conditions had the effect of reducing the welfare of final consumers by preventing them from taking advantage, in the form of a reduction in prices and costs, of the participation of the Spanish wholesalers in intrabrand competition on the national markets of destination of the parallel trade originating in Spain."

    - C-8/08 – **T-Mobile Netherlands** (2009). 7 pages. The court concluded that a concerted practice need not actually cause an anti-competitive effect to be liable under the "effects" criterion. It need only potentially distort competition on the market. So again, very wide. Just by object, you could be found to have infringed European Union competition law. An action had been brought against five telecommunications operators in the Netherlands (T-Mobile, KPN, Orange, Vodafone and O2) for concerted practices which had an anti competitive object.

"On 13 June 2001, representatives of mobile telecommunications operators offering mobile telecommunications services in the Netherlands held a meeting. At that meeting they discussed, inter alia, the reduction of standard dealer remunerations for postpaid subscriptions, which was to take effect on or about 1 September 2001. As is evident from the order for reference, confidential information came up in discussions between the participants at the meeting.

By decision of 30 December 2002, the NMa found that Ben, Dutchtone, KPN, O2 (Netherlands) and Libertel-Vodafone had concluded an agreement with each other or had entered into a concerted practice. Taking the view that such conduct restricted competition to an appreciable extent and was thus incompatible with the prohibition in Article 6(1) of the Mw, the NMa imposed fines on those undertakings."

The court upholds the lower authority's finding and indicates that actual anti-competitive effect need not be established for there to be liability for an intentional anti-competitive agreement or concerted practice. "[A] concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings."

- C-89/85 – **Ahlströ̈m Oy vs. Commission** (wood pulp industry) (1994). 17 pages. [Penny's note: I couldn't find one, combined judgement; there were 100's of defendants and dozens of court orders and judgements in this litigation; these notes come from some of the summaries and headnotes only]. Concerted practices between undertakings established in non-member counties affecting selling prices to purchasers established in the Community. Coordination and cooperation incompatible with the obligation of each undertaking to determine independently its market behavior. Concerted practice, parallel conduct, presumption of consultation. Effect on competition, assessment criteria, anti-competitive purpose.

  "A concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them. The criteria of coordination and cooperation which enabled that term to be defined must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market."

  Those criteria are not satisfied in the case of price announcements which are made by producers to users and which, in themselves, constitute market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors since, at the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.

Parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.