

**DROIT EUROPEEN DE LA CONCURRENCE**

**EUROPEAN COMPETITION LAW**

**MASTER 214 – DROIT DES AFFAIRES**

**UNIVERSITÉ PARIS-DAUPHINE**

COURSE READER

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## WELCOME

Dear Master 214-students,

Widely believed to stimulate innovation, to promote entrepreneurial freedom and to create more prosperous living conditions, *undistorted competition* has become a keystone of any market economy regime.

Competition *law* regulates businesses' market behaviour in accordance with the prevailing societal beliefs in undistorted or free competition. In the European Union, competition law rules particularly support the creation and functioning of the internal market envisaged by the founding Treaties. EU competition rules additionally also determine the extent to which Member States can intervene in the marketplace to support businesses. Compliance with EU competition law has therefore become an inherent part of any business' commercial strategy.

This course offers an intensive introductory overview of the different types of EU competition rules and their roles in the regulation of global business today. In five days, we will explore the different branches of competition law, assess the rules, enforcement procedures and analytical frameworks applied therein as well as train the skills that ought to form part any business lawyer's toolkit when confronted with an EU competition law problem. To that extent, the resolution of practical cases and the reading/discussion of Commission decisions and judgments will form part of the course experience.

I look forward to meeting you in class in Paris!

Pieter Van Cleynenbreugel

Liège, 28 August 2017

## GENERAL COURSE GOALS

It can hardly be denied that competition law has become *one of the most exciting and dynamic sub-fields* of international business law. Competition law governs all market operators and structures their behaviour accordingly. Technology giants such as Apple, Samsung or Microsoft, large pharmaceutical or chemicals companies such as Akzo Nobel or BASF, telecommunications operators such as France Télécom/Orange, global services providers (e.g. American Airlines and Ryanair or Otis, Schindler and Kone in elevator maintenance), breweries such as ABInbev, former state-owned companies such as Air France, SNCF, la Poste and Member States aiming to support the upgrading of its football stadiums in preparation for UEFA matches... All those very different private and public businesses have more or less recently been subject to *EU* competition law scrutiny.

This course offers an overview of different rules, principles and policies *EU competition law* relies upon to structure businesses' market behaviour. To that extent, it first outlines the goals of competition law and the legal concepts relied upon to attain those goals. By emphasizing the need for 'workable competition' within the 'internal market', *EU* competition law establishes a level playing field in accordance with which businesses and Member States have to structure their activities in the marketplace.

The course subsequently addresses the different specific competition law rules in more detail. It distinguishes between the prohibition and regulation of restrictive practices, the prohibition and regulation of abuse of a dominant economic position, the *ex ante* regulation of envisaged mergers and acquisitions and the regulation of state interventions in the marketplace. In addition, case studies are meant for you to practice those techniques in (semi-)real life business settings. To that extent, we will discuss hypothetical and real life case situations that will invite you to think like a competition lawyer.

At the end of this course, you will be able to evaluate to what extent particular market behaviour can be potentially captured by the rules and principles of *EU* competition law. At the same time, you will have gained insight into the particular legal assessments required in competition law, as compared to other fields of *EU* law. The interplay between law, economics and policy and the role of lawyers in that regard will especially have become clear.

More schematically, the course goals can be listed as follows:

- You will be able to identify and apply the key concepts relied upon in *EU* competition law (undertaking, interstate trade, restriction, abuse...) in simplified hypothetical and real-life case settings.
- You will be able to distinguish and choose among one or more of the five branches of *EU* competition law in a particular case situation (restrictive practices, abuse of dominant position, merger control or state intervention through aid or state-owned businesses) and to argue in favour of a case solution accordingly.

- You will be able to independently find the most relevant Commission decisions and cases that help you develop a well-structured competition law analysis of a given problem.
- You will be able to identify the role of law and its limits versus economics and policy analysis across the different techniques of EU competition law

On a more practical level, this course seeks

- to familiarize you with the process of finding EU competition law cases in the DG Comp databases and in the Courts' case law;
- to make you read and understand Commission decisions and Court of Justice of the European Union case law in the field of competition law
- to enable you to spot particular EU competition law issues and to address them accordingly.

As this course deals with EU competition law, basic knowledge of the foundations of EU law, of general EU substantive law and of public economic law will be presupposed. Lectures will take place in an interactive setting and will be above-all case-based. That means we will inductively, on the basis of a close reading of decisions and judgments, explore how the European Union integrates and equilibrates legal and economic reasoning in this field of law.

## SOURCES OF COMPETITION LAW

### 1. Primary sources

Relevant EU primary and secondary legislation can be found in The Official Journal of the European Union (OJ), the voluminous official gazette of the EU which has an 'L' series (for legislation) and a 'C' series (for other matters including legislative proposals); you can find those documents on <http://eur-lex.europa.eu>. EU competition law also relies on 'soft law' instruments, such as guidelines, notices and recommendations issued by the European Commission. Whilst those documents are not formally binding on individuals, they create a legitimate expectation that the Commission will in fact consistently apply and follow them. As such, they are being granted some legal value without being binding per se.

An overview of all hard and soft law documents maintained in the field of EU competition law are available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>. Check this website if you need to read (and print) a piece of legislation.

### 2. Further materials

Some helpful textbooks are

A. Jones and B. Sufrin, *EU Competition Law. Text, Cases & Materials* (Oxford, Oxford University Press, 6<sup>th</sup> Edition, 2016), 1372 pp.

N. Petit, *Droit européen de la concurrence*, (Paris, L.G.D.J., 2013), 688 pp.

V. Rose and D. Bailey (eds.), *Bellamy and Child: European Union Law of Competition* (Oxford, Oxford University Press, 7<sup>th</sup> Edition, 2013), 3736 pp.

R. Whish and D. Bailey, *Competition Law* (Oxford, Oxford University Press, 8<sup>th</sup> Edition, 2015), 1176 pp.

### 3. Periodicals

*Common Market Law Review*

*European Law Review*

*Concurrences e-journal*

*Competition Policy International*

*European Competition Law Review*

*European Competition Journal*

*Global Competition Litigation Review*

*International Review of Intellectual Property and Competition Law*

*Journal of European Competition Law & Practice*

*World Competition*

### 4. EU (competition) law on the Internet

You may find the following links very useful for your studies and research:

The main portal to the Institutions of the European Union contains a mass of materials:

<http://europa.eu/>

It is useful to explore the many links available there.

EU competition law grants the European Commission significant powers of general and individual decision-making. Those decisions can be found in a particular database on the Commission's Directorate-General for Competition (DG Comp in competition lawyers' parlance) website:

[http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=1](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1)

The database requires you to search by type of competition law case (antitrust, mergers or state aid), case number, name or sector.

Judgments of the Court of Justice and the General Court are available, usually from the day they are delivered, on the website of the Court of Justice of the European Union:

<http://curia.europa.eu/>

The Official Journal of the European Union is available in full text for two months from the date of publication at:

<http://eur-lex.europa.eu/>

In addition, the Eur-lex site contains a database of EU legislation in force (i.e. Regulations, Directives, Decisions and other significant documents), consolidated legislation as well as preparatory documents put forward by the Commission (the COM series).

## COURSE CALENDAR

<b>Session</b>	<b>Date</b>	<b>Day</b>	<b>Time</b>	<b>Topic</b>
<b>Lecture 1</b>	9 October	Mon	13h45 –15h15  15h30-17h00	Competition, competition law and EU competition law  Prohibited collusive behaviour: principles and concepts
<b>Seminar</b>	9 October	Mon	17h15-18h45	Cases on Article 101 TFEU
<b>Lecture 2</b>	10 October	Tue	8h30-10h00  10h15-11h45	Collusive behaviour: horizontal and vertical agreements  Collusive behaviour: prohibition and justifications
<b>Seminar</b>	10 October	Tue	12h00-13h00	Cases on Article 101 TFEU
<b>Lecture 3</b>	11 October	Wed	8h30-10h00  10h15-11h45	Dominant position  Abusive practices
<b>Seminar</b>	11 October	Wed	12h00 -13h00	Cases on Article 102 TFEU
<b>Lecture 4</b>	17 October	Tue	8h45-10h15  10h30-12h00	Enforcement of Articles 101 and 102 TFEU  Concentration control: procedure
<b>Lecture 5 + Seminar</b>	24 October	Tue	9h15-10h45  11h00-12h00	Concentration control: substance  Cases on concentration control

## LECTURE 1

Cases/materials to be discussed

The scope of application of EU competition law

- Case C-73/95 P, *Viho Europe BV v Commission of the European Communities*, [1996] ECR I-5457.
- Joined Cases C-159 and 160/91, *Poucet and Pistre v Assurances Générales de France*, [1993] ECR I-637.
- Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities*, [2009] ECR I-8237.

Collusive behaviour: Article 101 TFEU

- Joined cases 56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, [1966] ECR 299.
- Case C-309/99, *Wouters*, [2002] ECR I-1577.
- Case C-8/08, *T-Mobile*, [2009] ECR I-4529.

## INTRODUCTION

Competition law builds upon a fundamental belief that undistorted competition and the underlying ideal of a *free market economy* should either be promoted, or at least be maintained or preserved. From that point of view, the concept of free competition serves as a quintessential starting point for any understanding of competition law. Competition law comprises the *translation* of particular economic policy preferences maintained by policymakers into enforceable legal standards. This lecture provides the very basic economic background concepts that give shape to competition law provisions. Building upon a belief that a free market economy represents a fair way to ensure allocative efficiency and realising that the ideal of a free market does not function perfectly in practice, public authorities have consistently relied on the law to maintain and establish undistorted competition as a policy ideal. In doing so, policymakers have come to reflect different visions of state intervention in and regulation of the marketplace. Over time, competition law shifted from being an extension of private (contract and non-contractual liability) law to public (administrative) law. At the same time, it always represents a means towards realising ‘workable’ rather than ‘perfect’ competition.

EU law reflects this search for a ‘workable competition’ regime within the particular context of European ‘internal market’ integration. Quite unconventionally, the founding Treaties directly incorporate competition law provisions directly addressed to individual businesses (and to Member States, which is more conventional, as you know from your Foundations and Substantive EU law courses and as the free movement provisions particularly showcase). More



specifically, competition law provisions governing the internal market belong to the small category of *exclusive competences* attributed to the European Union by the Member States. Articles 101-109 TFEU incorporate and shape those exclusively attributed competences. Two types of EU competition law provisions can be distinguished, encompassing no less than five branches of EU competition law.

This lecture also starts to examine the first branch of that framework, i.e. the prohibition on restrictive anticompetitive practices under EU law. Market operators are limited in their ability to cooperate or streamline their business arrangements, to the extent that competition would be put at risk. Those arrangements include all kinds of cooperative endeavours, such as agreements between competitors or vertical agreements between non-competitors that nevertheless risk foreclosing the market.

## OUTLINE

1. Competition
  - a. Free market economy as starting point
    - i. Elastic supply and demand as least imperfect method for allocating scarce societal resources
    - ii. Undistorted competition as tool to avoid X-inefficiencies that result from monopolistic or oligopolistic behaviour
  - b. Free market economy does not necessarily materialise in reality
2. Competition law
  - a. Law as an instrument of behavioural regulation in the marketplace
  - b. From private to public law
  - c. Ensuring 'workable' competition
3. EU competition law: a bird's eye view
  - a. Exclusively attributed competition law competences
  - b. Competition as an object of EU integration
  - c. EU competition rules as EU 'economic constitutional law'
  - d. EU competition law as European Union law
4. Five branches of EU competition law
  - a. Rules applying to 'undertakings' or private market operators
  - b. Member States and EU competition law
5. Conditions for the application of EU competition law rules: 'undertakings' involved, 'effect on trade between Member States' and 'competition within the internal market' being distorted
  - a. Applicability *ratione personae*: The concept of 'undertaking'
    - i. The entity component and its legal consequences
    - ii. The economic activity component and its consequences
    - iii. Summary
  - b. Applicability *ratione materiae*: market behaviour that has an effect on interstate trade
  - c. Applicability *ratione loci*: affect competition within the internal market
6. Article 101 TFEU

- a. Agreements, decisions and practices
  - i. Agreements
  - ii. Decisions of associations of undertakings
  - iii. Concerted practice
  - iv. 'Single and continuous infringement'
- b. Restrictive object or effect on competition
  - i. The object/effect distinction: rationale
  - ii. Restrictions by object
  - iii. Restrictions by effect
  - iv. Shifts in the object/effect distinction: towards complementary presumption

## SEMINAR

Case 1: Commission Decision of 27 November 2013, relating to a proceeding under Article 101 of the TFEU (Case AT.39633 — Shrimps), [2013] O.J. C453/16.

Read the decision of the European Commission. We will use it to discuss how the Commission reasons and what evidence it uses to determine infringements of EU competition law. It will also already foray into the enforcement powers of the European Commission (a topic that will be dealt with in more detail in Lecture 5 later this week).

### Case 2: Book prices

The business of distributing and selling paper books is in disarray. Facing increasing competition from electronic devices such as E-readers, kindles and other kinds of tablets, the European Association for the Promotion and Preservation of Paper Books (EAPPPB) – a professional association comprising the major publishing companies within the European Union, together representing 83 % of the market in paper books – calls upon its members to take action to maintain profitability in an evolving European market place. To that extent, it proposes – without imposing – a fixed minimum retail price that should be adhered to when selling the books within the European Union.

The European Commission starts an investigation into this practice and formulates a statement of objections against EAPPPB's practices. Fearing that its practice may be deemed in violation of EU competition law, the EAPPPB decides to adopt a different technique: it incites national legislators to adopt *national legislation* imposing a minimum resale price on books, to the extent that this did not already happen (see e.g. the case of France, where such practices have already been mandated as a matter of national law).

- Should EAPPPB be afraid of competition law scrutiny? Could it be considered to be an 'undertaking'?
- Does national legislation provide a safe haven for such practices? Can the Commission act against national legislation on the basis of EU competition law? Can national competition law play a role in this regard?

## LECTURE 2

Cases/materials to be discussed

- Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities. - Selective distribution systems*, [1977] ECR 1875.
- Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, [1986] ECR 353.
- **Commission Regulation (EU) No 330/2010** of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] O.J. L102/1.
- Communication from the Commission — **Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1)** of the Treaty on the Functioning of the European Union (De Minimis Notice), [2014] O.J. C291/1.

### INTRODUCTION

As touched upon in the previous lecture, this provision prohibits different types of collusive behaviour. In this second lecture, we focus in particular on how this provision targets – in different ways – horizontal and vertical agreements and what conditions are in place effectively to justify behaviour that is prohibited *prima facie*. In that particular context, we will discuss some of the features Regulation 1/2003 introduced since 2004.

### OUTLINE

1. Prohibited agreements under Article 101(1) TFEU
  - a. Horizontal agreements
    - i. Problematic nature of horizontal agreements
    - ii. Different types of horizontal agreements
    - iii. Commission analysis of horizontal agreements
    - iv. De minimis non curat praetor
  - b. Vertical agreements
    - i. Problematic nature of vertical agreements?
    - ii. Different types of vertical agreements
    - iii. De minimis non curat praetor
    - iv. Distribution agreements – a peculiar type of vertical agreements
    - v. The Verticals Block Exemption Regulation
  - c. Mixed agreements
2. Justifications to the prohibition
  - a. Block exemptions
  - b. Individual exceptions
    - i. Four cumulative conditions
    - ii. Economic and non-economic justifications?
3. Invoking justifications

- a. Commission notifications?
- b. Self-assessment

#### SELF-STUDY QUESTIONS

- Are horizontal agreements more ‘dangerous’ from a competition law perspective than vertical agreements? Explain your answer.
- What types of vertical agreements – if any at all – are *per se* prohibited under Article 101(1) TFEU? Should those agreements always be prohibited?
- Are selective distribution systems tolerated under Article 101(1) TFEU?
- Can exclusive distribution systems be justified under Article 101(3) TFEU?
- What are hard-core restrictions? Can they be justified under Article 101(3) TFEU?
- What are the implications of the *Wouters* judgment for the definition of agreements having as their object/effect the prevention, restriction or distortion of competition within the internal market?
- What are block exemptions? How do they relate to Article 101(3) TFEU?
- Does EU competition law rely on its own *rule of reason*?
- Does Article 101(3) TFEU allow for non-economic goals to be taken into account at the justification stage?

## SEMINAR

### Case 1. E-books

Carefully read the **Commission commitment Decision in case 39847 on E-Books, rendered 25 July 2013**.

On the basis of your reading, you should be able to answer the following questions:

- What kind of decision did the Commission adopt? Which provision in Regulation 1/2003 provided a basis for the Commission doing so?
- Describe – in your own words – the relevant facts of the case on the basis of the information available in the decision and its supporting documents.
- How did the Commission go about in determining the relevant market?
- Did the Commission establish an infringement of EU competition law?
- Did the Commission take particular non-economic values or goals into account? At what stage of its analysis?
- How does the Commission determine the scope of the commitments offered and accepted?
- What are the legal consequences of the commitments offered? Can individuals having suffered damages from the agreement claim compensation under EU and/or national law for those damages?

### Case 2. Pen Pals

Bicpens – a French distributor of United States' stationary producer Bicpensils – approaches Crossroads Supermarkets with a proposal to agree on the distribution of a fixed number of Bicpensils for a fixed price.

Crossroads decides to accept the offer by Bicpens to act as an *exclusive distributor of Bicpensils to final consumers* in France. Under the terms of the contract concluded, Crossroads is obliged to charge at least 0,12 € per Bicpensil sold and to buy at least 2,560,000 Bicpensils from Bicpens Heijn at a rate of 0,11 € per item bought. The terms of this contract have been fixed in writing and have been published on both companies' websites.

As a result of the new agreement, InterHyper is no longer able to receive Bicpensils from Bicpens; it asks you – its in-house counsel – to look at the agreement. *Assess the abovementioned contract under Article 101 TFEU. Are we dealing with an agreement? What kind of agreement? Does this agreement restrict competition on the basis of the facts provided to you?*

Would your answer be the same if the following information was available to you: In the market of non-refillable writing instruments, Bicpens has a market share of 29%, whereas Crossroads enjoys a market share of 32% in the market of supermarket distributors.

Would your answer be different if Bicpens had a market share of 48% of the non-refillable writing instruments market? Suppose that the agreement did not contain a minimum resale price, would your answer to the previous questions have been different?

Under what conditions could a *prima facie* restrictive agreement between Bicpens and Crossroads be justified? Explore all options in this regard.

## LECTURE 3

Cases/materials to be discussed:

- Case 27/76, *United Brands v Commission*, [1978] ECR 207.
- Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, [1979] ECR 461.
- **Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] O.J. C372/5.**
- Communication from the Commission — **Guidance on the Commission's enforcement priorities** in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] O.J. C45/7.

### INTRODUCTION

Competition law does not only address collusive behavioural practices between two or more market operators, but also addresses particular market behaviour by single undertakings. One undertaking can indeed have a dominant position on a relevant market, which could potentially threaten or at least render difficult workable competition within that market. Although having a dominant position is not as such problematic from an EU law point of view, one could be enticed to abuse this dominant position. For those reasons, EU law directly *prohibits* abuses of a dominant economic position. The Commission, national competition authorities and national courts will indeed apply the prohibition and impose fines or other penalties in relation to undertakings engaging in such abuse. Contrary to what one may think however, abuse is an objective concept that can be manifested throughout different commercial practices, such as tying, bundling, rebates, predatory pricing or refusing access to essential facilities. In this lecture, we explore those concepts as constituent elements of the Article 102 TFEU prohibition.

Whereas Article 102 TFEU in principle targets only single undertakings abusing their dominant position, two or more undertakings can also hold a joint dominant position on a relevant market, which they can jointly abuse. Throughout the Court's case law, the notion of joint or collective dominance has gradually been developed and related to Article 101 TFEU concerted practices, as will be explored in this lecture as well.

### OUTLINE

1. Dominant economic position within the relevant market
  - a. Dominance v. monopoly
  - b. Dominance v. monopolisation
  - c. Determination of relevant market
  - d. Market threshold presumptions
2. Collective or joint dominance
  - a. The notion of collective dominance
  - b. Collective dominance: conditions
  - c. Collective dominance: presumptions
3. Collective dominance and concerted practice: the missing link between Articles 101 and 102 TFEU?



4. Abuse
  - a. Abuse as an objective concept
    - i. Objective requirements
    - ii. Relevance of subjective intent
  - b. Typologies of abuse and their treatment under EU law
    - i. Exclusionary abuses
    - ii. Exploitative abuses
  - c. Specific examples of abuse
    - i. Predatory Pricing
    - ii. Rebates
    - iii. Tying and bundling
    - iv. Access to essential facilities
5. Exceptions to the prohibition? Objective justification
  - a. The notion of ‘objective justification’
  - b. ‘Objective justification’ presumptions and their rebuttal

#### SELF-STUDY QUESTIONS

- Distinguish dominant economic position from monopoly and monopolization. What are the essential characteristics between those concepts?
- Define collective or joint dominance. (How) does it differ from single undertaking dominance? Who carries the burden of proof and what standard of proof is required?
- Explain how Articles 101 and 102 TFEU interact and interrelate. Your answer should at least refer to the notions of concerted practices and collective dominance.
- Abuse is an objective concept under EU law, yet subjective intentions can serve to give content to that concept. Explain with references to case law and materials discussed in this lecture.
- Explain the differences between exclusionary and exploitative abuses. Classify the examples given throughout the lecture and reading materials in one (or both) categories. Are both types of abuses considered equally harmful to competition?
- Distinguish quantity and loyalty rebates. Are both types of rebates treated differently under Article 102 TFEU?
- What is predatory pricing? Under what circumstances can predatory pricing constitute an abuse in accordance with Article 102 TFEU?
- Distinguish tying and bundling and assess the impact of both practices from the point of view of Article 102 TFEU. Refer to *Microsoft* in your answer.
- What are *essential facilities*? How do they relate to Article 102 TFEU analysis?
- Do you think that the current analytical framework of Article 102 TFEU is able to structure and regulate rapidly developing new technologies? Use the legal concepts and analysis highlighted in this lecture to make a sustained argument.
- Define objective justification in Article 102 TFEU. To what extent can non-economic justifications be considered objective? Refer to the ‘theory of harm’ in your answer.

### Case 1. Loyalty programmes

FlyAway is a well-established passenger air transport carrier offering passenger services across the globe and predominantly in Europe from its hub airport at Paris-CDG. At that airport, it is the dominant air carrier with a market share of 33 %. The other 67% is divided among various air carriers, none of which maintains a share of more than 9%. Facing increasing competition from European, Asian and Middle-Eastern airlines and from cheap low cost carriers operating from nearby commercially re-opened Le Bourget Airport, FlyAway decides to finally – just like all other carriers did years before – introduce a frequent flyer programme, *MilesAway*. Upon flying FlyAway, enrolled passengers particularly receive status points – which they retain for six months – and flymiles – which they retain for one year. Both points expire at some point, inducing customers to frequently fly on FlyAway rather frequently. Every passenger can enroll in *MilesAway* free of charge; the programme comprises different ‘loyalty tiers’ through which more frequent fliers can effectively progress, ultimately maintaining – and in some situations retaining – *FlyPlatinum*, the most elite status within the programme. Frequent flyer status entitles passengers to amenities such as free upgrades to businessclass, access to a fast track security and check in process and additional flymiles, which can be traded for free award tickets.

In addition, all *MilesAway* members are exempted from paying baggage fees and receive free meals and drinks on board (whereas non-members have to pay extra for those services). At first sight, the *MilesAway* programme is modelled after existing programmes in place by traditional air carriers.

You work for *Triple-A Airlines*, a Belgian-incorporated low cost carrier with a market share of 9% at CDG Airport, a market share of 43% at Le Bourget Airport, 56% at Beauvais Airport and 89% at Lille airport. Your CEO thinks that FlyAway’s sudden introduction of its new frequent flyer programme represents an attempt to get rid of you as a competitor and therefore comprises an abuse under Article 102 TFEU. The CEO asks you whether that could indeed be true and what actions Triple-A Airlines could take against FlyAway.

Taking a closer look, *MilesAway* also offers additional rewards not typically found among its competitors. The programme offers passengers having a registered address in Île de France free coach transport from their homes to CDG airport and access to a dedicated ‘FlyAway lounge’ there. In addition, travellers registered in those geographical areas will attain *FlyPlatinum* status if and to the extent that they fly FlyAway twice a year. In addition, they will receive double status miles and triple flymiles for any flight taken. Those additional advantages notwithstanding, FlyAway does not provide specific or targeted rebates for customers living in the abovementioned areas. Would this information affect your answer to the previous question?

Would your answer – at least from the substantive law point of view – be different if FlyAway offered the additional status and mileage amenities only in relation to bookings of flights to destinations also served by Triple-A? Would your answer be different if it did so only in relation to destinations also served by Triple-A from CDG airport?

## Case 2: Michelin

Carefully read the Commission *Michelin* Decision (Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (**COMP/E-2/36.041/PO — Michelin**), [2002] O.J. L143/1). Analyse and summarise the decision by answering the following subquestions:

- What criteria did the Commission rely upon to establish *Michelin*'s dominance? How did it calculate and/or determine the relevant market?
- Did the Commission use particular economic tests, data or other materials to substantiate its market findings?
- Did the Commission distinguish between/classify particular abuses?
- How did the Commission classify *Michelin*'s rebate system? Why was this rebate system particularly problematic?

## LECTURE 4

Cases/materials to be discussed:

- **Council Regulation (EC) No 1/2003** of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] O.J. L1/1.
- **Commission Notice on Immunity from fines** and reduction of fines in cartel cases, [2006] O.J. C298/17.
- **Directive 2014/104/EU** of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] O.J. L349/1.
- Case C-428/14, *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del mercato*, EU:C:2016:27.

### INTRODUCTION

One of the particularities of Articles 101 and 102 TFEU relate to their enforcement. In this respect, the European Commission maintains significant and extensive enforcement powers, resulting in the imposition of significant administrative fines or criminal penalties. Individuals are incited by the Commission to blow the whistle and obtain immunity or a reduction from fines. At the same time, national authorities and courts are effectively included into the system of EU competition law enforcement. The relationship between EU and national competition law therefore will also be explored in this lecture.

More recently, so-called *private enforcement* of EU competition law presents an additional evolution that warrants specific attention and is likely to remain at the forefront of judicial and political evolutions in this field for years to come.

### OUTLINE

1. A strong Commission-oriented (public) enforcement system, supported by national authorities and courts
  - a. The European Commission as *primus super pares*
  - b. Detecting competition law infringements: notifications, commitments and settlements
  - c. Leniency as a way to uncover infringements
  - d. Gradual involvement of national authorities and courts
  - e. The Court of Justice as general overseeing institution
2. The relationship between EU and Member State competition law
  - a. Art. 3 Regulation 1/2003
  - b. National competition law
  - c. The relationship between national and EU competition law
    - i. Stricter national law?
    - ii. More lenient national law?

- d. The relationship between EU competition law and national (non-competition) law
3. The emergence of private enforcement across (almost) all branches of EU competition law
  - a. From public to private enforcement
  - b. Private enforcement 2.0.: involving the national courts
  - c. Private enforcement 3.0.: the Damages Directive

#### SELF-STUDY QUESTIONS

- Explain the scope and consequences of the leniency programme. Does it apply to all branches of EU competition law?
- Define and distinguish public and private enforcement. Do you find any clashes between both types of enforcement? Refer to leniency in your answer.
- Develop a scheme outlining the role of the Court of Justice in the EU competition law system. Analyse the division of tasks between national courts, the General Court and the Court of Justice.

## LECTURE 5

Cases/materials to be discussed:

- **Council Regulation (EC) No 139/2004** of 20 January 2004 on the control of concentrations between undertakings, [2004] O.J. L24/1.
- **Guidelines on the assessment of horizontal mergers** under the Council Regulation on the control of concentrations between undertakings, [2004] O.J. C31/5.

### INTRODUCTION

Articles 101 and 102 TFEU seek to regulate – or at least structure – undertakings’ market behaviour. In doing so, both provisions presuppose that those undertakings are somehow stable and existing market actors existing independently and concluding agreements or engaging in potentially abusive practices. From that perspective, Articles 101 and 102 maintain a rather *static* vision vis-à-vis the market place. It is well-known however that markets are dynamic: undertakings come and go, transform into new entities, merge, split, create subsidiaries or joint ventures with other undertakings. At the time of the inception of competition law provisions in the Treaties, it was envisaged that Articles 101 and 102 would be sufficient to govern and control *those structural changes within and between undertakings in the European Union*. The Court’s early case law made clear however that an alternative system should perhaps be envisaged in that regard. In 1989, the European Commission therefore adopted a particular system tailored at ruling on the compatibility of envisaged structural changes with EU competition law. That system was established by means of Regulation 4064/1989 and provided for an *obligatory notification procedure* for envisaged structural changes. Parties could not implement those changes until the Commission approved them – within a tightly constructed procedural framework. Contrary to ‘decentralisation’ tendencies in the enforcement of Articles 101 and 102, that system remains in place until today. Regulation 139/2004, which replaced the 1989 Regulation, thus provides a framework governing structural changes in the internal market as a matter of EU competition law.

In this lecture, we will explore the system established by Regulation 139/2004. We will pay attention to the procedural conditions, to the Commission’s substantive analysis in this field and to the complex yet fascinating interaction between the Commission and national competition authorities. In addition, we will also look into the special case of joint ventures, which are captured by Regulation 139/2004, but potentially and simultaneously also by Article 101 TFEU. At the outset, it should be clear that the Commission can in principle only adopt a decision on concentrations with a community dimension. Concentrations lacking such dimension have to be notified to national authorities in accordance with national requirements. To establish a community dimension, Regulation 139/2004 relies on a set of presumptions based on turnover numbers in the EU and across Member States. If the Commission is the competent authority to decide on a concentration, it will have to proceed in accordance with the Regulation, resulting in the adoption of a Commission Decision, which can subsequently be reviewed by the Court of Justice

## OUTLINE

1. Why a particular concentration control regime in the European Union?
2. The MCR
  - a. Legal basis
    - i. Article 103 TFEU
    - ii. Article 352 TFEU
  - b. Commission implementing Regulations and notices
3. Concentration
  - a. Mergers
  - b. Acquisitions
  - c. Any other structural change in control
4. Community dimension
  - a. Turnover thresholds – Calculation of turnover thresholds
  - b. First set of thresholds
  - c. Second set of thresholds
  - d. Why two sets?
5. Joint ventures
  - a. Concept
  - b. Full-function Joint Venture
  - c. Concentrative v. cooperative joint ventures
6. Procedure: two stages
  - a. Phase I procedures and simplified procedure: Form CO A/B
  - b. Phase II procedures
7. Case referrals
  - a. Individuals, national competition authorities, to and from the Commission
  - b. Individuals to the Commission
  - c. Individuals from the Commission
  - d. National competition authorities to the Commission
  - e. National competition authorities from the Commission
8. Substance: substantive lessening of competition
  - a. SLC test and collective dominance – importance of market shares – ancillary restraints
  - b. Relationship between Articles 101-102 and MCR
  - c. Horizontal mergers
  - d. Non-horizontal mergers
9. Commission decisions and remedies
  - a. Types of decisions
  - b. Remedies included in decisions
10. MCR and national public policy
  - a. Mergers and public policy, i.e. non-economic considerations
  - b. Exceptions for the sake of public policy
11. Judicial review over merger decisions
  - a. Review on the basis of Article 263 TFEU

- b. Limited scope of review?
- c. End of limited review after *Tetra Laval*?

#### SELF-STUDY QUESTIONS

- How does the EU define the concept of concentration? When should it be notified?
- Explain the following concepts: one-stop-shop, community dimension, full function joint venture and remedies in the context of the MCR.
- Distinguish and explain the thresholds relied upon to determine the community dimension of an envisaged concentration. How are turnover numbers calculated?
- Describe the substantive lessening of competition test. How does it apply to horizontal mergers?
- How does the EU concentration control test relate to the notions of collusive behaviour and abuse of (collective) dominance discussed in the previous weeks?
- What are ancillary restraints? How are they treated under the MCR?
- Discuss the case referral mechanism. Can national authorities apply EU concentration control tests or do they always have to apply national law? Who can ask for a referral from the Commission to the national level and vice versa?
- What role – if any – do national public policy considerations play in relation to EU concentration control?



### Case 1. TV Ventures

Six French undertakings operating in the television-, telecommunications- and cable distribution sectors decide to set up a joint undertaking. The joint undertaking envisages to offer a variety of tv programmes and services via internet streaming and for additional payment to French-speaking viewers across Europe. The joint undertaking is jointly controlled by all six participating undertakings and will offer a particular product, have its own capital and management structure and will be established for an indefinite time period. The newly created undertaking would be a new entrant on the market for paid stream-TV and would directly compete with the incumbent dominant market player in that regard, Nixflix.

Each of the participating French undertakings obtains a 500 million € annual turnover. Four undertakings are exclusively active on the French market. The fifth undertaking maintains a turnover of 50 million € in France, 350 million in Germany en 100 in Belgium. The sixth undertaking maintains a turnover of 50 million in France, 350 million in Belgium en 100 million in Germany.

Do the undertakings involved have the right or the obligation to notify their envisaged transaction to the Commission on the basis of the Merger Regulation? What tests will the Commission – or the national authorities – have to rely upon when judging the compatibility of the envisaged transactions with EU competition law?

### Case 2. BNP Paribas Fortis

Carefully read the decision published in regarding the m-commerce joint venture by BNP Paribas Fortis and Belgacom (Commission Decision of 11 October 2013 in Case COMP/M.6967 — *BNP Paribas Fortis/Belgacom/Belgian Mobile Wallet*). On the basis of your reading, answer the following questions:

- Does the decision comprise a phase I or phase II decision?
- What did the Commission conclude?
- How did the Commission define the relevant market in the airline industry?
- Why was the envisaged merger potentially problematic? Do you agree with the Commission's position in that regard?
- What test did the Commission rely upon?
- Did the Commission refer to particular public policy elements?