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Lesson 3 (I). IBL. Free Competition Law. Antitrust, with special attention to its regulation in the EU (1.1 and 1.2)

Foreword on Free competition (in the EU)

European competition policy is intended to ensure free and fair competition in the European Union. EU rules on competition (**Articles 101 to 109 of the Treaty on the Functioning of the European Union - TFEU**) are based on some main principles:

1. (a and b) **prohibition of concerted practices** and other agreements and of **abuse of a dominant position capable to affect competition within the common market** (*antitrust rules*);
2. *preventive supervision of mergers with a European dimension* (i.e. to ensure that the significant size of the proposed merged operation in the EU market would not result in restrict competition, with the prohibition of some mergers;
3. *supervision of aid granted by EU countries which threaten to distort competition by favouring certain undertakings or the production of certain goods;*
 - Also, but beyond this Course
 - the liberalisation of sectors previously controlled by public monopolies, such as telecommunications, transport or energy
 - cooperation with competition authorities outside the EU.

The European Commission and the national competition authorities enforce EU competition rules. They cooperate among themselves within the European Competition Network (ECN), ensuring effective and consistent application of the rules.



Find the Dodo in this window...!

1. 1 . Antitrust (illicit agreements/decisions/concerted practices and abuse of dominant position)

- **Free Competition** benefits the market in so far as it encourages the offer of products

and services at the most favourable terms for of the participants in that market, as well as the access to products and services under non-discriminatory terms and conditions. To be effective, **it requires companies to act independently of each other**, and within a market where competitive pressures are exerted by its agents (producers, distributors, financiers, etc) operating in a level playing field. **European antitrust policy** is based in two central rules in the Treaty on the Functioning of the European Unión (Art 101 and Art 102 TFUE); as well as in secondary legislation ([mainly Regulation \(EU\) 1/2003](#)). The main Spanish Law in this area is *Ley de Defensa de la Competencia, Ley 15/2007*, [here](#)

The Treaty on the Functioning of the EU (TFEU) prohibits antitrust (anti-competitive) behaviour, in the form of agreements, decisions and concerted practices which restrict competition (Article 101), and abuse of dominant positions (Article 102):

- [Article 101 of the TFEU](#) **prohibits agreements, decisions and concerted practices between two or more independent market operators** which restrict competition. This provision covers *both horizontal agreements / decisions /practices* (between actual or potential competitors operating at the same level of the supply chain) and *vertical agreements* (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor).
 - One of the clearest cases of illegal conduct infringing Article 101 is the creation of a «cartel» between competitors, which may involve price-fixing and/or market sharing behaviours, etc.. A cartel is a group (horizontal or vertical) of **similar and independent companies** which join together to fix prices, to limit production or to share markets or customers between them, or to engage in similar practices.
 - Please note that agreements/decisions/concerted practices may be horizontal (between competitors at the same level of the supply chain fixing prices or limiting production) or vertical (such as between a manufacturer and a distributor).
 - Under Article 101(3) of the TFEU, these prohibited behaviours may be permitted, as an exception, **if they generate more positive than negative effects** (if they improve production or product distribution, or they promote technical or economic progress, for example), **and at the same time:**
 1. they allow that some of their benefits reach the consumers
 2. they do not eliminate completely all competition in relation to the products or services affected.
 3. They do not impose on the companies that are a part of the

agreement, restrictions which are not indispensable to achieve the positive objectives of the agreement

- Limited exceptions to Antitrust rules are also provided for by Regulation (*Reglamentos*).
- The exemptions can be declared in relation with any **agreement** or category of agreements between undertakings, or any **decision** or category of decisions by associations of undertakings, or any **concerted practice** or category of concerted practices. [Please visit the European Commission site on Decisions on Exemptions](#)

1 2 Antitrust (Abuse of dominant position)

- [Article 102 of the Treaty](#) prohibits that companies, undertakings or firms that hold a dominant position on a market, **abuse such position**. I.e, by charging unfair prices, by limiting production, by refusing to innovate to the prejudice of consumers. The main rules on procedures to implement this article (secondary EU Law) are set out in [Council Regulation \(EC\) 1/2003](#).

COMMON PROCEDURES ON ANTITRUST CONTROL (1.1 and 1.2)

- **The Commission may impose large fines on firms for such illegal business practices. Since 2004, national competition authorities can enforce EU antitrust rules on agreements/decisions/practices (and on dominance abuse) in the same way as the Commission.**
- **LENIENCY AGREEMENTS.** There are special situations where **leniency agreements** can be reached between infractors and Competition authorities to minimize the consequences of their infringements: Many cartels are found out as the European Commission successfully carries out its own investigations to detect them. But other cartels have been detected by the European Commission after one of its members *confessed* and asked for **leniency**. Leniency programmes (programas de clemencia) allow for the reduction of penalties.
- **SETTLEMENTS.** Also, undertakings can **settle their case** by acknowledging their involvement in the cartel under investigation, and thus, getting a smaller fine in return. (See [Commission Regulation \(EC\) No 622/2008 of 30 June 2008 amending Regulation \(EC\) No 773/2004, as regards the conduct of settlement procedures in cartel cases](#) and EU Commission Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) 1/2003 in cartel

cases)

Authorities that supervise and control Antitrust Law

- The EU Commission is empowered by the Treaty to apply antitrust and it has **investigative powers** (a.e. inspection at business and non-business premises, written requests for information, etc.). The **Commission may also impose fines** on those undertakings which violate the EU antitrust rules.
- European Court of Justice is competent in Antitrust EU cases
- **National Competition Authorities** (NCAs) such as in Spain the **CNMC** (*Comisión Nacional de Mercados y Competencia*) are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted.
- National courts may apply EU and National provisions to protect the individual rights conferred on citizens by the Treaty.
- **Please note:** Competition law does not only involve administrative sanctions. It also involves actions **for damages before national courts (both *stand alone* actions and *follow up* actions)**.

EU competition laws must be applied coherently throughout the EU.



Travellers' Guide!

More:

- [Lesson3/Mergers II \(EU\)](#)
- [Lesson3/StateAid III \(EU\)](#)
- [Lesson3/ UnfairCompetition \(EU\)](#)

- See also the following DerMerUle's pills: «[Monopolio y competencia](#)» (with links to **further external reading**)