1. Introduction
2. Competition analysis
3. Antitrust
4. Merger control
1. Introduction

1.1 Legal framework

1.2 Applicability of EU competition law to shipping

1.3 Global importance

EU competition law – General (1/2)

- Purpose
  - Competition policy is basically applying rules to make sure that companies compete with each other and, in order to sell their products, innovate and offer good prices to consumers

- Scope
  - Antitrust – concerned with undertakings’ behaviour/conduct
  - Merger control – concerned with market structure

- Legislation
  - Articles 101 and 102 TFEU (previously Articles 81 and 82 EC)
    - Article 101 TFEU
    - Article 102 TFEU
    - Merger Regulation
  - National Competition Acts
EU competition law – General (2/2)

- Addressees
  - Undertakings: Every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed
  - Exceptions
    - Public authorities or state-owned corporations in the exercise of official authority
    - Entities engaged in non-economic activities
    - Employees and trade unions

- Other competition rules
  - State Aid, cf. Articles 107-109 TFEU
    - State Aid Rules
  - Public procurement

Function of competition law

- Maximisation of consumer welfare
  - Static efficiency
    - Allocation of resources
    - Cost efficiency
  - Dynamic efficiency

- Others
  - Single market integration
  - Consumer protection
  - Protecting competitors?

- Different systems of competition law reflect different concerns
  - Different concerns varies over time also within same competition law system
2 categories; 3 substantive rules

<table>
<thead>
<tr>
<th>ANTITRUST</th>
<th>MERGER CONTROL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-competitive agreements</td>
<td>Abuse of dominant position</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EU</th>
<th>Article 101 TFEU</th>
<th>Article 102 TFEU</th>
<th>Merger Regulation, Reg. 129/2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>EEA</td>
<td>Article 53 EEA</td>
<td>Article 54 EEA</td>
<td>Article 57 EEA + Merger Regulation</td>
</tr>
<tr>
<td>Norway</td>
<td>§ 10</td>
<td>§ 11</td>
<td>Chapter 4</td>
</tr>
</tbody>
</table>

Antitrust: Anti-competitive agreements prohibited

- Article 101(1) TFEU: The prohibition
  - Comprises both horizontal and vertical agreements
  - Does not comprise agreements between undertakings within the same economic entity
  - With exception to cartels (price fixing, bid-rigging, market sharing), resale price maintenance and absolute territorial protection, the competitive effects are decisive
  - Assessment of the effects on competition requires competition analysis
- Article 101(3) TFEU: Exemptions
  - De jure exception where all 4 conditions are fulfilled; individual exemption no longer required
  - Improvements in economic efficiency required
  - Block exemptions regulations
- Article 101(2) TFEU: Unenforceability
Antitrust: Abuse of dominant position prohibited

- Article 102 TFEU
- Dominant undertakings have special responsibilities
  - Conduct generally permitted may be prohibited when performed by dominant undertakings because of the potential negative effects on competition
- Dominance
  - Legal test
    - “Economic strength which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”
  - The relevant market needs to be defined
  - Presumption for dominance if market share > 50%

Antitrust: Abuse of dominant position prohibited

- Abuse
  - Exploitative abuse
  - Anti-competitive abuse
    - Economic analysis of the effects on competition required
    - Competitive effects decisive, not type of measure
  - Objective justifications

- Effect on trade between member states
Merger control: Control of concentrations between undertakings

- Merger regulation (EU/EEA): Anti-competitive concentrations shall be declared incompatible
  - “A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market”
  - Requires analysis of the competitive effects of the concentration
- Compulsory pre-merger control: All concentrations exceeding defined turnover thresholds to be notified to the European Commission
  - Ex ante control
  - Once and for all clearance
- Stand-still obligation
- Time limits

Public enforcement

<table>
<thead>
<tr>
<th></th>
<th>ANTITRUST</th>
<th>MERGER CONTROL</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU</td>
<td>European Commission (Reg. 1/2003)</td>
<td>European Commission</td>
</tr>
<tr>
<td>EEA</td>
<td>European Commission/ESA</td>
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</tr>
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<td>(Art. 56 EEA; Reg. 1/2003)</td>
<td>(Art. 57 EEA; Reg. 129/2004)</td>
</tr>
<tr>
<td></td>
<td>Norwegian Comp. Auth. (The Norwegian EEA Competition Act)</td>
<td>(EFTA Surv. Auth.)</td>
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<tr>
<td>National Competition Acts</td>
<td>National Competition Auth. (National competition legislation)</td>
<td>National Competition Auth. (National competition legislation)</td>
</tr>
</tbody>
</table>
EU Competition Authorities

- European Commission (DG Comp)
- General Court (Previously: Court of First Instance)
  - Judicial review European Commission
- European Court of Justice
  - Appeals from the General Court
  - Referrals from Member States’ national courts
- National Competition Authorities
  - No decentralised enforcement of EU Merger Regulation

Sources of law

- Treaty provisions
- Secondary legislation
  - Council regulations
  - Commission regulations
- Case Law
  - The General Court (previously the Court of First Instance)
  - Court of Justice of the European Union
  - (EFTA Court)
- Commission decisions (ESA)
- Guidelines/notices from the Commission

- Internet sites
  - DG Comp
  - EFTA Surveillance Authority
1. Introduction

1.1 Legal framework

1.2 Applicability of EU competition law to shipping

1.3 Global importance

Antitrust: Articles 101 and 102 TFEU apply to maritime transport (Previously Articles 81 and 82 EC)

- The EC Treaty contains special transport provisions, cf. Title V Transport
  - Article 80(2) EC (prev. Art 84(2) EC))
- ECJ in 167/73 EC Commission v. France:
  - "Whilst under Article 84(2) EC, therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title V of the Treaty relation to the common transport policy, it remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty."
- ECJ in 209-213/84 Ministère public v. Lucas Asjes et al
  - "The rules in the Treaty on competition, in particular Articles [81 to 86], are applicable to transport."
- Two block exemptions for maritime transport
  - Liner conferences: Regulation 4086/86 – now repealed
  - Liner consortia: Regulation 906/2009
Article 101(3) TFEU: The former block exemption for liner conferences repealed since 2008

- Regulation 4056/86: Liner conferences block exempted
  - Liner conference:
    - "A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services."
  - The definition corresponds with the definition in UN’s Liner Code
  - European Commission in its Consultation Paper of 27 March 2003: Price-fixing and limitation of production are hardcore restrictions of competition
    - Thorough consultation process 2003-2006
    - [Link](http://europa.eu.int/comm/competition/antitrust/legislation/maritime)
  - Regulation 1419/2006: Repeals the liner conference block exemption
    - The repeal of the block exemption takes effect as of 18 October 2008

FEFC calls it a day

The Far Eastern Freight Conference (FEFC) of container lines has announced it will cease operating on 18 October as a response to changes in European law.

The group, which has about 70% of Asia to Europe trade, said the move will coincide with the repeal of the conference anti-competition exemption in Regulation 4056/86 on 17 October. Europe decided to change the rules on cartels in 2006, saying: "After that date (October 2008), conference activities and, in particular, price-fixing and capacity regulation will no longer be permitted."

The FEFC can trace its origins back to 1879 when six shipping lines, five British and one French, set up an "Agreement for the Working of the China and Japan Trade, Outwards and Homewards."

FEFC members are ANL, CMA CGM, Egyptian International Shipping, HMM, Maersk, MOL, NYK, Safmarine, Zim, APL, CSAV, Hapag-Lloyd, K Line, MISC, MSC, OOCL and Yang Ming.
MOL pulls out of liner agreements

MOL PULLS OUT OF LINER AGREEMENTS

MAJOR Japanese carrier Mitsu OSK Lines says that it will resign from the Transpacific Stabilization Agreement (TSA) and the Canada Transpacific Stabilization Agreement (CTSA), as of 27 November.

The company’s executive vice president, Masakazu Yakuishi, said: “With the European Union’s abolition of liner anti-trust immunity, it has become extremely difficult to align the business processes of our entire organization when its regional divisions must operate to differing standards. Having done a thorough analysis of marketplace dynamics and the roles of TSA/CTSA relative to our unique ability to differentiate, we concluded MOL and its customers would be better served by conducting business independently from transpacific liner agreements.”

MOL has been a member of TSA and CTSA since their inceptions in 1989, but resigned from the westbound discussion agreements in June 2005.

A statement said: “MOL is committed to meeting the ever-changing needs of its customers, while providing them with maximum value for their transportation dollar.”

Mr. Yakuishi added, “MOL has several capabilities that move us ahead of the pack. These differentiators include our new rapid bid capability, enhanced sales and customer service organizations designed to focus on what truly adds value for our customers, and our round-trip yield management process which improves efficiency. The time has come for MOL to move beyond what can be offered through liner agreements.”


Article 101(3) TFEU Block exemption for liner consortia

• Regulation 906/2009: Liner consortia block exempted
    • Regulation 823/2000 applies until 25 April 2010
  ◦ Consortium:
    • “An agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements”
  ◦ Article 3: Exempted agreements
  ◦ Article 4: Prohibited hardcore restrictions
  ◦ Article 5: Market share restrictions
    • The combined market share of the consortium members shall not exceed 30 %
  ◦ Article 6: The right to withdraw from the consortium
  ◦ Article 7: The Regulation enter into force 26 April 2010
    • Applicable until 25 April 2015
Antitrust: The general enforcement regime now also applies to maritime transport

<table>
<thead>
<tr>
<th>General</th>
<th>Maritime transport</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Article 84 EC: Member States</td>
<td>• Article 84 EC: Member States</td>
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<tr>
<td>◦ The transitional enforcement regime</td>
<td>◦ The transitional enforcement regime</td>
</tr>
<tr>
<td>• Council Regulation 17/62: European Commission</td>
<td>• Council Regulation 141/62</td>
</tr>
<tr>
<td></td>
<td>◦ Regulation 17/62 not applicable to the transport sector</td>
</tr>
<tr>
<td>• Council Regulation 4056/86: European Commission</td>
<td>• Council Regulation 4056/86: European Commission</td>
</tr>
<tr>
<td>◦ Article 1(2): Regulation 4056/86 only applies to</td>
<td>◦ Article 1(2): Regulation 4056/86 only applies to</td>
</tr>
<tr>
<td>international maritime transport services from or to</td>
<td>international maritime transport services from or to</td>
</tr>
<tr>
<td>one or more Community ports, other than tramp vessel</td>
<td>one or more Community ports, other than tramp vessel</td>
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<tr>
<td>services</td>
<td>services</td>
</tr>
<tr>
<td>National Competition Authorities</td>
<td>◦ Extend the scope of Reg 1/2003 to include cabotage</td>
</tr>
<tr>
<td>◦ Article 32: Regulation 1/2003 not applicable to</td>
<td>and tramp vessel services</td>
</tr>
<tr>
<td>cabotage and tramp vessel services</td>
<td>• Council Regulation 1/2003 applies to maritime</td>
</tr>
<tr>
<td></td>
<td>transport as any other industry</td>
</tr>
<tr>
<td>• Council Regulation 141/2006</td>
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<td>◦ Extend the scope of Reg 1/2003 to include cabotage and</td>
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<tr>
<td>tramp vessel services</td>
<td>and tramp vessel services</td>
</tr>
<tr>
<td></td>
<td>• Council Regulation 1/2003 applies to maritime</td>
</tr>
<tr>
<td></td>
<td>transport as any other industry</td>
</tr>
</tbody>
</table>

Pre Regulation 1419/2006: Antitrust enforcement – loophole for "tramp vessel services"

Antitrust: Commission closes investigation into transport of bulk liquids by sea

The European Commission has closed an investigation under EC Treaty antitrust rules prohibiting restrictive business practices (Article 81) into alleged cartel arrangements for shipping liquids in bulk on deep sea routes.

In April 2007, the Commission sent a statement of objections to a number of companies (see MEMO05/251). The statement of objections alleged that the undertakings concerned were involved in customer allocation, bidding, price fixing and the exchange of confidential market information concerning the maritime transport of bulk liquids on deep sea routes, thereby restricting competition in the EU market. At the time of the alleged infringements, between 1998 and 2002, large vessels were more vulnerable to the power of large manufacturers of shipbuilding and shiprepair services. The Commission concluded that the undertakings involved in the cartel were shipping agencies.

The evidence showed that the cartelists were not only part of the same market, but they were competitors both in the maritime transport of bulk liquids and in the same market, which could produce significant customer allocation and price fixing. Therefore, the investigation was completed with a view to determining the extent of the cartelists' activities.

It was found that the cartelists had entered into agreements to divide the market for shipping services for a period of time, thereby restricting competition in the EU market. The undertakings involved in the cartel were shipping agencies.

The investigation was completed with a view to determining the extent of the cartelists' activities.

As Regulation 451/90 was repealed in 2006 and the exemption for transport services no longer applies (see MEMO10/245), the case of whether shipping services are franchise or not is irrelevant to assessing current infringements, as all shipping services are now subject to the general procedural rules for the Commission to apply the competition rules, laid down in Regulation 1/2003.
Post Regulation 1419/2006:
Also Shipping pools – and other “tramp vessel services” – exposed to EU antitrust enforcement

Pool mates call it a day on gas front
The four partners in a gas-ship pool are going their separate ways.
The BW Gas-managed large gas carrier (LGC) pool is set to be dissolved.
New European Union (EU) competition rules have prompted the partners to wind up their co-operation.
The pool’s 19 ships of between 40,000 cbm and 60,000 cbm comprise the bulk of the world fleet in this segment.
The pool earlier said its control of the market is much less than it appears because the LGC sector is strongly affected by both the market for very large gas carriers (VLGCs) and smaller midsize units. However, the partners have now decided not to take any chances and will close the pool ahead of the new EU regulations, which are slated to go into force later this year, says Oslo-listed BW Gas managing director Jan Haakon Pettersen.

EU Merger Control Regime applies to shipping as any other industry

- EC Merger Regulation has always applied to shipping/maritime transport as any other industry
  - Regulation 139/2004 applies to all sectors of the economy
  - The scope of the ECMR only limited by the turnover thresholds: The concentration must have a “Community dimension”
Consequently, competition law has applied to shipping activities for a long time – e.g.:

- **Merger Control**
  - 2007: Tallink’s acquisition of Silja approved by Estonian, Swedish and Finnish National Competition Authorities
  - 2005: French CMA CGM’s acquisition of Delmas approved by European Commission
  - 2005: Joint venture established by Svitzer and Wilhelmsen Offshore approved by European Commission
  - 2005: German TUI’s (Hapag-Lloyd) acquisition of Canadian CP Ships conditionally approved by European Commission

- **Cartels**
  - Odfjell/Stolt-Nielsen/Jo Tankers
  - Company fines and imprisonment in the USA
  - Claims for damages
  - European Commission’s investigation closed in May 2008 due to lack of jurisdiction; current loophole closed by Regulation 1419/2006

- **Abuse of dominant position**
  - Compagnie Maritime Belge, C-396/96
  - A number of cases involving ports
  - Color Line
    - Investigated for alleged predatory pricing by Norwegian Competition Authorities
    - EFTA Surveillance Authority conducted dawn-raid in April 2006

But, the shipping industry has asked for industry specific guidance post Regulation 1419/2006

- **Council Regulation 1419/2006 of 25 September 2006**
  - Extends the scope of Regulation 1/2003 to include cabotage and tramp vessel services
    - With effect from 18 October 2006 all maritime transport services sectors are subject to the generally applicable procedural framework
  - Repeals Regulation 4056/86 containing the liner conference block exemption
    - The repeal of the block exemption takes effect from 18 October 2008

- **Focus by shipping companies on information exchanges between competitors in liner shipping and pool agreements in tramp shipping**

- **Draft Guidelines issued by the European Commission 14 September 2007**
  - OJ C 215, 15/09/2007 p. 3-15
  - Underlined that these guidelines complement other guidance already issued by the Commission

- **Final Guidelines published in OJ 26 September 2008 C 245/2**
Conclusion:

Today, EU Competition Law apply to Shipping and Maritime Transport as any other industry!
World-wide application to shipping

- Most countries now have national competition laws – and enforce it
  - Traditionally: North-America (US, Canada), EU and Oceania
  - Recently: South-America, South-Africa, Asia, including Japan, China and India
- Nationality of vessel irrelevant to establish jurisdiction
- US and EU competition laws – with their strict enforcement – may apply also to trades outside US and EU – if economic effect in US or EU
  - Extraterritorial application also of other countries’ competition laws
- Antitrust authorities cooperate extensively in different networks
  - Many enforcement agencies worldwide participate in the International Competition Network, subgroup for cartels
    - Including i.a. Brazil, Japan, Korea, India, South Africa, USA, Canada and European countries
- Focus on hard core cartels

Infringements have serious consequences

- High fines for serious infringements
  - EU: Fines of up to 10 % of the worldwide group turnover
- Imprisonment
  - In the US, Norway and some other countries, criminal sanctions, including imprisonment may be imposed against the individuals involved
  - Ongoing cases may have an impact on travelling to the US
- Leniency programs
  - Purpose: To make it easier and more attractive for companies to come forward and cooperate with the competition authority
  - Total immunity/reduction in fines
- Damages
  - US: Class actions (treble damages)
  - Europe: Initiatives to encourage private enforcement in antitrust cases
- Harm reputation
### EU: Ten highest cartel fines per case

<table>
<thead>
<tr>
<th>Year</th>
<th>Case name</th>
<th>Amount in €*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Car glass</td>
<td>1,383,896,000</td>
</tr>
<tr>
<td>2009</td>
<td>Gas</td>
<td>1,106,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>Elevators and escalators</td>
<td>832,422,250</td>
</tr>
<tr>
<td>2010</td>
<td>Airfreight</td>
<td>799,445,000</td>
</tr>
<tr>
<td>2001</td>
<td>Vitamins</td>
<td>790,515,000</td>
</tr>
<tr>
<td>2008</td>
<td>Candle waxes</td>
<td>676,011,400</td>
</tr>
<tr>
<td>2010</td>
<td>LCD</td>
<td>648,925,000</td>
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<tr>
<td>2010</td>
<td>Bathroom fittings</td>
<td>622,250,782</td>
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<tr>
<td>2010</td>
<td>Gas insulated switchgear</td>
<td>539,185,000</td>
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<tr>
<td>2007</td>
<td>Flat glas</td>
<td>486,900,000</td>
</tr>
</tbody>
</table>

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice).

### EU: Ten highest cartel fines per undertaking

<table>
<thead>
<tr>
<th>Year</th>
<th>Undertaking**</th>
<th>Case</th>
<th>Amount in €*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Saint Gobain</td>
<td>Car glass</td>
<td>896,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>E.ON</td>
<td>Gas</td>
<td>553,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>GDF Suez</td>
<td>Gas</td>
<td>553,000,000</td>
</tr>
<tr>
<td>2001</td>
<td>F. Hoffmann-La Roche AG</td>
<td>Vitamins</td>
<td>462,000,000</td>
</tr>
<tr>
<td>2007</td>
<td>Siemens AG</td>
<td>Gas insulated switchgear</td>
<td>396,562,500</td>
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<tr>
<td>2008</td>
<td>Pilkington</td>
<td>Car glass</td>
<td>370,000,000</td>
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<tr>
<td>2010</td>
<td>Ideal Standard</td>
<td>Bathroom fittings</td>
<td>326,091,196</td>
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<td>2007</td>
<td>ThyssenKrupp</td>
<td>Elevators and escalators</td>
<td>319,779,900</td>
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<tr>
<td>2008</td>
<td>Sasol Ltd</td>
<td>Candle waxes</td>
<td>318,200,000</td>
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<tr>
<td>2010</td>
<td>Air France / KLM</td>
<td>Airfreight</td>
<td>310,080,000</td>
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</tbody>
</table>

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice).
## EU: Ten highest abuse fines

<table>
<thead>
<tr>
<th>Year</th>
<th>Undertaking</th>
<th>Amount in €</th>
</tr>
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<tbody>
<tr>
<td>2009</td>
<td>Intel</td>
<td>1,060,000,000</td>
</tr>
<tr>
<td>2008</td>
<td>Microsoft</td>
<td>899,000,000</td>
</tr>
<tr>
<td>2004</td>
<td>Microsoft</td>
<td>497,200,000</td>
</tr>
<tr>
<td>2006</td>
<td>Microsoft</td>
<td>280,500,000</td>
</tr>
<tr>
<td>1998</td>
<td>TACA (15 undertakings)</td>
<td>273,000,000</td>
</tr>
<tr>
<td>2006</td>
<td>Telefonica</td>
<td>151,875,000</td>
</tr>
<tr>
<td>1991</td>
<td>Tetra Pak II</td>
<td>75,000,000</td>
</tr>
<tr>
<td>2005</td>
<td>Astra Zeneca</td>
<td>52,000,000</td>
</tr>
<tr>
<td>2006</td>
<td>Tomra</td>
<td>24,000,000</td>
</tr>
<tr>
<td>2001</td>
<td>Deutsche Post</td>
<td>24,000,000</td>
</tr>
</tbody>
</table>

## US: Fines of USD100 Million or more (As per Feb. 2011)

<table>
<thead>
<tr>
<th>Defendant (fiscal year)</th>
<th>Product</th>
<th>Fine (USD Millions)</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>F. Hoffmann-La Roche, Ltd. (1999)</td>
<td>Vitamins</td>
<td>$500</td>
<td>Switzerland</td>
</tr>
<tr>
<td>LG Display Co., Ltd. / LG Display America (2009)</td>
<td>LCD Panels</td>
<td>$400</td>
<td>Korea</td>
</tr>
<tr>
<td>Air France / KLM (2008)</td>
<td>Air Transportation</td>
<td>$350</td>
<td>France / The Netherlands</td>
</tr>
<tr>
<td>Korean Air Lines Co., Ltd. (2007)</td>
<td>Air Transportation</td>
<td>$300</td>
<td>Korea</td>
</tr>
<tr>
<td>British Airways PLC (2007)</td>
<td>Air Transportation</td>
<td>$300</td>
<td>UK</td>
</tr>
<tr>
<td>Samsung (2006)</td>
<td>DRAM</td>
<td>$300</td>
<td>Korea</td>
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<tr>
<td>BASF AG (1999)</td>
<td>Vitamins</td>
<td>$225</td>
<td>Germany</td>
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<tr>
<td>CHI MEI Optoelectronics Corporation (2010)</td>
<td>LCD Panels</td>
<td>$220</td>
<td>Taiwan</td>
</tr>
<tr>
<td>Hynix Semiconductor Inc. (2005)</td>
<td>DRAM</td>
<td>$185</td>
<td>Korea</td>
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<tr>
<td>Infineon Technologies AG (2004)</td>
<td>DRAM</td>
<td>$160</td>
<td>Germany</td>
</tr>
<tr>
<td>SGL Carbon AG (1999)</td>
<td>Graphite Electrodes</td>
<td>$135</td>
<td>Germany</td>
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<tr>
<td>Mitsubishi Corp. (2001)</td>
<td>Graphite Electrodes</td>
<td>$134</td>
<td>Japan</td>
</tr>
<tr>
<td>Sharp Corporation (2009)</td>
<td>LCD Panels</td>
<td>$120</td>
<td>Japan</td>
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<tr>
<td>Japan Airlines International Co., Ltd. (2008)</td>
<td>Air Transportation</td>
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<tr>
<td>LAN Cargo / Aerolíneas Argentinas (2009)</td>
<td>Air Transportation</td>
<td>$109</td>
<td>Chile / Brazil</td>
</tr>
<tr>
<td>Archer Daniels Midland Co. (1998)</td>
<td>Lysine &amp; Citric Acid</td>
<td>$100</td>
<td>U.S.</td>
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Source: Department of Justice, Antitrust division
US: Antitrust Fines

Source: Department of Justice, Antitrust division

US: Total Jail Time

Source: Department of Justice, Antitrust division
US: Average Jail Time

Source: Department of Justice, Antitrust division

US: Percentage of Defendants Sentenced

Source: Department of Justice, Antitrust division
US: Prison imposed on foreign defendants

<table>
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<tr>
<th>Fiscal Year</th>
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<td>2006</td>
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*Includes defendants charged with §15 U.S.C and/or obstruction offenses

Odfjell/Stolt-Nielsen/Jo Tankers: The US Deep-Sea Parcel Tanker Investigation (1/2)

- Odfjell
  - Odfjell Seachem AS accepted a criminal fine of USD 42.5 million.
  - President/CEO (Bjørn Sjaastad): 4 months imprisonment and a fine of USD 250,000.
  - Vice President (Erik Nilsen): 3 months imprisonment and a fine of USD 25,000.
- Jo Tankers B.V.
  - Criminal fine of USD 19.5 million
The struggle took a great toll. The cost in money—more than $150 million—was bad. The cost in stress and grey hair was worse.
2. Competition analysis

2.1 Introduction

2.2 The relevant market

2.3 Market power and dominance

**Competition analysis**

- Competition analysis is an essential tool to assess competition law issues
  - Assessment of the competition in the market
  - Assess expected effects of agreements, conduct and changes in market structure

Typical cases

- Concentrations (Merger Regulation)
  - Ex ante market analysis
  - Will a concentration significantly impede effective competition in the common market or in a substantial part of it? (ECMR)

- Antitrust
  - Anti-competitive agreements and concerted practices (Article 101 TFEU)
    - Both ex ante and ex post analysis
    - Will an agreement or a practice have an appreciable negative effects on competition?
    - Are the conditions for exception in Article 101 TFEU fulfilled?
  - Abuse (Article 102 TFEU)
    - Both ex ante and ex post analysis
    - Does an undertaking hold a dominant position in the market?
    - May the dominant players market conduct have as an effect that actual and potential rivals are excluded from the market?
Function of competition law

- Maximisation of consumer welfare
  - Static efficiency
    - Allocation of resources
    - Cost efficiency
  - Dynamic efficiency
- Others
  - Single market integration
  - Consumer protection
  - Protecting competitors
- Different systems of competition law reflect different concerns
  - Different concerns varies over time also within same competition law system

Competition analysis = analysis of effects

- The object of the competition analysis is to assess the effects on competition of agreements, conduct or concentration
  - E.g.: Distribution agreements, R&D cooperation, refusals to supply, mergers and joint ventures
- Each case must be analysed according to the specifics of the market and the players’ position in the market
- Balancing the direct effects on competition and other objective justifications is often essential
Not all restrictive practices are harmful to competition; few restrictions are harmful per se

- **Exclusive distribution**
  - Restricts intra-brand competition and may therefore be covered by Article 101 TFEU
  - But, may help in avoiding free-riding on retailers’ promotional activities
- **Exclusive supply**
  - Restricts in-store inter-brand competition
  - But, may help to avoid the hold-up problem that may arise when the suppliers make client-specific investments or transfer know-how to the retailers
- **Quantity rebates**
  - Give buyers motives to concentrate supply to a single supplier
  - But, may help realising economics of scale in production and distribution
- **Concentrations**
  - Eliminates actual and potential competition between the parties
  - But, efficiencies may be realised and the parties may be better able to challenge larger competitors
- **Pool agreements in tramp shipping**
  - May enable providing CoAs for which as individual operators they could not carry out on their own
  - But, the pool may also restrict inter-brand competition as pools often not assign all their ships to CoAs
Definition of the Relevant Market

- Normally the first step in the competition analysis
  - Article 101 TFEU: How large fraction of the market is affected by an agreement that restricts competition?
  - Article 102 TFEU: Is an undertaking dominant?
  - Merger Regulation: Effects of structural changes
- Object: Identify competing products and services that are restraining the behaviour of the undertakings concerned
- Relevance of case law varies
- Commission notice on the definition of the relevant market
  - Describes the role of market definition in the analysis
  - Presents common principles for definition of relevant product and geographical markets
  → Definition of markets is never an object in itself, but only serves as a tool for structuring the market analysis

Sources of competitive constraints

- Demand side substitution
  - Consumers response of a small but significant increase in prices
  - Depends on the reactions of the marginal consumers, not the average consumer
    - The issue is not whether all consumers react to an increase in prices by changing to another product but whether a sufficient number of consumers changes to other products or reduces their demand in an amount that makes the price increase unprofitable
  - The most immediate and effective disciplinary force, taken into account when defining the relevant market
- Supply side substitution
  - Other suppliers ability to switch production to the relevant products
  - Shift must be possible in the short term and without incurring significant additional risks or costs
  - Taken into account when defining the relevant market
- Potential competition
  - Not taken into account when defining relevant market, but may be an effective competitive constraint
The relevant product and geographical market

• Relevant product market
  ◦ Definition
  • “A relevant product market comprises all those products and/or services which are regarded as interchangeable by the consumer, by reason of the products’ characteristics, their prices and their intended use.”
  ◦ NB: Consumer = purchaser, including both end user or undertaking
• Relevant geographical market
  ◦ Definition
  • “The relevant geographical 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 areas.”

The method applied

• The SSNIP Test
  ◦ SSNIP = Small but Significant and Non-transitory Increase in Price
  ◦ Applied by most competition authorities world-wide
• The test
  ◦ Whether a sufficient number of customers would switch to readily available substitutes or to suppliers located elsewhere in response to an hypothetical small (in the range 5-10%) permanent relative price increase, making the price increase unprofitably
• Application

Coca Cola  Pepsi Cola  Private Brand Coke  Fanta  Perrier  Milk
The relevant market: Liner shipping (1/2)

- Commission Guidelines on Maritime Transport Services, Section 2.3.1
- Containerised liner shipping services defined as the relevant product market for liner shipping in several Commission decisions and Court judgments
- Other modes of transport normally excluded – even if to a marginal extent interchangeable – since a substantial proportion of the goods carried by container cannot easily be switched to other modes of transport
- A narrower product market limited to a particular type of product may be appropriate
  - E.g. perishable goods transported in reefer containers or conventional reefer vessels

The relevant market: Liner shipping (2/2)

- Normally no lasting change from container towards bulk/break bulk
  - One way substitutability: Once cargo becomes regularly containerised it is unlikely to be transported again as non-containerised cargo
- The geographical market normally consist of the area where the services are marketed, generally a range of ports at each end of the service
  - European end: Normally range of ports in Northern Europe and/or in the Mediterranean
  - From Europe: Shipping services from Mediterranean normally only marginally substitutable for those from Northern European ports
The relevant market: Tramp services (1/3)

- Commission Guidelines on Maritime Transport Services, Section 2.3.2
- No EU case law related to tramp shipping
- Demand substitution
  - The “main terms” of an individual transport request are a starting point since they generally identify the essential elements of the transport requirement at issue
  - The negotiable element of the main terms, e.g. the vessel type or size, may indicate that the relevant market with respect to this specific element is wider than laid down in the initial transport requirement
  - Necessary to ascertain whether the customers considers the services provided under time charters, voyage charters and CoAs to be substitutable
  - Vessel types usually subdivided into a number of standard industrial sizes
    - Due to considerable economies of scale, a service with a significant mismatch between cargo volume and vessel size may not be able to offer a competitive freight rate

The relevant market: Tramp services (2/3)

- Supply substitution
  - Physical and technical conditions of the cargo to be carried and the vessel type provide indications
    - If vessels can be adjusted to transport different cargos at negligible cost and in a short time-frame, tramp shipping service providers are able to compete for the transport of several types of cargo
  - Specialised vessels
    - The ability of specialised service providers to compete in other markets may be limited
  - Different vessel sizes
    - A service with significant mismatch between cargo volume and vessel size may not be able to offer competitive freight rate
    - Limitations due to draught restrictions in ports
    - Chain substitution effects may constrain pricing and lead to a broader market
  - Captive capacity may be excluded from the relevant market
- Other relevant factors
  - Reliability of service provider
  - Security
  - Safety and regulatory requirements (e.g. double hull requirement)
The relevant market: Tramp services (3/3)

- The geographical market
  - In tramp shipping, ports are generally substitutable from the supply-side as services are not scheduled but respond to specific demand
  - Substitutability of ports may be limited by restrictions on vessel mobility such as terminal and draught restrictions or environmental standards for particular vessels types in certain ports and regions
  - Repositioning of vessels, ballast voyages and trade imbalances should be taken into account for the delineation of relevant geographical markets

2. Competition analysis

2.1 Introduction

2.2 The relevant market

2.3 Market power and dominance
Market shares and concentration levels

- Market shares as indication for dominance/unilateral effects in mergers
  - < 40%: Normally not dominant
  - > 50%: Presumption for dominance
- Relevance of historic market shares and past performance
  - Instability and volatility market share: Indicator of effective competition
  - Steadily decreasing market shares: Indicator of effective competition
- Concentration levels (Used in merger cases)
  - HHI (Herfindahl-Hirschman Index)
  - Adding the squares of the individual companies in the market
  - ΔHHI = Change in concentration as a result of the concentration
  - Normally no horizontal competitive concerns if:
    - Post-merger HHI between 1000-2000 and ΔHHI < 250
    - Post-merger HHI between > 2000 and ΔHHI < 100
- Market shares and concentration levels only elements in individual market analysis: Importance of countervailing factors

Calculation of market shares in shipping cases

- Commission Guidelines on Maritime Transport Services, Section 2.4
- Liner shipping
  - Volume and/or capacity data has been identified as the basis for calculating market shares in several Commission decisions and Court judgments
- Tramp shipping
  - Market shares may be calculated in a number of ways, e.g.:
    - The number of voyages
    - Volume or value share in the overall transport of a specific cargo
    - Share in the market for time charter contracts
    - Data in relation to the parties’ contract negotiations
    - Parties’ capacity share in the relevant fleet (by vessel type and size)
Possible countervailing factors

- Possibility of market entry – Potential competition
  - Entry must be likely, timely (2-3 years) and sufficient to deter any anti-competitive effects
  - Examples of entry barriers
    - Regulatory barriers
    - Technical advantages (e.g. preferential access to essential facilities or IPR)
    - Commercial and strategic barriers; Importance of brands, over capacity, exclusive distribution networks and proprietary solutions
    - Importance of track records
    - Importance of economies of scale
    - Important sunk costs

- Buying power
  - Bargaining strength of the buyer vis-à-vis the seller in commercial negotiations
    - Depend on customers’ size, commercial significance and ability to resort to credible alternatives

- Dynamics of the market
- Nature and structure of products and competition
  - Differentiated or homogeneous products
  - Bidding markets

Collective dominance: Coordinated effects

- Increase of likelihood of coordinated behaviour between competitors
- Making coordination easier, more effective or more stable
- In oligopolistic markets
  - Few companies with similar market positions
  - Single, homogenous products
- Structural or economical links in order to ascertain whether they align their conduct in the market
  - Possibilities of reaching a common understanding
- Three market conditions must be fulfilled (Airtours Case; CFI 6 June 2002)
  - Possibilities of monitoring the market/terms of coordination being adherent to
  - Credible deterrent mechanisms
  - Reactions from outsiders not able to jeopardise the expected result
    - Relevance of entry/potential competition and buying power
1. Introduction
2. Competition analysis
3. **Antitrust**
4. Merger control
5. Jurisdiction – referrals

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<td>3.2 <strong>Article 102 TFEU</strong></td>
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<td>3.3 Enforcement</td>
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<td>3.4 The Maritime Transport Guidelines: Information exchange</td>
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<td>3.5 The Maritime Transport Guidelines: Shipping pools</td>
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<tr>
<td>3.6 The Block Exemption for Liner Consortia</td>
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</table>
Article 101 TFEU EC: Overview

- Article 101(1) TFEU: Anti-competitive agreements prohibited
- Article 101(3) TFEU: Conditions for exemption
  - Regulation 1/2003: Article 101(3) TFEU is directly applicable; no authorisation required
  - Block exemptions
- Article 102(2) TFEU: Unenforceability
  - Public enforcement: Regulation 1/2003:
    - Termination of infringement, cf. art. 7
    - Administrative fines, cf. art. 23
    - Interim measures, cf. art. 8
  - Private enforcement
    - Damages

Article 101(1) TFEU: Conditions

- Agreements, decision and concerted practices
- The object or effect of preventing, restricting or distorting competition
- The de minimis doctrine
  - The de minimis Notice (OJ 2001 C368/13)
  - Agreements between competitors: Market share < 10%
  - Agreements between non-competitors: Market share < 15%
- The effect on trade between member states
  - Guidelines on the effect on trade concept contained in Articles 101 TFEU and 102 TFEU (OJ 2004 C 101/81)
  - Commission Guidelines on maritime transport
    - Trade between Member States likely to be affected
      - Transport services offered by liner shipping and pool operators often international in nature
      - Linking Community ports with third countries
      - Including exports and imports
    - Cabotage
    - Effects on trade between Member States must be evaluated on a case by case basis
Agreements and concerted practices

- Legally binding agreement not required
- Meetings of minds constitutes concerted practice
  - ECJ in the Dyestuffs case (Case 48/79 etc. ICI v. Commission)
    - "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 the for the risk of competition"
  - ECJ in the Sugar Cartel case (cases 40/73 etc. Suiker Unie)
    - any direct or indirect contact between [competitors], the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market"
  - Problem: How to distinguish covert cartels from rational and innocent parallel commercial activities?
  - Oligopolistic markets
- "Unilateral" conduct and Article 101 TFEU
  - Vertical agreements

Article 101(1) TFEU: Horizontal agreements

- Horizontal agreements that have as their object the restriction of competition
  - Price fixing
  - Market sharing
  - Limit outputs
  - Limit sales
  - Exchange of future price information
  - Bid rigging

- Horizontal agreements that have as their effect the restriction of competition
  - Competition analysis required
  - The de minimis rule: Market share < 10%
Horizontal agreements that may restrict competition (1/2)

- General
  - Commission Guidelines on horizontal co-operation agreements (OJ 2001 C3/2)
  - Competition analysis normally required (if no object)
- Agreements normally outside Article 101(1) TFEU
  - Co-operation between non-competitors
  - Co-operation between competing undertakings that cannot independently carry out the project or activity covered by the co-operation
  - Co-operation concerning an activity which does not influence the relevant parameters of competition

Horizontal agreements that may restrict competition (2/2)

- Types of co-operation where competition analysis is required (cf. Horizontal Guidelines)
  - Research and development
  - Production agreements
  - Specialisation agreements
  - Purchasing agreements
  - Commercialisation agreements
    - Co-operation between competitors in the selling, distribution or promotion of their products
  - Agreements on standards
  - Environmental agreements
Article 101(1) TFEU: Vertical agreements

- Vertical agreements that have as their **object** the restriction of competition
  - To fix minimum resale prices
  - To impose export bans

- Vertical agreements that have as their **effect** the restriction of competition
  - Competition analysis required
  - Normally no concerns if intra-brand competition (if no object)
  - The de minimis rule: Market share < 15 %
  - The block exemption: Market share < 30 %

Competition analysis of vertical agreements

- Commission Guidelines on Vertical Restraints (OJ 2010 C 130/1)
- Relevant factors for the assessment under Article 101(1) TFEU
  - Market position of the supplier
  - Market position of competitors
  - Market position of the buyer
  - Entry barriers
  - Maturity of the market
  - Level of trade
  - Nature of the product
  - Other factors
Examples of vertical restraints

- Single branding
- Exclusive distribution
- Exclusive customer allocation
- Selective distribution
- Franchising
- Exclusive supply
- Tying
- Recommended and maximum resale prices

Article 101(3) TFEU: Criteria

- General
  - Guidelines on the application of Article 101(3) TFEU (OJ 2004 C 101/97)
- 4 cumulative criteria
  - Improvement in the production or distribution of goods or in technical or economic progress
  - Fair share to consumers
  - Any restrictions must be indispensable
  - No substantial elimination of competition
Block exemption regulations

- Horizontal agreements
  - Reg 487/2009 Air transport
  - Reg 906/2009 Liner shipping (consortia)
  - Reg 267/2010 Insurance sector
  - Reg 1217/2010 Research and development agreements
  - Reg 1218/2010 Specialisation agreements

- Vertical agreements
  - Reg 330/2010 Vertical agreements
  - Reg 461/2010 Motor Vehicle Distribution
  - Reg 772/2004 Technology transfer agreements

3. Antitrust

3.1 Article 101 TFEU

3.2 Article 102 TFEU

3.3 Enforcement

3.4 The Maritime Transport Guidelines: Information exchange

3.5 The Maritime Transport Guidelines: Shipping pools

3.6 The Block Exemption for Liner Consortia
Article 102 TFEU: General

- Dominant position
  - "Position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its customers", case 27/76 United Brands
  - Need to define the relevant market
  - Presumption for dominance if market share > 50%, case C-62/86 AKZO
  - Factors indicating dominance, cf. Part II Competition analysis

- Abuse
  - Exploitative abuse
  - Anti-competitive abuse
  - Objective justifications

- Effect on trade between member states

Abuse of dominance - examples

- Pricing practices
  - Excessive pricing
  - Predatory pricing
  - Loyalty discounts
  - Price discrimination

- Non-pricing practices
  - Exclusive agreements
  - Bundling (tying)
  - Refusal to supply
  - Access to essential facilities
3. Antitrust

3.1 Article 101 TFEU

3.2 Article 102 TFEU

3.3 Enforcement

3.4 The Maritime Transport Guidelines: Information exchange

3.5 The Maritime Transport Guidelines: Shipping pools

3.6 The Block Exemption for Liner Consortia

Regulation 1/2003: Commission’s powers of investigation

- Investigation into sectors of the economy and into types of agreements, article 17
- Requests for information, article 18
- Powers to take statements, article 19
- Powers of inspection, article 20
  - Voluntary investigations, cf. art 20(3)
  - Mandatory investigations (dawn raids), cf. art. 20(4)
- Inspection of other premises, article 21
  - Can include private homes
  - Requires prior authorisation from national court
Outcome of investigation

- Termination, article 7(1)
  - Behavioural remedies
  - Structural remedies
- Interim measures, article 8
- Commitments, article 9
- Finding of inapplicability, article 10
- Administrative fines, article 23
  - Commission’s Guidelines on the level of fine, OJ 1998 C 9/3
  - Commission’s Notice on the Non-imposition or Reduction of Fines in Cartel Cases, OJ 19965 C 207/4
- Periodic penalty payments, article 24

National Competition Authorities’ enforcement

- Duty to apply Articles 101 TFEU and 102 TFEU in parallel with national competition laws
- Power to apply Article 101 TFEU and 102 TFEU, article 5
- No investigation power in Reg 1/2003
  - Investigation under its national law, article 22(1)
- No sanctions provided for in Reg 1/2003, article 5
- Co-operation between the Commission and the national competition authorities
  - General, article 11
  - Exchange of information, article 12
The Maritime Transport Guidelines: General

- Maritime Transport Guidelines, Section 3.2
- A body of case law from European courts and the European Commission
- The essence of competition law: Each producer should act independently on the market and not co-ordinate its behaviour with that of its rivals
- If competitors exchange sensitive information about their pricing policies, investment plans, capacity or R&D projects, it becomes easier for them to act in concert
- The problem: To distinguish those exchanges of information which have a neutral or beneficial effect upon efficiency from those which seriously threaten the competitive process by facilitating collusive behaviour
  - The relevance of the structure of the market
  - The nature of the market exchanged
  - The means by which the information is exchanged
Information exchanges between competitors may constitute an infringement in its own rights

- General
  - Exchange of information may be a facilitating mechanism for the implementation of an anti-competitive practice, such as monitoring compliance with a cartel
  - Exchange of information might also constitute an infringement of Article 101 TFEU in its own rights

- The relevant test
  - Does the information exchange reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted
  - If truly competitive market, transparency is likely to lead to intensification of competition

- The difficult distinction
  - Article 101 TFEU does not prevent undertakings from autonomously adopting themselves to the existing or anticipated conduct of competitors
  - Article 101 TFEU prohibits direct or indirect contacts with competitors which influence the conduct of a competitor or reveal their own (intended) conduct if the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions in the market in question

The importance of market structure

- The ECJ: Information exchanges in highly concentrated markets
  - On a highly concentrated oligopolistic market on which competition is already greatly reduced, exchanges of precise information on individual sales at short intervals between the main competitors, to the exclusion of other suppliers and consumers, are likely to impair substantially the competition
  - In such circumstances, the sharing – on a regular and frequent basis – of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors

- The ECJ: Information exchanges in not highly concentrated markets
  - Also in such circumstances an information exchange system may be an infringement of Article 101(1) TFEU where this leads to a reduction of the undertakings' decision making autonomy resulting from pressure during subsequent discussions with competitors
Market structure

- The level of concentration
  - Relevant since, on highly concentrated oligopolistic markets, restrictive effects are more likely to occur and are more likely to be sustainable than in less concentrated markets
- The structure of supply and demand
  - Number of competing operators and the symmetry and stability of their market shares and the existence of any structural links
- Other factors
  - Homogeneity of services
  - Overall transparency in the market

Information exchanged

- Exchange of information already in the public domain
  - Not infringement of Article 101 TFEU
  - But the exchange may enhance and/or combine publicly available information with other information rendering the combined information commercially sensitive which may restrict competition
- Commercially sensitive information
  - Future or recent (i.e. not historic) information relating to parameters of competition as price, capacity or costs highly sensitive
    - Information older than 1 year normally historic and not sensitive – normally outside Article 101 TFEU
  - Individual data more sensitive than aggregate data from a sufficient number of independent undertakings – Level of aggregation will be decisive
    - Aggregated data normally outside Article 101 TFEU
  - More frequently exchanges of data facilities retaliation and lowers incentives to initiative competitive actions in the market, as competitors can react more swiftly
Information exchanges between liner shipping companies

- Exchanges of historic data on volume and capacity – even on a disaggregated basis – are unlikely to restrict competition
- Data becomes historic quicker if the data is aggregated rather than individual
- Exchanges of recent data on volume and capacity unlikely to restrict competition if the data is aggregated so that individual shippers’ or carriers transactions cannot be identified directly or indirectly
- Exchanges of capacity forecasts not based on publically available data – even in aggregate form – high risk of problematic in concentrated markets
- Capacity data is particularly sensitive as it is the key parameter to coordinate competitive conduct and have a direct effect on prices
- Aggregated forecasts indicating which trades capacity will be deployed may be anticompetitive

The European Commission’s new general guidelines on horizontal co-operation agreements

- Adopted in January 2011 (EUT C11/1 14.1.2011)
- “Object” vs “effect”
  - Information exchanges between competitors of individualised data regarding future prices or quantities should be considered a restriction of competition by «object»
    - Likely to lead to a collusive outcome
    - Less likely that such information exchanges are made for pro-competitive reasons
    - Unlikely to fulfill the conditions of Article 101 (3) TFEU
  - Will normally be considered and fined as cartels
Case C-8/08, T-Mobile Netherlands – ECJ broadening the «object» category?

• Five dutch mobile operators (combined market share 99,9 %) met once to discuss the reduction of standard dealer remunerations for postpaid subscriptions

• ECJ
  ◦ "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."

• The statement has created uncertainty as to the scope of the «object» category when applying Article 101 (1) TFEU to exchanges of information
  ◦ Broader than the Commission's guidelines on horizontal co-operation agreements

Reciprocal and unilateral information exchange

• Both reciprocal and unilateral information exchanges may constitute infringements

• A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it may violate Article 101 (1) TFEU
  ◦ E.g. mail, e-mails, phone calls, meetings

• When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically, it will be presumed to have accepted the information and adapted its market conduct accordingly, unless it responds with a clear statement that it does not wish to receive such data
Indirect information exchange

- Indirect (via third parties) information exchange may also constitute an infringement of Article 101 (1) TFEU
  - Public announcements
  - Through vertical intermediaries
- Commission’s Horizontal Guidelines
  - “Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies’ suppliers or retailers.” (para 55)
- Terminology
  - Hub & spoke collusion
  - IIC cartels (Illegitimate Indirect Contact)
  - ABC coordination
- May be as harmful to competition as direct collusion
- Application of Article 101 TFEU requires agreement, concerted practice or decision by association of undertakings

Public announcements

- Commission’s Horizontal Guidelines
  - Unilateral announcements
    - “Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1)”
    - This would not cover situations where such announcements involve invitations to collude
  - Series of public announcements
    - “the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors”
    - “strategic responses of competitors to each other’s public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.”
Vertical relations

Supplier as middleman  Retailer as middleman

supplier  supplier

retailer  retailer

UK case law on indirect information exchange

• Court of Appeals - Combined judgment CA Replica Kit and Toys, [2006] EWCA Civ 1318
  ◦ «If (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),
  ◦ (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed to A and B, and
  ◦ (iii) C does, in fact, use the information in determining its own future pricing intentions,
  ◦ then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition»
  ◦ «The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.»
Tramp shipping pools: factual characteristics

- No universal model
- A pool brings together a number of similar vessels under different ownership and operated under a single administration
- A pool manager is normally responsible for the commercial management
  - Joint marketing
  - Negotiations of freight rates
  - Centralization of incomes
  - Commercial operation – planning vessel movements and instructing vessels, keeping customers updated, issuing freight invoices
  - Collecting vessels’ earnings and distributing them under a pre-arranged weighting system
- Each owner remains responsibility for technical operation of the vessel
  - Safety
  - Crew
  - Repairs
  - Maintenance
Tramp shipping pools: Legal characteristics

European Commission: Legal characteristics
- The key feature of standard shipping pools is joint selling, coupled with some features of joint production
- "Each pool must be analysed on a case-by-case basis to determine, by reference to its centre of gravity, whether it is caught by Article 101(1) TFEU"
- Guidance is found in Commission’s Guideline on Horizontal cooperation agreements
- Pools subject to the Merger Regulation – because they are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity – are not directly affected by Regulation 1419/2006
- Article 101(1) TFEU
  - Agreements between actual or potential competitors
  - Price fixing agreements deemed to have an object of restricting competition

Pools outside Article 101(1) TFEU

- The participants to the pool are not actual or potential competitors
- The participants to the pool are competitors that cannot by any means provide the service(s) covered by the agreement individually
  - E.g. pools set up for the sole purpose of tendering for and providing CoAs for which as individual operators that could not carry out on their own
- Pools which does not contain provisions regarding joint price fixing and joint marketing
Pools generally falling under Article 101(1) TFEU

- If the pool agreement has as its object the restriction of competition by means of price fixing, output limitation or sharing of markets or customers
- Agreements between competitors involving price fixing will always fall under Article 101(1) TFEU irrespective of the market power of the parties
- Pool agreements between competitors limited to joint selling

Pools that may fall under Article 101(1) TFEU

- If not anti-competitive object, an analysis of its effects in the market concerned is necessary
- Article 101(1) TFEU applies if the agreement is likely to have an appreciable adverse impact on the parameters of competition on the market such as price, costs, service differentiation, service quality, and innovation
- The pool’s ability to cause negative market effects depends on the economic context, taking into account the nature of the agreement and the parties’ combined market share together with other structural factors
- Consideration should be given to whether the pool agreement prohibits members from being active in the same market outside the pool and the extent to which there is an exchange of commercially sensitive information
- Any links between pools, whether in terms of management or members as well as cost and revenue sharing should also be considered
- Other factors, as structural factors should also be taken into account
Applicability of Article 101(3) TFEU to shipping pools

• General
  ◦ It is for the undertakings involved to demonstrate that the conditions are fulfilled
  ◦ The sliding scale: The greater the restriction of competition, the greater the efficiencies and the pass-on to consumers must be

• Efficiency gains of pools
  ◦ Better utilisation rates and economies of scale
  ◦ Reduction of number of ballast voyages
  ◦ Planning vessel movements to spread its fleet geographically

3. Antitrust

3.1 Article 101 TFEU
3.2 Article 102 TFEU
3.3 Enforcement
3.4 The Maritime Transport Guidelines: Information exchange
3.5 The Maritime Transport Guidelines: Shipping pools
3.6 The Maritime Transport Guidelines: Shipping pools
3.7 The Block Exemption for Liner Consortia
Regulation 906/2000: Liner Consortia Block Exemption

• Scope, Article 1
  ◦ Consortia providing international liner transport services from or to one or more Community ports

• Definition of consortium, Article 2(1)
  ◦ “An agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo relating to one or more trades, the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements”

Exempted agreements (Art. 3)

• Joint operation of liner shipping services including:
  ◦ Coordination and/or joint fixing of sailing timetables and the determination of ports of call
  ◦ Exchange, sales or cross-chartering of space or slots on vessels
  ◦ Pooling of vessels and/or port installations
  ◦ Joint operations offices
  ◦ Provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment

• Capacity adjustments in response to fluctuations in supply and demand

• Joint operation or use of port terminals and related services
  ◦ E.g. lighterage or stevedoring services

• Activities ancillary to those above, such as:
  ◦ Use of computerised data exchange system
  ◦ Obligation on members to use in the relevant market or market vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties
  ◦ Obligation on members not to assign or charter space to other vessel-operating carriers in the relevant market except with the prior consent of the other members of the consortium
Other provisions

- Hardcore restrictions not exempted, Article 4
  - Fixing of prices when selling liner shipping services to third parties
  - Limitation of capacity or sales except capacity adjustments

- Conditions related to market share, Article 5
  - The consortium members combined market share must be < 30 %
    - To be calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units
    - Irrelevant whether those volumes are carried (i) within the consortium in question, (ii) within another consortium to which the member is a party or (iii) outside a consortium on the member’s own or a on third party vessel
    - The exemption continue to apply of the market share is exceeded during a two years period by not more than one tenth

- Other conditions, Article 8
  - Right to withdraw

- Regulation 906/2009 entered into force 26 April 2010
General

- Purpose of merger control: Control with structural changes in the market
  - In contrast with antitrust rules: Anti-competitive behaviour prohibited
    - Anti-competitive agreements/concerted practices prohibited (Art. 101 TFEU/Art. 53 EEA)
    - Abuse of dominant position prohibited (Art. 102 TFEU/Art. 54 EEA)
  - Decisive: Change of control
- Compulsory pre-merger control/ex ante control
  - Analysis of potential effects on competition/Ex ante analysis
    - Comparison of the competitive conditions that would result from the merger with the conditions that would have prevailed without the merger
    - In contrast with the ex post control of Art. 101/102 TFEU (Art. 53/54 EEA)
  - Once and for all clearance
- Procedural characteristics
  - Compulsory notification
  - Stand-still obligation
  - Strict time limits for enforcement agency
Terminology: Concentrations between undertakings

- EU Merger Regulation: "Concentrations between undertakings"
- Types of concentrations
  - Mergers
  - Acquisitions
  - Joint ventures

Types of mergers

- Horizontal
- Vertical
- Conglomerate
Effects of mergers on competition

• Possible positive effects
  ◦ Achieving economies of scale and cost reductions
  ◦ Developing new products/markets
  ◦ Promoting innovation and transfer of technology

• Possible negative effects
  ◦ Strengthening of market power
  ◦ Reinforcement of oligopolistic market structures
  ◦ Raising/increasing of barriers to entry

EU merger control

• Supra national (EU) v. national rules
  ◦ 2 sets of rules
    • The EU Merger Regulation
    • National merger control legislation
  ◦ No overlap

• Scope of EU merger control
  ◦ Concentrations with EU Dimension
  ◦ The EU Merger Regulation (Reg. 139/2004), art. 1
  ◦ Original and alternative turnover thresholds

• The one-stop shop merger control
  ◦ Concentrations with EU dimension: National merger/competition law not applicable, art. 21(3)
    • Referral provisions: Re-attribution of cases between the Commission and the Member States
    ◦ If EU dimension: From the Commission to Member States
    ◦ Cf. principle of subsidiarity
    ◦ No EU dimension: From Member States to the Commission
  ◦ Exception: Protection of Member States’ legitimate interests, art. 21(4)
    • Public security, plurality of the media and prudential rules shall be regarded as legitimate interests
EU Merger Control Authorities

- European Commission
  - DG Comp
- The General Court (previously the Court of First Instance)
  - Judicial review of European Commission’s decisions
- European Court of Justice
  - Appeals from the General Court
- No decentralised enforcement of EC Merger Regulation by National Competition Authorities
  - A case having a EU dimension may however be referred to the competent authorities of the Member States, cf. Article 4(4) and Article 9
  - If referral to Member States, national merger control legislation to be applied

Sources of law – overview

- The Merger Regulation (Reg. 139/2004)
- The Implementing Regulation 802/2004 (procedural rules; how to calculate time limits etc.)
  - Annex I: Form CO
  - Annex II: Short Form CO
  - Annex III: Form RS Reasoned Submission
- Judgments from the European Court of Justice and the General Court
- Decisions from the Commission
- Guidelines/notices from the Commission
Sources of law – European Commission’s Guidelines

• Substantive issues
  ◦ Assessment of horizontal mergers (OJ 2004 C 31/5)
  ◦ Assessment of non-horizontal mergers (OJ 2008 C 265/6)
  ◦ Definition of the relevant market (OJ 1997 C 372/5)
  ◦ Remedies acceptable (OJ 2008 C 267/1)
    • (See also Best Practices Guidelines)
  ◦ Restrictions ancillary to concentrations (OJ 2005 C 56/24)

• Procedural issues
  ◦ Consolidated Jurisdictional Notice (16 April 2008): Replaces former Notices
    • The concept of concentration (OJ 1998 C 66/5)
    • The concept of full-function joint ventures (OJ 1998 C 66/1)
    • The concept of undertakings concerned (OJ 1998 C 66/14)
    • Calculation of turnover (OJ 1998 C 66/20)
  ◦ Simplified procedures (OJ 2005 C 56/32)
  ◦ Case referral (OJ 2005 C 56/02)

• Best practices on merger control proceedings
  ◦ DG Comp Best Practices on the conduct of merger control proceedings (20 January 2004)
  ◦ The Commission’s model texts for divestiture commitments and the trustee mandate (2 May 2003)

4. Merger control

  4.1 Introduction

  4.2 The concept of concentrations

  4.3 Substantive assessment

  4.4 Procedure

  4.5 Jurisdiction – referrals

  4.6 Shipping pools under the Merger Regulation
Scope of EU merger control: Concentrations

- The concept of concentration: Change of control decisive element
  - Operations bringing about a lasting change in the control of the undertakings concerned, and therefore in the structure of the market
    - Internal restructuring within a group of companies are not included
- Types of concentrations, Article 3
  - Mergers
  - Acquisitions
  - Full-function joint ventures
- If no concentration, Article 101 TFEU may be applicable
- See also Consolidated Jurisdictional Notice, Part B

Acquisition of control – an overview

- Control
  - The possibility of exercising decisive influence on an undertaking
  - To determine its strategic commercial behaviour
- Types of control
  - Sole or joint control
  - De jure or de facto control
  - Direct or indirect control
- Ways of acquiring control
  - Acquisition of shares or assets
  - Acquisition of whole or part(s) of target undertaking
    - Legal entity, branches, assets
    - Must constitute a business to which a market turnover can be clearly attributed
Acquisitions of qualified minority interests

- De facto control
  - Likely to achieve a majority at shareholders’ meetings
    - Other shares widely dispersed
    - Evidence from the presence of shareholders in previous years
  - De jure control
    - Specific rights attached to minority shareholding
      - E.g. preferential shares leading to a majority of the votes
    - Other rights/Shareholder agreements enabling the shareholder to determine the strategic behaviour of the target company
      - E.g. the power to appoint more than half the members of the Board
  - Options
    - Will not in itself confer sole control; unless
      - Will be exercised in near future, and
      - Follows from legally binding agreement

Joint control

- Two or more undertakings/persons having the possibility of together exercising decisive influence over another undertaking
  - Decisive influence: Power to block actions which determine the strategic commercial behaviour of the undertaking
    - I.e. beyond veto rights normally conferred to minority shareholder
- Two parent companies each with 50 %
- Veto rights related to strategic decisions
  - In Statutes or shareholder agreements
- Elements in overall assessment
  - Appointment of management
  - Determination of budget
  - Business plan
  - Investments
- Strong common interests vs. shifting alliances
Creation of full-function joint ventures

- Three cumulative conditions for being subject to merger control
  - Joint control
    - Cf. previous slide
  - Full-function
    - Commission Consolidated Jurisdictional Notice
      - Performing all the functions of an autonomous economic entity
        - Stability
        - Dependence on parents
    - Lasting change in market structure
      - Entity created on a lasting basis
      - Financial resources
      - Personal resources
  - If not subject to merger control; Article 101 TFEU may apply

4. Merger control

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The SIEC-test

- Significantly impede effective competition, Article 2(2)
  ◦ "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market"
- Causal link required between the concentration and effects
- Market analysis
- The SIEC-test replaced the Dominance-test

- Elements in the market analysis
  ◦ Definition of the relevant market
    - Product market
    - Geographic market
  ◦ Competitive assessment:
    - Commission Guidelines on the assessment of horizontal mergers (2004 OJ C 31/03)
    - Market power – Unilateral effects
    - Coordinated effects
    - Vertical effects

Definition of the relevant market

- Precondition for assessing possible restrictions on competition
- Purpose: To identify and define the boundaries of competition between companies
  ◦ Identifying the products/services capable of constraining the behaviour of the parties to the concentration and preventing them from behaving independently of an effective competitive pressure
- Both a product and a geographic dimension
- Commission Notice on the Relevant Market
Significantly impede effective competition

- **Horizontal effects: Unilateral effects**
  - Creation or increase of market power
  - Ability to act independently of its competitors and customers
    - To profitably increase prices or reduce output, choice or quality
  - Merger with a potential competitor

- **Horizontal effects: Coordinated effects**
  - Collective dominance
  - Competitors more likely to coordinate their competitive behaviour?

- **Vertical effects**
  - Non-coordinated affects: Foreclosure
  - Coordinated effects

- Conglomerate mergers

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Market shares and concentration levels

- **Concentration levels**
  - HHI (Herfindahl-Hirschman Index)
  - Adding the squares of the individual companies in the market
  - $\Delta$HHI = Change in concentration as a result of the concentration
  - Normally no horizontal competitive concerns if:
    - Post-merger HHI between 1000 –2000 and $\Delta$HHI < 250
    - Post-merger HHI > 2000 and $\Delta$HHI < 150

- **Market shares as indication of unilateral effects**
  - < 25 %: Presumed compatible
  - < 40 %: Normally no unilateral effects

- **Market shares and concentration levels only elements in individual market analysis: Importance of countervailing factors**
Sources of competitive constraints

• Demand-side substitution
  ◦ Consumers’ response to a small but significant increase in prices
  ◦ Depends on the reactions of the marginal consumers, not the average consumer
    • The issue is not whether all consumers react to an increase in prices by changing to another product
      but whether a sufficient number of consumers changes to other products or reduces their demand in an amount that
      makes the price increase unprofitable
  ◦ The most immediate and effective disciplinary force, taken into account when defining the relevant market

• Supply-side substitution
  ◦ Other suppliers’ ability to switch production to the relevant products
  ◦ Shift must be possible in the short term and without incurring significant additional risks or costs
  ◦ Taken into account when defining the relevant market

• Potential competition
  ◦ Not taken into account when defining relevant market, but may be an effective competitive constraint

Possible countervailing factors

• Possibility of market entry – Potential competition
  ◦ Entry must be likely, timely (2-3 years) and sufficient to deter any anti-competitive effects
  ◦ Examples of entry barriers
    • Regulatory barriers
    • Technical advantages (e.g. preferential access to essential facilities or IPR)
    • Commercial and strategic barriers; Importance of brands, over-capacity, exclusive distribution networks and proprietary solutions
    • Importance of track records
    • Importance of economies of scale
    • Important sunk costs

• Buying power
  ◦ Bargaining strength of the buyer vis-à-vis the seller in commercial negotiations
    • Depends on customer’s size, commercial significance and ability to resort to credible alternatives

• Dynamics of the market
• Nature and structure of products and competition
  ◦ Differentiated or homogeneous products
  ◦ Bidding markets
Efficiency defence

• Many mergers have both negative (anti-competitive) and positive effects
  ◦ Positive effects e.g. efficiencies (economies of scale, economies of scope)
  ◦ How should positive effects/efficiencies be balanced against negative effects in individual cases?
• Consumer welfare standard
  ◦ Horizontal Guidelines, paras 76-88
  ◦ A merger should not be prohibited if the efficiency gains are sufficiently substantial as to ensure that the price will not increase
  ◦ Consumers should not be worse off as a result of the merger
  ◦ Compare Article 101 TFEU

Failing firm defence

• Horizontal Guidelines, paras 89-91
• Failing firm
  ◦ The allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking
• No alternative purchaser
  ◦ There is no less anti-competitive alternative purchase than the notified merger
• Assets of failing firm will exit market
  ◦ In absence of merger, the assets of the failing firm would inevitably exit the market
• “Burden of proof”
  ◦ Notifying parties must demonstrate that the deterioration of competitive structure not caused by the merger
Ancillary restraints

- Ancillary restraints, cf. Article 6(1)(b) second subparagraph
  - Restrictions directly related to and necessary to the concentration
  - Automatically covered by a merger clearance
  - Principle of proportionality: restrictions on duration, geographical scope and products/services to be covered must be limited
- Commission Notice on ancillary restraints (OJ 2005 C 56/24)
- Example #1: Non-compete clauses on the seller
  - Purpose: To protect the value of the business(es) being transferred
  - Acceptable for 3 years when transfer of both goodwill and know-how
  - Acceptable for 2 years when only transfer of goodwill
- Example #2: Supply and purchase obligations
  - In order to maintain the continuity of supply in a transitional period

Remedies

- Possible outcomes of investigation
  - Clearance
  - Prohibition
- Alternative outcome: Commitments by parties to overcome identified problems
- Types of remedies
  - Structural
  - Behavioural
- Notices
  - Notice on remedies, OJ 2008 C 267/1
  - Model text for Divestiture Commitments and Trustee Mandate, cf. Best Practice Guidelines
- DG Comp in-house Merger Remedy Study
4. Merger control

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4.6 Shipping pools under the Merger Regulation

Concentrations with a EU dimension must be notified

- EU dimension defined by turnover thresholds only (regardless of effects on competition)

- Original thresholds, Article 1(2)
  - Combined global turnover: > EUR 5 billion
  - Individual turnover within EU of each of at least two undertakings concerned: > MEUR 250
  - Exception: 2/3-rule

- Alternative thresholds, Article 1(3)
  - Combined global turnover: > EUR 2.5 billion
  - Combined turnover within at least 3 EU states: > MEUR 100
  - Individual turnover of at least two undertakings concerned within the EU states: > MEUR 25
  - Individual turnover within EU of each of at least two undertakings concerned: > MEUR 100
  - Exception: 2/3-rule
Calculation of turnover (Art. 5)

- Starting point: Undertakings concerned
  - Undertakings participating in a concentration
  - Acquisition of parts of an undertaking
- The concept of turnover, Article 5(1)
  - Amounts derived from sales of products/services of ordinary activities last financial year
- Identification of undertakings whose turnover is taken into account, Article 5(4)
- Geographical allocation of turnover, Article 5(1)
  - Customer location
- The Commissions Consolidated Jurisdictional Notice, Part C

Who must notify and when to notify (Art. 4)

- Who must notify (Art. 4(2))
  - Mergers: The merging parties
  - Acquisition of control: The person(s) acquiring control
  - The seller has no obligation to notify
- When must notification be submitted (Art. 4(1))
  - "Prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest"
  - Notification may also be made where the undertakings demonstrate a good faith intention to conclude an agreement
The stand-still obligation (Art. 7)

- **Purpose**
  - To ensure the possibilities of effective merger control

- **Automatic suspension**
  - The concentration may not be put into effect/implemented until it has been cleared by the Commission
  - Legal exception: Public bids/series of transactions (art. 7 (2))
    - May be implemented, but no exercise of voting rights
  - Individual exemption: Derogation upon request (art. 7 (3))
    - Rarely granted

- **Content**
  - All implementing measures
    - Closing
    - Exercise of share-holders’ rights
    - Integration of the activities of the undertakings concerned
  - Preparatory measures may be taken

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Timetable (Art. 10)

- **Stage I:**
  - 25 working days/
  - If commitments + 10 working days

- **Stage II:**
  - 90 working days/
  - If commitments + 15/20 working days

- **Notification CO**
- **Art.6 (1)/(2) decision**
- **Art.8 (1)/(2)/(3) decision**
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One-stop shop principle

Alternative 1:
If EU dimension;
EU Merger Regulation –
The Commission
(MS’ legitimate interests)

Alternative 2:
No EU dimension;
National merger legislation –
National Competition Authorities

The EU Merger Regulation: Turnover thresholds

EU dimension: Referral from the Commission to Member States, Article 4(4) and Article 9

No EU dimension:
Referral from Member States to the Commission, Article 4(5) and Article 22
**Referral to Member States: Pre-notification by the parties (Art. 4(4))**

- Test: Concentration may significantly affect competition in distinct market within a Member State
- Commission must be informed prior to notification by reasoned submission
- The Member State referred to in the RS must express disagreement or agreement within 15 working days of receiving the reasoned submission (silence = agreement)
- Commission may then decide to refer the whole or part of the case to the Member State
  - The case may even be referred to more than one Member State
- Commission’s decision must be taken within 25 working days after receiving the RS

**Referral to Member States: Post-notification by Member States (Art. 9)**

- A Member State may request referral within 15 working days after the case was notified to the Commission on its own initiative or upon the invitation of the Commission
- Article 9(2)(a) test: Concentration threatens to affect significantly competition on a distinct market within a Member State
  - Commission decides on the basis of the test but also has administrative discretion
- Article 9(2)(b) test: Concentration affects competition on a distinct market within a Member State which is a non-substantial part of EEA
  - Commission decides on the basis of the test, no administrative discretion (i.e. the Commission has an obligation to refer)
- Commission’s decision to refer or not shall as a general rule be taken within 25 working days from receiving the notification
- The case may be referred as a whole or partially
- The Member States shall inform undertakings of preliminary assessment within 45 working days after the Commission’s referral
Referral to the European Commission: Pre-notification by the parties (Art. 4(5))

- Test: Concentration which is capable of being reviewed by at least three Member States
- Commission must be informed before any notification by reasoned submission
- Competent Member States must express disagreement within 15 working days of receiving the reasoned submission
- Member States’ veto: No referral where at least one Member State disagree
- If no disagreement, the concentration is deemed to have a EU dimension

Referral to the European Commission: Post-notification by Member States (Art. 22)

- One or more Member States may request referral within 15 working days after the case was notified
- Test: Concentration affects trade between Member States and threatens to significantly affect competition within requesting Member States' territory
- Any other Member State shall have the right to join the initial request
- National time limits suspended until Commission has made decision
- Commission is deemed to have adopted decision to examine the concentration if no explicit decision within 10 working days after receiving the request
- Commission examines the case on behalf of requesting Member State(s)
### Starting point: Co-operation or concentration

- Starting point: Two alternatives
  - Structure pools after Article 101 TFEU
  - Structure pools after the EC Merger Regulation
    - Can the pool be structured as a concentration
- Advantages of a concentration structure
  - Article 81 EC will not apply, but the Merger Regulation
  - No self-assessment, but regulatory approval
  - Concentration below turnover thresholds in the Merger Regulation; automatic approval (Article 101 TFEU non-applicable) unless subject to national merger control
  - Concentration above turnover thresholds in the EC Merger Regulation; approval after notification/investigation
  - Less stringent test for merger approval than Article 101 TFEU: "significant impediment to effective competition"
  - Later increase in market share through internal growth does not affect approval
How to structure a pool as a concentration

- How to structure a pool as a concentration
  - Merger
  - Acquisition
  - Full-function Joint Venture
- Only a full-function JV allows pool participants to remain owner of its vessels
- Full-function JV requires joint control and structural change
- If not full-function, Article 101 TFEU applies

Joint control

- Parent companies must have the possibility to exercise decisive influence over the JV’s strategic behaviour
- E.g. veto rights on strategic matters
  - Appointment of senior management
  - Budget
  - Business plan
  - Investments
Structural change

- JV must operate on the market on a lasting basis as an autonomous economic entity
  - Independent senior management dedicated to day-to-day operations
  - Financial means
  - Staff
  - Assets (e.g. network of marketing and operational contacts and skilled technical expertise as key assets)

- JV can not act principally as sales agent for its parent companies or be obliged to purchase all it needs from the parents companies
  - The JV must operate its business autonomously of the Parties
  - The management shall determine the commercial policy pursuant to the interest of the JV
  - The JV shall have direct contact with its customers
  - Securing sufficient vessel capacity shall be the sole responsibility of the JV’s management
  - The JV shall be free to charter vessels from third parties – but may source from the parent companies for a transitional period