

12C006

Elements of Competition Law

Fall Term – 3 ECTS

Mandatory Course

Prof. Cani Fernández

Prerequisites to Enroll

None

Objective and Structure of the Course

The objective of this course is to provide students with a basic understanding of the different areas of Competition Law, with particular emphasis on the practical application of the legal provisions. The course focuses on EU Law, but provides a framework that could be useful also to understand competition laws of other jurisdictions.

The course will cover the major areas of competition law: cartels, mergers, antitrust (anti-competitive agreements and abuses of a dominant position) and State intervention (including State Aids and other types of behaviour by public authorities that could distort competition). For each of these areas of competition law, the course will examine first the legal substantive provisions and their judicial interpretation, to identify which practices are legal and which ones are prohibited. Second, the enforcement mechanisms of these legal provisions will be described, to get a clear view on “who does what” (i.e. which authorities are competent to enforce the different areas of competition law and which investigative and sanctioning powers they have). Finally, the “life” of a case will be presented, to familiarize students with the practical application of the law and procedures by competition authorities.

Students should be ready to prepare each session in advance, by reading few selected Commission decisions and Court judgments that will be discussed in class (links to the documents to be read are provided below, for each session of the program). The relevant legal provisions and interpretative notices should also be consulted (they can be found in DG Comp's website: http://ec.europa.eu/comm/competition/index_en.html). One of the goals of the course is, indeed, to familiarize students with the direct use of EU legal sources and to teach them how to find the key elements of information inside formal legal documents. Class participation will be taken into account in the final evaluation.

Course Outline

The course will be divided in five sessions (of 4 hours each).

- Session 1 : Introduction and overview of the actors and the statutes.
- Session 2 : Antitrust (1) Anti-competitive agreements and Agreements compatible with Competition Law
- Session 3 : Antitrust (2) Abuses of a dominant position
- Session 4 : Merger Control
- Session 5 : State Intervention

Please see more detailed information on each session in the following pages.

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Session 1: Introduction and overview of the actors and the statutes.

➤ *Introduction:*

• *Goals and evolution of EU Competition Law*

- Objectives of Competition Law
- Schools of Competition analysis and theories
- Ordoliberalism
- Competition Law and Regulation

• *Concepts, Techniques and Tools of Competition Law*

- Form or effect and Theories of harm
- Over and under enforcement: Type 1 and Type 2 errors
- Market power, Market definition, Barriers to entry and expansion

➤ *The European Union and its Institutions*

• *Introduction to the European Union*

- The European Union and the European Community
- The EU Treaties
- The non-judicial EU Institutions
- EU Acts
- The EU Courts
- General principles of Union Law and Human Rights
- The EU Legal Order

• *The Competition Provisions*

- General
- The substantive provisions of the TFEU
- The procedural provisions
- The Merger Regulation
- Other relevant Treaty provisions
- Notices and Guidelines.

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Session 2: Antitrust (1). Anti-competitive agreements. Agreements compatible with Competition Law

➤ *Anti-competitive agreements. Substantive provisions: Article 101 TFEU*

• Introduction

- Article 101, the text and the schema: the three paragraphs
- Consequences of infringement
- Burden and standard of proof
- The concepts of “Undertaking” and “Association of undertakings”
- The concepts of “Agreement”, “Decision” and “Concerted practice”
- Object or effect of the prevention, restriction or distortion of competition
- Appreciable effect on trade between Member states. *De Minimis*.
- Horizontal and Vertical agreements
- Agreements required by national legislation or encouraged by national governments
- Commission Notices
- Extraterritoriality

• The relationship between Article 101(1) and Article 101(3)

- Modernisation and the legal exception mechanism
- Application of Article 101(3)
- Burden and standard of proof
- Any agreement may in principle benefit from Article 101 (3)
- The Article 101(3): Criteria
- Block exemptions
- Unilateral action and Article 101(3)

➤ *Antitrust (abuses/anti-competitive agreements). Enforcement framework*

• Regulation 1/2003.

• Legal exception system (Art 1)

• Public enforcement:

- Shared competences by Commission and NCAs
 - Case allocation
 - Co-operation mechanisms
- The ECN+ Directive

• Private enforcement.

- Direct application of Arts 101 and 102
- Co-operation between National Courts and the Commission

• Relations between EU and national law (Art 3)

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➤ **Horizontal agreements: Cartels**

- "Naked" infringements of Article 101
 - Price fixing
 - Market sharing
 - Bid rigging
 - Boycotts
- Enforcement Framework: Public enforcement.
 - Regulation 1/2003. General principles.
 - Shared competences by Commission and NCAs
 - Case allocation
 - Co-operation mechanisms
- Private enforcement:
 - Damages claims before national courts.
 - The damages directive: Directive 2014/104/EU

➤ **Other Horizontal Agreements:**

- BER and guidelines on horizontal agreements (2011)
- Co-operation and R&D agreements.
- Joint selling/buying
- Exchanges of information
- Standardisation agreements

➤ **Vertical Agreements:**

- BER and guidelines on vertical restraints (2010);
 - Hardcore restrictions
 - Vertical price fixing
 - Territorial restrictions
 - Categories of vertical restraints
 - Single branding
 - Exclusive distribution
 - Selective distribution
 - Franchising
 - Exclusive supply

➤ **Technology transfer agreements**

- BER and guidelines (2014)
 - Safe harbour and hard core restrictions
 - Patent pools
 - Guidance on settlement agreements

➤ **Sector specific agreements**

- Eg, Insurance.

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➤ *The “life” of a cartel case*

- Initiation: complaint; leniency application; ex-officio
- Investigation powers: inspections; requests for information
- Rights of defense: statement of objections; access to file; oral hearing
- Infringement decision (Art 7, Reg 1/2003).
- Sanctions. Guidelines on fines (2006).
- Direct Settlements (Notice 2008)
- Judicial review

Compulsory reading before the course:

- The Commission decision on the Blocktrains cartel (2015)
http://ec.europa.eu/competition/antitrust/cases/dec_docs/40098/40098_827_7.pdf
- The ECJ judgement Groupement des Cartes Bancaires (C-67/13 P) (2014)
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=203310>
- And the Commission decision on the Container Shipping (2016)
http://ec.europa.eu/competition/antitrust/cases/dec_docs/39850/39850_3377_3.pdf

Session 3: Antitrust. Abuses of a dominant position

➤ *Abuses. Substantive provisions*

- The text, schema and interpretation of Article 102 TFEU
 - The prohibition
 - meaning of “one or more undertakings”
 - Dominant position
 - Within a substantial part of the Internal Market
 - Abuse
 - Effect on trade between Member states
 - Enforcement of Article 102 and the Review
 - Infringement decisions, fines and other remedies; cooperation procedure
 - The review: the Guidance Paper.
 - Market definition in Article 102 cases
 - Assessing Market Power
- Conduct which can be an abuse
 - Notion
 - Types of abuse
 - Exclusionary abuses: distinguishing illegitimate from legitimate conduct
 - Form-and effects-based analysis
 - Objective justifications, efficiency and other defences
 - Objective justification in the case law
 - The burden of proof
 - Justification in the Guidance paper
 - Meeting competition and other defences.
 - Issues in respect of abuses concerning pricing :
 - Exploitative and exclusionary pricing policies

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- Predatory pricing
- Margin squeeze
- Other exclusionary abuses:
 - Exclusive purchasing
 - Tying and bundling
 - Refusal to supply
 - Other: use of IP rights, abuse of litigation, vertical integration, “preferencing”...
- Discrimination contrary to Article 102(c)
- Exploitative abuses
 - Notion
 - Categories:
 - Unfair or excessive prices
 - Imposing unfair trading conditions
 - Inefficiency and limiting production

➤ *The life of an antitrust case (abuse/anti-competitive agreement).*

- Initiation: Ex-officio Complaint;
 - Notice on the handling of complaints (2004)
- Investigation powers
- Rights of defence
- Decisions
 - Commitment decisions (Art 9)
 - Inapplicability decisions (Art 10) / Guidance letters
 - Interim measures (Art 8)
 - Infringement decisions (Art 7)
 - Sanctions/Remedies
 - Non-Cartel Cooperation procedure
- Judicial review

Compulsory reading:

- The CFI judgement *Intel*, T-286/09 of 12 June 2014 (see points 21 to 33 for a summary of the essential elements of the Commission decision, points 69 to 71 for a summary presentation of the controversy regarding the licit or illicit nature of the fidelity rebates, 74 and ss for a concise explanation of the types of rebates according to the case-law of the EU Courts, 140 and ss for a judicial interpretation of the *As Efficient Competitor (AEC)* test.
<http://curia.europa.eu/juris/document/document.jsf?docid=153576&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=38360>
- The ECJ judgement *Intel*, C-413/14P of September 6, 2017
<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d6fe58288c35e143869edc924542a685e9.e34Kaxilc3gMb40Rch0SaxyMbx90?text=&docid=194082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=222163>

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- And the ECJ judgements *Post Danmark*, C-209/10 of 27 March 2012 and *Post Danmark (II)*, C-23/14 of 6 October 2015
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=202768>
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=169191&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=716517>

Session 4 : Mergers

➤ *Mergers. Substantive provisions*

- ECMR (Council Regulation 139/2004):
 - General principles
 - Notion of concentration (Art 3)
 - Mergers
 - Acquisition of control
 - Joint ventures
 - Significant impediment of effective competition (Art 2)
 - Interpretation and evolution of the ECMR substantive test
- Market definition:
 - A useful tool for merger control and antitrust assessment
 - Guidelines on market definition (1997);
 - Product market definition
 - Geographical market definition
- Horizontal mergers:
 - Guidelines on the assessment of horizontal mergers (2003).
 - Quantitative indicators: market share and HHI
 - Non co-ordinated effects
 - Co-ordinated effects
 - Entry
 - Countervailing buyer power
 - Efficiencies
 - Failing firm defence
- Non-horizontal mergers
 - Guidelines on the assessment of non-horizontal mergers (2008)
 - Quantitative indicators: market share and HHI
 - Non co-ordinated effects: foreclosure
 - Co-ordinated effects
 - Efficiencies
- Merger Remedies
 - Guidelines on Merger remedies (2008).
 - General principles
 - Divestitures
 - Other remedies

➤ *Mergers. Enforcement framework*

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- Exclusive competence:
 - Commission: Mergers of community dimension
 - National competition authorities: other mergers, defined by national law
- Notion of community dimension (Art 1)
 - Turnover thresholds
 - Two-thirds rule
- Referral provisions
- International dimension
- **The life of a merger case.**
 - Pre-notification
 - Notification. Form CO.
 - Stand-still provision. Derogations.
 - Investigation powers
 - First phase / simplified procedure
 - Second phase
 - Rights of defence. Best practices for merger investigations (2004)
 - Final decisions
 - Judicial review

Compulsory reading:

- The Commission prohibition decision in UPS/TNT Express (2013, published 2014).
For a summary of the Decision:
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0507\(01\)&qid=1442163761509&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0507(01)&qid=1442163761509&from=EN)
- The full text of the Decision:
http://ec.europa.eu/competition/mergers/cases/decisions/m6570_20130130_20610_4241141_EN.pdf
- The judgement of the General Court, T-194/13 of 7 March, 2017:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=188600&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=223835>
- The judgement of the Court of Justice, C-265/17 of 16 January 2019:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=209848&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=12579534>

Session 5: State Intervention

- **Limits imposed by EU competition law to State intervention**
 - General principles:
 - Neutrality of EU Treaty between public and private property
 - Wide discretionary powers to regulate the economic process
- **Violation by the State of Arts 101 and 102 (Article 4 TEU)**
 - Substantive provisions:
 - Imposing or inducing anti-competitive behaviour
 - Reinforcing the effects of anti-competitive behaviour
 - Delegate regulatory powers to private operators

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- Enforcement framework
 - 258 TFEU procedure against MS
- **Exclusive rights and liberalisation** (Article 106 TFEU)
 - Substantive provisions:
 - State measures related to public or privileged companies
 - Contrary to another provision of the EU Treaties
 - Exception: provision of services of general interest
 - Enforcement framework (Art 106.3)
 - Liberalisation measures:
 - Commission decisions
 - Commission directives
- **State barriers to cross border mergers** (Article 21 ECMR)
 - Substantive provisions
 - State Measure prejudicing a merger of community dimension
 - Public interest compatible with EU Treaties
 - Public security; plurality of media; prudential rules
 - Other interests
 - Necessity and proportionality
 - Enforcement framework (art 21.3)
 - Notification obligations by MS
 - Commission decisions
- **State Aids** (Articles 107 and 108 TFEU)
 - Substantive provisions
 - Notion of State aid
 - State resources
 - Advantage to a firm
 - Distortion to competition
 - Compatibility assessment (Arts 107.2 and 107.3), including treatment of measures adopted by Member States to react to the current financial and economic crisis
 - Enforcement framework
 - Notification obligations
 - Procedure.
 - Commission decisions
 - Council intervention (Art 108.2)
 - Recovery.

Compulsory reading:

- The ECJ judgment of 17 July 2014 in case C-553/12P Commission/DEI: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5b58970a5665d4fab35af74f7939bddc.e34KaxiLc3eQc40LaxqMbN4ObNmPe0?text=&docid=155109&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=200239>
- And the EU Commission decision in the Apple State aid case:
- Press release: IP/16/2923 http://europa.eu/rapid/press-release_IP-16-2923_en.htm
- Decision State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland
Alleged aid to Apple : http://ec.europa.eu/competition/state_aid/cases/253200/253200_1582634_87_2.pdf

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Required Activities

Compulsory reading of designated materials before each session. Other activities to be determined by the professor.

Evaluation

Exam at the end of the course (80%)

Relevant participation in class (20%)

Competences

- To (be able to) communicate with determination and in the English Language, the results and implications of
- the required analytical study using a language that the receiver can relate to.
 - To work within a heterogeneous team of researchers as economic analyst using specific group techniques.
 - To fit in diverse professional environments and varied types of collaborations in different professional projects
 - To possess and understand the knowledge that provides a basis or opportunity to be original in the development and / or application of ideas, often in a research context.
 - That students know how to apply the acquired knowledge and their ability to solve problems in new or unfamiliar environments within broader (or multidisciplinary) contexts related to their field of study.
 - That the students be able to integrate knowledge and face the complexity of making judgments based on information that, being incomplete or limited, include reflections on the social and ethical responsibilities linked to the application of their knowledge and judgments.
 - That the students be able to communicate their conclusions and the knowledge and the ultimate reasons that sustain them to both, specialized and non-specialized publics in a clear and unambiguous way.
 - That students possess the learning skills that allow them to continue studying in a way that will be largely self-directed or autonomous.
 - To identify and apply the insights of the theory, the models, and the analytical tools of modern economy to its global dimension.
 - To understand and apply the quantitative methods used to solve complex problems of the economy
 - To evaluate, with theoretical and quantitative instruments, the complex realities of the economy to understand the way it works.
 - Understand and apply economic theory related to the regulation of markets and competition policy.

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Learning Outcomes

- Identifies the applicable knowledge of Economic Theory, particularly in the areas of microeconomics, industrial economics, information economics, game theory and strategic behavior.
- Recognizes the principles of competition laws and their sources.
- Describes the theory and models of regulation, and in particular, the basic regulatory framework of the main industrial sectors.
- Applies the concepts of economic theory and methodological tools, such as game theory, in discussions and evaluations of competition policies and of market regulation.

Basic Bibliography on Competition Law:

A set of slides will be provided with the essential ideas for each session and, as explained above, to prepare the courses students are required to read directly from the sources (legal provisions, interpretative notices, Commission decisions and Court judgements). However, it could be useful for students to consult competition law manuals in order to improve the understanding of some specific points or to get a more comprehensive vision of some of the themes explored during the course. A non-exhaustive list of useful manuals is provided below. Many of them are available at the secretariat of the school. The first of the listed manuals (Jones & Sufrin) is recommended by the professor.

- **Jones and Sufrin**, *EU Competition Law, Text, Cases and Materials*, Oxford University Press. 7th edition, 2019
- **Damien Gerard and Eleanor Fox**, *EU Competition Law*, Edward Elgar Publishing, 2017.
- **Faull and Nikpay**, *The EC law of Competition*, Oxford University Press, 3rd edition 2014.
- **Wish Richard**, *Competition Law*, Oxford University Press, 9th edition, 2018.
- **Bellamy and Child**, *European Community Law of Competition*, Oxford University Press, 2016 edition (and also **Bellamy & Child: Materials on European Union Law of Competition**, 2016).
- **A. Ezrachi**. *EU Competition Law. An analytical guide to the leading cases*. Hart Publishing, 6th edition 2018.
- **Korah Valentine**, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition 2007
- **G. Monti**, *EC Competition Law, (Law in Context)*, 2007
- **H. Hovenkamp**, *The Antitrust Enterprise, principle and execution*. 2005. Harvard University Press paperback 1st edition, 2008