

Competition Law and Enforcement in the United States and Ukraine

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The views expressed are not purported to reflect the views of the
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An Overview

- ▶ What is the purpose of a competition law?
 - Protection of the *process* of competition, for the benefit of consumers and the economy
- ▶ What is included in competition law?
 - Agreements among firms
 - Abuse of dominance / "Monopolization": Unilateral single-firm conduct
 - Mergers and acquisitions
 - Sometimes: anticompetitive actions of local governments
 - Sometimes: State Aids

Agreements among enterprises

(Sherman Act, 1; TFEU, art. 101; Ukrainian law, arts. 5–11)

▶ Horizontal agreements

- Cartel agreements: the most serious violations
 - “Per se” illegal
 - Criminal punishment in U.S., increasingly elsewhere
 - So how detect and prove?
 - “Leniency”
- Joint venture agreements
 - “Rule of reason” analysis

▶ Vertical agreements

- Examples: Exclusive contracts, Most Favored Nation clauses, tying, resale price maintenance
- Generally a competition problem only when at least one firm is in a dominant position

Abuse of a position of dominance

(Sherman Act, 2; TFEU, art. 102; Ukrainian law, arts. 12–13)

- ▶ Single-firm conduct. In the US, “monopolization”
- ▶ Both “parts” of the offense must be present
 - It’s not illegal to have a dominant position, or even a monopoly
 - You can’t abuse a dominant position unless you HAVE a dominant position
- ▶ Two broad types of abuse: expropriative and exclusionary
 - Expropriative abuses: Expropriating the surplus of trading partners – for example, charging high prices, taking unfair advantage of customers. Not usually a focus of US, EC enforcement.
 - Exclusionary abuses: Excluding other firms from the market or harming the ability of other firms to compete in the market

Abuse of dominance: a standard methodology

- ▶ Define the market
 - Product market
 - Geographic market
- ▶ Analyze possible barriers to entry
- ▶ If the firm is in a dominant position, is the behavior an abuse?
- ▶ Most concern for “exclusionary abuses” that prevent the development of competition
 - ▶ Importance of ACCESS by smaller firms to critical inputs
 - ▶ Examples: Borsod Beer, Microsoft, Dentsply

Mergers and acquisitions

(Clayton Act #7; TFEU reg. 139/2004; Ukrainian law, arts. 22–25)

- ▶ The “latecomer” of the 3 principal provisions in US, EU law
- ▶ Most attention paid to horizontal mergers, BUT ...
- ▶ Vertical mergers may be harmful as well – especially “foreclosure/access” issues
 - For example: a dominant firm buying its input supplier or distributor
- ▶ Increasingly, agencies require advance notification (“prenotification”)

Horizontal merger analysis: a standard methodology

- ▶ **Market definition**
 - ▶ The “hypothetical monopolist” test
 - ▶ Product market
 - ▶ Geographic market
- ▶ **Barriers to entry**
- ▶ **Competitive effects**
 - Coordinated effects – usually homogeneous products
 - Unilateral effects – usually differentiated products
- ▶ **Efficiencies**

Special European issues

- ▶ In some countries: Anticompetitive actions of bodies of local governments
 - TFEU, art. 106; Ukrainian law, arts. 15–173
 - Focus on protectionist behavior favoring local firms over national or multinational firms
- ▶ In Europe especially: State Aids
 - TFEU, art. 107; Ukrainian Law on State Aid to Undertakings
 - Focus on transparency and competitive neutrality of government assistance to enterprises

In conclusion...

- ▶ Competition law is focused on process, not outcomes.
- ▶ U.S. Supreme Court: “Competition law protects competition, not competitors” (Brown Shoe v. United States, 1962).
- ▶ Adam Smith: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.” (1776!)
- ▶ Competition law focuses on letting markets work, blocking actions that would interfere.