

EU COMPETITION LAW

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Abuse of dominance

Article 102 TFEU



Sources of law

- Article 102 TFEU
- Case law
- Commission guidance on „enforcement priorities” (2009)
 - Modernization, „more economic approach”?

Structure of Article 102 TFEU

- Existence of a **dominant position**
 - Definition of the relevant market
 - Measuring market power; some competition may be left
- **Abuse** by one or more undertakings
 - Exploitative: consumers hurt (i.e. unfairly high prices) ☹️
 - Exclusionary: competitors suffer (market foreclosure) ☹️
- May affect interstate trade
- Note: no exception/exemption system
 - But: Art. 106 (2)
 - Justifications

Competition schools, policy goals do matter

- Protecting...
 - the structure of the market
 - consumer/social welfare
 - small business
 - Less efficient competitors?
- Relevance: delimiting abuse from aggressive market conduct
- Another way of controlling big companies: (sector specific) regulation

Dominance

- The notion of independence
- Significant market power + over a significant period of time
- Lack of sufficient competitive constraint:
 - Competitors: actual and potential (expansion and entry)
 - Customers („countervailing buying power”)
- Profitably increase prices above the competitive level
- „Horizontal” significance: M&A, 106 (1)

The assessment of dominance

- Market shares – „useful first indication”
 - Guidance: not likely below 40%
 - AKZO case law: above 50% + in the absence of special circumstances
 - Stability over time
- Expansion or entry: TLS
 - Entry barriers
- Countervailing buying power
 - Ability to switch quickly to competing suppliers

Is dominance as such prohibited in EU competition law?

- NO, yet ...
 - Abusively extending it to a neighboring market
 - Structural remedy (divestiture) if the abuse derives from the structure of the domco
 - Ex ante control if it results from an M&A
 - State created exclusive rights can be abolished

Abuse – general principles

- Special responsibility not to impair undistorted competition still existing
- Competition on the merits: OK
 - Elimination of competitors – which?
 - AEC („as efficient competitor”) test
- Disadvantage felt by competitors/customers + distorting competition
- Effects?
 - Potential effects sufficient
 - Affecting either the dominated or a neighboring market
- Protection of welfare/efficiency or fairness?

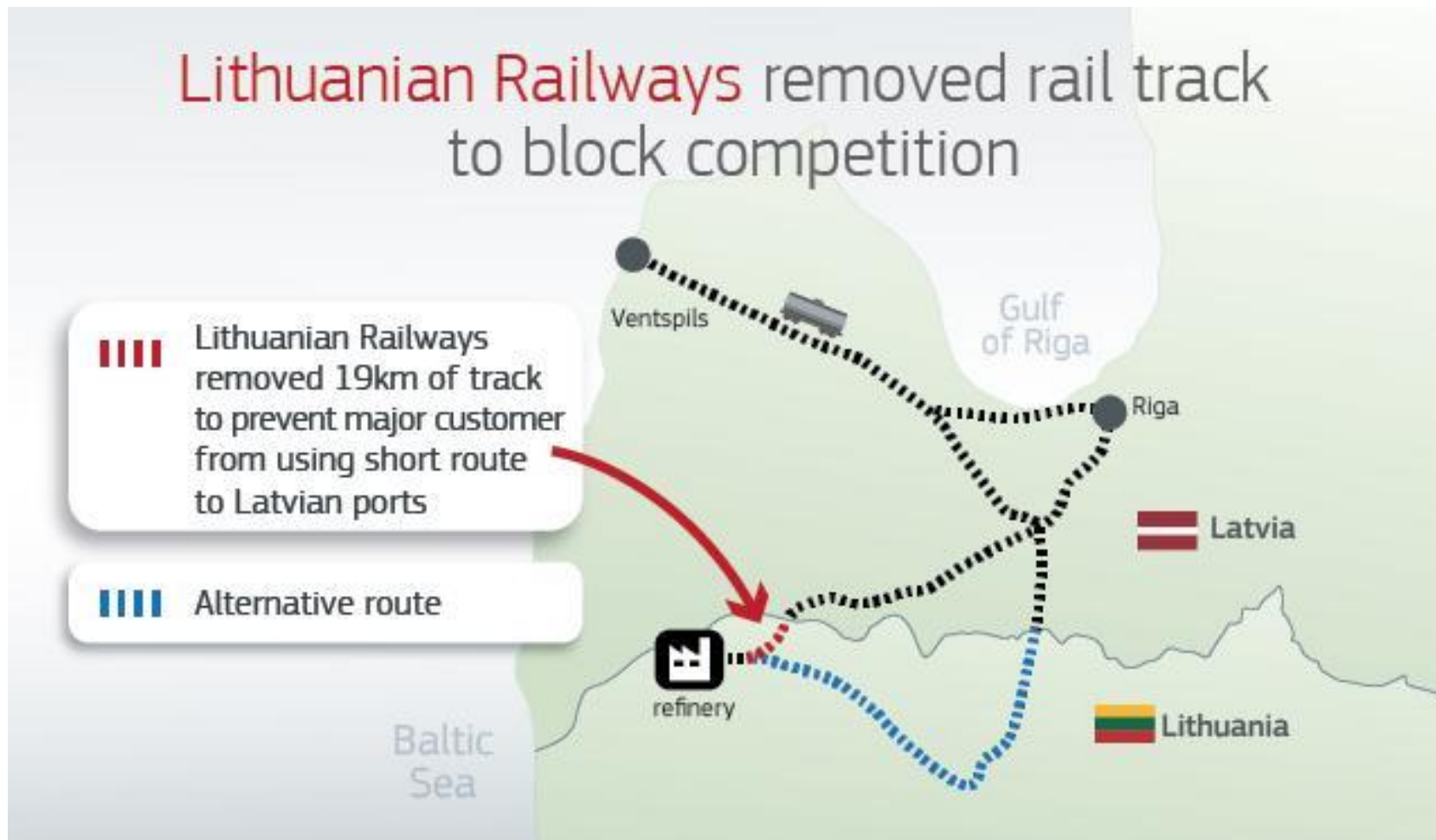
Abusive practices

- Charging unreasonably high prices
- Certain forms of price discrimination and rebates
- Charging different prices based upon the nationality of the buyer
- Selling at artificially low prices efficient competitors can't compete with („predatory pricing”)
- Price squeeze
- Refusing to deal with certain customers or offering special discounts to customers who buy all or most of their supplies from the domco
- Refusing access to an essential facility
- Making the sale of one product conditional on the sale of another product: tying, bundling

Article 102 v. Regulation?

- Legal certainty considerations, structural problems (market failures)
- Difficulties with fast moving tech markets
- Regulation
 - Mirroring competition law principles
 - SMP regulations in telco and energy
 - Price regulation: balancing dominance?
 - Danger of regulatory capture
- Can competition law be applied in regulated markets?
 - The concept of autonomous business conduct

Baltic railways abuse - dismanteling



Gazprom commitments

GAZPROM's proposed measures to remedy competition concerns



Allowing cross-border flows of gas



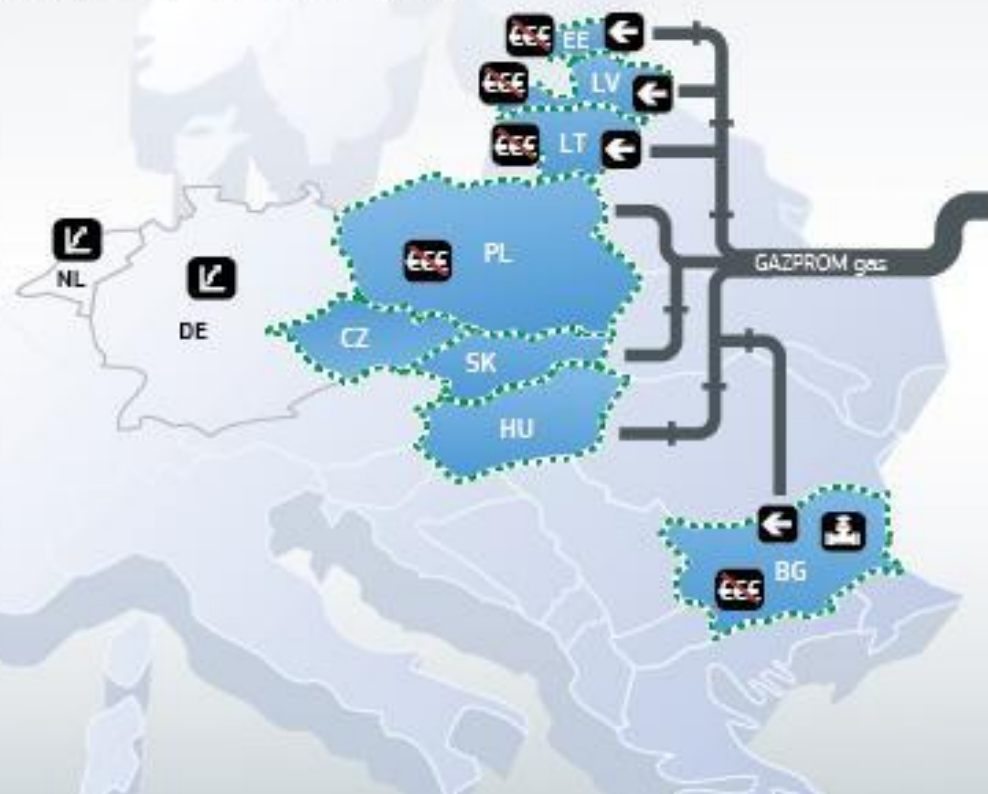
Ensuring competitive prices, linked e.g. to liquid hubs



Enabling interconnections



Providing flexibility to divert gas to this delivery point



ARA – packaging waste collection

- Access to an essential facility
- Structural remedy: divestiture



Amazon MFN clauses, commitments

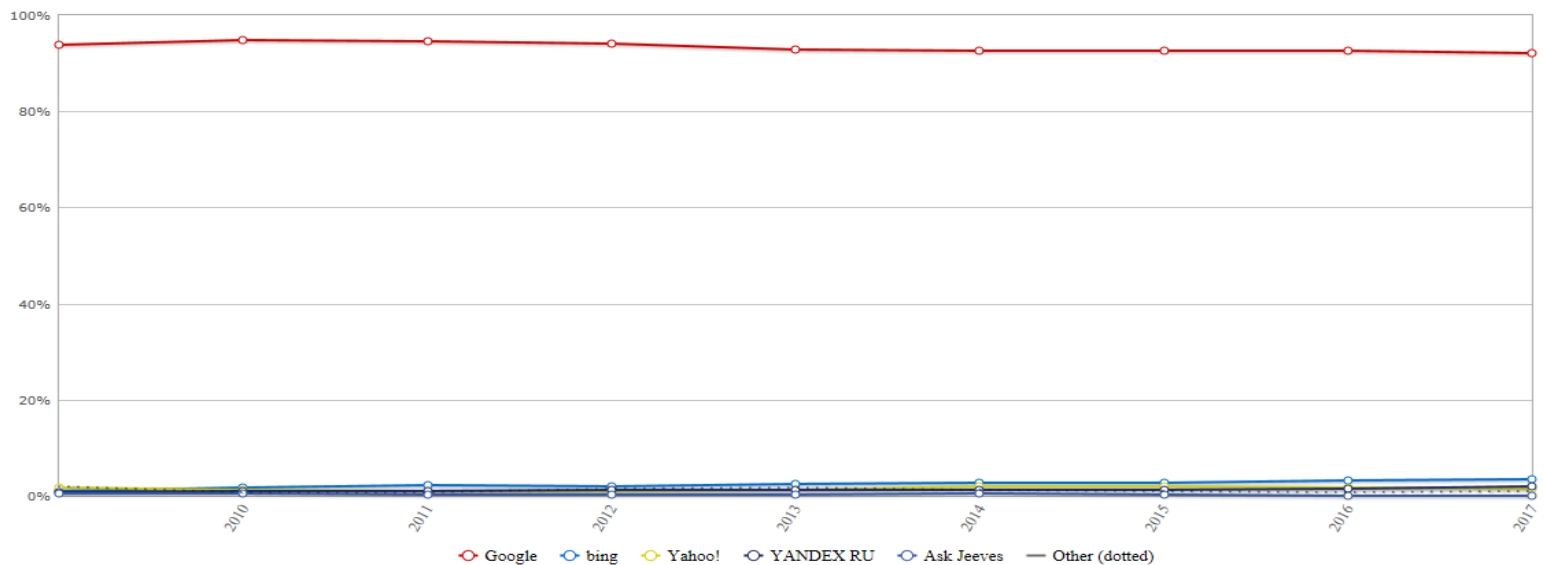


Google Shopping's unlawful advantage over rival comparison shopping services

- Is competition „just a click away”?
- The power of algorithms, leveraging market position
- 2,42 billion fines

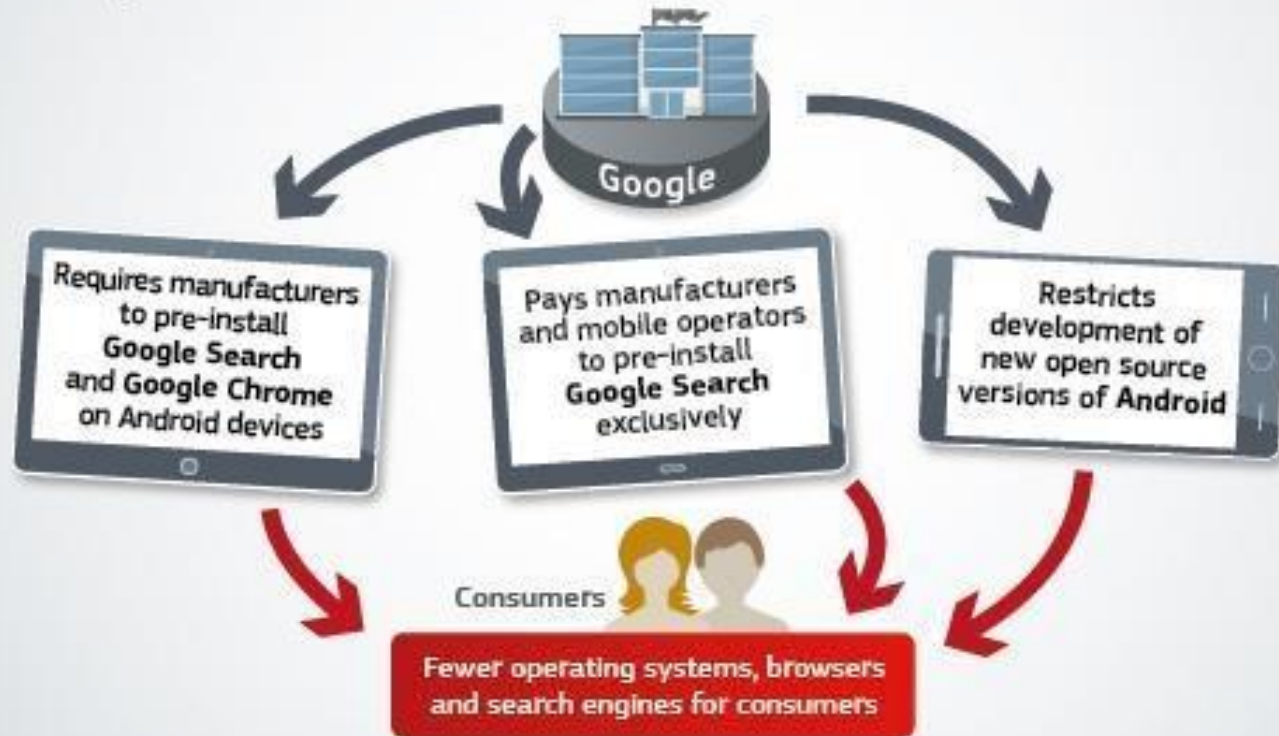
Search Engine Market Share in Europe

2009 to 2017



Google search/Android: 4,3 bn €

Google's Android restrictions illegally protect its internet search dominance



Google abuse in online advertising: 1,49 bn € fines

Google's AdSense restrictions protect its dominance in search advertising



Qualcomm predation

- 997 M € fines, exclusivity payments, pricing
- Mobile chipsets, 90%



Institutions and procedures

Enforcing antitrust rules



Law enforcement at EU and national levels



Selected features of EU Commission procedures

- 1/2003 Council Regulation
- Criminalization of sanctions – more emphasis on procedural safeguards, „human rights movement”
- Dawn raids (inspections)
- Lengthy procedures
 - Commitments
 - Settlements (10% fine discount)
- Co-operation within the ECN

The desire for more private enforcement

- Public vs. private enforcement
- Why? What can civil law courts do better?
 - Enforcing nullity and actions for damages
- Should it substitute public enforcement?
- EU Court case law (Crehan): right for damages
- Directive 2014/104/EU
 - Communication and practical guidance on the quantification of antitrust harm
- Not regulated: class actions

The Private enforcement Directive

- Procedural tools supporting plaintiffs
 - Binding effect of Commission and NCA decisions
 - Rebuttable presumption of harm
 - Discovery procedure
- Rules protecting leniency applicants
 - Access to documents by plaintiffs
 - Limits on joint and several liability
- Limitation periods should not hinder full compensations

The ECN+ Directive

- Directive 2019/1 empowering NCAs to be more effective enforcers of EU competition law
- Independence of NCAs
- Effective enforcement powers
- Protection of the rights of undertakings
 - Hearing, SO
- Harmonizing leniency rules
- Sanctioning
 - Definition of undertaking to be harmonized
 - At least 10% of worldwide turnover maximum

The control of M&As



M&As rules in a nutshell

- Council Regulation
 - 4064/89 EC
 - 139/2004 EC
 - Commission implementing regulation
 - Guidelines, notices
- SIEC (dominance) test, forward-looking
- Ex ante control: notification and suspension
- Community dimension - „One stop shop” for
 - ✓ concentrations
 - ✓ above the thresholds

M&A - Concentrations

- Triggering event: lasting change of control
- Merge
 - Amalgamate
 - Absorb
- Acquisition of control
 - Sole and joint control
 - Change in the nature of control
 - Legal or de facto basis

M&A - Acquisitions

- Objects of the acquisition
 - Undertaking (existing or new)
 - Assets, business, brands, licences
- Control can be based on
 - Shares, voting rights
 - Directors
 - Contracts
 - De facto basis

The Commission's jurisdiction

- Compared with Articles 101&102: legal certainty
 - „may affect trade between MSs”
- Complex turnover thresholds
 - worldwide/EU/not concentrated in 1 MS
 - Tendency of expansion
- Advantages of the „one-stop shop”
- Referral option

M&A – The SIEC test

- „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”
- The structure of competitive assessments:
 - ✓ Defining the relevant market(s)
 - ✓ Analysing the state and future of competition (horizontal, vertical, portfolio and conglomerate effects)
 - ✓ Covers both single firm and collective dominance

Consequences of M&As

- Balancing



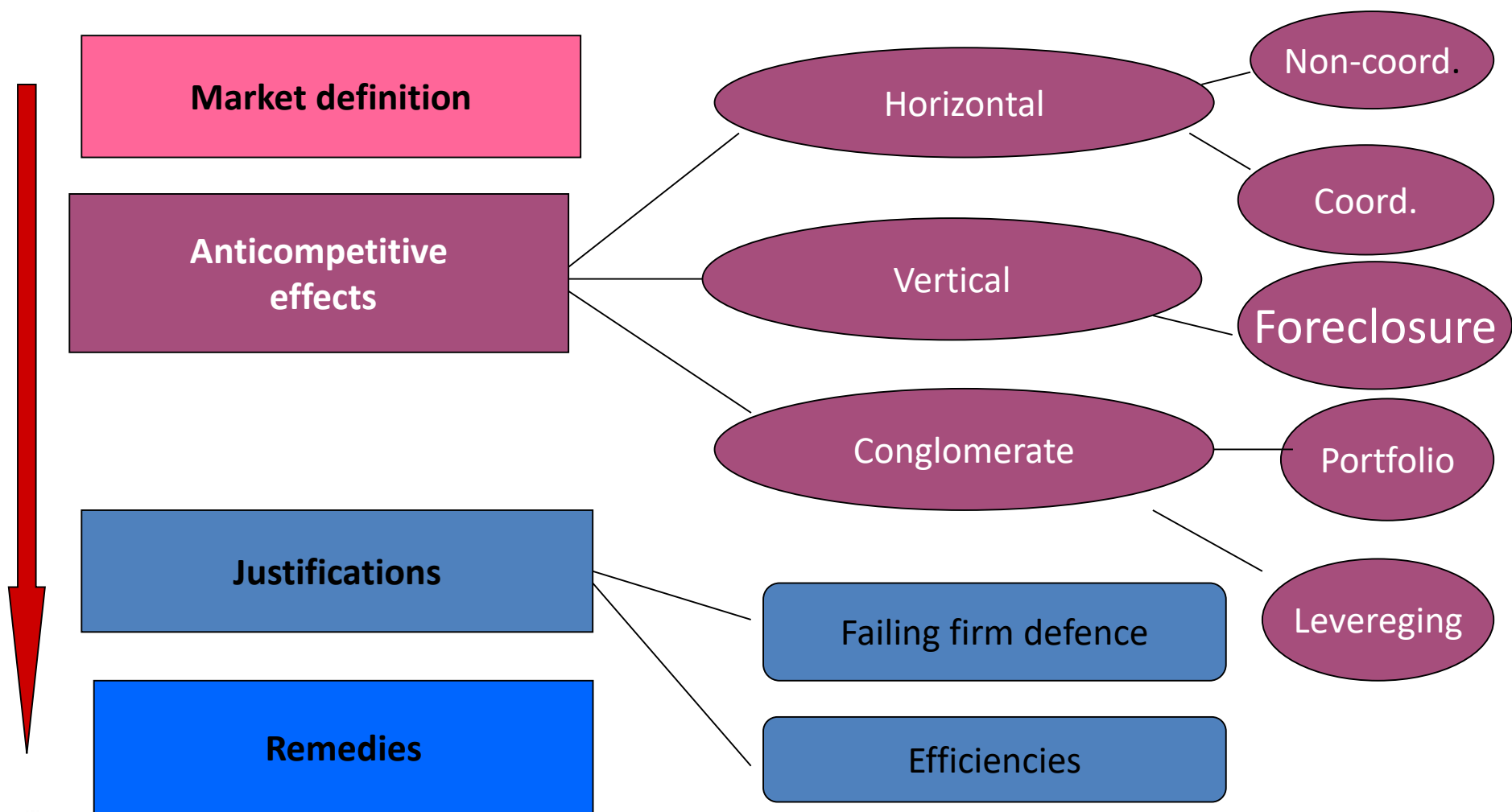
Benefits of concentrations

Increased market power

Economies of scale
and scope (efficiencies)

The ability of one or more
firms to profitably raise
prices, reduce output, choice or
quality, diminish innovation

Structure of the competition analysis



Unilateral and co-ordinated effects

- A merger may change equilibrium prices due to the merging parties' unilateral incentive to raise their price
- A merger may make it more feasible for the remaining firms to sustain a collusive regime (*ability to exercise market power collectively*)

Competitive pressures on merged firms

- Competitors
- Buyers: countervailing buying power
 - real possibility of switching to others
- Potential competitors
 - „Hit & run” entry - supply side substitution
 - Likely
 - Timely
 - Sufficient to deter potential negative effects
 - Long-term entry

Conglomerate mergers

- Portfolio power „the market power deriving from a portfolio of brands is greater than the sum of its part”

Firm	I	II	III	IV	V
A	30 %	30 %	10 %	0	0
B	0	0	10 %	40 %	40 %

Portfolio power & vertical mergers

- Presence in 5 markets gives a better competitive position than being in 1
- Concerns: potential for tying, refusal to supply, unfair pricing
- Vertical mergers (supplier-customer)
 - The same problems like in Art. 101 vertical agreements (market foreclosure)

M&A - Remedies

- Types: behavioural and structural
 - Divestiture
 - To give access to infrastructure, technology
 - Terminating distribution restrictions
 - Treating customers equally
 - Information requirements
- Implementation/monitoring
 - Trustee
 - Commission approval of buyer

Anti-competitive State actions

State aid



Rules applicable to Member States

- The 4 main areas of competition rules applicable to MSs
 - State aid rules
 - Exclusive rights and public services
 - Monopolies of a commercial character
 - Anti-competitive measures, „effet utile” rule

The 'effet utile' doctrine

- The case law rule combined application of
 - earlier: Art. 3(g), 10 and 81/82 EC
 - Now: 27. TFEU, 4. (3) TEU and 101/102 TFEU
- MSs may not adopt measures which would deprive competition rules applicable to undertakings of their effectiveness
- Not to legislate in a way detrimental to competition (anti-competitive effects test)? Not really ...
- Hardly any EU Commission enforcement

The 'effet utile' doctrine in practice

- MSs not allowed to
 - require
 - reinforce
 - favour, encourage

an agreement contrary to Art. 101

 - deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere
- Is an antitrust offence a prerequisite? Yes!

Commercial state monopolies

- Article 37 of the Treaty, bridges the free movement and competition rules
 - Lex specialis provision
- Production and service monopolies come under Article 106 (1)
- Examples: match, cigarette, electricity, alcohol, salt, crude oil

The purpose of Art. 37

- Reconcile the existence/creation of state monopolies as instruments for the pursuit of public interest aims with the functioning of the single market
- Ensure maintenance of normal conditions of competition between the economies of MSs where a product is subject to a national monopoly of a commercial character
 - How does EU law deal with the problem of monopolies?

The obligation of MSs

- „Adjust”: to avoid the possibility of discrimination
 - Export/import and wholesale: abolish the monopoly, „inherent” obstacle to free movement of goods
 - Retail monopoly: regulation avoiding discrimination
- Exceptions:
 - Art. 30?
 - Article 86 (2)

Article 106 TFEU

- The structure of Article 106 TFEU
 - Obligation on MSs not to use „special undertakings” to impair the single market
 - SGEI exception
 - General, for all competition areas
 - Can be invoked by undertakings as well
- Key phrases:
 - Liberalisation
 - Regulation
 - Harmonisation

Article 106 (1)

- A *lex specialis* „*effet utile*” rule
- Special companies, closely related to the State
 - Public undertakings
 - Exclusive rights
 - Special rights
- State measures
- Always applied in conjunction with other articles: especially Art. 102 TFEU
- Remember: the activity concerned must be ‘economic’ in nature

Shall exclusive rights be abolished?

- The creation of a dominant position is not as such incompatible with Article 102, BUT
- Article 106 (1) read together with Art. 102 requires a MS no to adopt measures
 - as a result of which the ‘special’ undertaking by exercising its rights cannot avoid abusing its dominant position, or
 - which create a situation in which the dominant undertaking is induced to commit such abuses.
- The possibility of abuse is sufficient!
- The theory of equal opportunities

Article 106 EC (2) - SGEI

- SGEI exception both for MSs and companies
- „Universal” exemption, applicable not only under Article 106
- Conditions:
 - an undertaking entrusted with
 - the supply of a service of general economic interest
 - competition rules would hinder it or endanger the economic viability of the activity
 - trade between MSs is not hindered unduly

Article 106 (2), cont.

- Main rule: public service companies are subject to competition law obligations
- Examples of public services:
 - Operation of an internal flight
 - Traditional postal services
 - Production and supply of electricity
 - Operation of fixed line telephone services
 - Waste management companies

Article 106 (2) – the *Corbeau* case

- Fast delivery postal service offered in Liege, endangering the public service?
- Cross subsidisation/monopolisation may be allowed to ensure the performance of that task/cover losses of the public service
- But this cannot be legitimised if:
 - the service can be separated from the public service
 - meets special needs, value added service
 - does not endanger the economic balance of the public service

Article 106 TFEU – (3)

- Enforced by the Commission and MS courts
- Commission tools to liberalize: decisions and directives
 - Directives: the liberalisation of telecoms
 - Decisions: express postal services, airports, mobile, harbours ...
- More powerful than regular internal market directives or infringement procedures

State aid: Article 107 (1) - prohibition

- ...any **aid** granted by a Member State or through **State resources** in any form whatsoever which distorts or threatens to **distort competition** by favouring **certain** undertakings or the production of certain goods shall, in so far as it **affects trade** between Member States, be incompatible with the internal market.

Article 107 (2) - exceptions

- The following **shall** be compatible with the **internal** market:
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

Article 107 (3) - exceptions

- The following **may be considered to be compatible** with the internal market:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
 - (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
 - (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the **Union** to an extent that is contrary to the common interest;
 - (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission

Some key concepts

- Forms of aid
- Scheme/individual aid
- Aims of the aid: regional, horizontal, sectoral
- Is there an advantage?
 - MEIP test – the State doing business
 - Altmark test – financing public services
- Notification, de minimis, Block Exemption Reg.
- Illegal & Incompatible State aid
- Recovery with interest