COMPETITION LAW AND ECONOMICS

European Master in Law and Economics

University of Hamburg

Second Term 2022

Room 1083a (Von-Melle-Park 5).

Hanns Peter Nehl, Till Steinvorth & Wolfgang Wurmnest

A. COURSE ADMINISTRATION

I. Course outline

This class is an introduction to competition law and economics. Based on the legal framework of European and (in part) U.S. competition (antitrust) law and policy, you will learn about different economic theories and models to analyze anticompetitive conduct ("theories of harm"). The class will give an overview of the three main pillars of competition (antitrust) law (coordinated anticompetitive conduct, abuse of a dominant position/monopolization, merger control) as well as the basics of competition law enforcement by competition authorities and by private parties. Throughout the lecture, we will discuss "classic" or "current" competition cases.

II. Contact information

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III. Course material

Material will be posted usually a week before class on OpenOlat.

IV. Course policy

The lecture is an "in class" lecture, so you are required to attend the lectures in person. The sessions will take place in Room 1083a (Von-Melle-Park 5).

V. Grading/exam

Grading will be based on the final exam, which will take place in March 2023. The exact date will be announced by the EMLE administration. The exam is planned to take place in person and is closed book. In case the exam needs to be held online (due to Covid), the exam will be open book. The final exam will take 3 hours and consist of essay questions. We will look at sample questions during class.

VI. Class participation & class preparation

Class participation is important. We want each student to engage and share his/her views, so that we can have an informed discussion and learn about each other's perspectives and approaches (legal, economic, political). For each class, there is some preparatory reading to be done by the student. The documents that must be read are outlined under C below (preparatory reading). These documents should be read by you before the class takes place and will usually be provided to you on OpenOlat a week before the class starts.

B. LECTURE TIMES

Date	**Time**	**Session**
Friday, 13.01.2023	14:00–15:30	The basics of competition law and economics (Wurmnest)
Friday, 20.01.2023	14:00–15:30	Coordinated anticompetitive conduct I (Nehl)
Friday, 27.01.2023	**18:15–19:45**	Coordinated anticompetitive conduct II (Nehl) (lecture cancelled)
Wednesday, 01.02.2023	16:00–17:30	Abuse of a dominant position I (Wurmnest)
Thursday, 02.02.2023	14:00–15:30	Abuse of a dominant position II (Wurmnest)
Friday, 10.02.2023	14:00–15:30	The international dimension of competition policy (Wurmnest)
Friday, 24.02.2023	14:00–15:30 15:45–17:15	Public & private enforcement of competition law (Nehl) Coordinated anticompetitive conduct II (Nehl)
Friday, 03.03.2023	14:00–16:30	Mergers I, Mergers II (Steinvorth)
Friday, 10.03.2023	14:00–16:30	Mergers II (continued), Mergers III (Steinvorth)

C. TOPIC OUTLINE AND READING LIST

Session 1: The basics of competition law and economics

In our 1st session, we shall explore the basics of competition law and economics. After explaining why competition is useful to society as a whole, the economic foundations of the competitive process and the three pillars of modern competition law are examined. For those students not familiar with the European legal system, we will also take a quick look at the most important EU institutions.

Session 2: Coordinated anticompetitive conduct I

The 2nd session will be devoted to a discussion of coordinated anticompetitive conduct prohibited by Article 101 TFEU. Particular emphasis will be put on the (economic) notion of 'undertaking', the various forms of horizontal and vertical coordination (agreements, concerted practices and decisions of associations of undertakings), and the notion of restriction of competition by object and/or effect. We will explore the way in which the latter notion is to be interpreted in the light of the relevant EU competition law enforcement objectives and the underlying economic theories of harm by drawing comparisons with US competition law. We will also briefly address the other legal criteria governing Article 101(1) to (3) TFEU.

Preparatory reading for session 2:

Notion of 'undertaking': Case C-97/08 – *Akzo Nobel*; Case C-882/19 – *Sumal*.

Session 3: Coordinated anticompetitive conduct II

The 3rd session will focus on case studies explaining the distinction between restrictions of competition by object and effect in the context of vertical and horizontal coordination. In so doing, we will repeat and further explore essential legal aspects addressed in the 2nd session.

Preparatory reading for session 3:

Case C-234/89 – *Delimitis*; Case 345/14 – *Maxima Latvija*; Case C-74/14 – *Eturas*.

Session 4: Abuse of dominant position I

In the 4th session, we will analyse abuses of dominant firms ("monopolization"), i.e. firms with power over the market. Abuse control is the second pillar of competition law. We will take a look at the legal framework in the US and the EU thereby focusing on anticompetitive exclusionary conduct which is outlawed in both jurisdictions. As the legal prohibitions are very broadly drafted and it is difficult to distinguish anticompetitive exclusion from competition on the merits when it comes to exclusionary abuses, the key to understand abuse of dominance cases are the economic theories of harm. Against this background, we will analyze how market power can be gauged and discuss predatory pricing cases that were brought in the US and the EU.

Preparatory reading for session 4:

Case C-377/20 – *Enel*, paras. 40–58.

Session 5: Abuse of dominant position II

The 5th session will be dedicated to recent abuse of dominance cases against big tech firm, like Google and Amazon, to explain the application of Art. 102 TFEU and Section 2 Sherman Act to exclusionary practices taking place in the online world.

Preparatory reading for session 5:

EU Commission, Fact Sheet Google Shopping Case

Session 6: The international dimension of competition policy

In our 6th session, we will take a look at the international dimension of competition law. As over the last 50 years many countries across the globe have adopted competition rules, we will examine some important issues for cross-border cases, namely the question of (adjudicative) jurisdiction. Moreover, we discuss the question whether a stronger harmonisation of competition law is meaningful and which instruments exists to achieve such a uniformity.

Preparatory reading for session 6

Behrens, The extraterritorial reach of EU competition law revisited – The "effects doctrine" before the ECJ, Europa Kolleg Discussion Paper No 3/16.

Session 7: Public & private enforcement of EU competition law

The 7th session is devoted to explaining the two pillars of EU competition law enforcement, i.e. public and private law enforcement, as well as their interrelationship. The fundamental role of the European Commission in public enforcement will be highlighted. Moreover, we will address seminal judgments having prepared the ground for private litigation based on Articles 101, 102 TFEU, the "legal exception" system introduced by Regulation No 1/2003, as well as Directive 2014/104 on damages actions.

Preparatory reading for session 7:

Interrelationship between public and private enforcement: Case C-344/98 – *Masterfoods*; Case C-132/19 P – *Groupe Canal+*, paras. 104 et seq.

Private enforcement, in particular damages actions: Case C-453/99 – *Courage and Crehan*; Joined Cases C-295/04 to C-298/04 – *Manfredi*.

Session 8: Mergers I

In the 8th session, we will take a look at the goals served by merger control. Is merger control necessary, or can competition be protected sufficiently by the established prohibitions of anti-competitive conduct? We also will analyze how competition authorities worldwide assert jurisdiction over a transaction. National, or supra-national, merger control typically includes a

"filter" to determine whether or not a merger is reviewable. This is to limit reviews to cases that have a sufficient size and impact, to economize on regulatory resources, and to provide legal certainty to the parties involved in a transaction. Most jurisdictions require a (mandatory) notification for transactions that meet certain criteria (e.g., in terms of turnover or value), and the implementation of such transactions must be suspended until a clearance is obtained from the competent authority ("pre-merger review"). Other jurisdictions do not impose a standstill obligation but allow the authority to review and, if necessary, unwind anti-competitive transactions on their own initiative, possibly after their implementation ("post-merger review"). Many jurisdictions combine both types of reviews.

Preparatory reading for session 8:

COMESA Competition Commission, Decision of 7 March 2016 – *China National Tire & Rubber and Pirelli*.

ICN Recommended Practices for Merger Notification and Review Procedures, 2018.

Council Regulation (EC) No 139/2004 of on the control of concentrations between undertakings ("EU Merger Regulation"), Articles 1–4, 9, and 22.

Vestager, The future of EU merger control, Speech at the International Bar Association 24th Annual Competition Conference, 11 September 2020.

Case T-227/21 – *Illumina v Commission*.

[Please also read the preparatory materials for session 9 before session 8 since session 9 starts immediately after session 8.]

Session 9: Mergers II

In the 9th session, we start looking at the substantive assessment of mergers. Typically, any review of a merger involves the definition of the relevant market(s) at the outset as a tool to measure the market power of the transaction parties. We will also introduce the distinction between horizontal, vertical, and conglomerate mergers.

Preparatory reading for session 9:

U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, 2010, Section 4 (Market Definition).

Case T-162/10 – *Niki Luftfahrt*, paras. 1–42 and 118–188.

Session 10: Mergers III

In this final session, we will deal with different theories of harm that may result in the prohibition of a merger (in particular, unilateral effects and coordinated effects). We will take a closer look at two cases, one involving horizontal effects (the EU Commission's classic "Kali + Salz" decision) and one with non-horizontal effects (Microsoft and Activision Blizzard).

Preparatory reading for session 10:

U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, 2010, Sections 6. (Unilateral Effects), 7. (Coordinated Effects).

European Commission, Case IV/M308 – *Kali + Salz/MdK/Treuhand*.

UK CMA, "Phase One" decision of 1 September 2022 – *Microsoft/Activision Blizzard*.

Further reading

Students interested in the matter can deepen their knowledge by reading more about the topic:

- *Jones & Sufrin*, EU Competition Law – Text, Cases, and Materials, 7th edition, Oxford University Press, 2019.
- *Motta*, Competition Policy: Theory and Practice, Cambridge University Press, 2004.
- *Whish & Bailey*, Competition Law, 10th edition, Oxford University Press, 2021.
- *Craig & De Búrca*, EU Law, Text, Cases and Materials, 7th edition, Oxford University Press, 2020.

Important journals

- European Competition Law Review (available online via HeinOnline).
- Journal of Competition Law & Economics (available online via Oxford Academic).
- Competition Law Review (available online via The Competition Law Scholars Forum).

Websites

EU Courts' case law (EN): https://curia.europa.eu/jcms/jcms/j_6/en/

European Commission, DG Competition: https://ec.europa.eu/competition/index_en.html

US Supreme Courts' case law: https://www.supremecourt.gov/opinions/slipopinion/22

D. SELECTED LEGAL RULES

I. EU law

Article 101 TFEU

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

II. US law

Section 1 Sherman Act

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. [….]

Section 2 Sherman Act

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.