

# Origin of antitrust laws

US progressive era, 1890-1914

## 1. **Sherman Act 1890**

Anticompetitive agreements

Abuse of dominance

## 2. **Clayton Act (1914)**

Merger Control

## 3. **Federal Trade Commission (FTC) Act (1914),**

FTC + DOJ

# Origin in Europe: Treaty of Rome, 1957

**Competition:** a mechanism of the market economy which encourages companies to offer consumer goods and services at the most favourable terms for consumers

## Goals:

- Essential to complete a single market
- Encourages efficiency
- Increases productivity, quality, choice
- Creates better conditions for investors and innovators
- Reduces prices (increases consumer benefit)
- Requires companies to act independently of each other, but subject to the competitive pressure of others

# European Competition Law Pillars

- **Anticompetitive (horizontal and vertical) agreements:** businesses with/out market power that operate at same/vertically related level must avoid hard-core restraints, concerted actions
- **Cartels:** competing businesses must not enter into anti-competitive agreements (price, market/customer allocation, bid rigging), or inappropriate info exchanges
- **Abuse of dominance:** businesses must not abuse their dominant market position (40%) in a way that affects trade
- **Merger control:** businesses must not implement acquisitions, mergers and joint ventures above a certain thresholds (or gun-jumping fines)
- **State aid:** national authorities must not grant state aids that distort competition and trade in the EU

# Anticompetitive agreements

- **Article 101(1)** TFEU prohibits agreements between businesses [2+] or concerted practices which **could affect trade between MS**, and which **have as their object or effect prevention/restriction/ distortion of competition**
- If so, agreement is **null and void – not enforceable**
- Agreement re supply of goods/services – but also know-how/ patents – across EU borders-with **effect on EU** or re foreign businesses' entry into EU market (**extra-territoriality**)
- Restriction on competition can be by object or effect

# Anticompetitive agreements - Cartels

Similar, **independent companies** join together to fix prices/ limit production/share markets or customers

- Instead of competing - **rely on agreed course of action**
- **Reduces incentives** to provide new/better products and services at competitive prices
- Result: consumers end up **paying more** for less quality
- **Illegal** and highly secretive
- **Heavy fines** [single company - over **€896 million**; all members of cartel - over **€1,3 billion**]
- **Leniency policy** for fine reduction

# Anticompetitive agreements - Cartels: examples

**EUR 141,7 mln - car parts suppliers** - 5 cartels for supply of wire harnesses to Toyota, Honda, Nissan and Renault (2013)

**EUR 280 mln** - German authority fines **sugar** cartelists (2014)

**EUR 17 mln** – 4 wallpaper manufacturers (price increase 2005-2008)

UK's universities face an investigation by the Office of Fair Trading (OFT) into “anti-competitive” practices (nearly all charge £9,000 a year despite widely varying degree quality – cartel?)

# Abuse of Dominance

- **Article 102** TFEU - no abuse of dominant position by [1+] company, special responsibility if dominant
- Covers:
  - Unfair prices/predation
  - Limiting production/markets
  - Supplementary obligations in contracts, exclusionary conduct
- Exemption: Market share below **40%**, but not always (no strong competitors)

# Dominance

*“position of **economic strength** [...] to prevent effective competition being maintained [...], **power to behave** [...] **independently of its competitors, its customers and ultimately of consumers**”*

- confers special responsibility
- not likely if market share of company = below **40 %**
- no significant competitors



# Dominance cont'd

## AT&T split up

## Microsoft competition case

- Complain from competitor in 1993 – blocking competitors by licensing practices; including its Windows Media Player within the Microsoft Windows platform (tying )
- Investigation by EC; fine **€497** + **€280.5** mln fine [€1.5 million per day from 16 December 2005 to 20 June 2006] for failure to comply with its obligations = provide info + additional **€899** mln fine for non-compliance with EC decision

## Now Google?

# Merger Control

- EU Merger Control Regulation – no concentration [2+] without prior approval
- Covers: - Mergers; - Take-overs; - Joint ventures (FF).
- Key - lasting change in control (*de facto/ de jure* control)
- Procedure: Regulation 139/2004; Regulation 802/2004; one stop-shop principle
- Uses thresholds for procedures

# Merger Control: example

***Case No COMP/M.5518 - FIAT/ CHRYSLER, 2009***

Fiat SpA (Italy) acquires **20%** in Chrysler LLC (USA)

“Despite Fiat’s stake of only 20 percent, which it may increase in future, Fiat holds rights in the decision-making process of the U.S. firm that will enable it to exercise sole control”



# State aid

**Advantage** in any form whatsoever conferred on a **selective basis** to undertakings by national public authorities.

- *Intervention by the state/ through state resources*
- *variety of forms* (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- *gives the recipient an advantage on a selective basis*, e.g. to specific companies or industry sectors/regions
- *competition has been or may be distorted*
- *affect trade between Member States*

**General prohibition** of State aid (Article 107 TFEU)

**Ex ante notification** procedure (preliminary investigation v. in-depth investigation)

**Recovery** of incompatible state aid

**Ex post monitoring**

# Fines in theory

- The European Commission has the power to impose a fine on a business if it breaches Article 101 TFEU. **The fine cannot exceed 10% of the company's worldwide turnover**
- The basic amount of the fine is based on the company's yearly turnover in the relevant market. The gravity of the infringement is assessed, and the fine is increased for each year of infringement

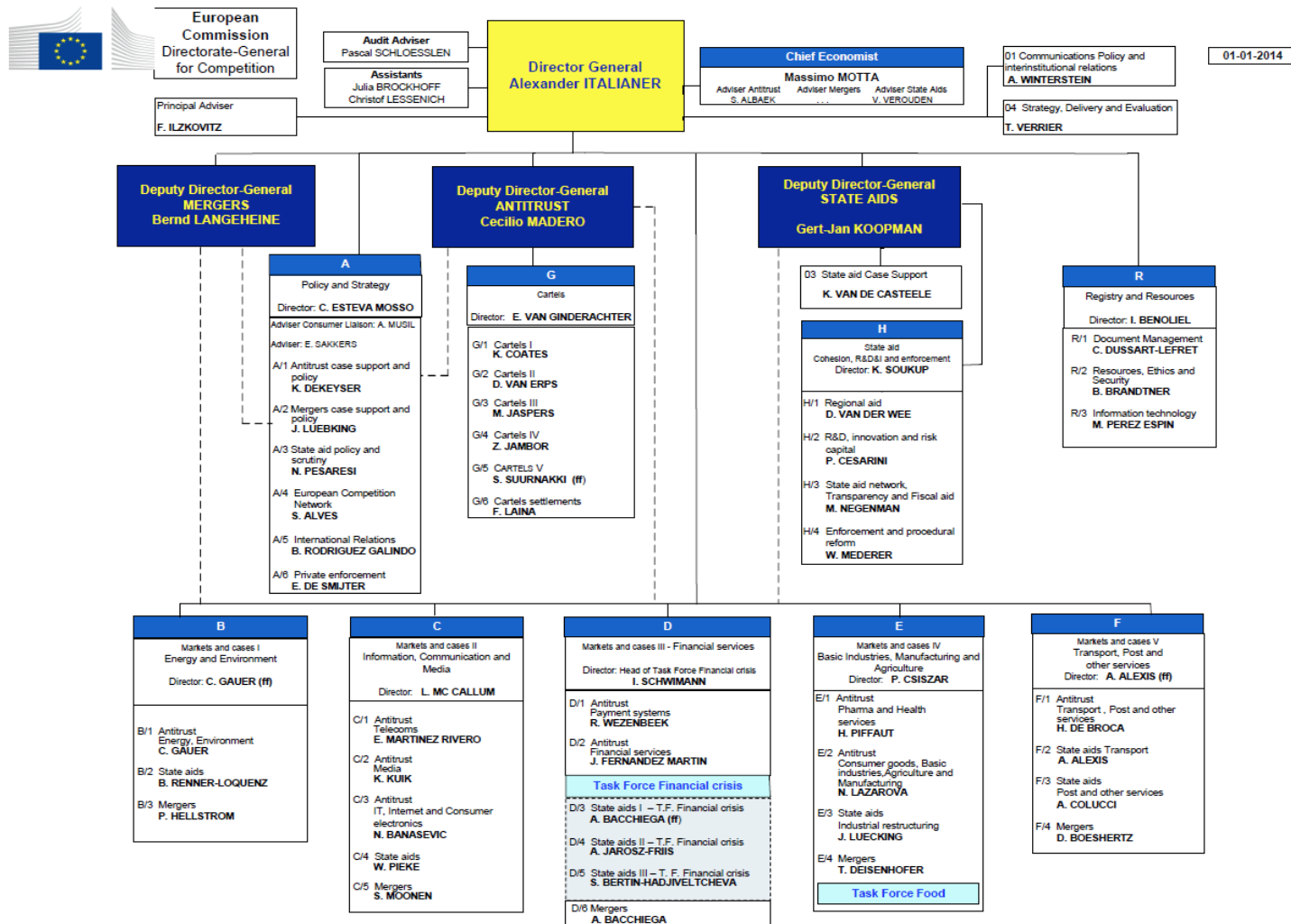
## **The basic amount of the fine is up to 30% of the value of sales**

- Upward adjustments to the basic amount can be made if :
  - repeat infringement
  - refusal to co-operate with the Commission
  - leader of the cartel

# Competition Authorities in Europe

- There is **one** European Competition Authority in charge of the National Competition Authorities of the 28 Member States
- the European Commission Directorate General for Competition (EC, DG COPM) [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)
- There are **28** National Competition Authorities (NCA)
  - Cases moving from national to EU level and vice versa
  - Commission and NCAs also share information and work together (e.g. for national dawn raids)

# EU Competition Authority



# Competition Networks

- **European Competition Network (“ECN”)**: Commission and NCAs in all EU Member States cooperate with each other through the ECN
- **International Competition Network (“ICN”)**: Commission also provides antitrust agencies from developed and developing countries with focused network for addressing practical antitrust enforcement and policy issues of common concern
- Transnational cooperation crucial in the fight of international cartels



# Objective of Competition Policy

Economists as in L&Ec.: **efficiency, welfare**

- Protect competition, not competitors: fight dominance only if abused/ inefficient
- Bias in favor of consumer surplus because firms better lobbyists
- But producer surplus still taken into account in merger control
- Classic “Harberger triangle” (deadweight loss from monopoly power)

# Debates

Schumpeter: **innovation** mostly in big businesses

- Creative destruction, innovation requires and generates monopolies;
- Competition in the market vs competition for the market.

Resurgent debate: competition, **market structure** and **democracy** (Google as big brother)

- Ordo-liberal school, big business dangerous for democracy, dominance to be avoided per se, not only if abused