INTRODUCTION TO COMPETITION LAW

Outline

- A quick introduction to the the substantive rules
- The objectives of competition law

A quick intro to competition law

- Two main rules that regulate firms' conducts

1. Prohibition of agreements and concerted practices that restrict competition (e.g. cartels) (Art. 101 TFEU)

2. Prohibition of abuses of dominant position (Art. 102 TFEU)

- Merger control regulation

Art. 101 (1) TFEU

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.

Art. 101 (3) TFEU

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.

Notion of undertaking

- For the purpose of EU **competition law**, any entity engaged in an **economic activity**, that is an activity consisting in offering goods or services on a given market, regardless of its **legal** status and the way in which it is financed, is considered an **undertaking**
- No intention to earn profits is required (but they have to bear the financial risk of the economic activity)
- Public bodies are not excluded (but bodies that perform only a market regulation function are excluded)
- Non-trivial examples:
  - Individual professionals (lawyers, accountants, etc.)
  - Sport associations

Agreement and concerted practice

- **Agreement** has a **wide meaning** and covers agreements whether legally enforceable or not, written or oral; it includes so-called gentlemen's agreements:
  - There does not have to be a physical meeting of the parties for an agreement to be reached
  - An exchange of letters or telephone calls may suffice
  - In the US the jurisprudence talks of a "meeting of the minds"

- **Concerted practice:** co-ordination between undertakings which, without having reached the stage of concluding a **formal agreement**, have **knowingly** substituted **practical co-operation** for the risks of competition

- Some form of **direct or indirect communications** is involved in both definition

Conducts caught by Art. 101 TFEU

- Horizontal agreements
  - Cartels
  - Information sharing agreements
  - Purchasing agreements
  - Commercialization agreements
  - Other horizontal agreements (e.g. R&D)

- Vertical Agreements
  - Distribution agreements
  - Franchising
  - Input supply, etc.

Art. 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.

Conducts covered by Art. 102 TFEU

- Exploitative abuses: e.g. excessive pricing (Art. 102; a)

- Exclusionary abuses
  - Predatory pricing
  - Refusal to supply an essential input
  - Exclusive contracts (with customers)
  - Fidelity rebates
  - Tying and bundling, etc.

Merger control/1

Mergers that satisfy some predefined conditions must be notified to the competent competition authority

Article 2

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation…

In making this appraisal, the Commission shall take into account: …

(b) the market position of the undertakings concerned and their economic and financial power, the **alternatives available to suppliers and users**, their access to supplies or markets, any legal or other **barriers to entry**, supply and demand trends for the relevant goods and services, the **interests of** the intermediate and ultimate **consumers**, and the development of **technical and economic progress** provided that it is to consumers' advantage and does not form an obstacle to competition.

Merger control/2

Article 2 (ctd)

2. A concentration which would not **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, shall be declared compatible with the common market.

3. A concentration 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**, shall be declared incompatible with the common market

Types of merger

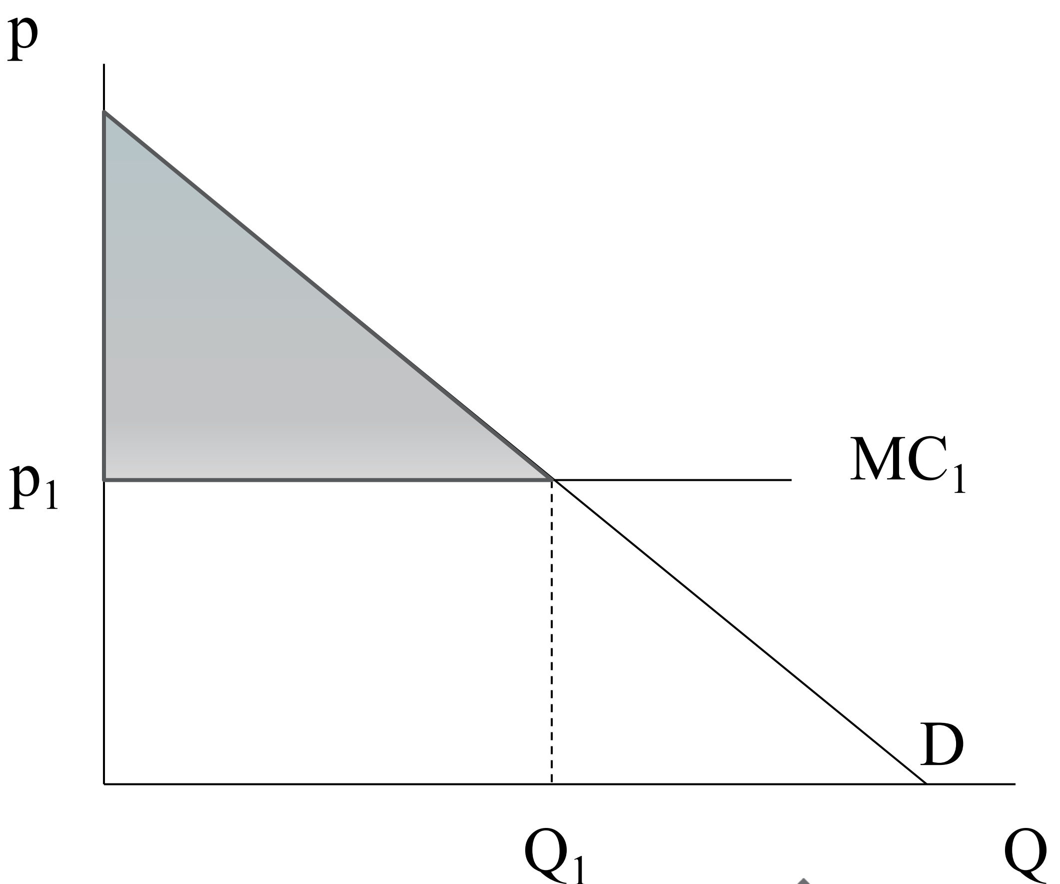
- **Horizontal mergers**: between firms that operate at the same level of the supply chain (substitutes)
- **Vertical mergers**: between firms that operate at different levels of the supply chain (complements)
- **Conglomerate mergers**: between firms that supply products that are neither substitutes nor complements

Objectives of competition law

- Consumer welfare
- Social welfare --> Allocative efficiency
- Productive efficiency
- Dynamic efficiency
- Distributive goals (?)

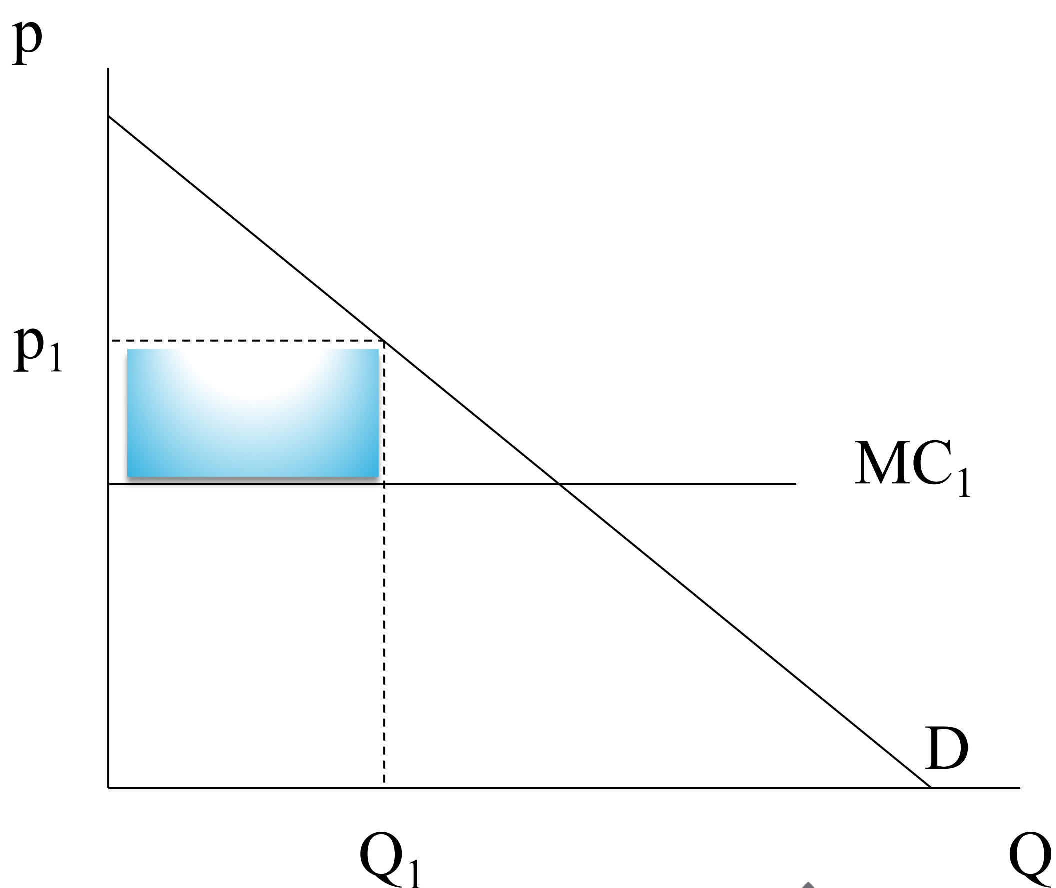
Consumer welfare (surplus)

- The demand function indicates how much consumers are willing to pay to buy a certain amount of product
- Consumer welfare (surplus) is the difference between what they are willing to pay and what they actually pay



Producer surplus

- The marginal cost function indicates how much a producer is willing to accept sell a certain amount of product
- Producer (surplus) is the difference between what the producer gets and what she is willing to accept



Notions of efficiency

- Allocative efficiency: a (static) **property of a market** (the system through which the exchange of products occurs)

- Productive efficiency: a (static) **property of the production process** (i.e. the system through which goods and services are produced and distributed)

- Dynamic efficiency: a property of the system of production and exchange to be assessed **over time**

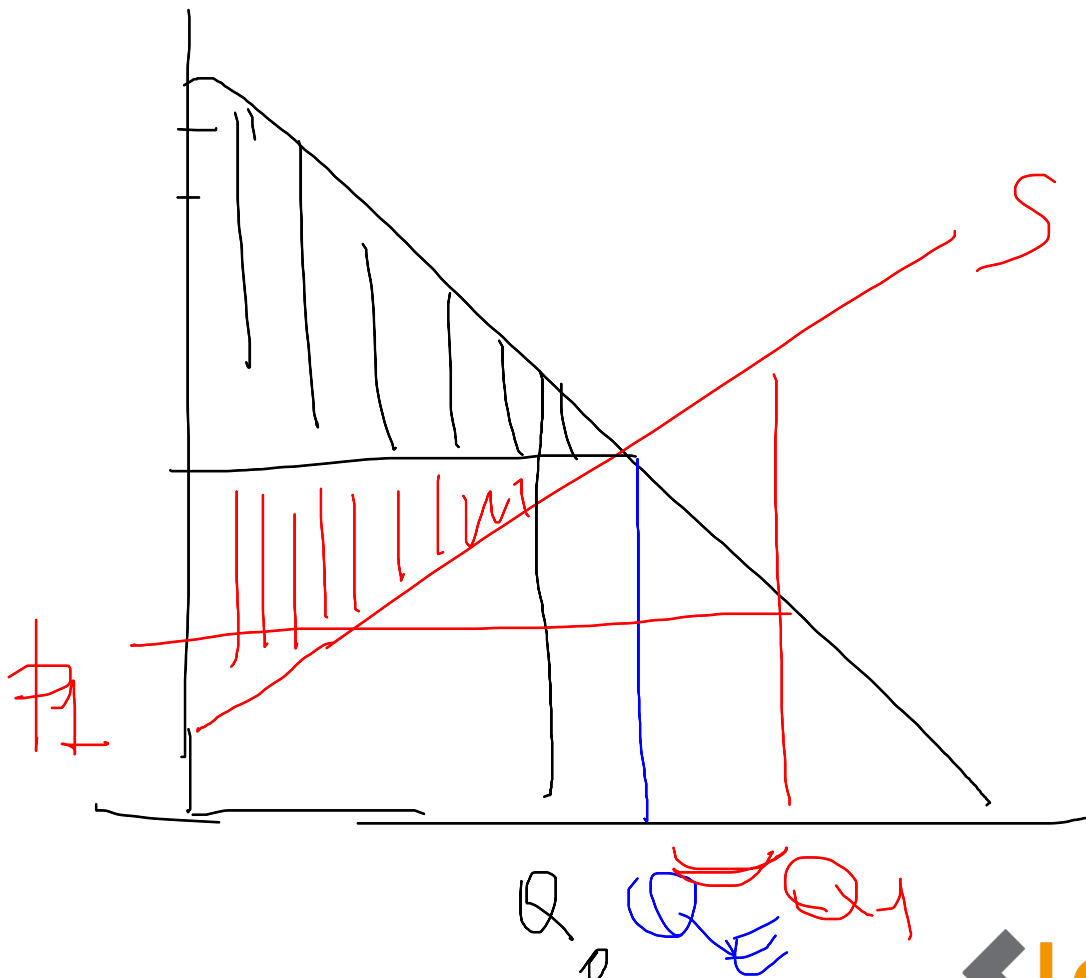
Allocative efficiency-1

- Consumers that derive from the consumption of a product a benefit larger than the social cost of producing the same good are **able to buy** the product
- Consumers that derive a benefit lower than the social cost of producing the same good are **excluded** from the consumption of the product

- Produces whose costs are lower than consumers' willingness to pay are **able to sell** the product
- Produces whose costs are higher than consumers' willingness to pay are **prevented** from selling the product

Allocative efficiency-2

A market works well if it allows transactions that generate a surplus and prevents those that do not



Productive efficiency

- Output is produced with the minimum amount of input (technical efficiency), and
- Output is produced at the minimum cost (economic efficiency)

Dynamic efficiency

- Improvement of economic activities over time, i.e. innovation
  - New (more efficient) production processes
  - New products (better quality, more differentiated)
  - New distribution systems (e.g. ecommerce)

Distributive goals

- Consumer welfare vs total welfare, i.e. should we give more weight to consumer rather than producer surplus?
  - Consumers must get a “fair” share of any efficiency
  - Political economy explanation

- Fighting inequality
  - Is this a competition policy goal or its “byproduct”?
  - Are we sure that “consumers” are less affluent than producers?
  - Do competition agencies have a legitimate mandate to pursue this goal?
  - Is this a political decision?
  - Are other public policies more appropriate?

My preferred definition

The purpose of competition law is to **prevent** the **creation, strengthening (or exercise) of market power** if market power leads to a (significant) **reduction of social/consumer welfare** (over a foreseeable period of time)