

**Retrospective** on competition policy  
in EU. From literal analysis of  
documents to  
likely economic effects!?  
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## Fond memories

- Of meetings with Judge Kapteyne, Lord Diplock, & a group of loyal enthusiasts supported by BIICL
- of meetings in Leiden speakers staying in Minerva hotel and impoverished academics in Catherine Crisham's flat

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## Art 81 (now TFEU 101)

- Para (1) Prohibited as incompatible with EU
- Collusion or categories of collusion that may affect interstate trade &
- Have object or effect of distorting ... competition in EU
  - Illegal and void
- Para (3) Para (1) may be declared inapplicable when agreement is indispensable to obtaining various benefits. “indispensable” is a strong word. So difficult for undertakings to surmount the burden of proof.

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## Com controls competition policy

- Regulation 17 adopted by Com under powers granted by Council (Reg 19/65) on Com's proposal:
- Only Com can apply 101(3) to agreements or CPs notified to it.
- Com inundated with notifications
- Reacted by applying 101(1) to categories of agreements or CPs (BERs).
  - Already envisaged in Reg 17, recital 4 & Art 101(3)

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## Early case law

- Almost all Commission officials in the 1960s were lawyers & many were formalistic. They thought ex post:
  - Once investment has been made, no need for incentives. So, encouraging investment in innovation seldom considered.
- Until 1969, all Com. cases concerned exclusive distribution with allocated sales territories, supported by export restrictions.
- Foreclosure assessed on basis of terms of agreement not on its likely effect on markets. Officials said:
  - Omit words like not, only, limited to, etc and the agreement would not infringe.
  - But those words often necessary to encourage investment or services by dealers.

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## Integration of common market Ordo Liberal influence

- Often exclusive territory followed national boundary
  - Perceived as dividing Common Market, but actually
- Accelerated integration of market,
  - if exclusive territory was needed to encourage dealer to incur sunk costs (those that are lost if the project fails)
- Ordo Liberal interest in leaving markets open.
- Some contracts were exempted under art. 101(3),
  - if there were no restraints on sales between MS,
  - because of consumer interest in wider choice.

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## Goetz Drauz

- Was Com. official in charge of co-ordinating policy on vertical agreements.
- In *Villeroy & Boch*, [1988] 4 CMLR 461, Com cleared a selective distribution agreement (i.e. retailers to supply only by retail or to other selected dealer. This enabled brand owners to maintain reputation of brand.)
  - where the dealer was required to invest in selling rival ceramic tableware to enable customers to compare brands.
- Went further than ECJ in *Metro I* [1977] ECR 1875.

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## Watershed decision

- Goetz had been seconded from the Bundeskartellamt which normally clears vertical agreements,
  - Those between undertakings at different points of the production and distribution chain
  - he reasoned that as there were 3,500 V & B dealers there was no risk of a dealer cartel and the market was very competitive.
- Thereafter, no distribution agreements were condemned by Commission until 1991, when Goetz had left for the merger task force and Com returned to its old case law: indeed became even stricter.

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## Early BERs formalistic

- Regs 67/67 1983/83: exemption narrow
- “agreements to which **only two undertakings are party**” created problems
  - If trademark was owned independently
  - Italian garages when 3<sup>rd</sup> party held licence to trade on that land
  - Even if each agreement between single buyer and seller
- “whereby ...the **reseller agrees with ... the supplier:**
  - Irrelevant whether market concentrated. Furore when for reg. 1983/1983 Com proposed cap on market shares.

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## Early BERs

- “**to purchase certain goods specified in the agreement for resale**”
  - not services or hiring out. Some franchising might qualify where franchisee bought from franchisor – agents’ position unclear.
  - Industrial franchises (excluded)
  - Later BER adopted for distribution franchises.
- “**only from the supplier**” (connected or designated undertaking).
  - If dealer needed exclusive territory, seller had to impose single branding restraint, even if not wanted!
  - It was seen as counterpart to excl. territory – fair not free competition.

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## White list of permitted restraints.

- Very short and its existence cast doubt on validity of other harmless restrictions of conduct.
- White list abandoned in BERs from 1999.

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## Clauses that prevented BER from applying

- E.g. reciprocal exclusive dealing between competing manufacturers.
- Non-reciprocal exclusive dealing between competing manufacturers unless one supplier is small,
- Impediments to parallel trade

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## Law unsatisfactory

- Little reference to economics or business common sense
- Commission treated any restraint of conduct as restraining competition,
  - consequently, many harmless agreements infringed art 101(1) and might be void, and only Commission had power to apply Art. 101(3).
  - It lacked resources.
  - Pressure on Com to grant formal exemptions for commercially important contracts

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## Klaus Dieter Ehlermann

- Became Director General of DG Comp in 1980s.
- He lacked staff to grant many individual exemptions
- It was more important to deal with international cartels, mergers and state aids
  - (only Com could apply art 101(3))
  - This exclusive competence had to go.
  - Economists' theory for vertical collusion was less formalistic

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## New officials more sympathetic to economic thinking

- From 1989, Council enabled DG Comp to recruit extra officials for merger task force.
- Ehlermann's chance to change thinking
  - DG Comp recruited some economists directly,
  - Other departments and MSs seconded officials to DG Comp. Many had worked with economists.
  - After 3 or 4 years in merger task force, officials were moved on to deal with co-ordination of policy & individual cases.
  - So familiarity with economics and respect for economists spread. Ground for law reform now more fertile.

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## Law reform

- It was thought easier to start with reform of vertical agreements, because
  - Economists argued that few were anticompetitive.
  - Often vertical agreement avoided free riding,
    - And thereby made it easier to extend business to another MS
    - by encouraging investment in brand,
  - Most Commission cases involved distribution, so BER would release more resources,
- Ehlermann was heavily dependent on David Deacon (economist) and on Jonathon Faull (politically influential and very bright).
- During 1990s much soul searching in Com, Largely behind closed doors,
  - but green and white paper.

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## Com Reg 2790/99

- New Group exemption (BER) and guidelines for vertical agreements radically different from earlier BERs :
- Art. 2(1): between **2 or more** undertakings,
- **Each operating for purpose of agreement, at a different level** of the production or distribution chain
  - Horizontal agreements largely excluded – Art 2(4) & Gs 26 & 27
- & relating to conditions under which parties may purchase sell or resell certain goods **or services** (vertical agreements).
  - Extended to services
  - Art 3 limited market share of supplier to 30%
    - Market share may be substitute for market power. (Easier to apply, but not perfect substitute)

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## Reg 2790/1999 targeted economically

- Covered distribution, franchising & agency so no need for separate BERs for different forms of distribution.
- Applied to agreements **not** between competitors, but could be several firms in vertical relationship.
- Art 3 EXCLUDED vertical BER from agreements when SELLER supplied more than 30% of market.
  - Where market shares differed, led to different terms in different MS, dividing EU!
  - ? Harmed market integration.

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## Later BERs

- In later BERs, where agreement may be between competitors, Cap of market share was tighter
  - eg technology transfer Reg 772/2004 (Gs redefined horizontal), and horizontal cooperation reg 1217/2010
- No white list,
  - Anything not forbidden allowed if qualified as vertical agreement.
  - This was repeated in more recent BERs
- Black list , Art 4 listed provisions that prevented application of BER to agreement, Art 5 prevented application of BER only to the restriction.
- More sensible arrangements for withdrawing BE in individual case

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## Current vertical BER

- Not very different from reg 2790/1999:
- Art 3 of reg 330/2010 now limits vertical BER to agreements when neither seller **NOR BUYER** supplies more than 30% of market.
- Similar schemes in later BERs, Criterion of buyer's market share controversial! How does supplier know market share of its customer in all product and geographic markets?
- Spelled out meaning of active and passive sales re internet access.

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## Guidelines on vert BERs

- \* Since 2000, Com has considered policy using economic theory.
  - Likely effect of conduct on market
    - Inducements for investment
  - New model for Gs.
- G6 2000, Com. accepts that vert. restraints seldom anticompetitive if sufficient inter-brand competition.
- G7 protection of competition, not competitors, is primary objective as it enhances consumer welfare.
- Then explains kinds of agreement
- Guidelines 2010 tighter than BER 1999 since restriction under 101(3) must be indispensable. Usually there are other options that rarely infringe 101(1) TFEU: eg selective distribution.??

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## Current Guidelines

- Explain reg.
- Vert. ags outside reg not presumed to be illegal (G62)
- Com has gone back to economic analyses of the problems, within and outside the reg in guidelines to each BER.
- Conduct now considered in its economic context even under BER (*Delimitis under Art 101(1)*).
  - Then possible anticompetitive effects.

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## Council Reg 1/2003 replaces Reg. 17

- Agreements qualifying under Article 101(3) ceased to be prohibited even without any decision to that effect.
  - Decisions became declaratory not constitutive
  - Resources were freed to deal with other tasks.
- Art. 1 removed the need for individual exemptions, no notification or scrutiny needed. Ehlermann's policy has succeeded!
- National courts are now able to declare agreements valid under Art 101(3).

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## Discussion Paper (DP)–Article 102

- Having reduced the need to request individual exemptions, competition staff in the Commission wondered whether they could reduce their work load also under Article 102.
  - Abuse of dominant position
- The Chief Economist hired a group of economists (**EAGCP**) to prepare a report on an economic approach to competition
- Which was followed by **Com's discussion paper (DP) on application of Art 102 to exclusionary abuses.**
  - Not binding, written by staff and not approved by Commissioners, nor published in OJ.
- Concerned mostly with anticompetitive foreclosure by Domco.

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## DP

- Moved further towards effects on market.
- 4, 54 88 refer to objective of Art 82 being protection of competition as means of enhancing consumer welfare and ensuring an efficient allocation of resources.

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## Objective justification & efficiencies

- 63. Protect competition not competitors against conduct which would exclude competitors as efficient as DOMCO.
- 8. If conduct would merit exemption, it was not abusive.
- Burden of proof on Domco
  - Controversial- some civil law systems construe narrowly any exception narrowly. Common lawyers construe narrowly only exception to general principles.
  - Argue that Ancillary restraint, or minimising effects of abuse by others not abusive.

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## We expected guidelines

- based on likely effects of Domco's conduct on the market, the ease with which customers and suppliers could switch if held to ransom by DOMCO.
- 84-92. Efficiencies only in narrow conditions based on 101 (3).
  - indispensable
- Controversial!
  - Since balance to be established by Domco &
  - Both benefits and harms to consumer seldom quantifiable
  - Defences hardly exist

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## Commission paper on enforcement priorities under Article 102

- Published in OJ probably not binding.
- But enabled Com to avoid issuing guidelines contrary to judgment in British Airways.

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## Later cases on 102 hardly consistent

- With each other, the DP or on Guidance on Com's enforcement priorities.

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## Joaquin Almunio Competition Commissioner

– Brussels April 19 2011

- “Perhaps the greatest change in antitrust enforcement over the years has been the increased focus on the economic effects of the companies’ behaviour, specifically in the field of abuse of dominance.
- Rather than looking at the form of conduct – is this an exclusive agreement ... our competition analysis then looks more carefully at the potential impact on the market of the conduct in question.

– Thank you!

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# Almunio

- “This is a welcome development: cases are not an end in themselves: they only have value if they allow us to improve the operation of markets and the benefits this implies for consumers.”
- Thank you!