

# Restrictions of Competition and Free Movement in EU Law

Oslo, 18 May 2011

Dr Renato Nazzini

# Introduction

## Structure of the Paper

- Relationship between competition and free movement in EU law
- Analytical structure of the tests
- Substantive threshold for finding a restriction
- Objective justification
- Conclusion

# Relationship between Competition and Free Movement in EU law

## EU Competition Law and the Internal Market

- The objective of the competition rules is to ensure the well-functioning of the internal market
  - Art 3 TEU on the objectives of the Union: ‘the Union shall establish an internal market’ + Art 3 TFEU on the competences of the Union: ‘the establishing of the competition rules necessary for the functioning of the internal market’ + Protocol No 27 = internal market – confirmed by ECJ in Joined Cases C-501/06 P etc *GlaxoSmithKline Services* and AG Kokott in C-95/04 P *British Airways*
  - Arts 101 and 102 prohibit agreements restricting competition and abuses of a dominant position as incompatible with the ‘internal market’
- Issue not as clear-cut
  - Consumer welfare: GC in Case T-168/01 *GlaxoSmithKline Services* (overturned by the ECJ) and certain Commission Guidelines, eg Guidelines on Vertical Restraints, para 7 and Guidelines on Art 101(3), para 13
  - Fairness and equality of opportunity: Case C-462/99 *Connect Austria*; Joined Cases C-327/03 and 328/03 *Bundesrepublik Deutschland*; Case T-271/03 *Deutsche Telekom*

## Objective of the Internal Market

- Need for a teleological interpretation of the competition rules
- Article 26 TFEU: ‘the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’
  - necessary to identify the objective of the internal market
  - economic freedom or removal of protectionist barriers?
  - ... or neither?

## Social Welfare Objective

- Article 3(3) TEU, after providing that ‘the Union shall establish an internal market’, adds that the Union ‘shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance’
- The Court of Justice in competition cases clarified that the overall objective of the competition rules is the ‘well-being of the European Union’ which includes the welfare of producers, consumers, and the public interest: Case C-52/09 *TeliaSonera*, paras 20 – 22; Case C-94/00 *Roquette Frères*, para 42; Joined Cases 46/87 and 227/88 *Hoechst*, para 25
- Teleological interpretation of the competition rules rests on the link between Articles 101 and 102 and Article 3(1)(b) TFEU and Article 3(3) TEU – therefore, the objective of the competition rules must be the same as the objective of the internal market

# Analytical Structure of the Tests

## Proportionality as Analytical Framework

- Proportionality as a neutral logical framework
- Opinion of AG Poiares Maduro in Case C-434/04 *Leppik*, para 24
  - whether the measure is suitable to achieving the objective
  - whether an alternative measure is available that would achieve the objective as effectively while being less restrictive
  - whether the level of protection afforded to the objective being pursued is commensurate to the interference with intra-EU trade that it causes
- Note, however, that proportionality also determines whether a measure is a restriction in the first place
  - Case 120/78 *Cassis de Dijon*

## Article 101

- Art 101(1): restriction of competition
  - Case 42/84 *Remia*; Case 161/84 *Pronuptia de Paris*; Case 258/78 *Nungesser*; Case C-250/92 *Gottrup-Klim*
  - Case C-309/99 *Wouters* and Case C-519/04 P *Meca-Medina*
  - Case 5/69 *Völk v Vervaecke* and Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C368/13 (the 'Commission Notice on Agreements of Minor Importance')
- Objective justification
  - the agreement improves the production or distribution of goods or promotes technical or economic progress
  - it gives consumers a fair share of the benefits in question
  - it is indispensable to achieving the benefits
  - it does not result in the elimination of all competition on the market concerned

## Article 102

- No bifurcated structure but case law developed an analytical framework based on the principle of proportionality
  - restriction
    - Joined Cases T-24/93 etc. *Compagnie Maritime Belge*; Case 27/76 *United Brands*; Case T-301/04 *Clearstream*; Case T-321/05 *AstraZeneca*, under appeal in Case C-457/10
  - Case C-95/04 P *British Airways*, para 86
    - *prima facie* restrictive conduct produces efficiencies or pursues some other legitimate objective
    - the conduct under review is suitable to achieving the efficiencies
    - it is the least restrictive means of achieving them
    - the benefits of the conduct, for both producers and consumers, outweigh the potential competitive harm. Consumers must receive some benefits

# Intervention Threshold

## Art 101

- Under Articles 101 and 102, when the conduct under review is capable of restricting the flows of goods and services within the EU, the intervention threshold is low
- Art 101
  - Joined Cases 56/64 and 58/64 *Consten and Grundig*
  - Joined Cases C-501/06 etc. *GlaxoSmithKline Services Unlimited v Commission*
  - Case C-260/09 *P Activision*
  - Opinion of Advocate General Mazák in pending Case C-439/09 *Pierre Fabre*, relying, inter alia, on Case C-322/01 *Deutscher Apothekerverband* and Case C-108/09 *Ker-Optika*

## Art 102

- Art 102
  - above-cost rebates: Case T-65/89 *British Gypsum* and Case T-228/97 *Irish Sugar*
  - refusal to supply: Joined Cases C-468/06 to 478/06 *Sot Lélou kai Sia EE v GlaxoSmithKline AEEVE Farmakeftikon Proionton*
  - raising rivals' costs: Case 26/75 *General Motors*; Case 226/84 *British Leyland*; *Deutsche Post AG - Interception of Cross-Border Mail*
  - discrimination: Case 27/76 *United Brands*, Case T-228/97 *Irish Sugar*; Case C-18/93 *Corsica Ferries*; 1998 *Football World Cup*; Case C-163/99 *Portuguese Republic*

## Assessment of the 101 and 102 case law

- Is the strict approach to trade restrictions in EU competition law justified?
- In law, the objective of the competition rules is to ensure the well functioning of the internal market
  - Arts 34 and 35 TFEU prohibit restrictions of imports or exports and measures having equivalent effect
  - within the framework of the provisions set out in Chapter 3 of the TFEU, Art 56 TFEU sets out a prohibition of restrictions to provide services in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. As long as restrictions on freedom to provide services have not been abolished, Art 61 TFEU provides that Member States shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of Art 56(1)
  - if EU competition law has the only purpose of ensuring the well functioning of the internal market, why should the competition tests be more lenient than the free movement ones? Opinion of Advocate General Kokott in pending Joined Cases C-403/08 and C-429/08 *Football Association Premier League*, para 249; 'conflicting assessments of the fundamental freedoms and competition law are to be avoided in principle' – see also her Opinion in Case C-169/08 *Presidente del Consiglio dei Ministri*, paras 134 ff
- In policy, trade is a key driver of long-term social welfare and productivity, which are the pillars of the economic (and social) well-being of a society. Naked restrictions of trade require, at least, some form of justification

# Objective Justification



## Parallels and Transplants

- Case 120/78 *Cassis de Dijon* and Case C-309/99 *Wouters*
- Opinion of Advocate General Kokott in pending Joined Cases C-403/08 and C-429/08 *Football Association Premier League*, para 250: similar considerations as apply to the objective justification of a restriction to provide services also apply to the objective justification of an agreement having the object of restricting competition by preventing parallel trade
- Wide range of justifications as long as they are compatible with the EU Treaties and consistent with the objective of the EU rules in question (creation of a single market under the free movement provisions and ensuring effective competition under the competition rules)

# Are There Unifying Principles?

## (Tentative) Conclusions

- Social welfare as unifying principle
- Application of the same analytical structure of proportionality
- Low intervention threshold for finding a restriction of competition consistent with the principle that a single market with free trade enhances long-term social welfare – same principle applies to free movement, which suggests that a low threshold is justified
- Convergence in objective justification tests
- Are transplants from the competition case law to the free movement case law possible?
  - market access as an objective and a default test not incompatible with rule-based provisions – see Art 102 case law