**PUBLIC COMPETITION LAW**

**EXAM TOPICS**

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**1. The concept of public competition law**

Public competition law – as any other branch of law – should be distinguished by using the following division criteria: 1) subject matter of regulation, which is the competition; 2) the method of regulation, which is the administrative one; 3) addressees of regulations, which are: the undertakings, the competition authorities, and the courts.

As for the concepts of competition see, e.g.: <https://www.tu-chemnitz.de/wirtschaft/vwl2/downloads/wettbew/Concepts.pdf>

The basic features of an administrative method of regulation in public competition law: 1) unilateral actions of public authorities; 2) the authoritative actions of public authorities; 3) the possibility of public authorities to use the coercion.

**2. The formal sources of public competition law**

The formal sources of the EU public competition law:

1) Articles 101-106 of the Treaty on the functioning of the European Union

2) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25

3) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, p. 1-22

4) Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, Official Journal C 95 of 16.04.2008

5) Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101, 27.04.2004, p. 97-118.

**3. The goals of public competition law**

The set of objectives that competition law of individual states or of international organizations does or may pursue:

1. Non-welfare objectives
2. The competitive process and competitive market structure
3. Economic freedom
4. Fairness
5. The protection of competitors and small and medium-sized enterprises
6. Market integration
7. Market liberalization
8. Consumer choice
9. Welfare objectives
10. Social welfare
11. Consumer welfare

The source: R. Nazzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102, Oxford 2011, pp. 14 et seq.

**4. Undertakings as the basic addressees of public competition law**

In the jurisprudence of the Court of Justice of the European Union it is accepted that the undertakings are the entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences:

First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of the EU competition law. The only relevant criterion in this respect is whether it carries out an economic activity.

Second, the application of the EU competition law as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice of the EU and the General Court, non-profit entities can offer goods and services on a market too. Where this is not the case, non-profit providers remain of course entirely outside the EU competition law.

Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity.

The source: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, Official Journal C8, 11.01.2012, p. 4-14

**5. Agreements restricting competition**

The factors that facilitate the collusion or anticompetitive agreements:

1. Structural factors: concentration; entry; cross-ownership and other links among competitors; regularity and frequency of orders; buying power; demand elasticity; evolution of demand; product homogeneity; symmetry; multi-market contacts; inventories and excess capacities.

2. Price transparency and exchange of information: observability of firm’s actions facilitates enforcement; exchange of information on past or current prices and quantities

The prohibition of agreements restricting competition, as set out in Article 101 of the Treaty on the functioning of the European Union (TFEU), applies to restrictive agreements and concerted practices between undertakings and decisions by associations of undertakings in so far as they are capable of affecting trade between Member States. A general principle underlying Article 101(1) which is expressed in the case law of the EU Courts is that each economic operator must determine independently the policy, which he intends to adopt on the market. In view of this the EU Courts have defined “agreements”, “decisions” and “concerted practices” as the EU law concepts which allow a distinction to be made between the unilateral conduct of an undertaking and co-ordination of behaviour or collusion between undertakings. Unilateral conduct is subject only to Article 102 TFEU as far as the EU competition law is concerned.

The type of co-ordination of behaviour or collusion between undertakings falling within the scope of Article 101(1) is that where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced. It follows that co-ordination can take the form of obligations that regulate the market conduct of at least one of the parties as well as of arrangements that influence the market conduct of at least one of the parties by causing a change in its incentives. It is not required that co-ordination is in the interest of all the undertakings concerned. Co-ordination must also not necessarily be express. It can also be tacit. For an agreement to be capable of being regarded as having been concluded by tacit acceptance there must be an invitation from an undertaking to another undertaking, whether express or implied, to fulfill a goal jointly. In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties. However, the mere fact that a measure adopted by an undertaking falls within the context of on-going business relations is not sufficient.

Agreements between undertakings are caught by the prohibition rule of Article 101(1) when they are likely to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.

The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand).

Article 101(1) TFEU distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 101(1) if its object or effect is to restrict inter-brand competition and/or intra-brand competition.

The source: Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101, 27.04.2004, p. 97-118.

**6. Abuse of a dominant position**

DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS

Recommended Practices

The concept of dominance or substantial market power limits the scope of application of most unilateral conduct laws. Making dominance or substantial market power a prerequisite for intervention under unilateral conduct laws serves as a filter for intervention against specific anti-competitive conduct.

The concept of dominance pursuant to unilateral conduct laws is generally equivalent to the possession of substantial market power, and thus this document uses the terms “dominance” and “substantial market power” interchangeably. Market power is defined generally as the ability to price profitably above the competitive level. Dominance/substantial market power is a high degree of market power both with respect to the level to which price can be profitably raised and to the duration that price can be maintained at such a level.

The degree of market power required to constitute dominance/substantial market power and the nature and extent of the evidence required to establish dominance/substantial market power are basic and important policy choices made by legislatures, competition agencies, and courts. The work of the Unilateral Conduct Working Group in 2006-2007 highlights different policy choices as to what is required to constitute and establish dominance/substantial market power.

All jurisdictions agree that unilateral conduct laws address specific conduct and its anticompetitive effects, rather than the mere possession of dominance/substantial market power or its creation through competition on the merits. All jurisdictions also

agree that the goal of enforcement is to identify and act against conduct that is anticompetitive, although it can be difficult to distinguish between pro- and anticompetitive unilateral conduct. Determining whether a firm possesses dominance/substantial market power generally is the first step in the evaluation of potentially anti-competitive unilateral conduct. Laws differ in the way dominance/substantial market power is defined. Most jurisdictions find that a rigorous assessment of whether a firm possesses dominance/substantial market power, going well beyond market shares, is highly desirable. In jurisdictions with a more formalistic definition of dominance based on market shares, it is recommended that agencies be particularly rigorous in their analysis of the conduct at issue.

Based on the group’s work during 2006-2007, the ICN recommends the following practices for the assessment of dominance/substantial market power in the context of unilateral conduct laws:

I. General Framework

1. Agencies should use a sound analytical framework firmly grounded in economic principles in determining whether dominance/substantial market

power exists.

*Comment:* Properly assessing whether a firm possesses dominance/substantial market power, is a complex and multi-faceted analysis. Although each jurisdiction has chosen its own specific wording for the legal definition of dominance/substantial market power, there is increasing convergence toward the principle that the analysis reaches well beyond market shares. The analysis of dominance/substantial market power, therefore, should be based on the assessment criteria mentioned in section II.

2. A firm should not be found to possess dominance/substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation.

*Comment 1:* Various market characteristics determine the extent to which a firm is or is not constrained by competitive pressure, in particular from actual or potential competitors.

Agencies should assess dominance/substantial market power by directly investigating how the particular relevant market operates and the competitive situation in the market.

*Comment 2:* The analysis of dominance/substantial market power includes but does not stop with the assessment of market shares. At a minimum, conditions of entry and expansion (affecting the durability of market power) should also be assessed. Agencies should, where appropriate, also take into account other criteria such as buyer power, economies of scale and scope/network effects, and access to upstream markets/vertical integration.

The source: ICN Unilateral Conduct Working Group, available at: <http://internationalcompetitionnetwork.org/uploads/library/doc317.pdf>

**7. Mergers or concentrations**

Defining “Merger” Transactions for Purposes of Merger Review

I. Introduction

The ICN’s Recommended Practices for Merger Notification and Review Procedures (“RPs”) provide considerable guidance on jurisdictional nexus and notification thresholds for purposes of defining transactions that are properly subject to merger notification and review requirements. As a matter of first principles, a merger review regime must also define the type of transactions that potentially qualify for notification as “mergers.”Although the definition of qualifying “merger” transactions is not expressly dealt with in the RPs, it is a critical issue from an enforcement policy perspective and it is fundamental to the transparency of the merger review process. While the precise technical terms may differ according to applicable local laws, the overriding aims of the definition of “covered transactions” are to capture those transactions that merit notification and review as “mergers” under applicable substantive merger legislation, while at the same time providing clear and easily understandable standards that enable merging parties to readily ascertain their notification obligations.

II. General Principles

As a general matter, merger review statutes and regulations are directed at business transactions in which two or more previously independent economic undertakings are combined in some fashion that involves a lasting change in the structure or ownership of one or more of the undertakings concerned.The types of qualifying business transactions typically include some form of merger between two or more previously independent undertakings, by the acquisition of control or some degree of influence by one undertaking over the whole or part of another undertaking, or by some combination of all or part of the business operations of two or more undertakings to create a new business enterprise (e.g., consolidations, amalgamations and joint ventures).

The degree of economic integration between the parties and the duration of the relationship (both subsumed in the notion of a “lasting structural change” under the EU Merger Regulation) are often utilized to distinguish qualifying “merger” transactions from mere collaborative arrangements, which are normally reviewed under competition.

The source: <http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf>

Assessment of merger transaction in competition law

The two basic questions in merger review are:

(a) which transactions are subject to review under merger control laws; and

(b) how should the substantive legal test - against which mergers should be assessed - translate into a competition test?

A key starting point here is to explain how the relevant national law translates into a competition test. In particular, it is important to explain how a competition authority expects to identify those situations where a merger will not pass the relevant competition test.

Commonly, competition is seen as a process of rivalry. That process is regarded as valuable not for the sake of rivalry itself, but for the benefits that it brings to customers and, in turn, consumers. When effective, the competitive process compels firms to win customers by offering a better deal than their rivals, which enhances consumer welfare. Consumer welfare depends on a range of factors, including price, output, quality, variety and innovation. In most jurisdictions, the core purpose of merger review is to protect competition, so that mergers do not lead to harm to consumers (or customers, where products or services are not directly sold to end-consumers).

Most mergers do not harm competition. Indeed, some may be pro-competitive because they benefit consumers by lowering costs (through the achievement of efficiencies such as economies of scale) and/or increasing innovation. Many others are competitively neutral, for example because post-merger competition will remain and continue to discipline the merged firm and its rivals.

Theories of consumer (or competitive) harm

However, in some situations, mergers can have an anticompetitive effect on the market, enhancing the market power of the merging parties and thus harming consumers (or customers). Several theories of consumer (or competitive) harm have been developed within the context of mergers. Unilateral effects and coordinated effects theories are the two mainstream theories of competitive harm. These theories – which are discussed below – envisage various ways in which a merger may result in consumer harm (e.g., higher prices and/or lower output, quality, variety or innovation) and the reference in this analysis to the price dimension is a shorthand for the several ways in which competitive harm can take form.

A central question in merger assessment is how the relevance of economic theories should be evaluated in the practical application of competition rules. Assessing the relevance of a theory to the actual transaction is critical because with the selected assumptions it is possible to build a theoretical model to support almost any view of the world. It is therefore important that any model used to assess the likely competitive effects of a merger fits the industry to which it is applied. This implies that competition authorities need to conduct substantial factual analysis in support of their assessment.

The increasing importance of detailed factual analysis in merger

Generally, there are three ways in which a model and its relevance to a case might be tested. First, one can test the internal logic of the model itself. Second, the assumptions of the model must be tested. Third, the model must capture important aspects of an industry, such as whether products are differentiated.

Competition authorities generally have the responsibility to intervene when they expect a merger to have an anti-competitive outcome: in these situations, the merger could either be prohibited or the adverse effects resolved by remedies.

Counterfactual

It is implicit in the description above that basic merger analysis relies on understanding the effects that a merger may have on the expected state of competition in a market. A central concept of any competition test is therefore a comparison of competition with and without the merger. The competitive situation without the merger is sometimes referred to as the counterfactual.

In most cases, the best starting point for the counterfactual is prevailing conditions of competition, i.e., the conditions of competition existing before the merger. It is necessary, however, in most instances to take into account likely and imminent changes in the nature of competition in order to reflect, as accurately as possible, the nature of rivalry without the merger. Examples of such circumstances may include:

• Expected near-term entry or exit from the market or committed expansion plans by existing competitors.

• There are committed expansion plans in place by one or both of the merging firms absent the merger.

• Where one of the parties to a merger is a failing firm or a merger involves the acquisition of a failing division, pre-merger conditions of competition might not prevail even if the merger were prohibited

• There may be changes to the regulatory structure of the market such as liberalisation or tighter environmental constraints that will change the nature of competition.

• There may be other changes in the market that have implications for the assessment of the competition. It is critical to keep in mind that markets are dynamic rather than static.

The source: ICN Merger Working Group: Investigation and Analysis Subgroup, ICN MERGER GUIDELINES WORKBOOK, available at: [www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf)

**8. Public competition authorities**

Polish competition authority is the President of the Office of Competition and Consumer Protection (‘the President of the Office’). The President of the Office is a central authority of the state administration. It reports directly to the Prime Minister, who appoints it from amongst the persons selected by way of an open and competitive contest. The President of the Office is responsible for shaping the antitrust policy and consumer protection policy.

The primary antitrust instrument used by the President of the Office are proceedings concerning competition restricting practices, i.e. abuses of a dominant position and prohibited agreements (cartels). The proceedings may end in a decision ordering the enterprise involved to cease the activities in question and pay a fine. The President of the Office is also authorised to control mergers in order to prevent situations where as a result of a merger a dominant entity is created on the market.

The Office of Competition and Consumer Protection (‘the Office’) provides its opinion on state aid schemes and individual state aid decisions before their notification to the European Commission, which is the only body with the power to determine state aid’s compliance with the Single Market. Based on reports from the granting entities and beneficiaries, the Office prepares annual reports on state aid, evaluating its effectiveness, efficiency and impact on competition.

The President of the Office has also the power to carry out proceedings concerning practices infringing collective consumer interests, which may lead a decision ordering the enterprise involved to cease the practices in question and pay a fine. Further consumer protection activities include ridding business to business contracts from prohibited clauses, i.e. contract terms setting forth consumers’ interests in a way that infringes the law or good practices. Here, the major instrument used by the Office are inspections of contracts used by enterprises.

To protect the health and life of consumers, the Office carries out proceedings concerning general product safety. They may end in a decision ordering the enterprise involved to withdraw a dangerous product from the market.

The source: <https://uokik.gov.pl/what_we_do.php>

The European Commission and the national competition authorities in all EU Member States cooperate with each other through the European Competition Network (ECN). This creates an effective mechanism to counter companies which engage in cross-border practices restricting competition. As European competition rules are applied by all members of the ECN, the ECN provides means to ensure their effective and consistent application. Through the ECN, the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practices.

The source: <http://ec.europa.eu/competition/ecn/index_en.html>

**9. Antimonopoly procedures**

In the European Union the competition cases under Articles 101 or 102 TFEU can originate in: 1) a complaint, 2) opening of an own–initiative investigation, or 3) a leniency application from one of the participants to a cartel. Under the Commission’s Leniency programme, the first firm to submit evidence that is sufficient for the Commission to either launch an inspection or enable it to find an infringement receives full exemption from its fine (total immunity). When it applies for immunity, the firm must also end its participation in the infringement. Firms that approach the Commission later and that contribute a real added value to the investigation are eligible for a fine reduction, subject to the same on-going cooperation as for immunity applicants.

Investigation

The Commission’s investigative powers to enforce Articles 101 and 102 TFEU are detailed in Council Regulation (EC) No 1/2003. The Commission is empowered, for example, to:

* Send information requests to companies;
* In the context of an inspection:
  + enter the premises of companies;
  + examine the records related to the business;
  + take copies of those records;
  + seal the business premises and records during an inspection;
  + ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers.

At the end of the initial investigative phase, the Commission can take the decision to pursue the case as a matter of priority and to conduct an in-depth investigation, or to close it. If the in-depth investigation confirms the Commission’s competition concerns, a statement of objections (SO) detailing the Commission’s concerns is sent to the companies concerned.

To ensure an objective outcome, the parties are given certain rights of defence. They are entitled to have access to the file – this means they can see all non-confidential documents from the Commission's investigation. The parties may then reply to the SO in writing within a certain delay. They may also request an oral hearing, which is conducted by an independent Hearing Officer. After examining the parties’ arguments, the Commission reviews and sometimes abandons (part of) its initial objections and may decide to close the case.

If the Commission's concerns are not – or only partly dispelled – it drafts a decision prohibiting the identified infringement. The draft is then submitted to the Advisory Committee composed of representatives of the Member States’ competition authorities. This provides a final check of the draft decision. If fines are proposed in the draft decision, the Advisory Committee meets a second time to specifically discuss them. Finally, the draft is submitted to the College of Commissioners which adopts the decision.

Alternatively to a prohibition decision the Commission may take a commitment decision under Article 9 of Regulation 1/2003. This is a quick way of restoring effective competition to the market. Under commitment decisions, the Commission does not have to conclude on the existence of an infringement of the antitrust rules and imposes no fines. It voices its competition concerns and parties can come forward with commitments to address these concerns. If the Commission, after consulting market participants, finds these commitments sufficient, it takes a decision to make them legally binding.

The commitments are usually in place for a specific period of time, and if the companies breach them they can be fined.

A company that has participated in an anti-competitive agreement and so infringed competition law may have to pay a fine. The Commission’s fining policy is aimed at punishment and deterrence. The fines reflect the gravity and duration of the infringement.

The addressees of a Commission decision have the right to appeal to the EU General Court, to amend or annul the decision. The Court can cancel, increase or reduce the fine imposed by the Commission. Judgments of the General Court can be appealed before the European Court of Justice (ECJ) by the unsuccessful party (so the Commission can also be an appellant). However, these appeals to the ECJ are limited to questions of law only.

The source: <http://ec.europa.eu/competition/antitrust/procedures_101_en.html>

**10. Anticompetitive state aid**

The provisions of the Treaty on the functioning of the European Union on state aid:

Article 107

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

**11. Anticompetitive state practices other than state aid**

Article 106 of the Treaty on the functioning of the European Union:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

State Action Doctrine:

Although Article 101 of the Treaty on the functioning of the European Union (TFEU) is, in itself, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, that article, read in conjunction with Article 4(3) of the Treaty on European Union (TUE), none the less requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. The Court of Justice of the EU claims that Articles 4(3) TUE and 101 TFEU are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

**12. Sector-specific regulation**

Sector-specific regulation (at least in its modern version) is relatively young body of law which in his origin has an eagerness of the EU (formerly: Community) authorities for removal of exclusive rights in the network-bound sectors (telecommunication, postal, energy and railway), so as to enable the future development of effective competition within these sectors. Regulation was also focused on introduction of the universal service’s concept which had to guarantee that in competitive environment some social obligations are not – especially by the former monopolists – abandoned. Within the framework of the sector-specific regulation one has to distinct the EU level (directives issued by the EU authorities, together with some regulations and the regulatory activity of the EU institutions, mainly that of European Commission) and national level (legal rules which implement the EU legal acts and the activity of the national regulatory authorities).

The accomplishment of the effective competition is the important aim of the sector-specific regulation. This is apparent from the many provisions of the particular sector directives. But the question remains what concept of competition is accepted in abovementioned directives. There are many convincing arguments for the thesis that sector-specific regulation is mainly concerned with ordo-liberal concept of competition. For this latter concept the most important value is the freedom of competition and creating of such conditions which enable to the particular undertakings making economic decisions without any (economic) constraint from the side of competitors (market’s rivals). Thus, this concept puts emphasis on the necessity of protection of the competitors’ economic freedom.

The source: M. Szydło, Sector-Specific Regulation and Competition Law: Between Convergence and Divergence, European Public Law 2009, vol. 15, nr 2, s. 257-275.

“Regulation can serve a number of purposes. Its aim might be to secure specific policy outcomes on a market – such as reducing pollution, ensuring security of energy supply, providing an essential but uneconomic service, or protecting vulnerable consumers. Or, to take a topical example, regulation may be necessary to supervise a sector such as the financial sector, where market failures can have a devastating effect on consumers, but also a systemic effect, with repercussions beyond the interests of those immediately affected. These different regulatory objectives will sometimes cause tensions with competition law but [it can be argued] that in the majority of cases competition instruments and regulatory instruments are actually complementary. Sometimes, regulation is actually used to open up markets to competition, as an instrument of liberalisation. This is typically the case in network industries, often former state-owned monopolies, such as telecommunications, transport and energy, but also postal services. Experience has shown that it is not enough to lift legal monopolies, and to rely on individual enforcement of the competition rules. In order to guarantee a competitive

environment in which new entrants can thrive, regulation is necessary. Not least because many of our competition enforcement instruments rely on *ex post* enforcement. Sometimes *ex ante* regulation is preferable to resolve structural problems and open up markets to competition by laying down the conditions for market entry, giving potential new entrants legal certainty and thus encouraging them to invest. (…) Competition enforcement and sector regulations arecomplementary instruments. They work together to achievemarkets that work well.” (the source: Joaquín Almunia, Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?, Speech available at: europa.eu/rapid/press-release\_SPEECH-10-121\_en.pdf.