Competition Policy Objectives

Overview of Articles 101-102 TFEU

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Outline

- What is Competition?
- What is Competition Policy?
- What is the legal basis for Competition Policy?
- Does it matter for business?
- Who is in charge? What are the tools?
- What’s next for EU Competition Policy?

What is Competition?

- OECD defines **competition** as a situation in a market in which firms or sellers <u>independently</u> strive to attract buyers in order to achieve a particular business objective (e.g. profits).

- Competition = rivalry between firms.

- This rivalry may take place in terms of price, quality, service or innovation.

- Competition encourages companies to offer consumers goods and services at the most favourable terms.

What is Competition Policy ?

- Margrethe Vestager, European Commissioner for Competition (2014-present):

“I think it is one of the fundamentals, not only of the European Union but also of free trade, that competition is fair”.

- The primary objective of competition policy and competition law is to enhance consumer welfare by promoting competition and controlling practices that could restrict it.

What is Competition Policy ?

1. It prohibits agreements or practices that restrict competition between business entities (e.g. cartels);

2. It regulates or bans abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position (e.g. excessive pricing);

3. It supervises mergers and acquisitions of large corporations such that transactions that threaten the competitive process are prohibited or approved subject to remedies;

4. It controls state aid (in the EU) to limit distortions to intra-EU competition and trade resulting from national subsidies.

What is the legal basis for Competition Policy?

- *(1) Competition policy prohibits agreements or practices that restrict competition between business entities.*
- This is implemented through rules set out in **Article 101** of the Treaty on the Functioning of the European Union (TFEU) (ex Article 81).
- It concerns:
  - <u>Horizontal agreements</u>: between firms competing in the same market (e.g. cartels, collusion);
  - <u>Vertical agreements</u>: between a manufacturer and its distributor.

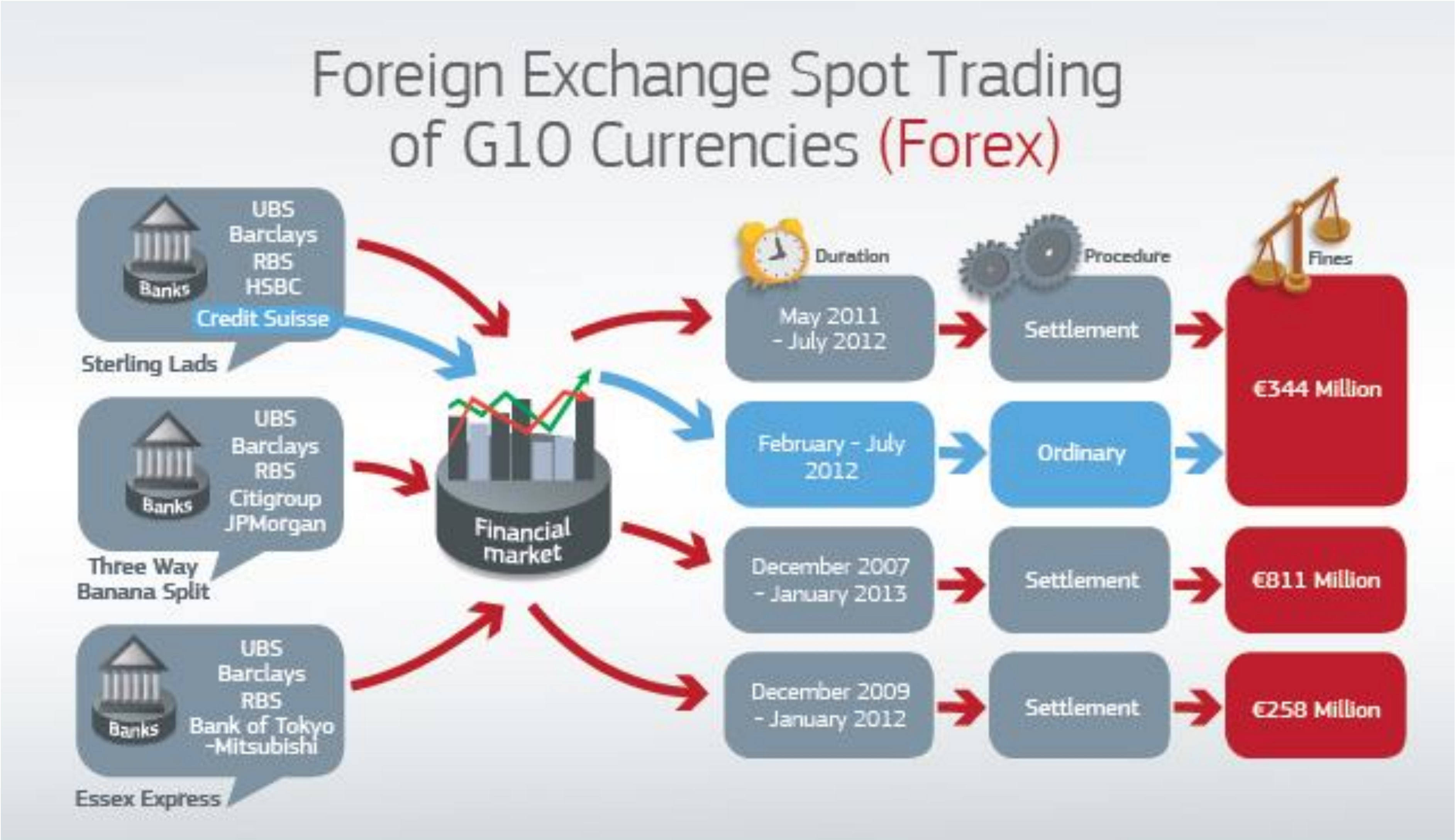
What is the legal basis for Competition Policy?

- It prohibits practices which:
  - directly or indirectly fix prices;
  - limit or control production;
  - share markets or sources of supply;
  - apply dissimilar conditions to equivalent transactions with other trading parties;
  - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

What is the legal basis for Competition Policy?

- Only limited exceptions to these prohibitions.
- The most flagrant example is the creation of a **cartel** between competitors, which may involve price-fixing and/or market sharing.
- In December 2021, the European Commission fined UBS, Barclays, RBS, HSBC and Credit Suisse €344m for participating in a Forex spot trading cartel.

What is the legal basis for Competition Policy?



Source: European Commission Press Release of 2 December 2021.

What is the legal basis for Competition Policy?

- Traders exchanged sensitive information and coordinated their trading strategies through an online chatroom called Sterling Lads.
- This enabled them to:
  - make informed decisions on whether and when to sell or buy the currencies;
  - identify opportunities for coordination, whereby some of them would temporarily refrain from trading to avoid interfering with another trader.

What is the legal basis for Competition Policy?

- *(2) Competition Policy bans abusive behaviour by a dominant firm.*
- This is implemented through rules set out in **Article 102** of the TFEU (ex Article 82) which prohibits:
    - imposing unfair prices;
    - limiting production or technical development;
    - apply dissimilar conditions to equivalent transactions with other parties;
    - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

What is the legal basis for Competition Policy?

Source: European Commission Press Release of 18 July 2018.

What is the legal basis for Competition Policy?

- These three types of abuse form part of an overall strategy by Google to cement its dominance in general internet search.
- In 2018, the Commission issued a fine of €4.3 billion and requires Google to bring its illegal conduct to an end within 90 days.

What is the legal basis for Competition Policy?

- *(3) Competition Policy supervises mergers and acquisitions.*
- This is implemented through Merger Council Regulation (EC) No 139/2004. In a sense, it is the child of Articles 101 and 102 TFEU.
- *(4) Competition Policy controls state aid (in the EU).*
- This is implemented through rules set out in Article 107 of the TFEU.

Does Competition Policy matter for business?

- Competition Policy can hurt companies by:
    - Blocking mergers and acquisitions
    - Imposing fines
    - Ordering the repayment of subsidies
    - Negatively affecting the valuation of companies
    - Involve companies in long and expensive battles
    - Cause reputational damage

Who is in charge? What are the tools?

- In the EU there are two different levels of jurisdiction.
- EU Commission deals with larger and cross-border cases.
- National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully within their territory.
- National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty.

Who is in charge? What are the tools?

- The Commission and NCAs have **investigative powers**:
  - Inspections at business and non-business premises;
  - Written requests for information,
  - Etc.
- The Commission may also impose fines on undertakings which violate the EU antitrust rules.

What's next for EU Competition Policy?

- Competition policy is under a major review as we speak.
- Policies need to adapt to the rapidly-changing digital, green and global economic landscape.
- Should we use antitrust to tackle social and economic issues that go beyond consumer welfare? How far should we go?
- COVID-19 gave rise to calls for the introduction of comfort letters to address legal uncertainty; updating investigation tools (e.g. remote solutions).
- Does the growing use of AI throughout the economy turn the concept of market power on its head?

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