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F. European and German Competition Law in a Nutshell

Vorlesung Grundlagen des privaten Wirtschaftsrechts –
Grundbegriffe des Wettbewerbsrechts
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F. Competition Law in a Nutshell

	Restrictions by horizontal covenants	Restrictions by vertical covenants	Abuse of a dominant position	Merger control
EU	Art. 101 TFEU	Art. 101 TFEU	Art. 102 TFEU	Art. 102 TFEU, Merger Regulation
D	Secs. 1-3 ARC	Secs. 1, 2 ARC	Secs. 18 ff. ARC	Secs. 35 ff. ARC



F. Competition Law in a Nutshell

I. Enforcement

1. Enforcement of German Competition Law

a) Administrative enforcement

(1) Competition Authorities

- Federal Cartel Office (BKartA)
- Landeskartellbehörden
- Federal Ministry of Economics
- Monopoly Commission



F. Competition Law in a Nutshell

I. Enforcement

1. Enforcement of German Competition Law

a) Administrative enforcement

(1) Competition authorities

(2) Sanctions

i. Administrative proceedings (1)

- proceedings upon motion only in merger control
- prohibition, abatement including structural remedies, sec. 32 ARC; structural remedies upon sector inquiry, sec. 32f ARC
- positive finding of an infringement, sec. 32a ARC



F. Competition Law in a Nutshell

I. Enforcement

1. Enforcement of German Competition Law
 - a) Administrative enforcement
 - (1) Competition authorities
 - (2) Sanctions
 - i. Administrative proceedings
 - ii. Counterventions proceedings:
 - Fines, secs. 81 ff. ARC



F. Competition Law in a Nutshell

I. Enforcement

1. Enforcement of German Competition Law

a) Administrative enforcement

(1) Competition authorities

(2) Sanctions

(3) Proceedings and powers of investigation

– opening of proceedings ex officio or because of a motion

– sector inquiry, sec. 32e ARC

– Requests for information and powers of inspection, sec. 59 ff. ARC



F. Competition Law in a Nutshell

I. Enforcement

1. Enforcement of German Competition Law

a) Administrative enforcement

(1) Competition authorities

(2) Sanctions

(3) Proceedings and powers of investigation

(4) Judicial control

– Cartel complaint (Kartellbeschwerde) in administrative proceedings to Court of Appeal (Oberlandesgericht)

– objection (Einspruch) against fines to Court of Appeal (Oberlandesgericht)

– Second tier: always Federal Supreme Court (BGH)



F. Competition Law in a Nutshell

b) Private enforcement

(1) Basis for claims – „Sword“ and „shield“ proceedings

- i. Nullity of anticompetitive covenants
- ii. Action for injunctive relief, damages, secs. 33 ff. ARC
- iii. Action for ill-gained profits, sec. 34a ARC
- iv. Flaws of private enforcement
 - Economic dependence
 - Rational apathy
 - Problems to prove economic damage



F. Competition Law in a Nutshell

b) Private enforcement

- (1) Basis for claims – „Sword“ and „shield“ proceedings
- (2) Procedural rules, secs. 87 ff. ARC



F. Competition Law in a Nutshell

2. Enforcement of EU Competition Law

a) Administrative enforcement

(1) EU Commission

i. Rules on sanctions and proceedings in
Enforcement Reg. No. 1/2003

ii. Rules on proceedings in Merger Regulation
No. 139/2004



F. Competition Law in a Nutshell

(2) Member States' Competition Authorities

- i. Direct effect of Art. 101 para. 3 TFEU since Reg. No. 1/2003
- ii. Duty to parallel application, Art. 3 para. 1 Reg. No. 1/2003
- iii. Need for cooperation
 - European Competition Network
 - Information, Art. 12 Reg. No. 1/2003
 - Uniform application by competition authorities, Art. 16 Reg. No. 1/2003
 - EU Commission retains right to attract cases, Art. 11 para. 6 Reg. No. 1/2003



F. Competition Law in a Nutshell

(2) Member States' Competition Authorities

- i. Direct effect of Art. 101 para. 3 TFEU since Reg. No. 1/2003
- ii. Duty to parallel application, Art. 3 para. 1 Reg. No. 1/2003
- iii. Need for cooperation
- iv. „ECN plus“ Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019, L 11/1
 - Procedural rights of parties and NCAs
 - Independence and resources
 - Sanctions
 - Leniency programmes and mutual assistance



F. Competition Law in a Nutshell

2. Enforcement of EU Competition Law

a) Administrative enforcement

(1) EU Commission

(2) Member States' Competition Authorities

(3) Judicial control: depending on enforcer

i. Commission: Appeal to General Court; appeal on law to Court of Justice of EU

ii. NCA: following national law



F. Competition Law in a Nutshell

2. Enforcement of EU Competition Law

a) Administrative enforcement

b) Private enforcement

(1) No bases for claims, except nullity defense, Art. 101 para. 2 TFEU

(2) Directive 2014/104 on Damages



F. Competition Law in a Nutshell

II. Horizontal covenants

1. Horizontal covenants pursuant to Art. 101 TFEU
 - a) Structure of Art. 101 TFEU
 - b) Scope of prohibition in Art. 101 para. 1 TFEU

Article 101 (ex Article 81 TEC)

1. 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,



F. Competition Law in a Nutshell

II. Horizontal covenants

1. Horizontal covenants pursuant to Art. 101 TFEU
 - a) Structure of Art. 101 TFEU
 - b) Scope of prohibition in Art. 101 para. 1 TFEU
 - (1) Undertaking
 - (2) Agreements between undertakings, decisions by associations of undertakings and concerted practices
 - (3) Restrictions of competition
 - (4) have as their object or effect
 - (5) may affect trade between Member States
 - (6) appreciability



F. Competition Law in a Nutshell

II. Horizontal covenants

1. Horizontal covenants pursuant to Art. 101 TFEU
 - a) Structure of Art. 101 TFEU
 - b) Scope of prohibition in Art. 101 para. 1 TFEU
 - c) Exemption under Art. 101 para. 3 TFEU
 - (1) System
 - (2) Block exemptions applicable to horizontal agreements
 - i. Block exemption 2023/1067 of 1 June 2023 on specialization agreements (OJ 2023, L 143/20)
 - ii. Block exemption 2023/1066 of 1 June 2023 on research and development agreements (OJ 2023, L 143/9).
 - (3) Requirements of Art. 101 para. 3 TFEU



F. Competition Law in a Nutshell

II. Horizontal covenants

1. Horizontal covenants pursuant to Art. 101 TFEU

2. Prohibition of cartels in the ARC

a) Structure of the prohibition

(1) Prohibition, sec. 1 ARC

(2) Exemption, sec. 2 ARC

(3) Cartels by SMEs, sec. 3 ARC

b) Legal consequences



F. Competition Law in a Nutshell

III. Restrictions of competition by vertical agreements

1. Vertical agreements and restrictions of competition
 - a) Agreements in vertical relations
 - b) Competitive relevance of agreements

Hypo 1: A lease contract, concluded by a brewery for the premises of a pub, requires the tenant to cover his full demand with his landlord's beer.

Hypo 2: A franchise contract requires the franchisor not to grant another franchise within a specified sales territory.

Hypo 3: A distribution contract requires the dealer not to undercut a targeted end sales price in more than five sale actions per month.

Hypo 4: Another distribution contract for women's outer garments requires a dealer to present all current products of a producer on a sales' aisle of at least 60 sqm and to make use of the current advertising material of the producer.



F. Competition Law in a Nutshell

III. Restrictions of competition by vertical agreements

1. Vertical agreements and restrictions of competition
2. Vertical agreements under EU Competition Law
 - a) Vertical agreements and restrictions of competition
 - (1) Critical fact pattern, Art. 101 TFEU
 - (2) Restriction of competition: Interbrand and intrabrand competition



F. Competition Law in a Nutshell

- (3) Exemption, Art. 101 para. 3 AEUV
 - » Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2022, L 134/4)
 - » Regulation no. 315/2014 on technology transfer agreements (OJ 2014, L 93/17; in review)
 - » Regulation no. 461/2010 of 27 May 2010 on vertical agreements in the motor vehicle sector (OJ 2010, L 129/52; prolonged until 2028, Commission Regulation(EU) 2023/822 of 17 April 2023 on amending Regulation (EU) No 461/2010 as regards its period of application)



F. Competition Law in a Nutshell

III. Restrictions of competition by vertical agreements

1. Vertical agreements and restrictions of competition
2. Vertical agreements under EU Competition Law
3. Vertical agreements under German Competition Law, sec. 1 ff. ARC



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

a) Structure and function of control of abuse pursuant to Art. 102 TFEU

Article 102 (ex Article 82 TEC)

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.



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law
 - a) Structure and function of control of abuse pursuant to Art. 102 TFEU
 - b) Structure of Art. 102 TFEU
 - (1) Market definition
 - (2) Market assessment: Dominant position
 - (3) Abuse



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

a) Structure and function of control of abuse pursuant to Art. 102 TFEU

b) Structure of Art. 102 TFEU

c) Market definition

(1) With regard to product market, geographical market and temporary market

(2) Test: reasonable substitutability from the view of opposite market side



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law
 - a) Structure and function of control of abuse pursuant to Art. 102 TFEU
 - b) Structure of Art. 102 TFEU
 - c) Market definition
 - d) Market assessment

65 THE DOMINANT POSITION REFERRED TO IN THIS ARTICLE RELATES TO A POSITION OF ECONOMIC STRENGTH ENJOYED BY AN UNDERTAKING WHICH ENABLES IT TO PREVENT EFFECTIVE COMPETITION BEING MAINTAINED ON THE RELEVANT MARKET BY GIVING IT THE POWER TO BEHAVE TO AN APPRECIABLE EXTENT INDEPENDENTLY OF ITS COMPETITORS , CUSTOMERS AND ULTIMATELY OF ITS CONSUMERS (ECJ of 2-14-1978, case 27/76 - United Brands, 1978 ECR 207 para. 65).



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

a) Structure and function of control of abuse pursuant to Art. 102 TFEU

b) Structure of Art. 102 TFEU

c) Market definition

d) Market assessment

(1) Market structure: market share important indicator; market position of competitors and opposite market side; barriers to entry

(2) Market conduct



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

- a) Structure and function of control of abuse pursuant to Art. 102 TFEU
- b) Structure of Art. 102 TFEU
- c) Market definition
- d) Market assessment
 - (1) Market structure: market share important indicator; market position of competitors and opposite market side; barriers to entry
 - (2) Market conduct
 - (3) Joint dominance



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

e) Abuse

- (1) General clause and concretizing examples
- (2) Exclusionary, exploitative and structural abuse

„THE CONCEPT OF **ABUSE IS AN OBJECTIVE CONCEPT** RELATING TO THE BEHAVIOUR OF AN UNDERTAKING IN A DOMINANT POSITION WHICH IS SUCH AS TO INFLUENCE THE STRUCTURE OF A MARKET WHERE, AS A RESULT OF THE VERY PRESENCE OF THE UNDERTAKING IN QUESTION, THE DEGREE OF COMPETITION IS WEAKENED AND WHICH, **THROUGH RECOURSE TO METHODS DIFFERENT FROM THOSE WHICH CONDITION NORMAL COMPETITION** IN PRODUCTS OR SERVICES ON THE BASIS OF THE TRANSACTIONS OF COMMERCIAL OPERATORS, HAS THE EFFECT OF HINDERING THE MAINTENANCE OF THE DEGREE OF COMPETITION STILL EXISTING IN THE MARKET OR THE GROWTH OF THAT COMPETITION ...“ (ECJ of 2-13-1979, case 85/76 - Vitamins, 1979 ECR 461 para. 91)



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

e) Abuse

- (1) General clause and concretizing examples
- (2) Exclusionary, exploitative and structural abuse
 - i. In particular exclusionary abuse:
anticompetitive foreclosure
 - ii. Possibilities to justify



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

e) Abuse

- (1) General clause and concretizing examples
- (2) Exclusionary, exploitative and structural abuse
- (3) Special responsibility of dominant undertaking



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law

e) Abuse

(4) Examples

- i. predatory pricing
- ii. boycott
- iii. refusal to deal
- iv. discrimination
- v. excessive pricing



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law
2. Under German Competition Law
 - a) Freedom to uphold stricter provisions under Art. 3 para. 2 s. 2 Reg. No. 1/2003
 - b) Structure of sec. 19 para. 1 ARC in accordance with Art. 102 TFEU, but:
 - (1) Presumptions of dominance in sec. 18 para. 4, 6 ARC
 - (2) Concretizing fact patterns in secs. 19 para. 2, 21 ARC
 - (3) Extension of addressees to merely powerful undertakings in relation to their market partners, sec. 20 ARC



F. Competition Law in a Nutshell

IV. Abuse of a dominant position

1. Under EU Competition Law
2. Under German Competition Law
 - a) Freedom to uphold stricter provisions under Art. 3 para. 2 s. 2 Reg. No. 1/2003
 - b) Structure of sec. 19 para. 1 ARC in accordance with Art. 102 TFEU, but significant differences
 - c) New sec. 19a ARC addressing leverage power of undertakings of paramount significance for competition across markets
 - (1) not necessarily market dominance
 - (2) prohibitions relating to market-transcending behaviour
 - (3) only subject to supervision
 - (4) two-stage proceedings



F. Competition Law in a Nutshell

V. Merger Control

1. under EU Competition Law: Reg. No. 139/2004
(„Merger Regulation“)

a) Procedure

(1) „*one-stop shop*“: either national oder European; no parallel enforcement

(2) Scope of application of EU Competition Law dependent on Community dimension

(3) ex-ante control with a prohibition to implement

(4) Two phased proceedings



F. Competition Law in a Nutshell

V. Merger Control

1. under EU Competition Law: Reg. No. 139/2004 („Merger Regulation“)
 - a) Procedure
 - b) Thresholds
 - (1) Merger
 - (2) Community dimension: turnover thresholds
 - i. Joint worldwide turnover of all participating undertakings in excess of 5 bn €
 - ii. And a unionwide aggregate turnover of at least two participating undertakings in excess of 250 m €
 - c) Substantive test: significant impediment to effective competition („SIEC test“)



F. Competition Law in a Nutshell

V. Merger Control

1. under EU Competition Law: Reg. No. 139/2004 („Merger Regulation“)
2. Under German Competition Law: secs. 35 ff. ARC
 - a) Ex-ante control with prohibition to implement
 - b) Two-phased proceedings
 - c) Duty to file motion for permission
 - (1) with turnover thresholds
 - (2) since 2017 additional value-of-the-transaction threshold



F. Competition Law in a Nutshell

V. Merger Control

1. under EU Competition Law: Reg. No. 139/2004 („Merger Regulation“)
2. Under German Competition Law: secs. 35 ff. ARC
 - a) Ex-ante control with prohibition to implement
 - b) Two-phased proceedings
 - c) Duty to file motion for permission
 - d) Substantive test: SIEC test since 2013; creation or strengthening of a dominant position only concretizing example

