

Course: Comparative Antitrust Law

Prof. Marco Botta

Winter Term / AY 2023-2024

LL.M. level course (GBLR)

Elective course for GBLR LL.M

2 US credit / 4 ECTS credits

Pre-requisites: None

E-learning:

Office hours and contact information for consultation: by appointment via email BottaM@ceu.edu

BRIEF INTRODUCTION:

The course compares the main features of the US antitrust and EU competition law. In particular, the course discusses the case law of US Supreme Court and this European Court of Justice in this field, to identify similarities and differences between the two main antitrust / competition law jurisdictions in the world. The course will cover the 3 main sub-areas of competition/antitrust law: anti-competitive agreements, unilateral conducts, and merger control. In addition, the course will compare the system of public and private enforcement of antitrust/competition law in the USA and in Europe. The course will have an emphasis on recent antitrust / competition law cases in digital markets. In this regard, the course will compare the recently adopted EU Digital Markets Act (DMA) and the draft American Innovation and Choice Online Act.

LEARNING OUTCOMES:

- Identify the key differences and similarities between EU competition and US antitrust law.
- Orally summarize the rulings of the EU Court of Justice and US Supreme Court assigned as reading materials. Students are thus trained to read judgements in English language.
- Understanding the core economic concepts underpinning the enforcement of competition/antitrust law.
- Demonstrate to apply the case law discuss in the class to solve a hypothetical mock case.

LEARNING ACTIVITIES AND TEACHING METHODS:

ASSESSMENT

(1) Assessment type 1 (80% of the final grade) – written exam:

- a. Students will be asked to solve a hypothetical case (i.e., mock case). Students will have to reply to 4 questions, by relying on the case law of the US Supreme Court and EU Court of Justice discussed during the course.
- b. The take-home exam is an open book exam.

- (2) **Assessment type 2 (20% of the final grade), active participation in the class.**
Students will be asked to summarize the rulings of the EU Court of Justice and US Supreme Court assigned as reading materials. Students are thus expected to read the mandatory reading materials before every class.

COURSE MATERIALS:

Course materials are uploaded on the e-learning site of the course.

Please make sure to check this site regularly for updates. PowerPoint slides used during the course are available to students on the e-learning site after each class session.

REQUIRED AND RECOMMENDED READINGS, ASSIGNMENTS:

Background readings for the course (optional):

- Chapters 20 and 21 from CHALMERS D., DAVIES G., MONTI G., *European Union Law, Cases and Materials*, 4th edition.
- ABBOTT, *A Primer of US Antitrust Law* (2021).
- Ascola online resources for teaching competition/antitrust law.

Class 1, History of US antitrust v. EU competition law

Topics:

- Role of competition policy in market regulation.
- Historical evolution US antitrust and EU competition policy.
- Spread of competition law jurisdictions in the emerging economies.

Mandatory readings:

- Section 1 and 2 Sherman Act (1 page).
- Art. 101-102 TFEU (1 page)

Optional readings

- Clayton Act

Class 2, Goals of US antitrust v. EU competition policy

Topics:

- Schools of thought: Harvard school; Chicago school; Neo-Brandeis movement.
- Goals of EU competition v. US antitrust law.
- Conflict between different goals: restriction of parallel trade.
- Non-economic goals in antitrust/competition policy: the interaction with data protection

law.

Mandatory readings:

- C-56/46, *Consten and Grundig* (only pages 338-340) (3 pages)
- T-168/01, *GlaxoSmithKline v. Commission* (only para. 8-21; 103-147) (4 pages).
- C-252/21, *Facebook Germany* (only para. 26-73) (9 pages)

Optional readings

- C-501/06, *GlaxoSmithKline v. Commission*

Class 3, Scope of application of US antitrust v. EU competition law

Topics:

- Geographic scope of application.
- Application of competition policy in regulated industries.

Mandatory readings:

- C-125/07, *Erste Bank* (only para. 63-86) (3 pages)
- 509 U. S. 764 (1993), *Hartford Fire Insurance v. California* (only Opinion of the Court, pages 769-784). (15 pages)
- 445 U.S. 97 (1980), *California Liquor Dealers v. Midcal Aluminum* (18 pages)
- C-41/90, *Höfner v. Macrotron* (only para. 1-34) (9 pages).

Optional readings:

- C-198/01, *CIF v. AGCM* (only para. 1-29; 40-58).
- C-89-85, *Wood Pulp* (only para. 1-23).
- 574 U.S. 494, *North Carolina State Board of Dental Examiners v. FTC* (para. Pages 1-4; 6-10).

Class 4, Market definition and market power

Topics:

- Relevant market.
- Market power.

Mandatory readings:

- C-27/76, *United Brands v. Commission* (only para. 1-56) (10 pages).
- 351 U.S. 377 (1956), *United States v. Du Pont de Nemours* (only Opinion of the Court, pages 377-404) (27 pages).
- 585 U.S. (2018), *Ohio v. American Express* (only Opinion of the Court, pages 1-20) (20 pages).
- C-85/76, *Hoffmann La Roche v. Commission* (only para. 1-19; 36-49) (13 pages).

Optional readings:

- 2022 draft Commission Market Definition Notice.

Class 5, *Horizontal agreements*

Topics:

- Sec. 1 Sherman Act.
- Art. 101 TFEU.

Mandatory readings:

- 221 U.S. 1, *Standard Oil Co. of New Jersey v. United States* (only Opinion of the Court, pages 63-77) (14 pages).
- C-8/08, *Dutch T-Mobile* (only para. 9-17; 23-43) (6 pages).
- C-67/13, *Groupement des Cartes Bancaires* (7 pages).

Optional readings:

- C-228/18, *Budapest Bank*

Class 6, *Vertical agreements*

Topics:

- Anti-competitive effects and efficiencies of vertical agreements.
- Vertical agreements under Sec. 1 Sherman Act.
- Vertical agreements under Art. 101 TFEU.

Mandatory readings:

- 433 U.S. 36 (1977), *Continental v. Sylvania* (only Opinion of the Court, pages 36-59). (23 pages).
- 551 U. S. (2007), *Leegin v. PSKS* (only Opinion of the Court, pages 1-28) (28 pages).
- C-230/16, *Coty* (13 pages).
- C-211/22, *Super Bock* (only para. 27-53) (4 pages).

Recommended readings:

- 2022 Vertical Block Exemption Regulation

Class 7, *Abuse of dominance v. monopolization – price conducts*

Topics:

- Legislative framework: Sec. 2 Sherman Act v. Art. 102 TFEU.
- Price conducts:
 - o Predatory pricing.

- Margin squeeze.
- Rebates.

Mandatory readings:

- C-62/86, *AKZO v. Commission* (only para. 1-14; 63-150) (25 pages).
- 509 U.S. 209 (1993), *Brooke Group v. Brown & Williamson Tobacco* (only Opinion of the Court, pages 212-227) (15 pages).
- C-413/14, *Intel v. Commission* (only para. 1-27; 129-147) (8 pages).

Optional readings:

- C-280/08, *Deutsche Telekom v. Commission* (only para. 1-18; 77-96; 155-185).
- 2023 revision of the Guidance Paper on Art. 102.

Class 8, Abuse of dominance v. monopolization – non-price conducts

Topics:

- Non-price conducts under Sec. 2 Sherman Act and Art. 102:
 - Refusal to deal / essential facility doctrine.
 - Bundling / tying.

Mandatory readings:

- C-7/97, *Oscar Bronner v. Mediaprint* (only para. 1-11; 23-47) (11 pages).
- 540 U. S. (2004), *Verizon v. Law Offices of Curtis Trinko* (only Opinion of the Court, pages 1-16) (16 pages).
- 504 U.S. 451 (1992), *Eastman Kodak Co. v. Image Technical Services* (only Opinion of the Court, pages 454-465) (11 pages).

Optional readings:

- T-612/17, *Google Shopping* (only para. 1-78; 136-249; 460-509).
- T-604/18, *Google Android* (only paragraphs 1-20; 52-72; 274-303; 620-648; 733-802).

Class 9, Public enforcement

Topics:

- Enforcement of US antitrust law: DoJ, FTC and federal courts.
- Enforcement of EU competition law (Reg. 1/2003):
 - Decentralization competition law enforcement.
 - EU Commission enforcement powers.
- Cartel leniency policy in the USA and the EU.

Mandatory readings:

- C-441/67, *Alrosa* (para. 38-67) (para. 6-69) (13 pages).

Optional readings:

- Regulation 1/2003.
- Directive ECN +.
- DoJ leniency policy.
- EU Commission Leniency Notice.

Class 10, *Private enforcement*

Topics:

- Introduction to private enforcement: legal framework in the USA and in the EU.
- Legal standing / passing on effect.

Mandatory readings:

- 392 U.S. 481 (1968), *Hannover Shoe v. United Shoe Machinery* (only Opinion of the Court, pages. 481-494) (13 pages).
- 431 US 720 (1977) *Illinois Brick v. Illinois* (only Opinion of the Court, pages 729-736) (7 pages).
- C-295-04, *Manfredi v. Lloyd Adriatico* (only para. 1-22; 56-64) (8 pages).

Optional readings:

- EU Commission Practical Guide on Damages Quantification.
- EU Commission Guidelines on Passing on.
- US Federal Rules of Civil Proceedings.
- Damages Directive.
- US Class Action Fairness Act.

Class 11, *Merger control*

Topics:

- Introduction on merger control.
- Legal framework in USA.
- Legal framework in EU.
- Horizontal v. vertical/conglomerate mergers.
- Relationship between EU and national system of merger control.
- Standard of judicial review in EU merger control.

Mandatory readings:

- C-12/03, *Tetra Laval* (only para. 1-16; 37-51) (9 pages).
- C-376/20, *CK Telecoms* (only para. 14-41; 63-88) (7 pages).

Optional readings:

- Reg. 139/2004, EU Merger Control Regulation (only articles 1-25)
- DOJ/FTC 2023 draft Guidelines on Horizontal Mergers.
- EU Commission Guidelines on Horizontal Mergers.
- EU Commission Guidelines on Non-Horizontal Mergers.

Class 12, Regulation of Digital Platforms

Topics:

- Introduction: shift from antitrust/competition policy enforcement to sector regulation of digital platforms.
- Digital Markets Act (DMA).
- Draft American Innovation and Choice Online Act (AICOA).

Optional readings:

- EU Digital Markets Act.
- Draft American Innovation and Choice Online Act.