

## COMPETITION LAW AND POLICY: CONTROLLING PRIVATE POWER (LL200)

**Course duration:** 54 hours lecture and class time (Over three weeks)

**LSE Teaching Department:** Department of Law

**Lead Faculty:** Dr Naimh Dunne and Dr Orla Lynskey

**Pre-requisites:** Introduction to legal methods or equivalent

Competition law involves, essentially, the use of legal tools to control the exercise of market power by economic actors, in order to protect the competition forces within the market. The competition rules present a powerful set of tools for public enforcement agencies—and, indeed, private litigants—to prevent and sanction harmful instances of private power. This course provides a comprehensive overview of the structure and substance of the EU competition rules, examining both the current legal framework and the underlying competition policy considerations which have informed its application and development.

The course runs in Session 3 (1-19 August 2016), and is taught by Dr Niamh Dunne ([N.M.Dunne@lse.ac.uk](mailto:N.M.Dunne@lse.ac.uk)), Dr Orla Lynskey ([O.Lynskey@lse.ac.uk](mailto:O.Lynskey@lse.ac.uk)) and Mr Ryan Stones ([R.R.Stones@lse.ac.uk](mailto:R.R.Stones@lse.ac.uk)). It will comprise 36 hours of lectures covering the substantive content of the syllabus, with 18 hours of smaller group classes to order to reinforce and further develop students' understanding of these topics.

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### Overview of the Course

EU competition law is one of the most well established and well regarded systems of competition law (antitrust) in the world today. A central component of the internal market system since the founding of the European Union, the EU competition rules have taken on further importance in recent years as the inspiration and basis for many new systems of competition law in different jurisdictions. At its core, the EU competition framework incorporates three key provisions: Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive agreements and other forms of coordination between economic actors; Article 102 TFEU, which prohibits the abuse of market power held by an economic entity which holds a dominant position in the market; and the EU Merger Regulation (EUMR), which prohibits mergers and other concentrations which would significantly impede effective competition in the internal market. EU competition law is, moreover, enforced under a distinctive and multi-faceted system which involves centralised enforcement by the European Commission, decentralised enforcement by the national competition authorities of the Member States, and a growing emphasis on private enforcement via antitrust damages actions brought by 'private attorneys general'.

This course aims to provide participants with a comprehensive understanding of the core rules and principles that underpin the EU competition system, alongside broader competition policy considerations. It does so through a systematic examination and assessment of each of these three areas of substantive competition law, as well as an exploration of the enforcement context plus the wider policy landscape. Although the course focuses primarily on the competition rules of the EU, comparative analysis to other jurisdictions—particularly the US—will be made where appropriate. Throughout the course, emphasis is placed upon the crucial, and often controversial, question as to

whether and when competition law should be deployed to control private power within the market and society more generally. The course thus aims to equip participants with both a strong technical knowledge of EU competition law and the ability to engage with and critique issues of competition policy.

The general scheme of lectures—which may be subject to some minor revision—will be as follows:

**Lecture 1:** Introduction to Competition Law and Policy

**Lecture 2:** Introduction to Article 101 TFEU; Concept of Undertaking; Agreements and Concerted Practices

**Lecture 3:** Object and Effect under Article 101(1) TFEU; Cartels

**Lecture 4:** Article 101(3) TFEU; Vertical Agreements

**Lecture 5:** Introduction to Article 102 TFEU; Excessive Pricing Abuses

**Lecture 6:** Predatory Pricing; Margin Squeeze; Refusal to Deal 1: Essential Facilities

**Lecture 7:** Article 102 TFEU in Technology Markets (Exclusivity, Refusal to Deal 2: IP Licensing)

**Lecture 8:** Introduction to Merger Control; Horizontal Mergers

**Lecture 9:** Non-Horizontal Mergers; Oligopoly

**Lecture 10:** Public and Private Enforcement of Competition Law

**Lecture 11:** Competition Law and Policy: The Wider Policy Agenda

**Lecture 12:** Contemporary Issues in Competition Law: Protecting Personal Data

## Recommended Texts

Students are advised to acquire one of the following texts:

- Whish & Bailey (2015), *Competition Law* (8<sup>th</sup> ed., Oxford University Press), or
- Jones & Sufrin (2014), *EU Competition Law: Text, Cases and Materials* (5<sup>th</sup> ed., Oxford University Press)

[Note: for students studying competition law for the first time, the Whish & Bailey book is recommended as the most straightforward. The Jones & Sufrin book nonetheless contains some very thoughtful analysis of the subject-area.]

For students seeking a greater knowledge of the economic underpinnings of competition law, the following texts may be helpful (but are certainly not required):

- Motta (2004), *Competition Policy: Theory and Practice* (Cambridge University Press), or
- Bishop & Walker (2010), *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell)

A broad range of additional readings will be set in support of lectures, and as preparatory readings for classes. These will be made accessible over the Moodle site for the course.

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## Assessment

Students will be set one summative piece of coursework comprising an essay of 1,500 words maximum on one of a number of set themes. The deadline for this work will be Thursday, 11 August. The other aspect of the summative assessment for the course will take the form of an unseen examination paper, which will take place on Friday 19 August. In addition, students will receive formative feedback on in-class presentations during the course.

## Teachers

**Dr Niamh Dunne** is an assistant professor in the Department of Law at the LSE, where she teaches on the undergraduate and postgraduate modules in Competition Law. She has previously worked as a case handler for the Competition Authority of Ireland, and as a consultant in competition policy for the OECD. Niamh's research interests encompass competition law and economic regulation, with a particular focus on competition institutions and enforcement mechanisms. Further information can be found here: <http://www.lse.ac.uk/collections/law/staff/niamh-dunne.htm>

**Dr Orla Lynskey** is an assistant professor in the Department of Law at the LSE. She lectures on the undergraduate courses in IT Law and Competition Law, and the LLM Digital Rights and Cyberlaw modules. She has previously worked as a contract agent for the EU Competition Directorate, and in the Antitrust team of a major US law firm. Orla's primary research interest is data protection law. Her monograph on the regulatory regime for data protection in the EU was



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published in 2015 by Oxford University Press. Further information can be found here:  
<http://www.lse.ac.uk/collections/law/staff/orla-lynskey.htm>

**Ryan Stones** is a current postgraduate research student in the Department of Law at the LSE. The theme of his thesis is 'Competitive Markets and Law: should EU competition policy take the legal form more seriously?', which he is undertaking under the supervision of Dr Pablo Ibáñez Colomo and Professor Martin Loughlin. Ryan began his thesis on EU competition law and legal theory at LSE in September 2014. He holds degrees from LSE (LLB 2013) and Corpus Christi College, Oxford (BCL 2014). Further information can be found here:  
[http://www.lse.ac.uk/collections/law/subjects/phd\\_students/ryan-stones.htm](http://www.lse.ac.uk/collections/law/subjects/phd_students/ryan-stones.htm)

## Structure of Lectures

### Lecture 1: Introduction to Competition Law and Policy

This lecture will provide a broad introduction to the structure, economics and history of the EU competition rules. It will begin with a brief introduction to the core concepts of competition economics, with a focus on the central notion of efficiency. It will then consider the history of both the US and EU competition systems, exploring the development of these systems—and, specifically, their evolving goals—over the twentieth century and to date. In particular, we will trace the Harvard and Chicago Schools of competition policy thought, assessing the greater consensus reached in much post-Chicago scholarship. Finally, we will take a bird's eye look at the overarching framework of current EU competition law, including Articles 101 and 102 TFEU, the EUMR, and a brief look at the wider competition context.

#### *Background reading:*

- Whish & Bailey, Chapters 1 & 2, or Jones & Sufrin, Chapter 1 & 2

### Lecture 2: Introduction to Article 101 TFEU; Concept of Undertaking; Agreements and Concerted Practices

This lecture will introduce Article 101 TFEU, which contains the EU law prohibition on agreements and other forms of coordination between two or more economic undertakings. First, we will consider briefly the general policy considerations that underpin competition rules regulating agreements between several firms. We will then consider three threshold requirements for the application of EU competition law to such arrangements: first, the need for two or more separate independent “undertakings”; second, the need to establish either an agreement or a concerted practice between those undertakings, or a decision of an association of undertakings; and third, the need for an effect on inter-State trade so as to trigger the application of EU (as opposed to domestic) competition law to such conduct.

#### *Background reading:*

- Whish & Bailey, Chapter 3, or Jones & Sufrin, Chapter 3

### Lecture 3: Object and Effect under Article 101(1) TFEU; Cartels

This lecture continues our consideration of Article 101 TFEU, and, specifically, the prohibition contained in the first paragraph of that provision. Article 101(1) TFEU prohibits forms of coordination between undertakings which have either the “object or effect” of restricting, distorting or preventing competition. In the first half of this lecture, we will consider these disjunctive requirements, which have been the subject of much legal discussion in recent years. First, we will consider the category of ‘object’ restraints, once a much criticised example of EU competition law claimed excessive formalism, but now apparently subject to a rather more nuanced consideration following the judgment of the Court of Justice in Case C-67/13 P *Cartes Bancaires*. Second, we will consider the residual category of ‘effect’-based restraints, which require a more comprehensive assessment of the likely impact of the claimed restriction on the market. In the latter portion of the lecture, we will discuss what are arguably the clearest object-based restrictions of competition, namely hard-core price-fixing and market-sharing cartels. In particular, the lecture will consider some of the legal and practice difficulties raised by the secretive nature of such activities, including the increasing use of cartel leniency programmes by public enforcement agencies.

*Background reading:*

- Whish & Bailey, Chapters 3 & 13, or Jones & Sufrin, Chapters 4 (to p.246) & 9 (to p.709)

**Lecture 4: Article 101(3) TFEU; Vertical Agreements**

In this lecture, we will first discuss the exemption provided by Article 101(3) TFEU. Under this third paragraph, agreements etc. that are *prima facie* restrictive of competition may still be exempted from application of the prohibition contained in the first paragraph where four cumulative criteria are satisfied, thus establishing that the agreement, on balance, generate pro-competitive benefits. We consider each of these exemption criteria in turn, distinguishing the application of Article 101(3) from the effects-based analysis carried out under Article 101(1). The lecture will then consider another category of restraints commonly examined under Article 101 TFEU, namely vertical restraints. We will first consider the substantive application of the first and third paragraphs to such agreements. Afterwards, we will discuss the important Block Exemption for vertical agreements, which exempts categories of vertical restraints fulfilling certain defined criteria.

*Background reading:*

- Whish & Bailey, Chapters 4 & 16, or Jones & Sufrin, Chapters 4 (pp.249-267) & 11
- Commission Regulation (EU) No 330/2010 of 20 April 2010 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 L 102/1, 23.4.2010)

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**Lecture 5: Introduction to Article 102 TFEU; Excessive Pricing Abuses**

In lecture 5, we will move on to discuss Article 102 TFEU, which prohibits the unilateral abuse of a dominant market position by undertakings. We will start by discussing the broader policy context of what is arguably the most controversial area of EU competition law, as well as overall framework of Article 102 TFEU. We will then consider the concept of dominance, which is the threshold criterion for application of Article 102 TFEU: namely, a position of market strength, which allows undertakings to act independently of market forces to an appreciable extent. We will discuss, amongst other things, the link between dominance and market shares, as well as other relevant criteria such as barriers to entry.

The lecture will then address what many would argue should be the 'textbook' example of an abuse of dominance, namely, the charging of very high or even monopoly prices. The paradox of excessive pricing cases—that such claims are almost impossible to establish successfully—demonstrates the clear preference of EU competition law (like many other antitrust systems) to pursue exclusionary as opposed to exploitative abuses. It also illustrates a significant limitation of competition law as a means by which to control private power: namely, a strong reluctance on the part of competition enforcers to 'regulate' private power as such, rather than strengthening the market mechanism instead.

*Background reading:*

- Whish & Bailey, Chapters 5 & 18 (pp.759-769), or Jones & Sufrin, Chapters 5, 6 & 7 (pp.365-401 & pp.575-584)

- Communication from the Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C 45/7, 24.2.2009)

## **Lecture 6: Predatory Pricing; Margin Squeeze; Refusal to Deal 1: Essential Facilities**

This lecture will introduce three types of exclusionary abuses that may be prohibited by Article 102 TFEU. The first, predatory pricing, involves very low cost pricing by a dominant undertaking which may drive rival firms from the market. Predatory pricing is, in many ways, a counterintuitive abuse: in the first instance, customers benefit from low prices, whereas dominant firms would usually need to incur significant (and, if the policy is successful, increasing) losses. We will consider whether, and in what circumstances, low pricing amounts to an antitrust abuse.

The second category of abuse, margin squeeze, can occur where a dominant firm is vertically integrated, operating at two or more levels of the chain of production. Margin squeeze arises, typically, where a dominant undertaking provides its retail-level competitors with wholesale-level access to a necessary input. Thus, the dominant firm has the ability to “squeeze” the retail profits of its competitors by manipulating the spread between wholesale and retail prices.

Finally, the lecture will consider the so-called “essential facilities” doctrine, whereby the refusal of a dominant undertaking to grant its competitors access to an indispensable input or infrastructure may amount to an abuse of dominance. The use of competition law to general mandatory duties to deal is highly controversial, and this lecture will introduce some of the competing policy arguments.

### *Background reading:*

- Whish & Bailey, Chapters 17 (pp.737-752) & 18 (pp.781-802), or Jones & Sufrin, Chapter 7 (pp.401-450 & pp.501-556)

## **Lecture 7: Article 102 TFEU in Technology Markets (Exclusivity, Refusal to Deal 2: IP Licensing)**

This lecture will continue our consideration of Article 102 TFEU, focusing in particular on several antitrust abuses that have arisen in technology markets. First, we will examine the issue of exclusivity, whereby a dominant undertaking requires its trading partners to commit to dealing exclusively with products or services provided by the dominant undertaking. Second, we will continue our consideration of the law regarding refusals to deal, considering the issue of refusals to grant licenses to essential intellectual property. Finally, the lecture will explore both sets of abuses in the context of the high-profile ongoing investigation of the European Commission into the practices of Google.

### *Background reading:*

- Whish & Bailey, Chapters 17 (pp.722-729) & 19 (pp.840-850), or Jones & Sufrin, Chapter 7 (pp.450-485 & pp.526-548)



## **Lecture 8: Introduction to Merger Control; Horizontal Mergers**

This lecture will introduce the final substantive area of competition law to be considered by the course, namely, merger control. The first half of the lecture will provide an overview of the merger control structure under the EUMR, including the procedural framework for merger filings and review. It will also address a number of important preliminary issues, including questions of jurisdiction and the definition of “concentrations” falling within the EUMR. The second half of the lecture will consider the substantive assessment of what are, generally, the most contentious type of concentration in this context: that is, horizontal mergers between rival firms operating at the same level of the chain of production.

### *Background reading:*

- Whish & Bailey, Chapters 20 & 21, or Jones & Sufrin, Chapter 15
- Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24/1, 29.1.2004)

## **Lecture 9: Non-Horizontal Mergers; Oligopoly**

The first part of lecture 9 will involve further consideration of substantive assessment under the EUMR. This lecture will consider non-horizontal mergers—that is, vertical mergers and conglomerate mergers—which are generally viewed as less problematic than horizontal concentrations, yet which may still raise competition concerns in certain circumstances. The latter part of the lecture will address the specific topic of oligopoly, which is a form of very concentrated market structure in which the problem of tacit collusion between ostensible rivals may arise. Oligopoly markets pose significant problems from a competition law perspective, and this lecture will endeavour to explore the extent to which oligopoly concerns can be tackled under Articles 101 or 102 TFEU and through the EUMR. In addition to addressing this particular competition policy issue, this lecture thus aims to demonstrate the links and overlaps between the discrete areas of competition law covered in earlier lectures.

### *Background reading:*

- Whish & Bailey, Chapters 21 & 14, or Jones & Sufrin, Chapters 9 (pp.709-730) & 15

## **Lecture 10: Public and Private Enforcement of Competition Law**

Lecture 10 will address the various interlinked enforcement structures, both public and private, for the enforcement of Articles 101 and 102 TFEU. The lecture will begin by providing an overview of the public enforcement framework of the European Commission, outlining the Commission’s investigatory procedures and decision-making powers. Particular emphasis will be placed on two contemporary concerns, namely, the absence of an independent adjudicator at first instance for infringement decisions taken pursuant to Article 7 of Regulation 1/2003, and the increasing use of the commitment procedure pursuant to Article 9 of Regulation 1/2003. Brief consideration will then be given to the decentralised enforcement framework introduced under Regulation 1/2003, with a much increased role for national competition authorities and courts in the enforcement of the EU competition rules. Finally, the lecture will explore the role of private enforcement within the EU competition framework. Private enforcement has been an integral aspect of EU competition law since the important decision in Case C-453/99 *Courage v Crehan* in 2001, and, moreover, has received a significant boost with the recent passage of Directive 2014/104/EU dealing within antitrust damages actions before national courts. The lecture will consider, amongst other things, the proper role for private damages litigation within an enforcement structure that has, to date, relied primarily upon public enforcement mechanisms.



*Background reading:*

- Whish & Bailey, Chapters 7 & 8, or Jones & Sufrin, Chapters 13 & 14
- 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 (OJ L 1/1, 4.1.2003)
- Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1, 5.12.2014)

### **Lecture 11: Competition Law and Policy: The Wider Policy Agenda**

The penultimate lecture of the course, which will be held in an interactive seminar format, will consider the wider policy environment within which competition law is located. Specifically, it will review the extent to which 'outside' norms can influence outcomes within competition law decision making. We will look at the legal form of competition provisions and assess how far they permit, or have been interpreted so as to permit, environmental, industrial, cultural and other norms to have a bearing. Amongst other things, this lecture will provide an opportunity to reflect upon the ultimate aims of competition law, asking students to think about what competition law can—and should—be deployed to achieve.

*Background reading:*

- Monti (2007) *European Competition Law* (Cambridge University Press), Chapter 4
- Monti (2002) "Article 81 EC and Public Policy" 39(5) *Common Market Law Review* 1057-1099.

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### **Lecture 12: Developments in Competition Law: Protecting Personal Data**

The final lecture of the course (again, in seminar format) aims to draw together the numerous substantive issues considered in the earlier stages through a case study on the application of competition law to a particular contemporary problem: namely, the intersections between competition law and the data protection rules. Personal data is often described as the 'oil of the information economy': this information about individuals is a valuable asset for the providers of online services. Indeed, this data is used to subsidise the provision of free services to internet users. Specific data protection rules exist to give individuals some control over the use of their personal data by such service providers. However, the internet is prone to monopolisation and is dominated by powerful companies such as Facebook, Google, Amazon and Apple. This has sparked a debate about what role, if any, competition law should play to ensure that these undertakings cannot take advantage of their market power to the detriment of individuals and their personal data.

*Background reading (available on Moodle):*

- Preliminary Opinion of the European Data Protection Supervisor, *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy*, March 2014
- EDPS, *Report of workshop on Privacy, Consumers, Competition and Big Data* 2 June 2014
- Almunia speech, "Competition and personal data protection," 26 November 2012
- *In the matter of Google/DoubleClick*, Dissenting Statement of Commissioner Pamela Jones Harbour, F.T.C. File No. 071-0170
- Commission Decision of 9 December 2009, Rambus, Case COMP/38.636

**Credit Transfer:** If you are hoping to earn credit by taking this course, please ensure that you confirm it is eligible for credit transfer well in advance of the start date. Please discuss this directly with your home institution or Study Abroad Advisor.

As a guide, our LSE Summer School courses are typically eligible for three credits within the US system and 7.5 ECTS in Europe. Different institutions and countries can, and will, vary. You will receive a digital transcript and a printed certificate following your successful completion of the course in order to make arrangements for transfer of credit.

If you have any queries, please direct them to [summer.school@lse.ac.uk](mailto:summer.school@lse.ac.uk)