Industrial policy

The competition policy

Pros and cons of monopoly (reprise)

- Price is higher and output is lower than under P.C.
- There is allocative inefficiency because price exceeds marginal cost
- There may also be productive inefficiency, it the monopolist becomes lazy because of a lack of competition
- There is deadweight loss

Bad

- In case of a natural monopoly, monopoly is always more cost-effective than competition
- In case of first degree price discrimination it can be possible to eliminate the DWL
- Monopoly status can be considered a reward for innovation (temporary)

Good

Definition of competition policy

It aims at promoting competition and controlling or eliminating market power abuses. This is done to promote efficiency, innovation and consumers' interest: competition is considered as something to be protected in the name of public interest.

Three main areas of intervention:

1) **Monopoly policy**, for avoiding that the dominant position of existing monopolies can come to a detriment of public interest (weighing it against possible benefits arising from economies of scale).
2) **Merger policy**; for situations of possible mergers (dominant position risk vs possible rationalization benefits).
3) **Restrictive practices policy**, for cases in which a firm or a group of firms is involved in restrictive practices that may damage public interest (price-fixing agreements, vertical restraints, predatory pricing, etc.).

Problems in competition policy

- How to measure **market power** (most used are seller concentration and market share);
- How to define the **relevant market** (products vs territory + non static definitions);
- **Terms of comparison**: reality or perfect competition? Competition policy aims at fostering a workable competition, i.e. capable of producing "good performance". But what is "good"?

Different approaches in different countries. Historically born in USA, then extended to other contexts (Europe, national governments).
Still absent in emerging countries such as China, Brazil … and very weak in Japan.

What are the consequences of these differences?

Competition policy in the U.S.

The modern framework for antitrust or competition law was established in the U.S. with three milestones:

1890: Sherman Act (first antitrust law at world level)
1914: Clayton Act
1914: Federal Trade Commission Act

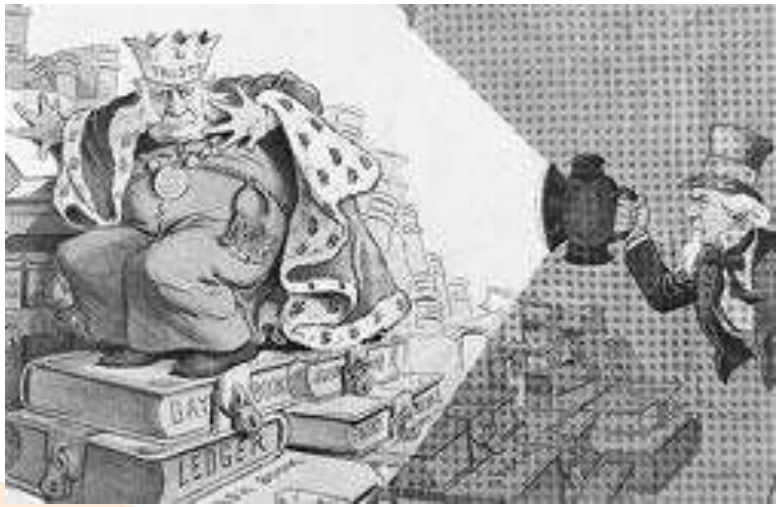
No huge changes since then in the regulation itself in the U.S.. However, there have been variations over time in the regulation enforcement, following changes in the cultural and political attitudes.

USA: 1890 Sherman Act

Section 1: trade restrictions under the form of “contracts, combinations and conspiracies” are prohibited;

Section 2: refers to monopolies and behaviours aimed at monopolise an industry; criminal penalties (fines or imprisonment) are prescribed.

First relevant applications: Standard Oil and American Tobacco



USA: *Standard Oil (SO)*

Established in 1870 by J.D. Rockfeller.

Through a series of questionable business practices it rapidly achieved a domination position: by 1890 it controlled 88% of refined oil flows in the US.

Even if this share had fallen to 64% by 1911, The Supreme Court declared SO to be an **unreasonable** monopoly.

It was adjudged guilty of several forms of unfair practice (incl. predatory pricing and vertical restraints).

The Court ordered the break-up of SO into **34 independent companies**, several of which then became dominant players in the global oil industry (such as EXXON, Mobil, Chevron, etc.).

N.B.

The rule of reason

N.B.

In the SO case, the Court also declared that monopoly or market power **are not illegal in themselves**.

They are subject to the Sherman Act **only** if they limit trade unreasonably: **RULE OF REASON**.

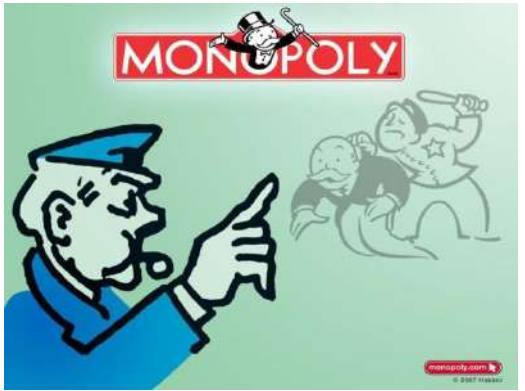
While some actions like price-fixing are considered illegal per se, other actions, such as possession of a monopoly, must be analyzed under the rule of reason and are only considered illegal when their effect is to unreasonably restrain trade.

1914 Clayton Act

- The **Sherman Act** regulates abuses linked to monopoly and dominant positions, price-fixing agreements and other restrictive practices on the part of independent firms. It does not deal with mergers and acquisitions. Therefore independent firms wishing to collude had the option of merging, placing themselves beyond the reach of the legislation.
- The **Clayton Act** extended antitrust policy to regulate mergers and acquisitions highly capable of damaging competition and a wide range of restrictive practice originally excluded from the Sherman Act such as: price discrimination reducing competition or creating a monopoly, exclusive dealings and tying and interlocking directorships in competing companies.

  In the same year the **Federal Trade Commission (FTC)** was established as the agency charged with enforcement of the Clayton Act.

  In many cases the investigation starts due to a complaint from a competitor, a report in the press or a report from a government agency.



Milestones in the U.S. antitrust policy history

- **1920**: US Steel accused to collude with competitors through trade meetings and "dinners" to discuss about pricing. Sentence: discharged because US Steel needed to cooperate with its competitors, there was not the intention to constitute a monopoly.

- **1945**: Alcoa (Aluminium Company of America) charged with monopolizing the market for aluminium ingots. Market share was calculated in 33%, including both primary and secondary ingots (produced from scrap aluminium). The Court of Appeals calculated instead a "real" market share of 90%, including also the indirect control that Alcoa exerted on the secondary ingot producers. Convicted because of overwhelming market share, even with little evidence of predatory pricing or aggressive anti-competitive practices (**1940-1970: aggressive phase of implementation of antitrust policy**: critiques of the Chicago School because of risk of distortions and political lobbies endangering efficiency).
- **Beginning of 1980s**: anti-interventionism. Market forces should be allowed to select the most efficient firms (1.611 antitrust cases in 1977, 638 in 1989).
- **2000s**: increased attention towards antitrust policy.

Europe: competition policies in the single states

- Before WWII, European countries were more tolerant regarding monopoly and restrictive practices than the U.S. (national champions, wars, etc.).
- After WWII, the American influence and the process toward market unification started to gain weight and Europe has converged toward the American model.
- By the start of 2000s, the European approach was even more severe than the American one.

EU: competition policies – Treaty of Lisbon

- **Objective**: to promote competition within the European Single Market
- **Cornerstone**: art. 101 and 102 of the Treaty of Lisbon (signed in 2007 and into force in 2009) partially based on the earlier Treaty of Rome (1957).

  It applies only to firms located in a member state trading in other EU countries, NOT to national firms operating on the domestic market.

  Reductions in fines are foreseen for cooperation or provision of information relating to violations of art. 101.

EU: competition policies – Treaty of Lisbon

1) **Art. 101**: **restrictive practices**, it prohibits agreements among firms from EU member states aimed at avoiding or limiting competition within the Single Market or in a relevant part of it. Prohibition of both horizontal and vertical agreements (for ex. it is illegal to fix prices or to share markets). However, **exemptions** are available if it is possible to prove that the benefits are higher than the costs for consumers.
2) **Art. 102**: it regulates possible **abuses of monopolistic power**, such as price fixing, predatory prices or price discrimination. An individual firm has a dominant position if it is able to prevent competition, to behave independently from competitors and to control production and prices. The investigation automatically starts for firms with a relevant market **higher than 40%.** Example of abuse of dominant position: refusal to trade with certain customers, imposition of unfair restrictions, etc. No indications about possible exemptions.

Example: United brands (abuse of dominant position

- 1978
- 40% of European market share for bananas and high level of vertical integration.
- Three different abusive behaviours:
  1. Prohibition for distributors to sell green bananas (de facto exclusive areas);
  2. Refusal to sell to a distributor who participated in a competitor's promotional campaign;
  3. Higher prices (in some cases +100%) to distributors in Denmark and Germany than to those in Ireland, Belgium, the Netherlands and Luxembourg. No justifications based on cost or risk differences among markets.

GUILTY

Example: Tetra-Pak(abuse of dominant position)

- It holds 90% market share (dominant position)
- Abuses in two cases
  1. Acquisition of Liquipak, holding an exclusive license for a new sterilisation method. This has caused serious difficulties to Elopak, a competitor that developed the new technology in collaboration with Liquipak. After the intervention of the Commission, Tetrapak has accepted to quit the exclusive.
  2. Abuse on a market where it did not have a dominant position (non-aseptic cardboard packaging and related machinery) due to:
     - Tied selling of packaging and machinery, not justified by technological optimisation;
     - Predatory pricing;
     - Price discrimination.

GUILTY

Mergers in EU – Regulation 139/2004

- Regulated by **Regulation 139/2004**, aimed at improving the transparency of merger investigations, with guidelines for the assessment based on economic indicators and guidelines for firms on their rights in case the merger is not allowed.
- Any merger has to be notified to the Competition Directorate not later than one week after a deal is announced. Within 4 months the Directorate takes the final decision. During the investigation the Directorate tries to measure the implications for competition against any possible benefits.

EU competition policies – State aid – Treaty of Lisbon

State aid is regulated by art. 106, 107 and 108 of the Treaty of Lisbon.

1) **Art. 106**: member states have the right to deliver public goods and services, but the provider has to respect the same rules on collusion and abuses of market power of private firms.
2) **Art. 107**: State subsidies cannot distort competition among firms, but **exemptions** are possible if necessary for the smooth functioning of the economy. For ex.: R&D funding, SME promotion, regional economic development, etc. Company rescues are allowed only after the approval of a feasible and coherent plan.
3) **Art. 108**: the Commission is the controlling body; States have to inform the Commission in advance.

Example: Google Android

- Formal proceedings opened in 2015 against Google **to investigate** in-depth if the company's conduct in relation to its Android mobile operating system and applications and services for smartphones and tablets has violated EU antitrust rules. In particular, Google:
  - has required manufacturers to pre-install the Google Search app and Chrome, as a condition for licensing Google's app store (the Play Store);
  - made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices; and
  - has prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called "Android forks").
- The Commission decision concludes that Google is dominant **in the markets** for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system. **Market dominance is, as such, not illegal under EU antitrust rules.** However, dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate markets.
- Google has engaged in three separate types of practices, which all had the aim of cementing Google's dominant position in general internet search.
- 1) Illegal tying of Google's search and browser apps
- 2) Illegal payments conditional on exclusive pre-installation of Google Search
- 3) Illegal obstruction of development and distribution of competing Android operating systems

Example: Google Android (ctd.)

Example: Google Android (ctd.)

- The Commission's fines Google **€4,342,865,000** for illegal practices (July 2018). The fine takes account of the duration and gravity of the infringement and it has been calculated on the basis of the value of Google's revenue from search advertising services on Android devices in the EEA.
- The Commission decision requires Google to bring its illegal conduct to an end in an effective manner within 90 days of the decision.
- At a minimum, Google has to stop and to not re-engage in any of the three types of practices.
- The decision also requires Google to refrain from any measure that has the same or an equivalent object or effect as these practices.

http://europa.eu/rapid/press-release_IP-18-4581_en.htm

Example: Google Search

- In 2004 Google entered the separate market of comparison shopping in Europe, with a product that was initially called "Froogle", re-named "Google Product Search" in 2008 and since 2013 has been called "Google Shopping". It allows consumers to compare products and prices online and find deals from online retailers of all types, including online shops of manufacturers, platforms (such as Amazon and eBay), and other re-sellers.
- The European Commission has decided in Nov. 2010 to open an antitrust investigation into accusation that Google Inc. has abused a dominant position in online search, in violation of European Union rules (Article 102 TFEU). The opening of formal proceedings follows complaints by search service providers about **unfavorable treatment** of their services in Google's unpaid and sponsored search results coupled with an **alleged preferential placement of Google's own services**.
- **The initiation of proceedings did not imply that the Commission has proof of any infringements. It only signified that the Commission wanted to conduct an in-depth investigation of the case as a matter of priority.**
- In 2017, The European Commission has fined Google **€2.42 billion** for breaching EU antitrust rules, abusing its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.
- The company has been required to end the conduct within 90 days or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet, Google's parent company.

Example: Google Search

http://europa.eu/rapid/press-release_IP-17-1784_en.htm

Italy's competition policies

- The law protecting competition has been approved in 1990 (law 287, "Norme per la tutela della concorrenza e del mercato") (but Italy had already adhered to the Treaty of Rome).
- The regulation applies to agreements, dominant position abuses and firm concentrations **not included** in the EU regulation (for ex. activities carried out only on the domestic market and damaging the competition on such market).
- Similarly to the EU regulation, the dominant position is not per se a violation of competition principles; what matters is how the position has been gained (legally or illegally) and the use done of the position.
- The "**Autorità garante della concorrenza e del mercato**" (AGCM) is the body operating in full autonomy, with evaluation and decision independency (also on misleading advertising, illegal comparative advertising, conflicts of interest). It identifies the cases, it investigates on the selected cases, without any interference from any Ministry.

Italy: the case of artificial milk (2000, 2004)

- Nestlé, Heinz, Milupa, Nutricia, Humana and Abbott convicted for collusion for having all decided to distribute their products exclusively in pharmacies.

  This agreement has completely excluded operators of large distribution from the possibility to sell artificial milk, damaging consumers, who were forced to buy the product only in pharmacies at very high prices (fine equal to 3% of sales for each firm, about 3 million €)

  Total sanction: 6m. €
- In 2004 new investigation for prices for all brands of artificial milk 150 to 300% higher in Italy than in other countries, with no imports.

  The Authority has detected «direct and indirect» contacts among firms Direct: meetings of all producers by the trade association. Indirect: to fix suggested prices that were communicated to pharmaceutical distributors, allowing producers to inform their competitors about the fixed price.

  Sanction: 9.7 m. €

Italy: the case of Amazon

Nella riunione del 10 aprile 2019 l'Autorità ha deliberato l'avvio di un procedimento istruttorio nei confronti di cinque società del gruppo Amazon, per accertare un presunto abuso di posizione dominante in violazione dell'art. 102 del TFUE.

In particolare, Amazon conferirebbe unicamente ai venditori terzi che aderiscono al servizio di logistica offerto da Amazon stessa ("Logistica di Amazon" o "Fulfillment by Amazon") vantaggi in termini di visibilità della propria offerta e di miglioramento delle proprie vendite su Amazon.com, rispetto ai venditori che non sono clienti di Logistica di Amazon. Tali condotte potrebbero non essere proprie di un confronto competitivo basato sui meriti, quanto piuttosto sulla possibilità di Amazon di discriminare sulla base dell'adesione o meno da parte dei venditori al servizio di logistica FBA ("self-preferencing").

Attraverso tali condotte, Amazon **sarebbe in grado di sfruttare indebitamente la propria posizione dominante nel mercato dei servizi d'intermediazione** sulle piattaforme per il commercio elettronico al fine di restringere significativamente la concorrenza nel mercato dei servizi di gestione del magazzino e di spedizione degli ordini per operatori di e-commerce (mercato dei servizi di logistica), nonché potenzialmente nel mercato dei servizi d'intermediazione sui marketplace, a danno dei consumatori finali.

Nella giornata di oggi, i funzionari dell'Autorità hanno svolto ispezioni nelle sedi di alcune delle società interessate, con l'ausilio del Nucleo speciale Antitrust della Guardia di Finanza.

Il procedimento si concluderà entro il 15 aprile 2020.

www.agcm.it

Italy: buy&share (April 2019)

- L'Autorità ha concluso sei istruttorie nei confronti di alcuni dei principali operatori attivi nel settore *e-commerce* attraverso il c.d. *Buy&Share,* accertando plurime violazioni del codice del Consumo. Si tratta, in particolare, dei soggetti titolari di: *girada.com*, *zuami.it, bazaza.it, listapro.it, shopbuy.it, ibalo.it e 66x100.com.*
- Nello specifico, gli operatori, seppure con modalità differenziate, hanno promosso una particolare offerta commerciale nella quale i consumatori sono stati invitati ad "acquistare" prodotti ad un prezzo particolarmente scontato, versando immediatamente il prezzo scontato richiesto, salvo poi dover attendere, per poter conseguire il prodotto, che altri consumatori effettuassero un analogo acquisto. Al fine di ottenere il bene al prezzo scontato, il consumatore doveva inoltre attivarsi per individuare direttamente i nuovi acquirenti, generalmente 2 o 3, ovvero attendere in una specifica lista gestita dal venditore che altri consumatori "acquistassero" il medesimo prodotto.
- L'Autorità ha accertato che, in realtà, **il pagamento richiesto costituisce una mera prenotazione del bene e non il prezzo scontato di acquisto del bene medesimo**. Infatti, solo le prenotazioni e i versamenti effettuati da altri consumatori consentono al primo consumatore di conseguire il bene prescelto al prezzo di prenotazione. Nel caso di attesa nella lista del venditore, inoltre, **non vengono resi noti i meccanismi di funzionamento**, scorrimento della stessa lista ed i tempi di attesa, aspetti che rendono estremamente aleatorio l'ottenimento e la consegna del bene.
- Gli accertamenti istruttori hanno altresì evidenziato che ai consumatori viene **impedito l'esercizio di diritti contrattuali**, ovvero di essere rimborsati di quanto originariamente versato, di acquisire il prodotto ad un prezzo di mercato e di esercitare il diritto di recesso.
- Le violazioni del Codice del Consumo rilevate sono state ritenute gravi in considerazione delle condizioni particolari e aleatorie dell'offerta, in grado di attrarre un numero sempre crescente di prenotazioni e di ingannare un numero crescente di consumatori, nonché condizionare indebitamente coloro che vi hanno aderito.
- Gli operatori coinvolti sono stati complessivamente sanzionati dall'Autorità per oltre un milione di euro

Italy: Juice Plus (March 2019)

- Il 27 marzo 2019 l'Autorità ha concluso un procedimento istruttorio nei confronti delle società del gruppo The Juice PLUS, accertando che le stesse commercializzano integratori alimentari e prodotti sostitutivi dei pasti a marchio JuicePlus+ con **modalità di promozione ingannevoli e non trasparenti** attraverso il canale *social media marketing* Facebook, in violazione del Codice del Consumo.
- La strategia di vendita adottata da JuicePlus incentiva la condivisione di esperienze di consumo non necessariamente autentiche, con forme di *marketing* occulto realizzata principalmente tramite pagine e gruppi segreti Facebook, consistente nel non rendere palese che i venditori dei prodotti JuicePlus agiscono nel quadro della propria attività commerciale, i quali, al contrario, si presentano **falsamente** sotto la veste di consumatori.
- In secondo luogo, è stata accertata **l'ingannevolezza** delle informazioni diffuse con riguardo alle caratteristiche principali dei prodotti e dei risultati che si possono attendere dal loro utilizzo, soprattutto in termini di **efficacia dimagrante e curativa**, promettendo che con l'assunzione dei prodotti in esame sia possibile guarire da talune patologie o ottenere notevoli cali ponderali in poco tempo.
- Inoltre, l'Autorità ha osservato che in un contesto virtuale, l'assenza degli elementi caratterizzanti l'interazione consumatore-venditore richiede ai professionisti di adottare tutte le misure necessarie per evitare le confusioni di ruolo e, dunque, comportamenti scorretti da parte dei venditori affiliati. Di conseguenza, JuicePlus avrebbe dovuto esercitare una specifica cautela nelle indicazioni date ai propri affiliati ed effettuare un controllo esteso del loro operato, con l'applicazione di sanzioni disincentivanti.
- Pertanto, l'Autorità ha ritenuto che la pratica commerciale descritta risulti scorretta ai sensi degli artt. 20, 21, 22 comma 2 e 23, comma 1, lett. *aa)* del Codice del Consumo e ha sanzionato le società coinvolte per un milione di euro.

www.agcm.it

Reading list (competition policy)

- Ch. 23 Lipczynski et al., 2013
- On the Italian Case: Gobbo, F. (2001), Il mercato e la tutela della concorrenza, Bologna, Il Mulino, Ch. 6