

Article 102 TFEU

The central goal of EU competition law is to preserve freedom of choice, and to protect decentralised decision making by curbing corporate power. In view of growing market concentration in various industries and the digitisation of the Union economy, a modern competition standard ensures antitrust policy is applied in a predictable and transparent manner. Rather than sanctioning the abuse of a dominant position, competition policy should focus more on preventing market power.

Introduction

A common misconception about Article 102 TFEU is that a company has to have a major market share to have market power. Abuse of market power is possible in every business relation between companies of different size. If a single business partner is responsible for 20 to 30 percent turnover, it has a considerable market power. Can a businesses really afford risk losing a customer and having their employees sitting idle for one day in a week? The rules on competition in the Treaty on the Functioning of the European Union (TFEU) starts with article 101 which curbs corporate power. Article 102 TFEU says in the case you have a dominant position, you may not engage in anti-competitive behaviour. Preserving competitive market structures is imperative to deliver on innovation and growth.

Curbing Corporate Power

The purpose of European antitrust is to preserve "decentralised decision making" and "freedom of economic agents", not efficiency.[1] Anticompetitive harms to input suppliers have not been prosecuted much in recent decades.[2] The meaning of "consumer welfare" in EU competition policy remains unclear.[3] An effective competition standard should look beyond consumer welfare and be science-based.[4] Subtler economic harms of monopoly include labor rights[5], the environment, along with harms to democracy.[6] Digital monocultures compromise privacy and diminish ownership through subscriptions and restrictive technological means.[7] Mergers efficiencies must be proven by the one asserting them.[8] Replacing the consumer welfare model with a modern and effective competition standard is key to enforcing the rules on competition in the digital age.[9]

The Effective Competition Standard

In the modern age protecting individuals, purchasers, consumers, and producers, preserving opportunities for competitors, promoting individual autonomy and well-being and dispersing and de-concentrate private power are essential objectives for a competition standard:

Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the European competition laws.

Conclusion

The Consumer Welfare Standard leads to under-enforcement of competition law. The Effective Competition Standard revives the primary aim of competition law enforcement in a modern and resilient economy. This framework is key to ensuring that competition works effectively, that all businesses get a fair chance to compete and that consumers can reap the benefits of competitive markets.

Footnotes

1. “Consumer Welfare Is Dead”: What Do We Do Instead?—A Perspective from Europe
<https://www.promarket.org/2023/04/27/consumer-welfare-is-dead-what-do-we-do-instead-a-perspective-from-europe/>
2. What Economists Mean When They Say “Consumer Welfare Standard”
<https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/>
3. Consumer welfare in EU competition law: what is it (not) about?
<https://research.utwente.nl/en/publications/consumer-welfare-in-eu-competition-law-what-is-it-not-about>
4. Structuring a Structural Presumption for Merger Review
<https://www.promarket.org/2023/04/14/structuring-a-structural-presumption-for-merger-review/>
5. Antitrust, the Gig Economy, and Labor Market Power https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347949
6. Now You See It, Now You Don’t: Antitrust Arguments “Chicago Style”
<https://www.ineteconomics.org/perspectives/blog/now-you-see-it-now-you-dont-antitrust-arguments-chicago-style>
7. CrowdStrike, Antitrust, and the Digital Monoculture
<https://www.eff.org/deeplinks/2024/07/crowdstrike-antitrust-and-digital-monoculture>
8. The Profit Paradox: How Thriving Firms Threaten The Future Of Work
<https://www.theprofitparadox.com/>
9. The Effective Competition Standard: A New Standard for Antitrust
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293187