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# Competition Law in the Energy Sector

## *Session 3: Competition Law as a Sword and Shield in Arbitration*

Moritz Keller

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# Overview

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- *Merits:*
  - Introduction – common legal bases for arguments under competition law.
  - Differences and legal consequences of Articles 101 and 102 TFEU.
  - Practical examples of disputes in competition law.
- *Procedural Issues:*
  - The arbitrability of competition law.
  - Scope of arbitration clauses.
  - Arbitral tribunals and national courts.
  - Common issues in arbitration dealing with competition law.

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# Merits



**Section 1**



# Introduction – Common legal bases for arguments under competition law

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- **Articles 101 and 102 TFEU** are the provisions most often invoked.
- Article 101 para. 1 TFEU provides:
  - *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, and in particular those which [for e.g.] (a) directly or indirectly fix purchase or selling prices or any other trading conditions.*
  - Article 101 para. 1 TFEU contains a number of further examples.
  - Article 101 para. 2 TFEU provides that any agreements or decisions prohibited pursuant to this Article shall be **automatically void**.
  - Article 101 para. 3 TFEU contains a **list of exceptions** to the above.
- Article 102 TFEU provides:
  - 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.
  - Such abuse may, in particular, consist for example (a) **directly or indirectly imposing unfair purchase or selling prices** or other **unfair trading conditions**.
  - Article 102 TFEU contains **further examples** of similar abuse.

# Differences and legal consequences of Articles 101 and 102 TFEU

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- The articles can be **distinguished** by the individuals that must take part in the act:
  - **Article 101** requires **cooperation between undertakings**, whereas,
  - **Article 102** merely requires a **single entity** to engage in anti-competitive activity for its application.
- Due to the nature of **Article 102 TFEU** it is **more likely** that it will be **invoked** in arbitration proceedings.
- Claims relying on a violation of **Article 101 TFEU** – the **relevant provisions** of the agreement **are void** as they are likely to be anti-competitive.
- A claimant can also bring a **claim for damage** suffered as a result of **anti-competitive behaviour** engaged in by another party or parties:
  - These claims can be **contractual** or be brought on the **basis of a tort**, i.e. without a contract between claimant and respondent.

# Practical examples of disputes in competition law

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1. **Long term contracts:** Legality can change with time and market conditions.
  - European Commission highlighted 5 considerations in relation to gas supply contracts:
    - i. Supplier's market position;
    - ii. Share of customer's demand under contract;
    - iii. Duration;
    - iv. Overall market share covered by the contract, and
    - v. Efficiencies of the contract (adaptability).
2. **Take/ship/store or pay obligation:** Obligation to pay irrespective of the relevant "offtake" under the Contract
3. **Excessive pricing:** Most prominently invoked example: oil-pegged gas prices.
4. **Destination clauses:** Territorial restrictions to the sale of gas provided by suppliers to the various European countries.
5. **Conditional supply contracts:** Required certain companies to agree to participate in the construction of pipelines for the benefit of certain suppliers in order for them to obtain a gas supply agreement with the supplier.

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# Procedural Issues



**Section 2**

# The arbitrability of competition law

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## The Old Perspective:

"..., the **issues in antitrust cases** are prone to be **complicated**, and the evidence extensive and diverse, **far better suited to judicial than to arbitration procedures**. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest."

***American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)***

## The Current Perspective:

"There is **no reason** to assume at the outset of the dispute that international **arbitration will not provide an adequate mechanism**."

***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 723 F.2d 155 (1983)***

Also adopted by the Court of Justice of the European Union in "**Eco Swiss**" and "**Genentech**": Subject to review at the level of national enforcement.



# Scope of arbitration clauses

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- Arbitration requires a contractual agreement to arbitrate:
  - Competition law disputes **arising out of contract** can be arbitrated.
  - Competition law disputes **outside of contract**, exist in **tort**.

## Common Perception:

- CJEU in "**Akzo Nobel**": courts must "*regard a **clause** which **abstractly** refers to all disputes arising from contractual relationships as **not extending to a dispute relating to the tortious liability** that one party allegedly incurred as a result of the other's participation in an unlawful cartel.*"
  - Issue whether the scope of the clause was known to the parties or foreseeable.

## A Counter Argument:

- English case "**Microsoft Mobile v Sony Europe**" (2017): "*It would be an extraordinary outcome were a claimant successfully able to contend that, because a contractual claim had not been pleaded, a "parallel" claim in tort arising out of exactly the same facts and with a scope defined by that contract fell outside the scope of such a provision.*"
- This view may affect the future application of arbitration clauses.

# Arbitral tribunals and national courts

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## Review of arbitral awards:

- Subject to limited grounds for annulment.
- "**Eco Swiss**" CJEU held national courts have an **obligation to ensure compatibility of arbitral awards** with Union competition law.
- Based on arbitral tribunals lack of access to CJEU preliminary rulings.

## The CJEU Preliminary Ruling Procedure:

- **Article 267 TFEU** – CJEU " *...shall have jurisdiction to give preliminary rulings...raised before any court or tribunal of a Member State...*"
- Opinion of Advocate General Wathelet in "**Genentech**" – ICSID may fall under **Article 267 TFEU** due to its binding nature in relation to its members and the near complete membership of the EU Member States (only Poland is not a member).

# Common issues in arbitration dealing with competition law

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- Role of experts:
  - Party-appointed expert witnesses are **essential**, however, the **pool is quite small**.
- Conflicts:
  - Arbitrators with the right experience and expertise are often conflicted.
- Duration:
  - **Arbitral proceedings** tend to be **faster** than Competition Authorities or national courts.
- Parallel Investigations by Competition Authorities:
  - Suspension of the proceedings?

# Thank you for your attention!

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