CHAPTER III

EUROPEAN UNION ANTITRUST REGULATION

In this chapter, the writer will explain about Antitrust regulation. However, to clarify it means that the writer needs to tell first about competition policy. As mentioned in Chapter 1, the antitrust law is a part of competition policy, which played a vital role in European integration process. In this context, competition policy is the completed version of antitrust regulation as it equipped not only with the law against cartels (antitrust), but also against mergers, and about state aid. It means, explaining about competition policy will give a better insight into what is precisely antitrust regulation, why and how it realized and enforced, also what is its role and function within the EU.

A. EU Enlargement and the Establishment of European Union

One can not just merely explain about Europe as a ‘continent' or as ‘a place where well-developed countries gather.' The term is not necessarily wrong, but it can never explain Europe comprehensively. Geographically, rather than continent, it is more definite to call Europe as a peninsula, which located at the western edge of the Eurasian continent. Not only it has diverse landscapes and climate, but the population also have diverse religions, languages, and even different writing styles (in term of letter or alphabet). However, just like many other countries in the world, the history of Europe, is not

void from wars and conflict, in the pursuit of nationalism between its countries (Piris, 2010).

Then the World War happen, spreading chaos everywhere. Many people suffered from hunger, poverty, unemployment, etc. To survive and maintain their respective national interest, the European countries decide to put aside their differences and tried to cooperate with each other against mutual enemies or challenges.

According to Piris (2010), the process of European enlargement is a long story with many challenges. Throughout those times, over half of century of its existence, the EU developed and transformed in a rapid speed. The name also changed twice: from European Economic Community (EEC), to European Community (EC), and finally to its current name: European Union (EU). The membership started from six countries in 1952 to twenty-seven (if we exclude United Kingdom who expressed their desire of quitting the EU in 2016) in 2015 (Table 3.1), and probably will increase or decrease in the future.

Table ٣.١ 28 European Union Member Countries (2015)

1957	Belgium, France, Italy, German, Luxembourg, Netherlands
1973	Denmark, Ireland, **United Kingdom**
1981	Greece
1986	Portugal, Spain
1995	Australia, Finland, Sweden
2004	Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia
2007	Bulgaria, Romania
2013	Croatia

Source: Riley, G. (2015)

The process of EU enlargement can not be as success as it is without various attempts and failure. As long as history follows, the foundation for EU was thanks to its predecassor and various discussions and negotiations: the Organisation of European Economic Co-operation (OEEC) in 1948 (in 1961, it changed into Organisation of Economic Co-operation and Development, OECD), as the means of European to defend against USSR, the ECSC establishment in 1951 through Treaty of Paris, the Hague Summit in 1969, which is the decisive moment for European integration, etc. After going through many evolutions or reformations, the EU formally established through Maastricht Treaty in 1993. However, the EU still has not become a single entity as there are 3 other entities alongside it : EC, ECSC (European Coal and Steel Community), Euratom (European Atomic Community) (Piris, 2010).

B. The Historical Background of EU's Competition Policy

It already explained briefly in Chapter 1 that the EU strives to keep the competitiveness of the market. By competitive practices, it means that the practices contain a broad range of business practices, i.e., a company or a group of company which tends to maximize their profit, and full agreement to prevent the practice abuses, including the dominance of the market, close to the monopoly (Maierean, 2012).

The historical tracks of competition policy show that the origin of the policy itself went far back to the creation of Treaty of Rome's. It is one of the cornerstones of the nature of the EU, the European Community of Steel and Coal (ECSC), made from the proposal of Robert Schuman and Jean Monnet. The present understanding about the treaties is that it produced in order to realize the idea of "people of Europe," through

economic integration. This idea encourages the cooperation among European countries and against the idea of shaping Europe based on one particular national influence (Chirita, 2014).

It is important to note that the ECSC firstly explained by Jean Monnet, a French economist. Inspired by him, the proposal of Schuman Plan was made by Robert Schuman, the French Foreign Minister on May 9th, 1950. The plan aimed to end the rivalry between French and Germany which was the result of World War II. The intention was pure political at first, but later it gained an economic interest as well because it happened to be appealing to the federalists then, who were disappointed because of the failure of changing the OEEC into a supranational organization or European called as 'High Authority.' (Nello, 2005).

In the early 1950s, coal and steel were vital commodities in Europe and is also the basis of both country's economies. The implementation of Schuman Plan not only give economic benefit to both countries who were facing a post-war economic crisis but also to put an end to the threat of confrontation which becomes a disturbance for European integration process. So, it was a 'kill two birds with a stone' kind of plan (Novak, 2017). According to the plan, the production of steel and coal should be 'pooled' and positioned under the High Authority, and intended to reduce the trade barriers and increase competition (or commonly known as 'black pool'[1]). It became the cornerstone for integration process and solution for Franco-German settlement. The ECSC established in 1951, under the

[1] The black pool is the term that used to called the plan of 'pooling' the production of coal and steel into a single framework of rules to realize an economic integration. The framework of rules includes the elimination of trade barrier, common coal and steel production, the constant surveillance and control of Community under the High Authority. Another 'pooling' that commonly known as 'green pool' is the term used for the 'pooling' plan in the agriculture sector.

Treaty of Paris which signed by The Six (France, Germany, Italy, Belgium, Luxembourg, and the Netherlands) (Nello, 2005).

ECSC served as not only the economic development but also a first step for economic integration and 'European political federation.' The idea of ECSC developed to counter the abuse of dominant position and exploitation of national markets through restrictive practices to preserve high profit which is disturbed the process of coal and steel production, and European economic integration at the same time. The word 'competition' first mentioned in this particular context. It can be said that the competition goals were first inspired and integrated into international dimensions through this community. Competition understood as a means to counteract against exploitation of markets by one particular economic actor, or widely called as 'cartels.'[2] (Chirita, 2014).

ECSC started to became effective in 1953. However, even though the concept competition already being founded, the implementation of competition policy itself had not begun until 1957, when the broader Common Market established under the Treaty of Rome. Through this treaty, the first framework for competition policy has been made. It aimed to promote market inclusiveness while at the same time strengthening the institutions and integration process of the European Community. The Common Market used ECSC as its models to create its policies and rules. The most critical problem recognized by the Common Market is how the anti-competitiveness practices need to be taken care of immediately (Wise, 2007).

Following the increase in oil prices in 1979, the prolonged decline in European economy was apparent with

[2]Cartel is the term for a coalition or cooperative agreement, that being done by one or more firms with the purpose of maintaining high price and limiting competition.

deteriorating output, high rate of unemployment, and falling world export shares. The EC was becoming worried about the growing gap between their economic performances with other countries such as Japan and US, especially regarding technology. Not to mention the EC's market keep being breached by foreign firms then. It caused the competitiveness within the EC to decrease significantly. To answer this problem, in 1985, Jacques Delors, the President of the Commission at that time propose the idea of Single or Internal Market Programme, which objectives are to complete original goals written in Treaty of Rome: market integration between the EC member states. The idea later followed by the Single European Act (SEA) in 1987. It reformed the EC decision-making process, and also called for integration attempt in another sector such as technology, monetary, social, regional, and external policies. It set out the required formal steps for Single Market Programme (Nello, 2005).

The Single Market Programme and Single European Act offered extra momentum for active competition policy. Through these programmes, the Commission finally gained the necessary power to affect business practices. Merger control is the most prominent, because at that time considerable scale of Mergers happened in Europe, which pushed the Council to approve Merger control regulation in 1989 (Wise, 2007).

Since the mid 1990s, the process of competition policy building has been faced some reformation. By this, it means in terms of economic principle. The competition policy relied on economic analysis shaped by merger control and liberalisation program. Simply put, the Commission shifted the attention of competition law so it would not only regulate trade and industry anymore but also with cartels and monopolies (charges, fare, etc.). This reformation's purpose is to "modernizing" the European competition policy enforcement. After going through many years of changing and reshaping, the Community finally can implement a more-modern enforcement process in 2004.

The new regulation enables the implementation of competition law through national institutions and process, rather than letting Commission monopolized the decision. The current competition law enforcement allows member states to do cooperation and coordination with the Commission. All member states have their competition laws and enforcement institutions. Also, their national substantive laws congregated with Community standard. This development is a significant step to maintain the consistency of policies and to avoid centralized enforcement (Wise, 2007).

C. European Union Antitrust Instruments

1. Article 101 and 102 TFEU

As Maierean (2012) stated, competition policy of EU now has transformed into a part of EU's regime, that considered critical to becoming a market economy. From the previous sub-bab, it is clear that competition policy is not created in one night, or through a single forum discussion, but rather going through a long and challenging process, alongside EU enlargement, in over a half-century. And it is not over either, in fact, it still has a room for improvement. There is a possibility that competition policy can still develop after this because the development of rules needs to harmonize with the necessity and the situation at the time. Same case with how competition policy emerges, thoroughly promoted, and institutionalized by regulations and bodies.

European Commission (2014) stated that antitrust regulation developed from two fundamental rules set out in the Treaty on the Functioning of the EU (TFEU), which established since the Treaty of Rome,

in 1958. It is the fundamental rules that fight against anti-competitive practices or abusement of dominant position :

a. Article 101 of the Treaty. It is forbidden for two or more independent market operators to form a deal that may hamper competition. The specification covers both horizontal agreement (between firms on the same level, putting aside if it is between actual or potential competitors), and vertical agreement (between firms running on different levels). The most basic violation of Article 101 is the formation of a cartel between firms.
b. Article 102 of the Treaty. It is forbidden for a firm who possess dominant position/more power in the market to misuse that position. For example, market exploitation by charging unfair prices or restricting production.

The primary purpose of these articles in TFEU is not only aimed to protect EU market from any business practice that may restrict competition. However, on a bigger picture, it sought to create a Single Market, where the flow of goods and trade can happen smoothly without restriction. These articles reinforced by a framework of secondary legislation, notices, and policy statements. The Directorate General for Competition of the European Commission (DG Competition) will enforce the law, while EU Courts provide the procedure request (Harrison & Bunker, 2011).

It is important to note that the antitrust regulation has faced several developments or

amendments. Not only the content of the regulation become more constraining and have a broader scope of the law, but the numbering of Articles also changed along with the Treaty in which it signed and ratified.

Table ٣.٢ The Evolvement of Anttitrust Regulation

Numbering of Article in Treaty of Rome	Numbering of Article in TEC	Numbering of Article in Treaty of Lisbon	Numbering of Article in TFEU
Article 85	Article 81	Article 81	Article 101
Article 86	Article 82	Article 82	Article 102

Source: European Union (2007)

The two central European competition policy firstly emerged in 1957, within the Treaty of Rome Article 85 and 86, which also the treaty that initiated EEC. It later evolved, though amended several times, into Article 81 and 82 of TEC (Treaty of European Community) in 1997, and Article 81 and 82 of Lisbon Treaty in 2007. Despite being amended several times, the policy remains as fundamental EU constitutional document. The current EU competition policy specified in Article 101 and 102 of TFEU (IP Glossary, 2013).

The foundation of TFEU already laid down since Treaty of Rome in 1958. TFEU started to became effective on 1 December 2009, after the ratification of Treaty of Lisbon. The TFEU itself is an amended and renamed version of the TEC. The Treaty of Lisbon amended the Treaty of European Union (TEU) or Maastricht Treaty and the Treaty establishing the European Community (TEC) (EurWORK, 2012). The

process of institutionalization of the law is somewhat complicated because it needs to evolve by the increasing problems and adapting to the global environment. But even so, the primary content and purpose of the law remain the same.

Article 101 and 102 underlined what is allowed and prohibited in EU antitrust policy. According to Nello (2005), Article 101 prevents any kind of practices that ‘incompatible with the Common Market,' that means all agreement that may hamper the trade between member states, anti-competitive practices, or any collusive behavior. Article 102 mainly prohibiting abuse of dominant position by one firms or more. The practices that may come into those category are :

a. Raising price or price-fixing;
b. Restricting output, markets, technical development or investment;
c. Share markets or sources of supply;
d. Applying different conditions when conducting equivalent transactions with other trading partners;
e. Concluding the contracts that supposed to be the subject to additional obligations.

Although it forbids collusive behavior, Article 101 still allows few exemptions. It will enable cooperation between firms, as long as it improves the production or distributions of goods, encourages technological advance, and acknowledge consumers right to a mutual benefit (Nello, 2005).

3. Regulation (EC) No.1/2003

While EU has Article 101 and 102 to conduct antitrust measure and combat against cartels and restrictive practices, it also needs rules regarding on how to implement the enforcement procedures. These situations regulated under the Regulation 1/2003. It replaced Regulation 17/1962, and change the way of EU in term of how to enforce the competition law. Regulation No. 1/2003 is the ‘modernized' regulation that started to became effective since 1 May 2004 (Slaughter & May, 2006)

Regulation 1/2003 is the pivotal turn on EU competition law enforcement, as it significantly changed the way of enforcement into a more modern method, which is recognizing the flaws on previous regulation and turning into a more liberalized approach. 17/62 Regulation is a regulation ratified by the Councils of Ministers on 6 February 1962. It was the regulation that implemented Article 81 and 82 of TEC (Heide, 2005)

According to Slaughter and May (2006), the most significant change that Regulation 1/2003 bring is the increased power of Commission in investigating infringement. The aim is to decentralizing the investigative power to national authorities so that Commission can dedicate their entire focus on the ‘hard-core' EU competition law infringement, including cartels and monopolies. It enables the national authorities to take part in the infringement investigation within their territories. After Regulation 1/2003 enacted, the investigations become increasingly active, especially in international cartels. The Commission cooperating with competition authorities in few countries such as the US, and also with national

competition authorities (NCA), including the confidential information exchange. Under Regulation 1/2003, the European Commission and NCA have established a European Competition Network (ECN). It introduced a new enforcement procedure that becomes a benchmark for future EU competition policy.

The role of ECN is to ensure the efficiency in the allocation of infringement case, also in cooperation between Commission and NCA in the term of exchanging information (Slaughter & May, 2006). It also to provide and organize mutual assistance in conducting investigations and co-ordinate in making the final decision. To make sure the new regulation can be implemented well in EU, ECN introduce some measures. One of it is the guidance on the main characteristics of the new procedure, such as :

a. When agreement and practices considered to have an effect on intra-member state trade;
b. What kind of cooperation between firms and to what extent it allowed;
c. The treatment of complaints;
d. How is the flow of operation among Commission, NCA, Courts (EU and National) so they can cooperate efficiently.

As explained before, the main vision for EU is to create the ‘people of Europe.' From this chapter, it is apparent that the existence of the Antitrust regulation that we came to know has been going through a long, deliberate process. The desire to overcome economic difficulty and tension between European countries during times of war gave birth to the idea of economic integration. From this, the term ‘competition' firstly introduced, and EU strives to realize a fair competition between actors in the said business. Another thing is that the process of EU enlargement relates heavily to

the process of competition policy. Competition policy is a part of EU's regime, which protects the competition, and thus, the integration itself since competition is a vital part of the integration process.

It is safe to assume that despite all differences among the member countries, the EU can exist right now due to numerous political agreements, whether it was small or large (Schuker, 2000). The regime that regulates EU as for now is the result of extended political arrangements, in conjunction with rapid changes in the world. That is why it is important to be continuously monitored and adjusted.