The construction of an Internal Market in Europe and the creation of a framework for competition without barriers within the EU Union. Experiences for the ASEAN

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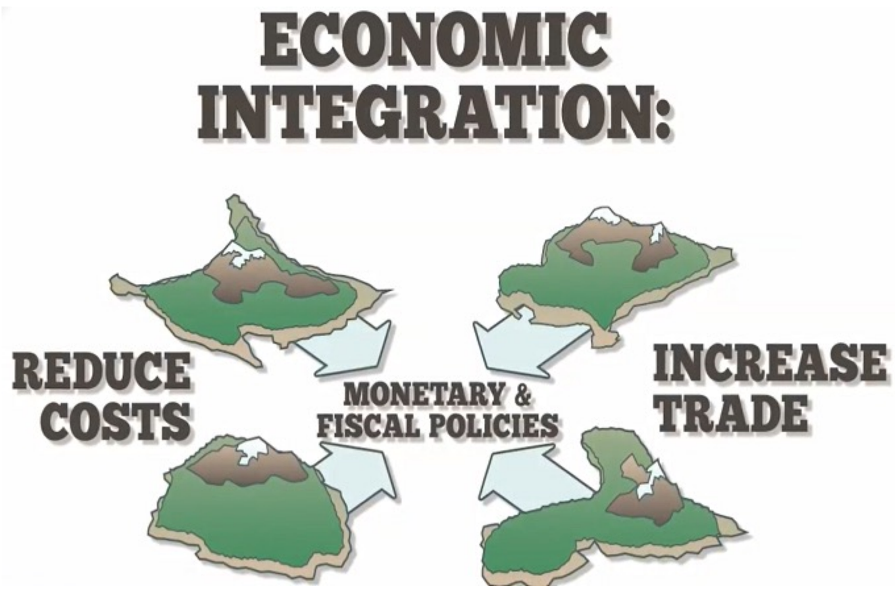
The long way to economic integration

Economic integration processes and International Economic Agreements

Advantages of economic integration



- Removal of **barriers to trade** between the member States
- Expansion of the **markets** for the participating economies
- Fostering of **innovation** and **competition**: the role of ***comparative advantages***

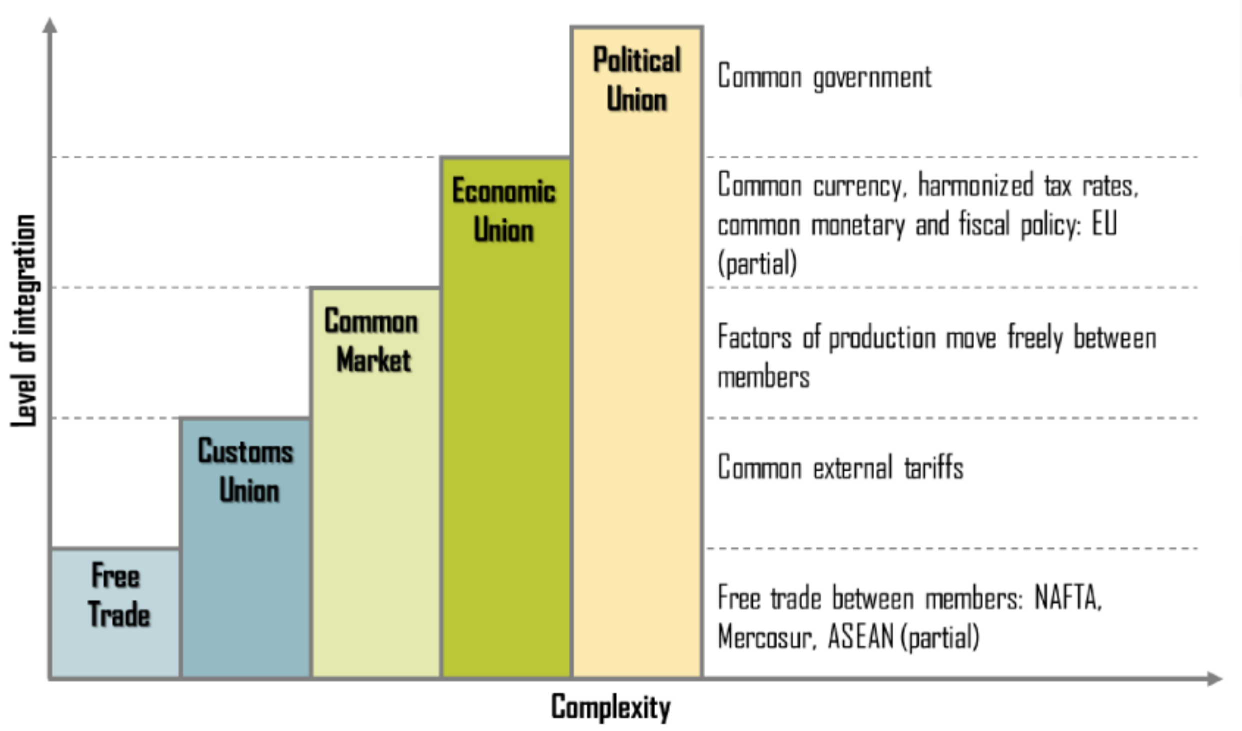
Requirements of economic integration

Removal of obstacles to trade

Cooperation in economical and/or legal matters

Improvement of the general level of welfare of the integrated zone

Forms of Regional Integration Agreements

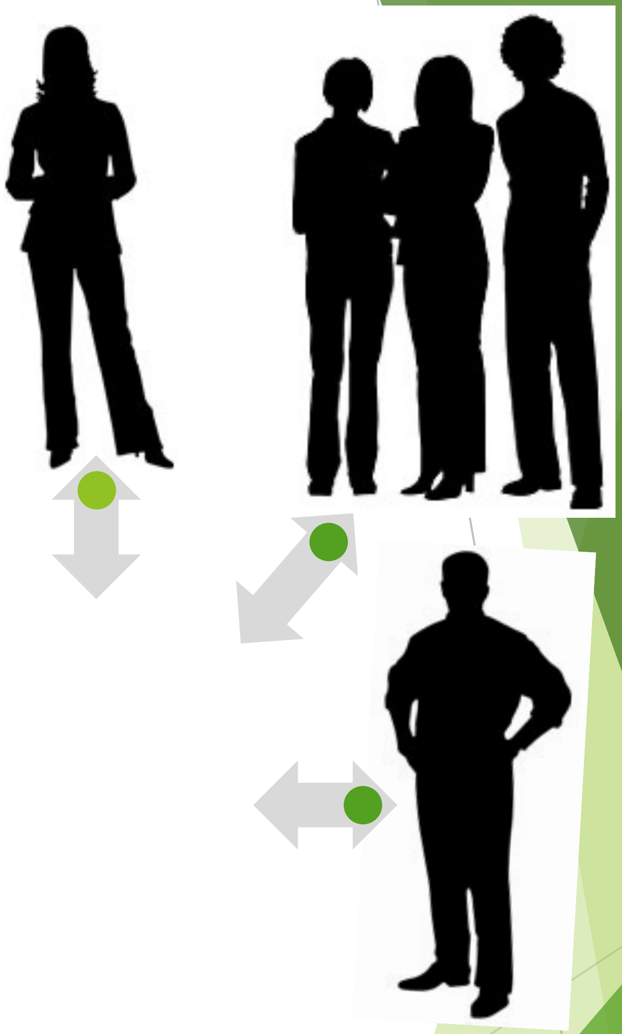


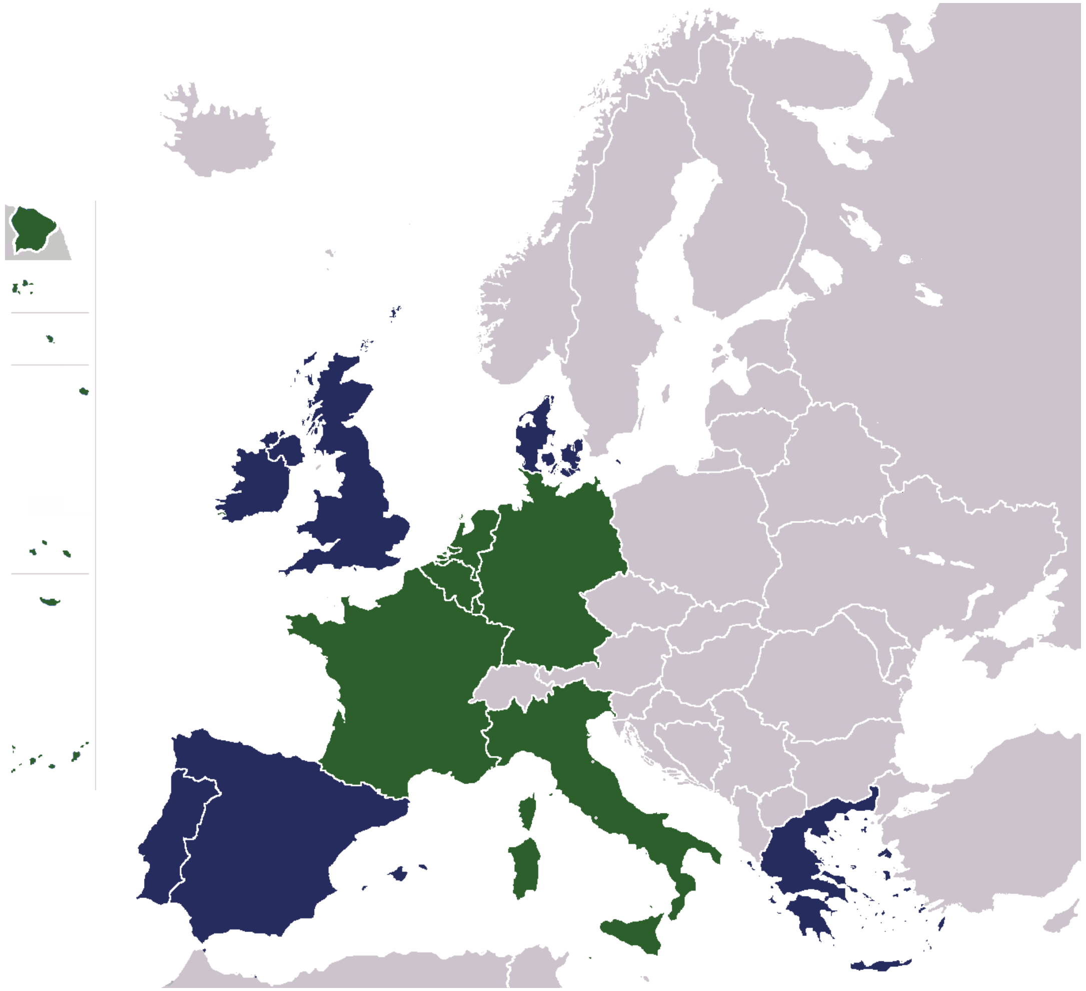
Economic integration

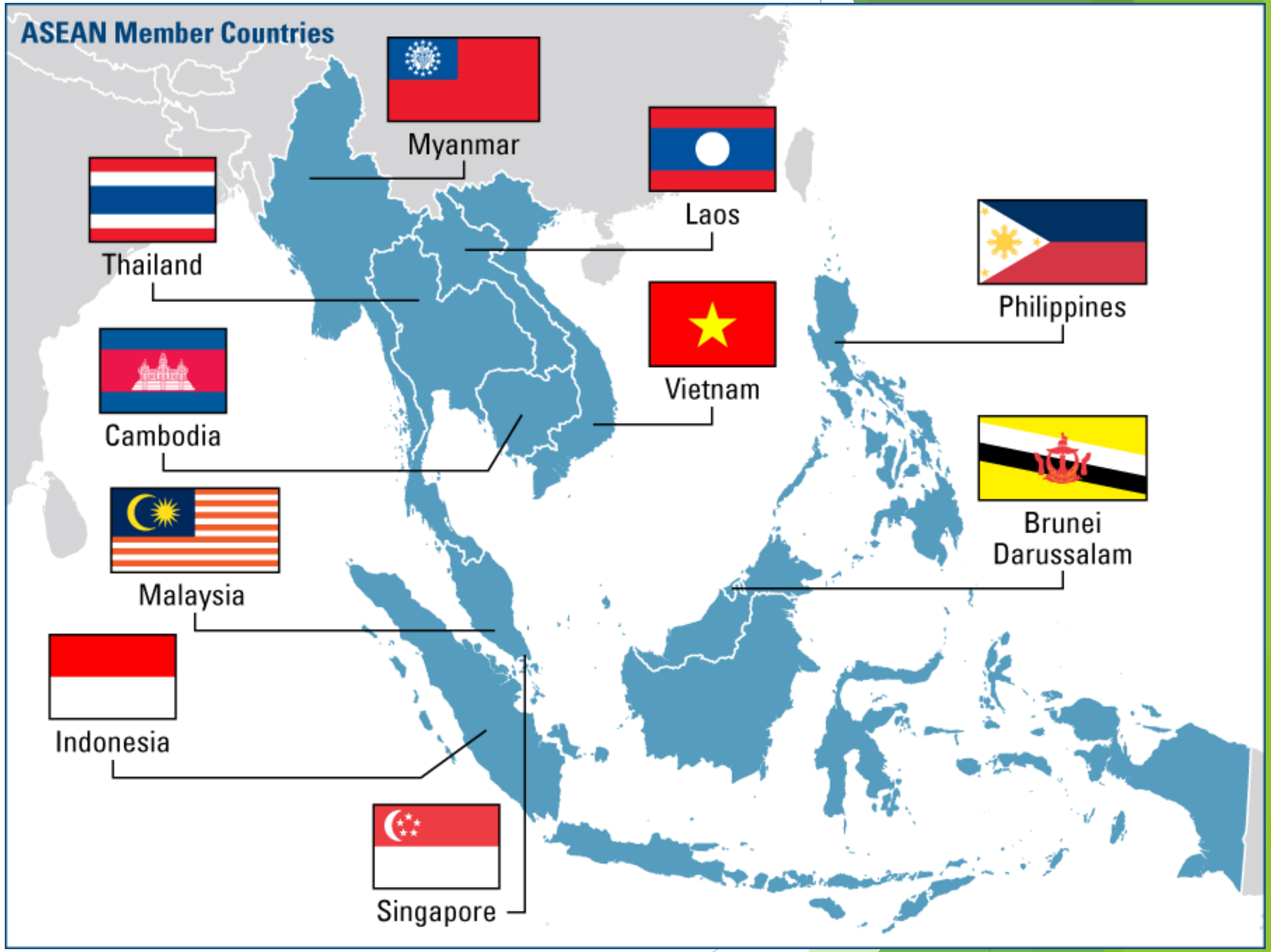
Preferential agreements: Some kind of commercial preferences (Ex. Reduction of tariffs, less protection to trade). Not fit in the legal framework of WTO/GATT (art. XXIV)

Free trade area: Removal of tariff and no-tariff barriers to the trade of goods. Every country retains the definition of trade policy and the regulation of trade with third countries. Needs the stablishment of a monitoring system to control trade inside the area.

Customs Union: Free trade area + a common tariff regarding to third countries.
Ex. European Community set in 1968






ASEAN Member Countries
Myanmar
Laos
Thailand
Philippines
Cambodia
Vietnam
Brunei
Darussalam
Malaysia
Indonesia
Singapore

On the Integration process

Common Market

- Customs union + Freedom of circulation of factors of production (labour, assets, companies…)
- Convergence of some common policies (ariculture, fishing, commercial relationships with thirds). Common Competition Policy
  Requirements: elimination of customs, technical frontiers and tax frontiers
  - European Union 1993 (Maastricht Treaty); ASEAN since Jan. 2016

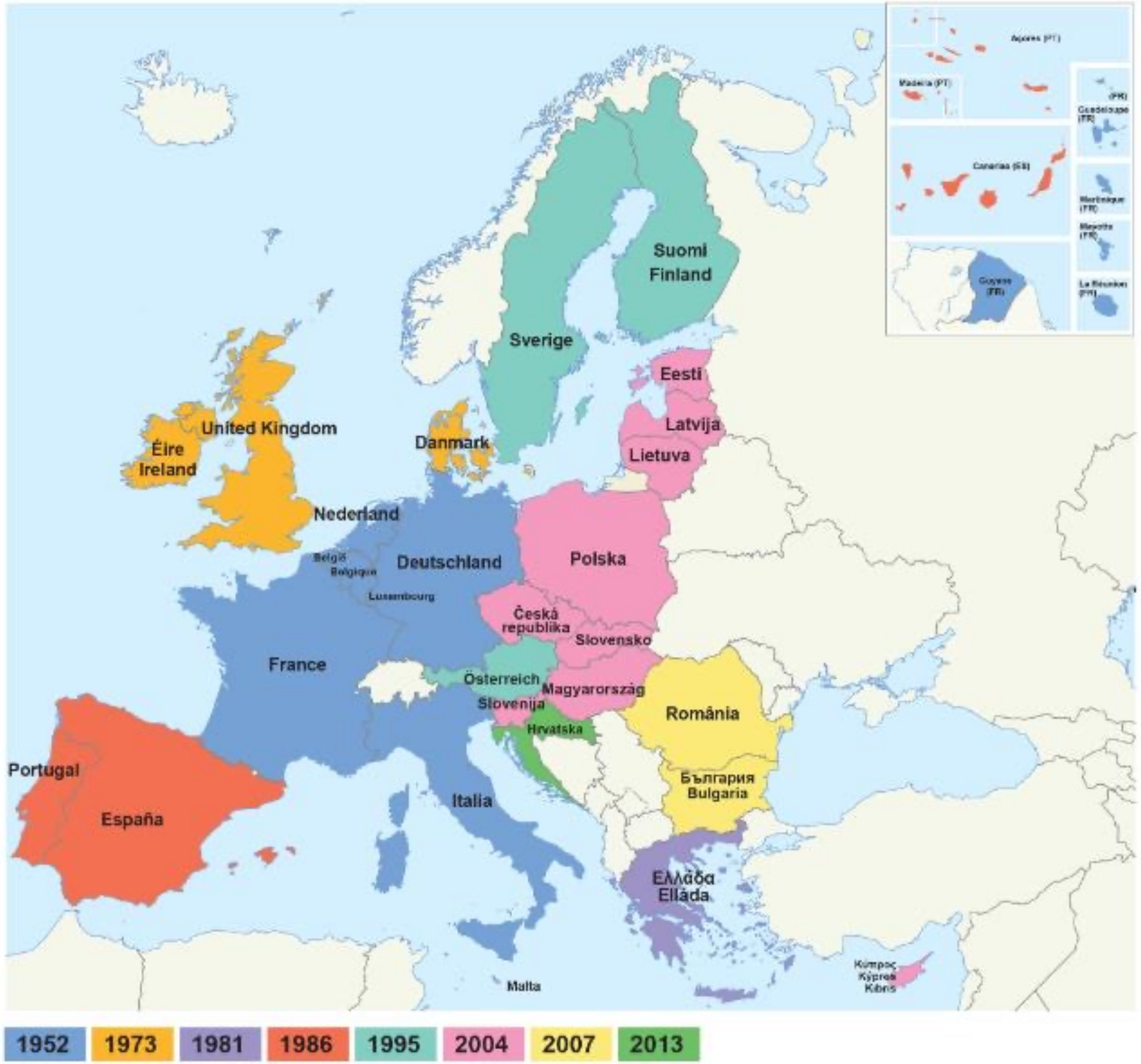
Economic Union

- Harmonization of monetary policy + the establishment of an harmonized fiscal policy
  Harmonization of other policies: public budgets, structural changes and regional development…
  - European Union 1999 (Amsterdam Treaty)

Full economic and political integration

- Economic Union + a common parliament and the adoption of a single foreign, defence and domestic policy
  - Ex. United States, Germany (1871) Italy (1870)

Entrance of new members in the Agreement



Regional Integration within the Big International Economic Agreements

World Trade Organization (WTO)

World Intellectual Property Organization (WIPO)

WORLD TRADE ORGANIZATION

Origin

- After WWII. Bretton Woods agreements. → Attempt to create the International Trade Organization (ITO) – Havana Charter (1948)
- Alternative – General Agreement on Tariffs and Trade (GATT)
- 1994 - Marrakesh Agreement - WTO

Fuctions

- GATT + Intellectual property, Environmental policy, trade and development, regional trade agreeements, Balance-of-Payment restrictions...

Parts

GATT – Trade of goods

GATS – General Agreement on Trade and Service

TRIPS – Agreement on Trade-Related aspects of Intellectual Property Rights

Dispute settlement system

TRIPS

Principles of IP in trade

- National treatment
- Most-favoured-nation principle
- Technology transfer

Protection of IP

- According to the WIPO

Obligation to protect IPRs

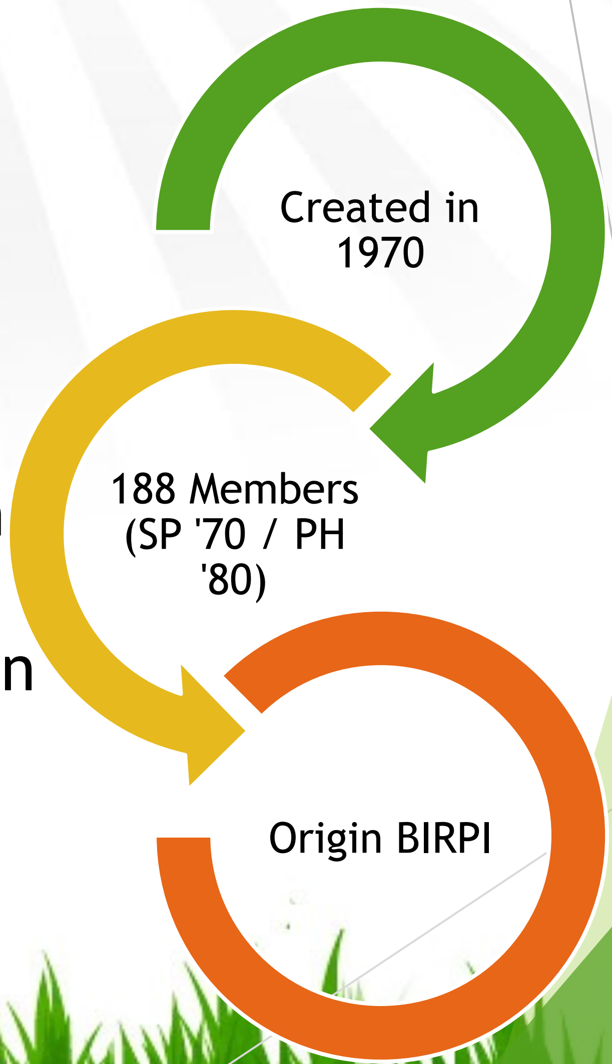
- Sanctions
- Deterrent effect

Dispute settlement

- General system of the WTO

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

"To encourage creative activity and promote the protection of intellectual property throughout the World"



- Paris Convention for the Protection of Industrial Property
- Berne Convention for the Protection of Literary and Artistic Works
- + Promotion of technology transfer and economic development

Competition Policy in the European Process of Economic Integration

Dimensions of Economic Integration

- **External Dimension:** Remove tariffs and barriers to trade within the involved countries
- **Internal Dimension:** Promotion of free competition

<u>Promotion of Competition</u>

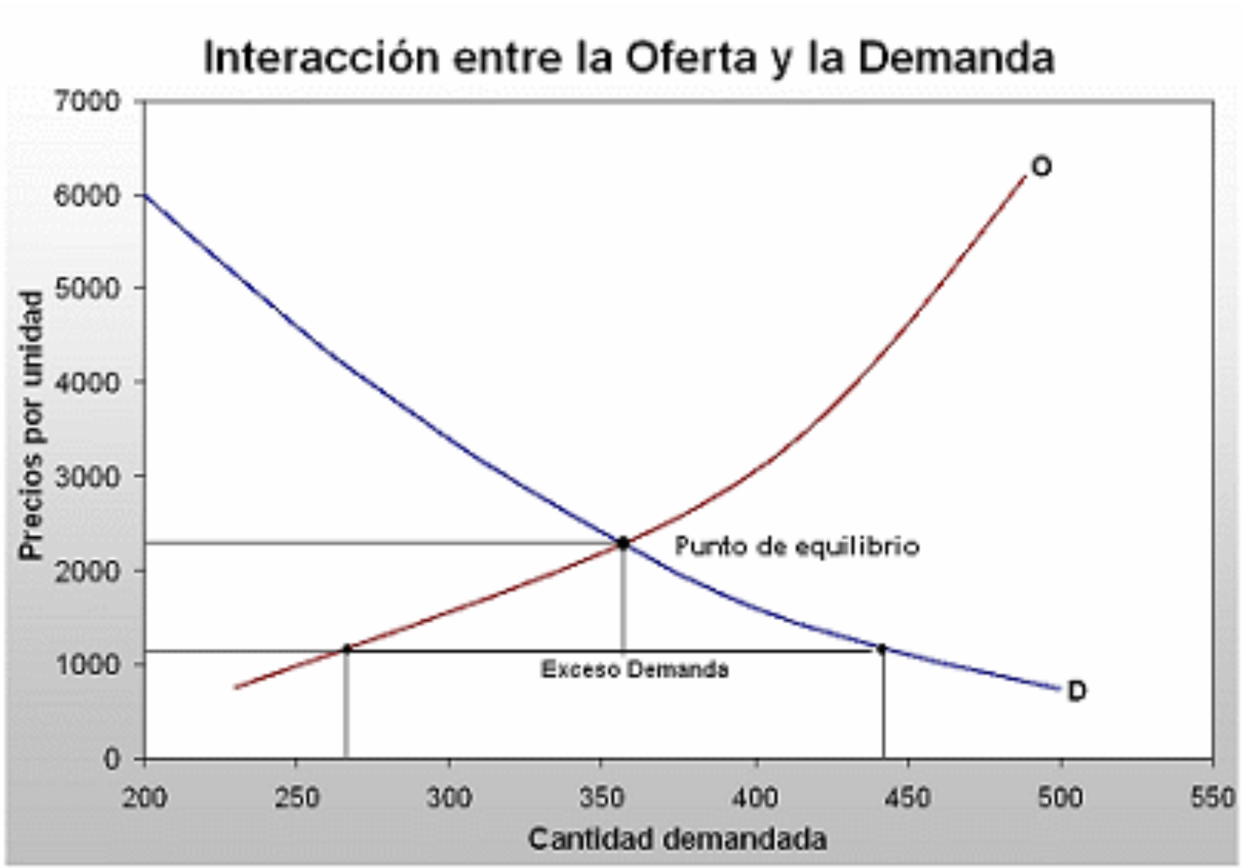
- Proper functioning of a Common Market
- Promotion of effective resource allocation
- Foster innovation and technical development
- Intertwinement with the international economy

Common Market → Increase of Competition

- **Compete:**
  - domestic rivals / other countries of the integration
  - Increase in the investments to become more competitive
- **Mergers and acquisitions**
  - Adapt resources to operate at the new dimensioned market
- **Specialization of the national industries**
  - Competitive advantages

Economic landscapes of a dysfunctional competition

SUPPLY AND DEMAND IN THE MARKET

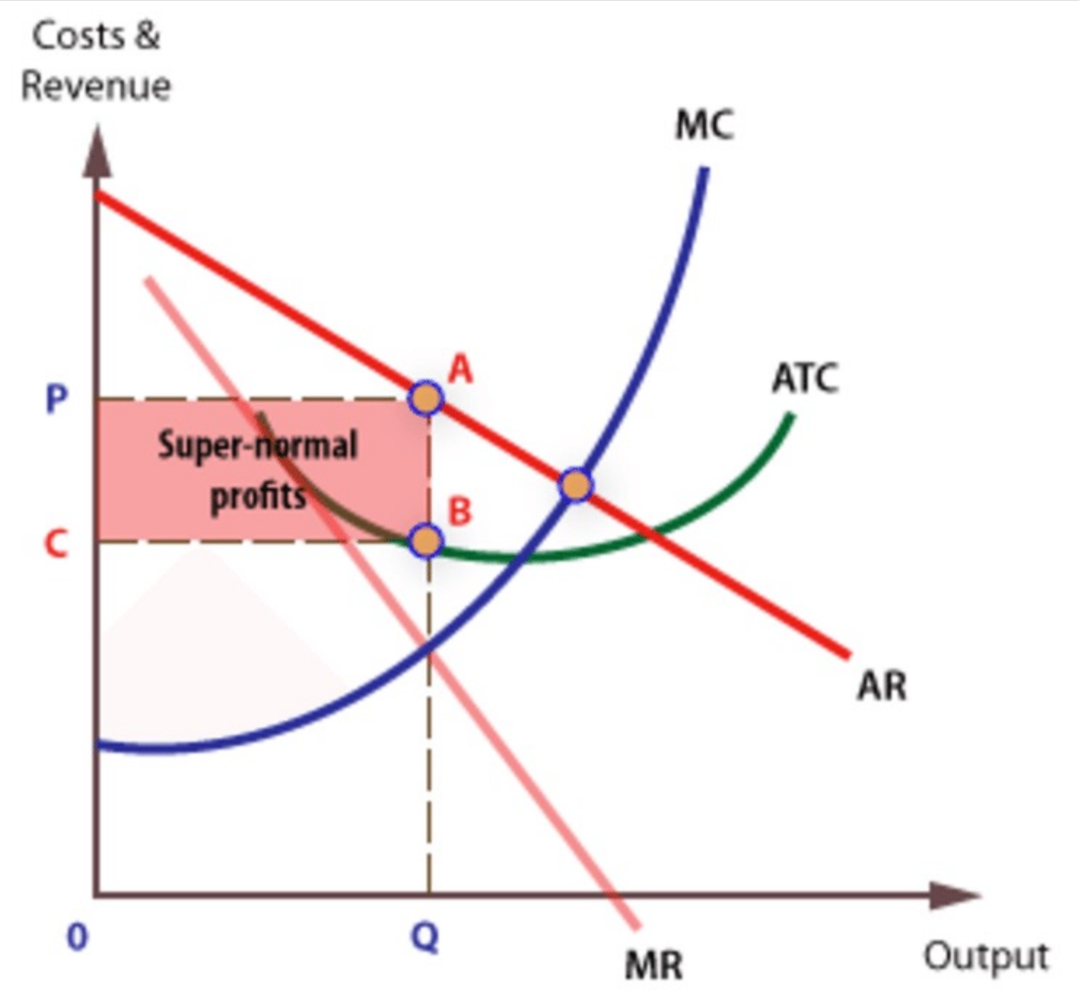


Kinds of markets

Kinds of markets	Many buyers	Few buyers	Only one buyers
Many sellers	Perfect competition	Oligopsony	Monopsony
Few sellers	Supply oligopoly	Bilateral Oligopoly	Limited buyer monopoly
Only one seller	(seller) monopoly	Limited seller monopoly	Bilateral monopoly

Market situation in monopoly/oligopoly situations

- In cases of a monopoly/oligopoly on the side of supply, the only seller may offer the product at the prices he decides. This price will be the one maximizing his incomes, without covering all the quantity of goods that may cover the market at the balance point.
- This implies an irrecoverable loss of efficiency



Legal protection of competition

Competition is the economic framework where business carry out their activity

Freedom of Enterprise and protection of the interests at stake

Foundations: **articles 33, 128 and 131 Spanish Constitution**

Competition Law (Free Competition) → Antitrust Law

- Repression of the business practices that prevent, restrict or distort competition in the market or in one of its sectors or segments.

Unfair Competition Law

- Repression of unfair practices (against good faith) in the development of business activity

European Foundations of Free Competition

- **Arts. 101 ff. TFEU**
- Principle of supremacy of the European Competition rules

Basic Spanish Regulation on Competition Law (Antitrust / Unfair competition)

Spanis Competition Act (act 15/2007, 3 July)

Act 3/2013, 4 june, on the Spanish Commission on Markets and Competition

Royal Decree 261/2008, 22 February, Regulations implementing the Competition Act

Act 3/1991, 10 January, on Unfair Competition

General Advertising Act (act 34/1988, 11 November)

Competition Law

Protecting free competition

CNMC

COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA

Situations covered by Competition Law

Prohibitions (cartels, abuse of a dominant position)

Authorised behaviours

Situations under control: Mergers / state aids

Prohibited conducts

- Agreements against competition (incl. cartels)
- Abuse of a dominant position

Anti-competitive agreements

Art. 101 TFUE (art. 1 Spanish Competition Act):

1. 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:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, bedeclared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Structure of the prohibition of anti-competitive agreements

General rule (art. 101.1 TFUE, art. 1.1. LDC) → Prohibition

- Exceptions:
  - Agreements covered by a block exemption regulation
  - Agreements covered by the exception of recital 3

Effect: agreements are void: not binding the parties, no one can claim for their compliance

Form of the agreements:

- Agreements, conventions or pacts between undertakings
- Decisions or collective reccomandations of associations of undertakings
- Concerted practices and (only for Spain) consciously parallel actings without a previous agreement)

In the relevant market → Market definition

Abuse of a dominant position – art. 102 TFEU, art. 2 LDC

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 in:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

- There is no prohibition of the existence de iure or de facto of monopolies or oligopolies. Only the abuse of such a position is forbidden
- Elements to determine the existence of a dominant position:
  - Market share
  - Control of a relevant resource / facility
  - Existence of important barriers to enter into the market
- This dominant position gives the undertaking freedom to act in the market (not boud by the competitive pressure): fix higher prices, exclude competitors from the market…
- Kinds of conducts: explotative abuses, abuses of exclusión
- These conducts may be performed individually or along with others (collective dominant position)
- The conducts take place in the relevan market
- There is no exception for the prohibition (no block exemption regulations / recital 3)

Examples of forbidden conducts

Both for anti-competitive agreements and for abuse of dominance

Open list:

- Imposing unfair purchase or selling prices or other unfair trading conditions
- limiting production, markets or technical development to the prejudice of consumers
- Unjustified denial to satisfy buy requests – market sharing
- Imposition of dissimilar conditions
- Tying agreements

Particular cases of abuse of a dominant position

- Exclusionary abuses:
  - Predatory pricing
  - Single branding agreements
  - Exclusive discounts
  - Tying agreements
  - Refusal to contract
  - Margin squeeze
- Exploitative abuses:
  - Excesive prices
  - Imposition of non-equitative conditions
  - Discrimination among customers

What is a cartel?

- Secret anti-competitive agreement (art. 101 TFEU, art. 1 LDC) concluded between two or more undertakings against competition rules, mainly consisting in the fixation of prices, market sharing, limitation of production…
- Difficulty to uncover
- The most serious infringement of competition Law
- Need of mechanisms to discover these agreements

Distorsion of free competition by unfair behabiours (art. 3 LDC)

- Prohibition connecting unfair competition and antitrust Law
- Only in Spain

The National Commission on Markets and Competition or the relevant authorities fo the Autonomous Communities will consider –in the same way provided by this Act for the repression of forbidden conducts- of any act of unfair competition that because they distort free competition affect the public interest

Enforcement procedures of these prohibitions

Criminal proceeding – Crime of fraudulent machination to alter the price of goods (arts. 282 ff. Criminal Code) – Not really used in Spain (unlike other legal systems)

Public enforcement of competition Law (administative procedure):

- National Commission on Markets and Competition / European Commission
- Investigation on the existence of an infringement – confirmation and proof:
  - Prohibition of the behaviour
  - Removal of effects
  - Imposition of fines (sanction, for not stopping the conduct)
- Leniency policy (arts. 65 and 66 LDC)
- Possibility of settled decisions (commitments / settlements)

Current trends in the enforcement of competition Law

- RATIO: Authorities have limited resources to detect all infringements, carry out the proceedings (with guarantees) and sanction
- Distribution of cases:
  - European Commission
  - NCAs
  - In Spain – Regional authorities

Enforcement instruments

- Prioritization
- Leniency policy
- Commitment decisions
- Settlements
- Cooperation procedure

Enforcement procedures of these prohibitions (2)

Private enforcement of Competition Law (judicial):

Basis: Right to a compensation of the damages suffered

Nullity of the agreements or conducts in breach of art. 101 TFEU / 1 LDC

Bring a claim to the Commercial Court (Juzgado de lo Mercantil)

Directive 2014/104/UE, arts. 71-81 LDC

The judge may also state the existence of the infringement (if that had not been previously declared by the Competition Authority)

- Follow-on damages actions
- Stand alone actions

Authorized behaviours

- Art. 4 LDC: “These prohibitions will not be enforced in behaviours resulting from the implemantation of the Law”
- Block exemption regulations E.g. Vertical agreements, R&D, standardization…
- In case of agreements – covered by 101.3
- *De minimis* conducts
- Possibility of administrative decisions of inapplicability of the prohibition (authorization) – For a concrete behaviour (art. 6)

Merger control

Concept: any operation that imply a permanent modification of the control structure of the involved companies by means of any legal procedure

Procedures

- Mergers
- Take-overs (acquisition of shares, appointment of managers…)
- Creation of a Company, invested companies or joint ventures

- **Case** compulsory notification to the CNMC:
  - > 30% market share
  - Joint sales > 240 millions (60 in Spain)
  - Cases of notification to the Europ. Commission – Regulation 139/2004
- Forbidden / Conditioned (*commitments*)
- Possibility of voluntary notifications

Control of State Aids

Arts. 107-108 TFUE / art. 11 LDC

Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market

Possibility of exceptions. E.g.: R&D, Environmental and energy, etc.

National Commission on Markets and Competition

Composition

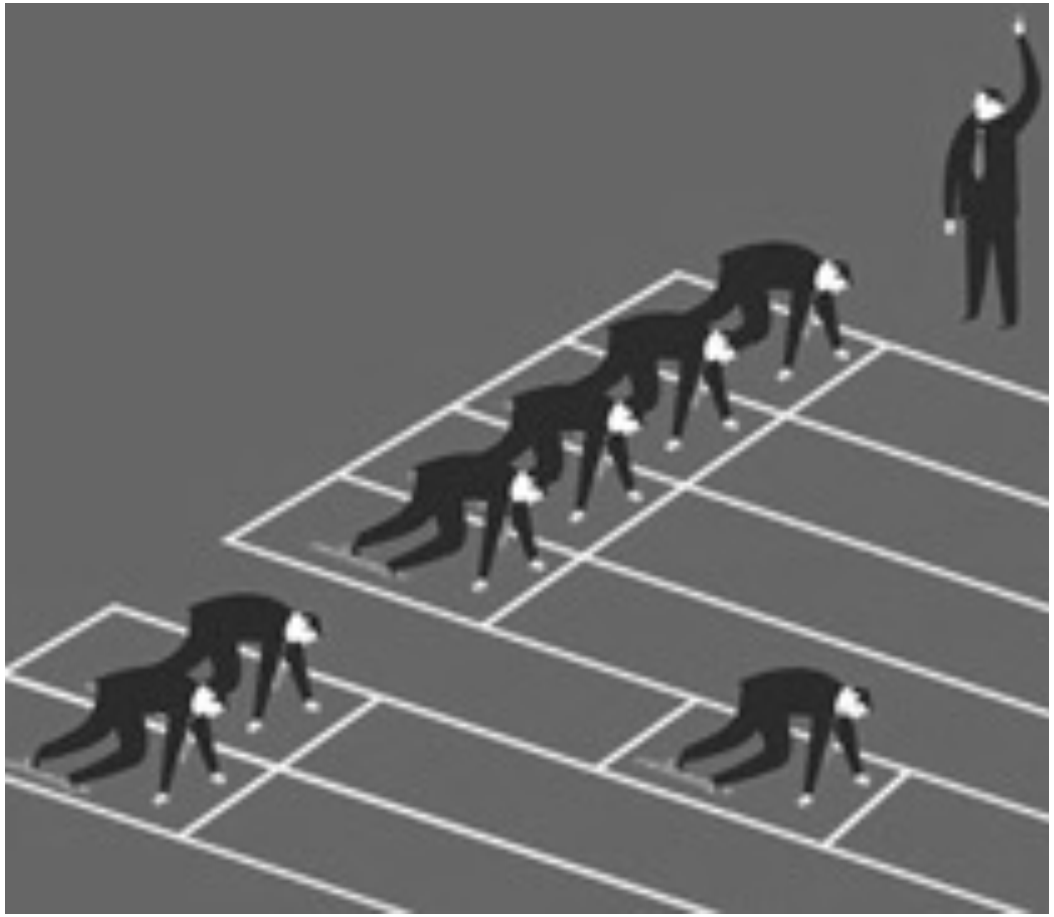
President	Council (10 members) – decision body	Direction of Competition (investigative body)

Competences

National / Autonomous authorities	Implementation of the LDC and european regulations (Reg. 1/2003)

Decisions

Appealables in the administrative court (Audiencia Nac. – Ch.Adt)	Binding effects to courts	Cannot decide on civil, criminal or labour aspects



Unfair Competition Law

Spanish regulation

- Act 3/1991, 10 January, on Unfair Competition
- General Advertising Act (act 34/1988, 11 November)

Connections with Antitrust Law (art. 3 LDC)

Scope of the regulation

- Goals (art. 1):
  - "Protection of competition in the interest of all the agents taking part in the market"
- Requirements to consider an act as unfair:
  - It takes place in the market
  - With the aim to compete
- Subjective scope (art. 3):
  - Businessmen, professionals and any other agents taking part in the market
- GENERAL RULE:
  - "Any behaviour that is objectively contrary to the requirements of good faith"
  - Art. 4 LCD

Forbidden behaviours
-General prohibition clause-

- **Disloyalty between businessmen**

"It shall be deemed unfair any behaviour that is objectivelly contrary to the requirements of good faith"

- **Disloyalty between businessmen and consumers or users**

Unfair: practices contrary to the entrepreneur's good faith that does not cover the duty of profesional diligence + it may distort the behaviour of an average consumer

Entrepreneur's good faith: The level of expertice, capacity and special care that are expected of a businessman according to the honest practices in the market, that distort or may significantly distort the economic behaviour of an average consumer

Forbidden practices

- Misleading practices
- Confusion practices
- Misleading omissions
- Aggresive practices
- Acts of denigration
- Acts of comparison
- Imitations
- Exploitation of other's reputation
- Violation of secrets
- Induction to the breach of contracts
- Breach of regulations
- Discrimination and abuse of economic dependence
- Sales at a loss (selling bellow cost)

Legal protection – Art. 32 LDC

Against the acts of unfair competition, including illegal advertising, the following actions may be brought:

- Action for the **declaration** of unfairness
- Action for **injuction** of the unfair act or of prohibition of its future repetition (cease and desist)
- Action for the **removal of the effects** produced by the unfair acting
- Action for the **rectification** of the misleading, incorrect or false information
- Action for the **compensation of damages** suffered as a consequence of the unfair conduct
- Action against the **unjustified enrichment**

Along with that, the publication of the judgement.

The next challenge for competition Law

- Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM(2020) 842 final

Foundations of the DMA

Consider the Digital Market as a "Regulated sector"

Only covers the so-called Gatekeepers

Providing core platform services

- Online intermediation services (*e.g. Amazon*)
- **Search engines** (*e.g. Google*)
- Social Network Services (*ej. Facebook*)
- Video Exchange Platforms (*ej. Youtube, Netflix…*)
- Interpersonal communication services independent from numeration (*e.g. Whatsapp*)
- Operation System (*e.g. Windows, iOS*)
- Cloud Computing Services (*e.g. Google Cloud, Amazon AWS, MS Azure…*)
- Advertising services, ad intermediation and exchanges (*e.g. Google, IG…*)

Thank you!
Salamat!

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