European Competition Law

Training for Judges from Kosovo

Pristina, 27-29 October 2025

EXCELLENCE IN EUROPEAN LAW

Speakers

Enver Fejzullahu, Executive Director at Kosovo Academy of Justice, Pristina

Małgorzata Kozak, Assistant Professor, Utrecht University

Manuel Kellerbauer, Legal Adviser, Legal Service, European Commission, Brussels

David Lekić, Slovenian Competition Protection Agency, Ljubljana

Ljiljana Pavlic, Chief Economic Advisor, Croatian Competition Protection Agency, Zagreb

Key topics

- The role of judges
- Market definition
- Economic evidence
- Digital markets
- Issues in Article 101 TFEU enforcement
- Abuse of dominance in traditional and digital markets
- Proving harm and calculating damages
- Private enforcement of competition law

Language
Albanian

Event number
225DT43

Organisers
Dr Virginia Pavel (ERA) in cooperation with the Croatian Judicial Academy and the Judicial Training Centre of Slovenia

Co-funded by the European Union

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European Competition Law Training for Judges from Kosovo

Monday, 27 October 2025

08:30 Arrival and registration of participants

08:45 **Opening of the seminar**
Virginia Pavel, Enver Fejzullahu

I. Judicial perspectives on market definition and economic evidence

09:00 **The evolving role of the judiciary in competition law**
Manuel Kellerbauer

09:30 Discussion

09:45 **Competition law at the crossroads: fundamental rights, consumer protection and regulated industries**
Manuel Kellerbauer

10:15 Discussion

10:30 Coffee break

11:00 **Navigating market definition**
- Principles and economic concepts
- Implications for judicial decision-making
- Current trends and challenges in market definition (New Market Definition Notice and its Implications, New VBER, Revised Horizontal Guidelines)
- Market definition in Court: areas of commonly contested grounds

Ljiljana Pavlic

12:00 Discussion

12:15 Lunch

II. Article 101 TFEU in practice: market definition, enforcement, and judicial challenges

13:30 **Market definition in the digital era: adapting to transformations**
- Characteristics of digital markets
- Adapting traditional tools
- Challenges in assessing market power
- Interaction between competition law and regulation

Manuel Kellerbauer

14:30 Discussion

14:45 **Understanding economic evidence**
- Simplifying economic tests used in market definition for legal decision-making
- Meaning and admissibility of econometric evidence in courts
- Evaluating the quality and reliability of economic evidence
- Interpreting data in market definition and abuse of dominance cases

Ljiljana Pavlic

15:30 Discussion

16:00 Coffee break

16:30 **Case study: defining markets in complex cases**
Ljiljana Pavlic

17:15 End of the first seminar day

19:30 Dinner

Objective

This seminar aims to equip national judges with a comprehensive update on key developments in EU competition law, focusing on market definition, economic evidence, and the latest trends in antitrust enforcement. Through expert insights and practical case studies, judges will gain a deeper understanding of complex competition law issues, including digital markets, abuse of dominance, and private enforcement. In doing so, the seminar will aim at raising awareness among national judges on enforcement in the area of public and private competition law and at improving their capacity to handle antitrust cases.

You will learn about…

- the role of judges in applying competition law
- new rules and challenges in market definition
- assessing economic evidence in competition cases
- competition law in digital markets
- key issues in Article 101 TFEU enforcement
- abuse of dominance in traditional and digital markets
- antitrust concerns in labour markets
- proving harm and calculating damages in private enforcement

Venue

Hotel Sirius
Agim Ramadani 10000, Pristina

Who should attend?

Judges, prosecutors, apprentice judges, and the court staff from Kosovo.

About the project

The seminar is part of a large-scale project to provide training on EU competition law to national judges from Kosovo and North Macedonia.

Tuesday, 28 October 2025

08:45 Arrival and registration of participants

III. Ensuring effective antitrust application: proof standards and practical challenges

09:00 **Article 101 TFEU enforcement – part 1. Horizontal agreements**
- Principles and exceptions
- Current trends and challenges in Art. 101 evaluation
- Art. 101 TFEU in Court: areas of commonly contested ground

Manuel Kellerbauer

09:45 Discussion

10:00 **Article 101 TFEU enforcement – part 2. Vertical agreements**
- Principles and exceptions
- Current trends and challenges in Art. 101 TFEU evaluation
- Art. 101 TFEU in Court: areas of commonly contested ground

Małgorzata Kozak

11:00 Discussion

11:15 Coffee break

11:30 **Burden of proof and evidentiary standards**
- Burden of proof in art. 101 TFEU – rule and exceptions
- Sufficient proof of an anticompetitive agreement
- Sufficient proof of a concerted practice

David Lekić

12:00 Discussion

12:15 Lunch

IV. Practical enforcement in Articles 101 and 102 TFEU

13:30 **Practical workshop – the steps of evaluating an Article 101 TFEU infringement**

Małgorzata Kozak

14:45 Coffee break

15:15 **Article 102 TFEU enforcement**
- Principles and exceptions
- Exclusionary conduct and theories of harm — how to distinguish competition on the merits from abuse
- Current trends and challenges in Article 102 TFEU evaluation

Ljiljana Pavlic

16:15 Discussion

16:30 **Assessing objective justifications and efficiency defences under Article 102 TFEU**
- Types of defences
- Burden and standard of proof
- Case law insights
- How to assess proportionality

David Lekić

17:30 Discussion

17:45 End of the second seminar day

Your contacts

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Co-funded by the European Union

Wednesday, 29 October 2025

08:15 Arrival and registration of participants

V. Evolving challenges in Articles 101 and 102 TFEU

09:00 **Practical workshop: the steps of evaluating an Article 102 TFEU infringement**

- Interactive session**:** applying updated guidance and theories of harm to cases
- Discussion in plenary

Małgorzata Kozak

10:15 Discussion

10:30 **Private enforcement of competition law: ensuring effective redress**

- Legal framework and role of national courts
- Burden of proof and evidentiary standards
- Interaction with public enforcement
- Quantification of harm and damages assessment
- Collective actions and representative claims

David Lekić

11:30 Discussion

11:45 Coffee break

12:15 **Practical workshop – evaluation of damages**

Małgorzata Kozak

13:30 Light lunch

14:30 End of the seminar

European Competition Law Training for Judges from Kosovo

Dr. Manuel Kellerbauer
Legal Adviser at the Legal Service of the European Commission

The opinions expressed are those of the speakers. They do not necessarily reflect the views of the European Commission. Company conduct is referred to for illustrative purposes and does not necessarily reflect companies' actual conduct.

EU Competition Law Part I: Introduction

I. The evolving role of the judiciary in competition law

II. Competition law at the crossroads: fundamental rights, consumer protection and regulated industries

III. Market definition in the digital era: adapting to transformations
- Characteristics of digital markets
- Adapting traditional tools
- Challenges in assessing market power
- Interaction between competition law and regulation

IV. Article 101 TFEU enforcement – Horizontal agreements
- Principles and exceptions
- Current trends and challenges

I. The evolving role of the judiciary

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- Jurisdictions and Proceedings
- Timeline
  - 1960s-1989
  - 1990-2010
  - 2011-present
  - Future Challenges

I. The evolving role of the judiciary

EU Competition Law: Proceedings and Jurisdictions

- **Proceedings before EU Courts:**
  - Actions for Annulment against Commission decisions
  - Interim Measures if danger of serious irreparable harm
  - Preliminary Rulings upon request by Member States‘ courts
- **Proceedings before National Courts**
  - Against a decision of a national competition authority
  - Private Enforcement of EU competition rules
- **Proceedings before European Court of Human Rights**

I. The evolving role of the judiciary

1960s to 1989:

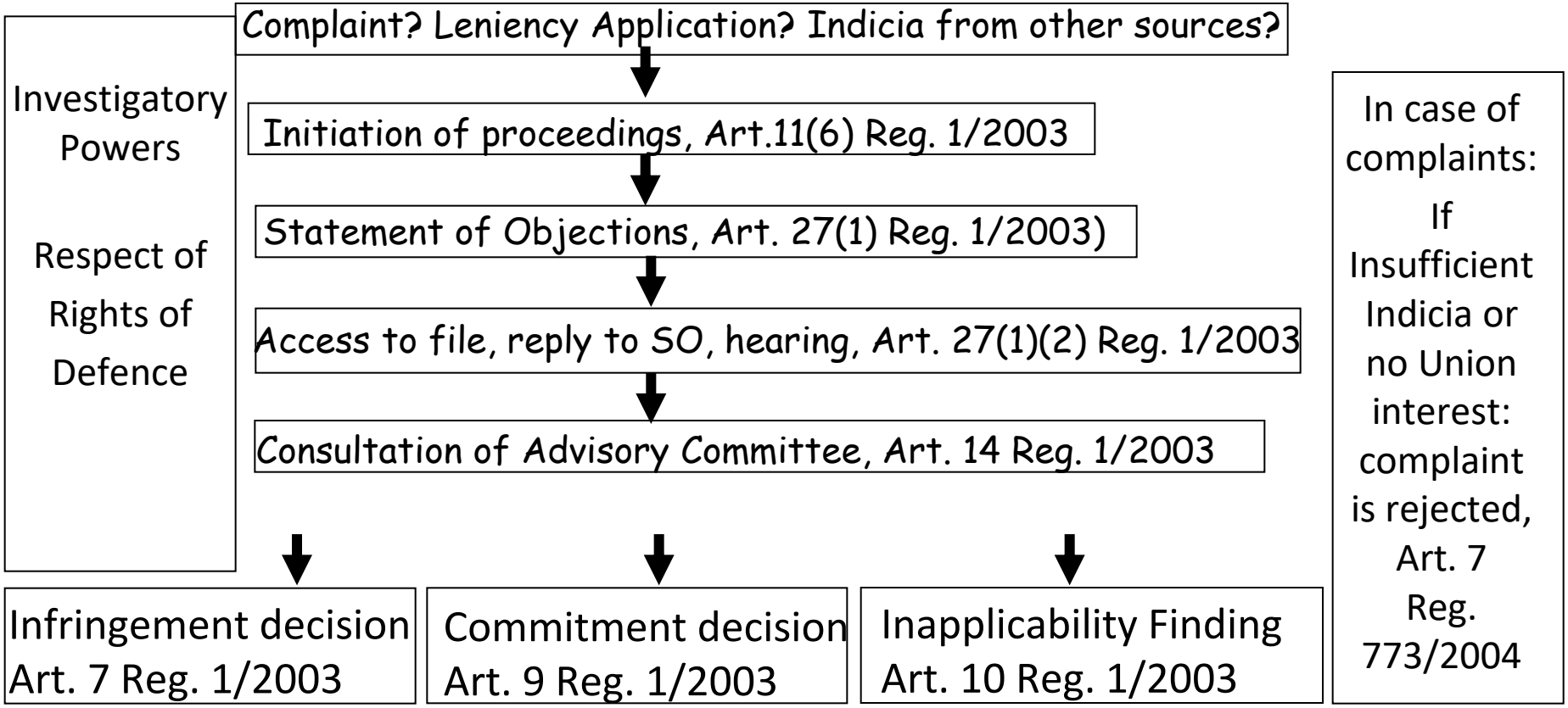
- CJEU accepts that Commission acts both as an **investigator and decision-maker**;
- The CJEU mostly exercises self-restraint, but at times also unlimited jurisdiction to **reduce fines** (like in Pioneer, Cases C-100-103/80);
- Early cases (like Consten & Grundig Case C-56/64) **help establish the groundwork** of Articles 101 and 102, but the Commission shapes the policy.

I. The evolving role of the judiciary

1990 to 2010

- EU Courts play a more assertive role in annulling decisions for procedural defects, checking economic reasoning and proportionality of fines.
- Cases like Solvay (T-30/91); Airtours (T-342/99) or Schneider/Legrand (T-310/01) showcase enhanced judicial scrutiny including over rights of defence and complex economic assessments.

The Main Steps of a Commission Antitrust Investigation



I. The evolving role of the judiciary

2011 – present:

- EU Courts exercise intensive review over both substance and procedure, including on fundamental rights (incl. ECHR) and due process.
- Key judgments like Intel (C-413/14 P; C-240/22 P) or Qualcomm (T-235/18) reflect a shift towards a more economic approach to Art. 102 TFEU, requiring the Commission to consider all relevant evidence, and to bullet-proof economic analyses.

I. The evolving role of the judiciary

Future Challenges :

1) **Evidence regarding data used for economic analyses**
   "precise and consistent evidence to support the firm conviction that the infringement was committed"
   Toshiba Samsung Storage, T-8/16, § 385

2) **Knowledge problem when establishing certain data**
   "taking into account [its] costs and prices enables [the dominant undertaking] to assess the lawfulness of its own conduct, which is consistent with its special responsibility under Article 102"
   Telia Sonera, C-52/09, § 44

3) **So called "Non-quantifiable Factors"**

I. The evolving role of the judiciary

Future Challenges:

"The move towards an effects-based enforcement of Art.102 TFEU raises the question of whether the heightened substantive legal standard that the Union Courts have accorded to it may inadvertently lead to undesirable outcomes"

Colleagues from Commission DG Competition (Competition Policy Brief, March 2023, p.4)

The Commission "made its own misery" by overstating the importance of the as-efficient competitor in the enforcement priorities it published in 2009

Their Director General Olivier Guersent (N. Hirst, MLex Report of 27 March 2023)

II. Competition law at the crossroads

fundamental rights, consumer protection, regulated industries

II. Comp. Crossroads: Fundamental Rights

- The Commission's dual role (investigator + decision-maker) and its compatibility with **Article 6 ECHR**.
- Impact of **Fundamental Rights** on enforcement (e.g. fair trial, right to be heard, right to privacy).
- Balancing **efficiency vs individual rights** — lessons from cases like *Menarini*, *Qualcomm* or *Deutsche Bahn*.

1. The Right to a Fair Trial in Art. 6 ECHR

Competition Authority (CA) both investigates and imposes sanctions. Is this **compatible with the European Convention of Human Rights?**

- Fines imposed by CAs are **criminal charges** (Art. 6 (1) ECHR), albeit outside the "hard core" of criminal law.
- Compatible with ECHR if judicial body has **full jurisdiction** to quash the CA decision on ground of all errors of fact and law Menarini v. Italy (Appl. 43509/08), § § 38–44, 58–59

➢ **This condition is met** for fines imposed by the Commission as CA. See Art. 263 TFEU, Art. 31 Reg. 1/2003.

Read: Wils, The Compatibility with Fundamental Rights of the EU Antitrust Enforcement, World Competition 37, no. 1 (2014): 5–26.

The Right to be Heard

Decisions must only be based on elements of fact and law on which parties were able to make known their views

Art. 27 Reg. 1/2003, general principle of EU law , Art. 41(2) EU CFR

- Parties are notified a "Statement of Objections“ (‘SO’);
- Parties are granted access to file;
- Parties can comment in writing and at a formal oral hearing;

Breaches lead to annulment of Commission Decision
if they could have had an impact on outcome of procedure.
a “slight chance” suffices.

C-265/17 P, United Parcel Service, § 56 (re merger); *T-235/18, Qualcomm, § 295: knowledge of information provided to the Commission at non-recorded meetings with third parties could have been relevant for the applicant’s defence*

Right to Respect for Home, Art. 8 ECHR

Under Art. 8 ECHR, business premises can be inspected if there are sufficient safeguards against abuse

ECHR, Posevini v. Bulgaria, 63638/14 [2017], § 69**;** See also Naumenko v. Latvia, App. 50805/14 [2022], § 45 et seq.; **C-693/20, Intermarché, § § 32 et seq.**

COM inspections are Art 8-lawful in view of following safeguards:

- **Statement of reasons** limits scope of inspection decisions
- **Rights of Defence** must be safeguarded
- Commission **may not use force** to carry out inspections
- Intervention of national authorities in case of opposition triggers **national review mechanisms**
- **Ex post facto remedies before EU Courts** exist, they can lead to exclusion of evidence or damages.
  See cases T-289/11, § § 64-113; C-583/13 P, § §31-34 Deutsche Bahn

II. Comp. Crossroads: Consumer Protection

- Private enforcement and facilitation of damages claims under the Damages Directive (2014/104/EU)

- Consumer welfare as a goal under Article 102 TFEU – to the advantage of dominant undertakings?

Private Enforcement and facilitation of damage claims

- **Art. 101 (2) TFEU: "Any agreement or decisions prohibited pursuant to this Article shall be *automatically void„***
- **"Art. 101 (1) and 102 produce *direct effects* in relations between individuals and create rights for the individuals concerned which the national courts must safeguard" (ECJ Case 127/73 (*BRT and SABAM* [1974] ECR 51, at 16))**
- **Art. 101 (3) TFEU directly applicable as of 1/5/2004: cf. Art. 1 (1)-(3) Reg. 1/2003**

Private Enforcement and facilitation of damage claims

- In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed."
  (ECJ, Joined Cases C-295/04 to C-298/04, Manfredi, para. 64)
- See also Recital 11 Damages Directive:
  All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. […]

Art. 102 TFEU and consumer protection

Article 102 TFEU does not seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market

Post Danmark, C-209/10, § 21; Intel C-413/14, § 133; C-240/22 P, Intel § 26

Less efficient competitors are “less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation."

Post Danmark, C-209/10, § 22, 38

Art. 102 TFEU and consumer protection

Avoiding needless restrictions of company conduct:

As-efficient-competitor approach avoids the needless protection of competitors that have nothing in store for consumers

Challenge: How to determine whether a competitor is attractive to consumers from the point of view of price, choice, quality or innovation?

III. Comp. Crossroads: Regulated Industries

Sectoral regulation (telecoms, energy, digital platforms etc.) complements competition law, e.g.

- Case law on essential facilities and access obligations (Bronner, Microsoft, Slovak Telecom).
- The Digital Markets Act (DMA) and its relationship with Article 102 TFEU.

Refusal to Supply: Legal Test

According to the legal test laid down by the Court of Justice in ***Oscar Bronner***, refusal to grant access to infrastructure is only abusive if:

(i) the infrastructure is indispensable to carry out the business of the party requesting access; (economically unviable to duplicate at smaller scale is insufficient)

(ii) the refusal is likely to eliminate all effective competition in a downstream or neighbouring market;

(iii) the refusal cannot be objectively justified

C-7/97, *Oscar Bronner* (nationwide home-delivery scheme for newspapers)

Where **an IP right** is at stake, the refusal must in addition prevent the **appearance of a new product** for which there is potential consumer demand.

Read T-201/04 Microsoft, § § 332-334; T-301/04 Clearstream, § § 144-149.

III. Comp. Crossroads: Regulated Industries

When there is a regulatory obligation (such as under the EU telecoms regulatory framework) for the dominant operator to grant access to its infrastructure, the classical Bronner indispensability test does not apply in same way.

C-165/19 P Slovak Telekom, paras 45-59.

Lack of GDPR compliance indicates that the dominant undertaking is not competing on the merits and obtains an unfair competitive advantage, thereby amounting to an exploitative abuse within the meaning of Art. 102 TFEU

C-252/21 *Meta Platforms* (facebook), para 47

III. Market definition in the digital era

III. Market Definition in Digital Era

Traditional Tools still apply but may need adaptation

- Market definition is the first step in assessing dominance (Art. 102 TFEU), certain agreements (Art. 101 TFEU) and mergers.
- It helps identify market shares/power, substitutability, and competitive constraints.
- In digital markets, boundaries blur — products are often “free,” multi-sided, and constantly evolving.
- Traditional SSNIP test (small but significant non-transitory increase in price) does not always fit easily.

Why do we define markets?

Market definition often determines outcome:

- Procedural consequences (e.g. in EU merger control)
- Shapes substantive analysis, in particular:
  - Dominant Position (Art. 102 TFEU)
  - Appreciable effect of restricting competition (Art. 101 TFEU)
  - Safe harbour (Block Exemption Regulations)
  - Compatibility with Internal Market (EU Merger Control)

Demand and supply side substitution

- **Demand Side Substitution (product market)**

  Starting point and most effective disciplinary force

  - Can Customer switch to other product or service?
  - Relevant factors: product characteristics; intended use; preferences; image of product, price.

- **Supply Side Substitution**

  Immediacy and effectiveness must be equivalent to DSS

  - Can supplier switch product or service that customer needs?
  - Relevant factors: Time and costs incurred for switching

Supply side substitution in digital era

Nowadays, customers may take into account whether a product is manufactured using more or less sustainable technology. Differences between distribution channels, including online and offline channels, or the regulatory framework may also be relevant. Furthermore, customer choices may be subject to behavioural biases, such as a tendency to choose the default option provided.

2024 Commission Market definition Notice, § 50

SSNIP Test

A tool for assessing demand substitution

*We postulate a hypothetical **s**mall but **s**ignificant (5-10%) **n**on-transitory **i**ncrease in **p**rices by a hypothetical monopolist*

What would customers do to react to that price increase?

Switch to substitutes or to suppliers located elsewhere?

How many would switch? Enough to render increase unprofitable?

NB: no obligation to carry out SSNIP test, other types of evidence also valid

2024 Commission Market definition Notice, § 31 with further references

Market definition: the Digital Era

Network effects/multisided markets

Multi-sided platforms support interactions between different groups of users, creating a situation where the demand from one group of users has an influence on the demand from the other groups.

Examples:
Apple App Store (app developers and users);
Amazon market place (merchants and customers)

For more info see COM 2024 notice on market definition, § 18a, 30, 57, 94 et seq.

Market definition: the Digital Era

Network effects/multisided markets

When defining markets, the indirect network effects between user groups on different sides of the platform need to be taken into account.

When such effects are strong and the services provided to the different sides are closely linked or essential to a single transaction a price change on one side significantly affects demand on the other side, so competition takes place on the platform as a whole.

=> The relevant product market includes **all user groups** (e.g., both users and developers).

Market definition: the Digital Era

Multi-sided platforms may supply a product to a user group at **a zero monetary price**, or even at a negative price, in order to attract users to products offered on the other sides of the platform and monetise their products on those sides.

Zero monetary prices may be an integral part of multi-sided platforms' business strategy. The fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product.

Market definition: the Digital Era

For zero price products, non-price parameters such as product functionalities, intended use, evidence of past or hypothetical substitution, barriers or costs of switching, such as interoperability with other products, data portability and licensing features are particularly relevant.

Alternatives to the SSNIP, may consist in assessing the switching behaviour of customers of the zero-price product in response to a small but significant non-transitory decrease of quality ('SSNDQ').

See AT.40099 – Google Android, § 286 et seq; Case T-604/18, § 174-181

Interaction with Digital Markets Act

- **Purpose:**
  To regulate *"gatekeepers"* — large digital platforms that control access between business users and consumers in core platform services (search engines, app stores, social networks, etc.).
- **Goal:**
  Ensure **contestability** and **fairness** in digital markets by imposing *ex ante* obligations — before anti-competitive conduct occurs.
- **Core idea:**
  Rather than reacting to abuses (as under Article 102 TFEU), the DMA **prevents them proactively** through clear, prescriptive rules.

Gatekeeper Designations

Gatekeeper	Core Platform Service
Alphabet	SOCIAL NETWORK: Tiktok, Facebook, Instagram, LinkedIn
Amazon	INTERMEDIATION: Google Maps, Google Play, Google Shopping, Amazon Marketplace, App Store, Meta Marketplace
Apple	ADS: Google, Amazon, Meta
ByteDance	BROWSER: Chrome, Safari
Meta	OPERATING SYSTEM: Google Android, iOS, Windows PC OS
Microsoft	N-IICS: Whatsapp, Messenger
	VIDEO SHARING: Youtube
	SEARCH: Google Search

Number-Independent Interpersonal Communication Services (NI-ICS) are interpersonal communication services which do not connect with publicly assigned numbering resources

Interaction with Digital Markets Act

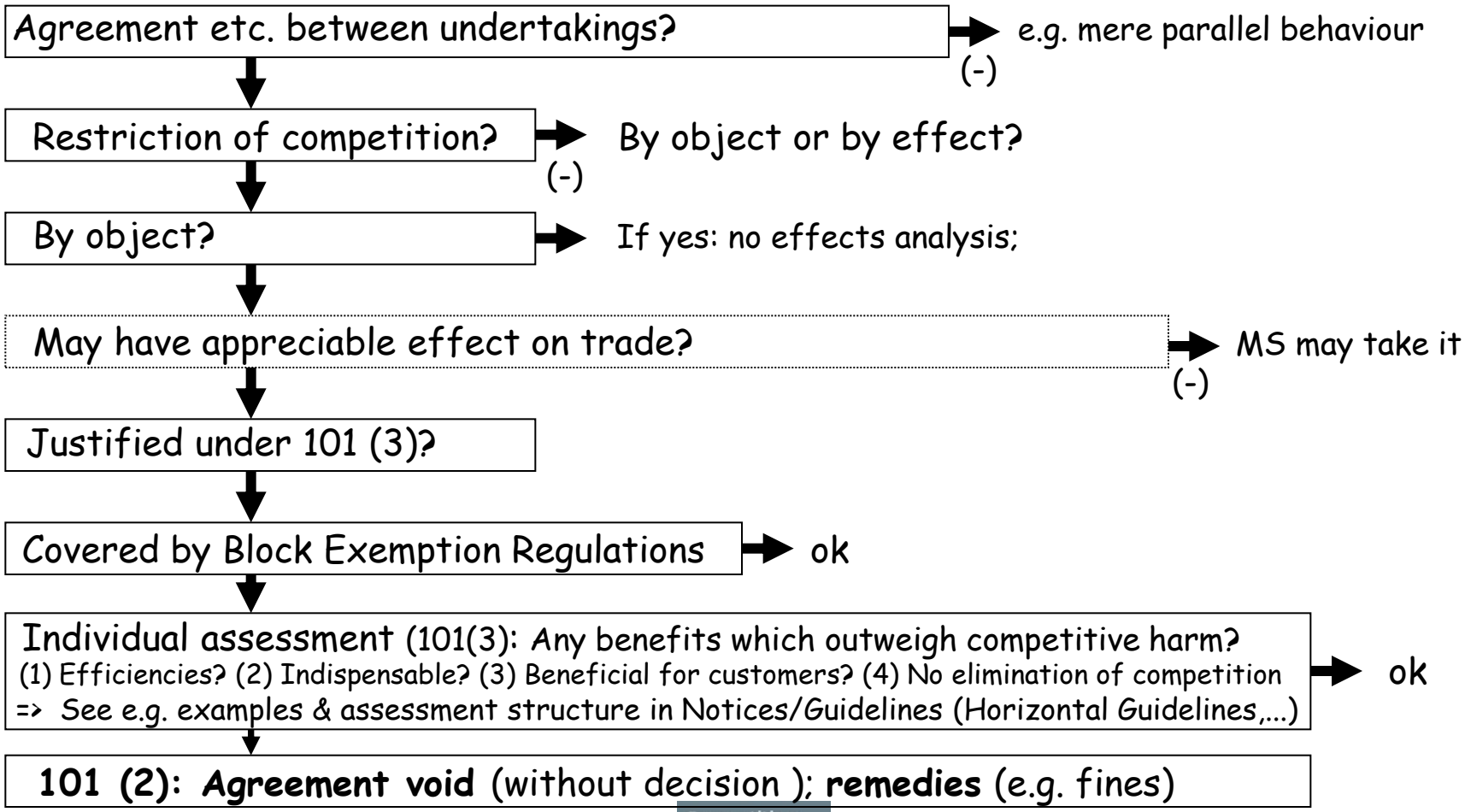
Articles 101 and 102 TFEU and the corresponding national competition rules […] have as their objective the protection of undistorted competition on the market.

[**The DMA**] pursues an **objective** that is **complementary to, but different** […] which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by [the DMA] on competition on a given market. [The DMA] therefore […] **should apply without prejudice to their application**.

DMA, recital 10, emphasis added.

IV. Article 101 TFEU enforcement – Horizontal agreements

Article 101 - Overview



2. Agreement/Association Decision/Concerted practice

a) Agreement* between *undertakings

- **in order for there to be an agreement it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way**
- **existence of the *concurrence of wills* between at least two parties, the form in which it is manifested being unimportant as long as it constitutes the faithful expression of the parties's intention**

(Read T-41/96, Bayer, at para. 67, 69)

2. Agreement/Association Decision/Concerted practice

a) Factors that do not exclude the finding of an agreement

- **an undertaking was *forced* into an agreement by other undertaking**
- **the agreement was *never implemented***
- **the individual that entered into the agreement *did not have the authority* to do so**
- **formal agreement has not been reached on all matters**

2. Agreement/Association Decision/Concerted practice

Standard of Proof:

Evidence must be sufficiently credible, precise and consistent to support the firm conviction that the undertaking has committed the infringement.

But: “The existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.”

Case C-441/11 P, *Verhuizingen Coppens*, paragraph 70 and the case-law cited

2. Agreement/Association Decision/Concerted practice

Concerted practice

- **a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition**

(cf. C-48 etc/69, ICI, at para. 64, C-8/08 T-Mobile NL, para. 26)

=> It covers any form of contact between competitors whereby uncertainty as to each other's conduct on the market is eliminated

Concerted Practice (I)

A Concerted practice is a form of coordination that

without reaching the stage of an agreement
knowingly substitutes practical cooperation between undertakings for the risks of competition

See Case 48/69 ICI, § 64, Case C-8/08 T-Mobile NL, § 26

⇒It covers any form of cooperation with competitors whereby uncertainty as to each other's conduct is eliminated

Concerted Practice (I)

Smart Adaptation as a Concerted Practice?

Concerted Practice (II)

Undertakings may adapt themselves intelligently to the existing or anticipated conduct of their competitors

Joined Cases C-89/85 etc. Wood Pulp II, paras 61-72

Decisive regarding parallel conduct:

<u>Can it be explained otherwise than by concertation?</u>

See Case T-442/08 CISAC; similar territorial restrictions as a result of a logical and independent decision of each collecting society.

Concerted Practice (III)

The constituent elements of a concerted practice

1)A form of contact between competitors

2)Cooperation is knowingly substituted for risks of competition

3)Subsequent conduct on the market as a consequence

See Horizontal Cooperation Guidelines, paras 60-63 with case law references

The presumption of ensuing conduct

In cases of exchanges with competitors, there is a presumption that conduct will result from the willingness to cooperate

unless

the company can adduce proof that the concertation did not have any influence whatsoever on its own conduct on the market.

e.g. publically distancing/clear statement that it does not wish to receive such data

Concerted Practice: frequently asked questions

What if

–one undertaking discloses its future conduct to a competitor?

–undertaking attends meeting where competitors disclose price plans?

–undertaking makes unilateral press announcement to raise prices?

Concerted Practice: frequently given answers

- **Concerted practice requires reciprocal contacts**
  "*That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.*"
  T-25/95 etc., Cimenteries, § 1849.

- **Attendance at a meeting where competitors disclose pricing plans can be caught by Article 101 TFEU**
  T-202/98 etc. Tate & Lyle § 54.

- **Unilateral public announcements generally no concerted practice <u>unless</u> part of strategy for reaching a common understanding**
  Horizontal guidelines, § 63.

Current challenges: Algorithms

Participation in a meeting where an undertaking discloses pricing plans to its competitors is likely to be caught by Article 101(1), even in the absence of an explicit agreement to raise prices.

In the same vein, introducing a pricing rule in a shared algorithmic tool (*for instance, the lowest price on the relevant online platform(s) or shop(s) +5%, or the price of one competitor -5%),* may be caught by Article 101(1), even in the absence of an explicit agreement to align future pricing.

See Guidelines on applicability of Art. 101 TFEU to horizontal cooperation agreements, § 397

Current challenges: Algorithms

Where an algorithmic pricing tool is used **independently and** on the basis of **publicly available data**, there is generally no concerted practice

Reason: Smart Adaptation is no concerted practice

Challenge: How about AI powerful enough to develop effective coordination strategies?

Current challenges: Algorithms

When an undertaking receives commercially sensitive information from a competitor (be it in a meeting, by phone, electronically *or as input in an algorithmic tool*), it will be presumed to take account of such information and adapt its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such information or reports it to the administrative authorities

Guidelines on applicability of Art. 101 TFEU to horizontal cooperation agreements, § 397

Current challenges: Algorithms

Collision by Code:

Competitors on the use of algorithms that take advantage of sensitive data.

See Case C-74/14 Eturas regarding travel agencies using a common computerised booking system, which generally caps the discounts they offered to customers at 3%: **concerted practice**

Current challenges: Algorithms

Hub and Spoke:

Exchanges of commercially sensitive information between competitors can take place via a third party (for instance a third party service provider, including a platform or third party optimisation tool provider).

An online platform can act as a hub where it facilitates, coordinates or enforces information exchanges between business users of the platform, for example, to secure certain margins or price levels.

Guidelines on applicability of Art. 101 TFEU to horizontal cooperation agreements, § 402

Current challenges: Algorithms

- can generate efficiencies, reduce costs and barriers to entry.
- can also be used to monitor (pre-existing) anti-competitive agreements between competitors, detect price deviations in real time and make punishment mechanisms more effective.
- Can be used to agree on essential parameters of competition to facilitate collusion (collusion by code).

Main principles:

- if pricing practices are illegal when implemented offline, they will most likely also be illegal when implemented online.
- Undertakings involved in unlawful pricing practices cannot avoid liability on the grounds that their prices were determined by algorithms. Algorithms are comparable to employees or outside consultant working under a firm's "direction or control"

European Competition Law Training for Judges from Kosovo

Thank you for your attention!

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NAVIGATING MARKET DEFINITION

Ljiljana Pavlic
Chief Economic Advisor, Croatian Competition Agency

Training for Judges from Kosovo
Pristina, 27. 10. 2025.

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Outline of the session

The basic principles

Hypothetical monopolist test

Demand-side substitutability

Supply-side substitutability

Evidence gathering

Example of bidding market

Current trends and challenges in market definition

Judiciary review

The basic principles

- Competition happens in a market – its definition is crucial for application of antitrust and merger control rules
- Inaccurate market definition can lead to an incorrect legal assessment
- Market power does not exist in the abstract

  It exists in relation to a market
- Relevant market comprises a product or group of products or services (interchangeable/substitutable) and the geographic area which provide competitive constraint on the products/services and area under investigation
- Two dimensions of the relevant market: the product market and the geographic market

The basic principles

- The Market Definition Notice sets out the main criteria and evidence used by the Commission to define relevant markets when it enforces EU competition law

- Market definition is a tool that the Commission uses to identify and define the boundaries of competition between undertakings

- The main purpose of market definition is to identify in a systematic way the effective and immediate competitive constraints faced by the undertakings involved when they offer particular products in a particular area

- Market definition leads to the identification of the relevant competitors of the undertaking(s) involved when they offer those products, as well as the relevant customers.
- Only products that exert effective and immediate competitive constraints within the relevant timeframe form part of the same relevant market as those of the undertaking(s) involved, while other less effective, or merely potential, constraints are considered as part of the competitive assessment.

The basic principles

- The Market Definition Notice is based on a classical “constraints” approach
- The exercise of market power can be constrained by demand-side substitutability, supply-side substitutability and by potential competition
- Demand side substitutability plays a primary role in market definition, supply side is only relevant in limited circumstances
- Potential competition is not taken into account when defining relevant market, but is relevant in assessing the actual market power of the undertaking under investigation once the relevant market have been defined
- Market definition is an intermediate tool to structure and facilitate the competitive assessment in appropriate cases and is not a mandatory step in all assessments

The basic principles

The Commission's use of market definition :

(a) in assessments under Article 102 TFEU, the Commission generally defines the relevant market when assessing the existence of a dominant position;

(b) in assessments under the Merger Regulation, the Commission regularly defines the relevant market when assessing the effects on competition of a concentration;

(c) in assessments under Article 101 TFEU, the Commission tends to use market definition when assessing agreements that have as their effect the prevention, restriction or distortion of competition.

- By contrast, the Commission usually does not define the relevant market when assessing agreements that have as their object the prevention, restriction or distortion of competition, such as cartel agreements, and is under no obligation to do so.

Hypothetical monopolist test

The SSNIP test

Small but significant and non-transitory increase in prices (5-10%)

Hypothetical monopolist test

A market is the narrowest collection of products in an area where, for a hypothetical monopolist of these products it would be possible and profitable to implement a SSNIP, where the exercise of market power is possible

SSNIP can only be applied to the competitive price

What is the smallest market worth monopolizing?

Hypothetical monopolist test

Determining smallest relevant market

- Start with focal products of concern – candidate market

Question: Will the hypothetical monopolist be able to increase the price of good in the candidate market by 5-10% above the competitive level

If yes, stop – candidate market is a relevant market

If no, repeat steps by expanding candidate market by adding the next best substitute product until you can define a market that can profitably be monopolized

Consumer demand responses are considered crucial

- Fizzy lemon drinks, next best alternative fizzy orange drinks…

If fizzy lemon drinks market is not worth monopolizing then:

Will the hypothetical monopolist be able to increase the price of fizzy lemon and orange drinks by 5-10% above the competitive level?...

Critical loss

- The amount of switching that makes the price rise unprofitable

5-10% of price rise profitable if higher margin earned on those customers who do not switch is greater than diverted demand (lost profit)

5-10% of price rise not profitable if higher margin earned on those customers who do not switch is lower than diverted demand

In practice – how much is lost

If 100 is lost $=$ 45 to orange flavoured drinks, 30 to cola flavoured drinks, 20 to energy drinks, 5 to water drinks

Diversion ratio from product A to product B identifies the amount of products A lost volume that goes to product B

Diversion ratio from fizzy lemon to orange is 45% (of the 100 lost volumes, 45 went to orange)

Useful for ranking closeness of the substitute to focal product

Demand-side substitutability

- Is the traditional way of defining a market
- Looks at the problem from the side of consumer
- In economic terms, relevant question concerns elasticities
- If price of x is increased by 10%, by which percentage does demand fall? - how much demand shifts away for a price increase
- If drop in demand is big, price rise is not profitable; market for x is not worth monopolizing
- The ability of companies to raise prices (or reduce quality) will depend on the extent to which consumers shift to competing offerings

Demand-side substitutability

- The customers most likely to switch are sometimes called 'marginal' customers and competition depends on the preferences of marginal consumers

- Toothless fallacy in United Brands case

The fallacy is in the logic that a product is a separate market just because some consumers cannot switch. The correct analysis should focus on the marginal consumer, who is the one most likely to switch to a substitute if prices increase.

EC's case against United Brands, which argued bananas were a separate market because "toothless" consumers (babies and the elderly) couldn't switch from them.

We should not fall on the Toothless fallacy mistake

Demand-side substitutability

- The geographic market definition has to be checked against characteristics like

Local or national preferences

Patterns of purchase

Product differentiation

- Would customers switch to suppliers located in other areas in the case of SSNIP?

Evidences

- Geographic market definition - evidence on time/distance customers are ready to travel
- If consumers are willing to travel a certain average time, 15 min, to reach a grocery store, then each store is competitively constrained by every store within 15 min travel time

Not so simple

Possibility that size and capacity of the stores could influence view which stores are competing on the same product market or not

Hypermarkets, small local shops…

- Retail could be local, but also national – chains of substitution

Supply-side substitutability

It looks at how easily producers can substitute away their production as reaction to a price increase

Looks at the problem from the side of the producer

The necessary conditions for the market to be broadened based on supply substitution are that most, if not all, suppliers are able to switch production between products in the range of related products, without incurring significant additional sunk costs or risks, have the incentive to do so when relative prices or demand conditions change, and can offer all products in the same range effectively in the short term

Example of market definition

- Gas station on the motorway constitute separate relevant product market compared to those on regular streets, off motorway
- From demand side – different higher prices on motorway, existence of tolls, premium brands on motorway, time-consuming, burdensome to get off the highway to tank
- From supply side – high entry barriers to open gas station on the motorway, have to bid in tender, lease the land from motorway operator, special permits

Evidence gathering

- Surveys, interviews with customers, request for information

What would they do if the price of good went up by 5-10%?, Which products they consider substitutable? – hypothetical switching, previous switching if any

- Internal documents of companies
- Statistical measures of substitution
- Actual switching behaviour

Impact of action prices, when product is out of stock what is the best alternative customers turn to

Bidding analysis

- Where companies generate substantial part of revenue from tenders it is necessary to identify:

- Which companies bid for, win the same or similar tenders

Analysis	Questions that can be addressed
Participation	○ Is (firm) participation indicative of product fit and of closeness? ○ How often do the parties meet? ○ How concentrated are tenders where the parties meet?
Win / loss	○ How often do the Parties lose to each other? ○ Do the Parties have a significant impact on the probability of each other being awarded a tender?
Probit	○ Does participation by one party affect the probability of the other winning, in econometric analysis (controlling for other factors)?
Margins	○ Are margins affected by participation by the other party (controlling for other factors)? ○ Is the evolution of margin at different stages of the bidding process affected? ○ What is the level of gross margins?

Example of market definition

M.8677 Siemens / Alstom

Product market definition

- The Commission considers that trains capable of speeds equal to and above 250 km/h("high and very high-speed trains") should be considered as a separate product market, distinct from intercity trains which are incapable of delivering the same service speed

- The Commission also considers that the market could be further sub-segmented on the basis of speed, thus distinguishing trains capable of speeds equal to or above 300 km/h ("very high-speed trains") as a narrower relevant market

- However, the question whether the market for high and very high-speed trains should be further segmented on this basis can be left open for the purposes of this Decision as the Transaction raises competition concerns on both conceivable market definitions.

Example of market definition

M.8677 Siemens / Alstom

Geographic market definition

- At least **EEA + Switzerland**
- Different and more stringent technical requirements distinguishing the EEA from the rest of the world, the participation of a different set of competitors when bidding in calls for tenders within the EEA compared to the rest of the world and price differences due to additional costs associated with EEA-specific standards
- Switzerland included – reasons: the similarity in competitors
- Bidding for contracts, geographic vicinity and interconnections, and the existence of similar technical rules

- Possibly **worldwide excluding China, Japan and South Korea** (closed to foreign suppliers)

Example of market definition

M.8677 Siemens / Alstom

Type of analysis	Useful for?	Data available?
Participation and winning rates	Importance of the parties	Y
Conditional participation and winning rates	Closeness	Y
Average number of bidders	Actual market concentration	Y
Impact of Alstom's presence on Siemens' winning probability	Closeness	Y/N

The Market Definition Notice 2024

- The revised Notice is the first update of the text since its adoption in 1997
- It provides greater transparency and predictability for undertakings and takes better account of changes in the economy, at the forefront of which is the development of digital markets

This revised version contains a number of improvements, including:

1.greater consideration of non-price competition parameters, such as innovation and the quality of products and services, including environmental sustainability, durability;

2.new guidelines in relation to digital markets and their specific characteristics (multisided markets, indirect network effects and digital ecosystems);

3.clarifications regarding the Commission's approach to highly innovative markets;

4.further explanations on the quantitative techniques, such as the SSNIP (small but significant and non-transitory price increase) test, that the Commission may use when defining a market;

5.expanded guidance on possible sources of evidence (such as internal documents of market participants) and how they are to be assessed by the Commission

Vertical Block Exemption Regulation VBER

- Vertical restraints may enter the safe harbour of the VBER if they fulfil two requirements: the respective agreement must be free from hardcore restrictions and the parties' market shares must not exceed 30% on the relevant market

- If we need market shares, we must establish the market they are calculated on

- Article 3 and Article 8 VBER, together with Chapter 5 of the Vertical Guidelines and the Market Definition Notice, stipulate how to define the relevant market and how to calculate the relevant market shares
- For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

(a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;

(b) the market shares shall be calculated on the basis of data relating to the preceding calendar year

Horizontal Block Exemption Regulation

- On 1 June 2023 the European Commission adopted and published the revised Research and Development Block Exemption Regulation ("**R&D BER**") and Specialisation Block Exemption Regulation ("**Specialisation BER**"), together referred to as the Horizontal Block Exemption Regulations ("**HBERs**"), accompanied by the revised Horizontal Guidelines ("**Guidelines**")

- The Guidelines provide guidance on how to apply the HBERs and how to assess other types of cooperation agreements (such as information exchange, R&D agreements, production agreements, joint purchasing agreements, commercialisation agreements, standardisation agreements and standard terms). The Guidelines also include a new chapter on the assessment of sustainability agreements
- There is increased clarity and flexibility in relation to the calculation of market shares for the purpose of applying the R&D BER, Specialization BER (HBER), including guidance in the Guidelines on how to apply the HBER.
- No amendments have been made in the market share thresholds - 25%, - 20%, the conditions for exemptions, nor to the lists of hardcore and excluded restrictions
- For the purposes of the Specialisation BER, the relevant market means the product and geographic market to which the products produced under the specialisation agreement belong, and, in addition, where those products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for downstream products, the product and geographic markets to which those downstream products belong

Judiciary review

The judiciary has two important functions in the implementation of competition policy: ensuring that procedural due process is observed, and applying the underlying substantive principles of the competition law in a correct and consistent manner. Thus, courts bring economic policy under the rule of law.

(OECD)

Judiciary review

AT.39612 Krka, Tovarna Zdravil |Servier SAS |Laboratoires Servier |Teva Pharmaceuticals Europe B.V. |Biogaran |Teva (UK) Limited |Unichem Laboratories |NICHE GENERICS |Lupin |Mylan

The European Commission's decision (2014)

Through a technology acquisition and a series of patent settlements with generic rivals, Servier implemented a strategy to exclude competitors and delay the entry of cheaper generic cardiovascular medicines to the detriment of public budgets and patients in breach of EU antitrust rules

- The EC adopted an infringement decision, finding that the agreements at issue:
- Constituted restrictions of competition by object and by effect, in breach of the prohibition on anticompetitive agreements under Article 101 of the Treaty on the Functioning of the European Union (TFEU)
- Formed part of an exclusionary strategy implemented by Servier, amounting to an abuse of dominance in breach of Article 102 TFEU
- Perindropil and its generic versions constituted a relevant market and that Servier was dominant in that market
- The EC imposed total fines of EUR427.7 million on Servier and the generic manufacturers

Judiciary review

The General Court's judgment (2018)

- The GC held that the EC, when applying the abuse of dominance rules, had wrongly defined the relevant market as being limited solely to originator and generic versions of perindopril
- In particular, the GC concluded that the EC was wrong to consider that perindopril differed (in terms of therapeutic use) from other ACE inhibitors, underestimated the propensity of patients treated with perindopril to change medicines and attached too much importance to the price factor in analyzing the competitive constraints
- The GC therefore considered that the EC had failed to show that the finished product market was limited to the perindopril molecule alone, when the latter could be exposed to non-price competitive pressures from other medicines of the same therapeutic class
- It ultimately disagreed with the EC's conclusion that Servier held a dominant position in certain markets and annulled the abuse of dominance part of the decision. The EC appealed this aspect of the judgment

Judiciary review

The AG's opinion (2022)

- AG Kokott considered that the GC provided insufficient and contradictory reasoning when it annulled the part of the EC's decision on definition of the relevant market for the purposes of applying the abuse of dominance provisions.
- She considered that the GC was wrong to base its assessment of the relevant market only on the objective characteristics of the products in question, in this case therapeutic substitutability
- In AG Kokott's view, it is also necessary to determine whether such substitutability gives rise to an effective competitive constraint, taking into account the conditions of competition and the structure of demand and supply on the market concerned

Judiciary review

The CJEU's judgment (2024)

- On the definition of the relevant market for the purposes of the abuse of dominance assessment, the CJEU again aligned with the AG and overturned the GC's findings
- It found that the GC was wrong in holding that the relevant market was broader than perindopril
- The CJEU considered that the assessment should not be limited to a functional analysis, emphasizing the importance of analyzing cross-price elasticity of demand for pharmaceutical products, by determining whether consumers of a product subject to a small but permanent price increase would switch to substitute products
- The CJEU concluded that the GC had relied on "incorrect grounds" when finding that the EC defined the relevant market too narrowly. The definition of the relevant market is key to determining whether Servier abused a dominant position via a combination of settling patent disputes with generic challengers and "killer acquisitions" of rival technologies.

Judiciary review

- The CJEU upheld a “narrow” approach to product market definition – in this case, molecule level.
- As regards Servier’s abuse of dominance infringement, the CJ disagreed with the GC’s emphasis on non-price competitive pressures for the purpose of defining the relevant market. The CJ noted that, irrespective of the specific characteristics of the pharmaceutical sector, “*the economic substitutability between medicinal products must be assessed in the light of the shifts in sales between medicinal products intended for the same therapeutic indication, brought about by the changes in the relative prices of those medicinal products*”
- The CJEU therefore referred parts of the case back to the GC to reconsider the abuse of dominance infringement and the applicable fine

Thank you for your attention

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Co-funded by the European Union

UNDERSTANDING ECONOMIC EVIDENCES

Ljiljana Pavlic
Chief Economic Advisor, Croatian Competition Agency

Training for Judges from Kosovo
Pristina, 27. 10. 2025.

aztn

Outline of the session

Introduction to the topic

The use of economics

Data issues

The quantitative techniques

Damages assessment

Right of defence issue

The practice of competition law is very often, if not always, fact-intensive.

“Economic facts” that are needed for an appropriate analysis in competition law are, on top of more circumstantial information and evidence, at some stage gathered and submitted according to econometric methods and models, which not only generate data but also attempt to distil from such numbers the information that is relevant for applying the competition rules.

de Ghelke

The extent to which economic concepts and methods are indeed used and applied vary according to the:

- The set of the legal rules to be applied (e.g., antitrust proceedings or merger control),
- The procedural situation or stages in the proceedings (from the administrative proceedings to appeal proceedings before the competent jurisdictions),
- The nature of the case (ex-ante control of a merger, assessment of the existence of a dominant position, the analysis of contractual clauses, the finding of evidence of cartel behaviour),
- The nature and intensity of judicial review

- The Court of Justice, since its landmark judgment in Technique Minière of 1966, constantly reaffirmed that, in the finding of a restriction of competition, regard must be had to the whole economic context in which the competition would occur in the absence of the agreement concerned

- This includes “the nature and quantity… of the products covered by the agreement” and “the position of the parties on the market for the products concerned”.

Case 56/65 *Société Technique Minière v Maschinenbau Ulm,* [1966]

The use of economics

- The highest intensity of the use of economics, both in terms of volume of data and economic analysis inevitably occurs in the area of merger control, at the stage of the administrative proceedings and in the decisions
- Next in importance for economic assessment, is, by far, the interpretation and enforcement of Article 102 TFEU, abuse of dominance cases, a domain of law where the case law of the Union courts plays a decisive role
- The application of Article 101 TFUE, in contrast, shows much less or quasi no economic reasoning. Economics can be relevant in assessing the “effects” of an agreement or conduct.
- Because cartels are infringements “by object” these cases therefore do not necessitate any in-depth analysis. Much economic analysis will be needed in damage claim disputes.
- Economic reasoning may be required where efficiencies must be demonstrated (andquantified) in the context of an assessment under Article 101 §3 TFUE.

Complex economic assessments

- The definition of a product or service relevant market on the basis of supply- and demand-side elasticity analysis.
- Cost calculation methods in order to determine whether pricing is above average variable costs, total fixed costs or incremental costs
- Methods and tests, including cost and profit margin calculations in order to discern an “as efficient competitor” and its capability to enter the market or remain on it
- The choice of a method of calculation as to the rate of recovery of costs and the application of such method
- The determination of the importance of a contestable market
- The determination of a margin squeeze on the basis of charges and costs of a vertically integrated undertaking
- Methods to determine the likelihood of supra-competitive pricing in case of concentration or market power

Data issues

- Even though many types of data are potentially available, it is often very challenging
- to collect useful and reliable data for analysis of competition matter
- Specific sales, prices and cost data are rarely publicly available
- Companies themselves do not necessarily maintain detailed data on sales or costs
- Accounting data are available but such data can present a number of challenges for economic analysis

Data issues

Issues with accounting data

- The level of aggregation

Accounting reports are usually created to represent aggregative measures of firm performance

The available data may not distinguish between revenues from different products or services offered by the firm; no separate cost information for different products

- Nature of accounting standards

Accounting principles do not necessarily correspond to economic principles in distinguishing between fixed and variable costs

The quantitative techniques

- Price correlation analysis
- Stationarity analysis
- Price elasticity analysis
- Critical loss analysis
- Switching analysis
- Merger simulation
- Price/concentration analysis
- Shock analysis
- Bidding studies
- Damages assessment

Price correlation analysis

- Examines the extent to which the prices of two products move together over time.
- If the price of one good constrains the price of the other, the two price series follow a similar pattern.
- Need to quantify the extent to which price levels move together over time. This is measured by the correlation coefficient.
- Coefficient interpretation:

The correlation coefficient is mathematically defined so that it always varies between +1 (moving perfectly together) and -1 (moving perfectly inversely to one another). A correlation of zero means that there is no statistical association between the two series

Price correlation analysis

Neste/Perrier merger

- The European Commission's initial definition of the relevant product market was **bottled source water**, a view that was contested by Nestlé

- Nestlé argued the market should be **non-alcoholic refreshment beverages**, which includes bottled water and soft drinks
- Bottled water and soft drinks – same or separate relevant market
- After the agency prepared comparable average price series for each brand of beverage in 1,5 l bottle correlations were calculated between different pairs of beverage brands across the various categories of drinks that were potentially competing in the same market

Price correlation analysis

Neste/Perier merger case

Correlation coeficients:

Still-still 0.89

Still-sparkling 0.90

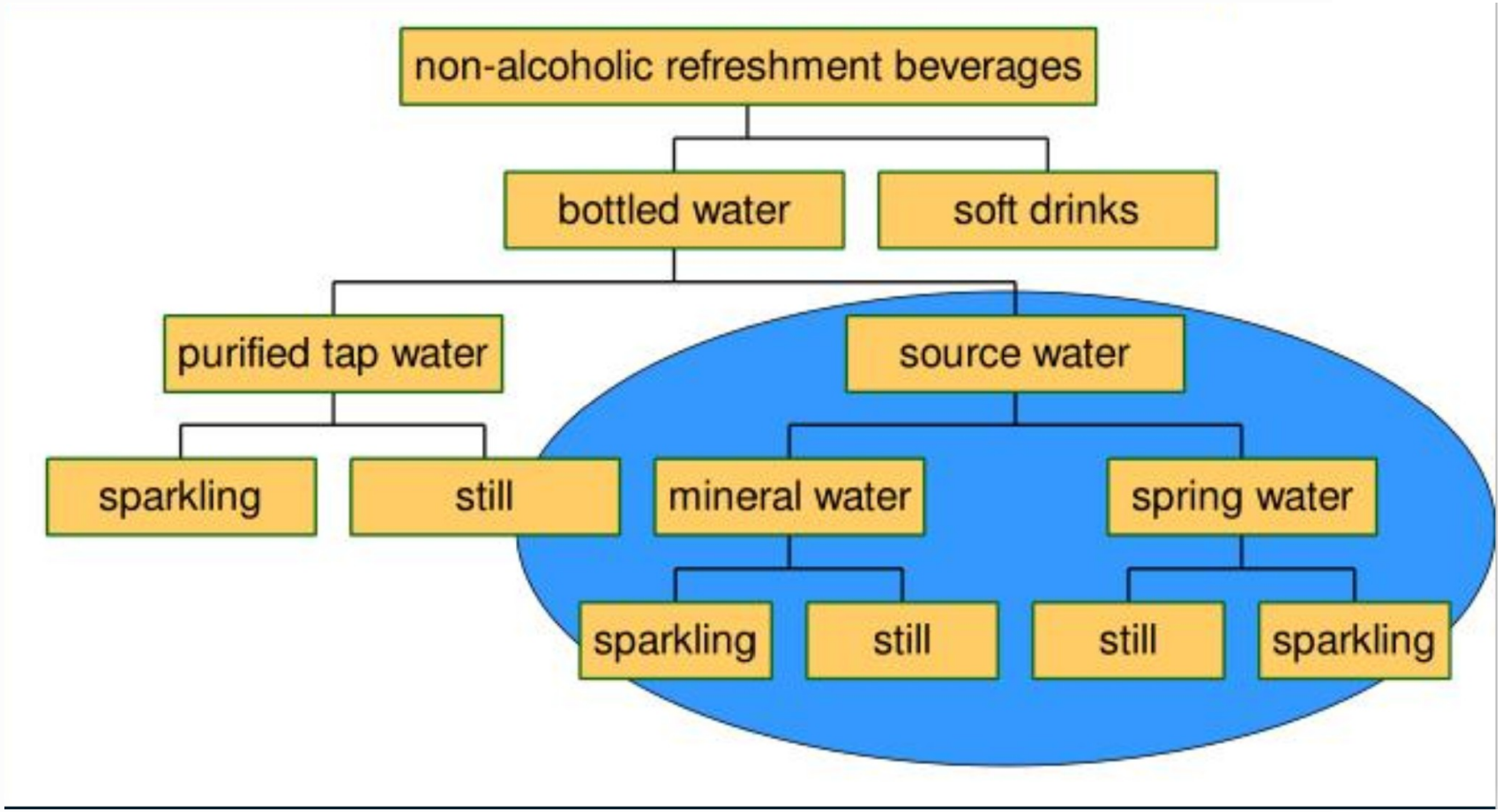
Sparkling-sparkling 0.94

The average correlation between the price of still and sparkling brands was 0.90. Still brands were therefore approximately as correlated with sparkling brands as they were with one another. This suggested that the two types of water products were part of the same relevant market

The analysis found that the prices of bottled water brands, regardless of whether they were sparkling or still were highly correlated with each other, but that they were negatively or very weakly correlated with the price of soft drinks, even for brands of bottled water and soft drinks sold by the same company

These results, in conjunction with other evidences, strongly suggested that soft drinks should not be included in the relevant antitrust market

Nestle/Perrier relevant market exercise



Stationarity analysis

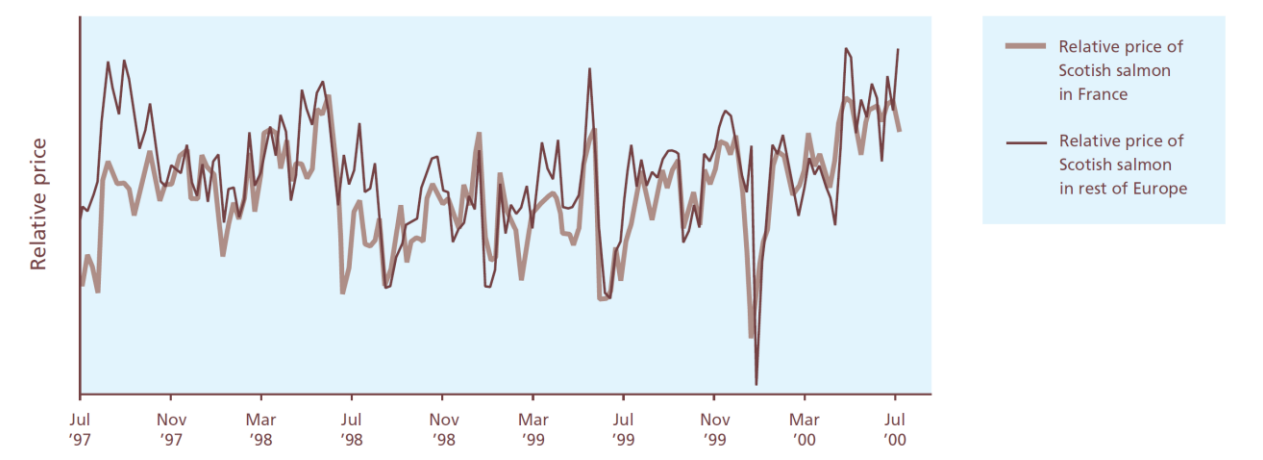
More sophisticated variant of price correlation analysis

Nutreco Holding NV/Hydro Seafood GSP merger

- Parties owned salmon fish farms and produced gutted salmon in Scotland. Do Scottish salmon and Norwegian salmon compete in the same product market? If there was a single market for all gutted salmon, was this market national or EEA wide?

- Results showed that the price of Scottish salmon relative to the price of Norwegian salmon in the UK appears to vary randomly around a constant long-run value, which suggests that the relative price is stationary. The econometric test for stationarity confirms that the relative price of Scottish salmon is stationary - Scottish and Norwegian gutted salmon compete in the same product market in the UK

Stationarity analysis



The relative prices of Scottish salmon both in France and in the rest of Europe appear to vary randomly around a constant long-run value over the period, which suggests that both relative prices are stationary. This impression was confirmed by econometric tests, which found that the relative prices of Scottish salmon in the UK and in the rest of Europe were stationary. This is consistent with a geographic market for salmon encompassing the UK and France, as well as other European countries

The results of the stationarity analysis were accepted - a single EEA market for gutted farmed salmon

Price elasticity analysis & Critical loss analysis

Price elasticity

- Econometrics to assess the responsiveness of the demand for a product or group of products to a change in price. The more elastic the demand, the less likely is it that a price rise would be profitable.
- This own-price elasticity of demand measures the extent to which revenue is lost when price is increased
- Accurate measurement requires the use of econometric analysis

Critical loss

- Addresses the following simple question: What amount of sales would have to be lost to make a hypothetical price increase profitable

Switching analysis

- Uses econometric analysis, internal company documentary evidence or survey results to estimate the extent to which two products are particularly ‘close’ competitors
- Involves the evaluation of the closeness of competition between the products (or brands) of the merging parties by analysing consumer behaviour
- Diversion ratio analysis
- Volvo/Renault merger

Evidence on customer switching showed that the two merging brands were not close substitutes, despite relatively high shares in the affected markets. In France (where the merging parties would have had a post-merger share of about 50% of truck sales) the analysis showed that relatively few truck customers switched between Volvo and Renault. Instead, the customers of both firms tended to switch to other truck manufacturers, such as Scania and DAF.

This evidence suggested that Volvo and Renault trucks were not close substitutes

Merger simulation

- The quantitative analysis technique using formal economic models. In concentrated industries with differentiated products for example, the Bertrand oligopoly model is applied. The values of the key parameters of the model are based on observed facts of the merger under review.
- Focus of investigation is on facts and assumptions that matter
- Technically very demanding approach which combines demand elasticities with an assumption about the nature of competition to estimate directly the unilateral effects of a proposed merger on the prices and outputs of market participants
- Merger simulation alone should not be relied upon to assess the competition issues associated with a merger; it should be considered as a complement to existing techniques

Price/concentration analysis

- In economics, the central object of ‘price concentration analysis’ is to assess whether prices are increasing with market concentration
- Explores whether prices are higher in markets where there are a few players (high market concentration), than in markets where there are many players (low market concentration)
- Price/concentration and margin/concentration analyses have the attraction that powerful results can be achieved with simple data. In their simplest form, only data for price, margin and market share

Shock analysis

- A sudden and unexpected change, to either supply or demand can give a key insight into the competitive conditions in a market on the basis of how customers and/or competitors have reacted to the event
- The basis of the approach is that consumers' and producers' reactions to certain events – particularly unanticipated events – can reveal much about the nature of competition in a market
- Shocks: strikes, unexpected plant shutdowns, stock shortages, promotion and advertising activity, trade frictions, sudden exchange rate movements, technological change, market entry, regulatory intervention

Analysis how the sales and prices at existing outlet were affected by the opening of different types of rival local outlets

Bidding studies

- Bidding studies can produce useful results in situations in which competition takes the form of bidding for contracts.
- In particular, bidding studies can be used to investigate how many firms are required for competitive outcomes and the extent to which two merging firms are ‘close’ competitors.
- Participation analysis

The simplest type of quantitative analysis that can be undertaken in bidding markets is to consider the extent to which the merging parties participated in tenders, and, in particular, participated in tenders against each other

At its simplest level, this requires information that identifies, for each tender that has taken place over a period of time in the relevant market, the identity of the bidders that took part in the tender

Damages assessment

- Assessment of damages from price-fixing cartels, exclusionary conduct like margin squeezes, exploitative conduct through excessive prices...
- The approach to damages assessment is to compare the actual outcomes with estimates of what the outcomes would have been 'but for' the actions of the offending party or parties
- This involves a counterfactual analysis, placing the injured party in the position they would have been in absent the infringement
- Challenge is estimating what would price have been without infringment

If it is known when the collusion was alleged to have started, then a simple comparison of prices during the period of alleged collusion with the prices in the period before or after can often be highly informative. Alternatively, it may also be possible to compare prices in areas (or to customers) where collusion is alleged to have occurred with prices in areas (or to customers) where it is accepted that collusion did not operate.

A thorough analysis of damages, however, will usually require the 'but for' prices to be econometrically estimated, regression model employed to estimate what prices would have been if the collusion had not been operating

Rights of defence

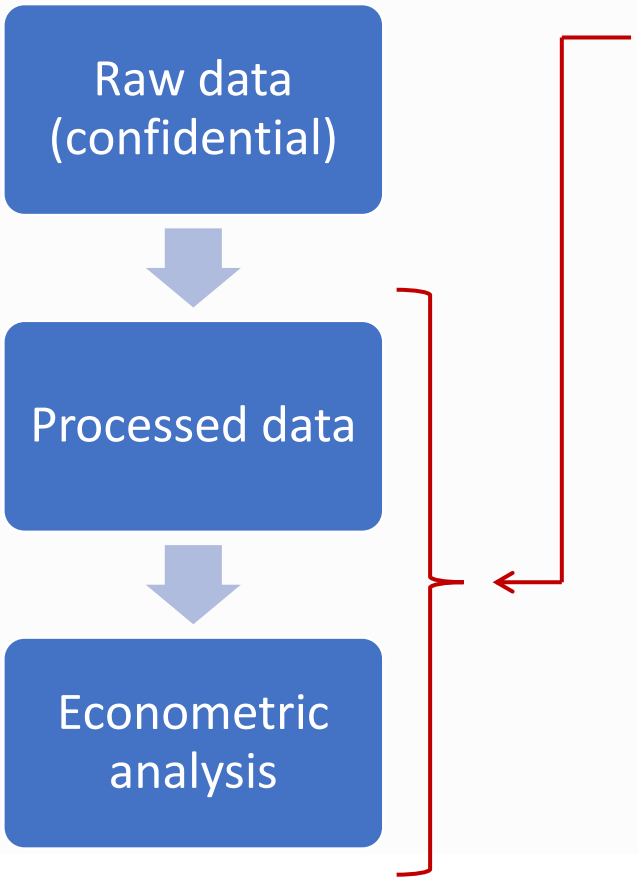
UPS/TNT merger – EC decision 2013

- EC found SIEC in intra-EEA express delivery of small packages in 15 Member States - based on the creation or strengthening of a dominant position
- The General Court annulled the Commission decision based on a procedural ground: infringement of UPS rights of defence by the Commission when using an econometric model to predict price effects of the transaction

Rights of defence

- The Court considered that the econometric model used by the Commission in the final decision was not the same as the one discussed during the administrative procedure.
- According to the Court, the Commission made certain changes "which cannot be regarded as negligible"
- The Court considered that the Commission was required to communicate the final version of the econometric model to UPS before adopting the decision
- The Court also stated that, in order for the rights of defence to be infringed, the applicant does not need to demonstrate that, in the absence of the procedural irregularity, the contested decision would have been different in content, but simply that there was "even a slight chance that [the merging party] would have been better able to defend itself"

Rights of defence and confidentiality issue



Access to file (after SO)

- Processed data used in the econometric analysis
- STATA code

Is it enough to ensure effective rights of defence?

- Each party can verify that its own individual data was processed correctly
- Each party can verify econometric analysis undertaken by competition agency
- Each party can undertake new econometric analysis
  - using processed data
  - using publicly available information
  - but not using individual confidential data

THANK YOU FOR YOUR ATTENTION

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Co-funded by the European Union

Ljiljana Pavlic

Training for judges from Kosovo
Pristina, 27. 8. 2025.

CASE STUDY
Relevant market in complex cases

In the UEFA Decision in which the European Commission allowed the bundling of rights to matches by UEFA, the EC defined the relevant upstream market as the market for the acquisition of TV broadcasting rights to football matches played regularly throughout the year. With this definition of the relevant market, the EC distinguished football from other sports content, as well as regular year-round club competitions from one-off competitions (such as the World Cup).

Bony acquired only certain packages of rights to Champions League and Europa League from UEFA, while the remaining packages of rights were acquired by national broadcaster (FreeTV) for the territory of Radonia. The technical capabilities of Bony's platform offer the possibility of following a much larger number of matches than the classic FreeTV broadcast. Namely, the Champions League and the Europa League allow Radonia viewers to additionally follow up to 112 additional Champions League matches and up to 190 additional Europa League matches, and the same situation is with the 1st national league of Radonia where, until Bony acquired the rights to broadcast, the possibility of following matches in live broadcast was generally limited to derby rounds.

Bony bought valuable packages of rights to these competitions, made them part of its own various TV channels alongside other sport content it has in its portfolio. Those TV channels are offered to Pay TV operators and exclusivity agreement was signed with only one of them, K prime TV. K prime TV bought these ready-made sport TV channels from Bony that include, among other content, UEFA competitions and 1st national league of Radonia.

The market for the acquisition of TV content (like UEFA packages) for inclusion in TV chanells is not characterized by a significant presence of downstream Pay TV operators, but primarily by FreeTV operators and media service providers, like Bony - individual channels (for example Eurosport, ESPN, VIASAT channels, etc.)

Pay TV operators do not produce their own channels but buy ready-made channels from companies like Bony and include them in their portfolio and offer to final consumers.

Bony proposed for the market definition exercise that the market for acquiring TV content for inclusion in TV channels should constitute wide spectrum of TV content (football, other sports content, documentary and feature films and series, music content, content for children and young people, etc.).

For the downstream market Bony proposed overall TV market (Pay TV market + FreeTV (national tv broadcasters).

In addition, Bony presented the view that Bony's UEFA and 1st national league of Radonia content does not represent the decisive reason for the user's decision to choose specific PayTV operator. Bony claimed that when choosing a Pay TV service, the end user primely takes into account the price of the service, and, these contents can only represent a competitive advantage of an individual Pay TV operator, but by no means a prerequisite for the business of every Pay TV operator.

Possible questions to discusion:

1.Consider possible market segmentations across or within the levels of the value chain. These segmentations can derive from:

- Content
    - Sport/Full range content (sport events, movies, music…) – consider the specific question of whether packages containing UEFA content from Bony are constrained by other content like other sport events, movies, music
    - Premium/non-premium content – is there premium content within sport content, type of sport events, within football content
- Broadcast model
    - Pay TV/FreeTV – similarities, differences (revenue model), competition constraints, same or different relevant product market

2. Consider the sources of evidence for market segmentation exercise – source of information (whom to ask), possible questions, set of information required, techniques

3. Would you support Bony’s view on market definition? Alternatives?

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Co-funded by the European Union

Competition law and vertical agreements

European Competition Law Training for Judges from Kosovo

Dr. Małgorzata Kozak

Outline

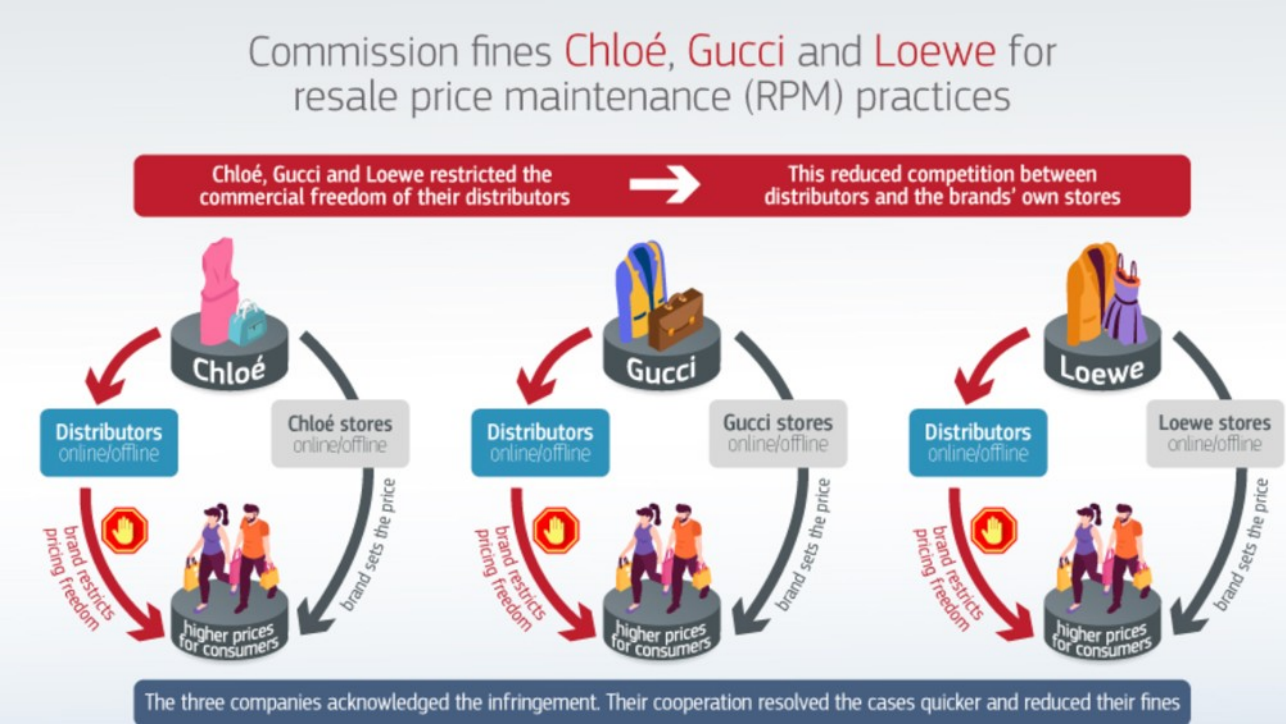
1. Setting a Scene
2. Vertical Integration Scenarios – Why Are They Legally Relevant?
3. Rationale and Competition Concerns for Vertical Schemes
4. EU Legal Framework for Vertical Restrains
5. Challenges

Utrecht University

1. Setting a Scene

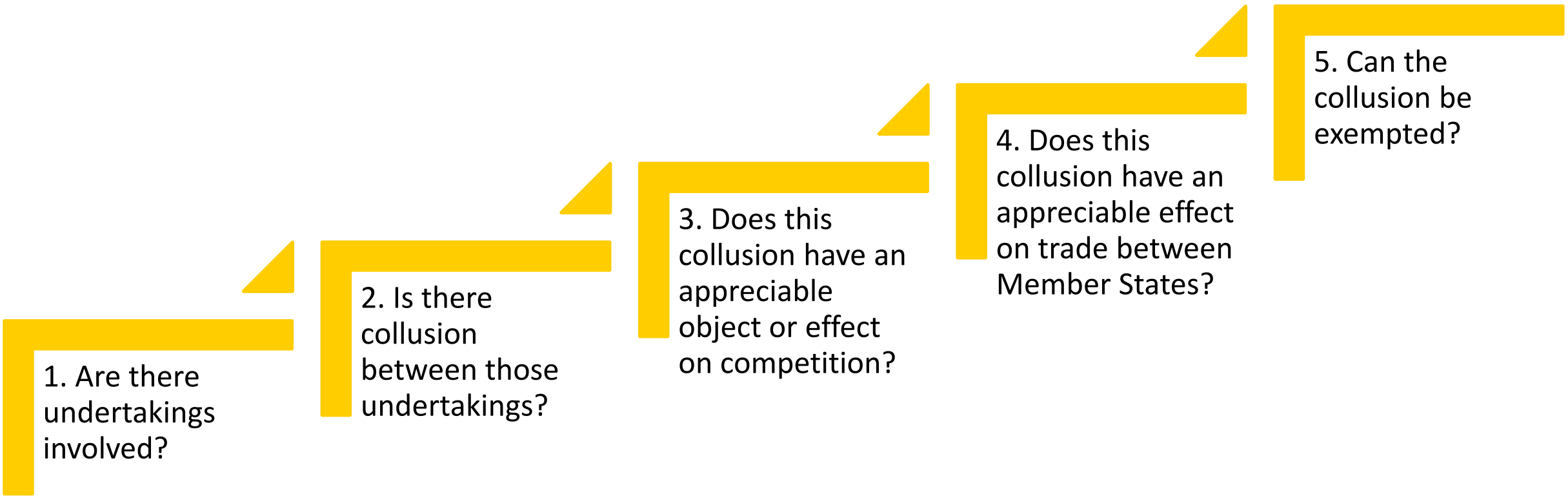
PRESS RELEASE | Oct 14, 2025 | Brussels | 6 min read

Commission fines fashion brands Gucci, Chloé and Loewe over €157 million for anticompetitive pricing practices

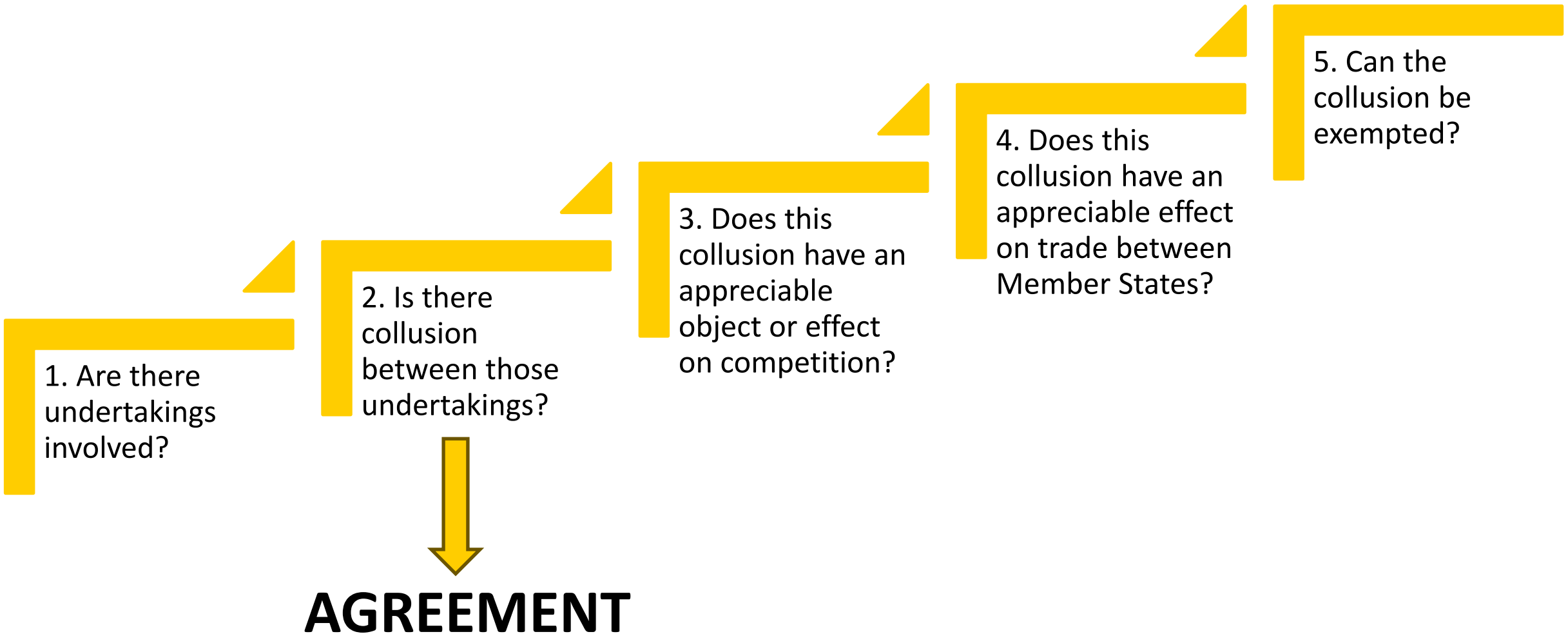


The European Commission has fined fashion companies **Gucci, Chloé** and **Loewe** for fixing resale prices, in breach of EU competition rules. The Commission's investigation revealed that the three companies restricted the ability of the independent third-party retailers they work with to set their own online and offline retail prices for products designed and sold by Gucci, Chloé and Loewe under their respective brand names. This kind of anticompetitive behaviour increases prices and reduces choice for consumers.

Article 101 Framework: Five Cumulative Steps

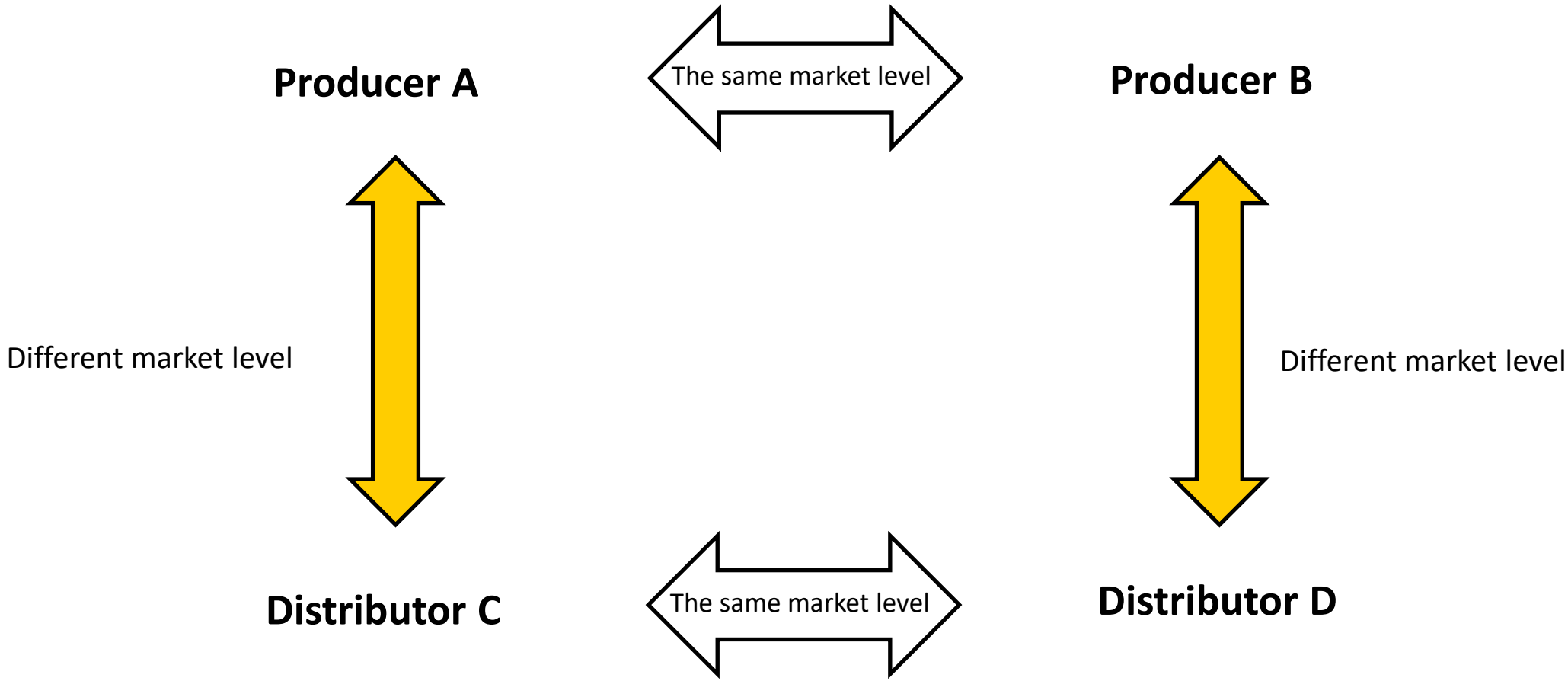


Article 101 Framework: Five Cumulative Steps



Agreements Falling within the Scope of Art. 101

Consten & Grundig, 56, 58/64



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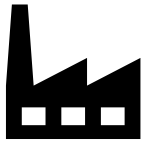
2. Vertical Integration Scenarios

– Why Are They Legally Relevant?

Vertical Integration & Distribution Chain



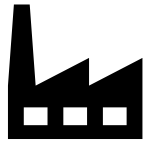
Producer

Agreements within the capital group, *Viho*, C-73/95

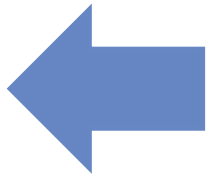
First scenario: vertical integration

Consumer(s)

Vertical Integration & Distribution Chain



Producer



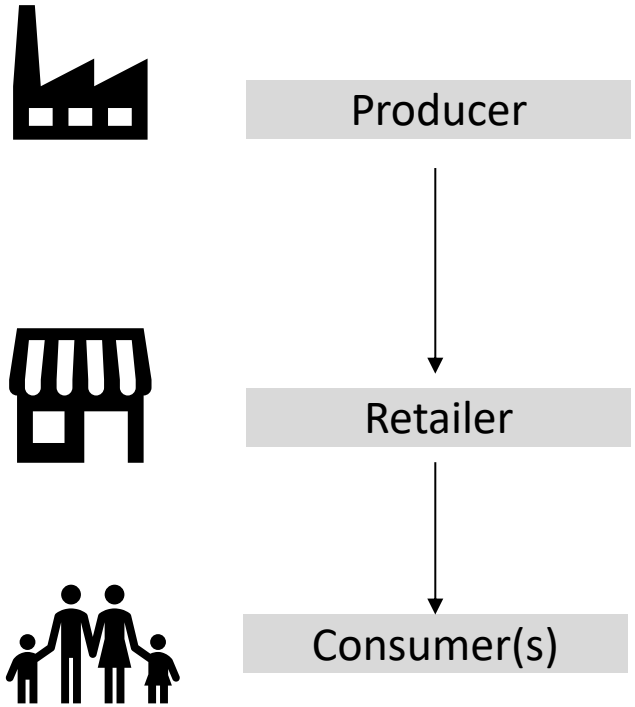
Decision-making

NO RISK TRANSFERRED

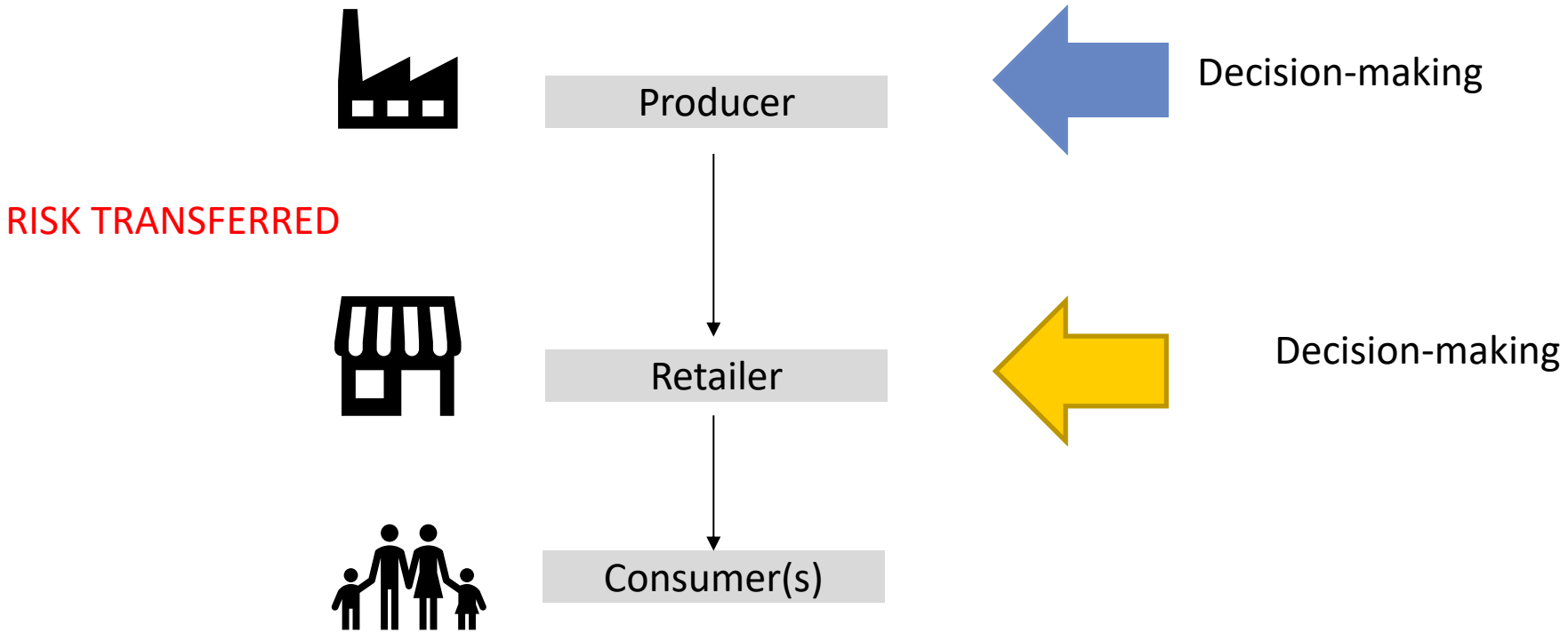
Consumer(s)

Vertical Integration & Distribution Chain

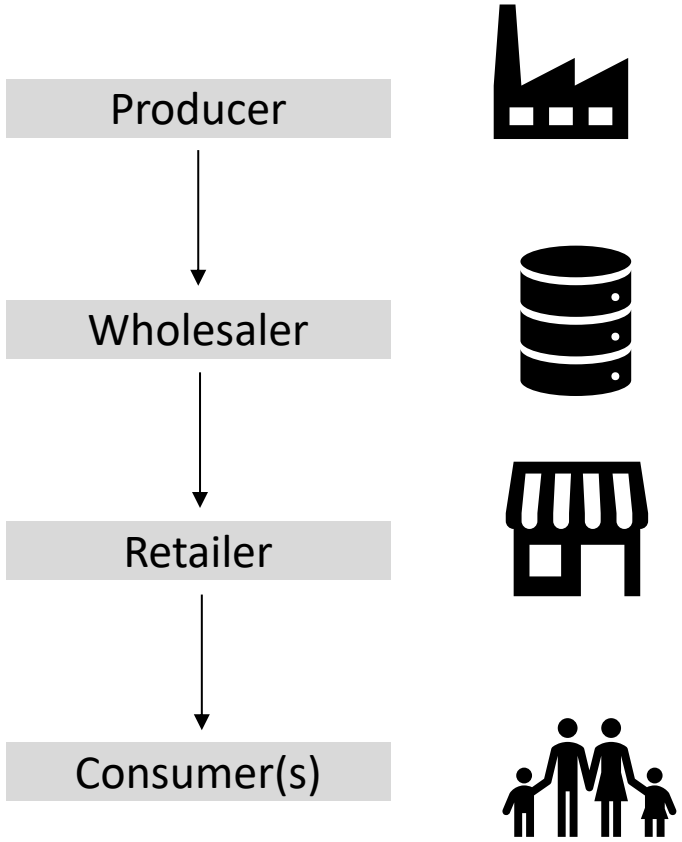
Second scenario: an independent retailer



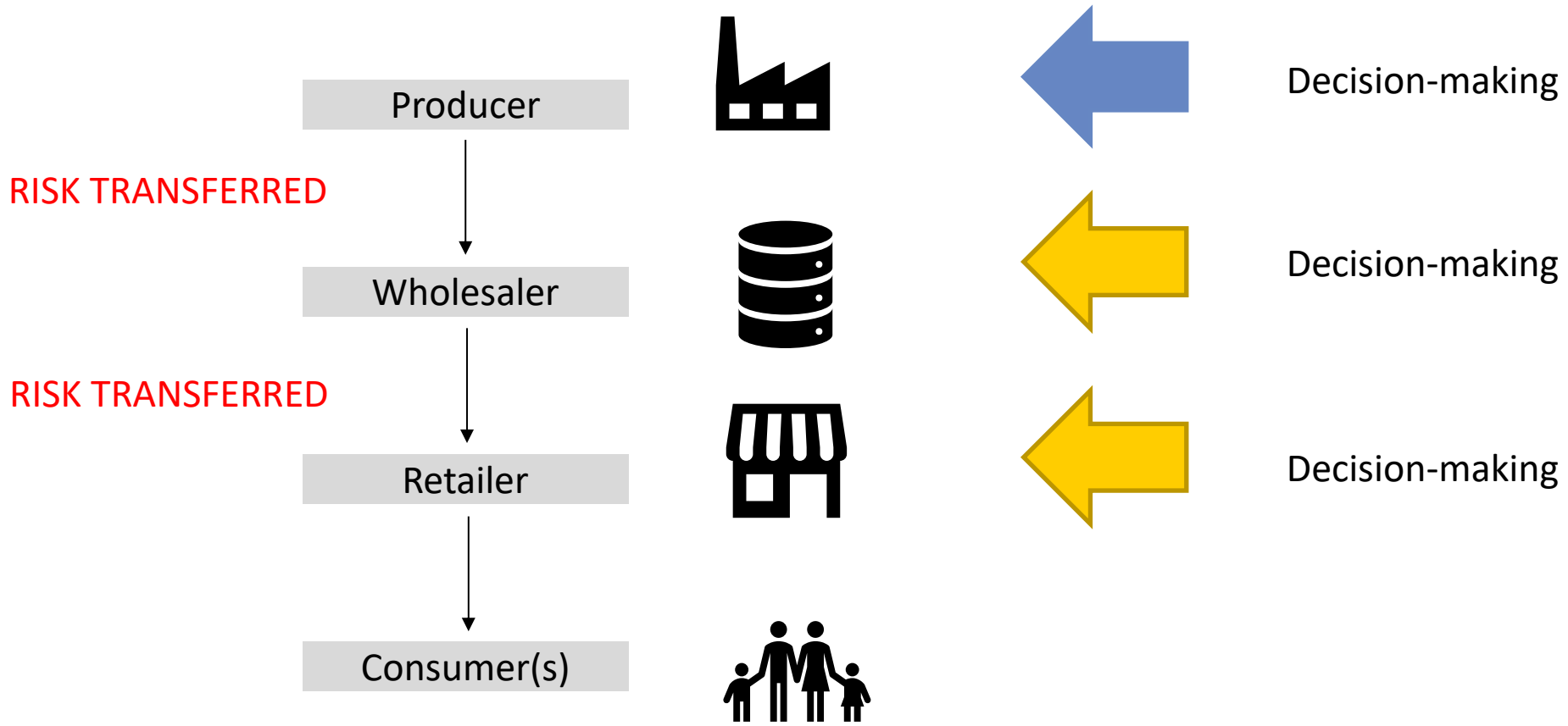
Vertical Integration & Distribution Chain



Vertical Integration & Distribution Chain

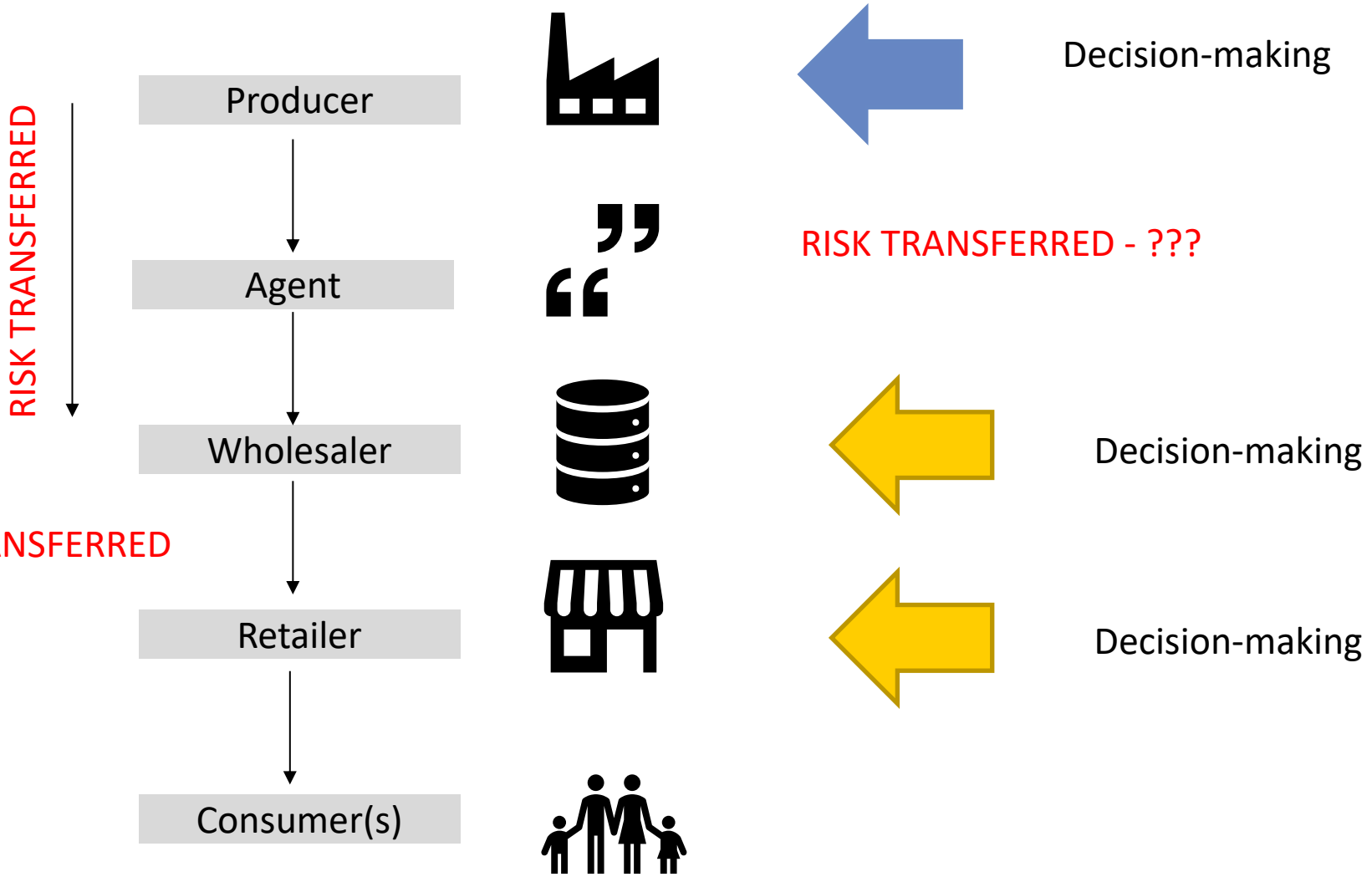


Vertical Integration & Distribution Chain



Vertical Integration & Distribution Chain

Third scenario: An intermediary



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3. Rationale and Competition Concerns for Vertical Restraints

Inter/Intra -Brand Competition

Intra-brand competition	Inter-brand competition
Competition among retailers or distributors of the **same brand.** Intra-brand competition may be on price or non-price terms.	Firms marketing differentiated products frequently develop and compete **on the basis of brands or labels**.

Economic Problems Related With A Distribution Chain (But Also Creating Some *Efficiencies*)

Double marginalization problem

Free-rider problems

Hold-up problem

Typical Restrictions Of Competition In Distribution Agreements

- Territorial protection of a distributor
- Territorial restrictions imposed on a distributor
- Customer allocation
- Customer restrictions
- Non-compete obligations and quantity forcing
- Exclusive supply obligations
- Exclusive purchasing requirements.

Main Competition Concerns Related To Market Power

Foreclosure effects

Reduction of inter-brand competition

Facilitation of collusion at a supplier level

Hindering market intergration

Inter / Intra – Brand Competition

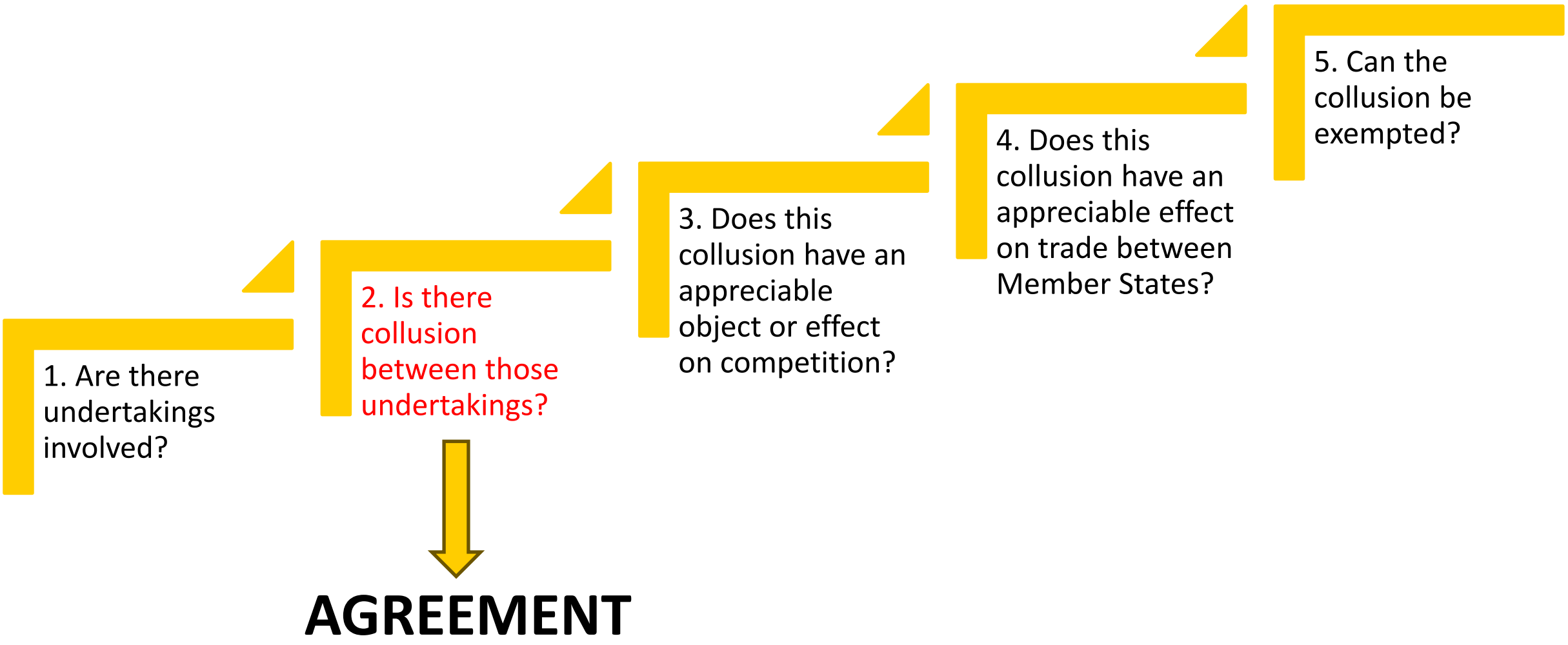
The assessment must also take into account that vertical agreements between undertakings operating at different levels of the production or distribution chain are generally less harmful than horizontal agreements between competing undertakings supplying substitutable goods or services.

In principle, this is due to the complementary nature of the activities carried out by the parties to a vertical agreement, which generally implies that pro-competitive actions by one party to the agreement will benefit the other party to the agreement and will ultimately benefit consumers. By contrast to horizontal agreements, the parties to a vertical agreement therefore tend to have an incentive to agree on lower prices and higher levels of service, which also benefit consumers.

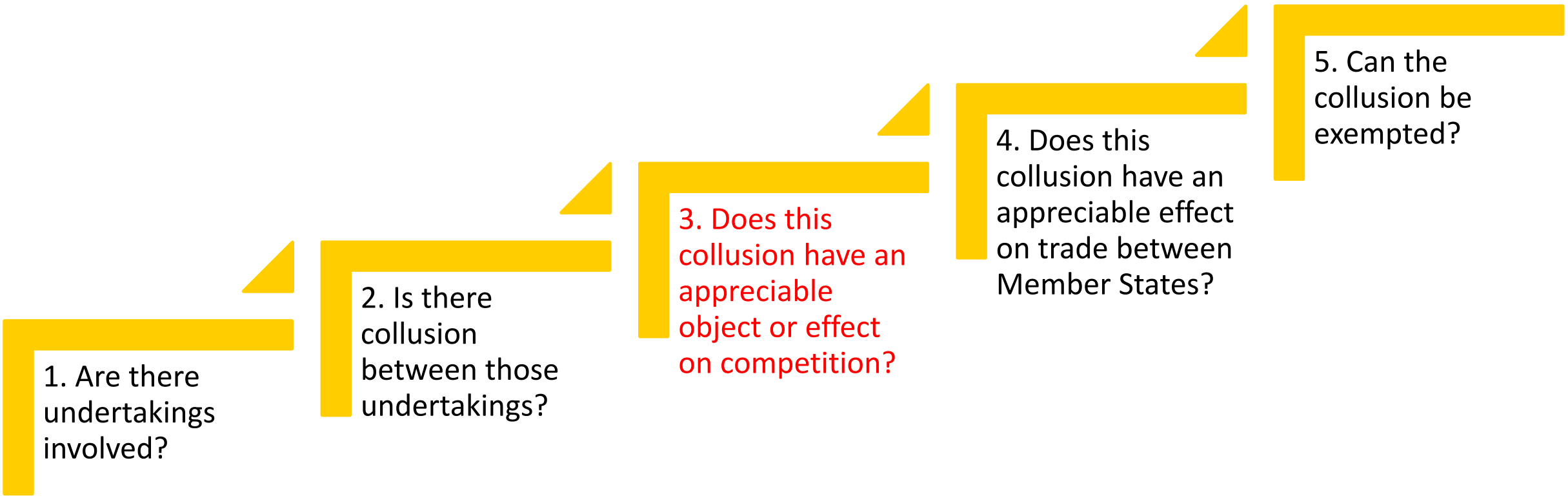
Vertical Guidelines, par. 10

4. EU Legal Framework for Vertical Restraints

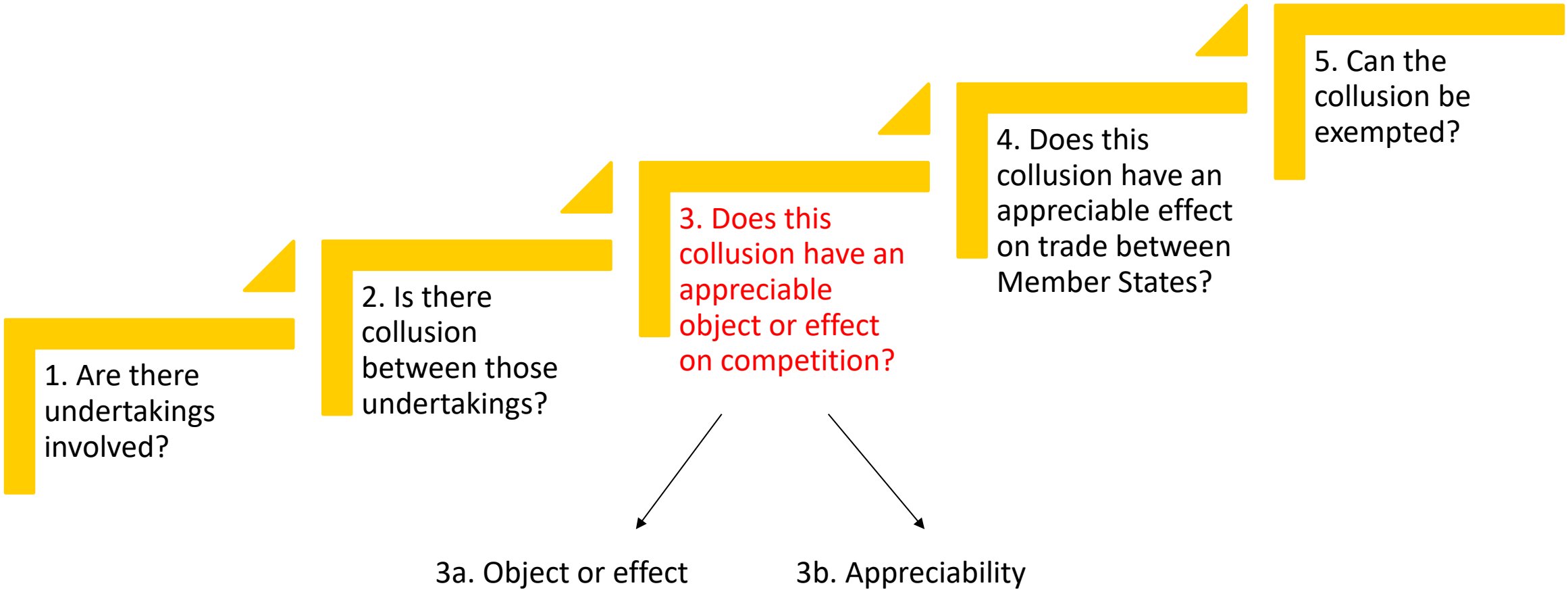
Article 101 Framework: Five Cumulative Steps



Article 101 Framework: Five Cumulative Steps



Article 101 Framework: Five Cumulative Steps



Step 3a. Object or Effect?

„The essential legal criterion for ascertaining whether an agreement involves a restriction of competition ‘by object’ is therefore the finding that such an agreement reveals in itself **a sufficient degree of harm to competition** for it to be considered that it is not appropriate to assess its effects. (…)

Although the Court has already held that a fact of that nature in no way precludes an agreement from containing a restriction of competition ‘by object’ (…) it must, however, be stated that the agreements at issue in the main proceedings are not among the agreements which it is accepted may be considered, **by their very nature**, to be harmful to the proper functioning of competition.”

Maxima Latvija, C-345/14

Step 3a. *Super Bock Bebidas*, C-211/22, paras 32-35

- Even vertical agreements may restrict competition by object; while often less harmful than horizontal ones, they can still have significant restrictive potential
- The key legal test is whether the agreement by its very nature shows **a sufficient degree of harm to competition**
- This requires assessing the agreement's **content, objectives, and context**, including
  - the nature of goods/services and
  - market structure and conditions).

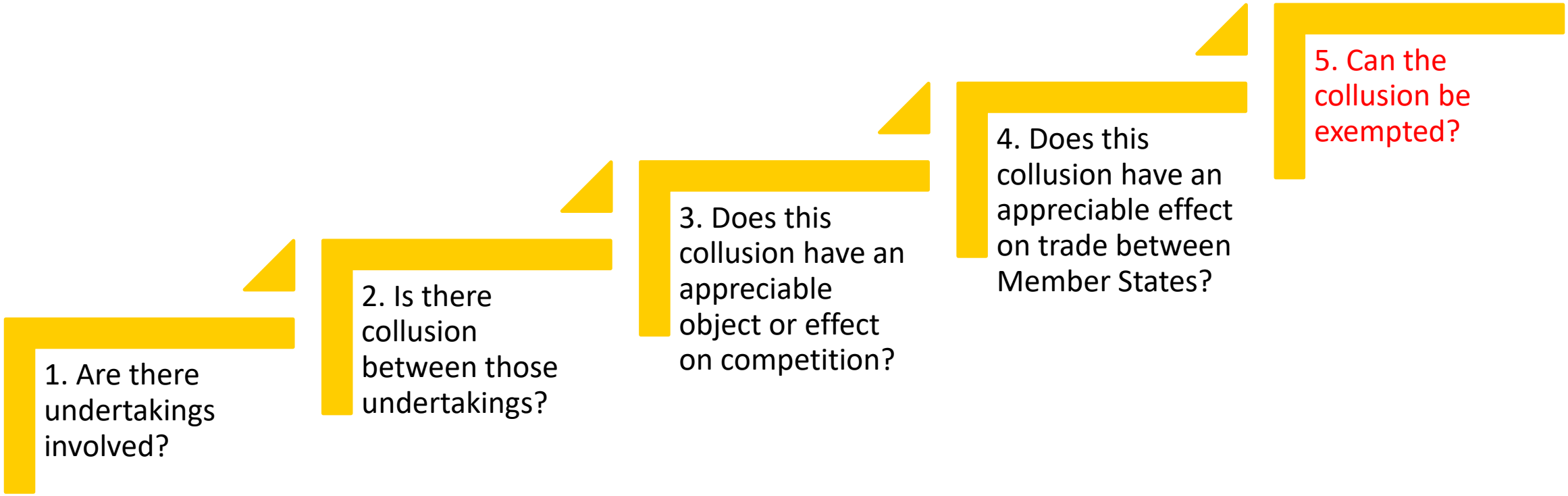
Step 3b. Appreciability = Only Meaningful Restrictions Are Caught

Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (**De Minimis Notice)**

De Minimis Notice applicable below certain market shares. **Non-competitors:** Market share held by each of the parties to the agreement **does not exceed 15 %** on any of the relevant markets affected by the agreement

De Minimis exception does NOT cover object restrictions.

Article 101 Framework: Five Cumulative Steps



Step 5. Art. 101 (3) TFEU - Application

5a. Individual → application of all 4 conditions

5b. Block exemption

- Fill in individual conditions
- Market share thresholds
- Black list of „hard core" restrictions

Self-assessment by companies

Step 5. ART. 101 (3) – Individual or Block Exemption, Burden of Proof

When an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Article 2 of Regulation 1/2003 of showing that their individual agreement satisfies each of the conditions of Article 81(3). ***They only have to prove that the restrictive agreement benefits from a block exemption.*** *The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope fulfil each of the four conditions laid down in Article 81(3).*

Guidelines on the application of Article 81(3) of the Treaty

Step 5. Art. 101 (3) TFEU – Individual Exemption: Cumulative Conditions

Positive	Negative (NOT TO)
which contributes to improving the production or distribution of goods or to promoting technical or economic progress,	impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,
while allowing consumers a fair share of the resulting benefit,	afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty

Step 5. Block Exemption Regulations System

Commission authorized by the Council (Article 103 (2) (b) TFEU) for the issuing of regulations

2 of the Council Regulations - inland waters (1017/68) and liner shipping (4056/86)

There is no need to notify agreements

Validity of contracts without the authority's authorization

Step 5. Scheme of Application of Block Exemption Regulations

1. Applicability of BER

Is there an agreement or concerted practice falling within the scope of BER?

No

Yes

2. Market share thresholds

Are the relevant market share thresholds met?

No

Yes

3. Hard-core restrictions (black and grey clauses)

Are the hard-core clauses absent?

No

Yes

Are the clauses excluded from BER absent?

No

Yes

No

4. Effect

The agreement is exempted from 101 (1) in its entirety

The agreement is exempted but the clauses are not

The agreement is not exempted by BER but maybe 101(3) TFEU

Step 5. Vertical Block Exemption Regulation

- VBER: Commission Regulation 2022/720 of 10 May 2022 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, C/2022/3015. OJ L 134, 11.5.2022, pp. 4–13
- Communication from the Commission Commission Notice Guidelines on vertical restraints 2022/C 248/01, C/2022/4238, OJ C 248, 30.6.2022, pp. 1–85

Step 5. VBER is Applicable if All of the Following Conditions Are Fulfilled:

NB: Hardcore restrictions are not necessarily *object* restriction (*Super Bock Bebidas*)

The agreement must be a vertical agreement

Market shares: market share of each supplier and buyer does not exceed 30%

There are no hardcore restrictions (Article 4 VBER)

- Eg. Price fixing except for maximum and suggested prices
- Eg. In exclusive distribution: restricting buyers' ability to sell
- Eg. Internet restrictions

There are no excluded restrictions (Article 5), the remaining part of the agreement can be exempted

- Eg parity obligations

Step 5. Pricing Restrictions (Article 4 (a) VBER)

Minimum and fixed resale prices infringe Article 101(1) TFEU

Recommended and maximum resale prices

Information relating to the supplier's recommended or maximum resale prices for the contract goods or services and information relating to the prices at which the buyer resells the goods or services, provided that the exchange of such information is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price

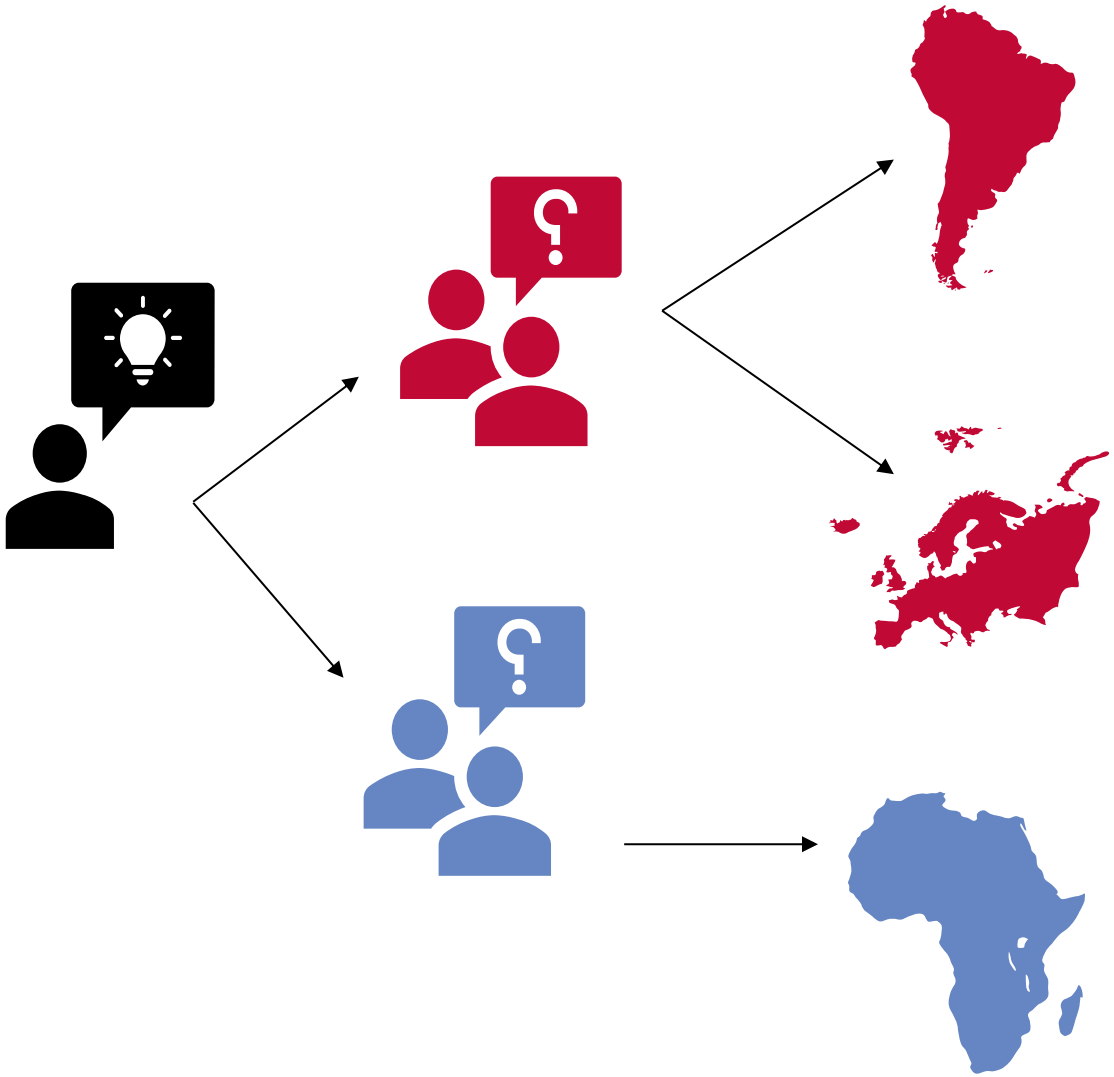
Step 5. Restricting Buyer's Ability to Sell (Article 4(b) VBER)

Exclusive Distribution Agreements

- **CJEU:** an exclusive distribution agreement does not have as its object the restriction of competition, but must be considered in its market context to determine whether it has this effect. (*STM v. Machinenbau Ulm)*

- A supplier may grant exclusive distribution rights to a distributor for a particular territory: for example, it might appoint X as the exclusive distributor for NL and Y as the exclusive distributor for Belgium.

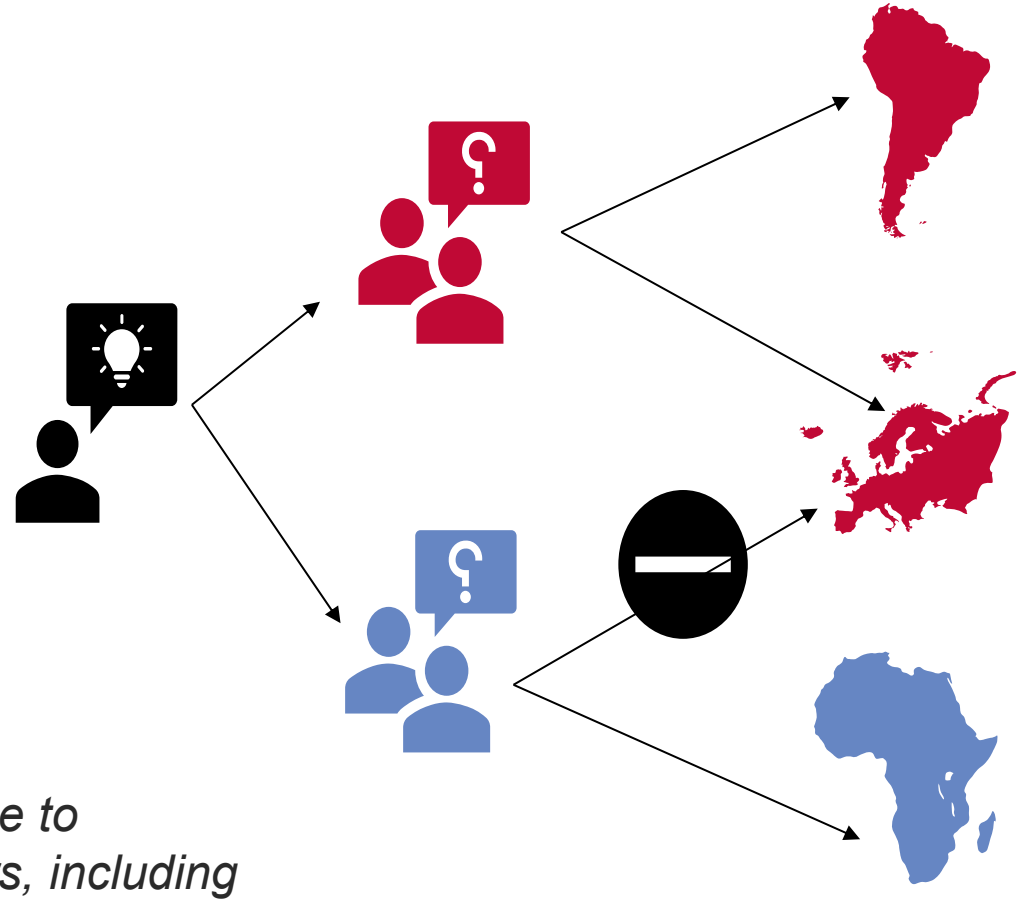
- Efficiencies



Step 5. Restricting Buyer's Ability to Sell (Article 4(b) VBER)

Exclusive Distribution Agreements

- A supplier may grant exclusive distribution rights to a distributor for a particular territory.
- **The supplier may also agree that it will not sell its products directly into the territories granted to X and Y.**
- **BUT what is not allowed: restrictions on PASSIVE sales**



'passive sales' means sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender

Step 5. Internet Restrictions (Art. 4(e) VBER)

- Hard-core restriction: preventing the buyer's effective use of the internet to sell the contract goods or services

- It amounts to 'at the very least the object of restricting passive sales to end users wishing to purchase online and located outside the buyer's physical trading area', Par. 203, Commission Guidelines

Examples: Requiring the buyer to:

- to request the supplier's prior approval for sales to customers assigned to other distributors
- terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's territory
- sell the contract goods or services only in a physical space or in the physical presence of specialised personnel (*Pierre Fabre)*

Step 5. Internet Restrictions: Case-by-Case Analysis

- Analysis of the content and context of the restriction
- Not a hard-core restriction *(Coty):* a restriction on the use of third party platforms for online sales where
  - the retailers were free to sell via their own websites
  - involves a risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character

- Restricting online distribution and advertisement across Member States (single market imperative)

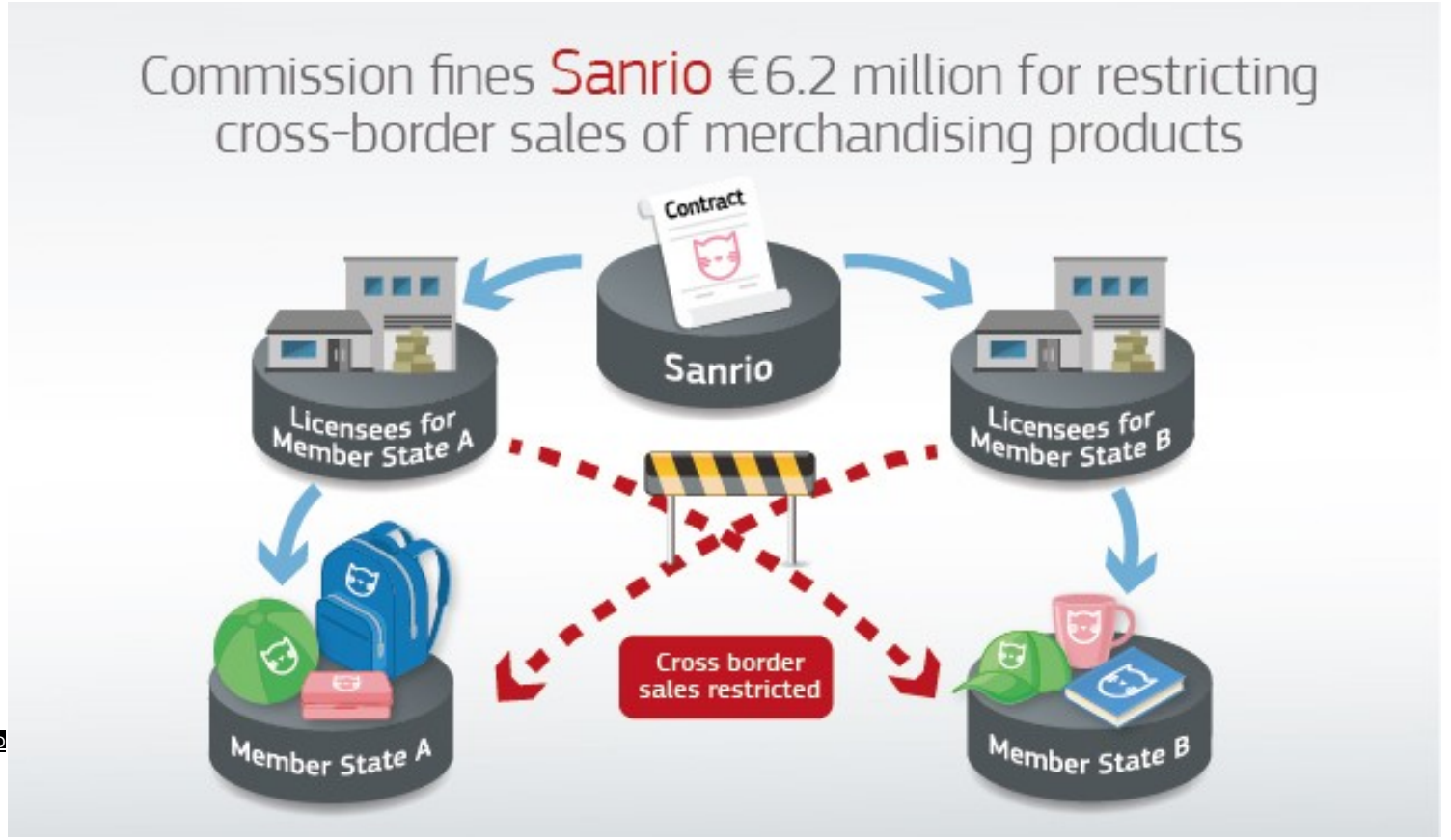
No Step 5. Online & Offline: Free Movement Principles

- Integration of various national markets.
- Prohibition on MS to introduce or maintain measures that hinder imports unless objectively justified.
- Right of exhaustion of IP right.
- Example: *A cosmetic producer could not rely on its trade mark or copyright to prevent an unauthorised dealer from distributing advertising leaflets picturing those products. Such advertisement was permitted provided it did not severely damage the reputation of the trade mark.*

Christian Dior v. Evora, C-337/95

No Step 5. Parallel Imports Hinderance

Parallel imports refer to cross-border sales of goods by independent traders outside the manufacturer's distribution system without the manufacturer's consent. Parallel importers generate profit by buying goods in one EU Member State at a relatively low price and subsequently reselling them in another Member State where the price is higher.



- In June 2017, the Commission opened three separate antitrust investigations to ascertain whether certain licensing and distribution practices of Nike, Sanrio (Hello-Kitty) and Universal Studios illegally restricted traders from selling licensed merchandise cross-border and online within the EU Single Market.

- In March 2019, the Commission fined Nike €12.5 million for preventing traders from selling licensed merchandise to other countries within the EEA.

Source: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3950

5. Challenges

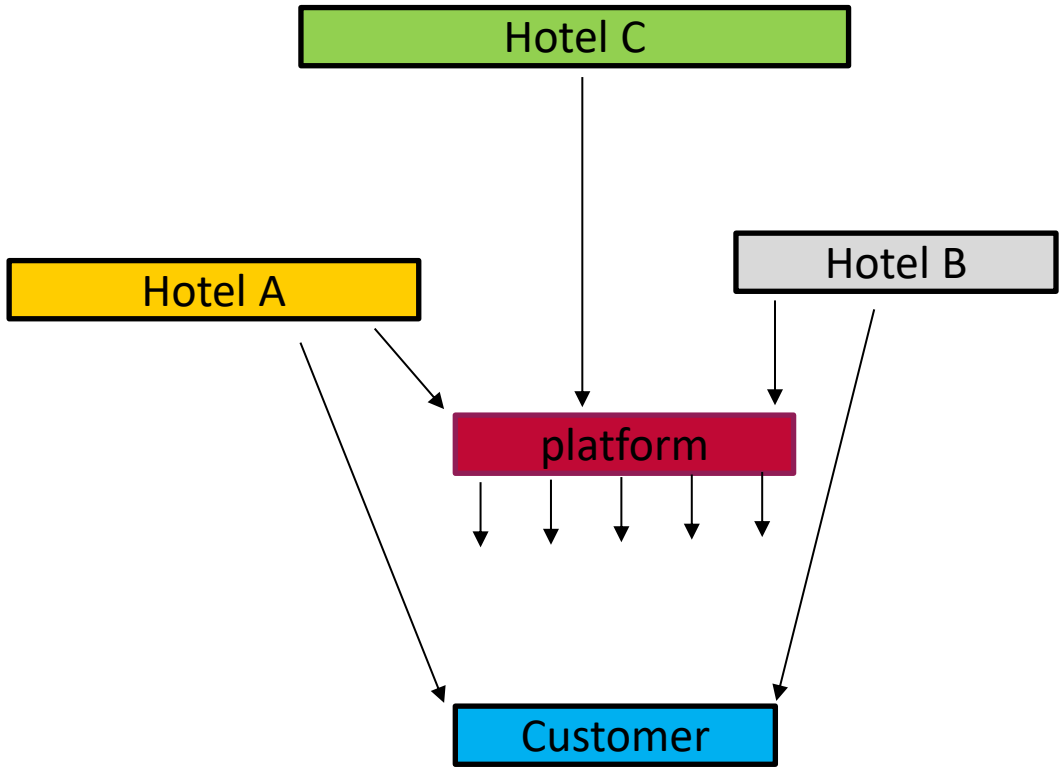
Dual Distribution

- The Danish Competition Authority Finds The Exchange Of Information Between Retailers Of Clothing Items Illegal
- Commission commitments decision in case of Amazon's usage of data of resellers

Parity Provisions ("Most Favoured Nation" clauses)

Contractual terms used (by online platforms) to prevent client sellers from offering their products or services at cheaper prices on alternative sales channels.

A, B, C will offer terms as favourable, or no less favourable than those offered to the platform: **wide** in own channels, **narrow:** on its own website

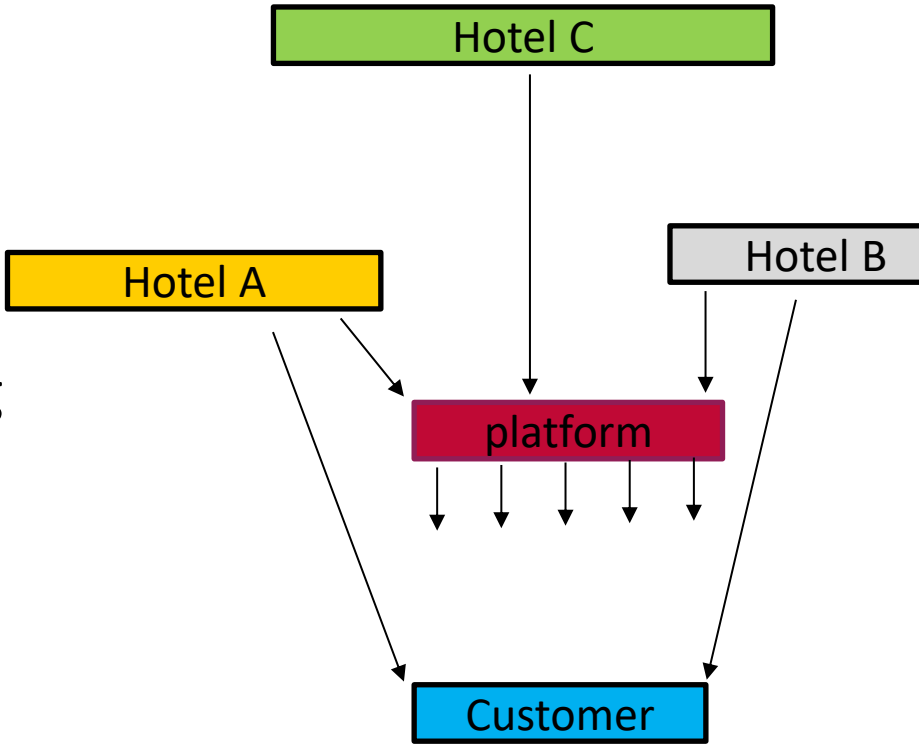


Parity Provisions ("Most Favoured Nation" clauses) –Cont. (case C-264/23)

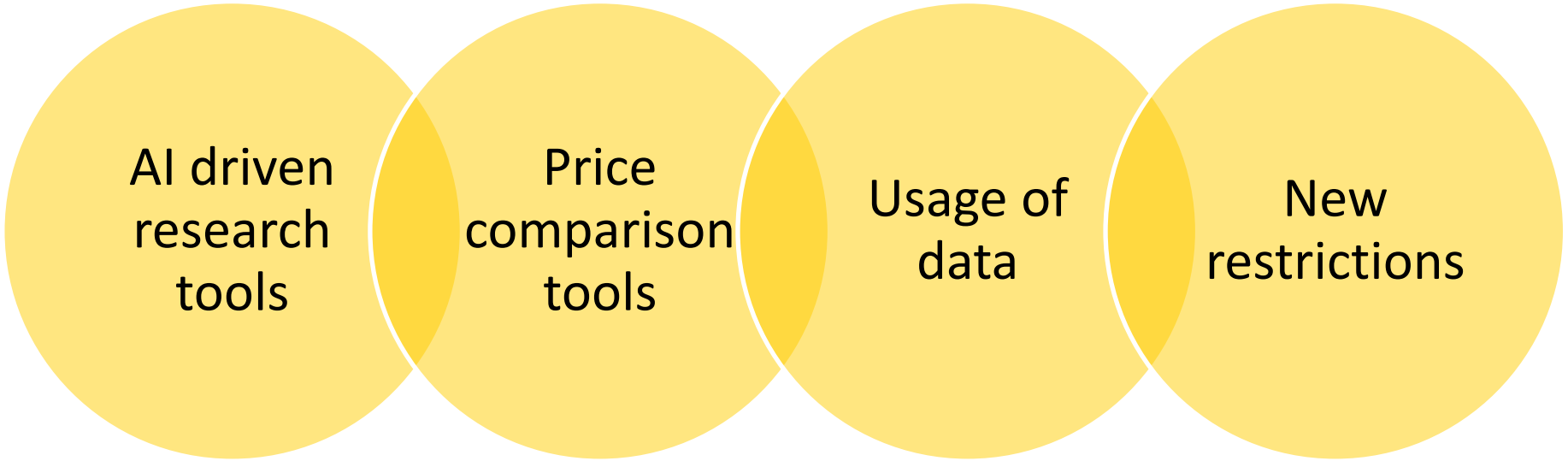
- Possible positive effects on competition provided MSF are
  - Objective necessary for the implementation
  - Proportionate to the objective

- Re: wide parity clauses, such clauses, in addition to the fact that they are liable to reduce competition between the various hotel reservation platforms, carry the risk of ousting small platforms and new entrants.

- Re: narrow parity clauses: Although those give rise, *prima facie*, to a less restrictive effect on competition and are intended to address the risk of free-riding, they do not appear to be objectively necessary to ensure the economic viability of the hotel reservation platform.



Emerging Challenges



!!! Need for finding a proper legal framework balancing efficiencies with restrictions

European Competition Law Training for Judges from Kosovo

Questions?

Thank you!!!

Co-funded by the European Union

Burden of proof and evidentiary standards with focus on article 101

Davor Lekić, case handler at Slovenian Competition Authority

Views expressed are solely mine.

Where to start and how to finish

Adam Smith (1776): "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

- As practitioners, we know Smith's suspicion is not proof. It is not enough, on its own, to establish an infringement.
- It is, however, often enough to *start an investigation*. This is where legal rules become critical: they guide decision-makers on how to distinguish harmful, anticompetitive acts from legitimate "competition on the merits."
- This creates the central challenge: balancing effective enforcement with the need for accuracy and legal certainty.
- This balance is managed through two primary levers:
    - **Set the bar too low,** and we risk **Type I Errors** (False Positives): Over-enforcement that chills pro-competitive conduct.
    - **Set the bar too high,** and we risk **Type II Errors** (False Negatives): Under-enforcement that allows anticompetitive harm to go unchecked.
- Competition law, through its rules on **burden of proof** and **evidentiary standards**, is in a constant search for this optimal balance.

Four Fundamental Questions:

- **What needs to be proven?** (The legal test)
- **Who needs to prove it?** (The legal burden of proof)
- **How to prove it?** (The evidentiary standard or burden)
- **Has** it been proven? (The standard of proof)

The Standard and Burden of Proof

These two points are not controversial:

- **Who Proves It? (Legal Burden of Proof):**
  - The authority alleging the infringement bears the legal burden to prove an infringement (Art. 2, Reg 1/2003).
  - This burden is reversed for efficiency defences under Article 101(3) TFEU; the undertaking must prove that the legal conditions for an exemption are fulfilled.(Art. 2, Reg 1/2003). Same applies to other objective justifications the undertaking may present (case law).
  - This burden is static in both cases.

- **To What Standard? (Standard of Proof):**
  - **"Firm Conviction":** The authority must provide "**"precise and consistent evidence to support the firm conviction that the alleged infringement was committed**".
  - Generally understood as the sufficiency of evidence needed to in the end persuade a judge of the facts and merits of a case.
  - Higher than "balance of probabilities" (mergers) but lower than "beyond reasonable doubt" (criminal).
  - But any doubt benefits the undertaking (presumption of innocence).

How is it Proven? (Evidentiary standard):

This burden is dynamic.

It shifts to the undertaking that wants to rebut a prima facie case.

When one party, first the accuser, adduces sufficient evidence to support its allegation, the evidentiary burden shifts to the other party, undertaking, to provide another plausible explanation of the facts or to rebut the allegation.

Cont’d

The evidentiary standard is influenced by several factors that can make discharging the burden of proof more or less difficult:

- **Design of the legal test:** A stricter test, such as proving anticompetitive "effects" rather than an infringement "by object," increases the evidentiary burden on the authority.
- **Characteristics of the evidence:** Cases built on direct evidence (e.g., documents detailing a cartel agreement) are often easier to prove than those relying on indirect or circumstantial evidence, which requires piecing together multiple elements through logical reasoning.
- **Applicable presumptions:** Rebuttable presumptions, such as the presumption that a company attending meetings where anticompetitive agreements are discussed is part of the cartel unless it proves otherwise, can ease the authority's burden.[1]
- **Temporality of the facts:** Proving a past event is generally easier than proving future potential effects, which involves inherent uncertainty.
- **Complexity and "economic normality":** Proving a fact that a decision-maker conceives as unusual or "not normal" is more challenging and requires more cogent evidence to be persuasive.
- **Standard of judicial review:** An intense standard of judicial review by the courts effectively raises the evidentiary bar that the competition authority must clear to prove its case.

Classification of infringement as by object or by effect

Classification not only affects the design of the legal test (what needs to be proven), but also the other elements of evidentiary standard.

Starting point:

The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute.

Case 56/65, Société Technique Minière v Maschinenbau Ulm GmbH, EU:C:1966:38, para 250

Thus:

The ‘by object’ category applies to practices that cannot be plausibly explained on grounds other than the restriction of competition.

Case C-307/18 Generics (UK) Ltd and Others v Competition and Markets Authority, EU:C:2020:52, para 89.

Cont’d

How to start and finish assessing a by object infringement is to a high degree fleshed out in regards to what and how it has to be proven.

> It is a Fact-intensive investigations, where the prima facie status of the behaviour is uncontroversial (cartels). The difficulty, from the perspective of an authority, is to provide convincing evidence that the said practice has been implemented.
>
> The inquiry is primarily about establishing the facts to the requisite legal standard.
>
> The legal status of cartels is not disputed and is well known to stakeholders, the primary challenge for an authority is to detect the conduct (which is concealed from enforcers in the vast majority of cases), establish the facts to the requisite legal standard and, finally, deter other firms from engaging in it (typically by imposing large fines).
>
> (PABLO IBÁÑEZ. COLOMO. The New EU Competition Law. Hart Publishing. 2023.)

This significantly lightens the evidentiary burden, as the authority only needs to prove the existence of the agreement, concerted practice and its anticompetitive objective within its economic and legal context. No market definition, counterfactual, pro-competitive objections, no deminimis appreciability exception.

Cont’d

Classification, and by effects infringements are usually ‘‘Law-intensive’ cases.

> Here the relevant facts are typically available to the authority and the challenge is to determine whether or not they amount to an infringement in the relevant economic and legal context.
>
> The inquiry hinges on the lawfulness of the practice.
>
> The focus relates to whether the conduct under consideration amounts to an infringement. Practices falling within this category are, accordingly, ‘law-intensive’. Their legal status depends on the specific circumstances in which they are implemented. This holds for majority of vertical restraints. Most of these agreements are not deemed anticompetitive by their very nature. Thus, whether or not they are restrictive of competition necessitates a context-specific evaluation of their actual or potential impact. Same goes for abuse of dominance.
>
> (PABLO IBÁÑEZ. COLOMO. The New EU Competition Law. Hart Publishing. 2023.)

The Commission bears the full evidentiary burden of demonstrating that by effect infringement has, or is likely to have, appreciable restrictive effects on competition. This does not change the standard of proof, but it dramatically increases the evidentiary burden. The authority must conduct a full counterfactual analysis, supported by specific, tangible points of analysis and evidence, to show how competition is weaker *with* the agreement than it would have been *without* it.

The legal test also determines the threshold of effects, that is, up to what level the competition authority needs to prove the actual or potential effects of certain conduct. This threshold of effects must not be confused with the standard of proof, even though both are commonly expressed in probabilistic language.

Sufficient proof of an anticompetitive agreement and/or concerted practice

It is usually a fact-intensive exercise:

Proving an Agreement: The "Concurrence of Wills"

- **Core Concept:** The parties must have expressed a joint intention to act in a specific way on the market.
- **Proof:** Can be direct (documents) or indirect (indicia).
- Can be **explicit** or **tacit**

Tacit acquiescence:

A seemingly unilateral policy (e.g., a supplier setting minimum prices) becomes an agreement if the other party consents, even tacitly.

Clarification from ECJ:

The ECJ in *Super Bock* clarified that this concurrence of wills can be demonstrated in two main ways:

1. **From the terms of the contract:** The distribution contract itself may contain an express invitation to comply with minimum resale prices or authorize the supplier to impose them.
2. **From the conduct of the parties:** Iit can be inferred from the conduct of the parties, specifically through the **explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices**.

To prove tacit acquiescence, an authority must show both an invitation and compliance. The judgment provides concrete examples of evidence that can be used to establish each part:

- **Evidence of an Invitation:** The supplier's attempt to impose minimum resale prices can be inferred from actions such as regularly sending distributors lists of minimum prices, asking them to comply, monitoring the prices they apply, and threatening retaliatory measures (like applying negative distribution margins or withholding supplies) for non-compliance.
- **Evidence of Acquiescence:** The distributors' agreement can be inferred from facts showing they complied with the supplier's policy. This could include evidence that the minimum prices are, in practice, followed by the distributors, or that distributors themselves request the price indications from the supplier. Even the act of complaining to the supplier about the price levels, rather than simply applying different prices, can be seen as a reflection of their acquiescence to the supplier's pricing policy.

Cont’d

The **Beevers Kaas** (C-581/23) ECJ further refined this principle in the context of exclusive distribution systems. The Court ruled that the mere fact that other buyers do not engage in active sales in an exclusive territory is not, on its own, sufficient proof of an agreement to restrict those sales. To prove tacit acquiescence, there must be more evidence, such as:

- An **invitation** from the supplier (explicit or implicit) to its other buyers not to sell into the exclusive territory. This could be a specific communication or a clause in the general terms and conditions.
- Evidence that the buyers **complied** with that invitation. The absence of sales could be a relevant factor, but it is not enough on its own, as it could also result from an autonomous commercial decision by those buyers.
- Additional evidence, such as a system of **monitoring and penalties** set up by the supplier to enforce the restriction, can help establish that the buyers' compliance was not merely coincidental but a result of the supplier's policy.

Proof of Concerted Practice

- **Definition:** Coordination that knowingly substitutes practical cooperation for the risks of competition, without a formal agreement.

- **Three Key Elements to Prove:**
  1. Contact between undertakings.
  2. Subsequent conduct on the market.
  3. A causal link between the two.

Case law

Presumption of contact by way of market parallelism:

- **Woodpulp**. Concerted practice is the **only plausible explanation** for the parallel behaviour.

Presumption of causal link between contact and subsequent market conduct

- **Anic**
  - Once contact and subsequent market conduct are shown, a causal link is presumed.This means that undertakings participating in concertation and remaining active on the market are presumed to take account of the information exchanged with their competitors when determining their own market conduct.
  - This presumption shifts the evidentiary burden to the undertakings to prove that the contact did *not* influence their market behavior (see rebuttal).

Quality and quantity of the contact:

- **T-Mobile Netherlands**

  Even a single meeting can be sufficient to establish the "contact" element, especially if the goal is simple (e.g., coordinating one price parameter).

- **Latest clarification by ECJ in Eturas (Case C-74/14)**

  ECJ Applied above principles to indirect one-way contact through common IT system (each travel agent received one way message that system will be capping discounts in the shared IT system.

  The presumption of participation only applies if the undertaking was aware of the anticompetitive message. The mere sending of a message is not sufficient; awareness is a prerequisite for the presumption of tacit acquiescence to apply.

Rebuttals and Plausible Explanations

- Pure parallel conduct is not proof of collusion if it is **not the only plausible explanation.** Rational adaptation to market conditions is a valid defense.

- Adduce other evidence to rebut causal link presumption (in Eturas: evidence of the systematic application of a discount exceeding the cap in question, which was possible by manual override)

- publicly distance themselves from practice, or
- report practice to appropriate authorities.

Escaping Art. 101(1):

Once an agreement restricts competition, it is prohibited by Art. 101(1). There are only two, very narrow, arguments to claim the restriction falls outside the prohibition at this stage:

1. **The Ancillary Restraints Doctrine,**
2. **Objective Justification.**

If these do not apply, the only remaining path is an exemption under Art. 101(3) TFEU.

In all these cases the accused undertaking bears the legal burden of proof.

I will deal with these situations in next session that relates to "**Assessing objective justifications and efficiency defences under Article 102 TFEU"** as they follow the same logic.

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Case Study: The Edible Oil Cartel (fictitious)

Dear Judges,

I look forward to our forthcoming meeting in Kosovo.

I would like to kindly request that you read the enclosed fictitious case study and reflect on the possible analyses that could be undertaken. We will have the opportunity to discuss the related questions together during our meeting.

Best regards,
Małgorzata

[Panel on Article 101 TFEU]

GoldenHarvest Oils S.A. is a major producer of sunflower and rapeseed oil in Edenia, a mid-sized EU Member State. It supplies both branded and private-label edible oils to all major supermarket chains, namely FoodMax, DailyMart, and EcoShop. The market for edible oils in Edenia is characterised by high concentration at the production level and significant buyer power among large supermarket chains. GoldenHarvest holds approximately 25 per cent of the national production market, while each supermarket chain has a market share of no more than 20 per cent in retail distribution of edible oils.

Between 2018 and 2024, following a period of volatility in global oilseed prices that intensified retail price competition, GoldenHarvest introduced monthly recommended resale price lists (RRPs) applicable to all its products. These RRPs were communicated in writing via email and orally through sales representatives.

Internal communications revealed during a dawn raid by the National Competition Authority that compliance with the RRPs was closely monitored and enforced through commercial measures. Sanctions included suspension or delay of supplies, withdrawal of promotional discounts, rebates or marketing contributions, refusal to grant access to limited-supply premium oils, and termination of joint advertising campaigns.

Emails and internal memos contained explicit references to coordinated pricing, including statements such as:

- ‘You need to stabilise prices – we cannot afford price wars again.’
- ‘We are keeping the prices, but our competition is not. Do something about it.’
- ‘All partners should respect the same price corridor if we want stable cooperation.’
- ‘We have shared your price list with other partners to align strategies.’
- ‘Any future promotions must be pre-approved to avoid market distortions.’

GoldenHarvest regularly collected and compared planned retail prices from each supermarket and communicated aggregated information to all distributors, indicating which chains were in

line and which were undercutting the market. This exchange of pricing intentions allowed the supermarkets to align their behaviour without direct contact. It was established that the supermarkets never communicated directly with each other regarding pricing or promotional strategies. Instead, all exchanges took place through GoldenHarvest, which acted as the sole intermediary and ensured alignment between the retail chains.

Supermarkets' internal correspondence confirmed that they adjusted their shelf prices after receiving RRP updates and feedback from GoldenHarvest. The arrangement effectively stabilised retail prices for GoldenHarvest-branded oils.

In addition to pricing coordination, GoldenHarvest applied other forms of restrictive conduct. Sales representatives instructed supermarkets not to engage in price promotions for products competing with GoldenHarvest oils without prior approval. When EcoShop attempted to run a discount campaign on its private-label oil, GoldenHarvest suspended deliveries for two weeks.

In late 2025, the Edenian Competition Authority issued a decision finding that GoldenHarvest and the supermarket chains had participated in a price-fixing agreement under Article 101 TFEU. The authority imposed fines of 45 million euros on GoldenHarvest, 18 million on FoodMax, 15 million on DailyMart, and 12 million on EcoShop.

Analyse:

1. Was the Edenian Competition Authority correct to qualify the arrangement between GoldenHarvest and the supermarkets as an agreement violating Article 101?
2. Can the agreement be justified on the basis of Article 101(3) as a response to falling prices caused by a global situation threatening producers' economic stability?

[this part is relevant for a panel on 102]

In parallel with the investigation into the price coordination scheme, the Edenian Competition Authority initiated a separate proceeding to examine whether GoldenHarvest Oils S.A. had abused its dominant position on the market for the wholesale supply of branded cold-pressed sunflower oil, in particular with regard to its flagship product *GoldenHarvest Premium Pure SunOil*.

While GoldenHarvest's overall share of the edible oil market was approximately 25 per cent, its share exceeded 55 per cent in the branded segment of high-quality cold-pressed sunflower oil. The investigation established that *Premium Pure SunOil* held a strong and stable position due to consumer loyalty, perceived superior quality, and limited substitutability with other brands or private-label oils.

First, GoldenHarvest required supermarkets and distributors to purchase bundled quantities of its lower-grade or less popular products, such as *GoldenHarvest Classic SunOil* and *GoldenHarvest Rapeseed Blend*, as a condition for obtaining sufficient volumes of *Premium Pure SunOil*. The allocation of the premium product during high-demand periods, such as Easter and Christmas, was explicitly linked to the acceptance of such bundled supply conditions. Internal correspondence described this as a "package approach ensuring balanced sales of the entire portfolio." Distributors who refused to buy the tied products faced reduced allocations or delayed deliveries of *Premium Pure SunOil*.

Second, the investigation revealed that GoldenHarvest had priced the premium segment oil at at very high level. Between 2019 and 2024, the wholesale price of *Premium Pure SunOil* increased by more than 40 per cent, while production costs rose by less than 10 per cent. The company's gross margins on this product consistently exceeded 45 per cent, far higher than for comparable branded oils sold in neighbouring Member States. Despite these increases, the product's composition and quality remained unchanged. The authority's economic analysis concluded that the price level was disproportionate to the economic value of the product and could not be objectively justified by cost factors, brand investment, or quality improvements.

The authority therefore examined whether this conduct amounted to an abuse under Article 102 TFEU. By linking access to the market's most sought-after branded oil with the compulsory purchase of other, less competitive products, GoldenHarvest restricted distributors' freedom of choice and leveraged its dominance in the premium segment to strengthen its position across the entire product range. At the same time, the excessive pricing policy directly exploited consumers, who faced inflated retail prices for *Premium Pure SunOil* and had few equivalent alternatives.

Analyse:

1. Can GoldenHarvest's practices be considered competition on the merits in light of Article 102 TFEU?
2. What forms of abuse are involved in this case?

[This part is relevant for the panel on damages]

In 2026, a group of consumers represented by the Edenia Consumer Rights Association filed a collective damages action before the Edenian Commercial Court against GoldenHarvest and the three supermarket chains. The claimants alleged that the coordinated price alignment resulted in sustained retail overcharges for edible oils across the whole market, including *GoldenHarvest Premium Pure SunOil*, and caused direct financial harm to consumers over several years.

The association based its claim on data showing that the average retail price of *Premium Pure SunOil* in Edenia increased by 35 per cent between 2018 and 2024, despite decreasing global oil prices during much of this period. Consumers were deprived of access to promotions and discounts that had previously been common, and cross-brand price competition between supermarkets effectively disappeared. The estimated overcharge to consumers was calculated at approximately 40 million euros, based on a comparison of actual prices with a counterfactual model reflecting competitive market conditions.

The claim relied on the decision of the Edenian Competition Authority and invoked the binding effect of this decision under national law implementing the Damages Directive (2014/104/EU). The case is pending before the Edenian Commercial Court. The claimants seek compensation for overcharges and loss of consumer surplus. The case has attracted attention as one of the first large-scale follow-on damages actions in the food retail sector in Edenia.

Analyse:

1. Are the claimants correct to seek compensation for overcharges and loss of consumer surplus?
2. Should the assessment of harm be based solely on prices in the three supermarkets involved, or on the entire national retail market?
3. To whom can the claimants address their claim?

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ARTICLE 102 ENFORCEMENT

Ljiljana Pavlic
Chief Economic Advisor, Croatian Competition Agency

Training for Judges from Kosovo
Pristina, 28. 10. 2025.

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Outline of the presentation

Article 102 – key concepts

Exploitative abuse

Exclusionary abuse

Predatory pricing

Margin squeeze

Price discrimination

Refusal to supply / Refusal to access

Denigration

The Draft Guidelines

Article 102

Article 102

(ex Article 82)

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.

Dominant position

- Position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, of consumers
- It is important to note that a dominant position is not condemned per se - only its abuse is
- A company can hold a dominant position because of its superior performance without this being reprehensible

How to evaluate dominant position

- First step – define relevant market – product and geographic market
- Second step – establish whether the undertaking has substantial degree of market power within the market
- Market power degree evidence:
- Market shares – first indication of the importance of each undertaking on the market in comparison to the others

  The higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance

  Dominance is not likely if the undertaking's market share is below 40 % in the relevant market
- Barriers to entry – technical, regulatory, privileged access to essential inputs or natural resources…
- Countervailing buyer power – ability of customers to switch quickly to competing suppliers
- Financial strength of the undertaking
- Vertical integration – evaluate the extent to which undertaking is present at several levels of the supply chain (vertical integration)

Article 102

- Prohibits certain forms of unilateral market behaviour
- Applies only to undertakings holding a dominant market position
- Applies only to abusive conduct

- Types of abuses

Exploitative - consists of the dominant undertaking imposing excessive or unfair trading conditions on its commercial partners, customers or suppliers

Exclusionary –consists of the dominant undertaking imposing strategies aiming at forcing exit of competitors from market

Competition on the merits

- Competition should be “on the merits” and that the use of “methods different from those governing normal competition” hurt the maintenance or development of the level of competition

  Michelin case

- What “normal competition” means? What is understood by “the merits” as opposed to “other methods”?
- The notion that competition must be “on the merits” means that a dominant undertaking is in principle free to compete (gaining market shares, strengthening its innovative edge, increasing its profitability and financial power, and even excluding competitors) where its competitive advantages result from the quality of its products or services, obtained through innovation, manufacturing excellence, from efficiency in marketing and in the provision of services, and through smart adaptation to market and customer needs

Exploitative abuses

- No exact legal definition in the TFEU (Treaty on the Functioning of the European Union)
- Can be defined as practices that result in a direct loss of consumer welfare, in contrast to exclusionary abuses, which harm consumers indirectly by foreclosing competition
- Exploitative abuse can take many forms: excessive pricing, unfair trading conditions, limiting output, offering poor quality, price discrimination
- Recent EU draft guidelines (and previously prioritization principles) for exclusionary abuse, but nothing for exploitative abuse

Test for excessive pricing

In *United Brands* (1971), the ECJ introduced a two-limb test for assessing excessive pricing under Article 102(a)

- Prices must be **excessive**: significantly disproportionate or unreasonable relative to costs
- Prices must be **unfair** in itself or by comparison to relevant benchmarks (significant and persistent difference)

Test for unfair trading conditions

In Apple Music Streaming (2024), the EC uses the following cumulative criteria to define unfair trading conditions:

- The conditions are **imposed unilaterally** by a dominant undertaking on its trading partners
- They are **detrimental** to the interests of the trading partners or of third parties, including consumers
- They are **not necessary** for the achievement of a legitimate objective or **not proportionate** for that purpose

Exploitative abuse case AKKA/LAA

AKKA/LAA (Latvian case, judgement CJEU)

AKKA/LAA Latvian only authorized entity for issuing licences for the public performance of copyrighted music works; legal monopoly

- AKKA/LAA had abused its dominant position as a result of the application of excessively high rates
- Certain rates applied in Latvia were compared with those applied in neighbouring Member States Lithuania and Estonia, and found that the rates applied in Latvia were two to three times higher
- It was also looked at the purchasing parity index (“PPP index”) and compared the rates in force in approximately 20 other Member States and found that the rates payable in Latvia exceeded by 50% to 100% the average level of those charged in the other Member States

Exploitative abuse case AKKA/LAA

Latvian Supreme Court

On appeal of this decision, the Latvian Supreme Court referred a number of questions to the ECJ, including among others:

(i) whether it was appropriate to consider rates in neighbouring Member States, as well as with those applicable in other Member States adjusted in accordance with the PPP index, for the purposes of examining whether a copyright management organization applies unfair prices;

(ii) what is the threshold above which the difference between the rates is to be regarded as appreciable, and therefore indicative of an abuse; and

(iii) what evidence the copyright management organization can adduce to demonstrate that the rates are not excessive

Exploitative abuse case AKKA/LAA

ECJ preliminary rulling

An abuse within the meaning of Article 102 TFEU might lie in the imposition of a price which is excessive in relation to the economic value of the services provided

- In this regard, the ECJ noted that the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to that question is affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing products
- In this respect, the ECJ further noted that a method based on a comparison of prices applied in the Member States concerned with those applied in other Member States must be considered valid
- The ECJ also held that when a dominant undertaking imposes fees which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference is indicative of an abuse

Exploitative abuse case AKKA/LAA

ECJ judgement

- The ECJ noted that a comparison with neighbouring Member States cannot be considered to be insufficiently representative merely because it takes a limited number of Member States into account
- Such a comparison is relevant on condition that the reference Member States are selected in accordance with objective and verifiable criteria such as, *inter alia,* consumption habits and other economic and sociocultural factors such as GDP and cultural and historical heritage
- As regards the comparison of the applicable rates with the non-neighbouring Member States, the ECJ held that such a comparison can serve to verify the results already obtained
- Such a comparison must however be made on a consistent basis, and the national authority must verify whether the method of calculating rates in the selected reference Member States is analogous to the method of calculation applicable in Latvia

Exploitative abuse case AKKA/LAA

ECJ judgement

- On the assessment of the apreciability of the rate difference, the ECJ noted that the difference between rates charged in the present case is not as large as in the previous case law on excessive pricing
- **There is no minimum threshold above which a rate must be regarded as appreciably higher**
- A difference between rates may be qualified as appreciable if it is both significant and persistent (as opposed to temporary or episodic) on the facts with respect in particular to the market in question

High prices should only exist in the markets where entry barriers prevent new competitors to enter the market and drive down prices

Exploitative abuse case AKKA/LAA

ECJ judgement

- As regards the Latvian court's question on possible justifications for applying higher rates, the ECJ stated that the copyright management organization may rely on objective dissimilarities between the situation of the Member State concerned and that of the other Member States.
- Such factors may include

(i) the relationship between the level of fees and the amount actually paid by the rightholders, and

(ii) the proportion of fees that are taken up by collection, administration and distribution expenses rather than by payments to rightholders, and

(iii) objective factors affecting costs, such as a specific national regulation or other features specific to the market concerned

Exclusionary abuse

- When company in a dominant position which tends to oust its competitors by means other than those of normal competition based on the merits
- Usually in the form of predatory pricing, margin squeeze, discrimination in prices, refusal to supply, grant access to essential facility, misleading claims denigration…
- "competition on the merits may by definition lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to customers from the point of view of … price, choice, quality or innovation"

Case C-413/14P, *Intel v Commission (*2017)

This statement suggests that the Court accepts that a method that is by definition "not on the merits" may nevertheless not be detrimental to competition where the dominant undertaking excludes a competitor that is not "as efficient" and would leave the market anyway because of the "merits" of the dominant undertaking

Predatory pricing

Prices are set at low levels that do not cover certain costs with the intent of eliminating a competitor from the market

Once the competitors are eliminated, undertaking in dominant position can then rise prices to a more profitable level

- Test is required
- Long-Run Average Incremental Cost (LRAIC) is an appropriate benchmark
- LRAIC may be used as a proxy to ATC
- Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market

Predatory pricing

Qualcomm abuse of dominance case (2019)

- Qualcomm sold certain chipsets below its Long-Run Average Incremental Cost (LRAIC) to two key customers, Huawei and ZTE. Qualcomm's internal documents showed that this strategy was designed to eliminate its main competitor at the time, Icera
- Qualcomm abused dominant position
- Prices below ATC: the General Court explained that LRAIC is an appropriate cost benchmark in the semiconductor industry, which is characterised by low variable costs and high fixed costs. The General Court also clarified that LRAIC can never exceed ATC. Therefore, by demonstrating that Qualcomm's prices were below LRAIC, the Commission automatically demonstrated that the prices were below ATC.
- This approach aligns with the Commission's draft guidelines on exclusionary abuse, which explicitly mention LRAIC as an appropriate cost benchmark.

Margin squeeze

- Practice of a vertically integrated company present both on an upstream market where it holds a dominant position and on a competitive downstream market setting its wholesale (upstream) prices at such a level that its competitors on the downstream market cannot cover their cost and therefore incur losses

Deutsche Telekom, Slovak Telekom case – abuse of dominance

- Slovak Telekom imposed a margin squeeze on alternative operators which made it impossible for them to use its local loops to offer retail broadband services in competition with Slovak Telekom without incurring a loss. The local loop is the metallic cable that connects a customer's premises with the local telephone exchange
- No fair access to the local loop network had the effect of delaying or preventing entry of new competitors who wanted to sell broadband services to retail customers

Margin squeeze

- The General Court confirmed that margin squeeze can be established even where margins are positive if the Commission proves that the pricing practice is likely to have the effect of making it more difficult for rivals to compete, for example, because of reduced profitability
- Deutsche Telekom is parent company of Slovak Telekom and is held liable for the abusive conduct of its subsidiary because it exercised “decisive influence” over its commercial policy
- Deutsche Telekom was fined an additional 31 million euros, since back in 2003, it (not Slovak Telekom) had been fined for the same type of abuse of dominance. This was despite the fact that the previous abuse had taken place in the German market.

Discriminatory pricing

- Article 102 TFEU includes in the abuses that may constitute an abuse of dominant position, the "*applying* [of] *dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*"
- Evidence of discriminatory trading conditions is not sufficient in order to establish an abuse
- The importance of effects analysis in the enforcement

The MEO judgement

- Establishing that the dominant firm had subjected trading partners to unequal treatment is not enough
- Instead, it would also have to assess "all the relevant circumstances" to determine whether the discriminatory conduct had a foreclosure effect on upstream or downstream customers, and it would have to ascertain the seriousness of this effect
- Amongst the relevant circumstances for this effects-based analysis of the dominant firm's unequal treatment are, for instance, the negotiating power of upstream or downstream customers, the conditions and duration of the discriminatory arrangements, the existence of an exclusionary strategy, and, notably, the impact of the discriminatory practice on the relevant customers' cost

Refusal to supply/Refusal to access

- For a refusal of supply to constitute an abuse of a dominant position under Art. 102 TFEU, it must:

(i) concern an indispensable product or service,

(ii) likely lead to the elimination of all competition in a downstream market and

(iii) not be objectively justified

- The Bronner conditions are only applicable if the infrastructure is

(i) developed by the undertaking in a dominant position solely for the needs of its own business and

(ii) owned by that undertaking

Refusal to supply/Refusal to access

Google Adroid Auto judgement CJEU (2025)

- The CJEU considered that Google's Android Auto platform had not been developed solely for the needs of its own business, since access was open to third parties
- As a result, the indispensability requirement of the refusal to supply test from Bronner criteria did not apply
- The legal premise was that Google's refusal to ensure interoperability between its Android Auto platform and third-party apps (like JuicePass) implies a refusal to give third parties (like Enel X) access to the dominant company's own (digital) *infrastructure* and that it can therefore be compared to the refusal at issue in the *Bronner* case

Refusal to supply/Refusal to access

- AG Medina's opinion

"dominant undertaking has developed infrastructure not solely for the needs of its own business but with a view to enabling third-party undertakings to use that infrastructure"

- The Court held that a refusal to grant access to a platform by a third-party undertaking which has developed an app is "capable of constituting an abuse of a dominant position even though that digital platform is not indispensable for the commercial operation of the app concerned on a downstream market"

General Court's judgment in Google Shopping

- An access restriction would be abusive "where the dominant undertaking develops an input for the declared purpose of sharing it widely with third parties but later does not provide access or restricts access to that input."

Denigration

- Denigration is a form of exclusionary abuse when practised by a company in a dominant position - it consists of publicly discrediting a competitor or its products or services

2024 – abuse of dominance

Teva disseminated misleading information about competitor targeting key stakeholders, including doctors and national authorities responsible for pricing and reimbursement decisions, by emphasizing clinically irrelevant compositional differences between the two competing products and by making misleading inferences from experiences with other glatiramer-related substances unrelated to Synthon’s GA product

The Draft Guidelines – exclusionary abuses

- Contrary to Article 101 and merger control, there are currently no Commission guidelines on Article 102
- Objectives:

The Commission's intention for the new guidance is to distil its Art. 102 enforcement experience into a "workable" effects-based approach that ensures legal certainty and systematises the rich and complex case law

Provide operational guidance to dominant firms as a means to facilitate self-assessment and foster compliance, to the benefit of all stakeholders including EU consumers and businesses,

Draw lessons from the Courts' case law and the Commission's extensive enforcement experience to promote a workable effects-based approach, which is firmly grounded in economic thinking and conducive to a robust and effective enforcement of Article 102

The Draft Guidelines

Structure of draft Guidelines:

1)Introduction (purpose of competition law enforcement, broad notion of consumer welfare and exclusion)

2)Dominance (single firm dominance, collective dominance)

3)General principles (two-pronged assessment: (i) conduct departs from competition on the merits; and (ii) conduct is capable of producing exclusionary effects)

4)Specific categories of conduct:a)Conducts subject to specific legal test (exclusive dealing; tying and bundling; refusal to supply; predatory pricing; margin squeeze)

b)Conducts without specific legal test (conditional rebates; multi-product rebates; self-preferencing; access restrictions)

5)Objective justifications

The Draft Guidelines

The Guidelines are organised around the notion of competition on the merits which is central in the recent case law.

'Naked restrictions', 'presumptively abusive practices', 'abuses with specific legal tests', and 'other type of abuses without a legal test' are all ways to identify unilateral conduct that is off the merits

•.For other conducts, list of elements that can be relevant in analysis e.g. breach of other laws when it affects competition parameters, deceiving behaviour, exclusion of hypothetical as efficient competitors

The Draft Guidelines

Capability to produce exclusionary effects

- Broad meaning of exclusion: reducing actual or potential competitors' ability or incentive to exercise competitive constraint - full-fledged exclusion, marginalisation, increase barriers to entry or expansion, constraints on competitor growth, …
- Causality / attributability: no need to establish that the conduct is the only cause for exclusionary effects; it is sufficient to use as comparator to establish attributability one plausible scenario that would have materialised absent the conduct (e.g. analysis of market before / after implementation of the conduct)
- Modulation in the burden and standard of proof

The Draft Guidelines

Objective justifications

- Draft Guidelines distinguish between:
- Objective necessity defence
- based on evidence that a behaviour of the dominant undertaking was objectively necessary to achieve a certain aim, e.g. public health, safety, or the protection of the dominant undertaking against unfair competition
- can only be accepted if the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim

The Draft Guidelines

- Efficiency defence
- Exclusionary effects resulting from the dominant undertaking's conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers

- The fact that a conduct has high potential to produce exclusionary effects or is a naked restriction must be given due weight in the balancing exercise
- Burden of proof for objective justifications is on dominant undertaking

The Draft Guidelines

The draft Guidelines provide for different standard of proof and legal presumptions depending on the category of conduct of the dominant undertaking:

- **Category 1 – General Principles:** Applies to conduct not covered by any of the other categories. The EC must demonstrate both a departure from competition on the merits and the capability to generate exclusionary effects;
- **Category 2 – Specific legal tests:** Includes practices like exclusive supply or purchasing agreements, exclusivity rebates, predatory pricing, margin squeeze, and certain forms of tying. Such conduct is presumed to depart from competition on the merits and to have exclusionary effects, though this presumption can be rebutted by the dominant company;
- **Category 3 – Naked Restrictions:** Encompasses conducts with no economic rationale other than restricting competition, such as paying customers to delay or cancel the launch of competing products. These are presumed abusive, with limited scope for rebuttal.
- The draft Guidelines also provide that dominant undertakings may defend their conduct by demonstrating that it is objectively justified or that its pro-competitive efficiencies outweigh its anti-competitive effects.

The Draft Guidelines

Type of conduct	Presumption of exclusionary effects	Need to demonstrate exclusionary effects	Does it amount to competition on the merits?
Naked restrictions	✓ ✓		No
Exclusive dealing (including exclusivity rebates)	✓		No
Predatory pricing	✓		No
Some tying (*Hilti, Tetrapak*?)	✓		No
Other tying (*Microsoft, Android*?)		✓	No
Margin squeeze (negative spread: $p<w$)	✓		No
Margin squeeze (positive spread: $p-w<c$)		✓	No
Refusal to deal		✓	No
Other access restrictions		✓	To be assessed
Conditional rebates (other than exclusivity rebates)		✓	To be assessed
Self-preferencing		✓	To be assessed

The Draft Guidelines

Reflecting on a Draft Guidelines

- Little economics: abandonment of concepts of some theories of harm and anti-competitive foreclosure; few references to economic principles and theories; practices with similar effects treated differently: back to a form-based approach? Maybe presumptions do not necessarily mean less economics (instead they enable an economisation of enforcement resources)
- Selective interpretation of case law? (the as-efficient competitor principle is missing)
- Will the Courts accept a *de facto* reversal of burden of proof?

Faleminderit

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Assessing Objective Justifications and Efficiency Defences under Article 102 TFEU

Davor Lekić
Slovenian Competition Authority
Views expressed are solely mine.

Introduction & Legal Context

- **The Topic:** Defences available to a dominant undertaking *after* conduct is found to be abusive.
- **The Challenge of Art. 102:**
    - **A Textual Silence:** Unlike Article 101, Article 102 TFEU has no explicit exemption clause. Early jurisprudence was hostile to the idea of justifying an "abuse".
    - **Judicial Creativity:** The Court of Justice of the European Union (CJEU) developed "objective justification" as an unwritten, inherent principle of the law.
    - **Striking a Balance:** This was necessary to balance a dominant firm's "special responsibility" not to impair competition with its right to engage in "competition on the merits".

The Two Core Defence Categories

The Draft Guidelines (Chapter 5) provide a clear scaffolding. A dominant undertaking's conduct may be justified in two primary ways:

1. **The Objective Necessity Defence**
    - The conduct is objectively necessary to achieve certain aim.

    - *Example: safety (Hilti), public health (Hilti), technical (Google Shopping), legitimate commercial interest of the undertaking (fair trade (United Brands), unfair competition (Google Shopping), response to actions of business partners (Sot. Lelos).*

The defence must be **proportionate** to the alleged necessary aim which includes also assessment of less restrictive means of achieving the said goal. (Servizio Elettrico Nazionale, Google Android).

2. **The Efficiency Defence**

    - The conduct's pro-competitive effects (efficiencies) outweigh its anti-competitive effects.

      Requires to demonstrate that the exclusionary effects resulting from the dominant undertaking's conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers. (BA, Post Danmark)

    - How succesfull the defence will be depends on the nature of infringement (higher threshold for naked restrictions)

    - *Example: Gaining economies of scale, leading to lower consumer prices.*

    - Proportionality embedded in the 4 part test.

Legal burden for both defences lies on the dominant undertaking

Defence 1: Objective Necessity

- **The Legal Test:** The dominant undertaking must demonstrate its conduct was "objectively necessary to achieve a certain aim".
- **Categories of Justification:**
    - **Technical Justifications:** e.g., maintaining product integrity or performance (*Microsoft* - rejected).
    - **Public Interest / Safety:** e.g., protecting public health (*Hilti*, *Tetra Pak II* - rejected as it's the role of public authorities, not dominant firms).
    - **"Legitimate Commercial Considerations":**
        - Protecting against *unfair* competition.
        - Responding to a customer's non-ordinary orders (*United Brands* - rejected).
        - *Response to actions of business partners, unusual orders (Sot. Lelos).*

- **The test:** The conduct must be indispensable and the exclusionary effects proportionate to the aim pursued.

Public health, safety or other public interest considerations are extremely unlikely (Hilti)

The Commission in Draft Guidance in this respect sees role for improving Union resilience, to reduce dependencies and mitigate shortages and disruptions in supply chain (policy goals) (footnote 355).

Defence 2: The Efficiency Defence

- This defence allows a dominant firm to justify prima facie abusive conduct by proving substantial pro-competitive efficiencies efficiencies counterbalance, or even outweigh, the *anti-competitive* effects.

- "More economic approach" shown by the undertaking. It accepts that some restrictive conduct may ultimately be good for consumers. The company has all the evidence to show this.

- It is subject to a rigorous, four-part cumulative test, largely mirroring Article 101(3) TFEU.

- **Cumulative Nature:** An undertaking must succeed on all four conditions. Failure on any single point means the entire defence collapses.

- This high bar makes it a defence of last resort, especially for conduct presumed to be harmful. If the conduct has a high potential to produce exclusionary effects or whether it is a naked restriction must means higher treshold to prove this defence.

- **Key Requirement:** The benefits *must* be passed on to consumers.

The Four-Part Test for Efficiencies

For an efficiency defence to succeed, the dominant undertaking MUST prove **all four** cumulative conditions (Post Denmark):

1. **Gains Counteract Harm:** The efficiency gains must counteract any likely negative effects on competition and consumers.

2. **Gains are Caused by the Conduct:** The efficiencies must be a direct result of the abusive conduct.

3. **Conduct is Indispensable:** The conduct must be *necessary* for achieving those gains (i.e., no less restrictive means exist).

4. **No Elimination of Competition:** The conduct does not eliminate effective competition.

Burden and Evidentiary Standard

A Shifting and Modulated Landscape

- **The Initial Burden:** The authority or claimant bears the initial burden of proving a prima facie case of abuse.
  - Evidence must be "sufficiently serious, precise and consistent".
  - It is sufficient to show the conduct is *at least capable* of producing an exclusionary effect, which can be potential, not just actual.
- **The Reversal of the Onus:** Once a prima facie case is established, the evidentiary burden shifts to the dominant undertaking.
- The undertaking then bears the full legal burden to proactively prove any objective justification or efficiency defence it invokes. (*Microsoft*, *Post Danmark II*).
  - The burden does not shift.

Quick reminder

The Commission's 2024 Draft Guidelines introduce a three-tiered system for assessing the authority's initial burden of proof regarding the infringement:

1. **"Naked Restrictions"**
   - Conduct with no plausible rationale other than restricting competition.
   - Exclusionary effects are strongly presumed; justification is "highly unlikely".

2. **"Soft" Presumptions**
   - Conduct with a high potential for exclusionary effects (e.g., exclusivity rebates, tying).
   - Capability of effects is presumed; the burden is on the firm to rebut this presumption.

3. **Full Effects Analysis**
   - For all other conduct (e.g., non-exclusivity rebates, self-preferencing), no presumption applies.
   - The full burden rests on the Commission to demonstrate the capability of exclusionary effects.

Evidentiary standard in Defence

- **Evidentiary Standard:** The undertaking must provide a **cogent and consistent body of evidence**. (Generics)
    - **NOT sufficient:** "Vague, general and theoretical claims".
    - The evidence must be specific, verifiable, and relevant to the specific conduct and market.

The undertaking is in position, or is presumed to be in position to provide such evidence (for instance contemporaneous internal documents)

- **Subjective element** (deliberate or incidental): Not relevant (Generics)."

The Key Judicial Tool: Proportionality

Core Idea: A general principle of EU law ensuring that even when pursuing a legitimate objective, the means used are no more restrictive of competition than absolutely necessary.

1. **Is the conduct suitable** to achieve the claimed aim (necessity or efficiency)?

2. **Is the conduct indispensable, necessary (least restrictive means)** for that aim?
    - This is the "less restrictive means" test.
    - Could the undertaking have achieved the same legitimate aim (e.g., safety, efficiency) through a method that was *less* harmful to competition?

If a less restrictive means was available, the defence fails.

- **The *Wouters* Doctrine:**
    - The *Wouters* case (Art. 101) established a proportionality test for rules pursuing a legitimate objective.
    - The CJEU has confirmed this doctrine can also apply to unilateral conduct under Article 102.

Recent example: In *European Superleague Company*, FIFA/UEFA's rules on prior approval for new competitions failed this proportionality test.

Case Law

- ***Wouters* (2002):** The foundational case. The EU Court of Justice (CJEU) decided that a rule from the Dutch Bar Association banning lawyers from partnering with accountants, while restrictive, did **not** violate competition law. This was because it pursued a **legitimate objective** (protecting professional ethics and client confidentiality) and the restriction was **proportionate** and necessary to achieve it. This created the "Wouters doctrine."

- ***European Superleague Company* (2023):** This case challenged FIFA and UEFA's rules that gave them exclusive power to approve new football competitions. The CJEU ruled that these rules were an **abuse of a dominant position** (Article 102) and an illegal cartel (Article 101). The court found that the power was not governed by transparent, objective, or proportionate criteria, making the restrictions arbitrary and unjustified. The ruling explicitly references the *Wouters* framework, confirming its relevance.

- ***International Skating Union (ISU)* (2023):** The ISU's rules imposing severe, career-ending sanctions on athletes for participating in unauthorized events were challenged. The CJEU found these rules to be a restriction of competition "by object." The sanctions were deemed disproportionate and the authorization system was not transparent, reinforcing that even sporting bodies with legitimate goals must act proportionately.

- ***Royal Antwerp FC* (2023):** This case examined UEFA's "homegrown player" rules, which required clubs to have a minimum number of locally trained players. The CJEU acknowledged the legitimate objective of promoting youth training but stated that the rules could still be illegal if they were not **proportionate**. The case was returned to the national court to assess whether less restrictive means could achieve the same goal.

Microsoft (T-201/04)

- **Conduct:** Tying Windows Media Player (WMP) to the Windows OS – second category of abusive acts

- **Defence Claim (Efficiency):**
  - Tying created technical efficiencies.
  - It resulted in a "superior technical product."
  - It was the "normal evolution" of the product.

- Defence **REJECTED.**
  - **Burden of Proof:** Microsoft failed to provide specific, cogent evidence of the claimed efficiencies.
  - **Proportionality:** Even if gains existed, the exclusionary harm was disproportionate. Less restrictive means (e.g., selling Windows without WMP) were clearly available.

Post Danmark II

- **Conduct:** A retroactive rebate scheme.

- **Defence Claim (Efficiency):** The scheme allowed *Post Danmark* to achieve economies of scale and offer lower prices, benefiting consumers.

- **CJEU's Ruling:**
    - Confirmed the efficiency defence is valid *in principle*.
    - Formally established the four-part test.
    - **Referred the case back to the national court** (i.e., you) to assess the *evidence* against this four-part test.

Google Shopping

- **Conduct:** Self-preferencing (favouring its own comparison shopping service in general search results).

- **Defence Claim (Objective Necessity / Efficiency):**
  - The conduct was "objectively necessary" to improve the quality of its search service for consumers.
  - It was an "efficiency-enhancing" product design.

- Defence **REJECTED.**
  - **Proportionality / Less Restrictive Means:** The conduct was *not necessary*. Google could have applied its quality-improving algorithms to *all* comparison shopping services (competitors included), not just its own.
  - The "less restrictive means" test failed.

Justifications in the Digital Economy

The High Bar for Technical Necessity

- Dominant tech firms often invoke justifications based on user security, data privacy, or technical integrity.
- The CJEU has set an exceptionally high standard for these defences.
- In *Alphabet/Google Android Auto*, the Court held that a refusal to grant interoperability could only be justified if:
  - Granting it would compromise the **integrity or security** of the platform, or
  - It was **technically impossible** to develop a solution.
- Mere cost or difficulty in development is **not** an objective justification.

The Interplay with the Digital Markets Act (DMA)

- The DMA is an *ex-ante* regulatory tool that runs in parallel with Article 102 enforcement.
- It imposes a series of direct obligations and prohibitions on designated "gatekeepers" (e.g., no self-preferencing, no tying).
- The DMA provides for very narrow grounds for justification and does not contain a broad, economics-based efficiency defence.

Potential Impact: The DMA's strict, per se-style rules could "contaminate" the more nuanced Article 102 analysis. It may become much harder for a gatekeeper to argue that conduct violating the DMA is justified under Article 102.

Other Possible Defence: The Ancillary Restraints Doctrine

- **Core Concept:** A restriction that is potentially anti-competitive in isolation may fall outside the scope of competition law if it is "directly related and necessary" to a main, non-restrictive transaction.

- **The Strict Test (from Art. 101 case law, *Booking.com*):** The CJEU recently clarified the test in the context of Article 101.

    1. **Objective Necessity:** The main operation must be **impossible** to implement without the restriction. It is not enough that it would be "less profitable". The Court rejected "preventing free-riding" as a sufficient justification on its own.

    2. **Proportionality:** The restriction must be the least restrictive means available to achieve the objective.

Relevance for Article 102:

- The doctrine is not typically applied in the same way, as Article 102 concerns unilateral conduct.
- However, the underlying logic is very similar to the **Objective Necessity Defence**.
- The high standard from *Booking.com* reinforces the high bar for objective necessity under Article 102, as seen in cases like *Google/Android Auto* where technical *impossibility* was required.
- Crucially, this analysis is distinct from an efficiency defence; it does not involve balancing pro- and anti-competitive effects.

Key Takeaways

1. **Defences are a high bar, not a loophole.** The *prima facie* abuse is already established.

2. **The burden of proof is high and *never* shifts.** The dominant undertaking must substantiate its claims with cogent and consistent evidence.

3. **Proportionality is critical tool.** "Was there a less restrictive way to achieve this same legitimate goal?" If the answer is yes, the defence fails.

4. **Assess the evidence, not just the argument.** Vague claims of "efficiencies" or "safety" are insufficient without specific, verifiable data.

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JUDGMENT OF THE COURT (Third Chamber)

29 June 2023 (*)

(Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Article 101 TFEU – Vertical agreements – Minimum resale prices fixed by a supplier to its distributors – Concept of 'restriction of competition by object' – Concept of 'agreement' – Proof of a concurrence of wills between the supplier and its distributors – Practice covering almost the entire territory of a Member State – Effect on trade between Member States – Regulation (EC) No 2790/1999 and Regulation (EU) No 330/2010 – Hardcore restriction)

In Case C-211/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), made by decision of 24 February 2022, received at the Court on 17 March 2022, in the proceedings

Super Bock Bebidas, SA,

AN,

BQ

v

Autoridade da Concorrência,

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU and of Article 4(a) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1) and also of the Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1).

2 The request has been made in proceedings between Super Bock Bebidas SA ('Super Bock'), AN and BQ, on the one hand, and the Autoridade da Concorrência (Competition Authority, Portugal) concerning the lawfulness of the latter's decision finding that Super Bock, AN and BQ had infringed competition rules and therefore imposing fines on them.

Legal context

European Union law

3 Regulation No 330/2010 succeeded, with effect from 1 June 2010, Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21). In accordance with Article 10 thereof, Regulation No 330/2010 expired on 31 May 2022.

4 Recitals 5 and 10 of Regulation No 330/2010, which are the same in substance as recitals 5 and 10 of Regulation No 2790/1999, were worded as follows:

'(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) [TFEU].

...

(10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.'

5 Article 1(1)(a) and (b) of Regulation No 330/2010 contained the following definitions:

'For the purposes of this Regulation, the following definitions shall apply:

(a) "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

(b) "vertical restraint" means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) [TFEU]".

6 Substantially identical definitions were contained in Article 2(1) of Regulation No 2790/1999.

7 Article 2 of both Regulation No 2790/1999 and Regulation No 330/2010 laid down an exemption rule. Article 2(1) of Regulation No 330/2010, which corresponds, in substance, to Article 2(1) of Regulation No 2790/1999 provided:

'Pursuant to Article 101(3) [TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) [TFEU] shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.'

8 Article 4 of both Regulation No 2790/1999 and Regulation No 330/2010 covered 'hardcore restrictions' which could not benefit from a block exemption. Article 4 of Regulation No 330/2010, which corresponded, in substance, to Article 4 of Regulation No 2790/1999, provided:

'The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Super Bock is a company established in Portugal that manufactures and markets beers, bottled waters, soft drinks, iced teas, wines, sangrias and ciders. Its main activity is on the markets for beer and bottled water.

11 AN is a member of Super Bock's board of directors. BQ is head of Super Bock's commercial department with responsibility for sales in the 'HoReCa' sector, also called the '*on-trade*' sector.

12 That sector, in which the conduct in issue in the main proceedings took place, corresponds to the purchase of beverages made in hotels, restaurants and cafés, namely for consumption away from home. For the purpose of distributing beverages through that sector in Portugal, Super Bock concluded exclusive distribution agreements with independent distributors. Those distributors sell beverages bought from Super Bock in almost the entirety of the Portuguese territory. Only some areas are supplied by direct sales made by Super Bock. That is the case for Lisbon, Porto, Madeira, Coimbra (Portugal) (until 2013) and, from 2014, for the Pico and Faial islands (Portugal).

13 According to the facts found by the referring court, for at least the period from 15 May 2006 until 23 January 2017, Super Bock regularly fixed and imposed, universally and without change, on all distributors, the terms of business which they were required to comply with when reselling products that it had sold to them. In particular, Super Bock fixed the minimum resale prices with the aim of ensuring a stable and consistent minimum price level throughout national market.

14 Specifically, every month (as a rule) the sales department of Super Bock approved a list of the minimum resale prices, which it transmitted to distributors. The network managers or marketing managers within Super Bock transmitted the resale prices to distributors either orally or in writing (by email). Those prices were, as a general rule, applied by the distributors. In turn, those distributors, in the context of a monitoring and tracking system established by Super Bock, were required to report to Super Bock relevant data on resale, for example in terms of quantities and prices. In the event of non-compliance with those prices, the distributors explain that, in accordance with the terms of business set by Super Bock, there were 'retaliatory' measures, such as the removal of financial incentives, comprised of trade discounts on the purchase of products and the reimbursement of discounts applied by distributors to resale, and the refusal to supply and replenish stocks. They thus risked losing the guarantee of positive distribution margins that had been granted to them under those marketing terms.

15 The Competition Authority considered that that practice of fixing, by direct and indirect means, prices and other terms applicable to the resale of products by a network of independent distributors in the

HoReCa distribution sector for almost the entire Portuguese territory constituted an infringement of the competition rules, within the meaning of Article 9(1)(a) of the NRJC and of Article 101(1) TFEU. It therefore imposed fines on Super Bock, AN and BQ.

16 Seised of an action by the latter, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) confirmed the decision of the Competition Authority.

17 Super Bock, AN and BQ brought an appeal against that judgment before the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), which is the referring court in this case.

18 In the light of the arguments raised before it and the questions for a preliminary ruling proposed by the parties to the proceedings that were submitted to it, the referring court considers it necessary to obtain clarification as to the interpretation of Article 101 TFEU. In essence, it asks, first, whether the concept of 'restriction of competition by object' is capable of covering – and, if so, under what conditions – a vertical agreement fixing minimum resale prices. Secondly, its questions concern the concept of 'agreement' where minimum resale prices are imposed by the supplier on its distributors. Thirdly, it asks whether the concept of 'effect on trade between Member States' may include the consequences of a distribution agreement which affects, solely, almost the entirety of the territory of one Member State.

Consideration of the questions referred

Preliminary observations

20 Without raising the issue of the inadmissibility of the request for a preliminary ruling and without formally putting the admissibility of certain questions at issue, Super Bock and the European Commission have expressed their doubts as to, respectively, the intelligibility of the fifth question and the need for the second question for the purposes of the main proceedings.

21 It must be borne in mind that the preliminary reference procedure, which is an instrument of cooperation between the Court and the national courts, is based on a dialogue between those two courts. It is for a national court to assess whether an interpretation of EU law is necessary to enable it to resolve the dispute before it, having regard to the procedural mechanism laid down in Article 267 TFEU, and it is also for that court to decide the manner in which those questions are to be worded. Although that court is at liberty to request the parties to the dispute before it to suggest wording suitable for the questions to be referred, it is for it alone, however, ultimately to decide both their form and content (see, to that effect, judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paragraphs 63 to 65).

22 Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for this Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 23 January 2018, *F. Hoffmann-La Roche and Others*, C179/16, EU:C:2018:25, paragraph 45 and the case-law cited).

23 In that latter regard, it must be noted that, according to settled case-law, which is now reflected in Article 94(a) and (b) of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual hypotheses on which those questions are based. Those requirements are of particular importance in the area of competition, where the factual and legal situations are often complex (see, to that effect, the judgments of 26 January 1993, *Telemarsicabruzzo and Others*, C320/90 to C322/90,

EU:C:1993:26, paragraphs 6 and 7, and of 19 January 2023, *Unilever Italia Mkt. Operations*, C680/20, EU:C:2023:33, paragraph 18 and the case-law cited).

24 Furthermore, it is essential, as stated in Article 94(c) of the Rules of Procedure, that the request for a preliminary ruling itself contain a statement of the reasons which prompted the referring court or tribunal to enquire about the interpretation or validity of certain provisions of EU law, and the connection between those provisions and the national legislation applicable to the main proceedings.

25 In the present case, in the spirit of cooperation intrinsic to the dialogue between the two courts and in order to enable the Court to deliver a decision which is as helpful as possible, it would have been desirable for the referring court to have set out more succinctly and clearly its own understanding of the dispute before it and the questions of law giving rise to its request for a preliminary ruling, rather than reproducing, in an excessively long form, numerous extracts from the file which had been submitted to it. Similarly, while the referring court has certainly set out the reasons that led it to make a preliminary reference to the Court, it would have assisted effective cooperation if it had also reformulated the questions suggested to it by the parties to the main proceedings in order to avoid the unnecessary overlap of those questions. It would also have been helpful to set out the legal and factual premisses on which the questions were based in order to allow the Court to reply in a more specific and targeted manner.

26 In those circumstances, although the preliminary reference is admissible as it meets the conditions of Article 94 of the Rules of Procedure, the Court is in a position to be able to provide the referring court with minimal and general indications only so as to provide guidance as to the application of Article 101 TFEU in the circumstances of the dispute in main proceedings.

The first and fourth questions: the concept of 'a restriction of competition by object', within the meaning of Article 101(1) TFEU

27 By its first and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that the finding that a vertical agreement fixing minimum resale prices constitutes a 'restriction of competition by object' may be made without first examining whether that agreement raises a sufficient level of harm to competition or whether it may be presumed that such an agreement, of itself, presents such a degree of harm.

28 At the outset, it should be recalled that, in the context of the procedure under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the role of the latter is limited to interpreting the provisions of EU law referred to it, in this case Article 101(1) TFEU. Therefore, it is not for the Court of Justice, but for the referring court to determine in the end whether, taking account of all of the information relevant to the situation in the main proceedings and the economic and legal context of which it forms a part, the agreement at issue has as its object the restriction of competition (judgment in 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 51 and the case-law cited).

29 However, the Court, when giving a preliminary ruling, may, on the basis of the information available to it, provide clarification designed to give the national court guidance in its interpretation in order to enable it to decide the case before it (judgment in 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 52 and the case-law cited).

30 It must first of all be recalled that, under Article 101(1) TFEU, the following are 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.

31 In order to be caught by the prohibition laid down by that provision, an agreement must have as its 'object or effect' the prevention, restriction or distortion of competition within the internal market.

According to the settled case-law of the Court since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement, as shown by the conjunction 'or', means that it is first necessary to consider the object of the agreement (see, to that effect, the judgments of 26 November 2015, *Maxima Latvija*, C345/14, EU:C:2015:784, paragraph 16 and the case-law cited, and of 18 November 2021, *Visma Enterprise*, C306/20, EU:C:2021:935, paragraphs 54 and 55 and the case-law cited). Thus, where the anticompetitive object of an agreement is established, it is not necessary to examine its effects on competition (judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C373/14 P, EU:C:2016:26, paragraph 25 and the case-law cited).

32 The concept of 'restriction of competition by object' must be interpreted restrictively. Accordingly, that concept applies only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, the judgments of 26 November 2015, *Maxima Latvija*, C345/14, EU:C:2015:784, paragraph 18 and the case-law cited, and of 18 November 2021, *Visma Enterprise*, C306/20, EU:C:2021:935, paragraphs 60 and the case-law cited).

33 However, the fact that an agreement is a vertical agreement does not exclude the possibility that it comprises a 'restriction of competition by object'. While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can also, in some cases, have a particularly significant restrictive potential (see, to that effect, the judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C32/11, EU:C:2013:160, paragraph 43, and of 18 November 2021, *Visma Enterprise*, C306/20, EU:C:2021:935, paragraph 61).

34 The essential legal criterion for ascertaining whether an agreement, whether it is horizontal or vertical, involves a 'restriction of competition by object' is a finding that that agreement in itself presents a sufficient degree of harm to competition (see, to that effect, the judgments of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 57, and of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 59 and the case-law cited).

35 In order to determine whether that criterion is met, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C32/11, EU:C:2013:160, paragraph 36 and the case-law cited).

36 In addition, where the parties to the agreement rely on its procompetitive effects, those effects must, as elements of the context of that agreement, be taken into account. Provided that they are demonstrated, relevant, intrinsic to the agreement concerned and sufficiently significant, those effects may give rise to reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition (see, to that effect, the judgment of 30 January 2020, *Generics (UK) and Others*, C307/18, EU:C:2020:52, paragraphs 103, 105 and 107).

37 It follows from that case-law that, in order to determine whether a vertical agreement fixing minimum resale prices involves the 'restriction of competition by object', within the meaning of Article 101(1) TFEU, it is for the referring court to ascertain whether that agreement presents a sufficient degree of harm for competition in the light of the criteria recalled in paragraphs 35 and 36 of this judgment.

38 When it makes that assessment, the referring court must also take into account the fact, which it has itself pointed to, that a vertical agreement fixing minimum resale prices may fall within the category of 'hardcore restrictions' for the purposes of Article 4(a) of Regulations Nos 2790/1999 and 330/2010, as an element of the legal context.

39 However, if it does so, that does not exempt the referring court from carrying out the assessment referred to in paragraph 37 of this judgment.

40 The sole purpose of Article 4(a) of Regulation No 2790/1999 read in the light of recital 10 thereof, and Article 4(a) of Regulation No 330/2010, read in the light of recital 10 thereof, is to exclude certain vertical restrictions from the scope of a block exemption. That exemption, set out in Article 2 of each of those regulations, read in the light of their respective recital 5, benefits vertical agreements deemed not to be harmful to competition.

41 By contrast, those provisions of Regulations Nos 2790/1999 and 330/2010 do not contain an indication as to whether those restrictions must be categorised as a restriction 'by object' or 'by effect'. Furthermore, as the Commission observed in its written observations before the Court, the concepts of 'hardcore restrictions' and of 'restriction by object' are not conceptually interchangeable and do not necessary overlap. It is therefore necessary to examine restrictions falling outside that exemption, on a case by case basis, with regard to Article 101(1) TFEU.

42 It follows that the referring court cannot dispense with carrying out the assessment referred to in paragraph 37 of this judgment on the ground that a vertical agreement fixing minimum resale prices constitutes on any hypothesis or is deemed to constitute such a restriction by object.

43 In the light of all of the foregoing considerations, the answer to the first and fourth questions is that Article 101(1) TFEU must be interpreted as meaning that the finding that a vertical agreement fixing minimum resale prices entails a 'restriction of competition by object' may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

The third and fifth questions: the concept of 'agreement', within the meaning of Article 101 TFEU

44 By its third and fifth questions, which it is appropriate to examine together in the second place, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that there is an 'agreement' within the meaning of that article where a supplier imposes on its distributors minimum resale prices of the products that it markets.

45 The referring court seeks clarification as to the concept of 'agreement', within the meaning of that provision, in order to be able to determine whether there is, in the circumstances of the main proceedings, such an agreement between Super Bock and its distributors. Since its question is based on numerous hypotheses of fact set out in the third and fifth questions referred, which in part are inconsistent and some of which are contested by Super Bock, it must be recalled that it is not for the Court to rule on the facts of the dispute in the main proceedings in accordance with the division of tasks between the national courts and the Court recalled in paragraph 28 of this judgment.

46 However, it may be observed, on the reading of the findings of fact made by the referring court, that those questions arise in a context in which Super Bock regularly transmits to its distributors lists of minimum resale prices and distribution margins. It is clear from those findings that the resale prices thus indicated are, in practice, observed by the distributors who sometimes request that indication and do not hesitate to complain to Super Bock about the prices transmitted instead of other prices being applied. Finally, according to that findings, the indication of the minimum resale prices is accompanied by mechanisms for monitoring prices and failure to apply those prices can give rise to retaliatory measures and lead to the application of negative distribution margins.

47 Having made that preliminary observation, it should be recalled that, according to the settled case-law of the Court, in order for there to be an 'agreement' within the meaning of Article 101(1) TFEU, it suffices for undertakings to have expressed their joint intention to conduct themselves on the market in a specific way (judgment of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraph 94 and the case-law cited).

48 An agreement cannot therefore be based on a statement of a purely unilateral policy of one party to a contract for distribution (see, to that effect, judgment of 6 January 2004, *BAI and Commission* v *Bayer*, C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 101 and 102).

49 However, an act or conduct which is apparently unilateral will constitute an agreement, within the meaning of Article 101(1) TFEU, where it is the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (see, to that effect, judgment of 13 July 2006, *Commission* v *Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37).

50 That concurrence of the parties' wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices (see, to that effect, judgments of 6 January 2004, *BAI and Commission* v *Bayer*, C2/01 P and C3/01 P, EU:C:2004:2, paragraphs 100 and 102, and of 13 July 2006, *Commission* v *Volkswagen*, C74/04 P, EU:C:2006:460, paragraphs 39, 40 and 46).

51 It is for the referring court to assess the facts of the dispute in the main proceedings in the light of that case-law.

52 In that context, the fact that a supplier regularly transmits to distributors lists indicating the minimum prices that it has determined and the distribution margins, as well as the fact that it asks them to comply with those prices, which it monitors, on pain of retaliatory measures and at the risk, in the event of non-compliance with those measures, of the application of negative distribution margins, are elements from which it may be concluded that that supplier seeks to impose minimum resale prices on its distributors. While, in themselves, those facts appear to reflect an apparently unilateral conduct by that supplier, it would be otherwise if the distributors complied with those prices. In that respect, the facts that the minimum resale prices are, in practice, followed by the distributors, or that their indication is sought by the latter, who, whilst complaining to the supplier about the indicated prices, do not however apply other prices on their own initiative, could be of such a nature as to reflect the acquiescence on the part of those distributors to minimum resale prices being fixed by the supplier.

53 In the light of all of the foregoing considerations, the answer to the third and fifth questions is that Article 101(1) TFEU must be interpreted as meaning that there is an 'agreement', within the meaning of that article, where a supplier imposes on its distributors minimum resale prices of the products that it markets, if the imposition of those prices by the supplier and compliance with them by the distributors reflects the expression of the concurrence of wills of those parties. That concurrence of wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices.

The second question: proof of an 'agreement' within the meaning of Article 101 TFEU

54 By its second question, the referring court asks, in essence, whether Article 101 TFEU must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors may be established only on the basis of direct evidence.

55 According to the Court's case-law, in the absence of EU rules on the principles governing the assessment of evidence and the requisite standard of proof in national proceedings for the application of Article 101 TFEU, it is for the national legal order of each Member State to establish those rules, in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by

EU law (principle of effectiveness) (see, to that effect, judgment of 21 January 2016, *Eturas and Others*, C74/14, EU:C:2016:42, paragraphs 30 to 32 and the case-law cited).

56 It is clear from that case-law that the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent. In most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgment of 21 January 2016, *Eturas and Others*, C74/14, EU:C:2016:42, paragraphs 36 and 37 and the case-law cited).

57 It follows that the existence of an agreement, within the meaning of Article 101(1) TFEU, on minimum resale prices may be established not only by means of direct evidence but also on the basis of consistent coincidences and indicia, where it may be inferred that a supplier invited its distributors to apply to follow those prices and that the latter, in practice, complied with the prices indicated by the supplier.

58 In the light of all the foregoing considerations, the answer to the second question is that Article 101 TFEU, read together with the principle of effectiveness, must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors, may be established not only by means of direct evidence, but also on the basis of objective and consistent indicia from which the existence of such an agreement may be inferred.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 101(1) TFEU**

   must be interpreted as meaning that the finding that a vertical agreement fixing minimum resale prices entails a 'restriction of competition by object' may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part.

2. **Article 101(1) TFEU**

   must be interpreted as meaning that there is an 'agreement', within the meaning of that article, where a supplier imposes on its distributors minimum resale prices of the products that it markets, if the imposition of those prices by the supplier and compliance with them by the distributors reflects the expression of the concurrence of wills of those parties. That concurrence of wills may be shown from the terms of the distribution contract at issue, where it contains an express invitation to comply with minimum resale prices or authorises, at the very least, the supplier to impose those prices, as well as from the conduct of the parties and, in particular, from any explicit or tacit acquiescence on the part of the distributors to an invitation to comply with minimum resale prices.

3. **Article 101 TFEU, read together with the principle of effectiveness,**

   must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors, may be established not only by means of direct evidence, but also on the basis of objective and consistent indicia from which the existence of such an agreement may be inferred.

4. **Article 101(1) TFEU**

must be interpreted as meaning that the fact that a vertical agreement fixing minimum resale prices covers almost the entirety, but not all, of the territory of a Member State does not prevent that agreement from being capable of affecting trade between Member States.

[Signatures]

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Private enforcement of competition law: ensuring effective redress

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The Question: For decades, competition law was the exclusive domain of public authorities. So, what changed? How can a small business or an individual consumer now stand up to a cartel and effectivly demand compensation?

Today's Agenda: I will try to answer five key questions that chart the rise of private enforcement in the EU:

1. **The Foundations:** How did individuals and national courts get the power to enforce EU competition law?
2. **The Claimant's Challenge:** If the evidence is hidden, how can a victim prove their case?
3. **A Delicate Balance:** How do public investigations and private lawsuits interact?
4. **Calculating the Harm:** If you've been harmed, what are you owed and how is it calculated?
5. **Strength in Numbers:** What about small damages spread across thousands of victims?

Legal Framework and the Role of National Courts

How did individuals get the power to enforce competition law?

The journey from a state-centric system to individual empowerment was driven by the European Court of Justice (ECJ), culminating in legislative action.

Key events:

- **1963: *Van Gend en Loos*** - Establishes the principle of direct effect, allowing individuals to enforce EU rights in national courts.
- **2001: *Courage v Crehan*** - The ECJ establishes a fundamental right to damages for breaches of EU competition law.
- **2006: *Manfredi*** - The ECJ defines the principle of "full compensation," including actual loss and loss of profit.
- **2014: The Antitrust Damages Directive** - The EU legislature harmonizes key procedural rules across all Member States to facilitate damages claims.

The Spark: The Principle of Direct Effect

- ***Van Gend en Loos* (1963):** This landmark case established that EU law creates rights for individuals that national courts must protect. The Court stated that the "vigilance of individuals" is an "effective supervision" alongside public authorities.

- ***BRT v SABAM* (1974):** The ECJ confirmed that the competition rules (now Articles 101 & 102 TFEU) have **horizontal direct effect**. This opened the doors of national courts to private litigants in disputes between private parties.

From Principle to Practice: The Right to Damages

- ***Courage v Crehan* (2001):**
  - **Context:** A pub tenant was bound by a "beer tie" agreement to buy beer at inflated prices. English law barred a party to an illegal contract from claiming damages.
  - **Ruling:** The ECJ held that the "full effectiveness" of EU competition law would be at risk if it were not open to *any* individual to claim damages. This created a "Euro Tort" for antitrust breaches.
  - **Now codified in: Article 3 of the Damages Directive**.
  - **Standalone case**
- ***Manfredi* (2006):**
  - **Context:** Victims of an Italian insurance cartel sought compensation for excessive premiums.
  - **Ruling:** The ECJ defined the substance of the right, establishing the principle of **full compensation**: actual loss (*damnum emergens*), loss of profit (*lucrum cessans*), plus interest.
  - **Now codified in: Article 3 of the Damages Directive**.
  - **Follow-On**

The Legislative Revolution: Decentralisation

- **The Old System (Regulation 17/62):** A centralized, *ex-ante* notification system where the Commission held a monopoly on granting exemptions. This marginalized national courts.

- **The New System (Regulation 1/2003):** Abolished the centralized system and fully empowered national courts and National Competition Authorities (NCAs) to apply Articles 101 and 102 TFEU in their entirety. This created the architectural foundation for private enforcement to become a practical reality.

The Path to Harmonisation: The Damages Directive

- **The Problem:** The **2004 Ashurst Study** found a landscape of "astonishing diversity and total underdevelopment" in private enforcement across the EU, identifying numerous obstacles.
- **The Policy Process:** The Commission responded with a **2005 Green Paper** and a **2008 White Paper** to build consensus on a European approach.
- **The Solution:** The **Antitrust Damages Directive (2014/104/EU)** was adopted. It codifies key case law and introduces harmonized rules to overcome the main obstacles. However, it is a measure of **minimum harmonization**, leaving key areas like causation and collective redress to national law.

Burden of Proof and Evidentiary Standards

If the evidence is hidden, how can a victim prove their case?

The Directive provides a powerful toolkit to address the core problem of information asymmetry, where the infringer holds all the evidence.

The Claimant's Toolkit: Disclosure of Evidence

- **The Problem:** Information asymmetry, where the infringer holds all the evidence.
- **The Directive's Solution (Chapter II):** A harmonized disclosure regime.
    - A claimant must present a "plausible" claim based on reasonably available facts.
    - A national court can then order the defendant to disclose specific categories of relevant evidence.
    - The request must be **proportionate** to prevent "fishing expeditions."
- **Key Case Law:**
    - ***Paccar* (2022):** The ECJ ruled that disclosure **is not limited to pre-existing documents.** A court can order a defendant to create a *new* document by compiling or classifying data it already possesses, provided the request is proportionate.
    - ***RegioJet* (2023):** The Court confirmed that "**white list"** documents (pre-existing evidence) can be disclosed even while a Commission **investigation is ongoing**, but "**grey list**" documents (prepared for the investigation) remain **protected** until the proceedings are closed.

Easing the Burden: Presumptions and Liability

- **Presumption of Harm (Article 17(2)):** For cartel cases, the Directive establishes a **rebuttable presumption that the cartel caused harm**. The burden shifts to the defendant to prove their cartel was harmless.
- **Estimation of Harm (Article 17(1)):** National courts are empowered to **estimate the amount of harm** if it is established that a claimant suffered harm but precise quantification is excessively difficult.
- **Clarifying Who is Liable:**
    - ***Skanska* (2019):** Established the principle of "economic continuity," meaning liability for damages can pass from an infringing company to its successor. This prevents infringers from escaping liability through corporate restructuring.
    - ***Sumal* (2021):** Established "top-down" liability, confirming that a victim can sue a subsidiary for an infringement committed by its parent, provided they form a single "economic unit." This makes it easier for claimants to find a liable entity to sue in their own jurisdiction.

Topic 3: Interaction with Public Enforcement

How do public investigations and private lawsuits interact?

The system is designed as a partnership, but it creates a natural tension, particularly around evidence and leniency.

The Follow-On Pathway: Building on Public Decisions

- **The "Follow-On" Action:** A private damages claim that follows a public authority's infringement decision.
- **Binding Effect (Article 9):** A final infringement decision by an NCA is **irrefutable proof** of the infringement in that Member State's courts.
- **Cross-Border Effect:** A decision from an NCA in another Member State serves as at least **prima facie evidence**.
- **Key Case Law:**
    - ***Landkreis Northeim* (2022):** A German court asked the ECJ to clarify if specialized refuse collection vehicles were covered by the Commission's trucks cartel decision. This highlights how the precise wording and scope of a public decision are critical for follow-on claimants.
    - ***Stichting Cartel Compensation* (2021):** The ECJ confirmed that national courts can award damages for infringements that occurred even before Regulation 1/2003, reinforcing that the right to claim damages stems directly from the Treaty and is not dependent on a prior public decision.

The Leniency Dilemma: A Delicate Balance

- **The Tension:** Public enforcement relies on **leniency programs** (confidentiality) to detect secret cartels. Private enforcement requires **access to evidence** to prove harm.
- **The Pre-Directive Problem:** The ***Pfleiderer*** case (2011) created uncertainty by requiring national courts to perform a case-by-case balancing act when deciding on access to leniency documents.
- **The Directive's Solution (Article 6):** A "traffic light" system that provides legal certainty:
    - **Black List:** Leniency statements and settlement submissions get **absolute protection** from disclosure.
    - **Grey List:** Documents prepared for an investigation are protected until the proceedings are closed.
    - **White List:** All other pre-existing evidence is generally disclosable.

Quantification of Harm and Damages Assessment

If you've been harmed, what are you owed and how is it calculated?

The goal is **full compensation**, but calculating it is one of the most complex aspects of private enforcement.

Harm = Overcharge - Passed-on Amount + Volume Effect

The Principle of Full Compensation

- **The Goal:** To place the victim in the position they would have been in "but-for" the infringement.
- **The Formula (Article 3):** Full compensation includes:
    - **Actual Loss (*damnum emergens*):** The direct financial losses, primarily the overcharge.
    - **Loss of Profit (*lucrum cessans*):** Profits the victim would have made but for the infringement (e.g., the volume effect).
    - **Interest:** From the time the harm occurred until compensation is paid.

The Passing-On Defence (Chapter IV)

- **The "Shield" (Article 13):** A defendant can argue that the direct purchaser did not suffer the full loss because they "passed on" the illegal overcharge to their own customers. The burden of proof is on the defendant.

- **The "Sword" (Article 14):** An indirect purchaser can claim damages and is assisted by a **rebuttable presumption** that the overcharge was passed on to them.

- **Commission Guidelines (2019):** The Commission has issued non-binding guidelines to help national courts with the complex economic analysis of estimating the pass-on rate.

The Components of Harm and Recent Developments

- **The Calculation:** The total harm is a composite of:
    - The **Overcharge:** The inflated price paid.
    - The **Volume Effect:** The loss of profit on sales that were lost because the higher price reduced customer demand.

- **Key Case Law:**
    - ***AB Volvo* (2022):** The ECJ clarified that the **presumption of harm** (Article 17(2)) is a substantive rule and cannot apply retroactively. However, the court's **power to estimate harm** (Article 17(1)) is procedural and can be applied to older claims. This distinction is crucial for quantifying damages in long-running cartel cases.
    - ***Tráficos Manuel Ferrer* (2023):** The ECJ confirmed that a national court has the power to estimate the amount of harm whenever it is practically impossible or excessively difficult to quantify, even if the defendant has already disclosed some data.

Topic 5: Collective Actions and Representative Claims

What if the harm is small but spread across thousands of consumers?

Individual litigation is often not viable for small, scattered claims. This is where collective redress comes in, though it remains one of the least harmonized areas.

The Unsolved Problem and New Frameworks

- **The Damages Directive's Gap:** The Directive **does not** harmonize rules on collective redress.
- **First Attempt (Soft Law):** The **2013 Recommendation on Collective Redress** encouraged Member States to introduce "opt-in" style systems, but its non-binding nature led to inconsistent implementation.
- **The New Framework (Binding Law):** The **Directive on Representative Actions (2020/1828)** mandates that all Member States provide a mechanism for collective actions brought by "qualified entities." However, its scope is limited to consumer protection laws listed in its Annex, which does **not** explicitly include Articles 101 and 102 TFEU.
- **Key Case Law:**
    - ***ASG 2*** **(2025):** The ECJ ruled that national law cannot prohibit collective enforcement models, such as assigning claims to a special purpose vehicle, if it is "practically impossible or excessively difficult" for victims to enforce their rights individually and no other effective alternative exists. This is a major step forward for facilitating collective claims.

Conclusion

The Story So Far and The Road Ahead

- **The Journey:** Private enforcement has evolved from a theoretical principle into a functioning, harmonized system for redress, driven by the ECJ and codified by the Damages Directive.
- **Key Takeaways:**
    - The right to full compensation is a cornerstone of EU law.
    - The Damages Directive provides a powerful toolkit for victims, with harmonized rules on disclosure, presumptions, and the passing-on defence.
    - The law is still evolving, with the ECJ continuing to clarify rules on jurisdiction, liability, and, crucially, collective redress.
- **The Future:** Private enforcement is now a firm, complementary pillar of EU competition law, empowering individuals and businesses to seek justice and contributing to a more competitive single market.