



European Competition Law

Training for Judges from North
Macedonia

Skopje, 4-6 February 2026

EXCELLENCE IN
EUROPEAN LAW¹

Speakers

Irina Trajkoska Strezoski, Director of North Macedonian
Academy of Judges and Public Prosecutors, Skopje

Małgorzata Kozak, Assistant Professor, Utrecht University

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

Lilijana Pavlic, Croatia competition authority, Zagreb

Virginia Pavel, Course Director, ERA

Gjoko Zhikovski, Judge, Skopje

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
Macedonian

Event number
226DT015

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

European Competition Law Training for Judges from North Macedonia

Wednesday, 4 February 2026

08:30 Arrival and registration of participants

08:45 **Opening of the seminar**
Virginia Pavel, Irina Trajkoska Strezoski

I. Judicial perspectives on market definition and economic evidence

09:00 **Article 101(1) in practice**

- The notion of undertakings and associations of undertakings
- Agreements, decisions and concerted practices
- The object or effect of preventing, restricting or distorting competition
- The *de minimis* doctrine
- The effect on trade between member States

Manuel Kellerbauer

09:45 Discussion

10:00 **Article 101(3): the exemptions**

- Article 101(3) criteria
- Article 101(3) and Regulation 1/2003
- The relation between Article 101(3) and block exemption regulations

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

Manuel Kellerbauer

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 **Public enforcement of EU competition law**

- Roles, case allocation and cooperation in the ECN
- Procedural aspects of an investigation
- Judicial review

Manuel Kellerbauer

15:30 Discussion

16:00 Coffee break

16:30 **Case study: defining markets in a real-life scenario**
Virginia Pavel

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

Academy of Judges and Public Prosecutors, Skopje

Who should attend?

Judges, prosecutors, apprentice judges, and the court staff from North Macedonia.

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.

17:15 End of the first seminar day

19:30 Dinner

Thursday, 5 February 2026

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

10:45 Discussion

11:00 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

Małgorzata Kozak

12:00 Discussion

12:15 Practical workshop – the steps of evaluating an Article 101 TFEU infringement

Małgorzata Kozak

13:15 Lunch

IV. Practical enforcement in Articles 101 and 102 TFEU

15:00 Article 102 TFEU enforcement

- Notion of dominant position
- Notion of abuse
- Exclusionary conduct and theories of harm — how to distinguish competition on the merits from abuse
- Current trends and challenges in Article 102 TFEU evaluation

Lilijana Pavlic

15:45 Coffee break

16:15 Assessing defences under Article 102 TFEU

- Types of defences
- Burden and standard of proof
- Case law insights
- How to assess proportionality

Lilijana Pavlic

17:00 Discussion

Your contacts



Dr Virginia Pavel
Course Director European
Business Law Section
E-Mail: vpavel@era.int



Liz Greenwood
Assistant
Tel.: +49 (0)651-93737-32;
E-Mail: egreenwoodt@era.



Co-funded by the European Union

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17:15 **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

18:00 End of the second seminar day

Friday, 6 February 2026

08:15 Arrival and registration of participants

V. Evolving challenges in Articles 101 and 102 TFEU

09:00 **Integrating the EU acquis into North Macedonian legislation**

- Overview of the current alignment state and remaining priorities
- Criminal law approaches to competition law
- National procedures for pursuing private damages claims

Gjoko Zhikovski

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

Liljana Pavlic

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 North Macedonia

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. Article 101(1) and Article 101(3) TFEU: an overview (60 minutes)**
- II. Navigating market definition (60 minutes)**
- III. Market definition in the digital era: adapting to transformations (60 minutes)**
 - Characteristics of digital markets
 - Adapting traditional tools
 - Challenges in assessing market power
 - Interaction between competition law and regulation
- IV. Article 101 TFEU: Horizontal agreements (45 minutes)**
 - Principles and exceptions
 - Current trends and challenges in Art. 101 evaluation
 - Art. 101 TFEU in Court: areas of commonly contested ground
- IV. Public enforcement of EU Competition Rules (45 minutes)**



I. Article 101 Paragraphs (1) and (3) TFEU





Part III: Article 101 TFEU

II. Art. 101 (1) TFEU

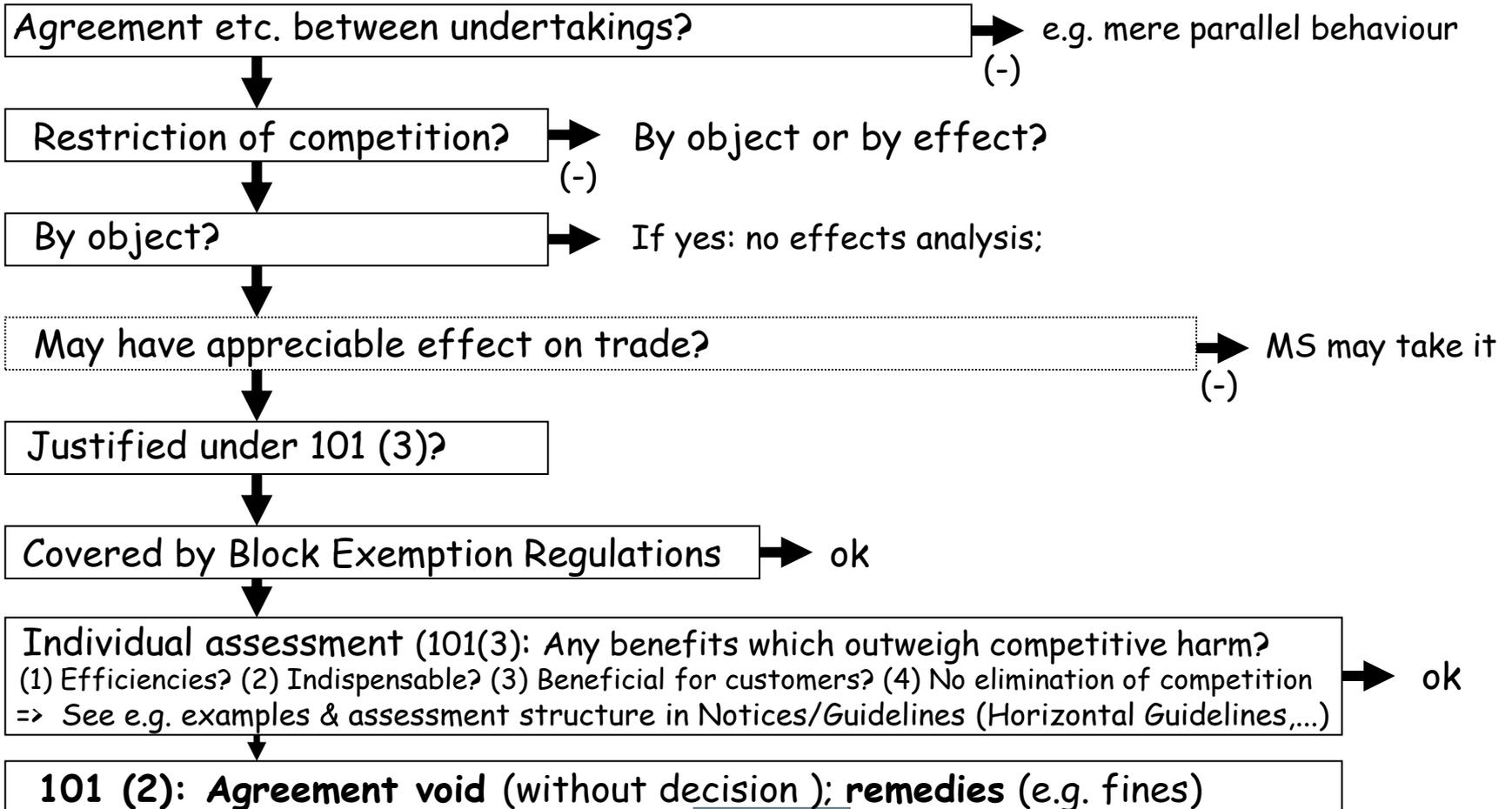
- 1. Form of Coordination between Undertakings**
- 2. Restriction of competition by object or effect**
- 3. Capability to affect trade between MS**
- 4. The de minimis doctrine**

III. Art. 101 (3) TFEU

- 1. Block Exemption Regulations**
- 2. Individual Exemptions**



Article 101 - Overview





O. Premise: Decision-making independence

- **Art. 101 is based on the premise that each undertaking must determine independently the policy which it intends to adopt on the internal market and the conditions it offers its customers.**
 - **Decision making independence and the risks of uncertainty are regarded as as the "two attributes of competition in its ideal form" (AG Stix-Hackl in C-99/04, Thyssen)**
- => Art. 101 (1) inapplicable, if conduct *required* by national legislation (so called *State compulsion defence*), cf. references in para. 22 Horizontal Guidelines)**



1. Undertakings or Association of Undertakings

Article 101 TFEU requires at least TWO *undertakings*

concept of *undertaking*:

“encompasses *every entity* engaged in an *economic activity*, regardless of the *legal status status* of the entity and the way it is financed”

(cf. ECJ, C-41/90 Höfner and Elser)

=> Art. 101 (-) for agreements between legal persons *within* the same undertaking (cf. C-73/95 P, *Viho*)



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 concurrency 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' intention
(Read T-41/96, Bayer, at para. 67, 69)



2. Agreement/Association Decision/Concerted practice

No agreement if unilateral policy has same effects

The mere fact that the unilateral policy of quotas implemented by Bayer, combined with the national requirements on the wholesalers to offer a full product range, *produces the same effect* as an export ban does not mean either that the manufacturer imposed such a ban or *that there was an agreement prohibited by Article 101 TFEU.*

(ECJ, C-2/01 P, Bayer)



2. Agreement/Association Decision/Concerted practice

b) decision of association of undertakings

- In view of the objective to prevent coordination, the term ‘decision’ cannot be understood to cover only resolutions which under the statutes of the association are supposed to be binding in a strict sense, but is to be interpreted also to encompass mere recommendations where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question.

(Case 96/82, IAZ, para. 20)



2. Agreement/Association Decision/Concerted practice

c) *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*



3. Restriction of competition

Concept of restriction in case-law

"Account must be taken of the actual conditions in which [the agreement] functioned, in particular the economic and legal context in which the undertakings operated, the products or services covered by the agreement and the actual structure and operating conditions of the market concerned"

(cf. T-99/04, AC Treuhand, at 126)

=> Decisive: is practice capable negatively to influence the parameters of competition?

e.g. price, product quality or consumer choice.



3. Restriction of competition by effect or object

- „prevention, restriction or distortion“ of competition
 - no need to distinguish between the three: *restraint* of competition suffices
 - Restriction may affect
 - *inter-brand* or *intra-brand* competition
 - Actual or *potential* competition, C-307/18, Generics, „pay-for-delay“
 - Restriction may also affect the economic freedom of *third parties* (e.g. pubs being tied to one brewery, C-234/89, Delimitis)



3. Restriction of competition

Restrictions by object

some practices between undertakings which reveal, in themselves and having regard to the content of their provisions, their objectives, and the economic and legal context of which they form part, a sufficient degree of harm to competition [...], since some forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.

Case C-307/18 Generics, para 67 (patent dispute settlements as restrictions by object)



3. Restriction of competition by object

Idea behind it:

certain types of coordination between undertakings **can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.**

ECJ, C-67/13, Cartes Bancaires, 57: “the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition ‘by object’ is finding that such coordination reveals in itself a sufficient degree of harm to *competition*”.

But: All relevant circumstances and in particular the economic and legal context must be examined!



3. Restriction of competition by object

Restriction *by object* – Examples

- Price fixing
- Market sharing
- Fixing quotas and limiting output
- Imposition of *fixed or minimum resale prices*
- Imposition of *export bans*
- „*pay for delay*“-agreements, C-307/18, Generics, at 87.

Note: Where an agreement has as its *object* the restriction of competition, there is no need to analyze its *effects*.



3. Restriction of competition

Chiquita, Dole and Weichert (the "parties") set their respective "quotation prices" for bananas each week and announce them to their customers. The prices actually paid by customers result from ensuing negotiations or pre-established price formulae partially linked to quotation prices.

Before setting the quotation prices, the parties have bilateral communications and discuss factors relevant for the setting of quotation prices.

After quotation prices have been set, the parties exchange their quotation prices to monitor individual pricing decisions in the light of previous communications.

Are these communications a restriction by object?



3. Restriction of competition

ECJ: pre-pricing communications are infringement by object

- As part of their pre-pricing communications, parties discussed quotation prices and price trends
- Quotation prices were relevant to the market concerned. Market signals, market trends or indications as to the intended development of actual prices could be inferred from them.
- Post-pricing communications were no self-standing infringement but part of the same infringement

C-286/13 , Dole, § 129-134



3. Restriction of competition by object

C-67/13, Cartes Bancaires – no restriction by object

Fees charged to new members joining the Groupement of card issuing banks and to those recruiting insufficient merchants to accept cards

⇒ Builds barriers hindering new entrants

BUT:

- A payment system is a **two-sided market**: you need both cardholders (issuers) and shops (acquirers) for the system to work;
- Banks issuing cards without recruiting merchants are "free-riding" on banks building the merchant network;
- Fees intended to maintain a balance between both..

⇒ Not inherently anti-competitive, effects analysis required



3. Restriction of competition by object

T-491/07 RENV, Cartes Bancaires – effects analysis:

Barriers to Entry: fees so high that it effectively discouraged new entrants (like online banks) from competing.

Reduced Innovation: By making it harder for "non-traditional" banks to enter the market, fees stifled the development of new types of card products and payment services.

Price Increases for Consumers: When the costs for issuing banks go up (due to the fee), those costs are often passed down to consumers in the form of higher annual card fees



3. Restriction of competition

Different banks in Spain agree to set up a system for the exchange of information about the solvency of their customers. The information relates to the identity and economic activity of debtors as well as to the special situations such as bankruptcy or insolvency.

Due to information exchange some customers are refused a loan.

Are these communications a restriction of competition?



3. Restriction of competition

Compatibility of information exchanges with Art. 101 (1) TFEU depends on specific characteristics of the system concerned, esp.

- purpose and the conditions of access to and participation in it,
- type of information exchanged – be that, for example, public or confidential, aggregated or detailed, historical or current
- importance for the fixing of prices, volumes or service.

C-238/05, Asnef-Equifax, § 54



Restriction by Effect: Case Asnef

(+)

- can reduce risk of borrower default, decreasing costs of borrowing
- can help credit consumer mobility to other financial institutions
- can help decrease information deficits for new market entrants

(-)

- can create awareness of other companies' market position/strategy
 - ⇒ Identity of lenders must not be (indirectly) disclosed
 - ⇒ market must not be highly concentrated
- can allow excluding competitors if accessible only to some
 - ⇒ Must be accessible to competitors on non-discriminatory basis

C-238/05, Asnef-Equifax, § 55-62



3. *Restriction of competition*

***Appreciability* - The De-minimis doctrine**

Agreement falls outside prohibition in Art. 101 where it has only an insignificant effect on market, taking account of weak position which the persons concerned have on the market in question.

C-5/69, Völk v. Vervaecke, § 7.

NB: Does not apply to *by-object* restrictions

C-226/11 Expedia, § 16.

Details: Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (De Minimis Notice)

Thresholds: combined 10 % market share for Horizontal Agreements, 15% for Vertical Agreements. SMEs presumed not to appreciably restrict competition.



II. Exemption under Art. 101 (3) TFEU?

Block Exemption Regulations (Art. 103 (1), 105(3) TFEU)

Typical structure:

- Recitals explain policy aims
- Definitions
- Exemption granted on a particular category of transactions
- “Hard-core restrictions” are black-listed => benefit of the block exemption is removed if they are part of the transaction.
- Transactions qualify for block exemption only if market share of undertakings does not exceed a certain percentage.



II. Exemption under Art. 101 (3) TFEU?

Individual exemptions under Art. 101 (3):

- as from 1.5.2004 *directly applicable*; no more “granting” of individual exemptions by the Commission
- *any* agreement may benefit from Art. 101 (3), however this is unlikely as regards hardcore restrictions like price fixing etc.
- *burden of proof* is with the undertaking claiming the benefit of Art. 101 (3), cf. Art. 2 Reg. 1/2003



II. Exemption under Art. 101 (3) TFEU?

Substantive Conditions:

- a) Improvement of the production or distribution of goods or promoting technical or economic progress
- b) Indispensability of the restriction
- c) Allowing consumers a fair share of the resulting benefit
- d) Agreement must not afford the possibility of eliminating competition



II. Exemption under Art. 101 (3) TFEU?

Example of individual exemption: Commission Decision of 24 January 1999 in Case IV/F.1/36.718 (CECED case):

Manufacturers of washing machines (Miele, Bosch, Whirlpool, etc.) entered into an agreement to **stop producing and importing** the least energy-efficient washing machines

=> **horizontal agreement limits production and techn. development**

By agreeing to kill off cheaper, less efficient models, undertakings remove low-cost options from market and coordinate product ranges.

=> **Restriction of competition within the meaning of Art. 101(1) TFEU**



II. Exemption under Art. 101 (3) TFEU?

Example of individual exemption (CECED case):

1. Improving Production/Distribution (Technical Progress):

more energy-efficient technology, reducing energy consumption.

2. Fair Share for Consumers:

consumers enjoy lower electricity bills. Plus collective environmental benefit.

3. Indispensability:

Individually, companies might refrain from stopping production of cheap machines because they would lose market share to competitors who kept selling them.

4. No Elimination of Competition:

The manufacturers only agreed on minimum efficiency standards. They were still free to compete on price, brand, design, and even higher levels of efficiency.



Navigating Market Definition



Competition



Navigating Market Definition

- 1. Why do we define markets?**
- 2. What is a Product, what a Geographic market?**
- 3. What are Demand Side / Supply Side Substitutability?**
- 4. What is a "SSNIP Test"?**
- 5. What are the New Developments in the Digital Era?**



Why do we define markets?

Main purpose:

Identify competitive constraints that may influence undertakings' conduct to assess their market power

Allows to calculate market size and market shares

Market definition is a precondition for competitive assessment;
see Cases T-691/18 KPN, para 63; T-321/05, AstraZeneca, para 30

Analysis is case-specific; does not bind Commission in future cases;
see Case T-210/01, General Electric, para 120



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)

Market definition **can be left open if irrelevant** for outcome of competitive assessment



Weekly Market



Can the only apple-seller double his prices?



What is a relevant market?

2024 Notice on Market Definition, Recitals 12(a) and (b):

- **Relevant product market**

*"comprises all those products that **customers regard as interchangeable** or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their prices and their intended use, taking into consideration the conditions of competition and the structure of supply and demand on the market."*



- **Relevant geographic market**

*"comprises the geographic area in which the undertakings involved supply or demand relevant products, in which the **conditions of competition are sufficiently homogeneous** for the effects of the conduct or concentration under investigation to be able to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas."*



See also Art. 9(7) EUMR



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; customer 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



New Market Definition Notice

New Market Definition Notice (2024), paras 90 et seq:

if companies are competing to develop a new technology that doesn't exist yet, the Commission can define a market based on **R&D efforts** rather than current sales.

⇒ **in highly innovative sectors, competition often happens long before a product hits the shelf.**

⇒ *"We don't have a dominant market share because we don't have a product yet"* does not fly!



New Market Definition Notice

New Market Definition Notice (2024), para 15:

Sustainability is now recognized as a core non-price parameter of competition.

⇒ Commission emphasizes that consumers don't just choose products based on price

⇒ they may also choose based on how "green" or "ethical" the products are.



New Market Definition Notice

Example: AdBlue (AT.40178) in 2021:

Commission fined car producers roughly €875 million for agreeing to **limit emissions-cleaning performance**.

⇒ Collusion restricts competition on environmental performance

⇒ Emissions reduction as a dimension of product quality and innovation

Similar: "End-of-Life Vehicles" Cartel (AT.40669, 2025) on agreement not to pay car for recycling services advertise how much of their cars were made from recycled materials.



Case example

Do Male/Non-male deodorants belong to different product markets?



Considerations: packaging, marketing, presentation in retail outlets, price difference



SSNIP Test

A tool for assessing demand substitution

We postulate a hypothetical small but significant (5-10%) non-transitory increase in prices by a hypothetical monopolist

What would customers do to react to that price increase?
Switch to substitutes or to suppliers located elsewhere?

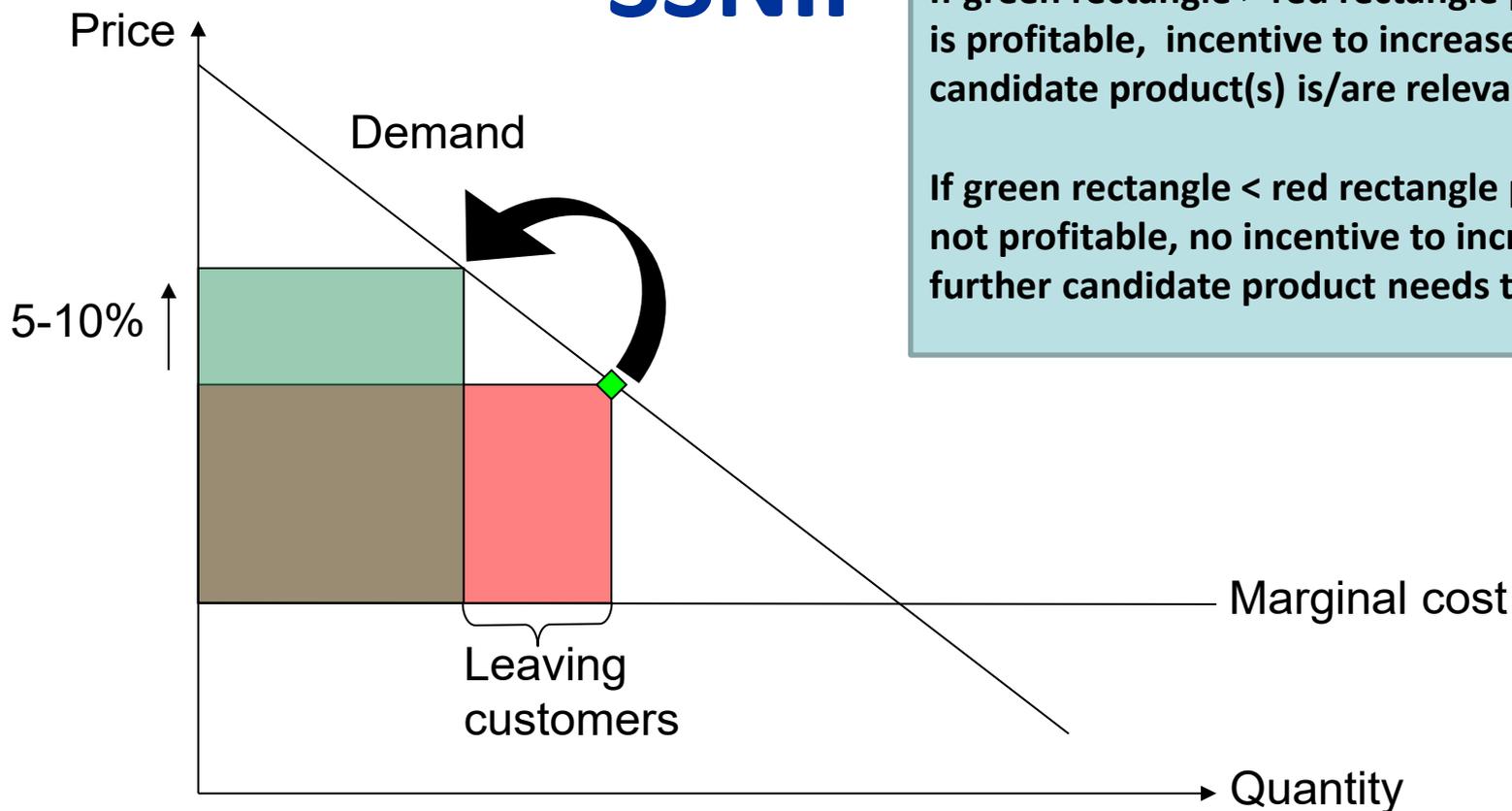
How many would switch? Enough to render increase unprofitable?

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

2024 Market definition Notice, § 31 with further references



SSNIP



If green rectangle $>$ red rectangle price increase is profitable, incentive to increase prices; candidate product(s) is/are relevant market.

If green rectangle $<$ red rectangle price increase not profitable, no incentive to increase prices; further candidate product needs to be added.



SSNIP Test: Water Example

Example: Are still, sparkling and flavoured water part of same product market?

- Start with narrowest possible market (e.g. still water) and test if a hypothetical company that is the only seller would be able profitably to institute SSNIP or whether sufficient customers would switch to closest substitute
 - No, price increase unprofitable, sufficient customers switch to sparkling w.
- Then consider a wider market by combining still water with its closest substitute (sparkling water) and test if only seller of both still and sparkling water could profitably institute a SSNIP.
 - Yes, price increase profitable. Not enough customers switch to flavoured w.

Conclusion: the relevant market includes still and sparkling water.



The Toothless Fallacy

Are Bananas and other fruit in the same market?

"The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick"

ECJ, Case 27/76, United Brands, § 31

But: What is the percentage of elderly people, children and sick persons in overall percentage of customers? What if the rest (perhaps 90%) could switch to apples or oranges?



The Cellophane Fallacy

What if due to a company's market power, the prevailing price is already substantially above the competitive price?

A small increase can then cause many customers to stop buying.

- Taking account of prevailing prices can lead to overly wide markets and underestimate actual market power
- SSNIP test should not be only method of defining markets.



Market definition in the digital era





Market definition: New Developments

- Use of SSNIP on zero-price markets
See AT.40099 – Google Android, § 286 et seq; Case T-604/18, § 174-181 – use of SSNDQ test
- Network effects/multisided markets;
- Asymmetric constraints: competitive relationship between two products is a "one-way street"
Eg. High-Speed vs. Low-Speed Internet

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



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) focusing on price does not always fit easily.



Supply side substitution in digital era

Nowadays, customers often take into account whether:

- distribution channel is convenient (e.g. online/ offline make belong to different product markets)
- they have made the same choice in the past (behavioral bias: *no (new) choice is the easiest choice*)

2024 Commission Market definition Notice, § 50



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 **network effects** between user groups on different sides of a platform effects **are strong** and **services** provided to different sides are **closely linked** or essential to a single transaction, a price change on one side significantly affects demand on the other side.

=> Competition takes place **on the platform as a whole.**

⇒ The relevant product market includes **all user groups**

E.g. One “market for credit card payment systems” rather than a “market for cardholders” and a “market for merchants”

↔ Insufficient close link for search engine providing “free search” to users and “targeted advertising” to companies



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 substitution, barriers or costs of switching, such as interoperability with other products, data portability 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



Market definition: the Digital Era

SSNDQ Example: Google Android case (T-604/18):

Q: Would users switch from Google Search to other engines if quality of Google's search results declined?

Examined: hypothetical decrease in accuracy or neutrality (bias) of Google search results.

Finding: even if quality decreased, not enough users are likely to switch due to "status quo bias" and the high costs of switching ecosystems.



Market definition: the Digital Era

In "zero-price" markets, calculating market share by "revenue" is impossible.

2024 Notice endorses usage-based metrics, e.g.

- Number of active users
- Engagement: Time spent on platform
- Traffic: data volume, number of downloads

See Commission Market Definition Notice 2024, § 108



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 harm occurs.
- **Core idea:**
Rather than reacting to abuses (as under Article 102 TFEU), the DMA **prevents them proactively** through clear, prescriptive rules.

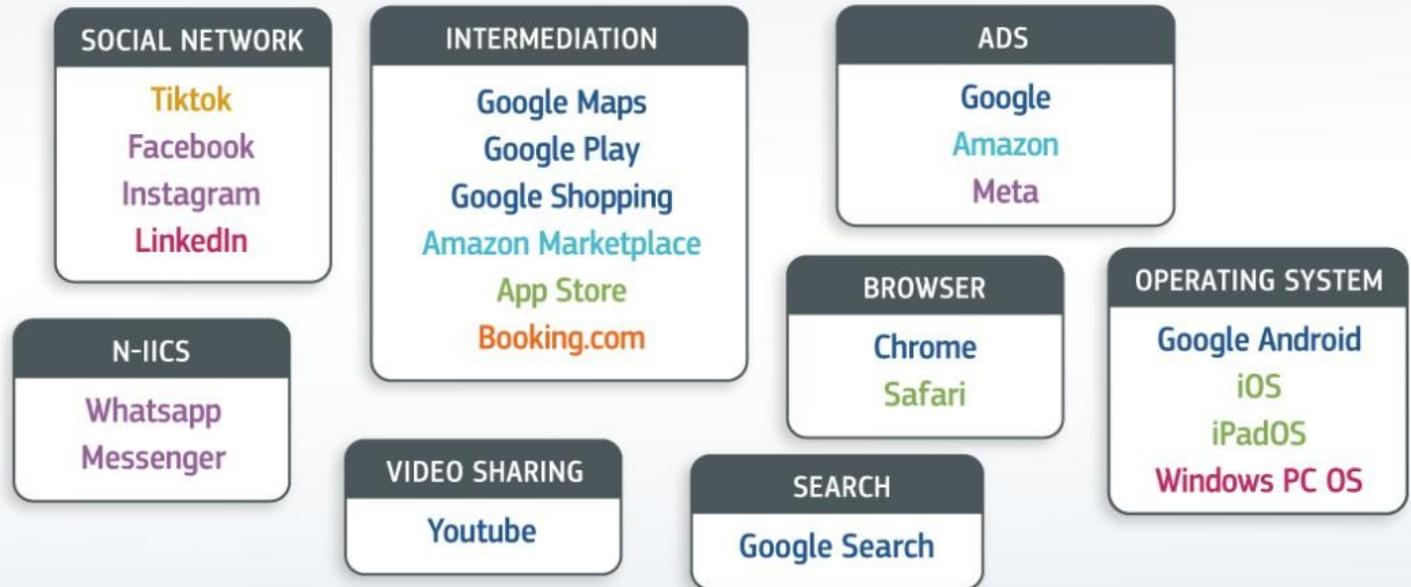
Gatekeeper Designations



Gatekeeper

- Alphabet
- Amazon
- Apple
- Booking
- ByteDance
- Meta
- Microsoft

Core Platform Service



Number-Independent Interpersonal Communication Services (NI-IICS) 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.

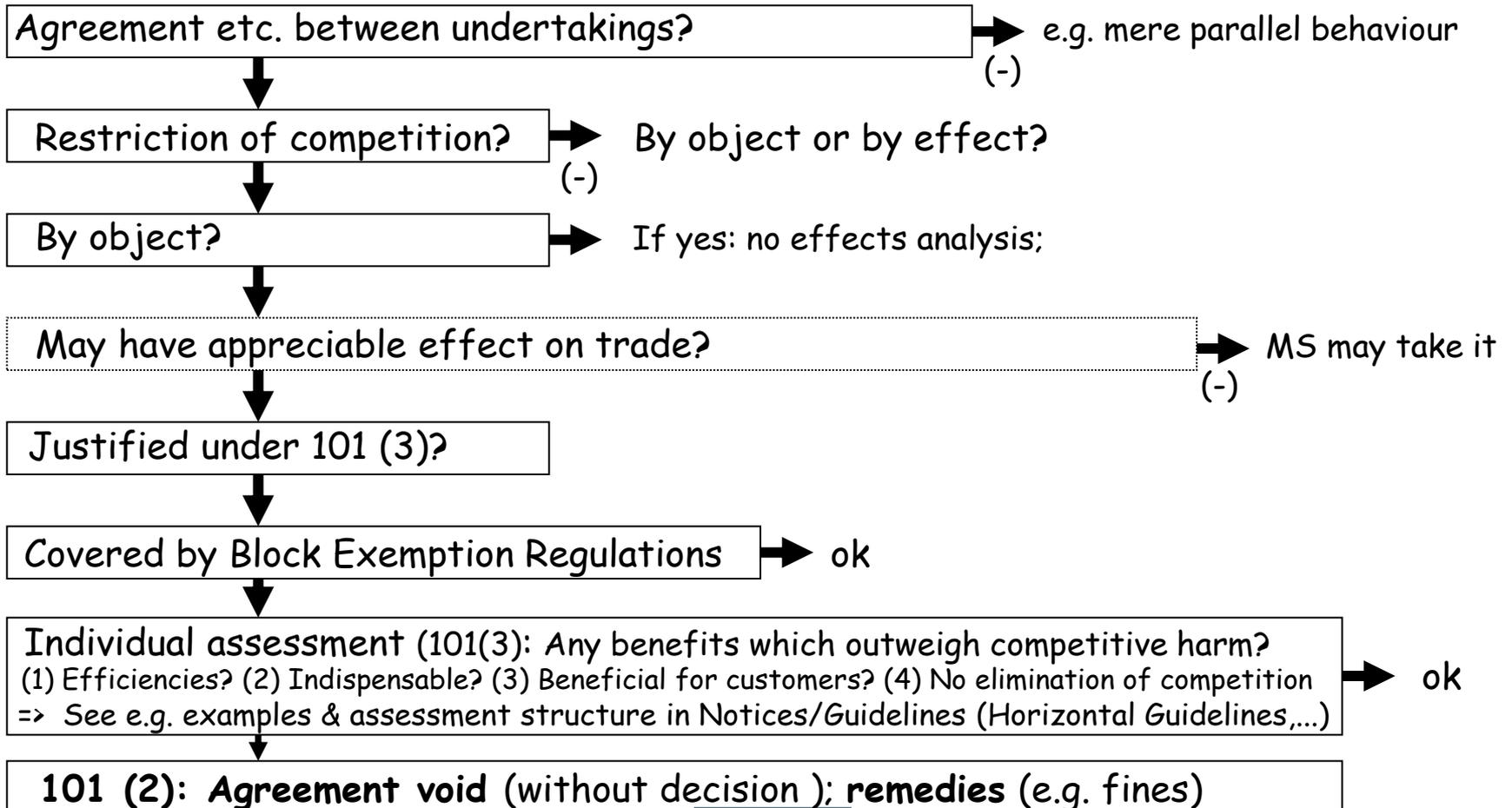


III. Article 101 TFEU - Horizontal agreements





Article 101 - Overview





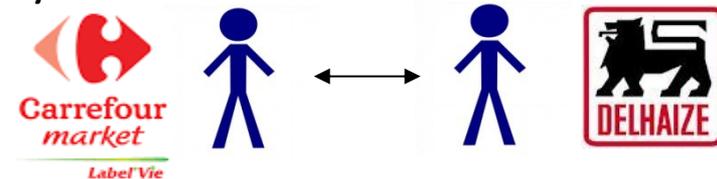
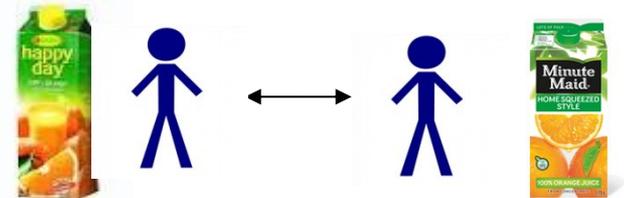
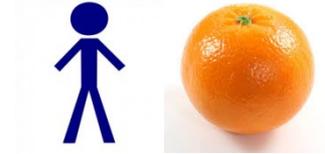
Horizontal Agreement

=> Agreement between competitors

vs.

Vertical Agreement

=> Agreement between undertakings that are active at different levels of the supply chain
(*"upstream – downstream"*)





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 concurrency 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



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



Single and Continuous Infringement

Undertakings are responsible for a Single and Continuous Infringement ('SCI'), even if not involved in every aspect of it.

Examples of SCI:

- a series of cartel practices over a period of time
- a series of cartel practices over a broad geographical area
- a series of cartel practices over a range of different products
- a series of distinct cartel practices.

Read: Whish/Bailey, Competition Law, 11th edition, pp 108 et seq.



Single and Continuous Infringement

Conditions for a Single and Continuous Infringement:

- 1. Overall plan pursuing a common objective;**
going beyond general aim to distort competition
- 2. Intentional contribution to that plan;**
no need to pursue the plan in exactly the same way
- 3. Awareness of offending conduct of other participants**
awareness of the general scope and the essential characteristics of the cartel as a whole



Single and Continuous Infringement

Consequences of a SCI:

- 1. Each undertaking is responsible for the conduct of other undertakings throughout its participation in the SCI.**
- 2. SCI may extend to periods that would be time-barred**
- 3. SCI may result in cartel having effect on inter-state trade**



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:

Can it be explained otherwise than by concertation?

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 unless part of strategy for reaching a common understanding**

Horizontal guidelines, § 63.



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"



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



Algorithms

Case C-74/14 Eturas:

Online travel booking system emails travel agents telling them that it had configured its software to cap the discount that they could offer when selling package holidays.

If following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may — if they were aware of that message — be presumed to have participated in a concerted practice.



PUBLIC ENFORCEMENT *of* **EU COMPETITION LAW**



European
Commission



DG COMP



INVESTIGATIONS

Commission action against anti-competitive conduct



NCA and Commission: Who is in charge?

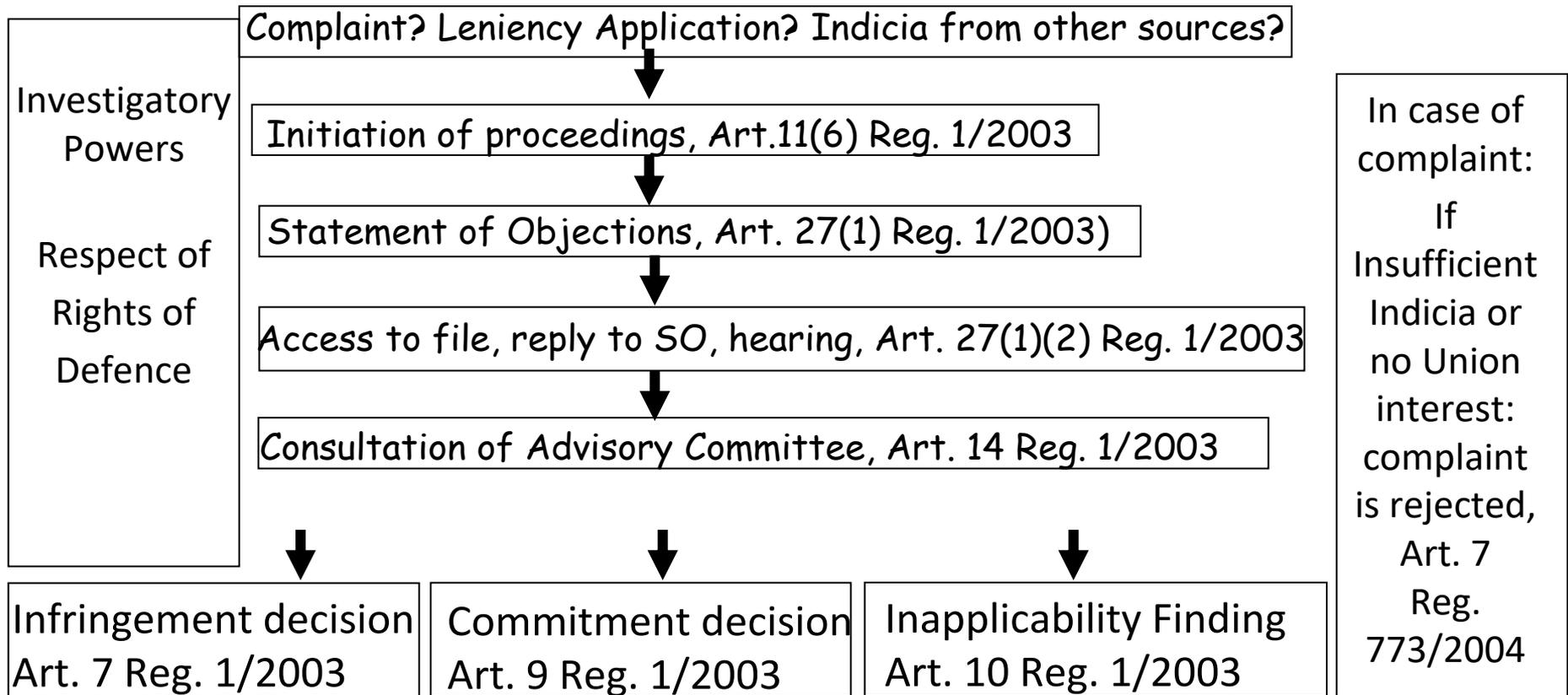
- **National Competition are required to apply EU competition law** > whenever they apply national competition law to an agreement or practice that may affect trade between Member States.
- **Principle of Parallel Competences**
of all NCAs on whose territory conduct is implemented or capable to distort competition
- **Well placed authority should deal with case**
 - Authority which starts a case generally remains in charge
 - NCA that is able to restore or maintain competition in the market is well placed
 - COM well placed where *effects in more than 3 MS* or special Union interest

(See Commission Cooperation Notice (§ 5-15), which does not create rights for companies)

NB: Compliance with the requirements of the rule of law is a relevant factor that the Commission must take into account for the purposes of determining which competition authority is best placed to examine a complaint, see Case T-791/19, Sped-Pro S.A.



Part IV: Public Enforcement





How about interim measures?

Pursuant to Article 8(1) Regulation 1/2003, interim measures may be imposed if at first sight (“*prima facie*”) there is an infringement of competition law rules, as well as an urgent need for protective measures due to the risk of serious and irreparable harm to competition.

See Commission Decision of 16/10/2019 AT.40608 - Broadcom



Commission Powers of Investigation

- **Requests for information (Art. 18 Reg. 1/2003)**
- **Inspections of business premises (Art. 20 Reg. 1/2003)**
- **Inspections of other premises (Art. 21 Reg. 1/2003)**
- **"Power" to take (oral) statements (Art. 19 Reg. 1/2003)**

NB: The Commission is required to record any interview it conducts to collect information relating to the subject matter of an investigation and to have the recording approved by the interviewee;
See C-693/20, Intermarché paras 105 et seq.



Future Commission Powers of Investigation

- Preservation Orders to order companies to preserve digital evidence?**
- Remote Inspections?**
- Real “Power” to take (oral) statements?**



Inspections at business premises: Overview

- **Two types:** voluntary inspections (requiring consent) and compulsory inspections, Art. 20(3)&Art. 20(4) Reg 1/2003
- **Lack of cooperation can entail fines**, Art. 23(1)(c) Reg 1/2003
Breach of seal: Fine of € 38 mn lawful, read C-89/11 E.ON Energie
- Commission decision is **reviewed only by ECJ**, Art. 20(8) Reg. 1/2003
- **No prior judicial control required.** National Court only verifies authenticity of Commission decision and coercive measures.
- Commission may copy entire hard drive and **continue inspection in Brussels** if rights of defence are not impaired and additional costs reimbursed, C-606/18, Nexans, paras 54-91



Case Study Inspections, Case C-583/13

Without judicial authorisation, the Commission adopts a decision ordering DB to submit to inspections concerning a possible breach of Art. 102 TFEU. When Commission officials notify the company of the inspection decision, DB refuses entry until external lawyers arrive 1 hour later.

Eventually, the Commission establishes a breach of Article 102 TFEU and imposes a fine against DB, which is increased by 3% for the delay in granting access to DB's premises.

Deutsche Bahn argues that

1. Inspections without prior judicial authorisation breach Art. 8 ECHR;
2. Exercising its right to legal assistance may not lead to an increased fine.

Will these arguments convince the EU Courts?



1. 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.**

No breach in view of following safeguards:

- **Statement of reasons** limit 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



2. Rights of Defence during Inspections

- **Right to legal assistance**

Commission must allow companies only brief period of time to consult its lawyers before starting with the inspection

Refusal of entry until arrival of external lawyer can justify higher fine

Read Case T-357/06, KWS, § § 220-233 (47 minutes => higher fine)

- **Right to legal professional privilege**

to preserve confidentiality of lawyer-client correspondence

- **Right to abstain from self-incrimination**

Commission may not compel undertaking to provide it with answers which might involve an admission of the existence of an infringement



Legal Professional Privilege: Requirements

- Correspondence with **external (independent) lawyers**
Not: in-house counsels/lawyers employed by a company
- admitted to a **bar in the EU/EEA**
- Correspondence that relates to the **defence of the client** in relation to the subject-matter of the investigation
 - No Legal Advice that is general in nature
 - Internal working documents exclusively drawn up for the purpose of (later) seeking advice from an external lawyer can be covered
 - No protection merely because documents were discussed with lawyers

See C-550/07 Akzo Nobel, § § 165-179, Cases T-125/03 etc, Akzo § § 122-24
Read W. Wils, World Competition 42, no. 1 (2019): pp. 21–42.



Legal Professional Privilege: Procedure

If company claims LPP, **Commission must not read document**
However, unless claim is substantiated, **cursory look** is allowed.

In case of dispute, **documents are put in a sealed envelope**. Where they remain until Court can be called upon.

Hearing Officer can be asked to mediate if both sides agree.

Read Art. 4(2)(a) Hearing Officer's Mandate



Right not to incriminate oneself: Substance

Right not to admit infringement.

No right to remain silent.

=> cannot be invoked if:

- companies are not compelled to provide information
e.g. voluntary submissions/replies to simple requests for info
- request concerns facts rather than opinion/interpretation
Borderline in case of "purpose of meeting", Case T-112/98, Mannesmann
- companies are required to provide pre-existing documents
e.g. minutes of a cartel meeting

See recital 23 Reg. 1/2003, Case C-238/99 etc LVM, § § 272-279,
C-301/04 SGL, § § 41-49; Case C-466/19 Qualcomm, § § 143-147.



Right not to incriminate oneself : Procedure

Companies can

- refuse to answer
- ask Hearing Officer to make recommendations

See recital 23 Reg. 1/2003, Case C-238/99 etc LVM, § § 272-279, C-301/04 SGL, § § 41-49; Art. 4(2)(b) Hearing Officer's Mandate

Unclear whether a reply to compulsory self-incriminatory question amounts to waiving of undertakings' right and, consequently, the Commission is entitled to use that reply as evidence.

See AG Wahl, C-247/14 Heidelberg Cement § 164 with further references



Case Study Right to be Heard

AMD files a complaint against Intel for breach of Article 102 TFEU. The conduct in question has already been investigated by US authorities, which gathered substantial evidence.

The Commission starts proceedings and sends a statement of objections to Intel.

When granting access to file, the Commission refuses Intel's request to obtain:

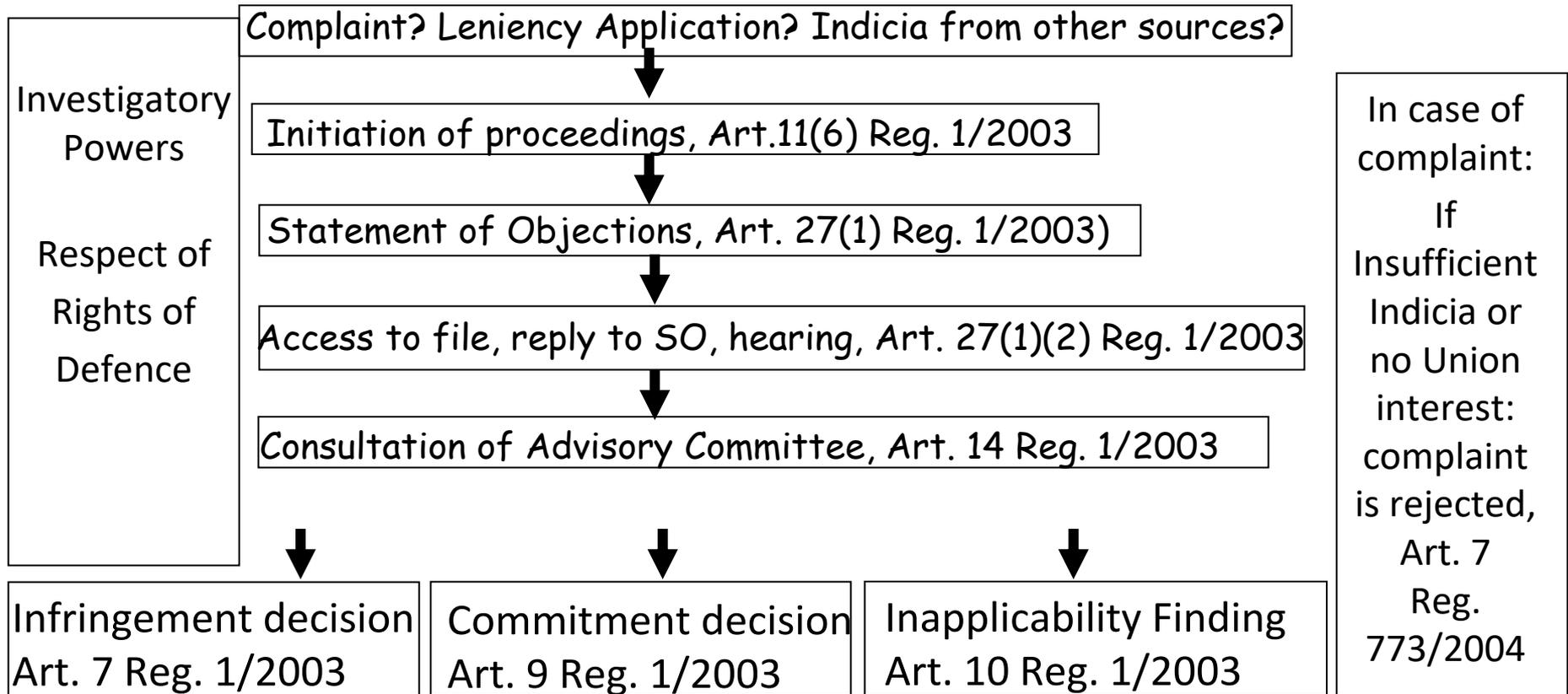
- AMD's complaint
- Minutes of a meeting the Commission had with AMD. No such minutes were taken because the Commission considered the meeting to be inconclusive.

Can Intel claim a breach of its right to access to file?

Can Intel go before the EU Courts to obtain the documents/evidence in question?



The Main Steps of a Commission Antitrust Investigation





The Parties' 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;
- New elements require supplementary SO or "letter of facts";
- 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



The Parties' Right to Access to File

Rule: a party's right to access to file covers **all documents obtained in the course of the investigation**, inculpatory or (potentially) exculpatory (principle of equality of arms).

See Art. 27(2) Reg. 1/2003, Article 15 Reg. 773/2004.

Exceptions:

internal & confidential information generally **inaccessible**



Right to Confidentiality ↔ Right to Access to File

How to find the Right Balance?

- Provide meaningful non-confidential versions.
Info providers are required to draw up such versions; Art. 16 Reg. 773/2004
- Use Confidentiality Rings and Data Rooms
Conditions either agreed between the parties or imposed by Hearing Officer
Sanctions for breaches depend on national rules; Commission reports to bar associations

See https://ec.europa.eu/competition/antitrust/conf_rings.pdf

Before disclosing allegedly confidential information, provider must be given opportunity to bring action before EU Courts (interim measures)

See e.g. T-423/17 R, Nexans. See also C-53/85 Akzo Chemie, § 29



Access to minutes of meetings/interviews

Any meeting/interview aimed at the collection of information relating to the subject matter of an investigation is an interview within the meaning of Art. 19(1) Reg. No 1/2003, which **must be recorded in full** and the recording must be rendered accessible.

C-413/14 P, Intel § 82-98 and T-235/18, Qualcomm, § § 201, 251 (also conference calls) and (even before 1st investigative act) § 281



Right to be Heard: What to do against Breaches?

During investigation, breaches cannot be brought before EU Courts

EU Courts examine such claims only **after adoption of final decision**

Before, Hearing Officers address complaints and decide on behalf of Commission

See Art. 6, 7 and 9 of Hearing Officer's Mandate.

NB: Failure to address the Hearing Officer may result in claims not being heard by the Court

See T-44/00, Mannesmannröhren-Werke, § 53.



European Competition Law Training for Judges from North Macedonia

Thank you for your attention!

**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.**



Co-funded by the European Union

To the National Competition Authority

Dear Mr President,

My name is John Doe. I am currently held in **Riverton Prison**, located in the village of Riverton (population ~28,000). I am writing to express concern about the prices of goods sold in the prison shop.

Over the past few months, I have noticed that basic groceries, snacks, and personal items in the prison shop **seem to cost considerably more than similar products in the town outside the prison.**

For example:

- A litre of **milk**, a loaf of **bread**, a dozen **eggs**, or a pack of **pasta** appears noticeably more expensive than the prices I have seen in **local supermarkets.**
- **Soft drinks, chocolate bars, crisps, and personal hygiene items** such as soap, toothpaste, and shampoo also appear to cost more than in shops in Riverton.
- Some products in the prison shop are **brand-specific**, while others are generic, but both categories appear to be priced above the usual town levels.

I have compared prices in the prison shop with those in the **supermarkets and small stores in Riverton**, and the differences are striking for several everyday items. For example, a packet of biscuits that costs E1.50 outside the prison often sells for E2.20 in the shop. A litre of milk that is E1.10 in town shops is E1.60 inside.

I am also aware that prices in the prison shop have changed over time. Some products have increased in price over the last few months, and these changes seem to follow patterns that are not always clear. For instance, the price of certain snacks rose while similar items in town shops remained stable.

I am concerned that these differences may affect how people buy products inside the prison, and how they experience daily life. I would like the Authority to **look into the pricing and consider the situation carefully**, as I believe it may help clarify whether prices reflect usual local market conditions.

John Doe

Questions – market characteristics

1. If prices of milk, bread, eggs, or pasta in the prison shop increased slightly, would some prisoners **try to obtain these products from Riverton supermarkets**?
2. Could prisoners **buy small quantities of snacks, drinks, or hygiene items from local corner shops** instead of the prison shop?
3. Could prisoners **arrange to get goods from the discount store 12 km outside the village**?
4. Could prisoners **order groceries online for delivery to the prison**, if delivery was feasible?
5. Would prisoners **continue buying from the prison shop despite higher prices**, accepting the cost due to convenience or access constraints?
6. Could prisoners **mix sources**, e.g., buy some items from outside and some from the prison shop, to reduce cost?
7. Could the **prison shop expand its stock or adjust prices** to respond if prisoners tried to substitute with outside sources?
8. Could the **Riverton supermarkets increase deliveries or offer special services** to reach prisoners if the prison shop's prices rose?
9. Could the **discount store expand its offerings or delivery options** to serve the prison population if the shop raised prices?
10. Could **online grocery services expand delivery capacity or offerings** to Riverton Prison if demand increased due to higher prices in the shop?

Scenarios

Group 1 – Standard Constraints

- **Scenario:** Prisoners have **limited access to the outside world**. Online delivery is possible in theory but very expensive and rarely used. The prison shop is the main source of goods.
-

Group 2 – Online Access Potential

- **Scenario:** Some prisoners have **occasional access to online grocery delivery** (friends or family can place orders). Deliveries are slow and limited in size.
-

Group 3 – Supplier Responsiveness

- **Scenario:** The prison shop could **quickly adjust its stock and prices** in response to demand shifts. Local supermarkets and the discount store are not allowed to sell to prisoners.
-

Group 4 – External Access via Friends/Family

- **Scenario:** Prisoners can **receive products from friends or family visiting the village**, though quantities are limited and not all products are brought in.



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Case study

A real-life scenario complaint

Dr Virginia Pavel - ERA

Dear Mr President,

My name is John Doe. I am currently held in **Riverton Prison**, located in the village of Riverton (population ~28,000). I am writing to express concern about the prices of goods sold in the prison shop.

Over the past few months, I have noticed that basic groceries, snacks, and personal items in the prison shop **seem to cost considerably more than similar products in the town outside the prison.**

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John Doe

Importance of market definition

- Agreements with anticompetitive **effect**
- **Appreciable effect** on competition
- **Effect on trade** between EU Member States
- **Block exemption**
- **Dominant position**

Market characteristics

- **Demand**

- Q1
- Q2
- Q3
- Q4
- Q5
- Q6

- **Supply**

- Q1
- Q2
- Q3
- Q4

Scenarios

- Group 1 - Prisoners have **limited access to the outside world**. Online delivery is possible in theory but very expensive and rarely used. The prison shop is the main source of goods.
- Group 2 - Some prisoners have **occasional access to online grocery delivery** (friends or family can place orders). Deliveries are slow and limited in size.
- Group 3 - The prison shop could **quickly adjust its stock and prices** in response to demand shifts. Local supermarkets and the discount store are not allowed to sell to prisoners.
- Group 4 - Prisoners can **receive products from friends or family visiting the village**, though quantities are limited and not all products are brought in.

Conclusions?

Thank you!



Utrecht University



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Competition law and vertical agreements

*European Competition Law Training
for Judges from North Macedonia*

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 Restraints
5. Challenges

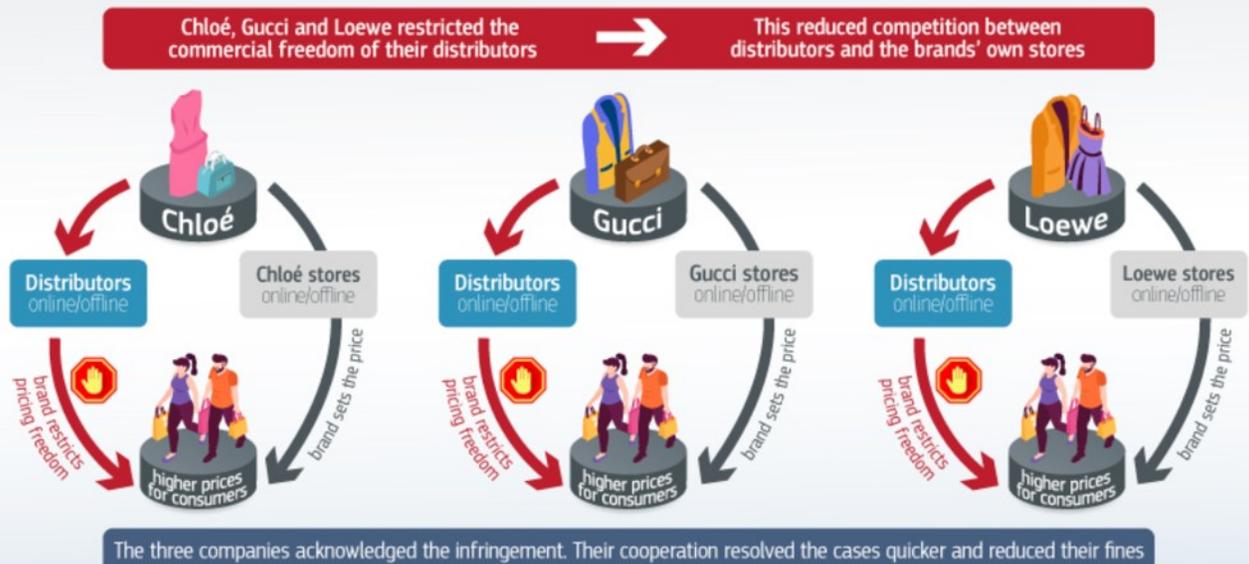


Utrecht University

1. Setting a Scene

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

Commission fines **Chloé**, **Gucci** and **Loewe** for resale price maintenance (RPM) 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

1. Are there undertakings involved?

2. Is there collusion between those undertakings?

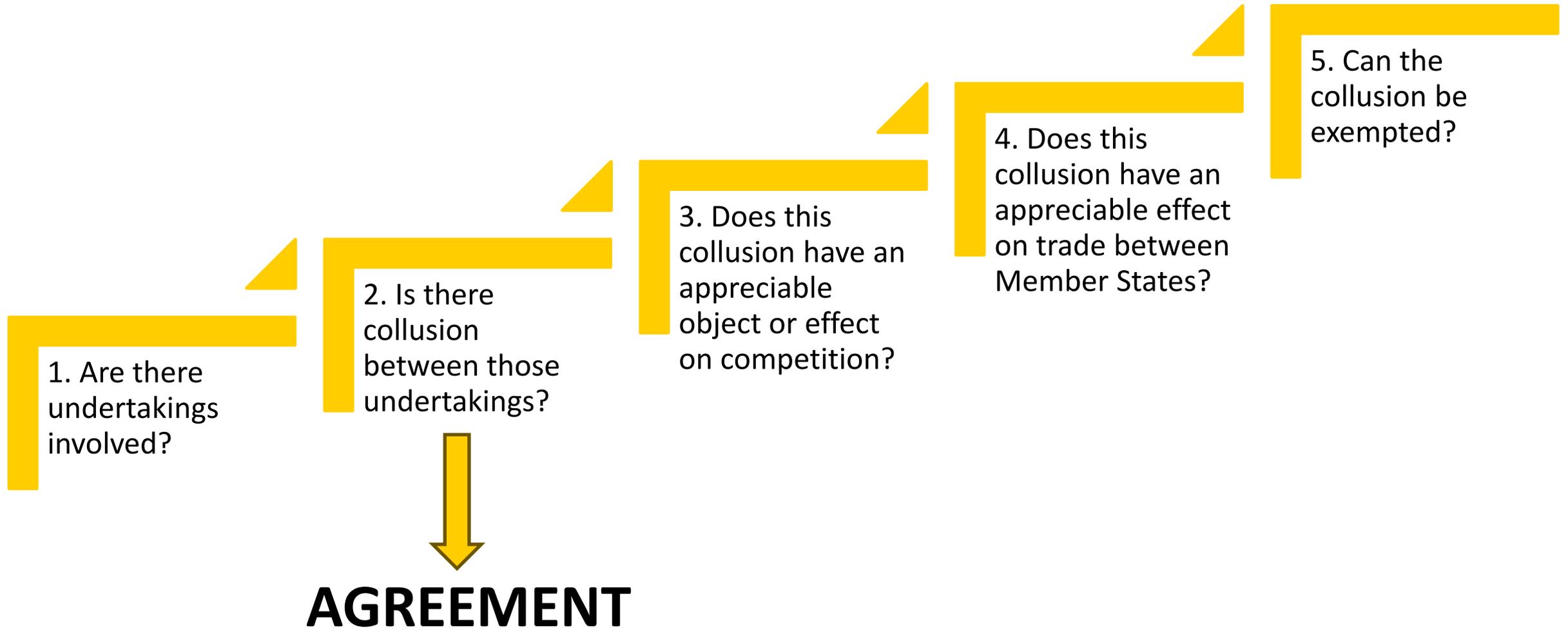
3. Does this collusion have an appreciable object or effect on competition?

4. Does this collusion have an appreciable effect on trade between Member States?

5. Can the collusion be exempted?

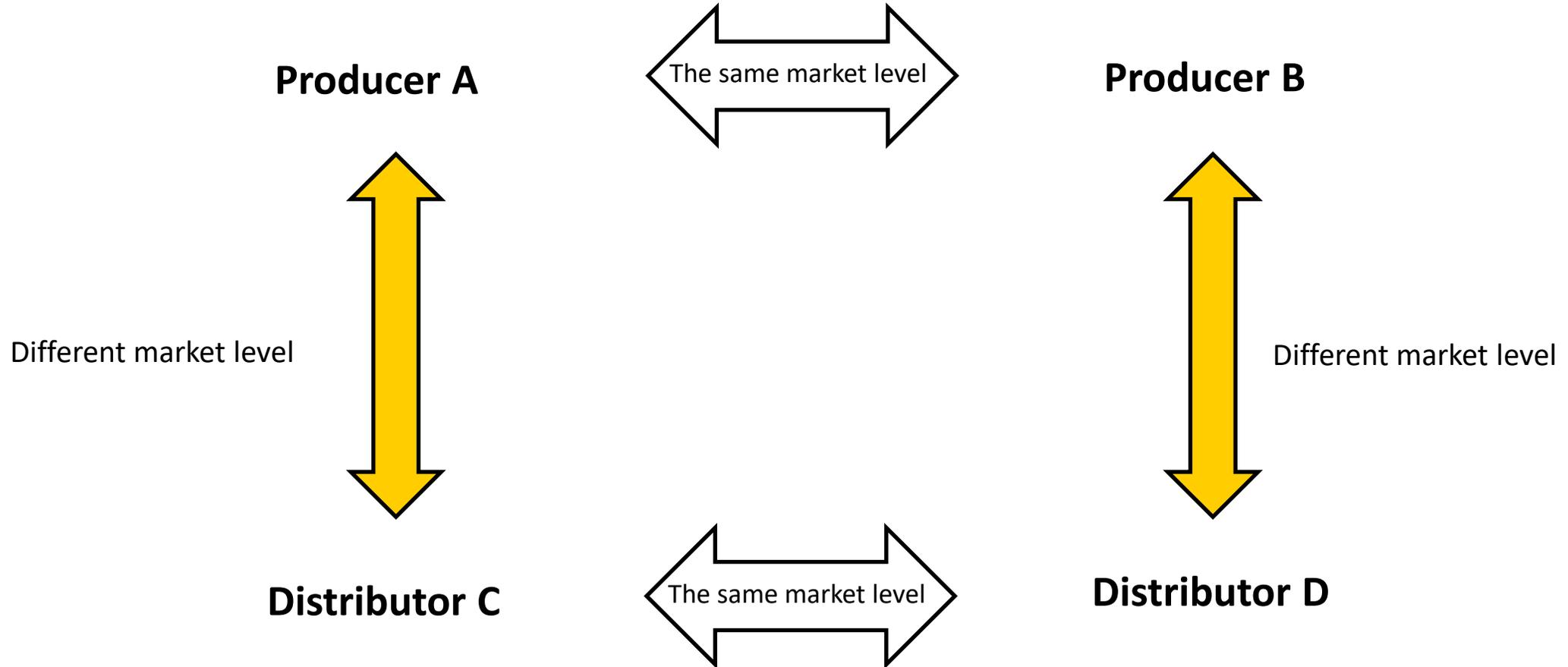


Article 101 Framework: Five Cumulative Steps



Agreements Falling within the Scope of Art. 101

Consten & Grundig, 56, 58/64



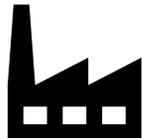


2. Vertical Integration Scenarios

– Why Are They Legally Relevant?

Vertical Integration & Distribution Chain

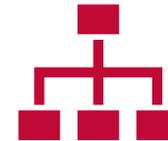
**First scenario:
vertical integration**



Producer

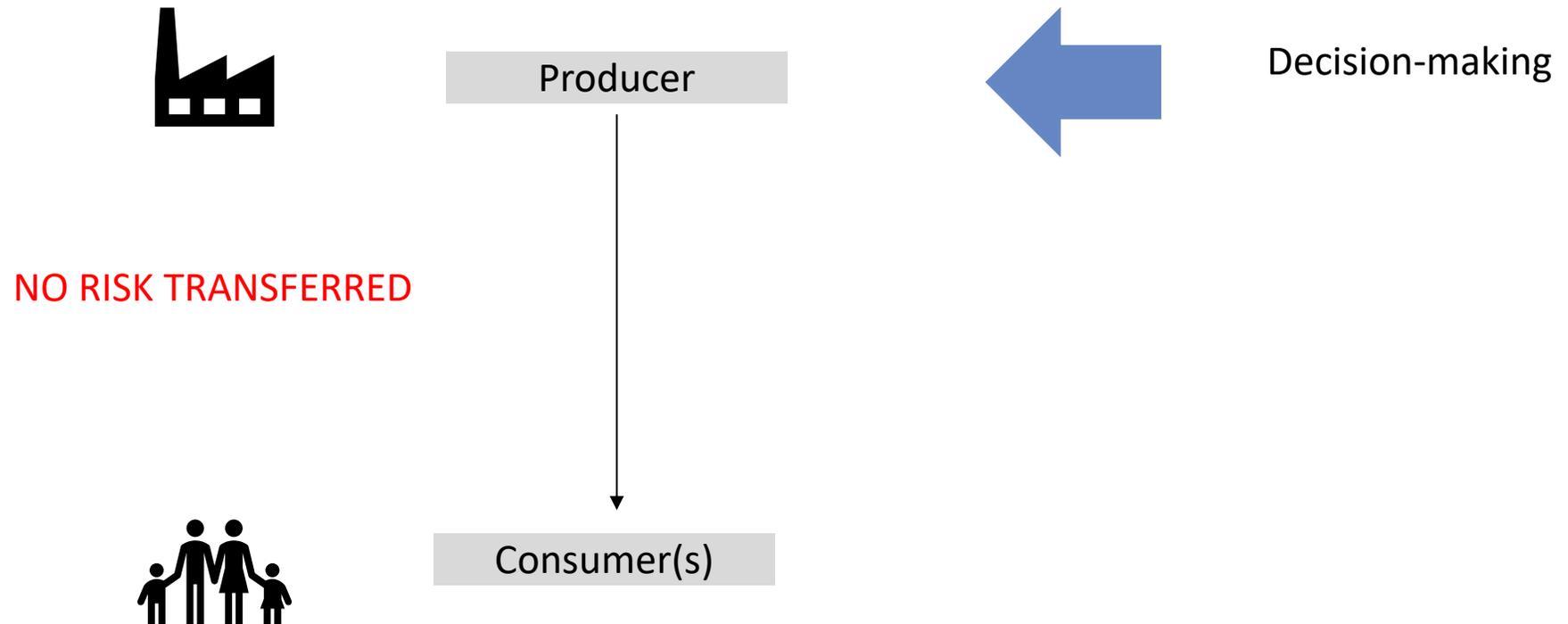


Consumer(s)



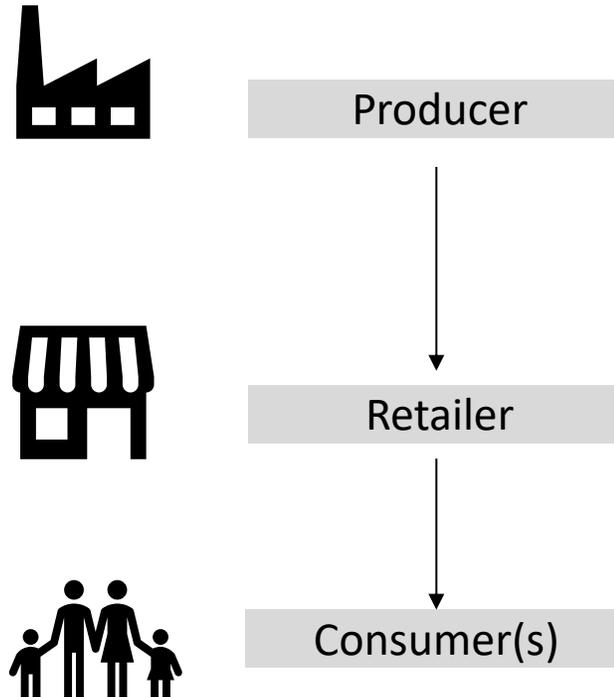
Agreements within the capital group,
Viho, C-73/95

Vertical Integration & Distribution Chain

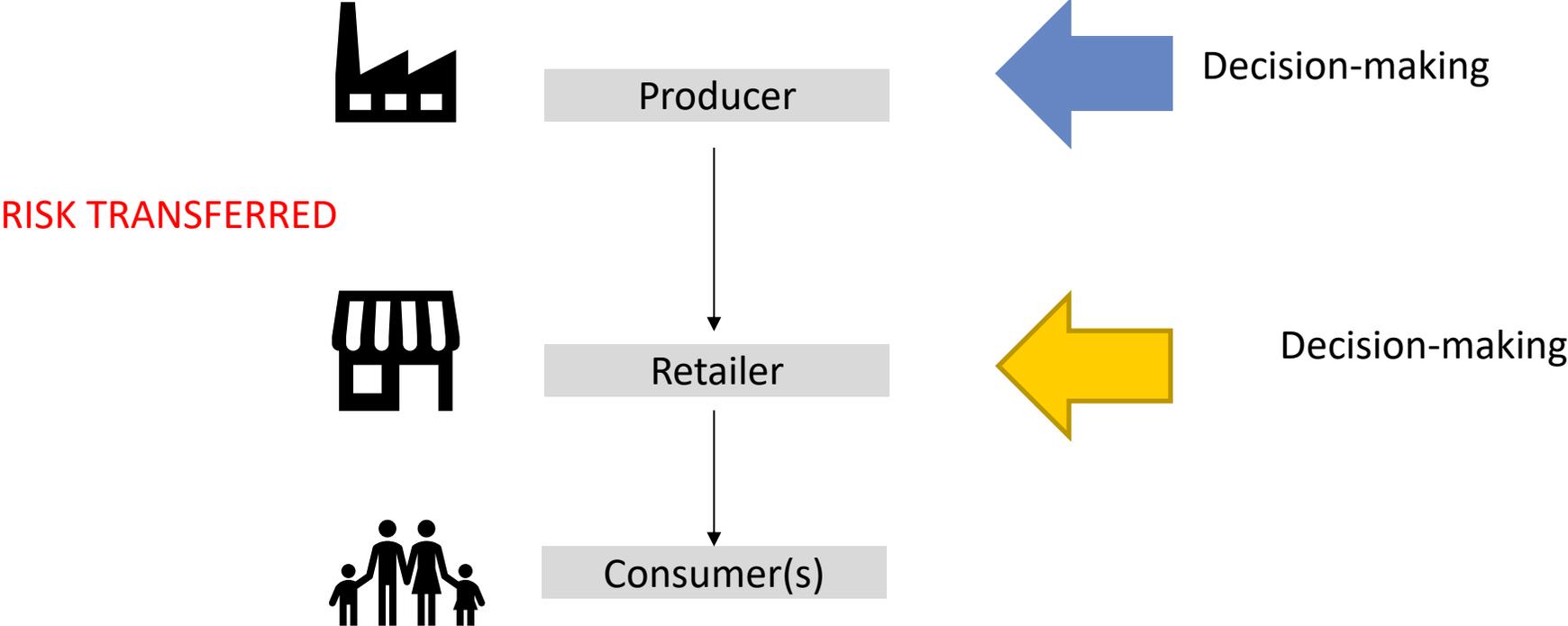


Vertical Integration & Distribution Chain

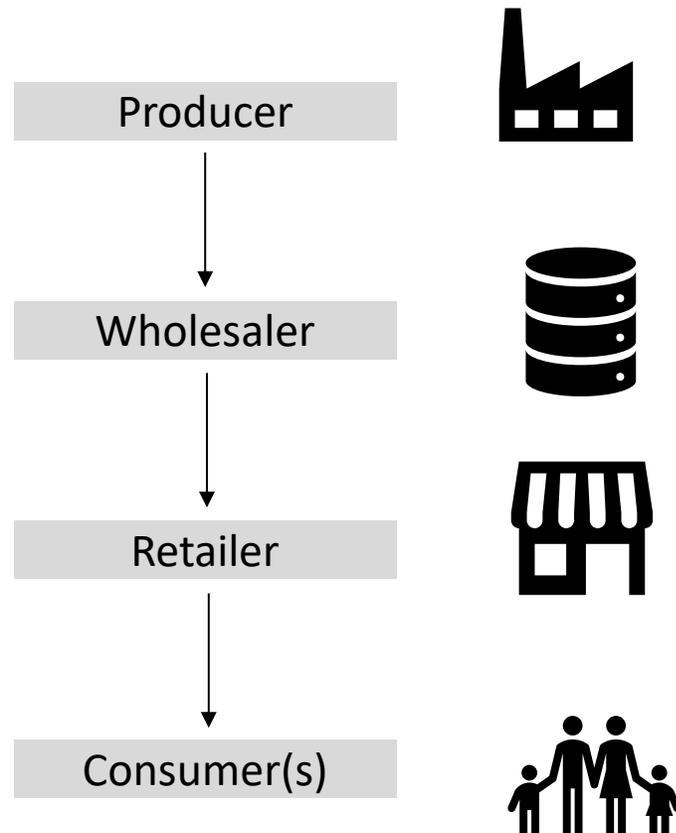
**Second scenario:
an independent
retailer**



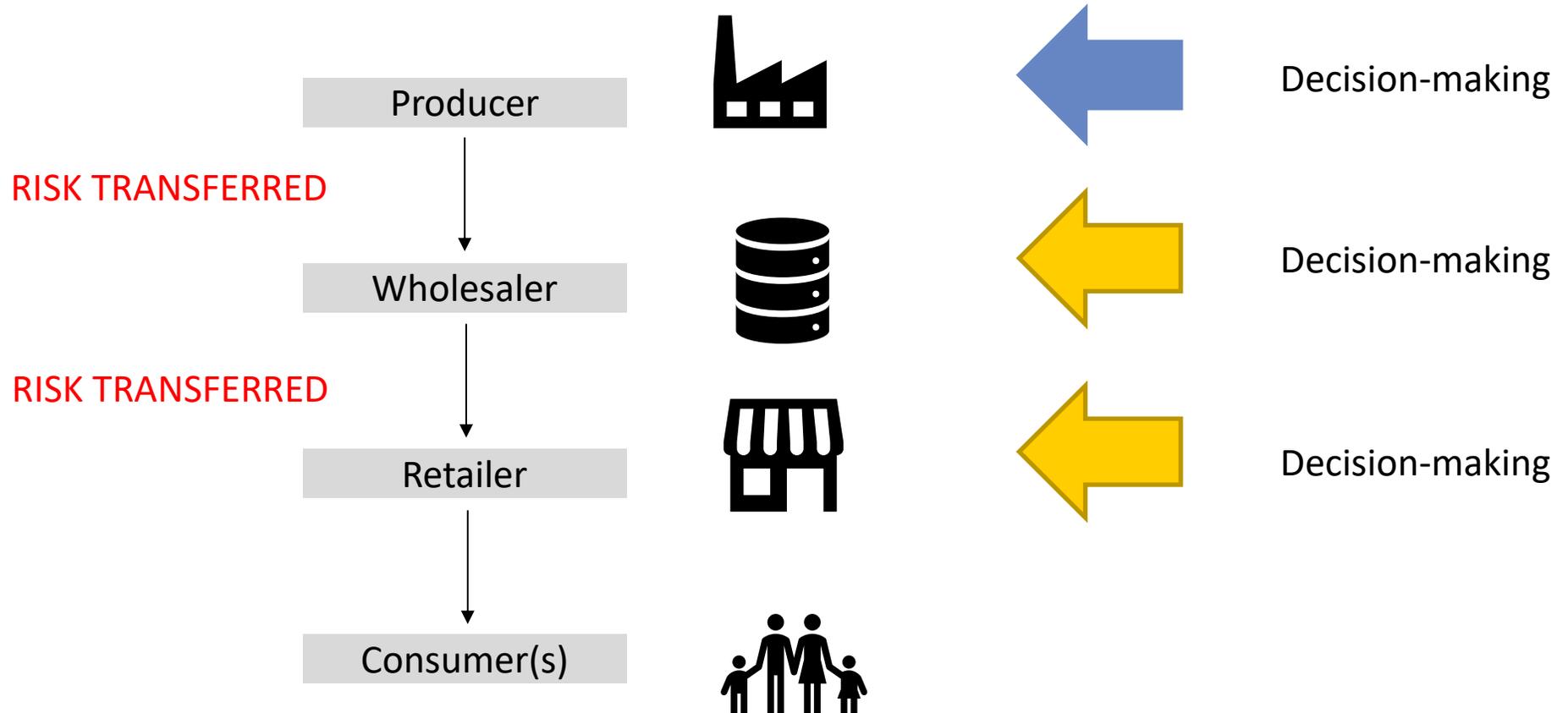
Vertical Integration & Distribution Chain



Vertical Integration & Distribution Chain

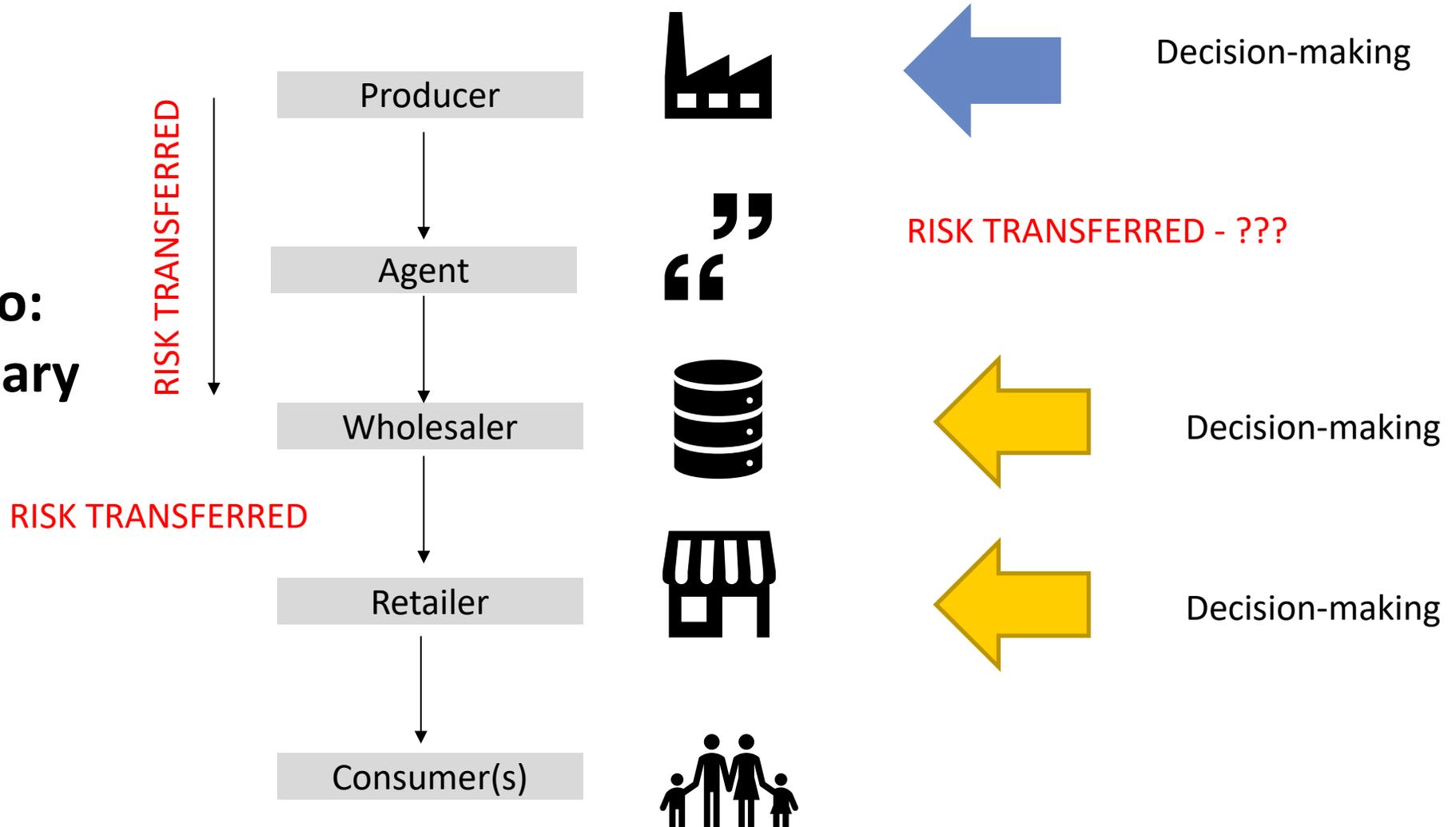


Vertical Integration & Distribution Chain



Vertical Integration & Distribution Chain

**Third scenario:
An intermediary**





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 integration

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.

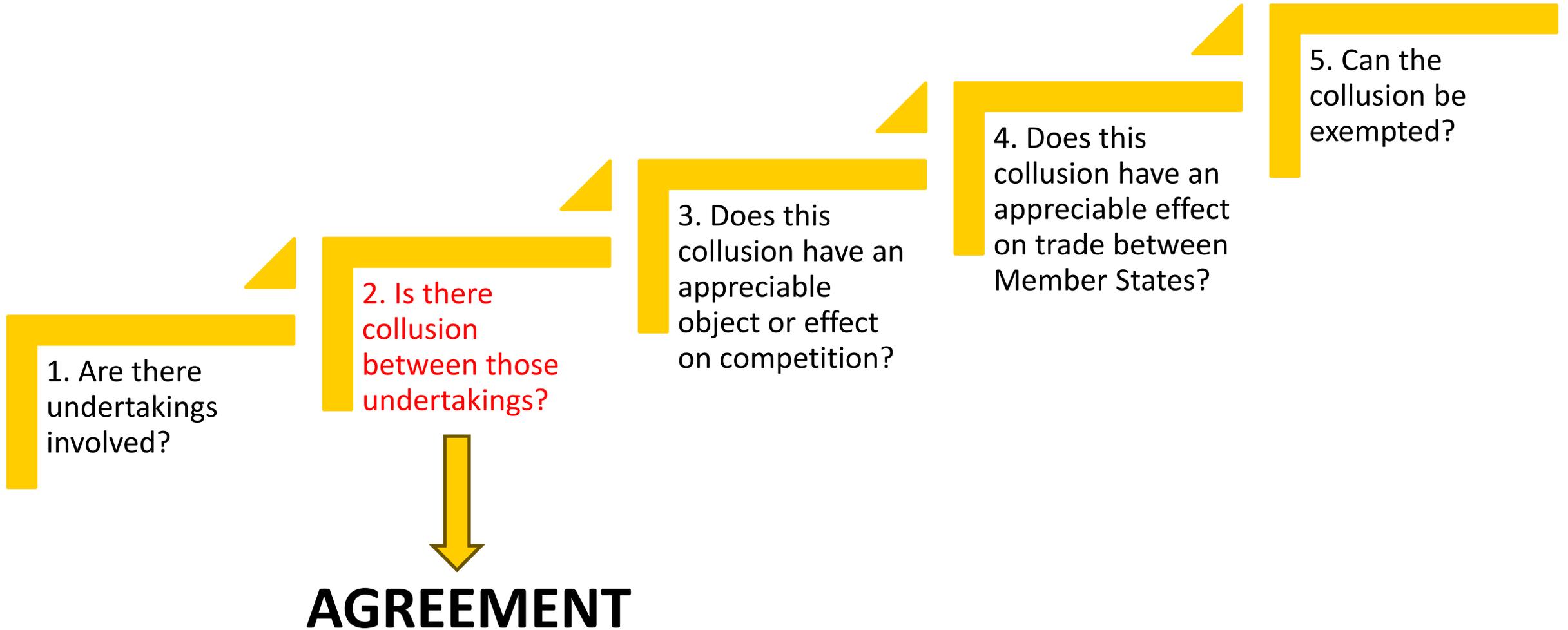
In principle, this is due to **the complementary nature** of the activities carried out by the parties to a vertical agreement, which generally implies that pro-competitive actions by one party to the agreement will benefit the other party to the agreement and will ultimately benefit consumers. By contrast 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

1. Are there undertakings involved?

2. Is there collusion between those undertakings?

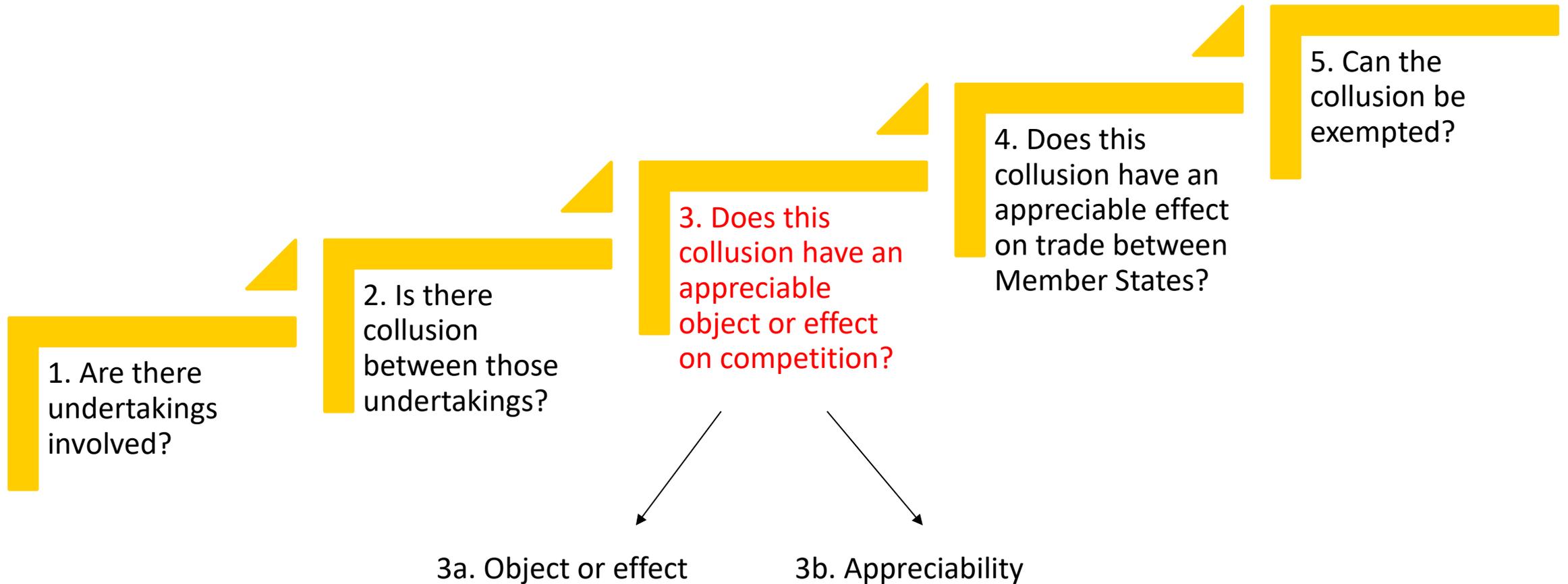
3. Does this collusion have an appreciable object or effect on competition?

4. Does this collusion have an appreciable effect on trade between Member States?

5. Can the collusion be exempted?



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.”

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**)

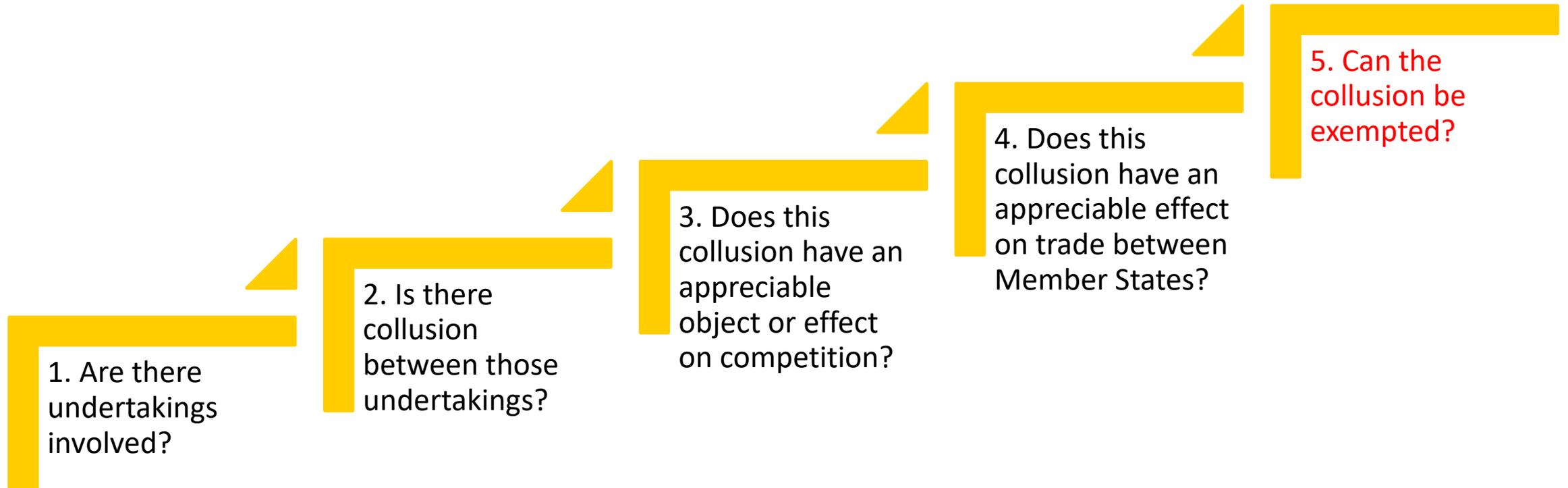


De Minimis Notice applicable below certain market shares. **Non-competitors:** Market share held by each of the parties to the agreement **does not exceed 15 %** on any of the relevant markets affected by the agreement



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)

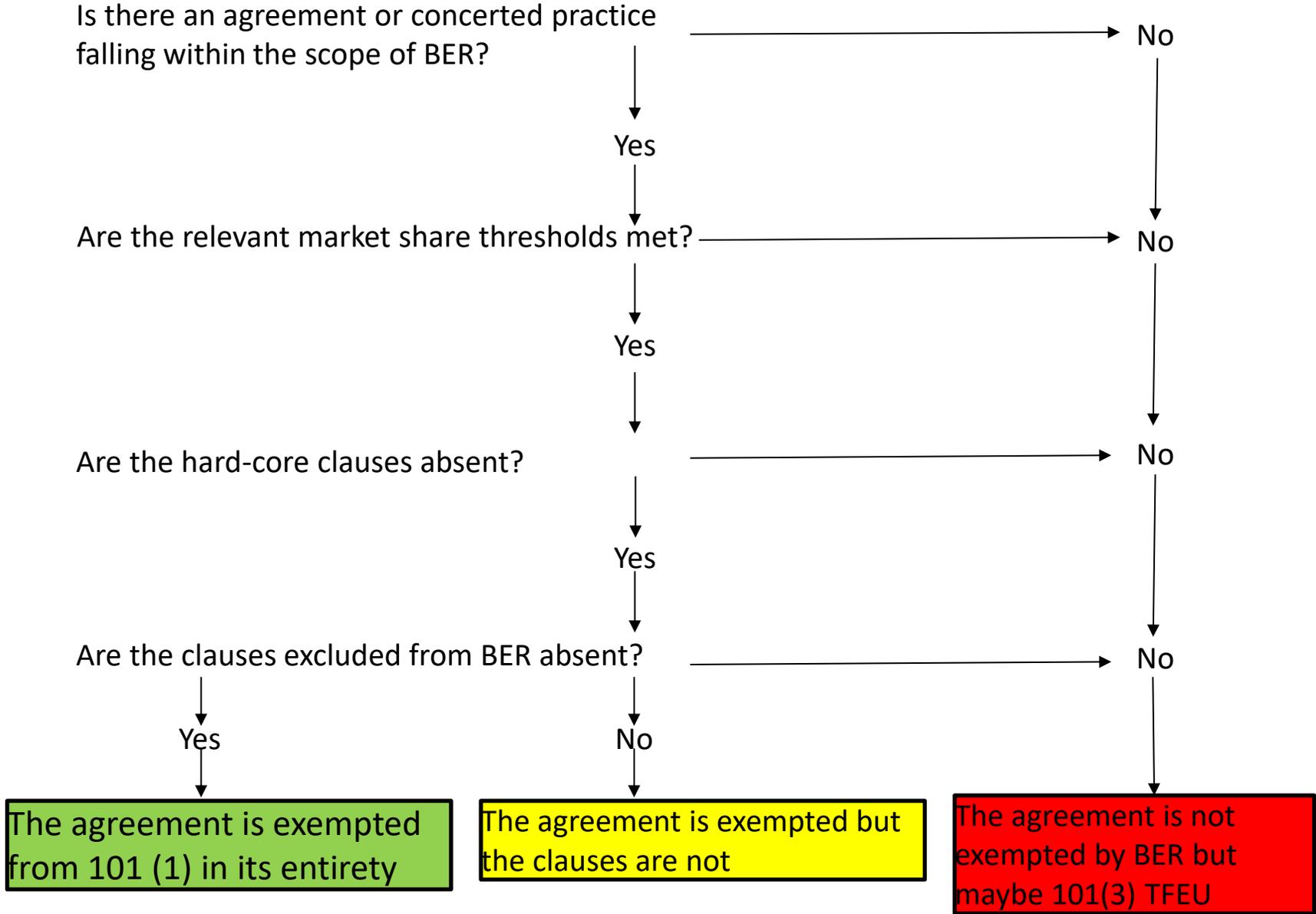
There is **no need to notify** agreements

Validity of contracts without the authority's authorization



Step 5. Scheme of Application of Block Exemption Regulations

- 1. Applicability of BER
- 2. Market share thresholds
- 3. Hard-core restrictions (black and grey clauses)
- 4. Effect



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)

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

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

- Eg parity obligations

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

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

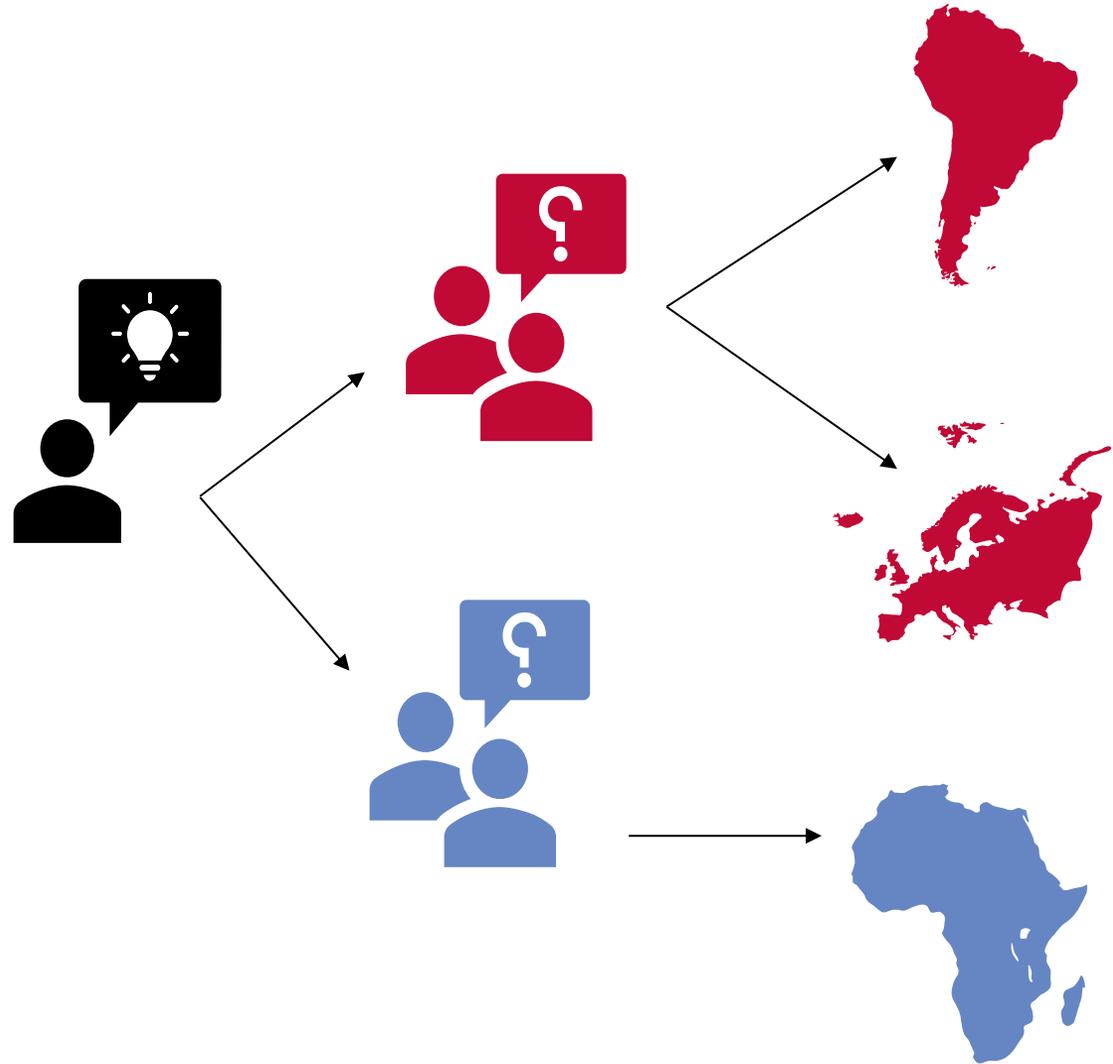
Recommended and maximum resale prices

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

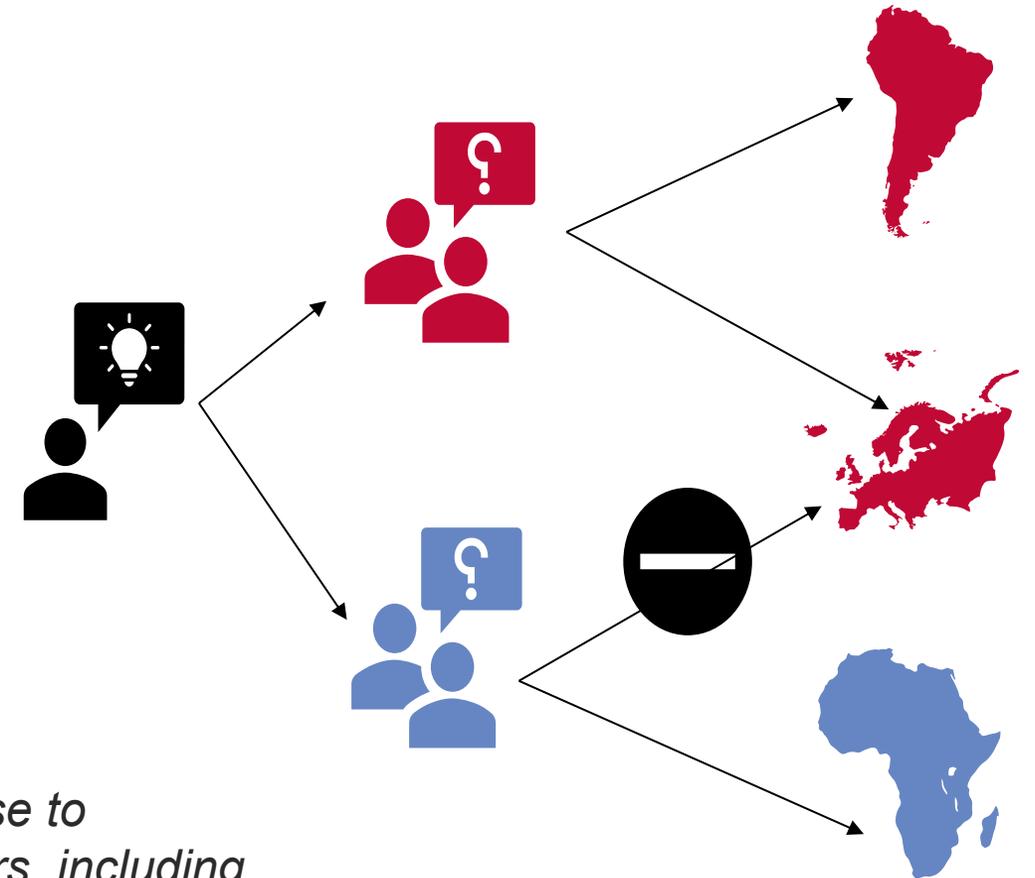
- **CJEU:** an exclusive distribution agreement does not have as its object the restriction of competition, but must be considered in its market context to determine whether it has this effect. (*STM v. Maschinenbau Ulm*)
- A supplier may grant exclusive distribution rights to a distributor for a particular 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.*

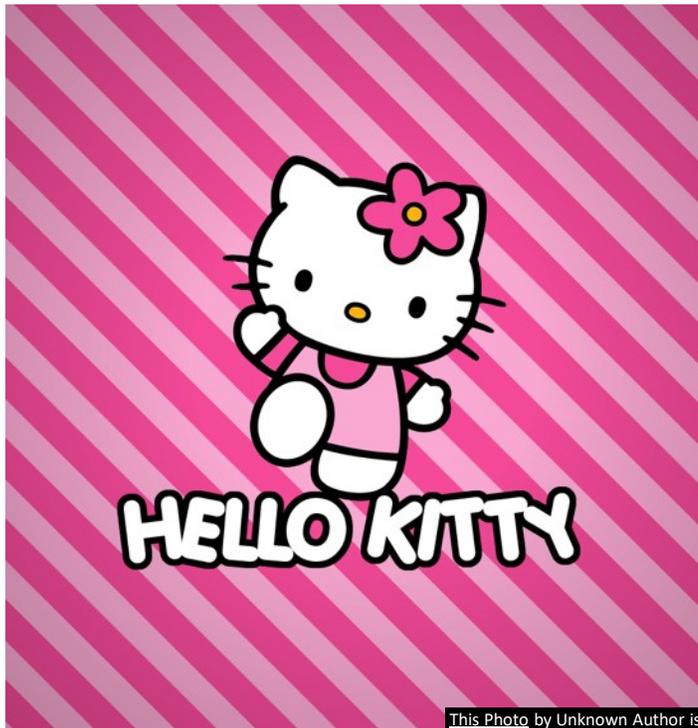
Christian Dior v. Evora, C-337/95

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.

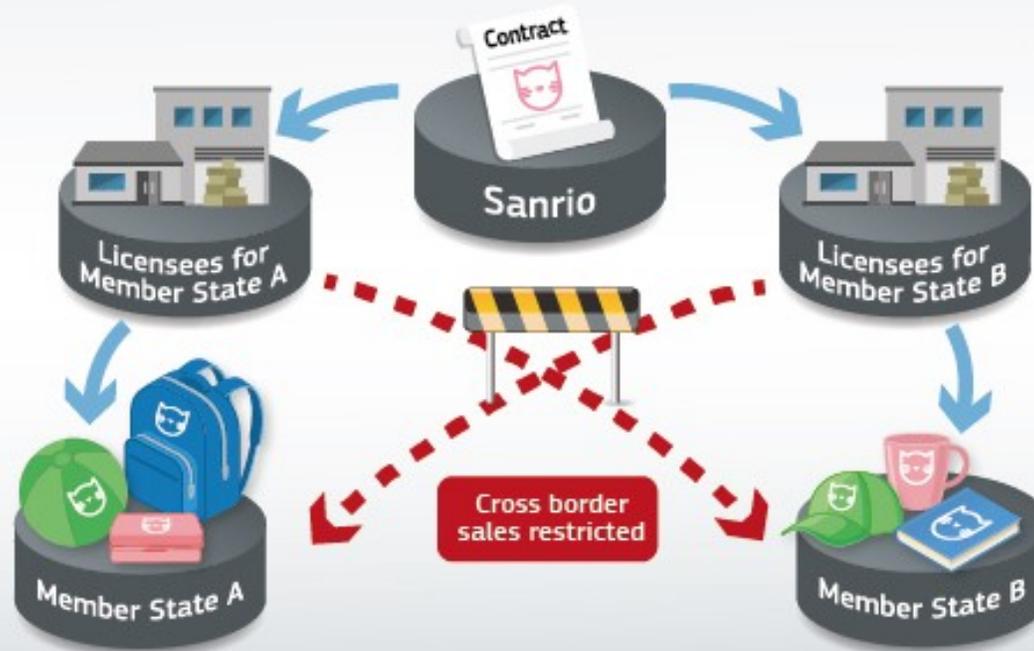


Export bans



This Photo by Unknown Author is licensed under CC BY-NC-ND

Commission fines **Sanrio** €6.2 million for restricting cross-border sales of merchandising products



- 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

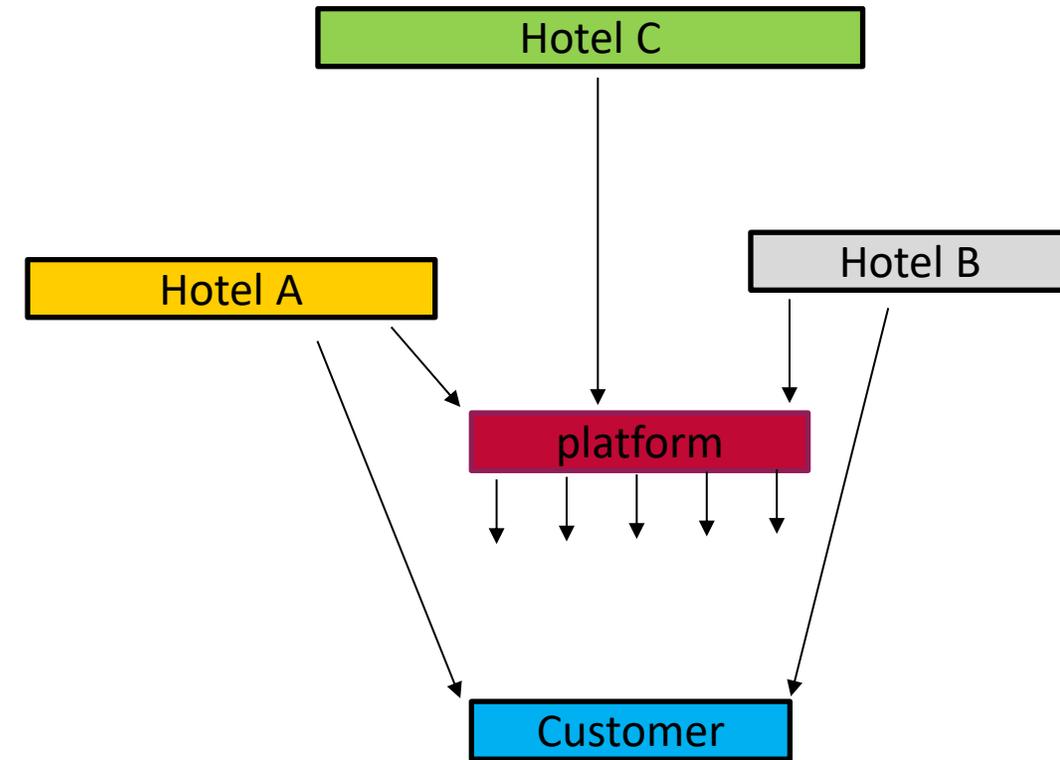
- The Danish Competition Authority Finds The Exchange Of Information Between Retailers Of Clothing Items Illegal
- Commission commitments decision in case of Amazon's usage of data of resellers



Parity Provisions (“Most Favoured Nation” clauses)

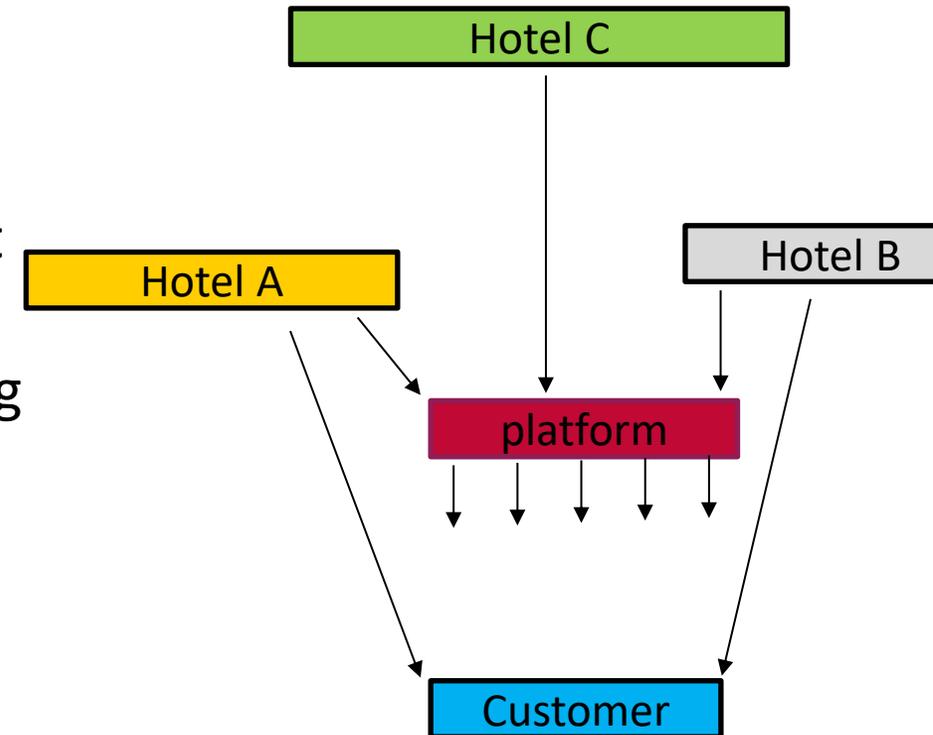
Contractual terms used (by online platforms) to prevent client sellers from offering their products or services at cheaper prices on alternative sales channels.

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

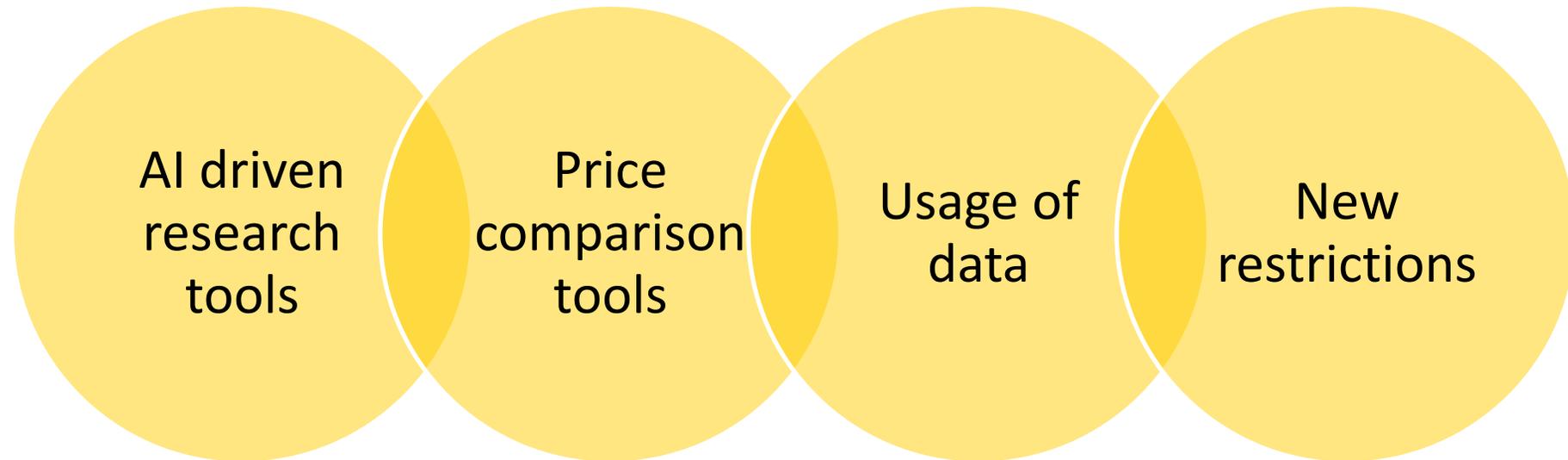


Parity Provisions (“Most Favoured Nation” clauses) –Cont. (case C-264/23)

- 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!!!



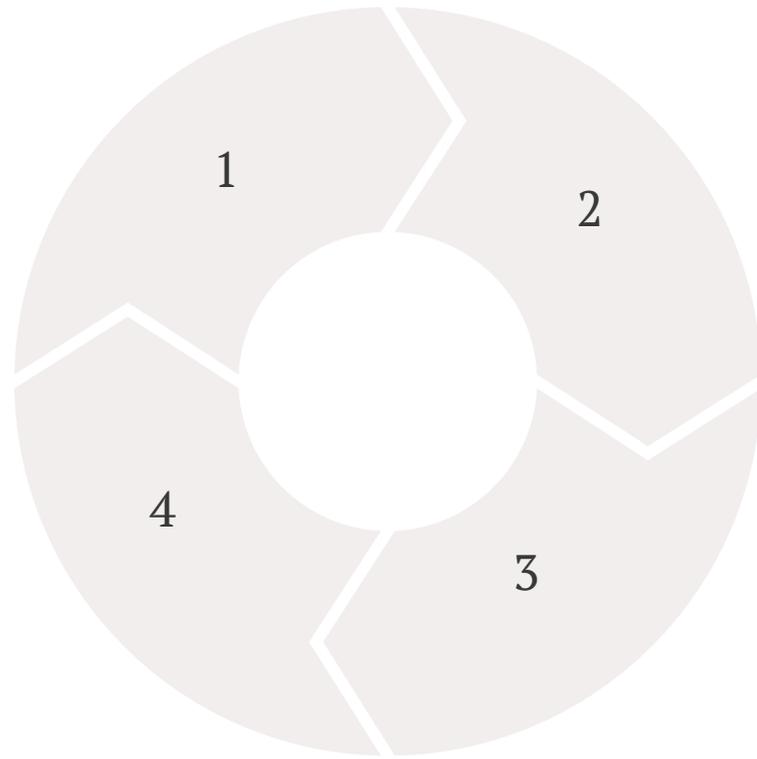
Co-funded by the European Union

Burden of Proof and Evidentiary Standards with Focus on Article 101

Dr. Małgorzata Kozak, Assistant Professor, Utrecht University

ERA workshop for judges in Skopje, 5th February 2026

Presentation generated with AI-driven tool.



Outline of the Workshop:

1. Introduction of Concepts
2. Legal Framework
3. How is Wrongdoing Proven?
4. Specific Elements in the Case of Article 101 TFEU

1 Regulation / Legislation

2 Enforcement

3 Identification of Wrongdoing

4 Proving of a Wrongdoing

Where to Start and How to Finish

Understanding Cartels and Collusion

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

This foundational observation highlights the inherent temptation for competitors to collude, forming cartels to restrict competition and increase profits at the expense of consumers.

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:** Risk of Type I Errors (False Positives) – over-enforcement that chills pro-competitive conduct
- **Set the bar too high:** Risk of Type II Errors (False Negatives) – under-enforcement that allows anticompetitive harm to go unchecked



1. INTRODUCTION

Four Fundamental Points

What needs to be proven?

The legal framework

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**

Articles 101 and 102 TFEU - Differences

Article 101:

1. Are there undertakings involved?

2. Is there collusion between those undertakings?

3. Does this collusion have an appreciable object or effect on competition?

4. Does this collusion have an appreciable effect on trade between Member States?

5. Can the collusion be exempted?

Article 102:

1. Is there an undertaking?

2. Do(es) the undertaking(s) have a dominant position on a given market?

3. Is this dominant position within the Internal Market or a substantial part of it?

4. Is this dominant position being abused?

5. Does this abuse affect trade between Member States?

6. Can this abuse be justified?

The Standard and Burden of Proof - Key Concepts

Who Proves It? (*Legal Burden of Proof*)

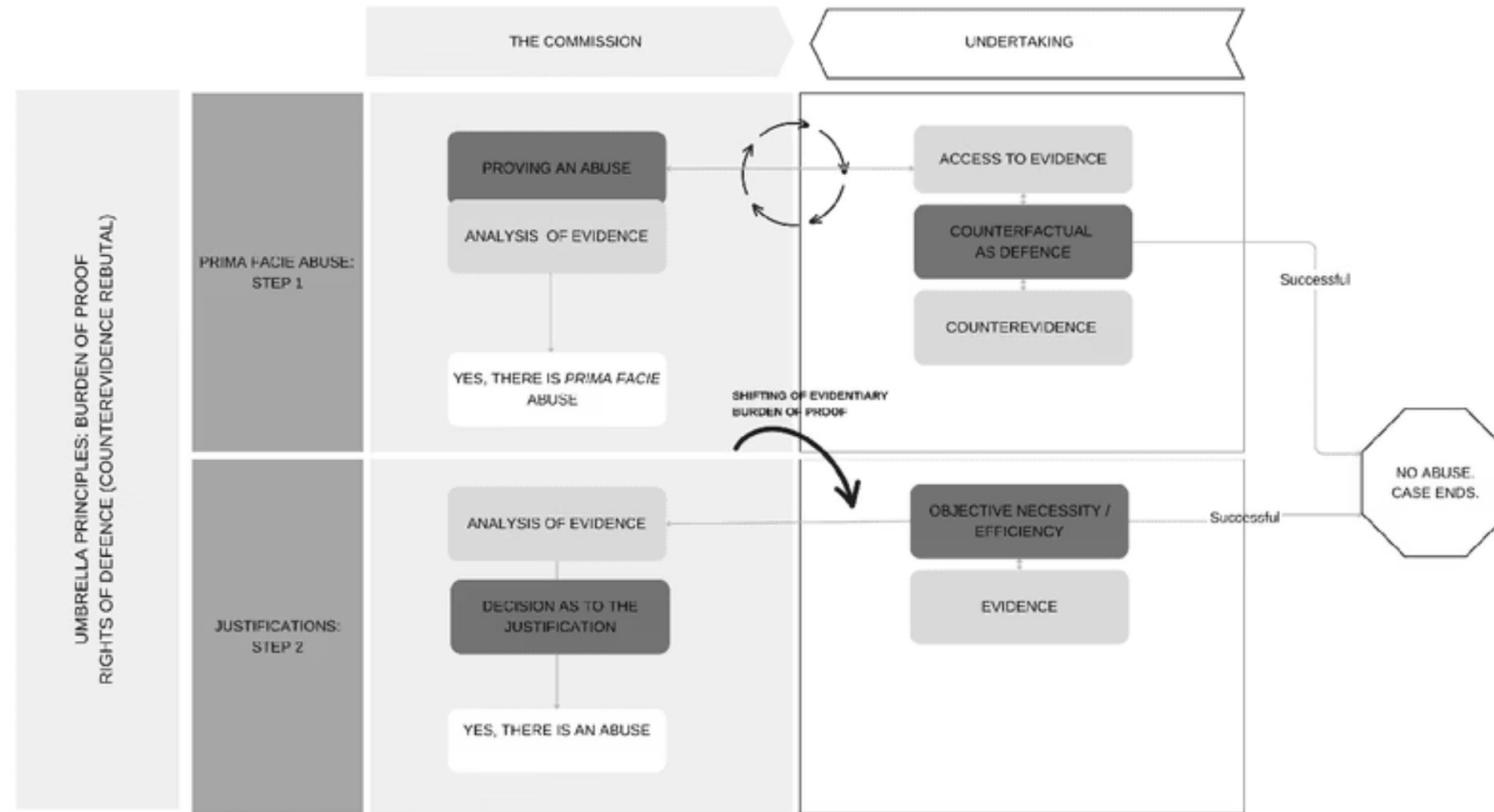
- The authority alleging the infringement bears the legal burden to prove an infringement (Art. 2, Reg 1/2003)
- This burden is reversed for efficiency defences under Article 101(3) TFEU; the undertaking must prove that the legal conditions for an exemption are fulfilled
- Same applies to 102 TFEU objective 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 persuade a judge of the facts and merits of a case
- Higher than "balance of probabilities" (mergers) but lower than "beyond reasonable doubt" (criminal)
- Any doubt benefits the undertaking (presumption of innocence)

3. HOW ?

How is it Proven? (*Evidentiary Standard*)



Dynamic Burden

This burden is **dynamic**. It shifts to the undertaking that wants to rebut a *prima facie* case.

LEGEND:



Source: Małgorzata Kozak, Zlatina Georgieva, TRUE UNICORNS? ESCAPING THE ARTICLE 102 TFEU PROHIBITION, *Journal of Competition Law & Economics*, 2025; <https://10.1093/joclec/nhaf027>

3. HOW ?

Factors Influencing Evidentiary Standard

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



Characteristics of Evidence



Applicable Presumptions



Temporality of Facts



Complexity and Economic Normality



Standard of Judicial Review

Sufficient Proof of an Anticompetitive Agreement and/or Concerted Practice (Article 101 TFEU)

It is usually a fact-intensive exercise:

1

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**

2

Tacit Acquiescence

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

Agreement / Tacit Acquiescence: Beavers Kaas

The **Beavers 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
- Evidence that the buyers **complied** with that invitation
- Additional evidence, such as a system of **monitoring and penalties** set up by the supplier to enforce the restriction

Proof of Concerted Practice

4. SPECIFIC ELEMENTS OF ARTICLE 101 TFEU

Contact between undertakings

Subsequent conduct on the market

A causal link between the two

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

Key Case Law Developments



Woodpulp

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



Anic

Once contact and subsequent market conduct are shown, a causal link is presumed. This presumption shifts the evidentiary burden to the undertakings to prove that the contact did not influence their market behavior.



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).



Eturas (Case C-74/14)

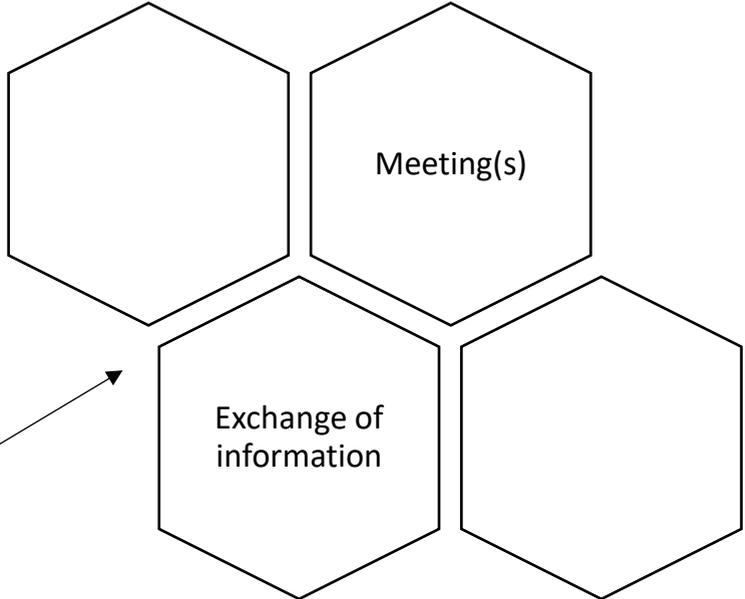
ECJ applied above principles to indirect one-way contact through common IT system. The presumption of participation only applies if the undertaking was aware of the anticompetitive message. **Awareness** is a prerequisite for the presumption of tacit acquiescence to apply.

Concerted Practice: *Woodpulp*

Market behaviour →

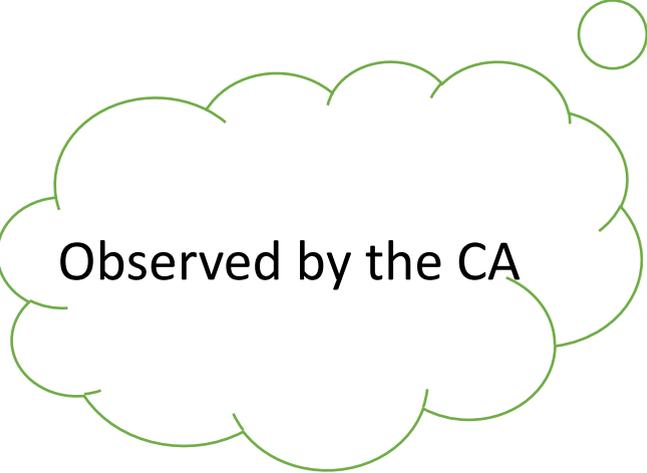
Causality

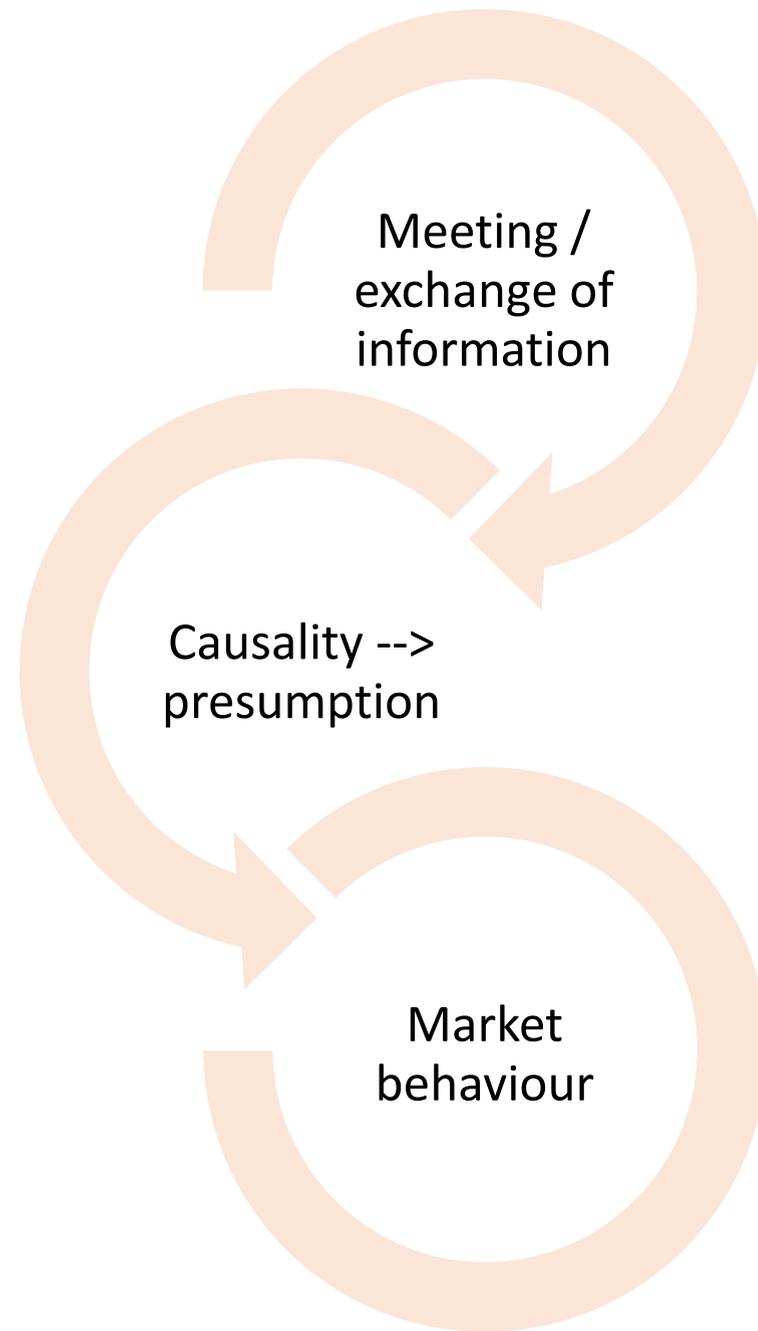
COORDINATION



Any interference???
Presumption when no
reasonable explanation

Supporting evidence:
ICI: price announcements





Concerted practice: *T-Mobile*

- Proof of participation is sufficient to prove the participation in a cartel
- Unless: party has *publicly distanced* itself

Clarification from ECJ: Super Bock

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

It 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:

Evidence of an Invitation

- Regularly sending distributors lists of minimum prices
- Asking them to comply
- Monitoring the prices they apply
- Threatening retaliatory measures (like applying negative distribution margins or withholding supplies) for non-compliance

Evidence of Acquiescence

- Evidence that the minimum prices are, in practice, followed by the distributors
- 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

Classification of Infringement: By Object or By Effect (Article 101)

Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101 (1)] to demonstrate any actual effects on the market...

Guidelines on Art. 101 (3), recital 21

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

Core Principle

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



AG Bobek: 'If it looks like a fish, smells like a fish, one can assume that it is a fish'

Restrictions by object or effect

4. SPECIFIC ELEMENTS OF ARTICLE 101 TFEU

Restriction by effect

- where an agreement does not have as its object the restriction of competition, it is necessary to prove its restrictive effect
- need to assess agreement in its market context (*Delimitis*)
 - necessary to define the relevant product and geographic market
 - following factors should be looked at (see *Maxima Latvija*):
 - factors which determine access to the relevant market (are there real concrete possibilities for a new competitor to establish itself (para. 27))
 - the conditions under which competitive forces operate on the relevant market including:
 - the number and size of operators present on the relevant market
 - the degree of concentration and customer fidelity to existing brands
 - consumer habits
- need to establish a 'counter-factual' (O2)

Restriction by object

- by its very nature injurious to the proper functioning of normal competition
- conduct is *presumed* anti-competitive

'Object box'

horizontal agreements:

- to fix prices
- to share markets
- to limit output, incl. removal of excess capacity
- to limit sales
- to exchange information that reduces uncertainty about future behaviour
- for collective exclusive dealing
- to impose fixed or minimum resale prices

vertical agreements:

- to impose export bans

By Object Infringements: Fact-Intensive Investigations

Lighter Evidentiary Burden

The authority only needs to prove:

- The existence of the agreement or concerted practice
- Its anticompetitive objective within its economic and legal context

No need for:

- Market definition
- Counterfactual analysis
- Pro-competitive objections
- De minimis appreciability exception

By Effect Infringements: Law-Intensive Cases

Increased Evidentiary Burden: 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 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 Wouters doctrine: The court balances competition restriction against a 'legitimate objective in the public interest'.

❏ The Court considered:

- Prohibiting multi-disciplinary partnerships may limit production and technical development (Art. 101(1)(b)).
- The rule impacted trade between Member States.

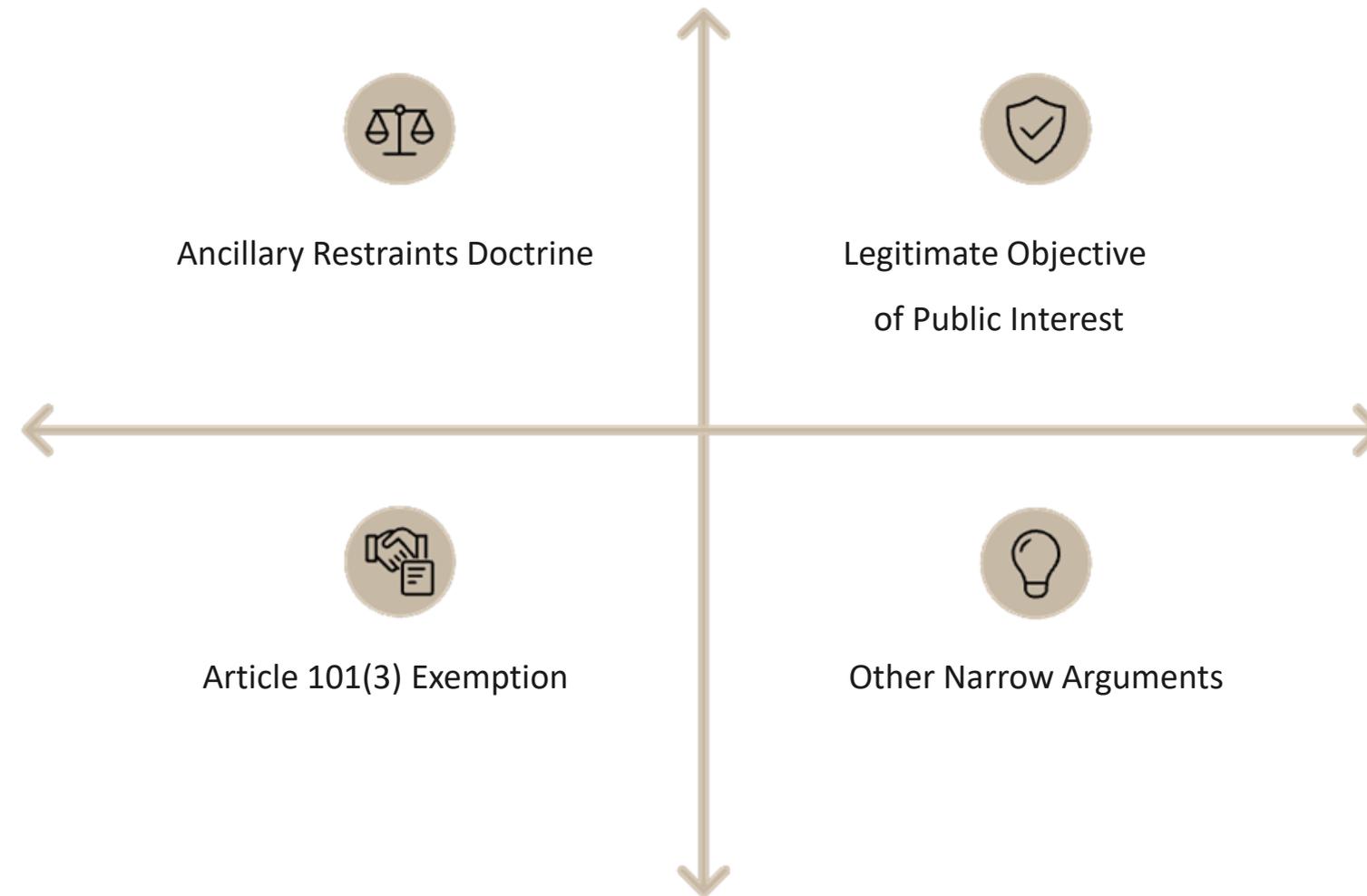
BUT:

Per Par. 97 and following:

Not every agreement restricting freedom of action necessarily falls within Article [101(1)] of the Treaty.

- Consideration of the decision's overall context, including:
 - Objectives,
 - Protection of service recipients.
- Restrictions must be inherent to pursuing those objectives.

Rebuttals and Plausible Explanations



Questions?



Case Studies

(fictitious)

*European Competition Law Training
for Judges from North Macedonia*

Dr. Małgorzata Kozak



Co-funded by the European Union

General format

1. Division of groups

You will be divided into thematic groups corresponding to the analytical steps under Articles 101, 102, and the damages assessment.

3. Presentation of group analysis

Afterward, each group will have **5–7 minutes to present their analysis** to the rest of the participants, followed by a short **recap and joint discussion**.

2. Internal discussion

Each group will have **5–7 minutes** to discuss their assigned step(s) internally

4. Plenary discussion

We will sum up the discussion



Utrecht University

Case study no. 1

The Edible Oil Cartel

Dr. Małgorzata Kozak

Article 101 Framework: five cumulative steps

1. Are there undertakings involved?

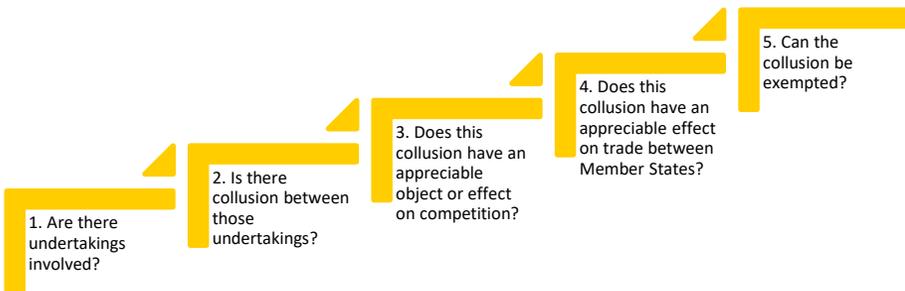
2. Is there collusion between those undertakings?

3. Does this collusion have an appreciable object or effect on competition?

4. Does this collusion have an appreciable effect on trade between Member States?

5. Can the collusion be exempted?

Four groups corresponding to steps: 2, 3, 4 and 5



- 1 Is there collusion between undertakings? What form of collusion?
- 2 Does this collusion have an appreciable object or effect on competition?
- 3 Does the collusion have an appreciable effect on trade between Member States?
- 4 Can the collusion be exempted under Article 101(3)?



Case study no. 2

Abuse of dominant position

Article 102 Framework: 5 cumulative steps + 1 more

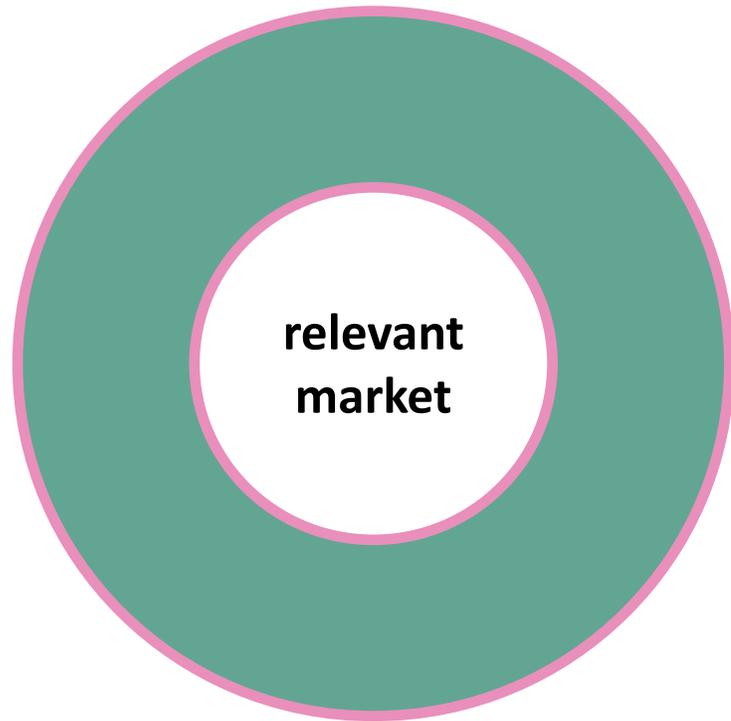


Four groups corresponding to Steps: 2, 3+5 & 4

- 1 What sort of relevant market is it?
- 2 Does GoldenHarvest hold a dominant position?
- 3 Is the dominant position within the Internal Market or a substantial part of it, and does the conduct affect trade between Member States?
- 4 Is the dominant position being abused by pricing practices?
- 5 Is the dominant position being abused by tying different products?

Two-stage Approach to Determine Dominance

Stage 1: market definition



Stage 2: market power assessment

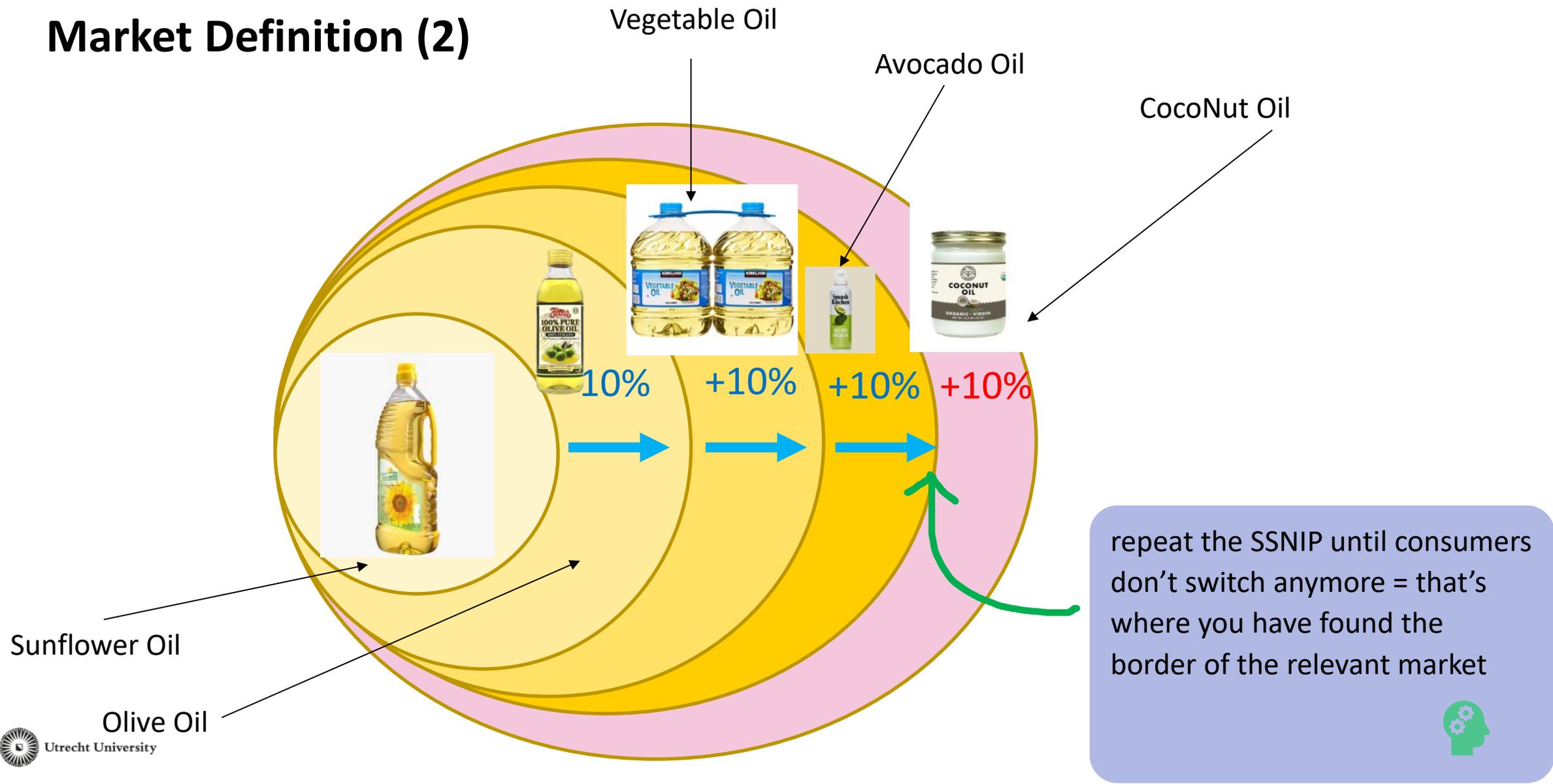


Market shares

Barriers to entry

Countervailing buyer power

Market Definition (2)



Market Definition

- Commission's Market Definition Notice prefers quantitative methods (like the SSNIP test) over qualitative methods which consider product characteristics, price, and intended use.
- It is not necessary that products are completely interchangeable – partial interchangeable is enough (*Michelin I*).
- The market must be defined from the both the demand and the supply side (*Continental Can*).

Substantial Part of Internal Market



‘Substantial’ not simply in geographic terms but rather in terms of the pattern and volume of the production and consumption of a product as well as the habits and economic opportunities of vendors and purchasers (*Suiker Unie*).

Likely that each Member State or even parts of a Member State can be considered to be a substantial part of the internal market (*Suiker Unie*).

Abuse of Dominance



Definition of abuse

“Article [102] applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.” (*Post Danmark I*, para. 24)

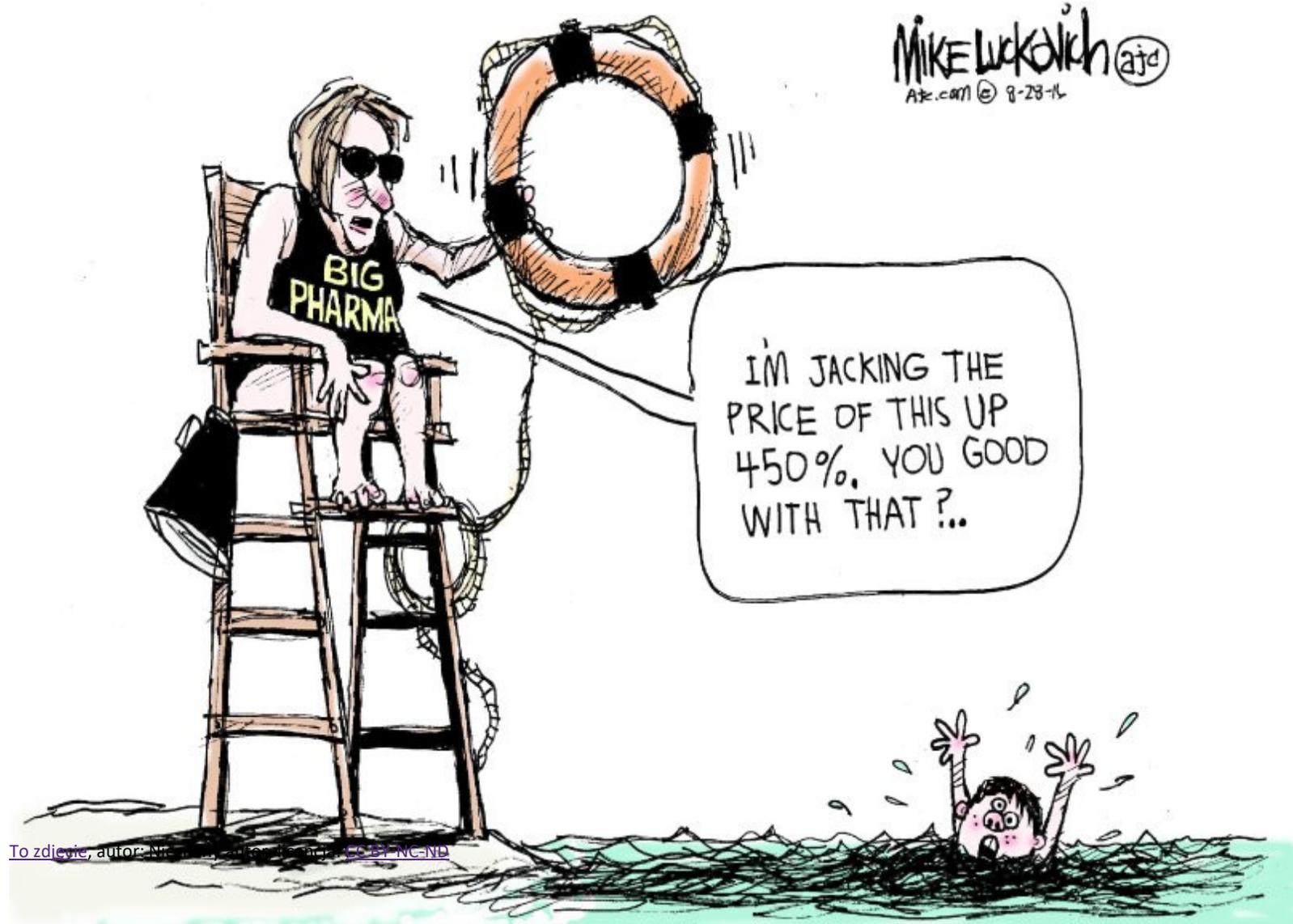


Special responsibility

“a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.” (*Michelin I*, para. 57)

Excessive pricing

- Art. 102 (a) TFEU: directly or indirectly imposing **unfair purchase or selling prices** or other unfair trading conditions;
- Exploitation of **customers**, *not* exclusion of competitors
- Few cases but growing interest



Excessive pricing

General Motors (1975): the ECJ determined that an abuse might exist if the price imposed is '*excessive in relation to the economic value of the service provided*'.

United Brands (1978): ECJ related 'economic value' to production costs and prices of competing products

In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse (cf. Para 252),

Then, whether a price is either unfair in itself or when compared to competing products.

Excessive??? Selling price / cost of production

Unfair??? Price comparison

Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome, C-177/16

- AKKA/LAA has a monopoly over the collection of copyright fees for public performances of musical pieces of Latvia and was fined by the NCA
- The CJ confirmed that consistent inter-state comparisons are a valid way of determining whether price is excessive.
- Prices must be 'appreciably higher' than in other MS (par. 60):
- "Thus, a difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify" (par. 55)

Tying and bundling

- Practices whereby an undertaking supplies a product (the tying product) on condition that the customer also obtains something else (tied product).
- Concern that dominant undertaking leverages its market power.



Test to establish anticompetitive tying

1. the tying and the tied products are two separate products;
2. the undertaking concerned is dominant in the tying market;
3. the undertaking concerned does not give customers a choice to obtain the tying product alone; and
4. the practice forecloses competition.

whether products are distinct is determined by consumer demand





Case study no. 3

Damages

Three groups

- 1** **Question 1:** Are the claimants correct to seek compensation for overcharges and loss of consumer surplus?
- 2** **Question 2:** Should harm be assessed only for the purchasers of the three supermarkets or the entire retail market?
- 3** **Question 3:** To whom can the claimants address their claim?

Question 1: Are the claimants correct to seek compensation for overcharges and loss of consumer surplus?

- *Full effectiveness of art. 85 of the Treaty and, in particular, the effectiveness (effet utile) of the prohibition laid down in 1 would be challenged if every person could not demand compensation for damage caused to her by a contract or behaviour that would restrict or distort competition” (CJEU, Courage & Crehan)*
- The right to damages extends not only to actual loss (*damnum emergens*) but also to any loss of profit (*lucrum cessans*) plus interest. The principle of national procedural autonomy still applies (CJEU, *Manfredi*)

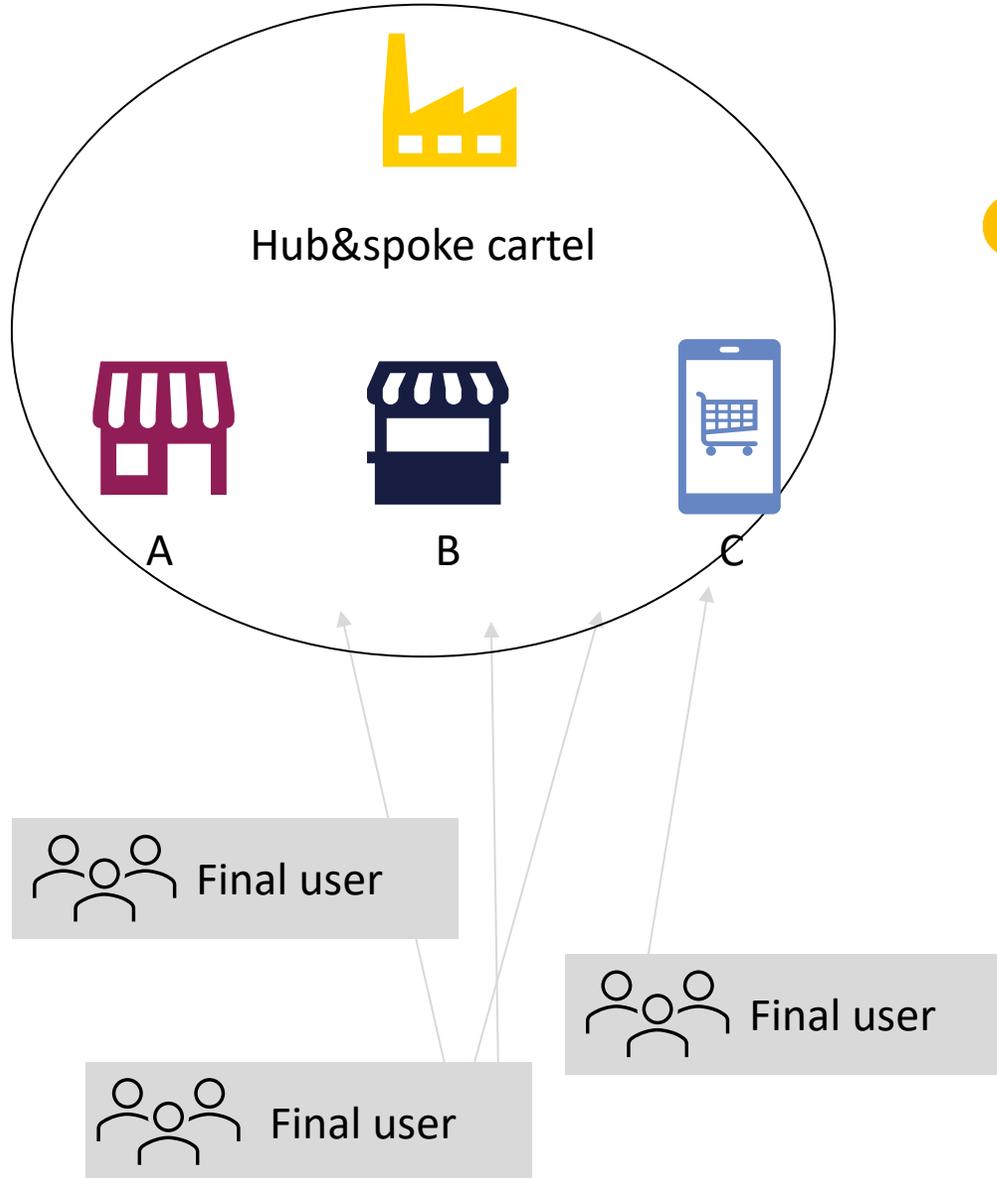
Question 1: Are the claimants correct to seek compensation for overcharges and loss of consumer surplus?

- Article 1 Directive 2014/104: This Directive sets out certain rules necessary to ensure that **anyone who has suffered harm** caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.
- Article 3: any natural or legal person who has suffered harm caused by an infringement of competition law is able to **claim and to obtain full compensation** for that harm.
- Article 3(2): Full compensation shall place a person who has suffered harm **in the position in which that person would have been had the infringement of competition law not been committed**. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.
- **No overcompensation**, whether by means of punitive, multiple or other types of damages.

Question 2: Should harm be assessed only for purchasers from the three supermarkets or the entire retail market?

- ECJ (*ÖBB-Infrastruktur AG*): EU law precludes national laws which categorically exclude any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions (umbrella pricing)
- Joint and several liability of cartel members
- Article 12 (1) Directive 2014/104: To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that (...) compensation of harm can be claimed by anyone who suffered it, **irrespective of whether they are direct or indirect purchasers from an infringer**, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.

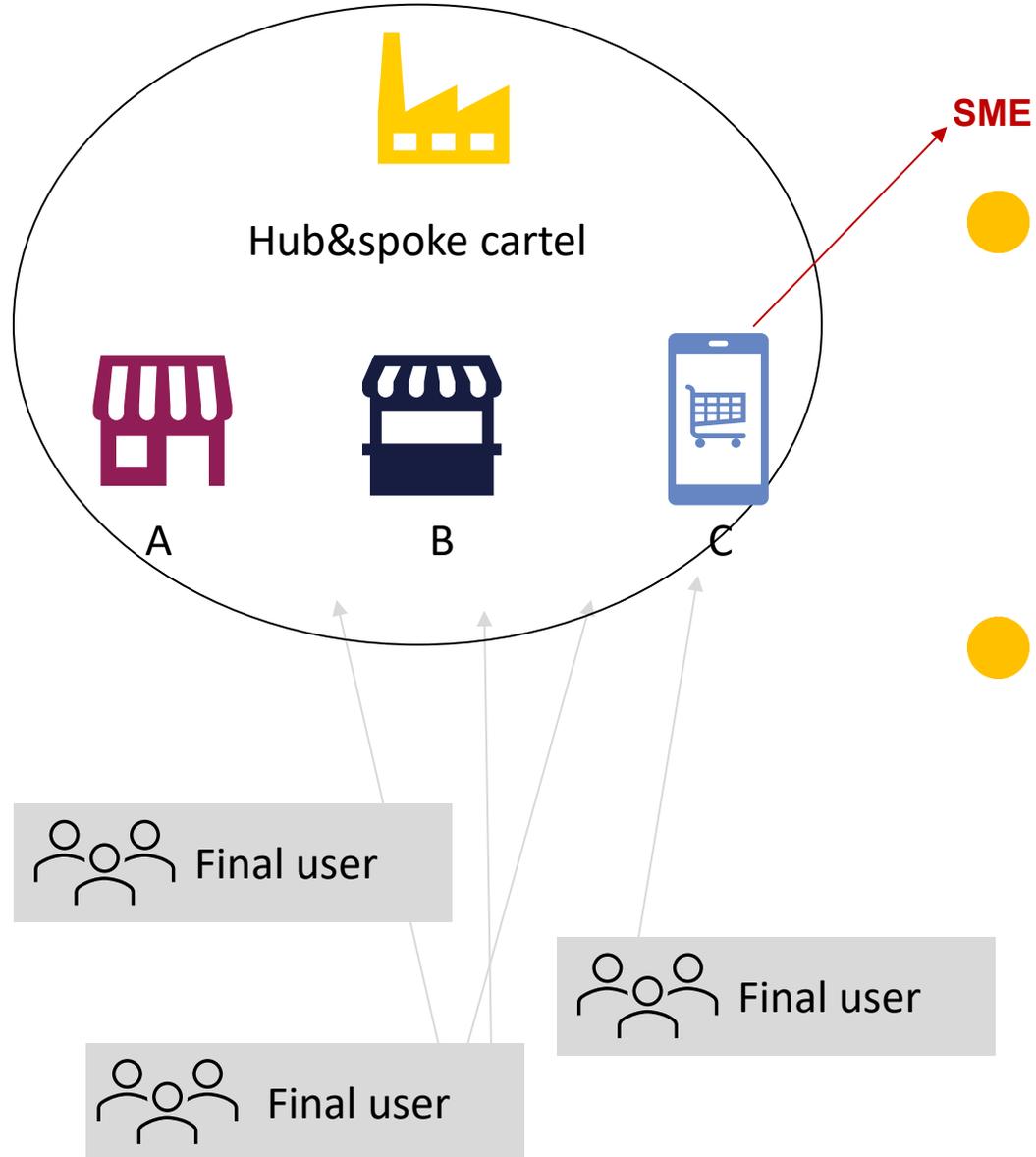
Question 3: To whom can the claimants address their claim?



● Every entity from the supply chain may – regardless of relation with any of producers – claim damages:

- From supermarket A,B or C
- From two of them
- From all of them jointly

Question 3: To whom can the claimants address their claim?



SME



Every entity from the supply chain may – regardless of relation with any of producers – claim damages:

- From supermarket A,B or C
- From two of them
- From all of them jointly



Claims to „C” can be only made from his distribution channel



Thank you!

M.w.Kozak@uu.nl



Co-funded by the European Union

This is a redacted version for translation purposes. The full text of the judgement can be found: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=2FD1234535124D1A4207D954BD67AFE5?text=&docid=275033&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5099027>

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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ARTICLE 102 TFEU ENFORCEMENT

Ljiljana Pavlic

Chief Economic Advisor, Croatian Competition Agency

Training for Judges from North Macedonia

Skopje, 05. 02. 2026.



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 ruling

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 appreciability 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 (<i>Hilti, Tetrapak?</i>)	✓		No
Other tying (<i>Microsoft, Android?</i>)		✓	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)
- Will the Courts accept a *de facto* reversal of burden of proof?

Thank you



Savska cesta 41/XIV, Zagreb www.aztn.hr agencija.ztn@aztn.gov.hr



Co-funded by the European Union

ASSESSING DEFENCES UNDER ARTICLE 102 TFEU

Ljiljana Pavlic

Chief Economic Advisor, Croatian Competition Agency

Training for Judges from North Macedonia

Skopje, 05. 02. 2026.



Outline of the presentation

The Basic Principles

Categories of Defences

Objective Necessity Defence

Proportionality

Efficiency Gains

Case Law

The Basic Principles

- An undertaking in a dominant position whose conduct allegedly constitutes abuse of dominant position may submit a plea of objective justification
- Objective justifications in EU competition law refer to legal defences invoked by undertakings to justify behaviour that would otherwise be considered anticompetitive under EU competition rules

The Basic Principles

- While Article 101 TFEU contains an exemption clause, the defence clause is not explicitly provided for in Article 102 TFEU
- The possibility of defence/objective justification has been developed as inherent principle of the law in line with the EC's effect-based approach to enforcement by the relevant courts
- Tetra Pak II - the CJEU, in holding that contractual tying is by its very nature capable of producing a foreclosure effect, stated that the tied sales of two products may 'constitute abuse within the meaning of Article [102] unless they are objectively justified'

CJEU C-333/94 P, Tetra Pak International SA v Commission

The Basic Principles

- A dominant undertaking is allowed to demonstrate an objective justification for any conduct that is liable to fall under the prohibition in Article 102 TFEU
- The undertaking in dominant position bears the burden of proof for the objective justification
- “Although the burden of proof of the existence of the circumstances that constitute an infringement of Article 102 TFEU is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, to raise any plea of justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted”

judgment 2007, Microsoft v Commission, judgement of General court 2021 Google LLC and Alphabet v EC

Categories of defences

Two major categories present in Draft guidelines - a dominant undertaking's conduct may be justified in two primary ways:

1. Objective Necessity Defence

2. Efficiency Gains

The possibility of these two major categories has been recognized by relevant courts

Main categories of defences

Objective Necessity Defence

- The draft Guidelines recognize for an objective necessity defence to be successful, the dominant undertaking must show that its conduct was objectively necessary to achieve a certain aim
- The conduct of the undertaking in question must be indispensable and proportionate to achieve legitimate aim
- Legitimate aims identified in the case law:
 - Public Interest
 - Public health
 - Safety
 - Technical reasons
 - Legitimate commercial interest of the undertaking...

Main categories of defences

Efficiency Gains

- In the context of Article 102 TFEU, efficiency gains refer to the benefits accrued from activities or strategies undertaken by dominant undertakings that result in enhanced productivity, cost reductions, technological advancements, or improvements in product quality
- These gains often translate into tangible benefits for consumers, such as lower prices, increased product variety, or enhanced service quality.
- The rationale behind the recognition of the efficiency defence „relates to the concept of competition on the merits and the assumption that consumers benefit from meritorious competitive market behaviour”

Jones & Sufrin's EU Competition Law. Text, Cases and Materials

Objective Necessity Defence

- Certain conduct by dominant undertakings is objectively necessary to achieve legitimate business objectives or serve compelling public interests - it provides a framework for justifying behaviour that may otherwise be considered abusive under Article 102 TFEU on grounds of necessity
- Under the objective necessity defence, a dominant undertaking may argue that its conduct was indispensable to achieve legitimate business objectives, such as ensuring product safety, maintaining financial stability, or safeguarding intellectual property rights

Proportionality test

Proportionality test proposed by the EC

- The actual or potential exclusionary effects resulting from the conduct at hand must be proportionate to the legitimate aim for an objective necessity defence to be accepted
- If the same aim could be achieved through means less restrictive of competition, the conduct is not proportional

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

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

Proportionality test

- The Commission's decisional practice and the case law from courts both recognize the fact that objective justifications need to fulfil the proportionality test

Romanian Power Exchange case

- The necessity to avoid an unlawful mismatch of VAT payments in order to justify the discriminatory treatment of power exchanges from other Member States was rejected by the EC as an objective justification, because of its disproportionate character
- The fact that less restrictive alternatives are available is further evidenced by the fact that none of the other EU power exchanges applies a similar requirement but have dealt with the issue in other ways

EC, *Case AT.39984*, OJ C 314/11.09.2014

- “Competition authorities and courts will assess the legitimacy of the public interest invoked, ensuring that it genuinely serves the common good rather than individual or corporate interests”

Objective Necessity Defence – Case Law

- In the decisional practice of the EC, public interest considerations like *passenger safety* could be considered an objective justification
- Lithuanian Railways (LR) dismantled 19km of railway track connecting Lithuania and Latvia. Lithuanian Railways managed the track, but the track was constructed and owned by the Lithuanian State. According to the EC, this track removal prevented one of Lithuanian Railways' major customers, the Polish State-owned oil company Orlen Lietuva AB (Orlen), from switching to a new entrant competitor, Latvian Railways, since there were no viable alternative routes from Lithuania to Latvia (the alternative route being much longer), and therefore harmed a competitor
- LR provided various explanations in support of its argument that the track was unsafe and that traffic could not have been renewed before extensive repair works that required its removal had been carried out. The Commission finds that these explanations are inconsistent with each other, at times simply contradicting one another and are unconvincing. The Commission therefore considers that LG failed to show objective justification for the removal of the Track.

EC, *Case AT.39813 – Baltic Rail*, Decision 2017

Case Law

- Health and public safety considerations were mentioned in cases *Hilti* and *Tetra Pak II*, but they were rejected on the grounds that public safety is enforced by state regulations and public bodies actions and cannot justify private undertakings exclusionary practices

General court, Case T-30/89, *Hilti AG v. Commission of the European Communities*, Judgment of 1991; EC, Decision in Case IV/31043 *Tetra Pak II*

- Space and capacity restraints were recognized as possible objective justification for the refusal to allow independent ramp-handling and self-handling services at an airport

EC, Decision in Case *FAG/Flughafen-Frankfurt/Main*

United Brands case

- The party argued that cutting off supply was necessary to protect its commercial interests in response to a distributor's participation in competitors campaign
- The Court acknowledged that a dominant firm may take reasonable, proportionate steps to protect its commercial interests, it rejected the "necessity" argument in this specific case because the action was disproportionate and actual purpose is strengthening dominant position

CJEU, Case C-26/76, United Brands Company and United Brands Continentaal BV v. EC, Judgment 1978

IMS Health Case

NDC Health, a competitor of IMS Health, the possessor of an intellectual property right on the market for pharmaceutical data services requested access to the specific method developed by IMS health for collecting and organizing pharmaceutical sales data in Germany, IMS refusal to licence its service was considered an abuse of dominance.

Although the Court had retained that protecting patents and maintaining incentives for innovation are crucial for public health, such protections must not be used to unjustifiably prevent competition and the development of new products that can benefit consumers.

CJEU, Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, Judgment 2004

Case Law

Commercial Solvents case

- The Court established that a dominant undertaking cannot justify the refusal to supply a raw material to an existing long-standing customer—which would eliminate that customer as a competitor—simply by asserting that the refusal was necessary for its own business strategy, particularly when it enters the downstream market and try to monopolize it

CJEU, Joined Cases C-6/73 and C-7/73, ICI SpA v. Commission of the European Communities, Judgment 1974

Case Law

DEI case – electricity

- The defence in this case involved arguments regarding the security of energy supply. The Greek State and DEI argued that the privileged access to lignite was necessary to ensure the stability of the Greek electricity grid
- The ECJ ultimately held that, regardless of the underlying objective of securing energy supply, the mechanism by which it was achieved (exclusive access) distorted competition
- In the DEI case, the discriminatory access to vital raw materials was not found to be a proportionate means of serving the public interest, as it created "unequal conditions of competition"
- Member States cannot use public ownership as a shield to grant exclusive rights that lead to market foreclosure, even if the intent is to guarantee public service or security of supply

CJEU, Case C-553/12 P, European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI), Judgment 2013

Case Law

- Conduct is necessary to achieve legitimate business objectives, such as ensuring product safety, maintaining financial stability, or preserving the integrity of contractual relationships
- To successfully rely on this defence, the dominant undertaking must demonstrate that its conduct is objectively necessary to achieve legitimate business objectives and that there are no less restrictive means available to achieve the same objectives without harming competition

Case Law

Sot. Lelos case

- The Court of Justice had recognized the entitlement of dominant companies to protect their commercial interests, without having the objective to strengthen the detained dominant position or to abuse to it
- the CJEU indicated that a dominant pharmaceutical company could not just stop sales of its medicines to Greek wholesalers who wished to buy these medicines in order to export at least in part to high-price countries elsewhere in Europe - it also indicated that the pharmaceutical company should have the possibility of operating a sales quota system in order to limit at least parallel exports of its medicines out of Greece and thus secure sufficient availability of these medicines for Greek patients
- The CJEU recognizes the possibility for a dominant pharmaceutical company to restrict the supply of drugs in order to protect its legitimate commercial interests - the interest of the dominant pharmaceutical company in avoiding reductions of profits because of parallel trade and the interest of a dominant pharmaceutical company not to violate its obligation to entirely and constantly meet the domestic demand

CJEU, Case C-468/06, *Sot. Lélos kai Sia EE and Others v. GlaxoSmithKline AEVE Farmakeftikon Proïonton*, Judgment 2008

Case Law

Alphabet and Google v. AGCM – CJEU preliminary ruling 2025

- Questions: whether the absence of a template for interoperability — at the time of Enel X’s request — objectively justifies Google’s refusal to ensure interoperability with the Android Auto platform or whether Google has an obligation to develop that template and, in the latter case, whether it must offer that template within a certain timeframe
- If the dominant company fails to demonstrate that the security of its own platform is at risk or that it is technically impossible to develop the template, it indeed has an obligation to develop one: “... the fact that there is no template for the category of apps concerned or the difficulties involved in its development which the undertaking in a dominant position may face cannot in themselves constitute an objective justification for that undertaking’s refusal to grant access.”

Case Law – Alphabet and Google v. AGCM

- The CJEU acknowledges that the dominant company must be given “a reasonable period of time to that development” and it identifies three factors that should assist the Referring Court in determining when the delay would be reasonable: “(i) the degree of technical difficulty in developing the template ..., (ii) constraints related to the fact that it is impossible for it to equip itself, within a short time, with some of the resources, in particular human resources, necessary to develop that template ..., or even (iii) constraints external to the undertaking in a dominant position which have an impact on its ability to develop that template, such as, for example, constraints relating to the applicable regulatory framework
- Mere difficulties (due to technical issues, challenges in allocating human resources internally or external regulatory constraints) in developing the required template do not exempt Google from an obligation to develop the template
- The dominant company can invoke these difficulties to “buy” reasonable time to comply with its obligation

The CJEU also acknowledges that the development of such a template “is likely to represent a cost” for the dominant company and, as a consequence, that Art. 102 of the TFEU “does not preclude [it] from requiring an appropriate financial contribution from the undertaking which requested interoperability,” provided it is “fair and proportionate” and allows it “to derive an appropriate benefit from it.”

Efficiency Gains

- Dominant undertakings may argue that their behaviour, although potentially restrictive of competition, ultimately leads to overall efficiency improvements that outweigh any negative effects on competition
- A dominant undertaking may engage in pricing strategies aimed at achieving economies of scale or investing heavily in research and development to innovate and improve product offerings

These activities, while potentially limiting competition in the short term, can result in long-term benefits for consumers, such as lower prices, better-quality products or increased consumer choice

Analysing efficiency gains will imply balancing the positive and negative competitive effects generated by a given behaviour.

CJEU, Case C-413/14 P, Intel Corp. v. EC, Judgment of 6 September 2017

- The efficiency gains justification under Article 102 was introduced in the *British Airways* judgement

Efficiency Gains

- The efficiency gains justification under Article 102 was introduced in the *British Airways* judgement
- The General court considered that conducts, aiming to protect the undertaking's commercial interests and protect the competitive position of the undertaking which occupies a dominant position must, at the very least, to be lawful, be based on criteria of economic efficiency.
- Economic theory is often concerned with total welfare
- However, economic efficiency gains which result in consumer welfare are accepted in the context of defences within competition law

Efficiency Gains

- The conditions which needs to be met in case of the efficiency gains defence, according to the Commission Guidance regarding the priorities in applying article 102 TFEU; Draft Guidelines :
 - a) the efficiencies as a results of the conduct - the existence of a causal link between the conduct in question and the realized or likely to be realized efficiency gains;
 - b) the conduct is indispensable from the perspective of the realization of efficiencies;
 - c) the likely efficiencies outweigh negative effects on competition and consumer welfare;
 - d) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition

Efficiency Gains

- Efficiency gains as a justification under Article 102 TFEU:
 - The burden of proof lies with the dominant undertaking to demonstrate that the efficiency gains are genuine and outweigh any negative effects on competition
 - Efficiency gains must not result in the foreclosure of competitors or the creation of insurmountable barriers to entry in the market
 - Efficiency gains must be passed on to consumers

Efficiency Gains

- Efficiency gains are genuine and outweigh any negative effects on competition

General court, Case T-201/04, Microsoft Corp. v. EC, Judgment 2007, ECLI:EU:T:2007:289, para. 688; CJEU, Case C-23/14, Post Danmark A/S v. Konkurrencerådet, Judgment

- This approach requires a robust economic analysis and empirical evidence to substantiate the claimed efficiencies
- The European Commission and courts have emphasized that efficiency gains must be passed on to consumers in the form of lower prices, improved quality, or increased choice
- Mere assertions of efficiency improvements, without concrete evidence of consumer benefits are unlikely to suffice as a valid defence

Efficiency Gains

Superleague case

- The Court noted that FIFA and UEFA argued that the rules in question facilitate efficiency gains by streamlining the negotiation process for rights purchasing before international or European competitions
- The centralization lowers transaction costs and reduces uncertainties compared with negotiations with individual clubs that might have differing interests
- These rights are made more appealing due to FIFA's and UEFA's brand reputation and the comprehensive coverage of the competitions they organize
- The Court stated that a significant portion of the profits from the centralized rights sales is used for 'solidarity redistribution' within the football community, benefiting various stakeholders – redistribution supposedly enhances the production and distribution processes, benefiting fans and consumer across
However, the actual effect and distribution of these profits need to be substantiated by concrete evidence.

Efficiency Gains

Superleague case

- The actual effect and distribution of these profits need to be substantiated by concrete evidence
- It is up to the national court to carry out a balancing test and to assess the extent of these claimed efficiency gains and decide whether they adequately compensate for any competitive disadvantages that may arise from the rules
- It is necessary not only to prove the real presence and size of these efficiency gains, but also to demonstrate that they adequately offset any competitive disadvantages created by practice in question

Efficiency Gains

Establishment of causality

- The undertaking must show that efficiency gains are realized because of the conduct under investigation by establishing the actual existence and extent of those gains
- The ECJ stated that if the exclusionary effect of the conduct bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary to attain those advantages, that practice must be regarded as abuse

Judgment of the Court 2011, Konkurrensverket v TeliaSonera Sverige AB (TeliaSonera Sverige), C-52/09

- The dominant undertaking must first establish the actual existence and extent of the efficiency gains

Efficiency Gains

Establishement of causality

- In Post Danmark judgment – the threshold of proving efficiency gains as “likely”
- According to the newer judgements from 2023 and 2024, the dominant undertaking must show that its conduct can allow efficiency gains to be achieved by establishing the actual existence and extent of those gains

ECJ judgement in European Superleague Company 2023, General court judgement Qualcomm, 2024

Efficiency Gains

Indispensability

- For anticompetitive conduct to be justifiable, this conduct must be indispensable to achieve the established efficiency gains
- There must be no less anticompetitive alternative resulting in corresponding efficiency gains to the chosen conduct of dominant undertaking

Efficiency Gains

- Efficiency gains must not result in the foreclosure of competitors or the creation of insurmountable barriers to entry in the market
- Foreclosure effect occur not only where access on the market is impossible, but also where access to the market is made more difficult.
- Conduct that eliminates or substantially restricts competition to the detriment of consumers and other market participants is unlikely to be justified solely on the grounds of efficiency gain

Efficiency Gains

Efficiency gains must be passed on to consumers

- Abusive conduct by dominant undertakings that harms competition, and, by extension, consumer welfare, is prohibited
- Consumer welfare lies at the heart of competition law, reflecting the principle that competition should ultimately benefit consumers, by ensuring lower prices, better quality products, increased choice, and innovation
- However, certain behaviours that may restrict competition can be justified if they result in overall benefits for consumers

Efficiency Gains

- Certain business practices, while potentially limiting competition in the short term, can lead to long-term benefits for consumers
- For example, a dominant undertaking may engage in pricing strategies aimed at reducing costs and passing on savings to consumers in the form of lower prices

Investments in research and development to innovate and improve products or services can enhance consumer welfare by offering better-quality products, increased choice

- The mere assertions of consumer welfare benefits, without concrete evidence are unlikely to suffice as a valid defence - results in tangible benefits for consumers

Efficiency Gains

- Competition authorities and courts will assess whether the purported benefits to consumers outweigh any negative effects on competition
- Conduct that leads to the foreclosure of competitors, the creation of barriers to entry, or the distortion of competition in the market is unlikely to be justified on the grounds of passing on efficiency benefits to consumers
- The long-term effects on consumer welfare must be taken into account - certain practices may lead to short-term benefits, but may also have adverse consequences for competition and consumer welfare in the long run

Efficiency Gains Case Law

Microsoft case

- Microsoft claims:
- The integration of media functionality into Windows was vital for software developers and internet site creators to benefit from the stable Windows platform
- Removing media functionality from Windows would harm consumers, developers and internet site creators by degrading and fragmenting the system

- The Court rejected all of Microsoft's arguments

“Microsoft does not show that the integration of Windows Media Player in Windows creates technical efficiencies or, in other words, that it leads to superior technical product performance”

Summary

- A dominant undertaking can provide objective justification for its conduct which would be considered abusive according to Article 102 TFEU absent of any defences
- For the objective necessity defence, it must be shown that the conduct is indispensable and proportional to achieve a legitimate aim
- Legitimate aim must have its basis in factors external to the dominant undertaking – old way
- In its 2024 draft Guidelines, the Commission acknowledges that the objective necessity may also stem from factors internal to the dominant company. It explicitly mentions (1) "legitimate commercial considerations" (2) "technical specifications," including those "linked to maintaining or improving the performance of the dominant undertaking's product" and (3) public health, safety, or other public interest considerations

Summary

- For the efficiency gains defence, four conditions must be satisfied
- It must be shown that the efficiency gains are realized as a result of the conduct in question, that that conduct is indispensable to achieve those efficiency gains and that conduct can not eliminate effective competitors
- The relevant courts usually confine themselves to mentioning *pro memoria* that dominant companies have the possibility to bring forward a justification for their alleged abuse
- The case law is evolving with giving undertakings more opportunities to defend their alleged anticompetitive behaviour than in the past

Thank you



Savska cesta 41/XIV, Zagreb www.aztn.hr agencija.ztn@aztn.gov.hr



Co-funded by the European Union

Integration of the EU acquis into the legislation of the Republic of North Macedonia

Mr Goko Zhivkovski - Judge at the Administrative Court

6 February 2026



Overview of the current situation

➤ Agreement on Stabilisation and Association

CHAPTER VI

Legislative Alignment and Law **Enforcement**

Article 68

1. The Parties recognise the importance of aligning existing and future legislation of the Republic of Macedonia with that of the Community. The Republic of Macedonia shall endeavour to ensure the compatibility of its legislation with that of the Community in a gradual manner.
2. This gradual adaptation of the legislation will be carried out in two phases.

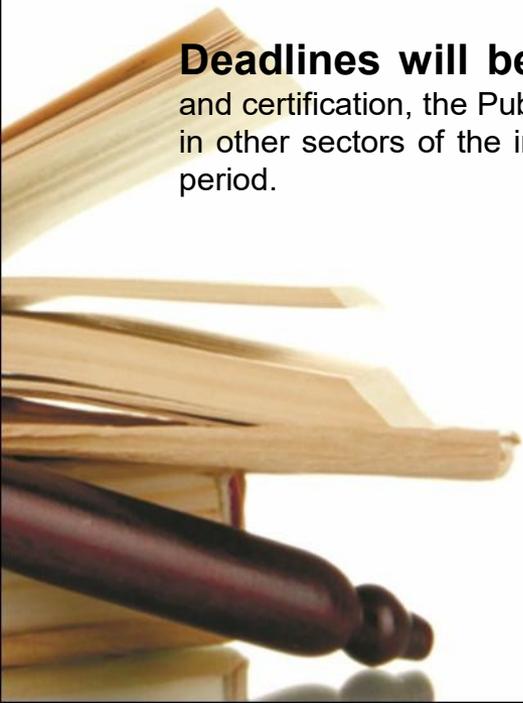


Harmonisation of Legislation and Enforcement of Laws

Article 68

3. Starting from the date of signature of the Agreement, for the duration as explained in Article 5, the adaptation of laws shall be extended to certain fundamental elements of the *acquis* of the internal market, as well as to other trade-related areas, in accordance with a programme to be defined by the Commission of the European Communities. **The Republic of Macedonia will also define, in cooperation with the Commission of the European Communities, the modalities for monitoring the implementation of the legislative adaptation and the law enforcement activities to be undertaken, including the reform of the judiciary.**

Deadlines will be set for the laws on competition, intellectual property, standards and certification, the Public Procurement Law and the Data Protection Law. The adaptation of legislation in other sectors of the internal market will be an obligation to be fulfilled by the end of the transitional period.



COURTS ACT

Article 2

(1) The courts shall adjudicate and base their decisions on the Constitution, laws and **international treaties ratified in accordance with the Constitution.**



European Commission Report on North Macedonia for 2025

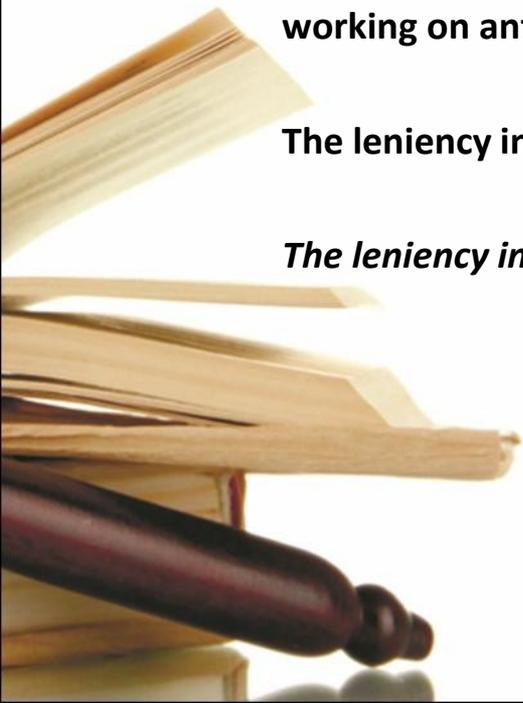
Chapter 8: Competition Policy

Antitrust and Mergers

The legislative framework for antitrust and mergers is largely aligned with EU law, although parts of the implementing legislation have yet to be aligned. Regarding the institutional framework, the Commission for the Protection of Competition (CPC) remains understaffed, which limits its enforcement capacity. Its technical capacities and financial resources remain limited. **Further training is needed for judges working on antitrust cases.**

The leniency instrument is still rarely used to improve enforcement.

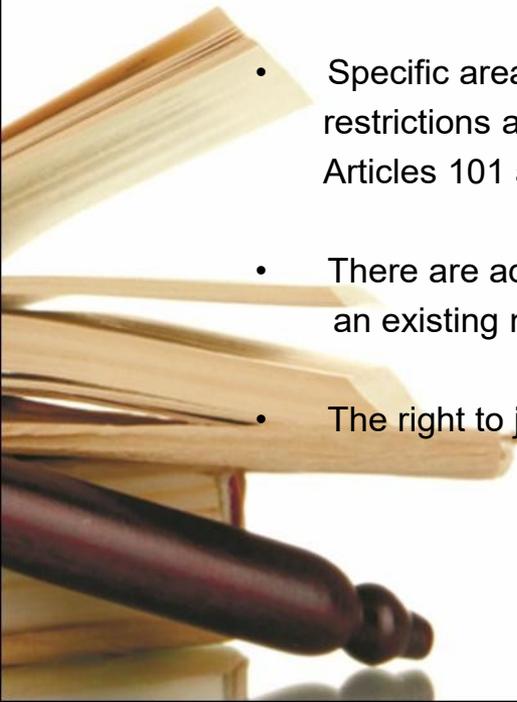
The leniency instrument



LAW ON THE PROTECTION OF COMPETITION

"Official Gazette of the Republic of Macedonia" No. 145/2010, No. 136/11, 41/14, 53/16, 83/18 and "Official Gazette of the Republic of North Macedonia" 208/24 and 16/2025

- Significant progress has been made in harmonisation – the Law is aligned with the fundamental principles of the European Union for the protection of competition: prohibition of cartels, abuse of a dominant position, merger control, an immunity system and reduced fines
- Commission for the Protection of Competition – a state body with a mandate for control and enforcement
- There is a legal basis for cooperation with the European Commission and the institutions of neighbouring states
- Specific areas where there is good alignment: prohibition of agreements for restrictions and abuse of a dominant position – fully aligned with Articles 101 and 102 TFEU
- There are administrative procedures for the control of concentrations (mergers) – an existing notification and analysis mechanism
- The right to judicial protection is guaranteed

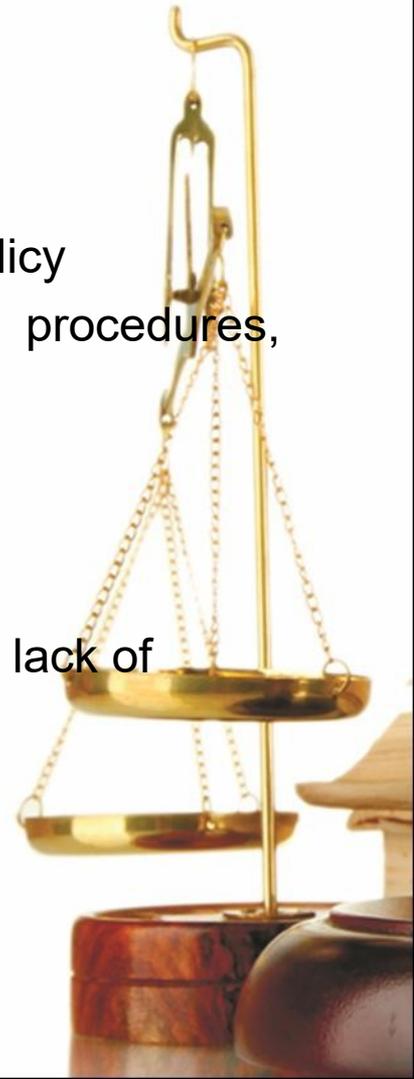
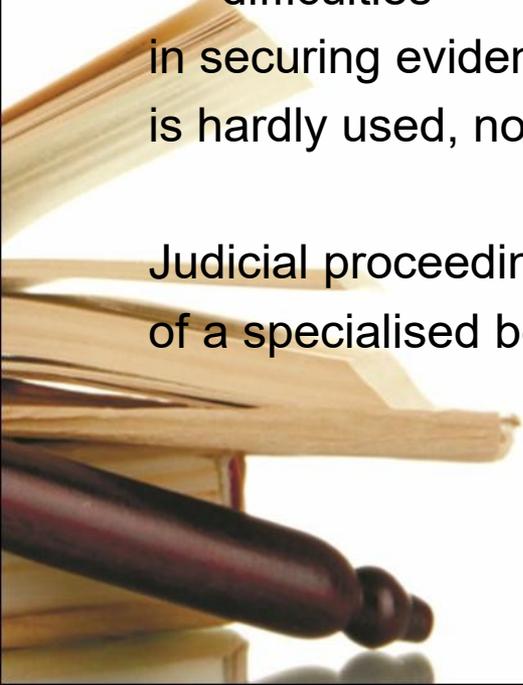


Detected obstacles in the implementation of competition protection policies

Institutional: Insufficient human and financial capacity for complex economic analyses, lack of economic experts, forensic tools and systematic training

Procedural: The efficiency and effectiveness of the sanctions policy is not at the required level; Reasons: lengthy administrative procedures, difficulties in securing evidence, the Penalty Remission Instrument is hardly used, nor is it promoted

Judicial proceedings: Insufficient case law, lengthy proceedings, lack of of a specialised bench in the Administrative Court



Challenges

Increasing institutional capacities: hiring economic experts, training, forensic tools

Strengthening enforcement: review of criminal policies, faster and more efficient procedures, evidence-gathering mechanisms

Improving judicial practice: training for judges, review of procedures for assessing damages

Improving private damages mechanisms, promoting class actions



Challenges

- Strong coordination with the European Commission and national competition authorities: rapid information exchange and procedural alignment
- Adaptation to the latest digital tools: development of specialised guidelines, analytical capacities and inter-agency cooperation
- Cooperation with relevant national institutions and identifying priority sectors:
 - Public Procurement Office/State Commission for Public Procurement Appeals
 - Ministry of Economy
 - Agency for Electronic Communications
 - Ministry of Agriculture, Forestry and Water Management



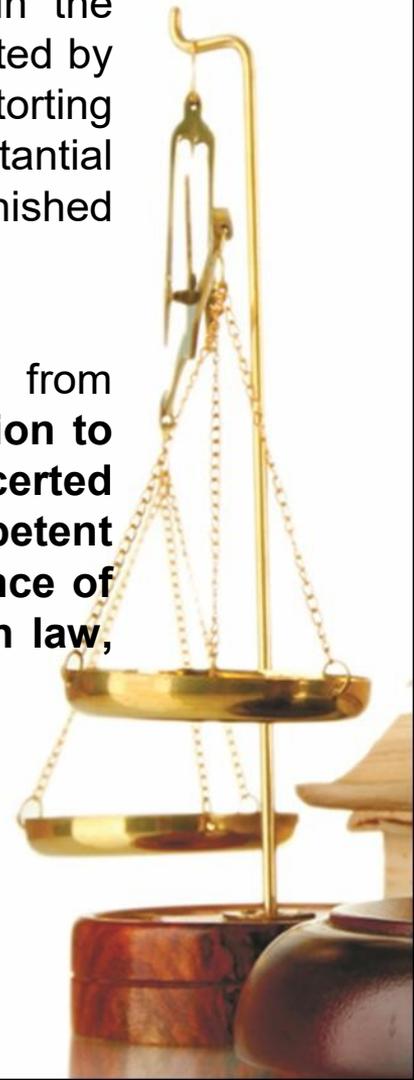
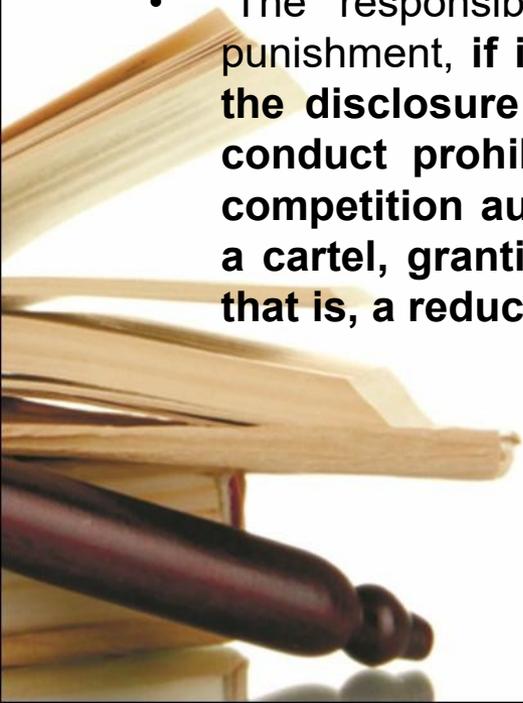
Criminal-legal approaches to competition law

- Cartel conduct is unlawful under the Competition Protection Act and is treated as an infringement – not as a criminal offence – for which only administrative fines may be imposed: fines are levied only on companies and not on responsible persons.
- The law provides for *leniency* for companies that admit and cooperate, but again this applies only in the context of administrative fines.



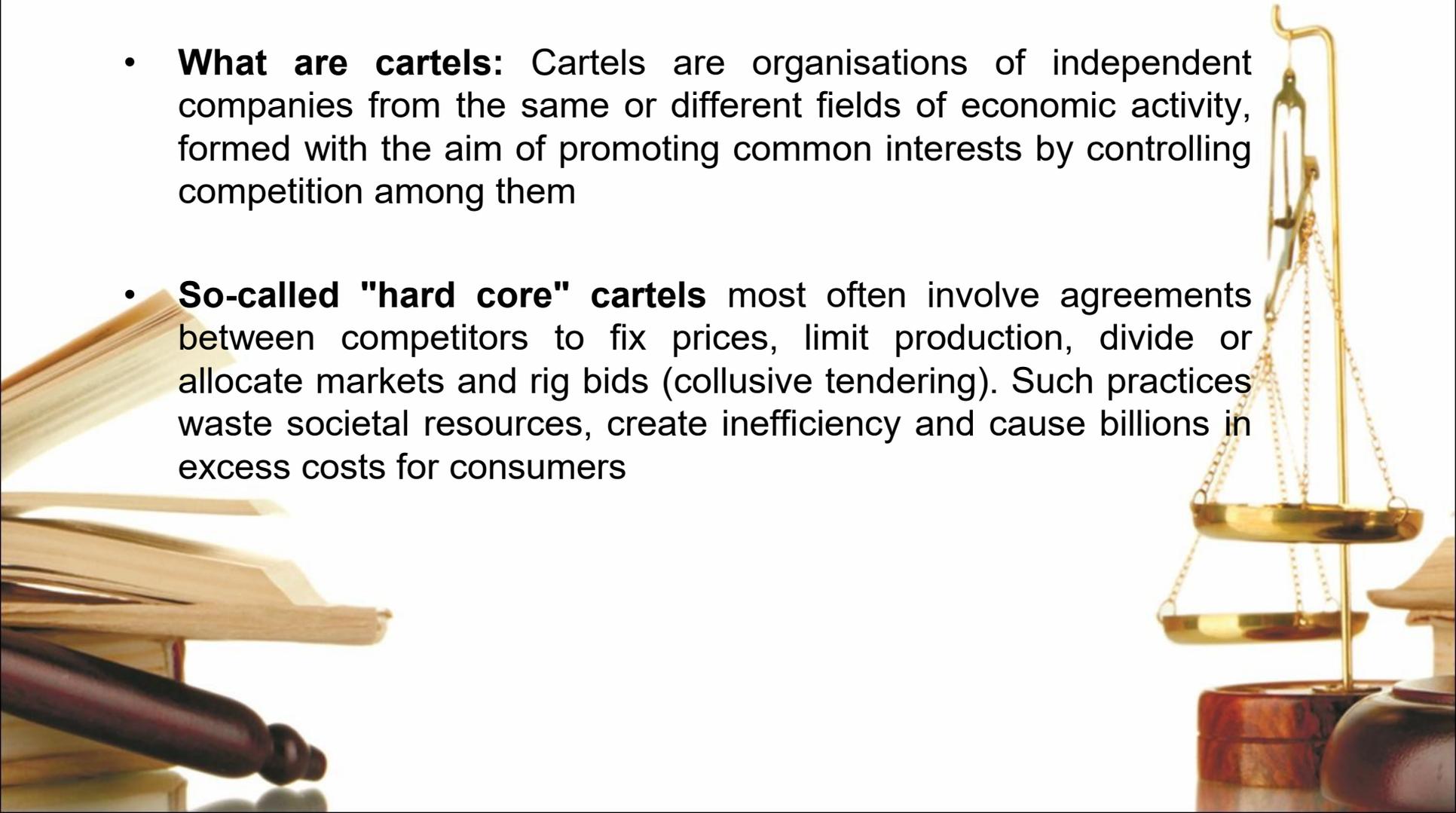
Article 283 of the Criminal Code Prevention, restriction or distortion of competition

- In accordance with Article 283 of the Criminal Code: A responsible person in a legal entity who concludes an agreement or participates in the conclusion of an agreement, decision or concerted practice, prohibited by law, which has the purpose of preventing, restricting or distorting competition, thereby causing the legal entity to obtain a substantial pecuniary advantage or to inflict substantial damage, shall be punished with imprisonment from one to ten years.
- The responsible person in the legal entity shall be exempt from punishment, **if it has disclosed or made a significant contribution to the disclosure of a concluded agreement, a decision or concerted conduct prohibited by law, which has resulted in the competent competition authority, in proceedings to determine the existence of a cartel, granting an immunity in accordance with competition law, that is, a reduction of the fine imposed on the legal entity**



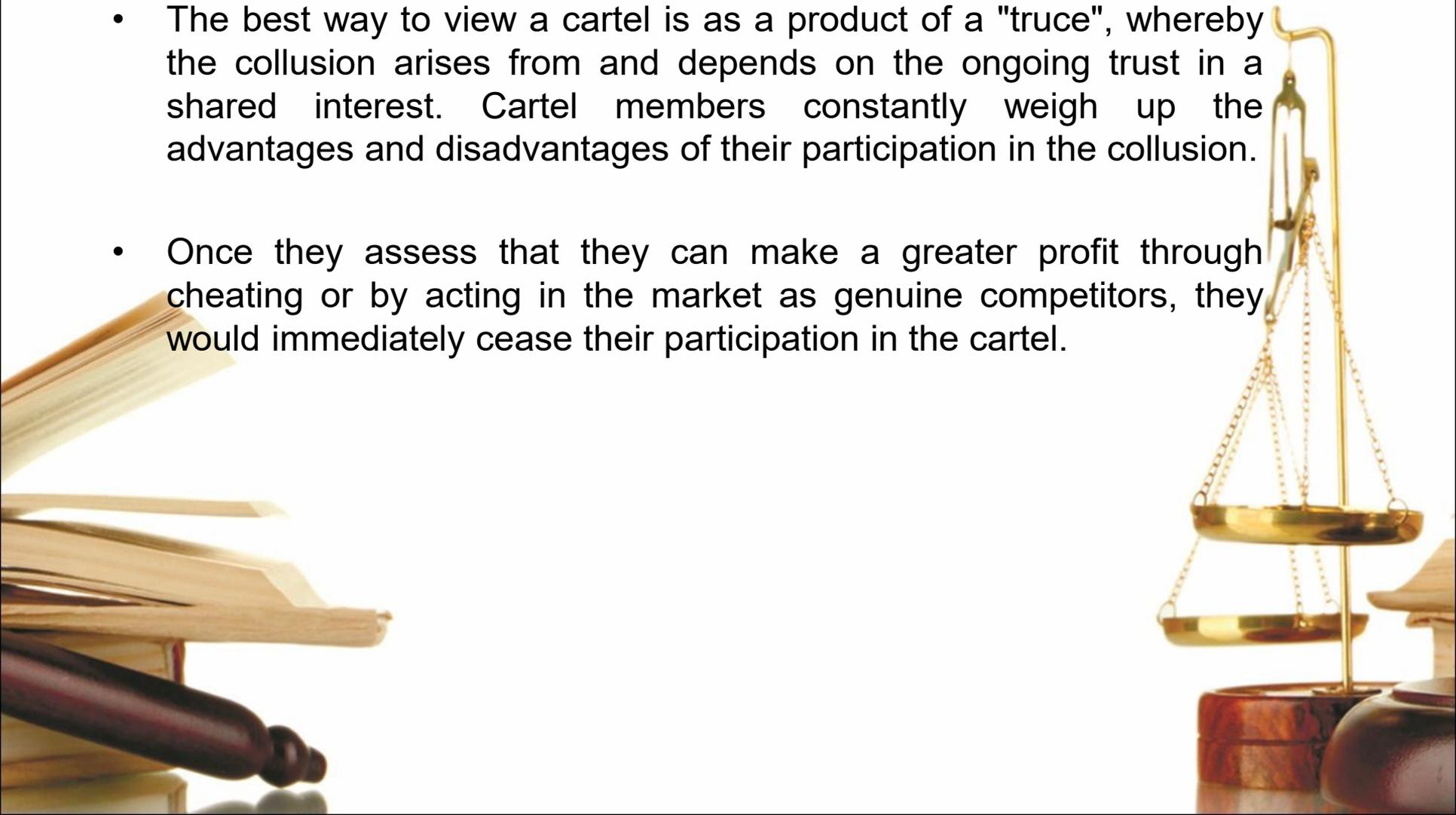
Pros and cons of criminal prosecution

- **What are cartels:** Cartels are organisations of independent companies from the same or different fields of economic activity, formed with the aim of promoting common interests by controlling competition among them
- **So-called "hard core" cartels** most often involve agreements between competitors to fix prices, limit production, divide or allocate markets and rig bids (collusive tendering). Such practices waste societal resources, create inefficiency and cause billions in excess costs for consumers



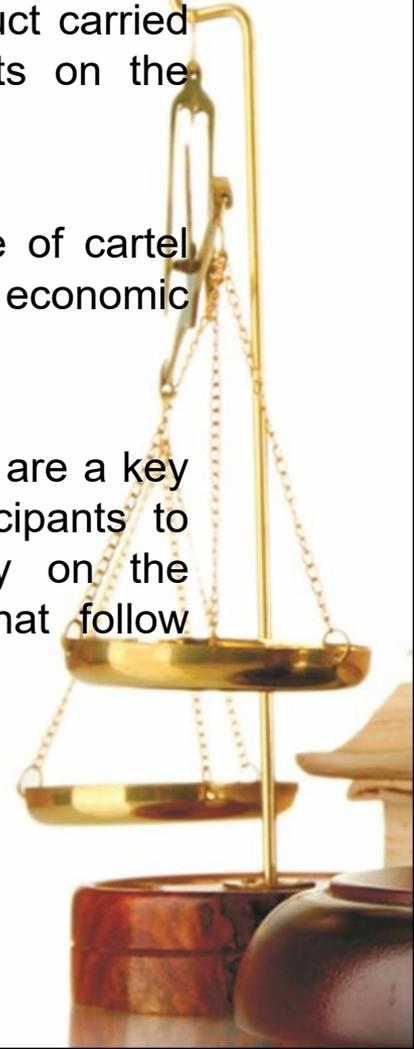
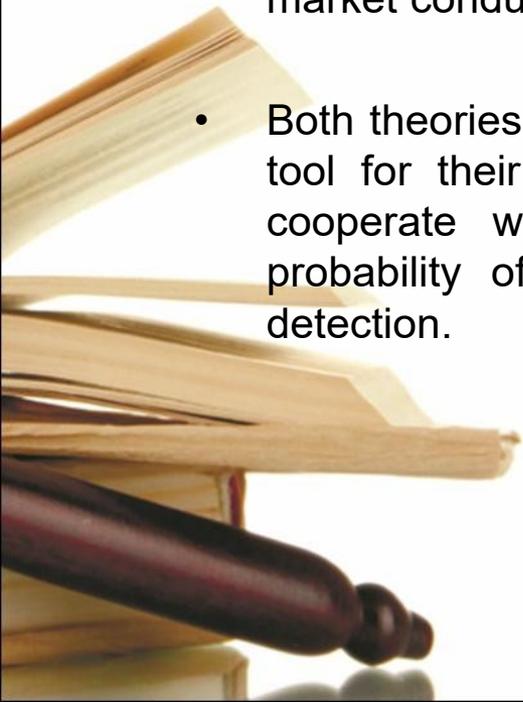
Pros and cons of criminal prosecution

- The best way to view a cartel is as a product of a "truce", whereby the collusion arises from and depends on the ongoing trust in a shared interest. Cartel members constantly weigh up the advantages and disadvantages of their participation in the collusion.
- Once they assess that they can make a greater profit through cheating or by acting in the market as genuine competitors, they would immediately cease their participation in the cartel.



Pros and cons of criminal prosecution

- Why it is essential to determine whether cartel activities are the result of individuals acting within a legal entity and thereby directly affecting the position of other individuals, or whether they are unlawful conduct carried out by corporate actors, i.e. legal persons, which has effects on the functioning of markets
- There are different theoretical approaches regarding the nature of cartel conduct — as a human activity subject to legal control or as economic market conduct
- Both theories lead to the conclusion that **leniency mechanisms** are a key tool for their detection. However, the decision of cartel participants to cooperate with the competent authorities depends primarily on the probability of detection and the severity of the sanctions that follow detection.



Optimal penalties

- Penalties against cartels deter illegal behaviour and eliminate the financial gain from cartels.
- Effective sanctions deter cartel participants and encourage them to cooperate with national authorities
- To be effective, cartel fines must be imposed in the most expeditious proceedings without delay, be significant, proportionate, remove the expected profit, deter recurrence and deter other companies.



Individual penalties versus criminal liability

- Fines for responsible persons
- Prohibition from practising a profession or activity



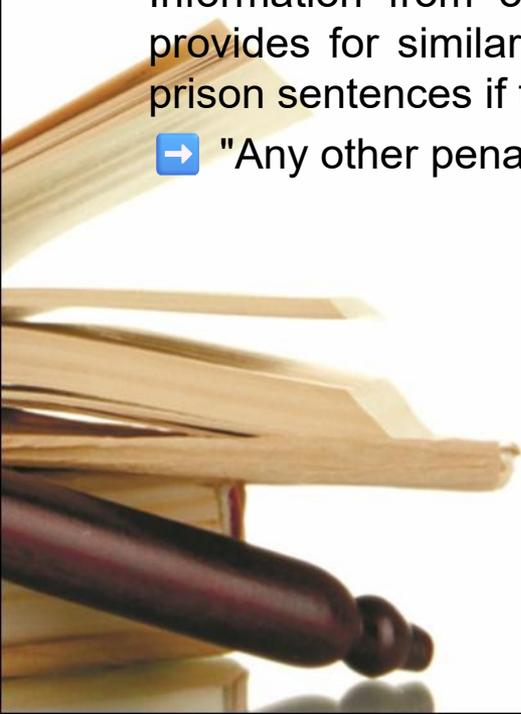
Legal basis for the introduction of criminal liability

- National competition commissions pursuant to Article 5 of Regulation 1/2003: They may impose monetary fines, periodic penalties or other penalties provided for in national law. This includes criminal penalties – imprisonment, provided it does not conflict with another sanction.

- According to Article 12(3):

Information from other NCAs may be used as evidence only if national law provides for similar sanctions. The exchanged information may not be used for prison sentences if this is not permitted under national law.

→ "Any other penalty" may include imprisonment for natural persons"



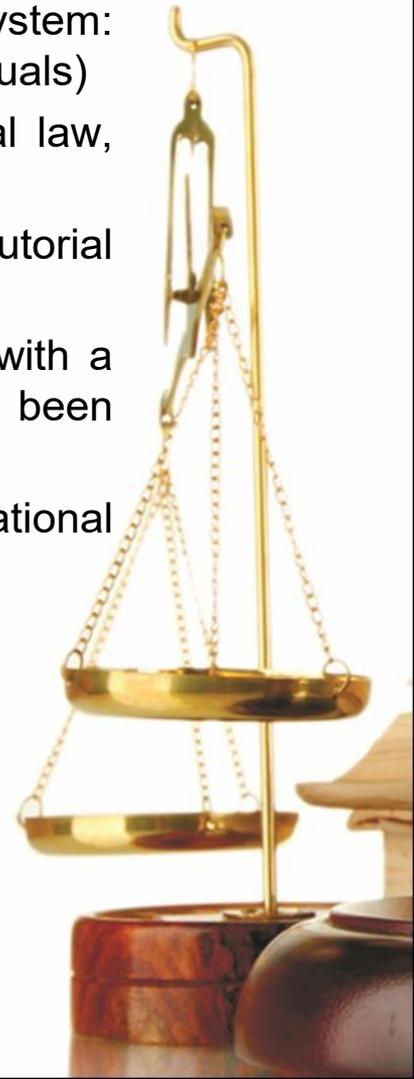
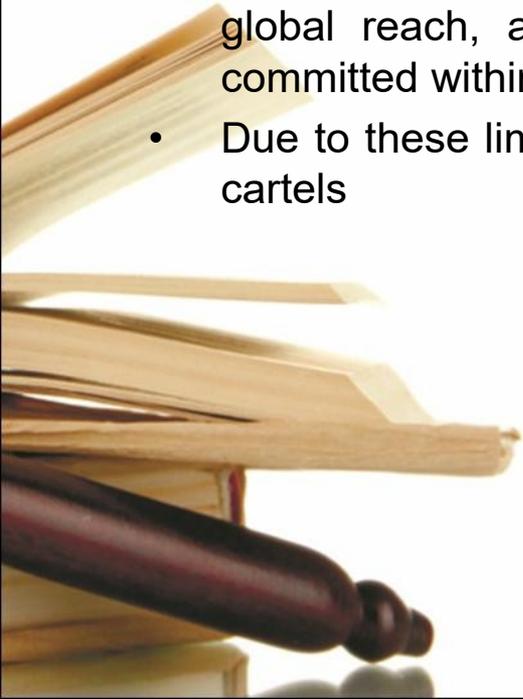
Non bis in idem – problems and solutions

- You cannot be punished twice for the same offence
- ECJ: European law has primacy, but national law is not excluded
- Different focus: national = domestic market; European = trade between states
- Parallel administrative and criminal sanctions are justified if they provide an optimal deterrent effect
- A second prosecution is permitted if the first penalty is not sufficient (important for leniency policies and harmonisation)



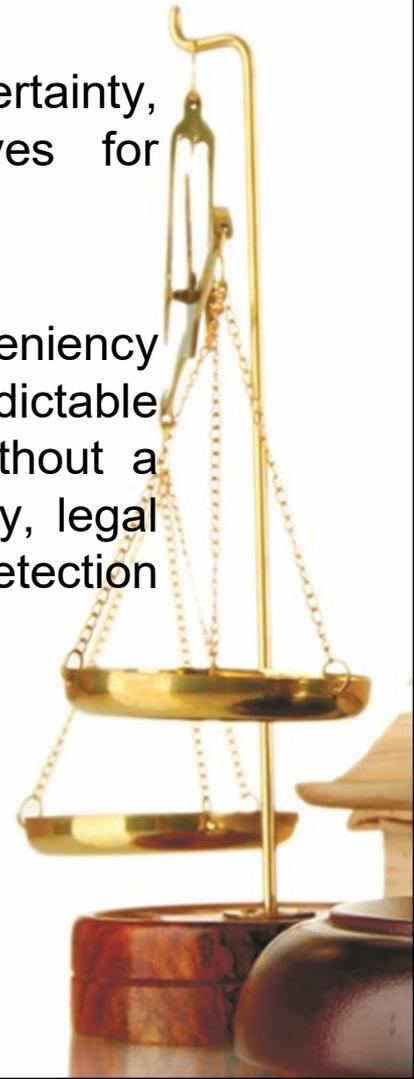
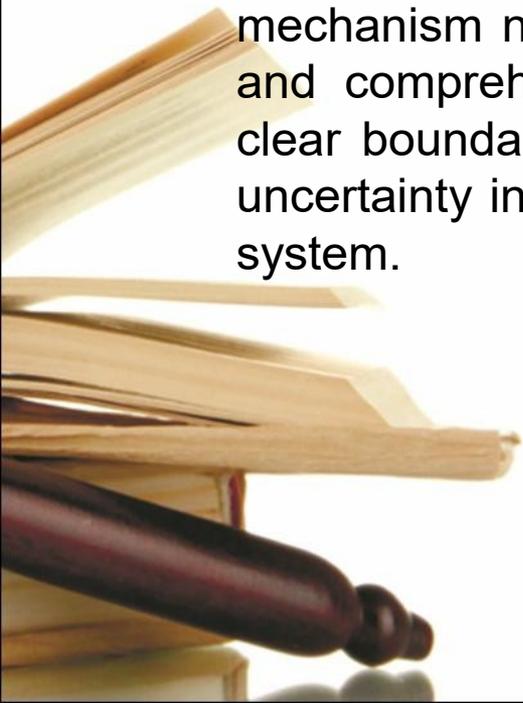
Parallel proceedings and extraterritorial challenges

- The criminalisation of national competition laws creates a parallel system: an administrative one (for companies) and a criminal one (for individuals)
- National agencies (NCAs) often apply both European and national law, which creates a risk of conflicts and undermines effectiveness
- Solution: a functional separation of administrative and prosecutorial functions, to focus on serious cases and develop expertise
- Extraterritorial issues: it is difficult to secure evidence for cartels with a global reach, as criminal prosecution requires the act to have been committed within the national territory
- Due to these limitations, criminal prosecution is only effective for national cartels



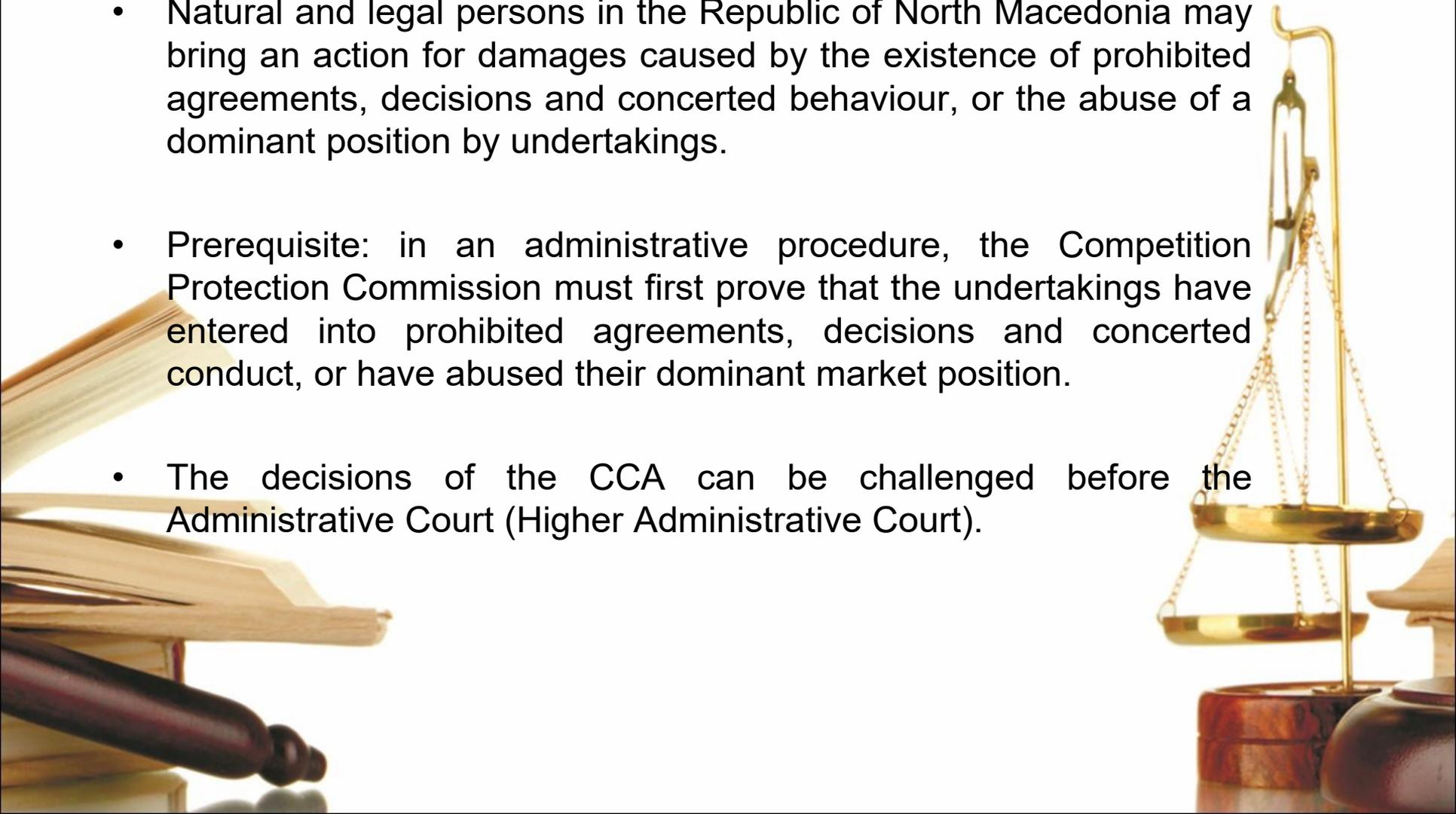
Leniency and the current situation in North Macedonia

- Leniency Notice 2006 clearly shows that increasing legal certainty, formalising the procedure and strengthening incentives for reporting are key to the effective detection of cartels
- In the context of North Macedonia, the existing leniency mechanism needs to be enhanced, namely to provide predictable and comprehensive protection for the first applicant. Without a clear boundary between administrative and criminal liability, legal uncertainty increases and undermines the existing cartel detection system.



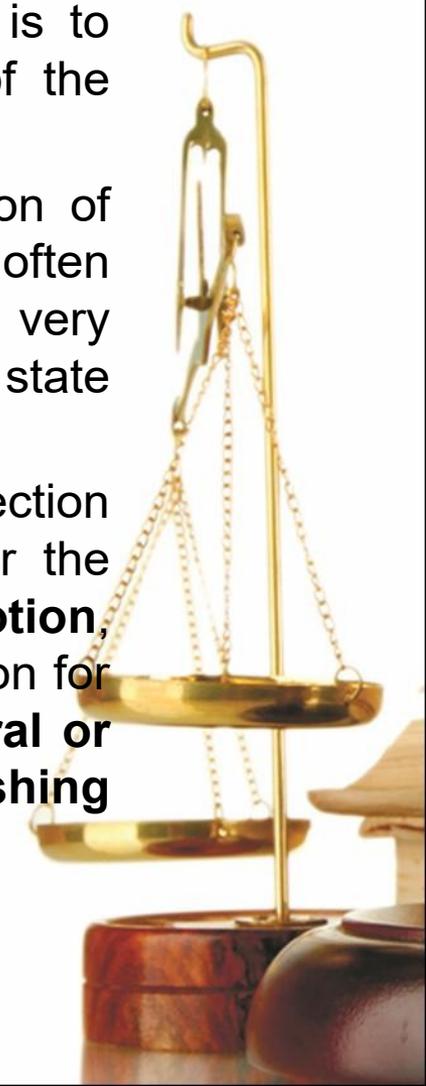
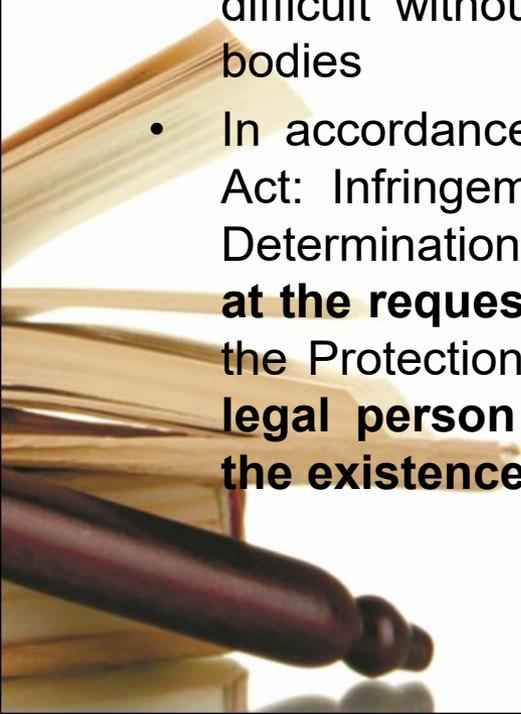
Procedures for submitting claims for private damages

- Natural and legal persons in the Republic of North Macedonia may bring an action for damages caused by the existence of prohibited agreements, decisions and concerted behaviour, or the abuse of a dominant position by undertakings.
- Prerequisite: in an administrative procedure, the Competition Protection Commission must first prove that the undertakings have entered into prohibited agreements, decisions and concerted conduct, or have abused their dominant market position.
- The decisions of the CCA can be challenged before the Administrative Court (Higher Administrative Court).



Detected obstacles to effective judicial protection

- Proving a competition infringement = the biggest barrier is to prove that a cartel existed and that it was the cause of the damage
- If there is no decision from the Commission for Protection of Competition (CPC) regarding that infringement, claimants often have to compile the evidence themselves — which is very difficult without access to information from companies or state bodies
- In accordance with Article 32(1) of the Competition Protection Act: Infringement proceedings before the Commission for the Determination of Infringements are initiated of **its own motion**, **at the request of the Secretary General** of the Commission for the Protection of Competition, or at the request of **a natural or legal person who has a legitimate interest in establishing the existence of an infringement.**



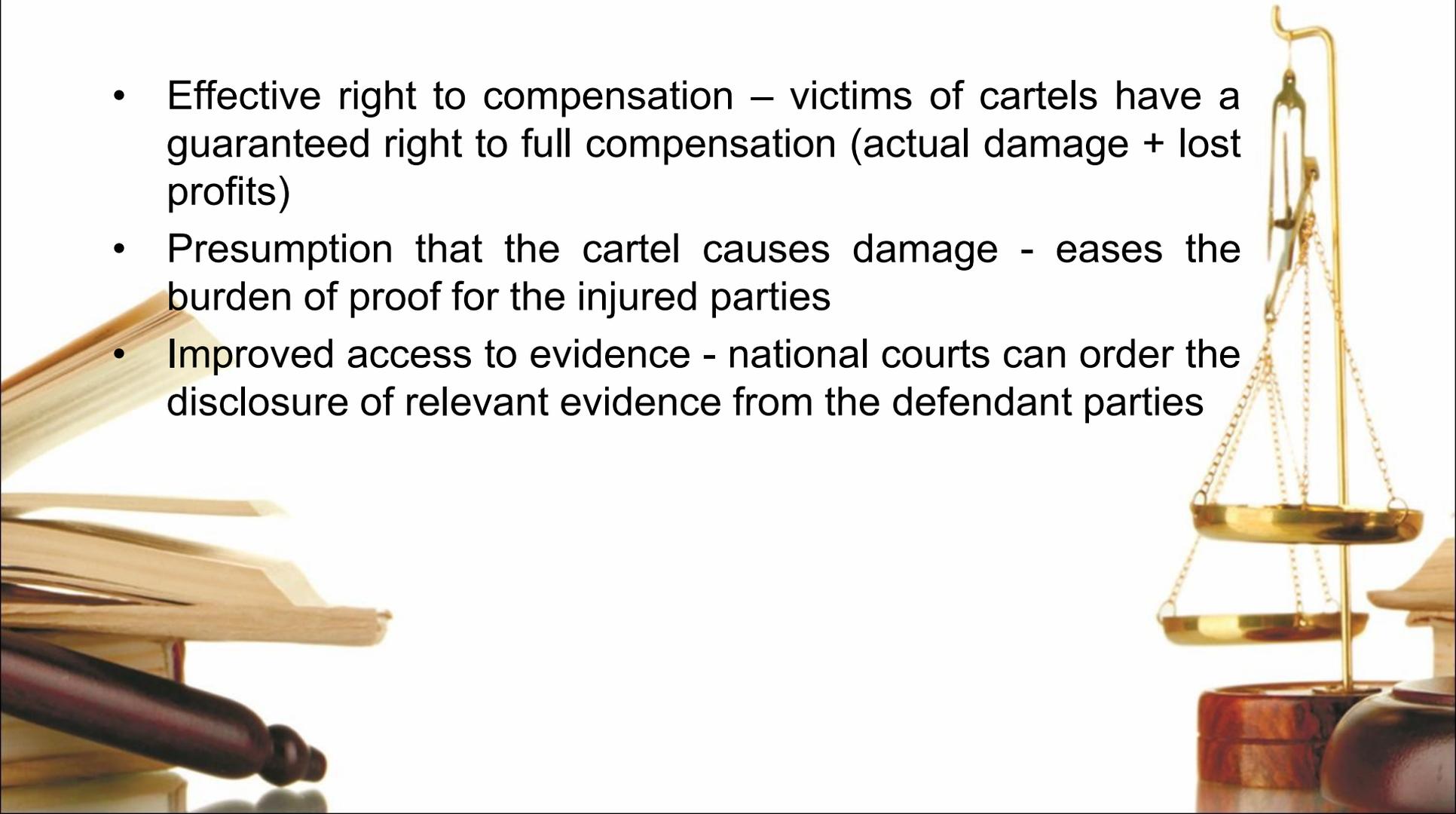
Detected obstacles to effective judicial protection

- Lengthy administrative and administrative-judicial proceedings
- The limitation period for compensation claims is shorter than the absolute limitation period for establishing
- Even if a claim for damages is brought, the claimant must prove that they have actually suffered damage themselves



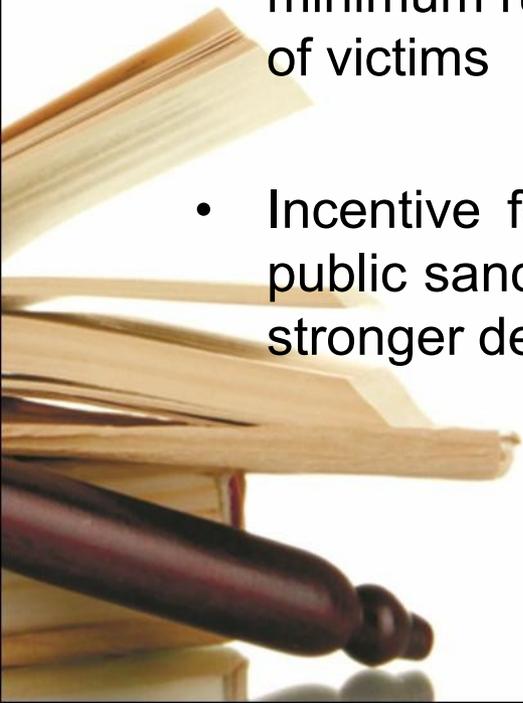
Harmonisation of national legislation with the EU acquis – DAMAGE DIRECTIVE 2014/104/EU

- Effective right to compensation – victims of cartels have a guaranteed right to full compensation (actual damage + lost profits)
- Presumption that the cartel causes damage - eases the burden of proof for the injured parties
- Improved access to evidence - national courts can order the disclosure of relevant evidence from the defendant parties



Harmonisation of national legislation with the EU acquis – DAMAGE DIRECTIVE 2014/104/EU

- Protection of leniency programmes – balancing the right to compensation with preserving the effectiveness of leniency programmes
- Legal certainty and compliance in the EU - harmonised minimum rules for all Member States → equal treatment of victims
- Incentive for private enforcement of competition law - public sanctions are complemented by private claims → stronger deterrence



Thank you for your attention!

Judge

Mr Goko Zhivkovski

e-mail: ??????





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PRIVATE ENFORCEMENT OF COMPETITION LAW: ENSURING EFFECTIVE REDRESS

Ljiljana Pavlic

Chief Economic Advisor, Croatian Competition Agency

Training for Judges from North Macedonia

Skopje, 06. 02. 2026.



Outline of the presentation

Basic Principles – Public and Private Enforcement

Evolution of Private Enforcement

Damages Directive

Private Enforcement in Practice

The Role of National Courts

Access to Evidence

Follow-on Actions

Quantification of Damages

What Judges should do

Collective Actions

Limitations

The Basic Principles and Distinctions

- Competition law is a twofold branch of law:
 - Public, when public administrative bodies such as the national competition authority enforce competition law regulations in the public interest;
 - Public enforcement:
 - by EC, relevant courts – general court, CJEU
 - by MS NCAs, judicial review by national courts
 - Private, when injured parties go to the courts to seek compensation for possible harm related to competition law infringements

The Basic Principles

- Public and private enforcement should be viewed as complementary tools, as both serve the same ultimate goal of ensuring optimal compliance with competition rules
- Public enforcement through sanctions may be punitive, depending on the system, but is in any event intended primarily to achieve deterrence – it is important that enforcement decisions are publicly available
- Private enforcement has the specific goal of retribution or corrective justice and may depending on the system also have deterrent and punitive effects

The Basic Principles

- Private enforcement primary goal is to achieve compensation for victims
- This requires legislators to adopt laws primarily to remove practical obstacles in bringing actions for damages before national courts
- In the EU, this development was facilitated by the adoption of the EU Damages Directive
- To strike the right balance between public and private enforcement, the applicable law includes specific rules and safeguards ensuring that competition agencies can continue to effectively enforce competition rules, while victims of antitrust violations can seek compensation

Evolution of Private Enforcement

Van Gend & Loos case CJEU,1963, 26/62

- The court recognised that the provisions of the Treaty may produce direct effect and confer rights on individuals, which national courts must protect

Courage v Crehan case C-453/99

- The court recognize the right to obtain damages for breaches of EU competition law

“The existence of such a right strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.

There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community”

Manfredi case 2006

- The ECJ defines the principle of "full compensation," including actual loss and loss of profit

Evolution of Private Enforcement

Pfeiderer case C-360/09 2011

- Right of access to NCA public enforcement proceeding, need for proportionality

The provisions of European Union law on cartels, and in particular Council Regulation 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement

It is for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law – balancing test

Damages Directive 2014/104/EU

- The EU legislature harmonizes key procedural rules across all Member States to facilitate damages claims
- Into force December 2014
- Transposition into national legislation of MS till December 2016

Damages Directive

Designed to achieve more effective enforcement of the EU antitrust rules

- The Directive introduces two rebuttable presumptions that make it easier to prove a damages claim:
 - Cartel infringements cause harm
 - Cartel overcharges are at least partially passed on to indirect purchasers
- Right to Full Compensation: Victims can claim compensation for actual loss and loss of profit plus interest from the time the harm occurred
- Easier Evidence Access: The Directive mandates rules for disclosing evidence held by opposing parties or third parties, overcoming information asymmetry
- Limitation Periods: A minimum five-year limitation period is required to bring claims, which is suspended during public authority investigations

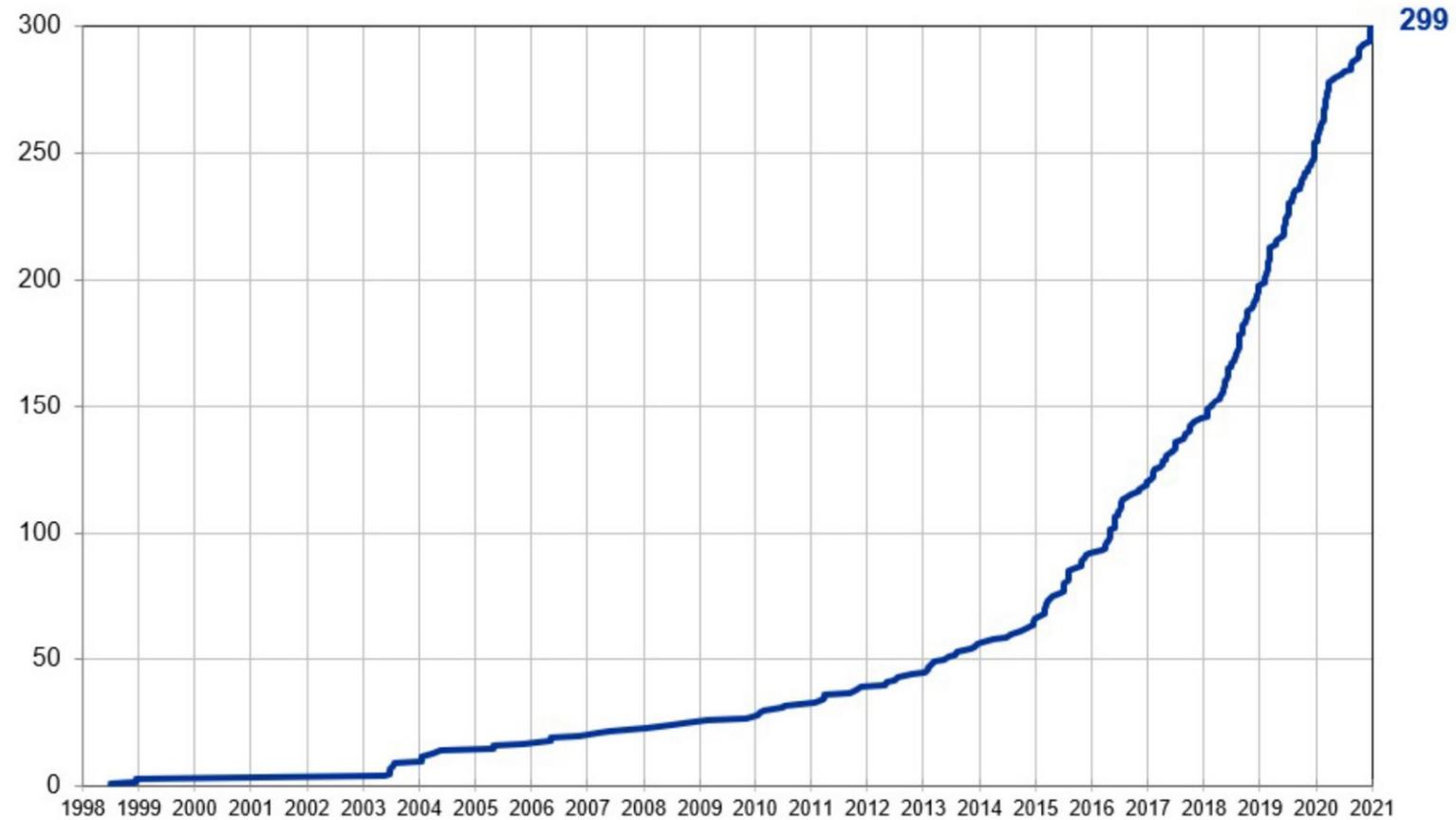
Private Enforcement in Practice

- Types of actions/claims:
 - Declare contract or contract clauses null and void
 - Damages (follow-on, stand alone)
 - Disclosure orders
 - Injunction to cease infringement...

Private Enforcement in Practice

- Damages claims:
 - Follow-on
 - Stand alone – almost non existent for cartels, usually for abuse of dominance
 - Mixed
- Croatia – Commercial court in Zagreb 2001-2019 – 6 cases, 5 follow-on cases, in all plaintiffs were unsuccessful
- Portugal 1988-2018 - 93% cases were stand alone

Number of cartel damages actions in European countries



Source: Laborde, www.concurrences.com

The Role of National Courts

- National courts are central to private competition law damages, providing the legal forum for victims to claim compensation for harm caused by antitrust infringements
- Application of EU and national competition laws
- Enforcement the Damages Directive's right to full compensation
- Managing evidence disclosure, often in conjunction with national competition authorities

Access to Evidence

- Access to evidence is a pre-condition for the right to compensation of victims of infringements of the prohibitions of anticompetitive behavior, and the effectiveness of that right could be endangered if potential claimants were deprived of adequate means to access evidence to support their claims
- Evidence of the infringements and their effects may not be readily at hand
- In follow-on actions, the NCA's decision may be binding in court and that facilitates the burden of proof for claimants
- However, the claimant still needs to provide evidence in support of the remedies sought - in damages actions, in which the claimant has the burden of proving the harm suffered, its causal link with the infringement and quantum of the overcharge
- Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterized by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence

Access to Evidence – disclosure scheme

- The Damages Directive included a novel ‘disclosure scheme’, aimed at easing claimants’ access to evidence in the adversarial process, forcing disclosure by the defendant or third parties of evidence needed to prove and support their damages’ claim
- Disclosure of evidence under the novel ‘disclosure scheme’ can be ordered by the court to either party in the process, and to third parties, including public authorities and particularly NCAs

Access to Evidence – disclosure scheme

- Black list
 - In order to create incentives for companies to cooperate with the authorities, absolute disclosure protection is, for example, provided for leniency statements and settlement statements

Leniency programmes and settlement procedures are important tools for the public enforcement as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law

As many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the actions for damages in cartel cases

Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. [...]

Access to Evidence – disclosure scheme

- Gray list
 - National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings: information that was prepared by a natural or legal person specifically for the proceedings of a competition authority, information that the competition authority has drawn up and sent to the parties in the course of its proceedings and settlement submissions that have been withdrawn
- White list
 - All other evidence falls under a white list
 - There is no per se privilege for them – the court assessment whether is necessary and appropriate to hand over evidence; no “fishing expedition” by plaintiffs
 - Their disclosure may be subject to a proportionality

Damages in Follow-on actions against cartel

Truckmakers fined by Brussels for price collusion

MAN, Volvo/Renault, Daimler, Iveco, and DAF responsible for breaking EU antitrust rules

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Truck firms hit with record €3bn EU fine for price fixing

'Hundreds' of construction firms join fresh truck cartel claim

The RHA estimates that 600,000 trucks in the UK were affected by the trucking cartel.

Spain: Suit filed against European cartel of truck makers

BY **CPI** | FEBRUARY 5, 2019



Some 4,500 claimants affected by a scam committed by a truck cartel have filed a claim for over €700 million (US\$800.3 million) for the premium they paid at the time of purchasing their vehicles. In total there are around 7,300 claims involving more than 34,000 trucks.

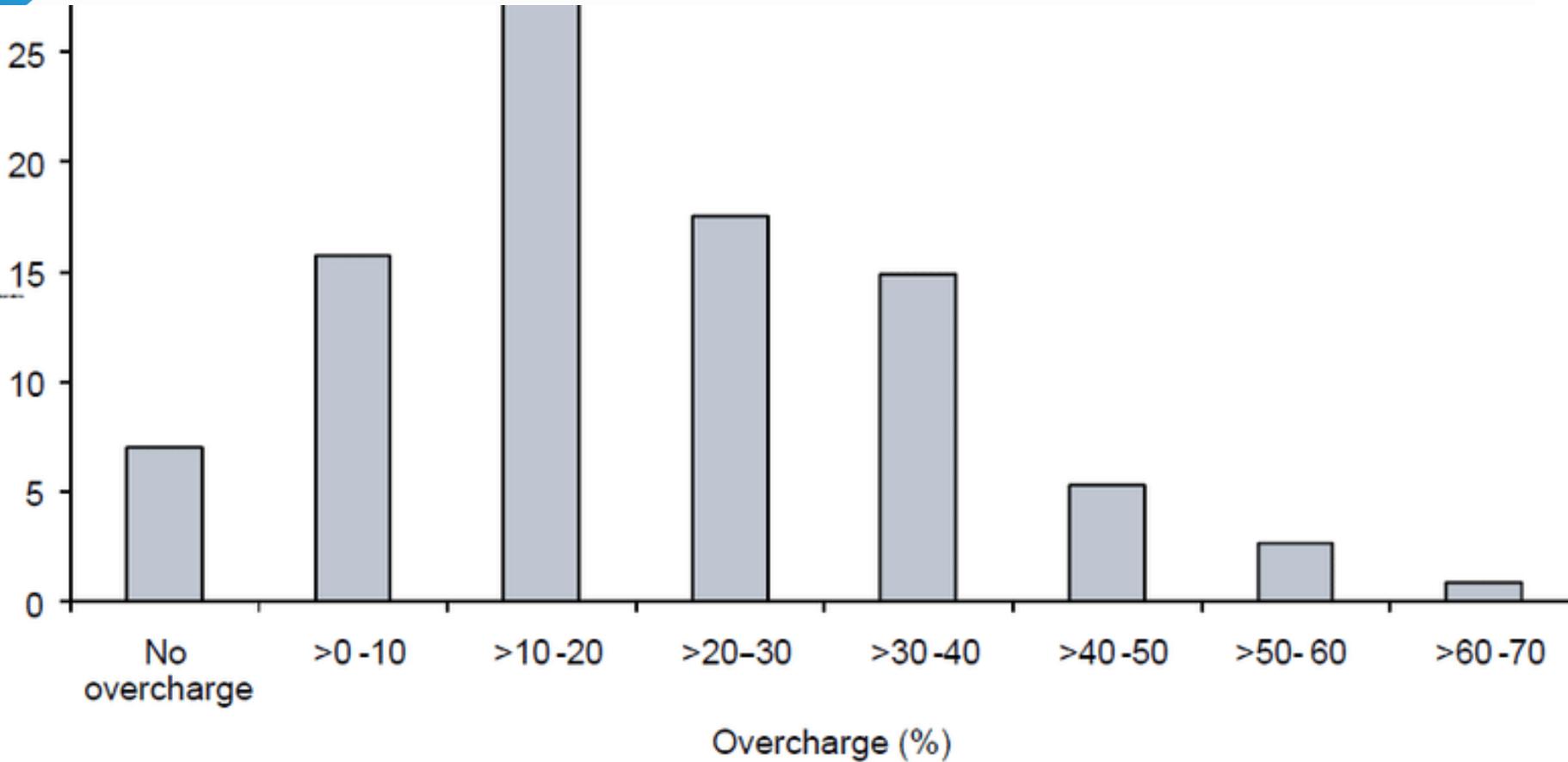
Key issues in Follow-on Actions

- Infringers are on one side and private enforcement with private parties suing for damages on other side
- Authority (EC or NCA) already has decided on the case
- Decisions of EC/NCA are binding for national courts in relation to infringement (Article 9 Damages Directive)
 - No need to litigate if there was infringement or not
- Some issues have been clarified by ECJ
 - Who is entitled to sue?
 - Who is liable?

Key issues in Follow-on Actions

- Follow-on actions are mainly focused on:
 - Causation
 - Did cartel caused damages, is there pass on?
 - What is the amount of damages?
- It should be presumed that cartel cause harm to consumers
- The infringer should have the right to rebut that presumption (Article 17(2) Damages Directive)
- Most important harm: cartel overcharge – price charge on top of the competitive price

Harm to Consumers



Distribution of cartel overcharges in empirical studies of past cartels: indicative results from new sample selected by Oxera, based on Connor and Lande (2008)

How much Harm is Caused by Cartel - Quantum

- Complex task
- Courts are struggling to get the “right” figure
- Overcharge: Immediate customer pays more on each unit of input bought
- Simple damage estimate: Overcharge per unit x number of units bought
- Most countries have no presumption of overcharge (%)
- Some countries have introduced rebuttable presumption of overcharge, allowing defendants to prove a lower or no actual damage occurred
 - Hungary, Latvia 10%
 - Romania 20%
- Presumption of overcharge may simplify the burden of proof for claimants, who often lack access to evidence required to calculate the exact, often complex, cartel damage; easier for the judges if already have some focal point
- Overcharge depends of the economic circumstances of the case

The Quantification of Damages

Factors relevant to damage calculation

- Overcharge
- Pass-on
- The Output Effect

Estimating the overcharge

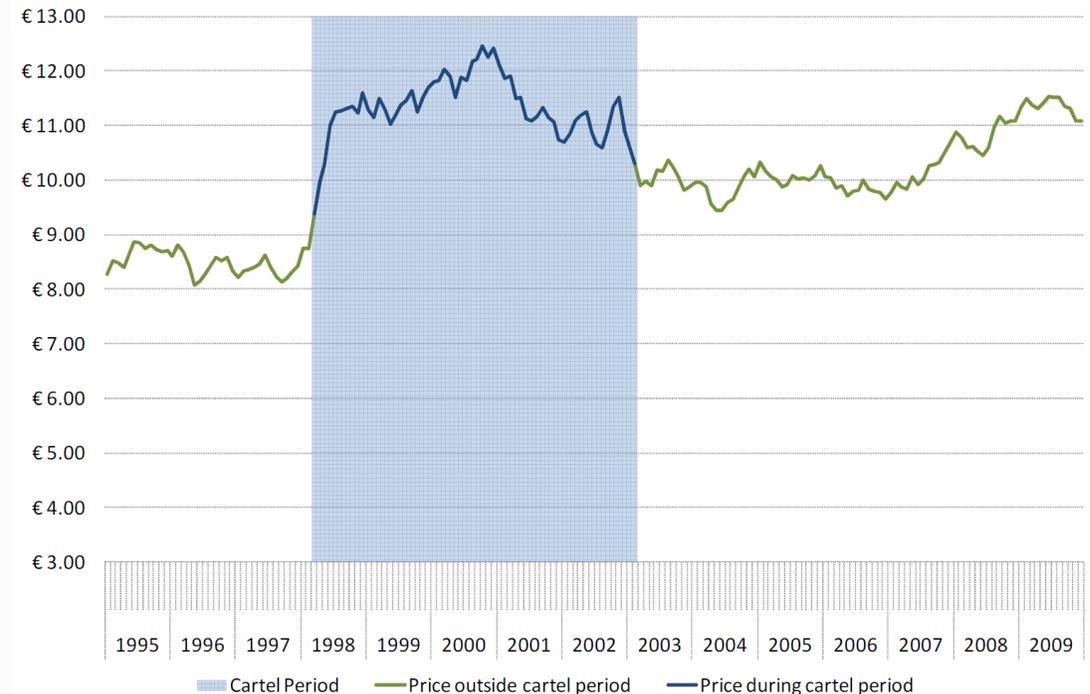
Estimating the pass-on and output effect

Complex Task of Assessing Overcharge

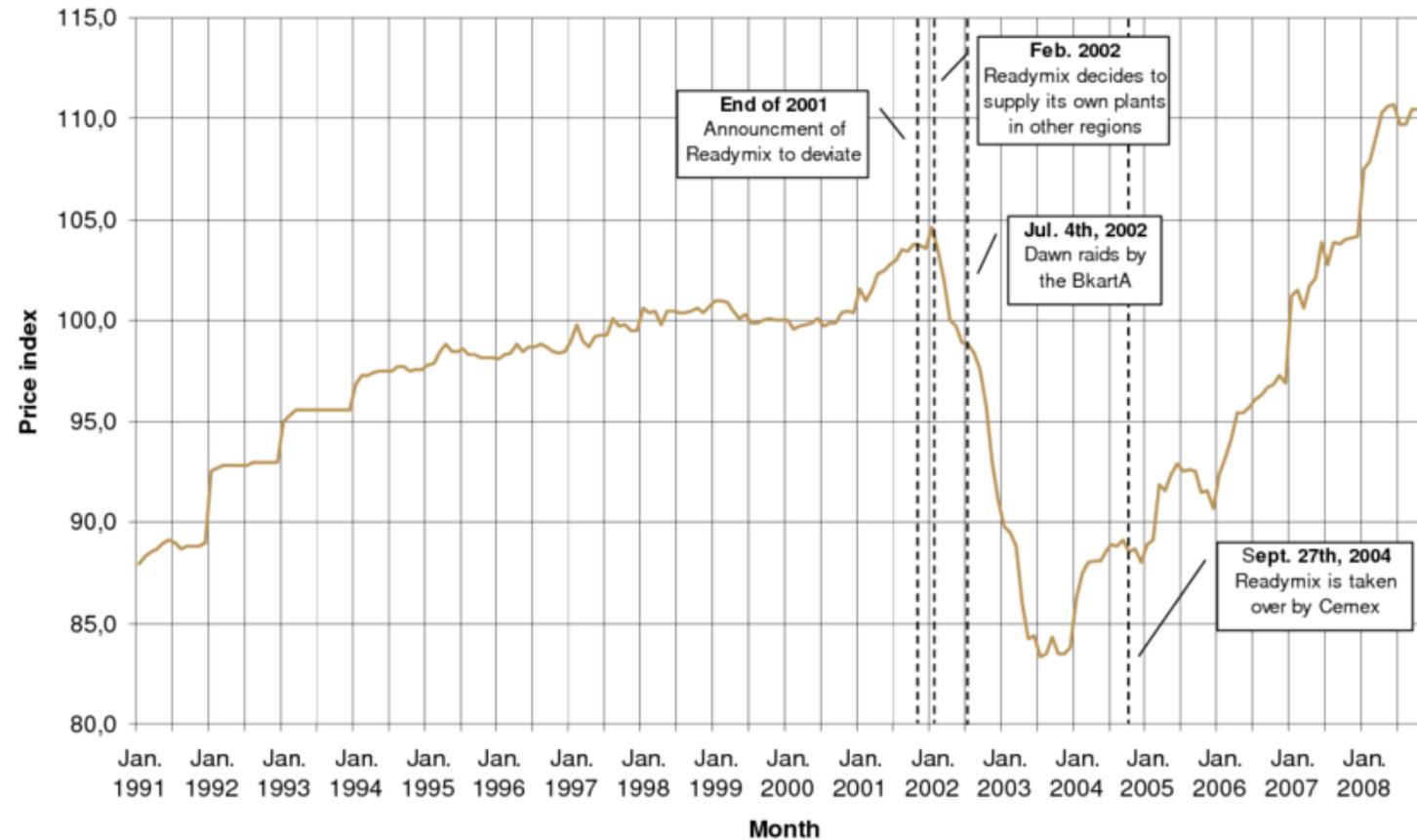
- Assessment is based on hypothetical scenario
- Damages are assessed with respect to a hypothetical situation where no infringement occurred
- What would be the price absent of infringement, how would price evolve over time?
- Hypothetical can not be calculated with precision
- Estimation is inevitable
 - But, how it is done?

Cartel Overcharge – Economic Estimations

- Comparing prices during the cartel period with those before/after
- The difference between the two prices is the cartel overcharge
- Subject to data availability, one should control for the impact of changes in supply and demand conditions on the price level
- Issue: older data not available, post cartel prices might distort calculations – overestimate if price war, underestimate if cartelists aware of possible damage claims and deliberately don't want to decrease the price after the cartel has been exposed

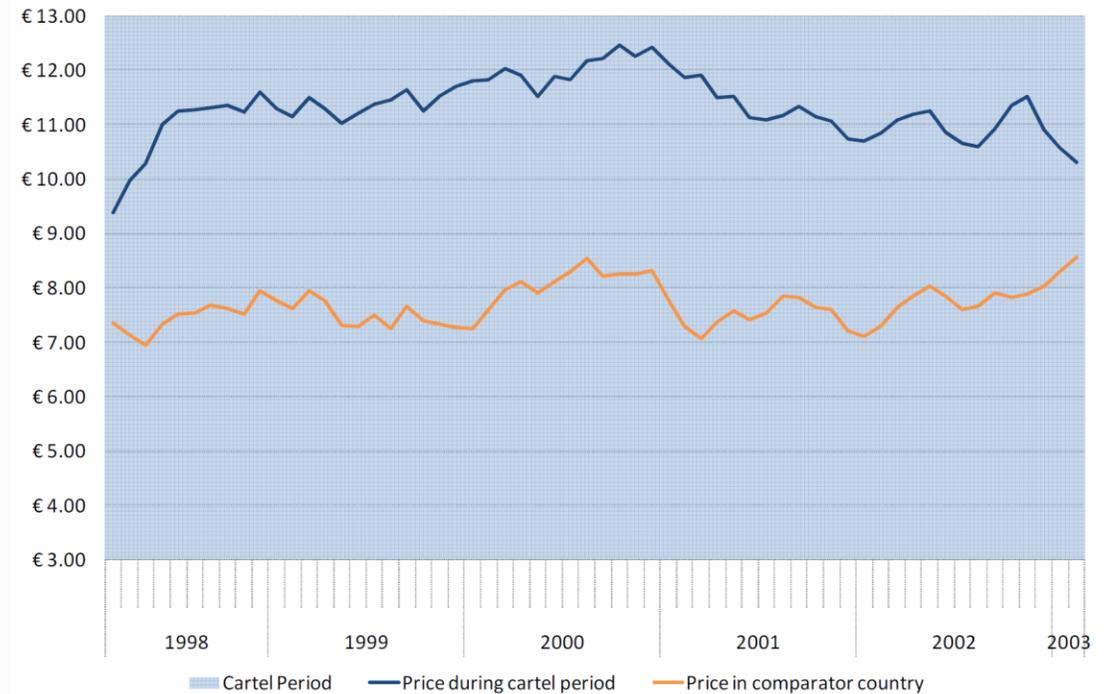


The Effects of the German Cement Cartel on Price



Cartel Overcharge

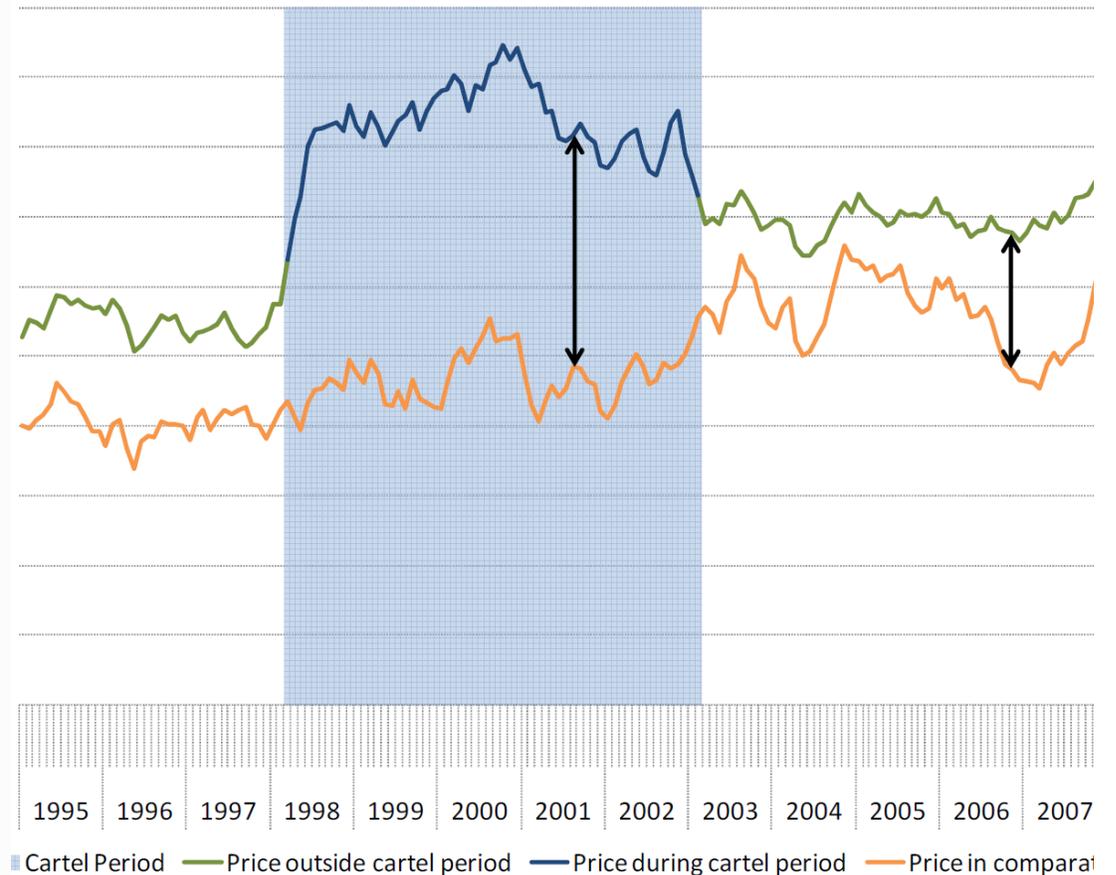
- Comparing the price in affected markets (e.g. the EEA) with the price in nonaffected markets (e.g. North America)
- The difference between the two prices is the cartel overcharge



Cartel Overcharge – Economic Estimations

“Difference in difference” model

- Combines time-based and market-based comparison
- It examines the evolution of the price in the market concerned over a given period, before, during and after the infringement and compares it with the evolution of the price over the same period in a comparable (geographical or product) market not affected by the infringement
- Issue: hard to find comparable market or no sufficient data available



The Passing-on of Overcharges

- The passing-on of overcharges may occur at different levels of the supply chain
- Arises when the harmed company passes on part or all of the overcharge to its direct purchasers
- This is because input cost increases reduce margins, making the negative effects of any volume loss less severe and giving firms an incentive to raise prices
- Mitigates impact of cartel on immediate customer (but not overall)
- Consequently, the company who initially suffered the harm from increased prices will, by passing it on, see the harm suffered reduced or even eliminated
- Indirect purchasers located at different points in the supply chain are entitled to claim damages

The Passing-on of Overcharges

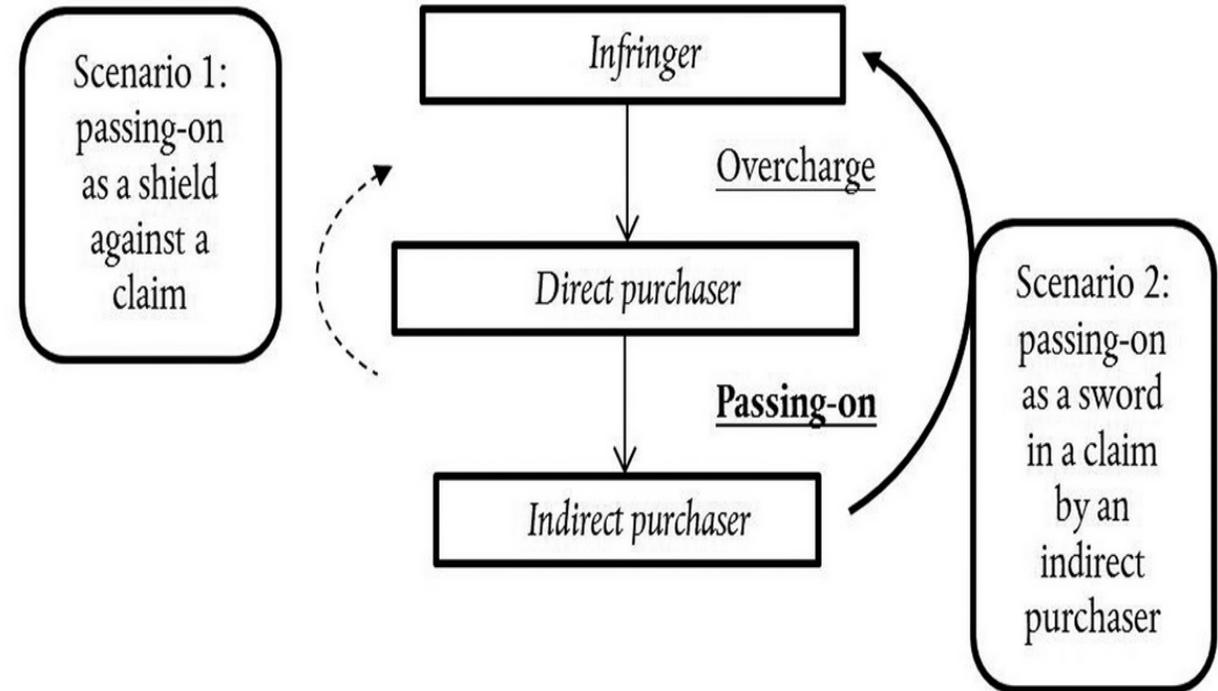
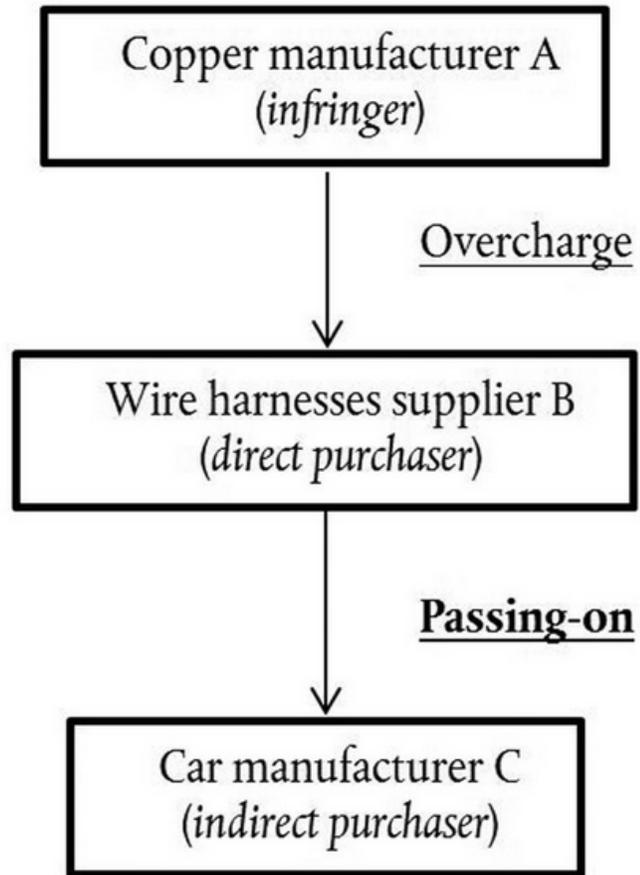
Passing-on as a shield

- An infringer may invoke the passing-on of overcharges in its defence against damages claims, i.e. arguing that the direct or indirect purchaser has passed on the overcharge, entirely or in part, to its own purchasers

Passing-on as a sword

- Indirect purchasers may base their damages actions on the argument that the direct purchasers of the infringers have passed on (parts of) the overcharge to them and that they have therefore suffered harm
- In these cases, the quantification of the harm (and, therefore, the amount of compensation) must also be adjusted according to the degree of passing-on
- Revised estimate of immediate damage: $\text{Overcharge} - \text{Pass-on}$

The Passing-on of Overcharges



The Passing-on and Output Effect

- Pass-on causes higher downstream prices, lower sales
- Without overcharge in the first place: lower prices would deliver expanded sales and profits
- Theoretical models suggest that firms will often choose to absorb a portion of the cost increase
- However, an actual estimate of the magnitude of pass-on can only be obtained on the basis of a detailed empirical analysis
- To estimate pass-on and output effect it is necessary to estimate
 1. relationship between prices charged by the downstream firms and their input costs
 - requires, for example, a comparison of average margins during and after the cartel
 2. impact of higher downstream price on volumes sold by downstream firms
 - requires an estimate of demand elasticity
 3. the margin foregone on any lost volume
- Revised damage estimate:

Overcharge – Pass-on + Estimate of profits on lost sales

What Judges Should Do

- Meta studies suggest:
 - Overcharge is 10-20%
 - Low probability of “no overcharge” cases – 7%
- Where it is sufficiently likely, based on the facts of the infringement and the market conditions, that a claimant has suffered harm, courts across Europe increasingly accept the notion of a “**minimum amount**”
- To address the shortcomings of economic damage analyses and ensure the effectiveness of EU competition law, those courts unanimously assume at least a “**5% overcharge**” on cartelised goods or services.

What Judges Should Do

- The emergence of the 5% benchmark can be traced primarily to the truck cartel, which has significantly shaped the development of private antitrust enforcement throughout Europe
- UK - Following the European Commission's 2016 infringement decision finding that several truck manufacturers had colluded for 14 years in setting gross list prices, the London Competition Appeal Tribunal (CAT) delivered its judgment on 7 February 2023 Royal Mail & BT v DAF
- It awarded £38.5 million in damages and interest to Royal Mail and BT against DAF
- After extensive hearings, neither party's experts nor their regression models persuaded the tribunal
- According to the CAT, "no regression model" would yield a definitive solution due to data imperfections and the complexity of the task
- the CAT's "**fair and reasonable**" solution was Solomonic: it assumed a **5% overcharge** on the value of commerce (VoC) for both Royal Mail and BT for the entire relevant period – roughly half of what the claimants had argued, while DAF denied any damage whatsoever

What Judges Should Do

- the Spanish Supreme Court held that the characteristics of the truck cartel – its subject matter, participants, market coverage, duration and geographical scope – were sufficient to presume significant harm
- However, the court considered an *exact* quantification of that harm impossible
- Referring to the CAT’s reasoning in *Royal Mail* and the limitations of the extensive and costly expert hearings conducted there, as well as to the effectiveness of Article 101 TFEU, the SSC thus estimated a “**minimum percentage of 5%**” of the costs of the affected lorries as the amount of harm
- “As long as it is not proven that the amount of the damage was higher than the minimum percentage of 5%, the plaintiff cannot claim compensation in excess of that percentage.”
- In 2025, the SSC accepted a **higher overcharge** in another truck cartel case
- The SSC confirmed that the expert opinion of the plaintiff in that case convincingly demonstrated an overcharge of 16.35%, while the expert opinion of the defendant, which assumed “zero damages”, was not credible in view of the facts established by the EC
- The Appeal Court only applied a one-third reduction to account for uncertainties in the plaintiff’s report, arriving at a final overcharge of slightly above **10%**.

What Judges Should Do

- Norway – 2025
- The Norwegian appellate court found that the truck cartel had caused an overcharge of **10%** of the chassis value for trucks purchased by Posten Bring, a state-owned postal and logistics group, in Norway
- For trucks purchased by subsidiaries in Sweden and Slovakia, the court set the overcharge at **5%**, noting that Posten had supplied less evidence concerning those markets
- Over the course of 34 hearing days, the court had examined testimony from 18 economic experts
- The results of the various regression models diverged widely, and none produced a reliable conclusion, underscoring that econometric precision cannot be required where inherent data limitations make such models unstable or misleading
- The court therefore aligned itself with the CAT's caution against “spurious accuracy” in *Royal Mail*
- Instead, the court assessed all available evidence – including the Commission's infringement decision, economic theory and cartel meta-studies – and awarded Posten approximately NOK 117 million (around €10 million) plus interest in damages

Collective Actions

- The Directive does not harmonize rules on collective redress

Croatia

- Under the general civil procedure rules, amended in 2011 to introduce the collective action mechanism, collective redress should be available also in competition cases (Article 502a-502h Civil Procedure Act, Official Gazette 57/11)
- However, no mechanism tailored to competition law cases exists, and no collective redress competition case has been reported yet
- The system put in place is not particularly plaintiff-friendly, as it only allows '*abstract consumer protection*', meaning that the compensation must be claimed in a separate case, provided the court established a breach of collective interests and rights in the initial case
- The vagueness, heaviness, and length of civil procedures, combined with uninterest of consumer protection NGOs to pursue competition cases contributed to reducing the effectiveness of Croatian collective redress system

Collective Actions C-253/23, “ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen

- In March 2020, a group of sawmills established across Germany, Belgium and Luxembourg assigned their rights to claim compensation from harm caused to them as a result of anti-competitive behaviour against the Land Nordrhein-Westfalen (“Land”) to ASG 2 (“ASG”)
- The sawmills felt that they had paid inflated prices for the unwrought coniferous timber that they had purchased from the Land and sought to institute a private enforcement action before the Regional Court of Dortmund
- Instead of pursuing these actions individually, 32 of the sawmills assigned their right to compensation to ASG. ASG is classified as a provider of legal services under German law and it proceeded to institute one action on behalf of the sawmills, in its own name and at its own expense
- in Land’s view, ASG did not have any legal standing
- The Regional Court asked the ECJ whether Article 101(1) TFEU read in conjunction with the principle of effectiveness, Damages Directive and Article 47 of the Charter of Fundamental Rights precludes an interpretation of national law that has the effect of preventing victims harmed by alleged competition law infringements of assigning their rights to compensation to a provider of legal services so that the provider may assert their action on their behalf

Collective Actions C-253/23, “ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen

- The ECJ observed that the Damages Directive which was aimed at harmonising the rules on private enforcement action in Member States, envisages the possibility of class action lawsuits
- Reference was made by the ECJ to Article 2(4) of the Damages Directive which defines an action for damages as an action under national law by which a claim for damages is either brought by an injured party, or by someone acting on behalf of one or more alleged injured parties
- However, the ECJ also observed that the Damages Directive does not oblige Member States to provide for the possibility of group actions under their national law and nor does it lay down the rules which govern group actions or which conditions they should satisfy for the assignment of claims to be valid
- The national domestic rules on actions governing the compensation for damages must not be set up in such a way that jeopardises the effectiveness of the application of Article 101 TFEU
- The ECJ confirmed that victims of competition law infringements may assign their right to claim damages, if this is the only way in which their right to seek damages can be effectively exercised

Limitations in Private Enforcement

- On 15 September 2015, the CNMC published a decision finding that several car manufacturers, including Nissan Iberia, had breached of Article 101 of the TFEU and Spanish counterpart
- The decision was challenged by the addressees but upheld by the Spanish Supreme Court in 2021
- In March 2023, an action for damages was brought by CP, an individual, against Nissan Iberia, seeking damages to compensate loss caused by the cartel
- The defendant argued that the statute of limitations had expired as time had started to run on the date of publication of the CNMC decision in 2015
- On 4 September 2025, the Court of Justice of the European Union ruled that the limitation period applicable to a private enforcement action following on from a decision of the Spanish CA did not begin to run until the judicial review process had completed
- The CJEU found that, where an NCA decision is still in the process of being challenged and its findings are not binding on a national court before which damages are sought, the statute of limitations cannot begin to run
- Accordingly, the CJEU held that the statute of limitations only began to run on the date of official publication of the Spanish Supreme Court judgment confirming the CNMC decision, specifying that official publication requires the judgment to be freely accessible to the general public, with the date of publication clearly indicated

Thank you



Savska cesta 41/XIV, Zagreb www.aztn.hr agencija.ztn@aztn.gov.hr