

Why Competition Law ?

- **Competition law regulates the market activity of business to allow for optimum levels of competition**, requiring companies to act independently of each other, but subject to the competitive pressure of others.

- **The main goal in doing so is to increase consumer welfare manifested by:**
 - ✓ *Better competitors* in global markets: Competition within the EU helps make European companies stronger outside the EU too – and able to hold their own against global competitors.
 - ✓ Encourages *efficiency*
 - ✓ Increases *productivity, quality, choice* - Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better service
 - ✓ To deliver this choice, and produce better products, businesses need to be innovate = creates better conditions for *investors and innovators*
 - ✓ Reduces *prices* (increases consumer benefit)

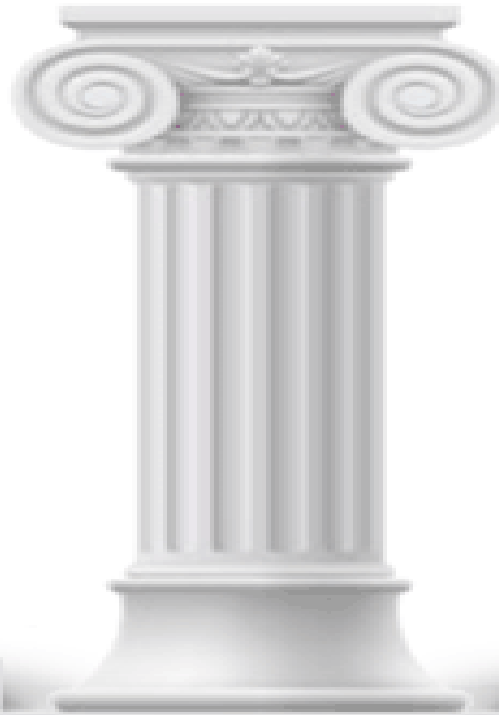
https://ec.europa.eu/competition/consumers/why_en.html

Quick Intro: European Competition Law Pillars

Pillar 2
Abuse
of Dominance



Pillar 1
Anti-Competitive
Agreements



Pillar 3
Regulating
Mergers / Acquisitions



The Competition Law Framework

- Competition laws are enforced both by **public authorities** and by **private individuals**. Public enforcement at European Union (EU) level is done in parallel by the European Commission and the National Competition Authorities of the Member States. In Malta, the regulator is the Office for Competition within the MCCA.
- In the EU, two treaty provisions mainly constitute the law in this area: Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). EU Member States have their own competition law systems based to a greater or lesser extent upon **Articles 101 and 102 TFEU**. In Malta, the law in this field is constituted by **Articles 5 and 9** of the Competition Act. A third component of the EU competition law system (as well as national legal systems) is the merger control regime.
- **Private enforcement** of competition law can be sought by way of actions before national courts. Articles 101 and 102 TFEU as well as the equivalent Maltese legal provisions create rights for private parties and can therefore be directly invoked before the Maltese courts.

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU

▪ **Horizontal**

- ✓ Agreements between two or more competitors that operate **at the same level** in the supply chain.
- ✓ This is perhaps the best-known anti-competitive behaviour, often referred to as a **'cartel'**.
- ✓ This does not have to be 'direct' collusion and could be via a third party such as a shared supplier.

▪ **Vertical**

- ✓ Agreements between those at **different levels of the supply chain** that don't normally directly compete with each other.
- ✓ For example an exclusive distribution agreement between a manufacturer or a supplier and a distributor.

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU - Horizontal

- **There are 4 key cartel agreements that incur the highest penalties and should never be entered into:**
 - ✓ Price Fixing – when firms agree to sell items at a price higher than they normally would if they were competing against each other.
 - ✓ Restricting Supply – When firms restrict the quantity of goods/services supplied with the intention of raising prices.
 - ✓ Market Sharing – When firms agree to operate only within agreed areas in the country.
 - ✓ Bid Rigging - When businesses agree, when bidding for a contract, which one will win that contract and at what price.

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU - Vertical

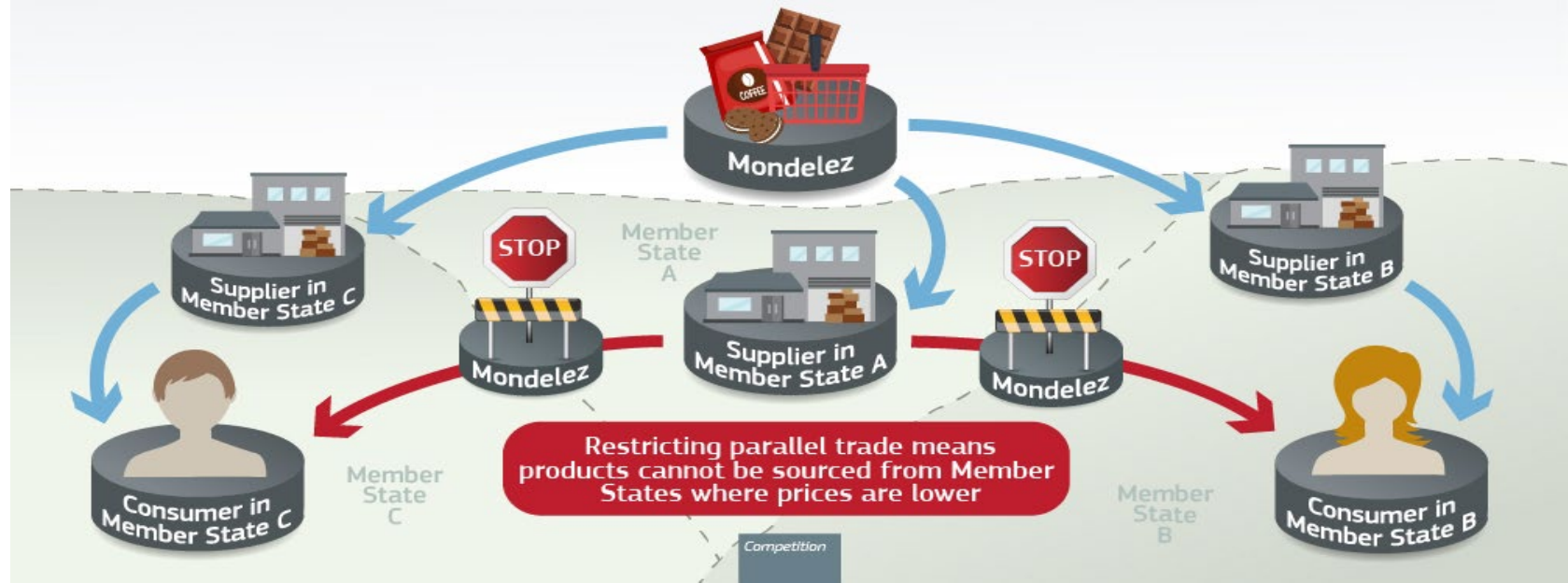
- **Not all vertical agreements are anti-competitive**

- ✓ Where they can be found to be anti-competitive is when one or more of the parties has significant economic power in the relevant market.
- ✓ Suppliers and manufacturers may impose certain restrictions in vertical agreements.
- ✓ They can recommend a resale price (often known as 'RRP') but they cannot fix the distributors resale price (often known as 'resale price maintenance').
- ✓ They can contractually limit a distributors 'active' sales into a territory, region or group of customers, this being those they can actively market to and pursue.
- ✓ They cannot however prohibit 'indirect' sales from outside of this territory, region or group of customers if third parties come to them of their own accord.

In the News...Art 101 TFEU



Commission opens investigation into **Mondelez** for potential cross-border trade restrictions on chocolate, biscuits and coffee products



PILLAR 2: Abuse of Dominance

Article 102 TFEU

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- Abuse of a dominance occurs when a large company, or group of companies, come together to:
 - ✓ Eliminate or discipline a competitor,
 - ✓ Drive out competitors, or
 - ✓ Restrict new businesses from entering the market...

with the intention of preventing or substantially lessening competition to solely own the market.

PILLAR 2: Abuse of Dominance

Article 102 TFEU – What does Dominance mean?

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- **A dominant company is one that enjoys the freedom to set prices and production volumes without competitive pressures.**
 - ✓ It is ‘unlikely’ if a company has below 40% of the market share but not impossible.
 - ✓ This and the fact that the market itself can be widely defined means that this market share calculation cannot be the sole factor in assessing dominance.
 - ✓ Dominance itself is not anti-competitive. However, if the **conduct** of the dominant company results in artificially high prices or significantly reduced choice for consumers, it can attract regulatory action.

PILLAR 2: Abuse of Dominance

Article 102 TFEU – What is Abusive Conduct?

- **There are many actions that if taken by a dominant company, can be deemed to be abusive and anti-competitive:**
 - ✓ Price gouging or charging extortionate prices in the absence of any competitors
 - ✓ Limiting production to create scarcity and exclusivity to drive up price
 - ✓ Refusal to supply a long-standing customer for no good reason
 - ✓ Charging different prices to different customers for identical goods and services (also known as price discrimination).
 - ✓ Forcing customers to buy related products or sign up to service contracts as a condition of purchase (also known as bundling or tying)

- **Dominance is difficult at times to gauge**
 - ✓ is ultimately a decision for an investigating regulator, and the position can change quickly depending on market circumstances. As such, never make the call alone.

In the News...Art. 102 TFEU



PILLAR 3: Mergers & Acquisitions

EU Merger Regulation

- **Merger control refers to the procedure of reviewing mergers and acquisitions to vet in advance whether mergers will**
 - ✓ Have a detrimental impact on competition, or
 - ✓ Result in anti competitive effects.

- **There are two levels of merger control in the EU:**
 - ✓ EU merger control for certain transactions with a "Community dimension", which fall within the jurisdiction of the European Commission under Council Regulation (EC) No. 139/2004 (EU Merger Regulation); and
 - ✓ National merger control for those transactions which do not meet the EU Merger Regulation criteria, but qualify for investigation under the national laws of individual Member States (Control of Concentrations Regulations).

PILLAR 3: Mergers & Acquisitions

The Merger Regulation - What is a “concentration”

A concentration is defined by the EU Merger Regulation as arising where:

- ✓ two or more previously independent undertakings **merge**; or
- ✓ one or more undertakings **acquire**, whether by the purchase of securities or assets, by contract or otherwise, direct or indirect control of the whole or parts of at least one other undertaking; or
- ✓ a **joint venture** is created which performs, on a lasting basis, all the functions of an autonomous economic entity (i.e. a "full function" joint venture).

And Turnover Thresholds are met.

In the News...Mergers



What has Competition Law got to do with me?

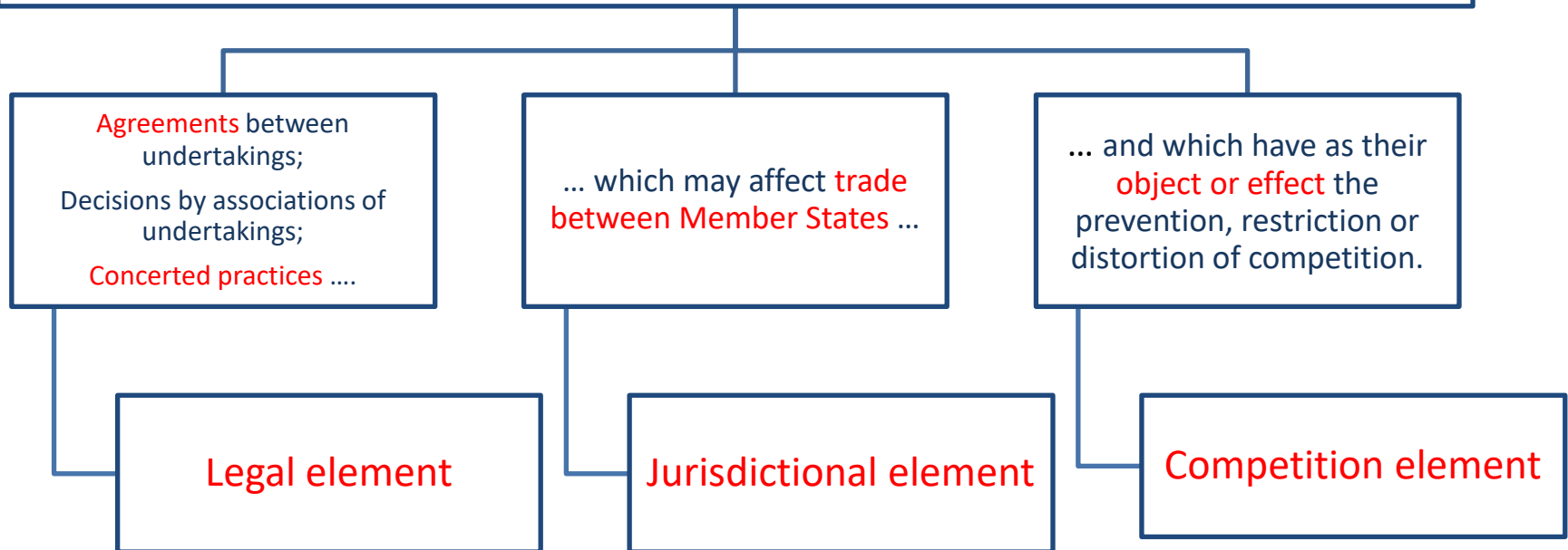
- Competition Law allows the oversight and regulation of negative conduct of persons and businesses carrying on a commercial/economic activity that don't allow others to operate on the market, restricting competition. When exclusion of rivals in business occurs, this leads to higher prices being imposed on you. By overseeing regulating negative business conduct, regulators help to ensure that rivals are not pushed out of the market.
- **Non-Compliance has serious consequences:**
 - **Fines** up to 10% of annual worldwide turnover
 - Liability in **damages** under national law
 - **Voiding** of contract
 - totally **disrupt commercial relationships** – e.g., where agreement is basis of core business functions
 - **Criminal liability** sometimes
 - Substantial **expenditure of time and money**
 - **Bad publicity**
 - Investigations by **other** competition authorities
 - Increased risk of **on-going surveillance**

The Text of Article 101 TFEU

The following shall be prohibited as incompatible with the common 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 common market:
 1. directly or indirectly fix purchase or selling **prices** or any other trading conditions;
 2. **limit** or control production, **markets**, technical development, or investment;
 3. **share markets** or sources of supply;
 4. apply **dissimilar conditions** to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 5. make the **conclusion of contracts** subject to acceptance by the other parties **of supplementary obligations** which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Three constitutive elements of Art. 101



The Notion of an Undertaking

Article 101 (and 102) applies only to “undertakings”

The CJEU’s definition of an undertaking: A Functional Approach

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

(Case 41/90, Höfner and Elser v Macrotron, para 21)

➤ *It has also been consistently held that any activity consisting in **offering goods or services on a given market** is an economic activity*

(Case C-180/98 etc para 75)

➤ *Procurement ancillary to a non-economic activity is not economic*

(Case T-319/99 FENIN)

➤ *Exercise of the powers of a public authority not economic activity*

Some Examples of an Undertaking

- Individuals acting as economic actors may themselves constitute an undertaking — for example, an opera singer , individual inventor
- In contrast, it seems that employees acting as such are not undertakings for the purposes of the competition rules (although the actions of the employee may be attributable to the employer).
- Sporting bodies and committees or clubs carrying out activities having a connection with sport.
- In 1990 World Cup FIFA case (Cases IV/33.384 and IV/33.378) FIFA was found to be an undertaking. Although a federation of sports associations which carried out sports activities, it also carried out (lucrative!) economic activities, for example, conclusion of advertising contracts, exploitation of World Cup emblems and conclusion of television broadcasting contracts.
- Professions.
- In Wouters the CJ made it clear that members of the Bar which offered, for a fee, services in the form of legal assistance carried out an economic activity and so were undertakings for the purposes of the rules
- Public bodies or corporations, even bodies which do not have an independent legal personality but which form part of a State's general administration, in so far as they offer goods or services in a given market (even if they involve the supply of public services or if the entity is subject to a public service obligation)

An Example of “Economic Activity”

Malta Bargains Limited (UK) v Awtorita tat-Turismu ta' Malta et.

CCAT held:

- The basic test is whether the entity in question is engaged in an activity that is an economic one involving the offering of goods and services on the market
- The MTA is a public entity which has its functions listed in Malta Travel and Tourism Services Act (Chapter 409 of the Laws of Malta).
- The MTA does not offer products and services to the market, but carries out its powers according to a law

“li l-ghoti ta’ sussidju da parte tal-Awtorita hi attivita in linea mad-dmirijiet u l-obbligi taghha ai termini tal-artikolu 5 tal-Kap. 409, primarjament u inter alia li tippromwovi lil Malta bhala destinazzjoni turistika u ghalhekk tali attivita mhix wahda ekonomika izda hi ezercizzju ta’ awtorita pubblika flinteress pubbliku. ...l-Awtorita mhix intrapriza kif definita fil-Kap. 379 tal-ligijiet ta’ Malta relattivament ghall-attivita’ in ezami u kwindi l-artikoli 5 u 9 tal-istess Kap. 379 ma jappikawx fil-konfront taghha f’dan irrigward”

What is **NOT** an Undertaking: exercise of Public Powers

- Therefore EU competition law adopts a functional approach and focuses on the commercial nature of activities and not on the type of entity engaged in them - regardless of their legal status and the way in which they are financed.
- However, where an entity is carrying out a task in the public interest which form part of the essential function of the State the State is acting in its capacity as a **public authority rather than an economic operator**
- Certain State activities have been singled out by the EU Court as not being of an economic nature.
 - the army or the police;
 - air navigation safety and control;
 - maritime traffic control and safety;
 - anti-pollution surveillance;
 - the development and revitalization of public land by public authorities; and
 - the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data.

What is **NOT** an Undertaking: activities of a purely social nature

Further, the case law has provided a set of criteria under which certain activities with a purely social function are considered non-economic.

- The management under the control of the State of compulsory social security schemes pursuing an exclusively social objective, functioning according to the principle of solidarity, offering insurance benefits independently of contributions and of the earning of the insured person.
- The provision of childcare and public education financed as a general rule by the public purse and carrying out a public service task in the social, cultural and educational fields directed towards the population.
- The organisation of public hospitals which are an integral part of a national health service and are almost entirely based on the principle of solidarity, funded directly from social security contributions and other State resources, and which provide their services free of charge to affiliated persons on the basis of universal coverage.

The Concept of an **Economic Activity**

Case T-319/99 FENIN v Commission

- FENIN is an association of undertakings which sells medical goods and equipment used in hospitals.
- SNS the organisations managing the Spanish national health system were in a dominant position on the Spanish market for the purchase of medical goods and equipment and that they had abused that position by delaying payment of their debts
- **GC held:**
- It is the activity consisting in offering goods or services that is the characteristic feature of an economic market, rather than the activity of purchasing goods or services.
- The nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounted to an economic activity.
- The relevant organisations were not engaged in economic activity as they operated according to the principle of solidarity, in that they were funded by social security contributions and provided services free of charge to their members. Accordingly, the purchasing activities which were linked to an activity which was not of an economic nature, must be classified in the same way.
- Therefore, SNS as a public sector body was not undertakings subject to EU competition law because it purchased goods for use in connection with an activity which is not economic in nature, (one which involves no remuneration and is purely social such as provision of health care services under a national social security system)

The First constitutive element of Art. 101

Agreements between undertakings;
Decisions by associations of
undertakings;
Concerted practices

Legal element

The Concept of an Agreement

- This concept is construed widely. In T-148/89 Trefilenrope the General Court declared that: *“for there to be an agreement within the meaning of...[Article 101(1) TFEU], it is sufficient for the undertakings in question to have expressed their joint intention to conduct themselves in the market in a particular way”*
- There must be an alignment on the competition parameters available to them.
- The form is of no importance:
 - _ A formal contract, signed or unsigned;
 - _ A non-binding gentleman’s agreements;
 - _ An oral understanding;
 - _ A protocol which reflects a consensus;
 - _ A set of guidelines issued by one undertaking and adhered to by another undertaking
- Article 101(1)(a)-(e) provides a non-exhaustive list of examples of types of agreements covered by Article 101(1). It is primarily aimed at classic cartels, known as **horizontal** competition, but it is also designed to deal with restrictive agreements between manufacturers and retailers, known as **vertical** competition, which affects the availability of goods and services

Horizontal Competition

RED FLAGS: CARTELS



- Cartel: An arrangement between competing firms where instead of competing with each other, cartel members rely on each others' agreed course of action, which reduces their incentives to provide new or better products and services at competitive prices
- As a consequence, their clients (consumers or other businesses) end up paying more for less quality.
- Cartels are most serious infringement of EU competition law:

Competition Commissioner Neelie Kroes: *"Cartels are the worst obstacle to competition, and I intend to penalise firms that operate them and so jeopardise the very basis of our market economy and harm consumers. I am sending a very clear message to company directors that such practices are unacceptable."*

- Be aware of competition laws when speaking or dealing with a competitor Meeting/talking with competitor may raise inference of agreement to restrain competition
- Competitor contacts receive utmost scrutiny from authorities
- Most common types of cartels are (i) price-fixing, (ii) market-sharing, (iii) output limitation

RED FLAGS: Price Fixing



- Agreement with a competitor on any term of sale that has an impact on price is almost always illegal under EU Competition Law
- For example, Trod Ltd an online seller of posters and frames was fined over £160,000 for agreeing with a competitor, GB eye Ltd not to undercut each other's prices when selling on Amazon's UK website
- Price-fixing is prohibited in both horizontal and vertical relationships
- Indirect agreements such as sharing confidential information may also be illegal, e.g. to :
Compare price lists before publication; Exchange detailed information on each other's production costs; Impose minimum prices on different distributors such as shops; Information on prices, rebates and other price-related information; Production or distribution costs; Forecast capacity; Investment plans
- For example, the Royal Bank of Scotland has been fined £28.6m for breaching competition law after sharing confidential details about the pricing of its commercial loans with rival staff at Barclays. This was done either over the phone or during social, client or industry events. This information was used by Barclays staff to set the pricing of its own loans, this suggests that some customers could have been charged more for their borrowing.

Market Sharing



- Market sharing occurs when competitors agree to divide or allocate customers, suppliers or territories among themselves rather than allowing competitive market forces to work and hinders maintenance of EU countries as a single market

- Market sharing can include:
 - _ allocating customers by geographic area
 - _ dividing contracts by value within an area
 - _ agreeing not to:
 - ✓ compete for established customers
 - ✓ produce each other's products or services
 - ✓ expand into a competitor's territory

- For example The UK CMA has fined two suppliers of specialist healthcare and manufacturing 'cleanroom' laundry services for breaking competition law by agreeing not to compete for each other's customers in Great Britain. The CMA found that, one party served customers in an area north of a line broadly drawn between London and Anglesey, and the other party served customers south of that line, and each agreed not to compete against the other.

Limiting Output



- Output restrictions may also be thought of as supply or acquisition restrictions. They occur when competitors agree to prevent, restrict or limit the volume or type of particular goods or services available.
- The intention of businesses in restricting outputs is to create scarcity in order to either increase prices or stop prices from falling. Generally, a cartel needs the support of key market participants to achieve this aim.
- Any business may independently decide to reduce output to respond to market demand, but it is against the law to make an agreement with competitors to coordinate restricting an output.
- Output restrictions reduce the available supply of particular goods or services which artificially increases demand for the product and so increases the price.
- Case C-209/07 BIDS an Agreement was concluded by federations representing farmers to reduce production capacity within the context of a cartel on the market for beef and veal

POP Quiz!

A. Three Malta companies dealing in selling ACs, agree that their customers will only be offered 15 days of credit instead of the normal 90 days of credit.

Are these companies infringing on Article 101?

- Yes.
- No.

B. The most important worldwide producers of chips for mobile phones are worried about serious over-capacity in the industry, which is reducing their profit margins. In fact, most producers are selling chips at a loss. The CEOs of these companies meet at a luxury spa resort in order to find a solution to their mutual problem. Instead of agreeing on specific quotas, which they believe will be very hard to monitor and enforce, they orally agree to shut down a number of production plants across Europe over a period of two years. They also agree to immediately reduce their production time by three hours a day and to refrain from investing in additional production capacity.

Are the chip producers infringing Article 101?

- Yes.
- No.

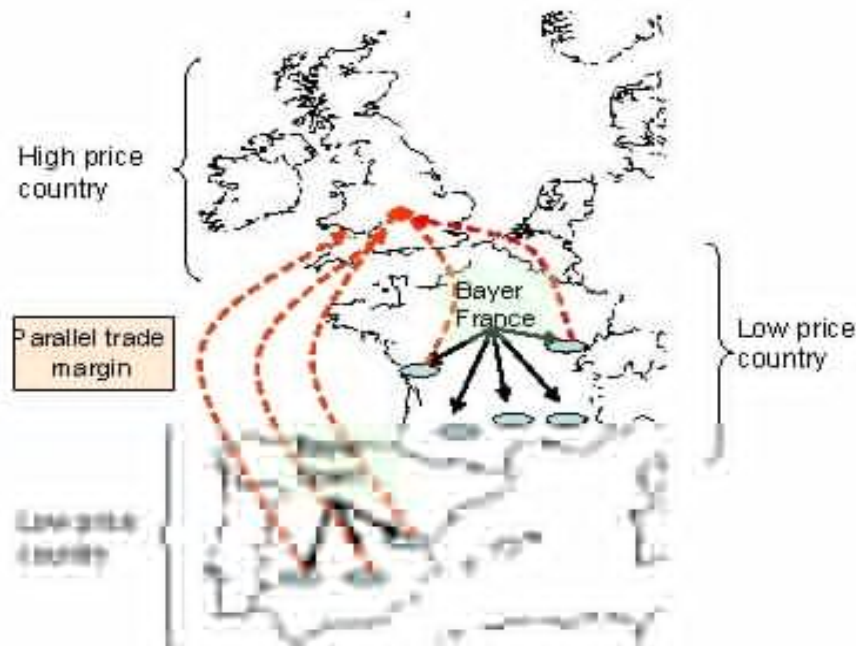
Bayer Case and the Concept of an Agreement



- Bayer was one of the main European chemical and pharmaceutical groups which made and sold a range of medicinal products designed to treat cardio-vascular illnesses under the brand names ADALAT
- In most EU Member States the price of medicinal products was fixed by the competent national authorities and the prices of ADALAT in France and Spain were about 40% lower than those charged in the UK.
- Those price differences led Spanish and French wholesalers to export a large quantity of ADALAT to the UK, inflicting 230 million loss for the British subsidiary of Bayer.
- The Bayer Group then changed its supply policy and refused to meet all orders placed by Spanish and French wholesalers to approximately the amounts needed for local use, as a means of preventing parallel exports originating from these two countries

= Anti-competitive agreement between Bayer and its Spanish and French wholesalers to limit parallel exports of ADALAT to the UK

Agreement (9) – The *Adalat* Case



In 1996, the Commission sanctions Bayer for operating an export ban, to curb parallel imports of Adalat to the UK. Bayer reduces supplies to Spanish and French wholesalers which exported products to the UK. There is no evidence that the wholesalers had agreed to Bayer's ban. Yet, the Commission applies the "contractual framework" criterion to find an agreement.

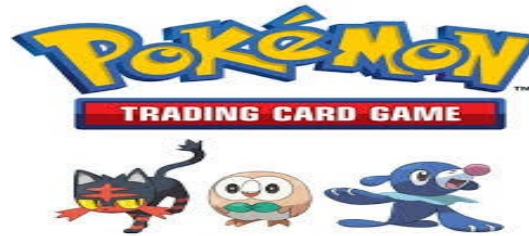
Bayer and the General Court

- Bayer appealed, claiming that there was no agreement; the conduct was unilateral, so Article 101 could not apply.
- The GC acknowledged that there could be an agreement where one person tacitly acquiesces in practices and measures adopted by another,
- But that conduct in question could not be viewed as an “agreement” just because the wholesalers continued to trade with Bayer.

= very concept of an agreement rests on a meeting of minds between economic operators...The GC found that it was necessary to demonstrate a concurrence of wills

- The GC found that the Commission had failed to demonstrate that:
 - Bayer imposed an export ban on the wholesalers;
 - Wholesalers were asked to accept Bayer’s supply scheme;
 - Wholesalers were punished by Bayer for exporting Adalat; and
 - Bayer monitored the destination of the medicines it supplied its wholesalers with.

TOPPS v BAYER



- The Topps Co Inc produces collectible products like stickers, trading cards or removable tattoos which follow certain themes, including Pokémon collectibles
- In 2000, there was a huge demand for such Pokémon collectibles while prices between Member States differed significantly. Families in high-price countries like Finland had to pay more than twice as much for the same Pokémon stickers as families in Portugal
- The Topps Company Inc and its European subsidiaries, Topps Europe, Topps International, Topps UK Ltd and Topps Italia SRL, infringed Article 101: Topps involved its distributors in a strategy designed to prevent wholesalers and retailers in countries where Pokémon products were sold at a comparably high price (e.g. Finland, France) from importing those products from low-priced countries (e.g. Spain, Portugal, Italy):
 - Topps initiated and co-ordinated a policy with the overall objective of preventing parallel imports of Pokémon collectibles in the EU
 - Topps actively involved its intermediaries in monitoring the final destination of Pokémon products and tracing parallel imports back to their source
 - Topps requested and received assurances that stock would not be re-exported to other Member States
 - In some cases where intermediaries did not co-operate, Topps threatened to terminate their supply

Commission Decision (COMP/C-3/37.980)

The First constitutive element of Art. 101

Agreements between undertakings;
Decisions by associations of
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Concerted practices

Legal element

The Concept of a Concerted Practice

- Like 'agreement', concerted practices have been interpreted broadly
- Its meaning was first considered in Case 48/69 Imperial Chemical Industries. The Commission concluded there was a concerted practice concerning price increases
- The undertakings challenged the Commission's decision, arguing that the price increases merely reflected parallel behaviour in an oligopolistic market where each producer followed the price leader.
- The Court of Justice defined the term 'concerted practice' as:
...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.
- A concerted practice is difficult to prove and the mere fact of parallel price increases are not conclusive. There must be a precise and consistent body of evidence to justify the finding of a concerted practice.
- In Case C-47/09 T-Mobile Netherlands, the ECJ ruled that the presumption of a causal connection between a concerted action (information exchange) and conduct on the market can apply even if the concerted action is the result of a single meeting between the undertakings .
- In addition, Cases 40/73 Suiker Unie (the Sugar Cartel case) states that a concerted practice need not be verbal or in writing, and can be direct or indirect.

Agreement/**Concerted Practice**

- The difference between an agreement and a concerted practice has been well captured by G. Monti:

...If two competitors enter into a contract to set the same price for their goods, this is an unlawful agreement;

If two competitors meet and exchange information about their intended commercial policy, this is a concerted practice only when the parties take this information into consideration into account in devising their future commercial policy...

- To bring a « concerted practice » case, the Commission has to adduce evidence of three elements:
 1. Contacts between competitors;
 2. A meeting of the minds or consensus between the parties to cooperate rather than to compete;
 3. A subsequent course of conduct on the market, and a causal link between the contacts and the course of conduct

Agreement or Concerted Practice? (HYPOTHETICAL SCENARIO)

- Malta telephony providers GO, Epic and Melita are the three largest mobile telephony services providers in Malta.
- All companies operate independently from each other. During the world famous Broadband Convention the Go CEO confides in his colleagues that prices for mobile telephone services have been rather low over the past years and that a price increase could be justified, given the intensified ancillary services offered to consumers.
- The CEOs do not however agree to raise prices, nor to adapt their commercial pricing policies in relation to mobile telephone services during the conference.
- Two days after the conference however, Go decides to raise the average price for its mobile telephone services with 2 euros per month. Two and three days later, Melita and Vodafone also raise their prices to the same level.

The Concept of a Decision of an Association of Undertakings

- Albeit not defined by the Treaty, the CJUE has construed the concept of association of undertakings extensively: any body which represents the interest of its members is eligible for the qualification as an association of undertakings. The public law status of an association is irrelevant for the purposes of competition law;
- As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general.

A Decision of an Association of Undertakings

- *Opinion of AG Léger in Case C-309/99 Wouters, ECLI:EU:C:2001:390, para 62*

“the concept of an association of undertakings seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article [101(1)] covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.”

- In practice, it covers not only trade associations but also a myriad of bodies with statutory, disciplinary, regulatory and executive duties:
 - General Council of the Dutch Bar (Wouters);
 - Belgian Architects Professional Order;
 - Customs’ agents associations (Commission vs. Italy);
 - Agricultural cooperative (Milk Mark).

The Concept of a **Decision** of an Association of Undertakings

- A decision must be understood as any initiative, irrespective of its form, which is taken by the association and which has the object or effect of influencing the commercial behaviour of its members:
 - ✓ Recommendations;
 - ✓ Guidelines;
 - ✓ Resolutions;
 - ✓ Ruling of administrative body (disciplinary);
 - ✓ Statutory rules, articles of incorporation, by-laws;
 - ✓ Oral exhortation

- Cases 96-102, 104-106, 86 and 110/82 IAZ International Belgium it was held that *...a recommendation, even if it has no binding effect, cannot escape Article 101(1) where compliance with the recommendation by the undertaking to which it is addressed has an appreciable influence in the market in question.*

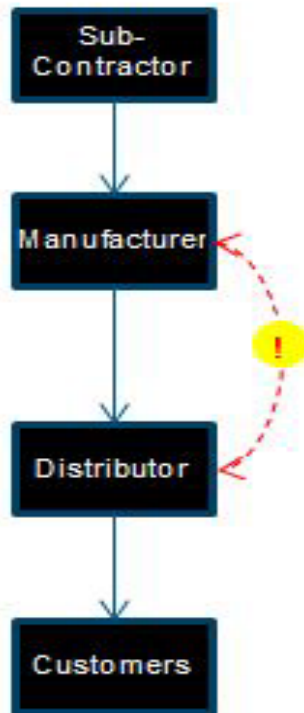
Vertical Competition: Other Anti-Competitive Agreements

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- Remember, Article 101(1) TFEU prohibits **agreements** and concerted practices which may affect trade between EU Member States and which may have the object or effect of preventing, restricting or distorting competition.
 - EU competition law prohibits all forms of restrictive agreements and concerted practices between companies so that Article 101(1) applies to both:
 - ✓ "horizontal" agreements (agreements between competing undertakings, such as cartels); and
 - ✓ "**vertical**" agreements (agreements between undertakings at different levels of supply chain: manufacturer and distributor; distributor and retailer)

VERTICAL VS HORIZONTAL ISSUES

Vertical

Vertical restrictions would include a manufacturer requiring distributors to resell at a particular price

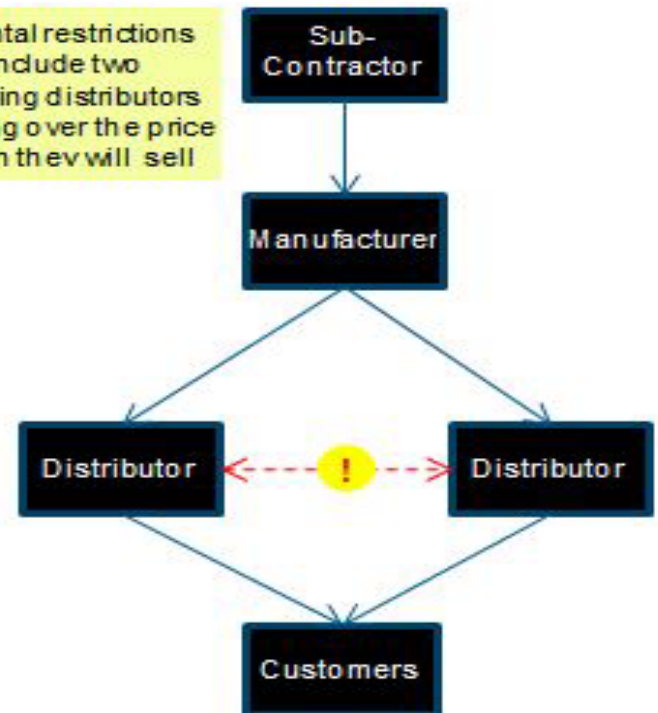


Common Supply Chain Issues: Vertical

- What price you can sell at
- Who you can sell to (or buy from)
- What markets you can sell to

Horizontal

Horizontal restrictions would include two competing distributors colluding over the price at which they will sell



Common Supply Chain Issues: Horizontal

- What price to buy or sell at
- Who to sell to or buy from
- What markets you can sell to
- Information sharing

Most Common Vertical Restraints

Vertical Restraint	Definition
Single Branding	Buyer is obliged/forced or induced/incentivised to purchase all or most of its requirements from only one supplier, that is, not to buy and resell (or not to incorporate) competing goods/services.
Exclusive Distribution	Where the supplier agrees to sell its products only to one distributor for resale in a particular territory (and where usually the distributor is restricted from active selling into other exclusively allocated territories)
Exclusive Customer Allocation	Where the supplier limits sales to only one buyer for a certain class of customer
Selective Distribution	Where the supplier agrees to sell the contract goods/services, either directly or indirectly, only to dealers selected on the basis of certain pre-defined qualitative or quantitative criteria and where those dealers agree not to sell to unauthorised dealers
Exclusive Supply	Where the supplier agrees, or is incentivised, to sell only or mainly to one buyer
Resale Restrictions	Buyer is obliged/induced not to resell the contract goods below certain price levels: minimum resale prices, fixed resale prices, recommended or maximum resale prices
Up-Front Access Payments	Fixed fees that suppliers pay to distributors at the beginning of a relevant period, in order to obtain access to their distribution network and remunerate services provided to the suppliers by the retailers.

Three constitutive elements of Art. 101

... and which have as their
object or effect the prevention,
restriction or distortion of
competition.

Competition element

Competition Element: The Concept of Object/Effect

- The words "object" or "effect" are to be read disjunctively. It is, therefore, sufficient that an agreement has either an "object" or an "effect" that is anti-competitive
- By Object: "certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition." : it is not necessary for the authority or the court to prove that the restriction had anti-competitive effects.
- For "by object" agreements regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part"
- The former EU DG for Competition Alexander Italianer has stated:

"Drunk driving is always illegal, because all our experience tells us that it is extremely likely to cause harm. The risk of harm is sufficiently great to warrant an outright prohibition, rather than judging infringements on a case by case analysis."

- On the other hand, where the analysis of the object of the agreement does not reveal an obvious anti-competitive objective it is then necessary to conduct an extensive analysis of its **effect** on the market

The Concept of “by Object”

Horizontal agreements and practices

- Fixing prices
- Exchanging current or future price information
- Sharing markets
- Limiting output
- Limiting sales
- Collective exclusive dealing arrangements

Vertical Agreements and practices

- Fixing minimum resale prices
- Imposing export bans
- Restricting cross-supplies between distributors within a selective distribution system

Competition Element: The Concept of Object/Effect

- Where a restriction does not reveal obvious harm to competition, the next question is whether it restricts competition by effect.
- Classification: “non per-se” – not necessarily harmful to competition, their effect depends on particular circumstances as the nature of the agreement and market conditions
- This means that, for an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or at least be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation.
- Under certain conditions, vertical agreements are likely to help realise efficiencies and the entry of new markets in a way which may offset possible negative effects. In general, vertical restraints will be viewed more favourably if they are of limited duration and assist in the introduction of new and complex products or the protection of specific investments.

Competition Element: The Concept of Object/Effect

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- Only vertical agreements that include hardcore restrictions (e.g., price-fixing or market-sharing) are prohibited Some clauses are never exempt: **Resale price maintenance or absolute territorial restrictions** on distributors
 - Non-compete clauses lasting more than five years or Post-termination clauses lasting more than one year
 - Read C-345/14 - Maxima Latvija – on an analysis of “object” and effect”

Restriction by Object – Vertical Agreement

Roma Medical Aids Limited - restrictions on resale prices in respect of online sales of mobility scooters over the internet

- Roma Medical Aids Ltd entered into arrangements with seven UK-wide retailers preventing them from (i) selling Roma-branded mobility scooters online and from (ii) advertising their prices online.
- the restrictions were not formally set out as contractual clauses, but were rather contained in circulars sent by Roma to its retailer network.
- Roma monitored retailer compliance and threatened retailers with cessation of supplies if they did not comply. The infringements were found to exist even though not all of the retailers complied all of the time. For competition law purposes, this constituted an infringing agreement or concerted practice.
- Documentary evidence demonstrated that one reason why Roma introduced the Prohibitions was to incentivise bricks and mortar retailers to stock and sell their products, on the basis that retailers would not face intra-brand competition from the internet and could therefore achieve a higher margin than would otherwise be the case
- Nonetheless a Restriction by Object

Restriction by Object - Vertical

...send an update on who is underselling our products and the outcome of the calls you've had with those Dealers who have been offering lower than recommended prices.

It's as [sic] important to inform me of those who give you a hard time or are unwilling to change their pricing. I will deal with those who fall into this category.'

We've received an order for an Alcora- ROM 765- today from your company.

Unfortunately, we are not in a position to supply you with the product until you've withdrawn the pricing for all Roma branded scooters from your official website [...]

Once this has been done and you inform us then we will be more than happy to process all orders for future Roma branded scooters. We will hold onto this order and hopefully you can make the change to your sites so we may supply with you with the product.

See also UK OFT decision on Pride Mobility Scooters:

https://assets.publishing.service.gov.uk/media/54522051ed915d1380000007/Pride_Decision_Confidential_Version.pdf

Application of Article 101

TFEU



International Skating Union's (ISU) restrictive penalties on athletes breach EU competition rules - Case C-124/21 – International Skating Union v European Commission (OJ 2021 C163/19).

Facts

- The ISU is the sole body recognised by the International Olympic Committee (IOC) to administer the sports of figure skating and speed skating on ice. Its members are national ice skating associations. The ISU and its members organise and generate revenues from skating competitions, as the Winter Olympic Games, World and European championships. The ISU also licenses broadcasting rights, negotiates sponsorship agreements and sells tickets worldwide.
- According to the ISU's Eligibility rules a speed skater becomes ineligible for a period up to a lifetime to participate in the ISU's international speed skating events if he participates in any speed skating events not authorised by the ISU or one of its Members.
- Two professional speed skaters Mr Mark Tuitert and Mr Niels Kerstholt members of the Royal Netherlands Skating Federation ("KNSB") which is itself an ISU Member complained that such Eligibility rules prevented them from participating in an international speed skating event ("Icederby"), offering athletes an opportunity to make a better living out of their profession, thanks to the significant prize money and other sources of revenues (for instance, sponsoring)

Application of Article 101 TFEU

ISU - An Association of Undertakings?

- The objectives of the ISU comprise regulating, governing and promoting the sports of figure and speed skating.
- But, besides its regulatory activities, the ISU conducts commercial activities related to the organisation and marketing of international ice sports events, including the licensing of broadcasting rights and sponsorship agreements - Since the ISU conducts economic activities, even if secondary to its primary objectives be considered as an undertaking within the meaning of Article 101(1) of the Treaty.
- The ISU is an association that is composed of individual national associations which administer skating and conduct economic activity at the national level as well organising Member can exploit the domestic TV rights and the marketing/advertising rights of the event. Therefore Members also constitute undertakings within the meaning of Article 101(1) of the Treaty.

Therefore, Since the Members themselves qualify as undertakings, the ISU constitutes an association of undertakings within the meaning of Article 101(1) of the Treaty that is active in the market for the organisation and commercial exploitation of international speed skating events.

Application of Article 101 TFEU

ISU – Eligibility Rules a **Decision** of an Association of Undertakings?

- According to the ISU General Regulations, the Eligibility rules are binding on all Members and their affiliated clubs as far as international matters are concerned. Due to the binding nature of the Eligibility rules, they coordinate the behaviour of the ISU Members.

Therefore, the Eligibility rules constitute a decision of an association of undertakings within the meaning of Article 101(1) of the Treaty.

Application of Article 101 TFEU

ISU – Restriction by **Object and/or Effect?**

- By imposing such restrictions, the ISU eligibility rules restrict competition and enable the ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events. In particular, the ISU eligibility rules restrict the commercial freedom of athletes who are prevented from participating in independent skating events. As a result of the ISU eligibility rules, athletes are not allowed to offer their services to organisers of competing skating events and may be deprived of additional sources of income during their relatively short speed skating careers.
- The ISU eligibility rules **prevent independent organisers from putting together their own speed skating competitions** because they are unable to attract top athletes. This has limited the development of alternative and innovative speed skating competitions, and deprived ice-skating fans from following other events.

Application of Article 101 TFEU

ISU – Impact on **Parameters** of Competition?

- The Eligibility rules have a negative impact on several parameters of competition, in particular: 1) **output**; and 2) **consumer choice and innovation**.
- First, the Eligibility rules result in an output restriction. In the absence of the Eligibility rules, potential new entrants, such as Icederby, would not be confronted with a limitation of their sources of supply and could organise additional speed skating events, without the need for the ISU's authorisation.
- Second, the Eligibility rules have an adverse effect on consumer choice and innovation since potential competitors could offer different, innovative formats of speed skating events. For instance, Icederby intended to offer a new format of speed skating, conducted on a 220 metre track (at ISU events, long track speed skaters use a 400 metre track and short track skaters use a 110 metre track). This new form of competition, where short track and long track speed skaters compete side-by-side, might have been an attractive new speed skating event for consumers.

However, due to the Eligibility rules, Icederby was prevented from organising this innovative form of competition.

Jurisdictional Element: The Concept of Effect on Trade

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- This is a jurisdictional requirement that distinguishes between agreements caught by the EU competition rules (contained in the TFEU) and those that are regulated (if at all) by the national competition laws of EU member states. Only agreements that are capable of affecting trade between EU countries to an appreciable extent are subject to Article 101. If there is no appreciable effect on inter-state trade, then any competition issues should be a matter exclusively for domestic competition rules.
 - An agreement concerning exports or imports between member states is an obvious example of an agreement that is likely to affect trade between member states. But an effect on trade between member states can be found even if all the parties to the agreement are located in one member state. It is not necessary to show that each restrictive clause (or the participation of any particular party) has an effect on trade between member states; it is sufficient if the agreement, viewed as a whole, has or is likely to have that effect.
 - The concept of "trade" is not limited to traditional exchanges of goods and services across borders. It is a wider concept covering all cross border economic activity, including establishment (see for example Case 172/80 Züchner, where a subsidiary is engaged in an anti-competitive arrangement apparently affecting only customers in a single member state, the transmission of profits in the form of dividends back to the parent company in another EU country has been held to be sufficient to give rise to the necessary effect on trade between member states

