Award in Principles of Competition Law

Lecture Title: Introduction to Competition Law

Diploma in Law (Malta)

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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

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What has Competition Law got to do with me?

- Competition Law oversees and regulates the conduct of undertakings carrying on a commercial/economic activity that don't allow others to operate on the market, restricting or even preventing competition.

- **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**

Quick Intro: European Competition Law Pillars

- **Anticompetitive agreements**: businesses with/out market power that operate at same/vertically related level must avoid hard-core restraints, concerted actions
- **Cartels**: competing businesses must not enter into anti-competitive agreements (price, market/customer allocation, bid rigging), or inappropriate info exchanges
- **Abuse of dominance**: businesses must not abuse their dominant market position in a way that affects the market structure/competition
- **Merger control**: businesses must not implement acquisitions, mergers and joint ventures that substantially lessen competition on a given market(s)

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 (NCA) of the Member States. In Malta, the NCA is the Office for Competition within the MCCAA.
- 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.

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Legal Framework

- **Articles 101 to 109 of the TFEU.** The TFEU covers prohibitions on agreements that have the object or effect of restricting competition, abuse of dominance, and state aid
- **Competition Act**, Chapter 379 of the Laws of Malta
- **Secondary EU Council Regulation (EC) No 139/2004** of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)
- The **Control of Concentrations Regulations**, S.L. 379.08 of the Laws of Malta
- **Other rules, guidelines, and notices** for interpretation, example:

✓ Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

✓ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

✓ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings

✓ The provisions of the TFEU are interpreted and applied by the **EU's courts**.

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Some basic Concepts

- **Agreement:** an arrangement /understanding or action in concert. It need not to be enforceable by law. Any communication among competitors, either in person or by telephone, letters, e-mail or through any other means even a handshake can be construed as an agreement
- **Undertaking**: means a person which engaged in any economic activity consisting in offering goods or services on the market; but does not include any activity of the State relatable to its sovereign functions, such as currency or defence and security
- **Dominance**: the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers
- **Relevant Market:** is a set of products/services that are considered substitutes by consumers, both in terms of their characteristics and the geographic area where they are offered.
- **Effect on Trade**: is the ground of jurisdiction which determines whether the European Union (EU) competition rules apply
- **Concentration**: is the legal combination of two or more firms by merger or acquisition, including joint ventures.

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU reads:

- Article 101(1) TFEU prohibits agreements between businesses or concerted practices which could affect trade between MS, and which have as their object or effect prevention/ restriction/ distortion of competition
- If so, agreement is null and void – not enforceable
- Restriction on competition can be by object or effect
- Effects depends on relevant market, market context, market power, appreciable effect of agreement, and whether there is a vertical or horizontal restriction (cartel v. RPM)

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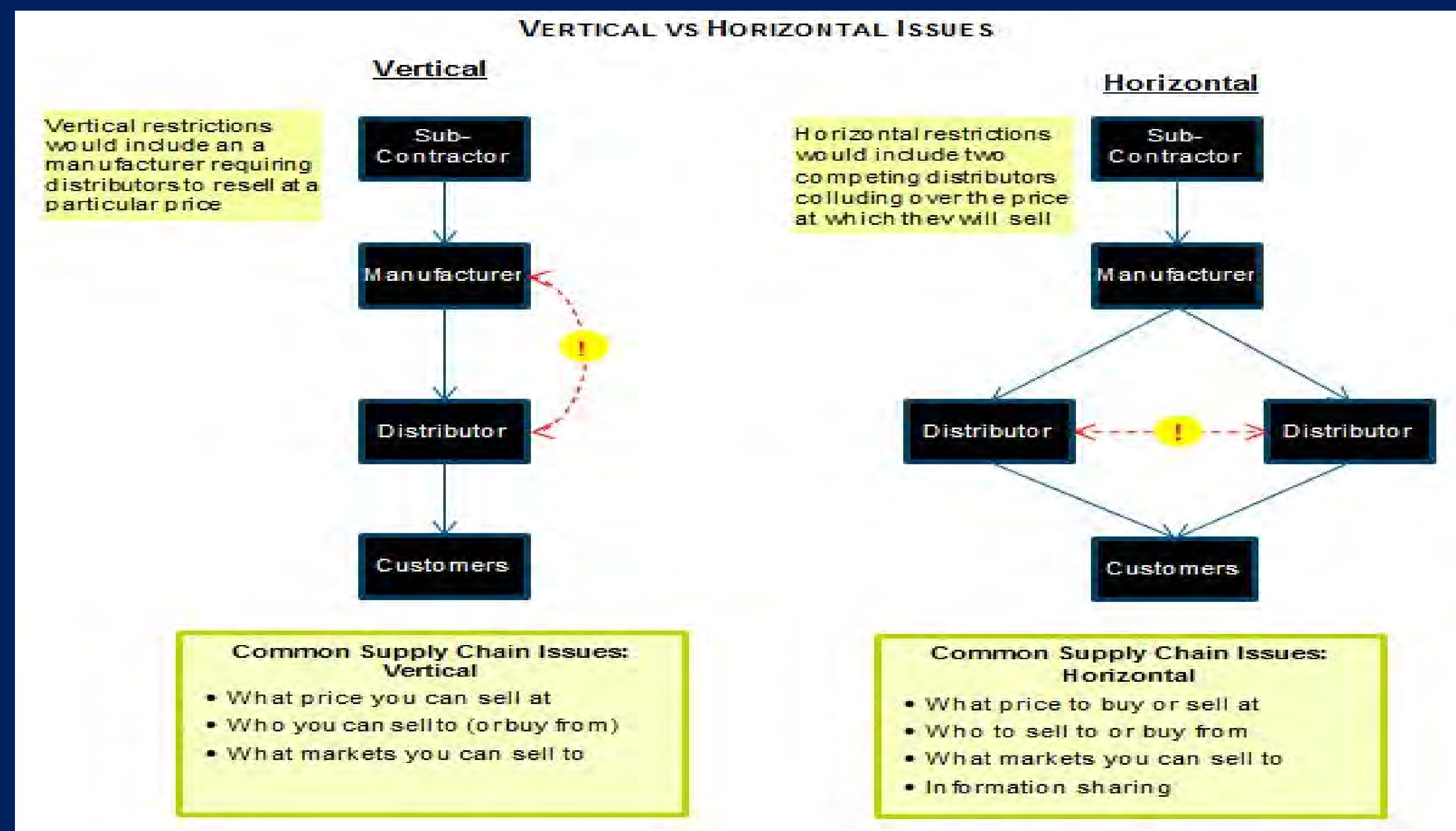
PILLAR 1: Horizontal and Vertical Relationships



Source: *https://www.hlcomplexcontracting.com/supply-chain-restrictions-and-exclusivity*

PILLAR 1: Anti-Competitive Agreements

- **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.

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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.

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PILLAR 1: An Ex of Horizontal Price Fixing

Businessman 1: Every shop in the mall is slashing their prices.

Businessman 2: Now we have to lower our prices too.

Businessman 1: Look, we'll all end up making less if we go on like this. Why don't we talk to other owners and stop the price war? Let's fix the prices together. Then we can keep our margin.

Businessman 2: Ok. Let's talk to other owner

Businessman 3: Smart Plan? If you're smart, you'll know this is against Competition Law.

Businessman 1: Come on! No one cares about small businesses like us.

Businessman 3: That's not right! It's got nothing to do with the business size.

Price-fixing: is serious anti-competitive conduct under Competition Law. No business, big or small, should agree with their competitors to fix prices.

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU - Vertical

- ✓ Agency – a legal or natural person entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal').
- ✓ Exclusive Distribution – the supplier allocates a territory or a group of customers exclusively to one or a limited number of buyers, while restricting all its other buyers within the Union from actively selling into the exclusive territory or to the exclusive customer group.
- ✓ Selective Distribution – the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria.
- ✓ Single Branding - those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier.

PILLAR 1: Anti-Competitive Agreements

01 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: vertical restraints 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.

PILLAR 1: An Ex of Vertical Resale Price Maintenance

An online retailer enters the mobility scooter market and prices its scooters cheaper than its bricks and mortar competitors.

The online retailer and the bricks and mortar retailers have the same supplier.

Several bricks and mortar retailers complain to the supplier that the online retailer's mobility scooters are too cheap and threaten to stop placing orders for those products.

The supplier asks the online retailer not to price below the RRP and threatens to cut supply unless the online retailer agrees.

This is RPM and is prohibited under Competition Law

PILLAR 1: An Ex of illegal Tying

Hospital XYZ: Our new contract negotiation with ABC Enterprises is under way. But they requested an additional clause specifying that if we want to buy the medical device that only ABC Enterprises makes, we must buy other medical supplies including medical masks, gloves, syringes etc. as well.

Employee XYZ: But our current suppliers of these equipment offer lower prices and better quality. There's no reason for us to switch to ABC Enterprises.

Hospital XYZ: But if we do not agree, ABC Enterprises will not sell us their medical device and we can't provide proper care without this device. That leaves us no choice at all.

Employee XYZ: Calm down. This tying clause might contravene Competition Law. ABC Enterprises cannot make such request.

Tie-in agreement are anti-competitive (subject to market context)

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PILLAR 1: Anti-Competitive Agreements

Individual Exemption

- An agreement that infringes Article 101(1) may be exempted under Article 101(3) if the benefits that it provides outweigh its anti- competitive effects
- That is, improve production/ distribution, promote technological progress, consumer benefit share
- Price fixing, market sharing and bid rigging will almost never be exempt
- Self-assessment : the parties must evaluate whether their agreement could infringe Article 101(1). Guidance notes on horizontal and vertical agreements have been published by the European Commission
- Block exemptions will also apply to certain types of agreements, such as vertical agreements (but consider also TTBE for tech licensing - market share below 30%).
- Covers both vertical and horizontal agreements

PILLAR 1: Anti-Competitive Agreements

Block Exemption

- When assessing whether a vertical agreement is exempted, you need to define relevant market to work out the market shares of supplier and buyer
- if the market shares are under 30%, the agreement will be exempted as long as none of the hard-core restrictions apply;
- if the market shares are over 30%, you should assess whether the agreement can be exempted under Article 101(3) TFEU, i.e.

✓ it must contribute to improving production/distribution/promote economic or technical progress

✓ allow consumers a fair share of benefit

✓ not impose vertical restraints that are not indispensable

✓ not enable businesses to eliminate competition

In the News…The EC: Melia and Art 101 TFEU

Source: *https://www.distributionlawcenter.com/documentation/case-cards/melia-at.40528/*

PILLAR 2: Abuse of Dominance

Article 102 TFEU

- **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.

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PILLAR 2: Abuse of Dominance

Article 102 TFEU - What does Dominance mean?

- **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.

- **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.

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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)

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PILLAR 2: A Pre-Condition: The Relevant Market

- In practice, dominance or market power can only exist in relation to the supply or acquisition of a particular class of goods or services. Therefore, the inquiry under Article 102 begins with an assessment of the market share of the firm or firms concerned, which, in turn, requires the definition of the relevant market

- A necessary pre-Condition: "For the purposes of Article [102], the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (...), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market." Case T-61/99 Adriatica di Navigazione para 27

- Purpose: "Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. ...and to identify in a systematic way the competitive constraints that the undertakings involved face." see Commission Guidance on Defining the Relevant Market

PILLAR 2: A Pre-Condition: The Relevant Market

- The relevant market is established by a combination of the market's two dimensions:

✓ the relevant product market = "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

✓ the relevant geographic market = "comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas." (Commission Guidance on RM, para 7)

- This means, for example, establishing whether Uber creates a new market, or whether it competes with taxi services. Or to determine whether Google does or does not compete with Amazon. To do so, various elements need to be taken into account, such as, among others, the characteristics of the different services and their prices.
- Again, a brand of herbal tea may have a large share of that market but a very small share of the total tea market. For example, a brand of herbal tea may have a large share of that market but a very small share of the total tea market

PILLAR 2: Examples of Abuse of Dominance

- ✓ **Discrimination**: Consider Malta and Gozo as separate markets for a dominant supplier. Suppose firm X is dominant in the market of tyres. Since it can easily segregate the market it may charge higher prices in one part and lower prices from other consumers for the same tyre in spite of its cost being same in both the markets.
- ✓ **Predatory Pricing**: Enterprise A, a manufacturer of cell phone screens is dominant in this market. It used to charge a price of Eur 16 per screen. However, it has recently started selling its screens at a loss making price of Eur 10 knowing that its competitors will not be able to match its price as their cost of production is higher than Eur 10. As a result of this, A’s competitors were forced to exit the market, after which, A, was free to charge any price that it wanted.
- ✓ **Tying**: A coffee machine manufacturer who is dominant in the coffee machine market would force the consumer to also buy coffee pods from it. Since, coffee machines and pods are different products; they form part of a separate relevant market. Consequently, the competition in the pods market may be affected as pod producers would lose their customers to the coffee machine manufacturer.

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In the News…ECJ: Unilever and Art 102 TFEU

Source: https://www.distributionlawcenter.com/news-analysis/abusive-conduct-by-distributors-may-be-imputed-to-dominant-producer-according-to-court-of-justice/

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In the News…The EC: Apple and Art. 102 TFEU

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PILLAR 3: Mergers & Acquisitions

EU Merger Regulation (EUMR)

Under the EUMR, the Commission is required to assess whether or not a transaction would "significantly impede effective competition" in the EU internal market. While dominance is not a pre-requisite for establishing competition concerns, it is mentioned as an important example of a problematic merger.

- **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.

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PILLAR 3: Mergers & Acquisitions

Key Element

Control is defined as "*having the possibility of exercising decisive influence on an undertaking*".

Control may be:

- ✓ Sole control, when acquired by one undertaking that is able to alone determine the undertaking's strategic decisions,
- ✓ Joint control, when acquired by two or more undertakings which need to co-operate to influence the strategic behaviour of the undertaking.

Control is exercised, in particular, through:

- ✓ Ownership or the right to use all or part of the assets of an undertaking.
- ✓ Rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

It is possible to acquire control not only by law, but also on a de facto basis. The acquisition of a minority interest can be considered a concentration if the minority shareholder will be able to exercise decisive influence, for example by vetoing strategic decisions in an undertaking.

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PILLAR 3: An example of (Joint) Control

A, B and C acquire 50%, 25% and 25% respectively in New Co

Board of directors of New Co is composed of 4 members:

- A can appoint: 2 members
- B can appoint: 1 member
- C can appoint: 1 member

Adoption of strategic decisions:

- 75% - at shareholders' meetings or
- Approval by ¾ - of board members

A cannot adopt alone the strategic decisions but has the ability to block them with its 50% shareholding

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PILLAR 3: Mergers & Acquisitions

Primary thresholds:

€5 billion - parties' combined worldwide turnover;

AND

€ 250 million - each of at least 2 parties has EEA-wide turnover,

UNLESS

all parties generate at least 2/3 ('2/3 Rule') of their individual EEA-wide turnover in one and the same EEA Member State (EU + Iceland, Lichtenstein + Norway).

=

Notification is mandatory ex ante

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PILLAR 3: Mergers & Acquisitions

Alternative thresholds:

€2.5 billion - parties' combined worldwide turnover;

AND

€100 million - each of at least 2 parties has EEA-wide turnover

AND

in at least 3 EEA member states:

✓ €100 million - combined turnover, and

✓ €25 million - at least 2 parties each has turnover

UNLESS

2/3 rule

=

notification is mandatory ex ante

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PILLAR 3: Mergers & Acquisitions

Malta thresholds:

The combined aggregate turnover in Malta of the undertakings concerned exceeded EUR2,329,373.40 in the preceding financial year;

AND

Each of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover in Malta of the undertakings concerned in the preceding financial year.

=

notification is mandatory ex ante

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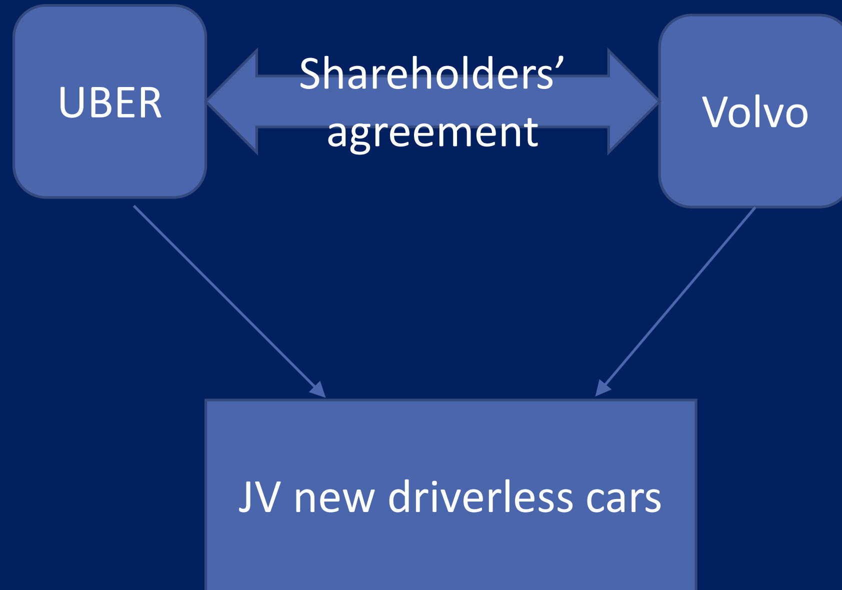
PILLAR 3: Mergers & Acquisitions



Uber 1 = 35 million
Volvo 2 = 26 million
10% of 61 million = 6.1 million
Notification required ex ante

Uber 1 = 980K
Volvo 2 = 26 million
10% of 26.98 million = 2.6 million
Notification not required

The undertakings concerned in this example are, (i) UBER and (ii) Volvo. The JV is not an undertaking in that it doesn't have turnover and therefore it is excluded from the turnover calculation (in this example).

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PILLAR 3: Mergers & Acquisitions

Merger review may be said to be based on an age-old dictum, 'Prevention is better than cure' and therefore ex-ante in nature.

Rationale for Ex-ante regulation of Concentrations:

- ✓ should not be permitted to create, enhance, or entrench market power or to facilitate its exercise
- ✓ enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives
- ✓ Unilateral effects – Firms can enhance market power simply because of elimination of competition through merger or acquisition.
- ✓ Coordinated effects – merger can also result in increased risk of joint dominance through coordinated, accommodating, or concerted behaviour among remaining market players in relevant market
- ✓ Unscrambling a merger may also involve high socio-economic costs. Regulation of concentrations provides legal certainty to business, had the combining enterprises taken clearance after filing notification

PILLAR 3: An Example of Unilateral Effects

Suppose there are three main firms in the cardboard boxes market in Malta having the following market shares:

Firm	Market Share
Ecofibre Inc	35
Boxin Enterprises	25
Cardboard Limited	15
Others	25

There are high barriers to expansion and entry (in view of the high financial and regulatory costs of setting up a factory).

Ecofiber decides to acquire its main rival Boxin to become the largest producer with a combined market share of 60%, leaving Cardboard in second place.

Such an acquisition may significantly increase the market power of the combined entity and allow it to unilaterally raise its box prices thereby impinging on the competition in the market

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In the News...Google and Mergers

The Parties

Google is active the supply of a wide range of products and services including licensable operating systems ("OSs") for smart mobile devices (Android) and smartwatches (Wear OS) and offers a health and fitness application ("app").

Fitbit is a technology company that develops, manufactures and distributes wearable devices, software and services in the health and fitness sector.

The Transaction

Following the Transaction, Google will own 100% of Fitbit's shares = **Control**

In the News…Google and Mergers

<u>Turnover Threshold</u>
Google: EUR 144 580M + Fitbit 1 282M = combined worldwide in excess of 5Billion

AND

Each of Google and Fitbit has an Union-wide turnover in excess of EUR 250 M

BUT

they do not achieve more than two-thirds of their aggregate Union-wide turnover within one particular Member State.

=

The Transaction therefore has an **Union dimension pursuant to the EU Merger Regulation**.

In the News…Google and Mergers

Investigation

Following an in-depth investigation of the proposed transaction, which combines Google's and Fitbit's complementary activities. The Commission found that:

- ✓ Fitbit has a limited market share in Europe in the fast-growing smartwatch segment where many larger competitors are present, such as Apple, Garmin and Samsung.
- ✓ The proposed transaction leads to very limited horizontal overlaps between the activities of Google and Fitbit.
- ✓ The Commission's investigation focused **on the data collected via Fitbit's wearable devices and the interoperability of wearable devices with Google's Android operating system for smartphones**.

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In the News…Google and Mergers

Concern

The Commission had concerns that the transaction, would have harmed competition in particular:

Advertising: By acquiring Fitbit, Google would acquire (i) the database maintained by Fitbit about its users' health and fitness; and (ii) the technology to develop a database similar to that of Fitbit.

Access to Web Application Programming Interface (‘API') for digital healthcare: A number of players in this market currently access H&F data provided by Fitbit through a Web API, in order to provide services to Fitbit users and obtain their data in return.

Wrist-worn wearable devices: Google could put competing manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones.

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In the News…Google and Mergers

Concern

By increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google's services in the markets for online search/display advertising, and the entire “ad tech” ecosystem. The transaction would therefore raise barriers to entry and expansion for Google's competitors for these services to the detriment of advertisers, who would ultimately face higher prices and have less choice.

Google might restrict competitors' access to the Fitbit Web API. Such a strategy would come especially at the detriment of start-ups in the nascent European digital healthcare space.

The Commission is concerned that following the transaction, Google could put competing manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones.

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In the News…Google and Mergers

Commitments:

- Google will not use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA
- Fitbit's user data will be stored in a “data silo” which will be separate from any other Google data that is used for advertising.
- Google will ensure that EEA users will have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services (such as Google Search, Google Maps, Google Assistant, and YouTube).
- Web API Access Commitment: Google will maintain access to users' health and fitness data to software applications through the Fitbit Web API, without charging for access and subject to user consent.

Public Enforcement

- EU competition rules can be enforced both at the European – by the Commission – and national levels – by NCAs
- According to Regulation 1/2003, the Commission and the NCAs form a “network” of competition authorities (the “ECN”).
- All those authorities can apply the EU competition rules. To avoid duplication of efforts and decisional conflicts, distribution of cases amongst ECN is subject to certain principles

✓ Commission focuses on (i) hardcore cartels with significant transnational interest (+3 rule); and (ii) cases raising new questions of law.

✓ NCAs may also provide assistance to the Commission in the context of investigations in the MS

✓ Cases are allocated to the “best placed” NCA (generally the 1st one to start an investigation…).

Public Enforcement

- Member States MUST appoint NCAs (Article 35 of Regulation 1/2003). In Malta the Office for Competition (OC) is the designated NCA which has the power to investigate and request the Civil Court (Commercial Section) to issue an infringement decision with or without penalties, case and desist orders etc.
- The OC usually initiates an investigation on the submission of a reasonable allegation in writing by a complainant or ex officio
- The OC has the duty to look into every complaint and either initiate an investigation or reject the complaint.
- In carrying out its obligations the OC may issue requests for information; carry out "dawn raids" as well as seek the imposition of an interim measure.
- Businesses must cooperate with the OC and must submit themselves to inspection. The OC Commission can, among others:

✓ Enter any premises, land and means of transport;

✓ Take or obtain in any form copies of or extracts from books or records;

✓ Seal any business premises and books or records for the period necessary for the inspection

✓ Ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents

PILLAR I – Article 101 TFEU

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."

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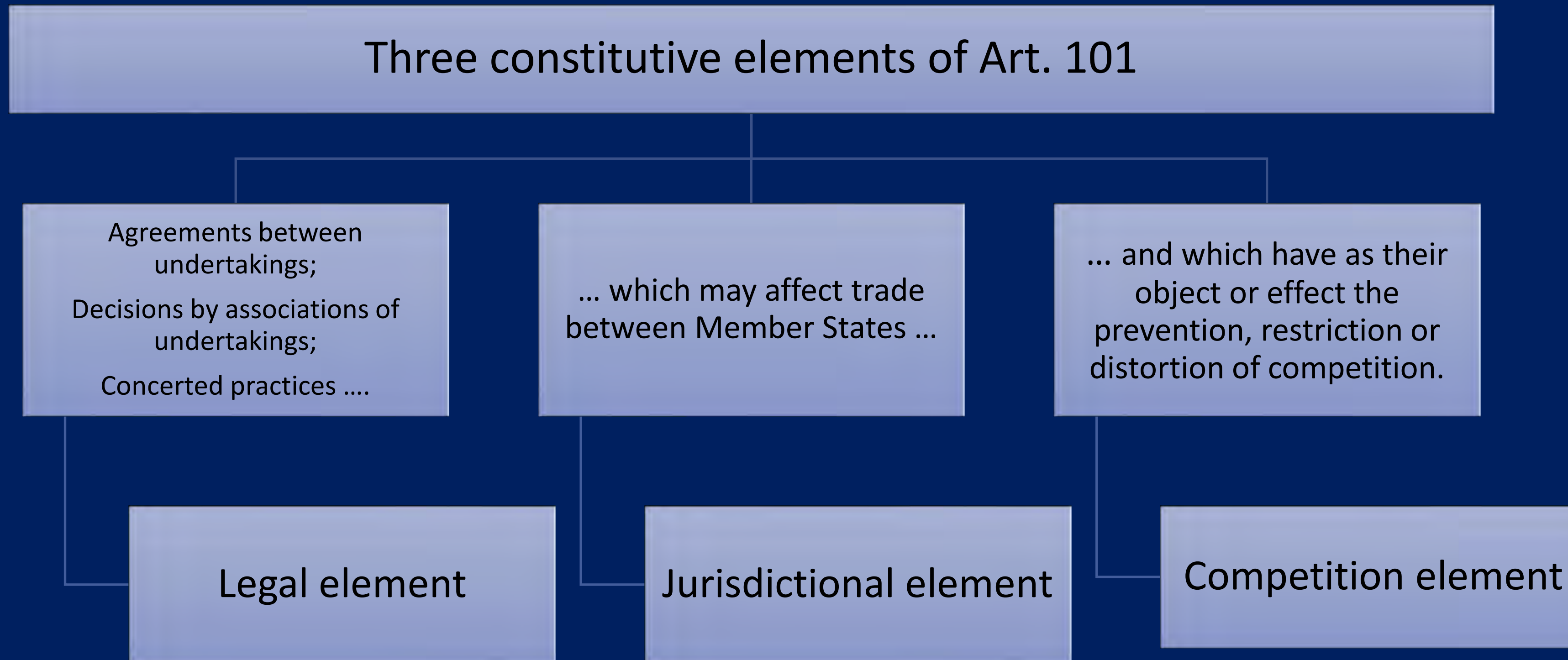

Three constitutive elements of Art. 101
Agreements between undertakings;
Decisions by associations of undertakings;
Concerted practices ….
… which may affect trade between Member States …
… and which have as their object or effect the prevention, restriction or distortion of competition.
Legal element
Jurisdictional element
Competition element

Legal Element - 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 Elsner 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*

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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 **pubic 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.

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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

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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

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RED FLAGS: Price Fixing

- Agreement with a competitor on <u>any term of sale</u> that has an <u>impact on price</u> 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 <u>horizontal</u> and <u>vertical</u> 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

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.

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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.
- That led to significant parallel exports of Adalat from Spanish and French wholesalers to the UK, which caused a significant loss of turnover for Bayer's UK subsidiary. 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.

- Bayer changed its delivery policy in order to prevent or limit exports of Adalat by wholesalers to the UK, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. That led to significant parallel exports of Adalat from Spanish and French wholesalers to the UK, which caused a significant loss of turnover for Bayer's UK subsidiary

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

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 Pokemon 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 undertakings;

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

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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.

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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.

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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

- 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.

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

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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.

Object/Effect

- 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”

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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**

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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

Jurisdictional Element: The Concept of Effect on Trade

- 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

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