Award in Principles of Competition Law

Lecture Title: Introduction to Competition Law

Diploma in Law (Malta)

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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)

What Is Competition Law, in Plain English?

- **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.
- In simple terms, it is the **law of fair play** in business. It sets the rules that stop businesses from cheating, colluding, or abusing their power in ways that harm customers, workers, or other businesses.
- Think of it like the rules of a football match. Without a referee and a rulebook, the strongest team could just trip everyone up, bribe the referee, and agree with the other team on the final score before kick-off - **Competition law is the referee.**

- **There are three big things competition law prohibits:**

➢ Agreements between competitors to cheat — such as fixing prices or sharing markets;

➢ Abuse of dominance — a very powerful company crushing smaller rivals unfairly

➢ Mergers that give one company too much power — preventing the creation of monopolies that harm consumers and markets

Why Does It Matter? The Goals of Competition Law

- Competition law is a body of law that regulates competition and attempts to prevent the creation of monopolies. Its purpose is to protect consumers and promote fair and competitive markets.

- **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 - businesses that compete are forced to operate better and leaner*

✓ 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

✓ Drives i*nnovation*: To deliver this choice, and produce better products, businesses need to be innovate = creates better conditions for *investors and innovators*

✓ Reduces *prices* - ultimately, healthy competition increases consumer benefit by keeping prices in check

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 disrupts 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

Its not just about hard core Cartels: Labour Market & Competition Law

Quick Intro: European Competition Law Pillars

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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 and the Civil Court (Commercial Section) 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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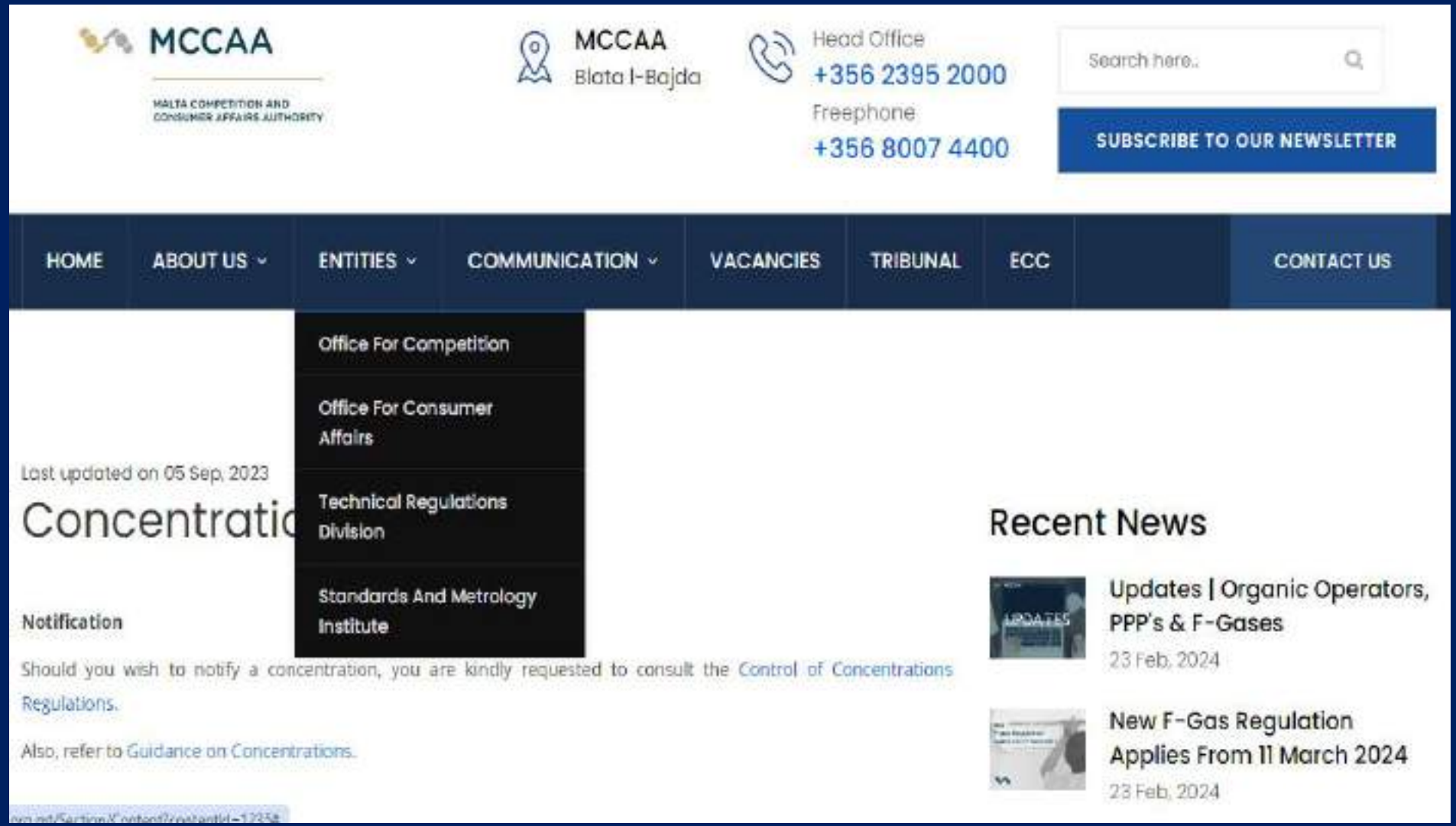
Public Enforcement – The OC within the MCCAA



Public Enforcement

- Member States MUST appoint NCAs (Article 35 of Regulation 1/2003). In Malta the OC 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 rejects 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

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**,** examples include**:**

✓ 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 (Article 101 Guidance)

✓ 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 (Article 102 Guidance)

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

✓ 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 – ARTICLE 101 OF THE TFEU

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU reads:

- Article 101 TFEU consists of 3 paragraphs the first of which sets out a general prohibition:

Article 101(1) 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

- Restriction on competition can be by object or effect
- If so, agreement is null and void – not enforceable according to Article 101(2)
- If Article 101 (1) applies the agreement may be exempted under Article 101(3)

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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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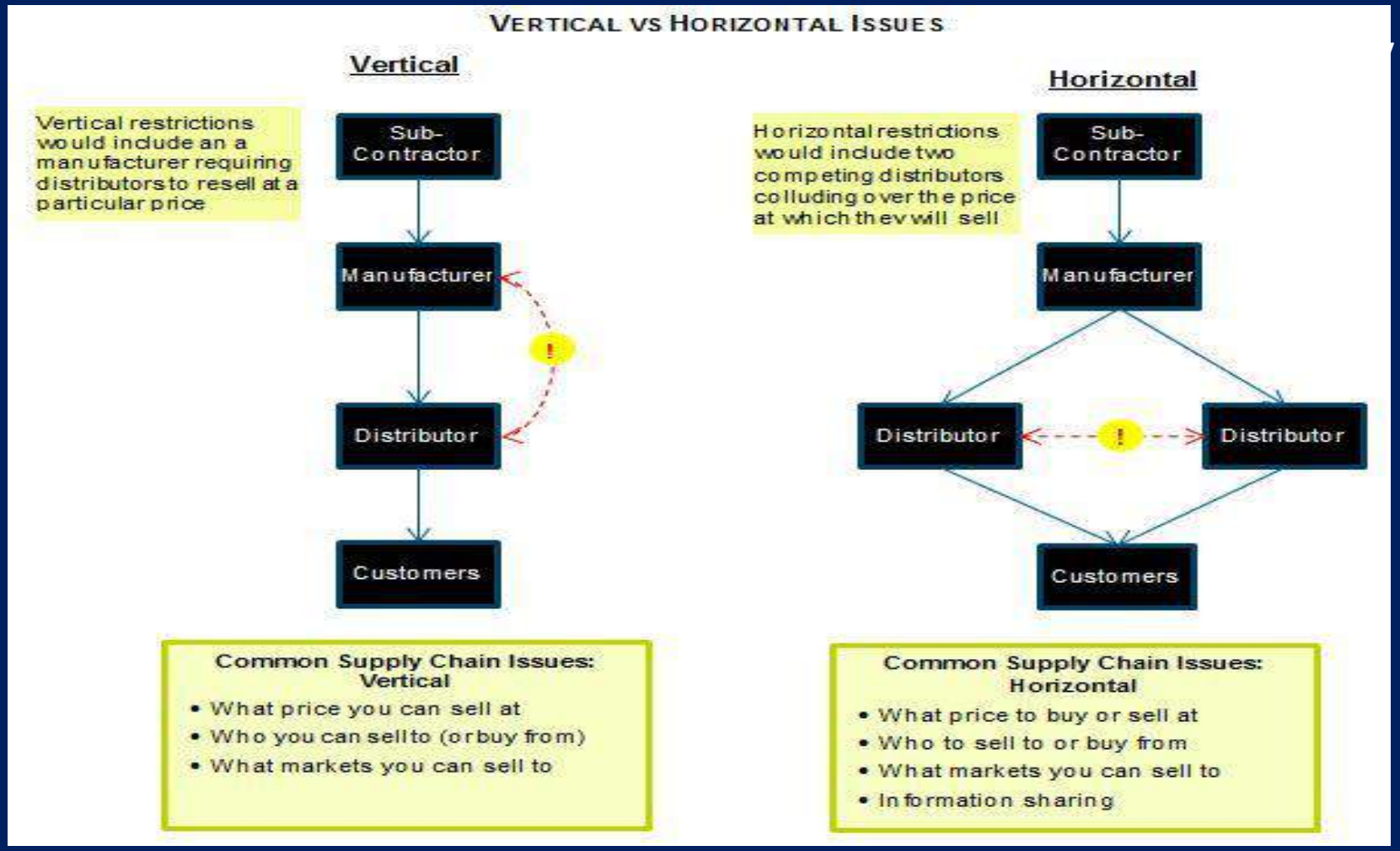
PILLAR 1: Horizontal and Vertical Relationships



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

PILLAR 1: Anti-Competitive Agreements

Article 101 TFEU - Horizontal

- **There are 4 deadly sins of competition law that incur the highest penalties and should never be committed:**

✓ 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: What Does a Cartel Look Like in Banking?

Four competing banks begin holding regular informal meetings — sometimes over lunch, sometimes in hotel lobbies. What starts as friendly industry networking gradually becomes something else entirely.

They begin to:

- Discuss and coordinate their fee structures with one another
- Agree that they will not actively compete for each other's key clients
- Regularly share confidential information about customer orders, pricing strategies, and market positions

One banker even keeps a private record of what was agreed at each meeting. They give their arrangement a nickname among themselves — quietly acknowledging that what they are doing is not ordinary business practice.

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PILLAR 1: Why is this illegal?

These banks are no longer operating independently. Instead of competing, they are cooperating — to keep prices artificially high and protect their market positions without earning them fairly. This is a cartel, and it is one of the most serious infringements of competition law:

What They Did	Why It Is Illegal
Coordinating interest rates and fees	Price-fixing — directly prohibited under Article 101 TFEU
Agreeing not to compete for each other's clients	Market sharing — eliminates competition entirely
Sharing confidential pricing and client information	Exchange of competitively sensitive information — illegal even without a formal agreement

PILLAR 1: What Does a Cartel Look Like in Hair Salon Products?

Eight major companies — together accounting for 70% of the professional haircare sector in Spain — coordinate their actions through regular, stable, and systematic meetings held twice a year for nearly 20 years. They call themselves the "G8".

They agree to:

- Exchange recent price increases and planned future increases, complete with projected dates, discounts, payment terms, and incentives for sales staff
- Not recruit each other's sales staff — referred to amongst themselves as a "gentlemen's pact“
- Share individual company data in writing through structured information panels distributed to all members

The trade association STANPA eventually joined the cartel, replacing a chartered accountant who had previously collected and processed the information on behalf of the group.

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PILLAR 1: Why is this illegal?

By merely exchanging that strategic information over such a lengthy period of time, the companies knowingly replaced the risks of competition with cooperation — voluntarily relinquishing their independent conduct in the market and reducing the play of competition

What They Did	Why It Is Illegal
Exchanging recent and planned price increases at every meeting 7	Price coordination — directly prohibited under competition law
Agreeing not to recruit each other's sales staff 3	Market-sharing — eliminates competition for talent
Exchanging structured data panels on pricing, discounts and financing 8	Exchange of competitively sensitive information — illegal even without a formal written agreement
Using STANPA as a platform to organise and distribute information 5	A trade association facilitating a cartel is itself liable

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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.

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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: 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.

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PILLAR 1: An Ex of Vertical Resale Price Maintenance

The UK NCA received a complaint by an online reseller of Dar Lighting, a supplier of domestic light fittings. He wrote: "…. we were told not to sell any Lighting Book 2 or David Hunt products below list price… We were told if we did not adhere to this policy our account would go on hold or be closed…" Further to this, the reseller showed a WhatsApp message to the NCA from Dar Lighting to its resellers: "Can you increase the price to 325 until further notice."

Dar Lighting illegally restricted resellers' freedom to offer discounts beyond a certain level online.

When online resellers have the freedom to price items independently, competition can thrive as rivals compete to offer the best deal to customers. This gives people the option to compare prices and shop around for a better deal. However, if a supplier dictates to its resellers a specific minimum price that they cannot drop below, or tries to stop them from selling at a reduced price, rival resellers are prevented from competing on price and customers lose out. This practice is known s Resale Price Maintenance (RPM) and is illegal.

See https://www.gov.uk/government/case-studies/dar-lighting-fined-1-5-million-for-illegally-preventing-online-price-discounts

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
- Although Article 101 (3) covers both vertical and horizontal agreements, 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%).

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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

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PILLAR 1: What Does an Anti-Competitive (vertical) Arrangement Look Like in Hotels?

Booking.com, a major online travel platform — used by millions of consumers every day — requires every hotel that lists on its site to sign up to a price parity clause. This clause means that hotels can not offer their rooms at a lower price anywhere else — not on their own website, not through any other platform, not even to a walk-in guest at the front desk. Hotels that wanted access to Booking.com's enormous customer base had no real choice but to agree.

What Did This Mean in Practice?

- A hotel could not offer a cheaper rate on its own website — even though it would save on commission fees by doing so
- A hotel could not offer a better deal through a smaller competing platform — preventing rival platforms from competing on price
- Consumers were denied the ability to shop around and find a better price elsewhere
- Smaller and independent hotels were effectively locked in to Booking.com's terms with no ability to compete differently

PILLAR 1: Why is this illegal?

What Booking.com Did	Why It Is a Competition Law Concern
Requiring hotels not to offer lower prices elsewhere	Restricts competition between platforms and removes consumer choice
Applying parity clauses across all booking channels	Prevents hotels from rewarding direct bookings — harming both hotels and consumers
Locking hotels in through market dominance	A dominant platform imposing unfair trading conditions engages abuse of dominance rules
Preventing rival platforms from competing on price	Forecloses the market — making it harder for smaller platforms to grow

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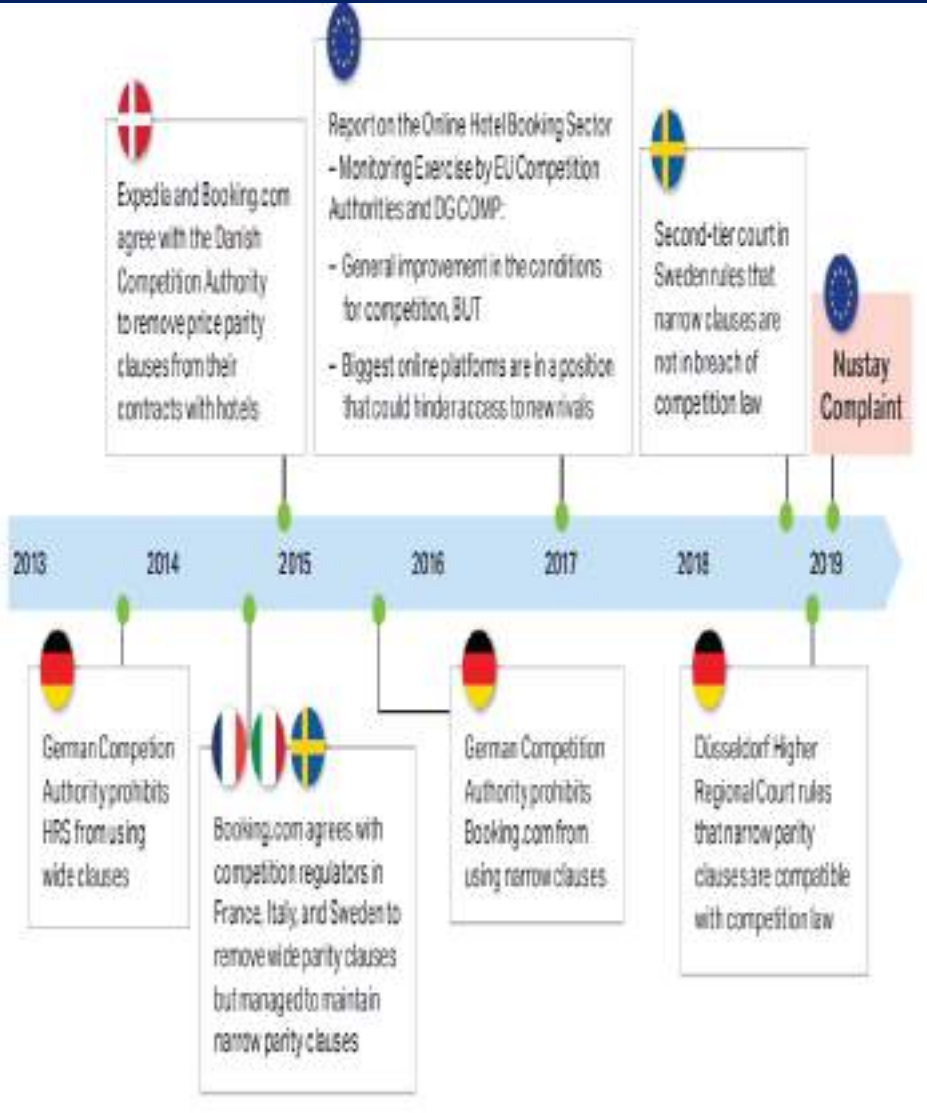
In the News…Booking.com and the EC



When entering the German market in 2006, Booking.com imposed a 'wide price parity clause' in Germany, which prohibited accommodations making use of Booking.com from offering lower prices through their own sales channels or through sales channels operated by third parties – such as competing OTAs.

The ECJ recognized that the main operation in this case, the provision of online intermediation services by OTAs to hotels, has neutral or positive effects on competition. It increases competition between hotels and makes it possible for consumers to search for and compare competing offers of hotel services.

However, wide parity clauses (which prevent hotels listed on the booking platform from offering rooms at prices lower than those offered at the platform both on their own direct sales channels and on third party sales channels) clearly produce appreciable anti-competitive effects as they reduce competition between the various hotel booking platforms and risk excluding small platforms and new entrants (to the prejudice of consumers)

PILLAR 2 – ARTICLE 102 OF THE TFEU

PILLAR 2: Abuse of Dominance

Article 102 TFEU reads:

- Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

- Abuse of dominance occurs when a large company, (or group of companies collective dominant):

➢ Eliminate or discipline a competitor,

➢ Restrict new businesses from entering the market

➢ Exploits customers

…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

✓ Limiting production to create scarcity and exclusivity to drive up price

✓ Refusal to supply or provide access to an important "facility"

✓ 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)

✓ Long-term exclusive agreements

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PILLAR 1: Discrimination — The Malta and Gozo Tyre Supplier

Firm X is the dominant supplier of tyres in Malta. Because Malta and Gozo are effectively separate geographic markets — with Gozo being more isolated and consumers having fewer alternatives — Firm X charges higher prices to Gozitan customers than to Maltese customers for the exact same tyre, despite its costs being identical in both markets.

What They Did	Why It Is Illegal
Charging different prices to different consumers for the same product	Price discrimination by a dominant firm — prohibited under Article 102(c) TFEU
Exploiting geographic isolation to extract higher prices	Taking advantage of consumers who have no real alternative — an exploitative abuse
Applying dissimilar conditions to equivalent transactions	Places certain trading parties at a competitive disadvantage

The lesson: Dominance comes with responsibility. A dominant company cannot simply exploit customers who have nowhere else to go.

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PILLAR 2: Predatory Pricing — The Cell Phone Screen Manufacturer

Enterprise A dominates the market for cell phone screens, historically selling at €16 per screen. Knowing that its competitors' cost of production exceeds €10, it deliberately drops its price to €10 — selling at a loss — not to benefit consumers, but to drive competitors out of the market. Once its rivals are gone, Enterprise A is free to raise its prices to whatever level it chooses.

What They Did	Why It Is Illegal
Pricing below cost of production deliberately	Predatory pricing — prohibited under Article 102(a) TFEU
Using financial strength to sustain losses competitors cannot match	Exclusionary abuse — designed to eliminate competition rather than compete on merit
Raising prices once competitors have exited	Demonstrates the predatory intent — consumers ultimately pay more, not less

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PILLAR 2: Tying — The Coffee Machine Manufacturer

A dominant coffee machine manufacturer tells consumers that if they buy its machine, they must also buy their coffee pods exclusively from the manufacturer. Coffee machines and coffee pods are two separate products and two separate markets — but the manufacturer uses its dominance in the machine market to foreclose competition in the pods market, locking out independent pod producers entirely.

What They Did	Why It Is Illegal
Conditioning the sale of one product on the purchase of another	Tying — prohibited under Article 102(d) TFEU
Using dominance in one market to extend power into a separate market	Leveraging dominance — eliminates competition in the tied market
Locking consumers into purchasing pods exclusively from the manufacturer	Restricts consumer choice and forecloses rival pod producers

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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.
- As for geography, this means whether the territory where the products are sold is international, national or local.

PILLAR 2: The Product Market: What Does Uber Actually Sell?

Possible Market Definition	What It Includes	What It Excludes
Narrow: Ride-hailing apps only	Uber, Bolt, FREE NOW	Taxis, buses, trains, priva
Medium: All taxi and private hire services	Uber, Bolt, traditional taxis, minicabs	Public transport
Broad: All urban passenger transport	All of the above plus buses, trams, metro	Long-distance transport

The **key test — substitutability:** Would a consumer switch from Uber to a traditional taxi if Uber raised its prices by 5-10%? If yes, they belong in the same market. If no, they are separate markets.

- Arguments for a **narrow** definition:

✓ Ride-hailing apps offer real-time GPS tracking, cashless payment, upfront pricing, and driver ratings — features traditional taxis do not always offer

✓ Certain consumers — particularly younger, tech-savvy users — may consider apps and taxis genuinely different products

- Arguments for a **broader** definition:

✓ For most consumers, the core service is the same — getting from point A to point B

✓ Price increases by Uber would likely push many consumers towards taxis or public transport

PILLAR 2: The Geographic Market: Where Does Uber Compete?

Possible Geographic Market	Reasoning
City-level (e.g. London, Valletta)	Uber operates city by city; a consumer in London cannot use a driver based in Manchester
National	Regulatory frameworks are national; Uber's presence and pricing may vary nationally
EU-wide	Unlikely — consumer behaviour and regulatory conditions vary significantly between Member States

In most competition authority assessments, the geographic market for ride-hailing services has been assessed at the city or metropolitan area level, since supply and demand are inherently local.

PILLAR 2: Why Does This Matter for Uber?

- If the market is defined as ride-hailing apps only in a specific city where Uber holds a very large share, Uber may be found dominant — and its conduct (such as pricing strategies, exclusivity arrangements with drivers, or surge pricing) will be subject to Article 102 TFEU scrutiny.
- If the market is defined as all urban transport, Uber's share is much smaller and dominance is far less likely. This is precisely why Uber and competition authorities have disagreed in various jurisdictions about how the market should be drawn.

The Golden Rule of Market Definition

- The market is defined by the consumer's choice — not the company's preference. A company does not get to decide which rivals it competes with. That is determined by what consumers would genuinely switch to if prices rose or quality fell.

In the News…European Commission v Meta (2025)

What isHappening?

- Meta — the owner of WhatsApp — announced a new policy in October 2025 that prohibits third-party AI providers from using the WhatsApp Business Solution (the tool that allows businesses to communicate with customers via WhatsApp) when AI is the primary service being offered.
- **In plain terms:** if your business is an AI assistant, Meta will block you from reaching your customers through WhatsApp.
- **Meanwhile,** Meta's own AI service — "Meta AI" — remains fully accessible on the platform.

In the News…European Commission v Meta (2025)

The Basic Setup

WhatsApp offers something called **the WhatsApp Business API** (Application Programming Interface) — so a doorway that allows outside software, including AI tools, to connect into WhatsApp and send or receive messages on behalf of a business.

Three Practical Examples

- 1. Customer Service Chatbots When you message a bank, airline, or retailer on WhatsApp and receive an instant reply at 2am — that is almost certainly an AI assistant operating through the WhatsApp Business API. The AI reads your message, understands what you are asking, and responds — all within WhatsApp.
- 2. Conversational AI Assistants Companies have built AI assistants that users can access directly through WhatsApp. Instead of downloading a separate app, a user simply messages a WhatsApp number and chats with an AI — asking questions, drafting text, or requesting information.
- 3. Business Automation A hotel, hair salon, or small business might use an AI tool integrated into WhatsApp to automatically handle booking confirmations, appointment reminders, or FAQs — without any human involvement.

In the News…European Commission v Meta (2025)

Why WhatsApp Specifically?

Reason	Detail
Scale	Over 2 billion users globally — it is where customers already are
Trust	Consumers are comfortable using WhatsApp — no new app to download
Accessibility	The dominant communication tool across large parts of Europe, India and Latin America
Business adoption	Millions of businesses already use it to communicate with customers

Why This Matters

Being blocked from WhatsApp is not a minor inconvenience for an AI provider — it means being cut off from billions of potential users. That is precisely why what Meta did next became a serious competition law concern.

In the News…European Commission v Meta (2025)

Who Is Affected?

- Third-party AI providers who offer conversational AI assistants through WhatsApp — enabling users to ask questions, generate content, or access customer support directly within the app — risk being blocked entirely from the platform
- Businesses that rely on third-party AI tools integrated into WhatsApp to serve their customers
- Consumers who may lose access to the AI services they use through WhatsApp

Why Is This a Competition Law Problem?

- WhatsApp is not just any messaging app. It is the dominant messaging platform used by billions of people worldwide, including across the EEA. For many businesses, it is an essential channel for reaching their customers — there is simply no realistic alternative of equivalent reach. Meta now tells competing AI providers: "You cannot use our platform to offer your primary service — but our own AI can."
- This case engages the same principle as the coffee machine and pods example: Meta is using its dominance in one market — messaging platforms — as a lever to advantage its own services in a separate, growing market — AI assistants.
- If proven, this would constitute an abuse of a dominant position contrary to Article 102 TFEU — which prohibits abusive conduct by dominant companies in the EU

PILLAR 3 – MERGER CONTROL

PILLAR 3 – MERGER CONTROL

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

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PILLAR 3: A Simple Example — Two Supermarket Chains Merging

Imagine the two largest supermarket chains in Malta — together accounting for 60% of all grocery sales on the island — announce that they want to merge into a single business.

Before the merger:

- Consumers can shop around and benefit from price competition between the two chains
- The two chains compete aggressively on price, promotions, and quality to win customers

After the merger:

- The combined business now controls 60% of the market
- There is one fewer competitor — reducing the pressure to keep prices low
- Consumers have less choice and less bargaining power

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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).

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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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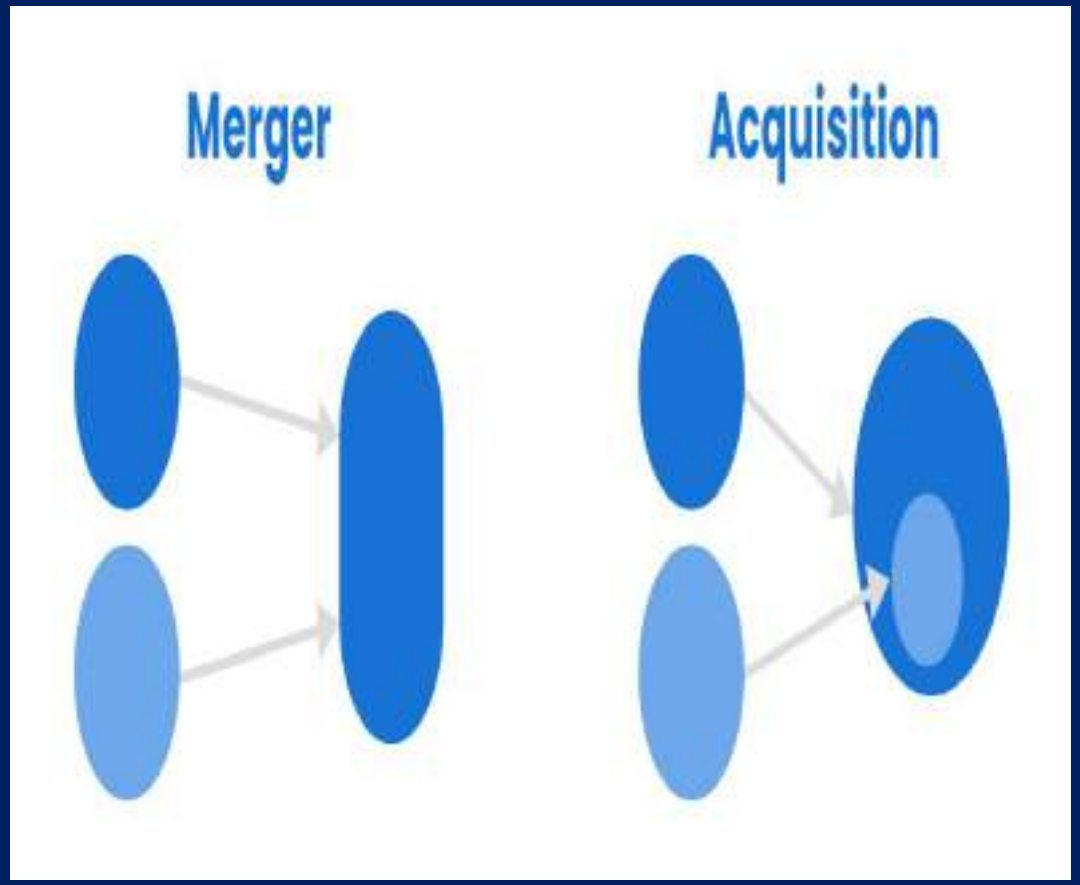
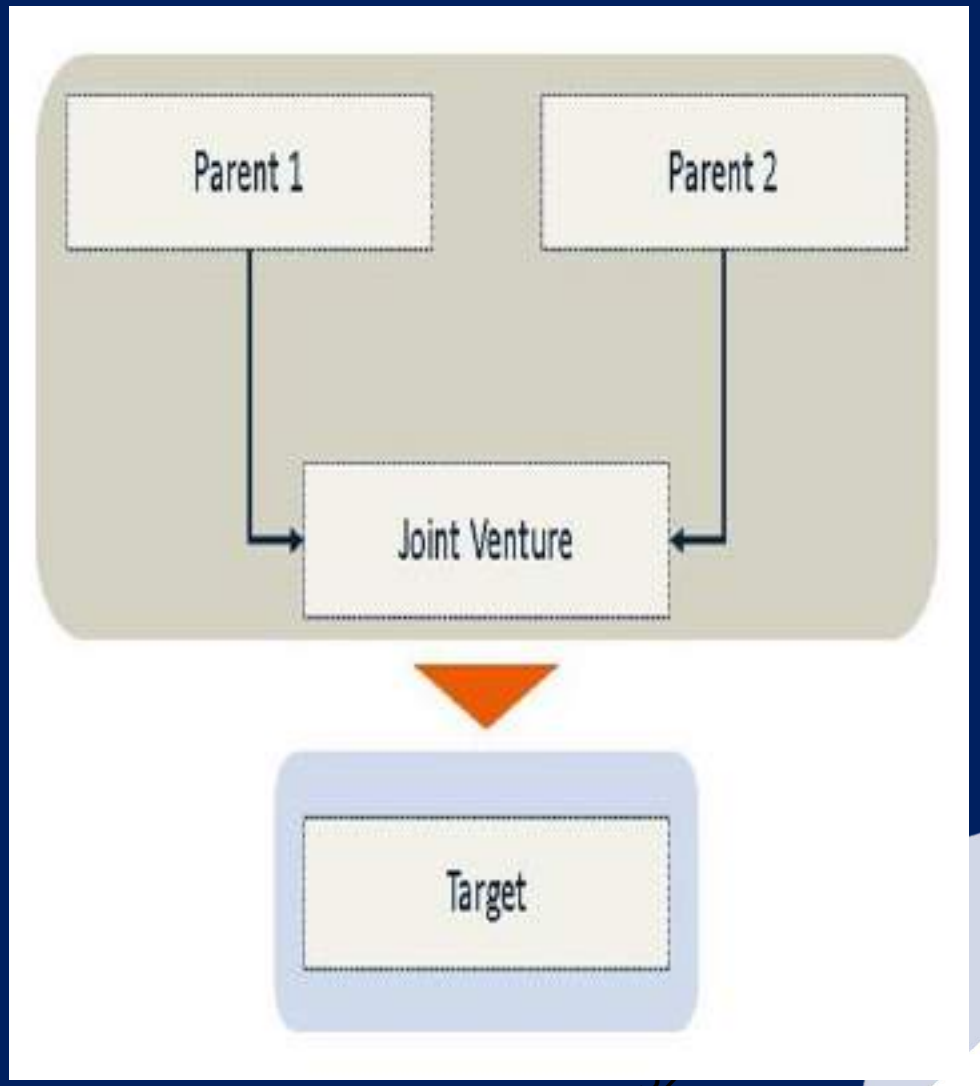
PILLAR 3: Mergers & Acquisitions





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: 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: When Must a Merger Be Notified? — The Maltese Thresholds

The Scenario

Two supermarket chains in Malta — SuperMart and FreshChoice — announce they intend to merge. Before they can proceed, they must ask a critical question: Are we legally required to notify the OC within the Malta Competition and Consumer Affairs Authority (MCCAA) before completing this deal? The answer depends on whether the merger meets the mandatory notification thresholds under Maltese competition law.

Condition 1 — Combined Aggregate Turnover

The combined aggregate turnover in Malta of all undertakings concerned must have exceeded EUR 2,329,373.40 in the preceding financial year. In plain terms: add up the total Maltese revenues of every company involved in the deal. If that combined figure exceeds EUR 2,3M — the first condition is met.

Condition 2 — Individual Turnover Requirement

Each of the undertakings concerned must have had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover in Malta.In plain terms: it is not enough for one company to be large. Each party to the merger must individually account for at least 10% of the combined total.

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PILLAR 3: When Must a Merger Be Notified? — The Maltese Thresholds

Applying the Test to SuperMart and FreshChoice

	SuperMart	FreshChoice	Combined
Maltese Turnover (preceding year)	EUR 1,500,000	EUR 900,000	EUR 2,400,000
Share of Combined Turnover	62.5%	37.5%	—
Meets 10% individual threshold?	Yes	Yes	—

Result:

- Combined turnover of EUR 2,400,000 **exceeds** EUR 2,329,373.40 — Condition 1 is met
- Both SuperMart (62.5%) and FreshChoice (37.5%) each exceed the 10% individual threshold — Condition 2 is met

PILLAR 3: Unilateral Effects — What Are They?

The Core Concern in Horizontal Mergers

- When two competitors merge, the most immediate competition law concern is that the merged entity may — on its own, without needing to coordinate with anyone else — find it profitable to raise prices, reduce quality, or cut output.
- This is called a **unilateral effect** — because the harm flows from the unilateral behaviour of the merged entity, not from any coordination with remaining competitors.
- The merged firm no longer needs to worry about losing customers to the company it just absorbed — because it now owns it.

Why Does This Happen?

- Before the merger, if SuperMart raised its prices, some of its customers would switch to FreshChoice. SuperMart loses revenue — a strong incentive to keep prices competitive.
- After the merger, if the combined entity raises its prices, some customers will still switch — but they will switch to FreshChoice, which the merged entity now also owns.
- The revenue is not lost — it simply moves from one pocket to another. This is the fundamental economic logic of unilateral effects.

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PILLAR 3: Unilateral Effects — What Are They?

Mapping the Market Before the Merger. Suppose the grocery retail market in Malta looks like this **before** the merger:

Retailer	Market Share	Notes
SuperMart	35%	Largest retailer — strong presence across Malta
FreshChoice	25%	Second largest — direct competitor to SuperMart
QuickShop	20%	Third player — limited geographic coverage
Others (independents)	20%	Small local stores — limited competitive constraint
Total	100%	

After the merger:

Retailer	Market Share	Notes
SuperMart + FreshChoice (merged)	60%	Now the dominant player by a significant margin
QuickShop	20%	Remains but is a significantly weaker constraint
Others (independents)	20%	Too small to exert meaningful competitive pressure
Total	100%	

PILLAR 3: Unilateral Effects — What Are They?

The Golden Rule: The closer two merging firms are as competitors, the greater the unilateral effect. When the two firms are each other's nearest substitute — as SuperMart and FreshChoice are in this example — the merger eliminates precisely the competitive constraint that kept prices low and quality high for consumers.

Three Unilateral Effects the Authority Will Assess

1. Price Increases - Before the merger, SuperMart could not raise its prices without risking losing customers to FreshChoice — its closest competitor. After the merger, that constraint disappears. The merged entity can raise prices knowing that customers who switch away from the SuperMart brand will simply go to FreshChoice — still owned by the same company.
2. Reduction in Quality or Choice - Before the merger, both chains competed on product range, freshness, store experience, and service. After the merger, the pressure to maintain high standards is reduced — there is one fewer competitor pushing the merged entity to perform.
3. Reduction in Promotional Activity- Before the merger, SuperMart and FreshChoice regularly ran competing promotions — discounts, loyalty schemes, and special offers — to win each other's customers. After the merger, this competitive dynamic disappears entirely. Consumers lose the benefit of that rivalry.

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In the News…eTraveli and Booking.com

The Parties

Two leading providers of OTA services in a concentrated industry. Booking is the leading hotel OTA while eTraveli is one of the main providers of flight OTA services in Europe

Market Background

OTAs provide an important intermediation service, matching demand and supply for travel services, which include accommodation, flights, car rentals, and attractions. In the EEA only, OTAs handle transactions worth more than €100 billion annually. Hotel OTA services are the largest and most profitable segment of the OTA market and are worth approximately €40 billion annually.

During the investigation, the Commission received feedback from a large number of stakeholders, including hotels and competing OTAs. Market participants were concerned that the transaction would strengthen Booking's dominant position on the market for hotel OTAs in the EEA, reduce competition and increase prices for hotels and, possibly, for consumers.

In the News...eTraveli and Booking.com

The Commission's decision - the transaction would have strengthened Booking's dominant position in the hotel OTA market, leading to higher costs for hotels and, possibly, for consumers.
More specifically, the Commission found that:

- Booking is the **dominant hotel OTA** in the EEA 60%

- The transaction would have allowed Booking to **acquire a main customer acquisition channel**. After accommodation, flight OTA services are the second largest OTA market and the closest complement to Booking's core hotel OTA business

- The transaction would have allowed Booking **to expand its travel services ecosystem**, flights have the highest chance to lead to the cross-selling of accommodation. Flight OTA services are an important customer acquisition channel for hotel OTAs as they generate a significant amount of traffic and are often the first step in the planning of a trip. On the flight OTA market, eTraveli is a best-in-class OTA and the number two player in the EEA. Booking could have leveraged eTraveli's capabilities to become the main flight OTA in Europe

- The strengthening of Booking's dominant position would have further increased its bargaining position towards hotels and diverted demand from cheaper sales channels to Booking. This could have resulted in **higher cost for hotels and, possibly, consumers**.

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PILLAR I – Article 101 TFEU the detail

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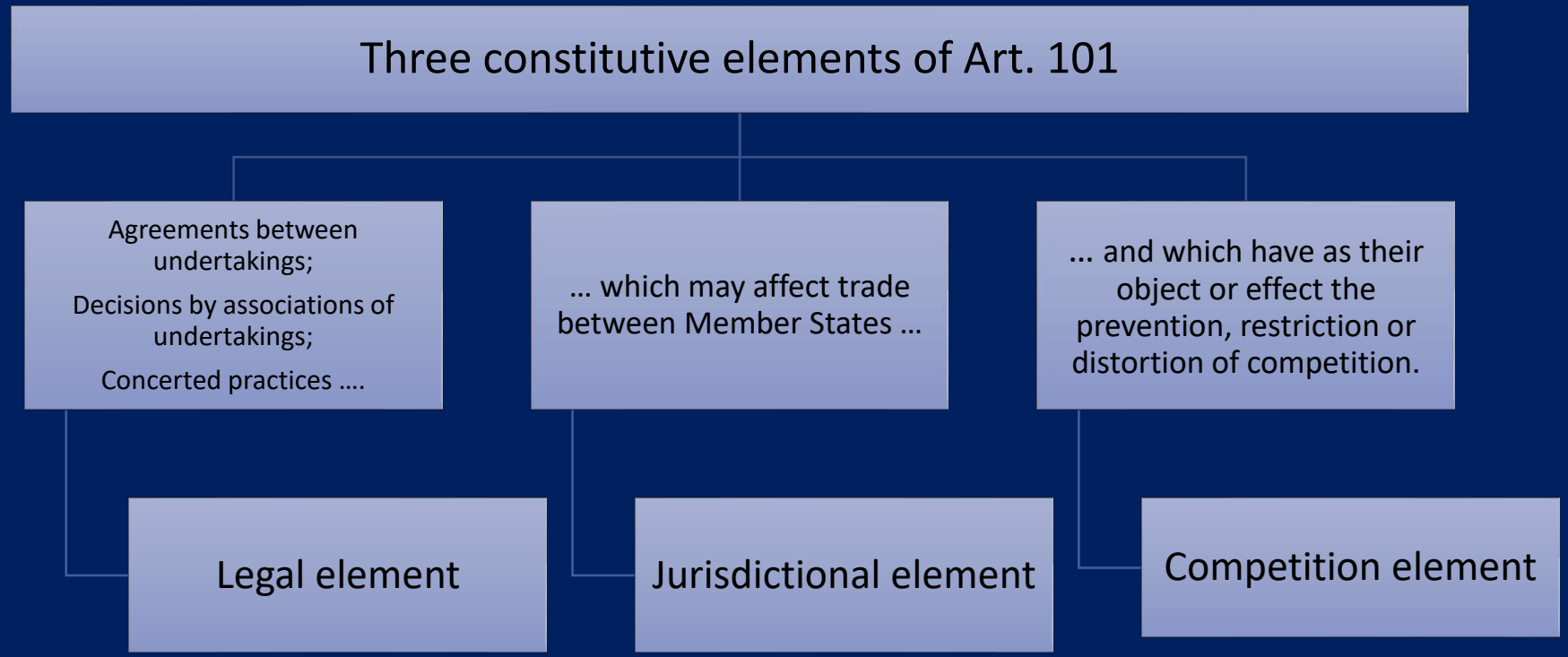
Three constitutive elements of Art. 101
Agreements between undertakings;
Decisions by associations of undertakings;
Concerted practices ….
… which may affect trade between Member States …
… and which have as their object or effect the prevention, restriction or distortion of competition.
Legal element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

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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"

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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.

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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

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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

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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.

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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.

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

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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;

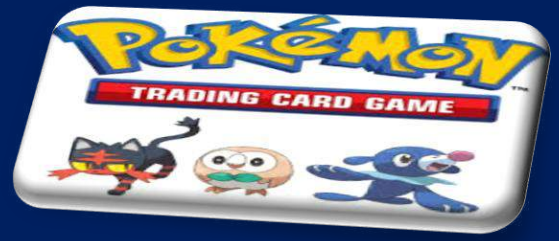
➢ Wholesalers were asked to accept Bayer's supply scheme;

➢ 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)

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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 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.

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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?

- During the world famous Broadband Convention, four representatives of the only telephony providers in the Netherlands, meet for a drink at the bar. One of the CEOs 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.
- Two days after the Convention, telephony provider 1 decides to raise the average price for its mobile telephone services with 2 euros per month. Two and three days later, the other 3 telephony providers also raise their prices to the same level.
- Agreement or Concerted Practice?

- Each economic operator must determine independently the policy he intends to adopt on the common market
- The EI between competitors can allow undertakings to know the market positions and strategies of their competitors. This can appreciably distort competition between the undertakings. Therefore, the exchange of information between competitors is liable to breach Article 101 if it reduces or removes the degree of uncertainty as to the operation of the market, with the result that competition is restricted.

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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).

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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.

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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.

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Restriction by Effect – Vertical Agreement

- Maxima Latvija the largest chains of supermarkets in Latvia, were party to several commercial lease agreements with shopping centres that granted Maxima Latvija, the anchor tenant in these shopping centres, the legal right to agree to the allocation of commercial premises to other tenants.
- This provision effectively enabled Maxima Latvija to block potential retail food competition in the shopping centres concerned.
- It was held that Maxima Latvija's market power rendered the purpose of the agreements the prevention of competition, and therefore that the test for restriction "by object".
- The ECJ (C-345/14) did not, however, consider the non-compete restrictions in the Maxima Latvija agreements to be among the categories of agreement considered harmful by their nature to competition.
- The ECJ responded that it was necessary for the national court to consider the full legal and economic context of the agreement to assess whether a lease restriction may close-off the relevant market and competition, such that it has the effect of preventing, restricting or distorting competition within the meaning of Article 101(1).

Restriction by Effect – Vertical Agreement

- As part of this assessment the ECJ indicated relevant factors may include:

- the relevant retail market and size of the catchment area covered by the agreements;
- the level of real, concrete possibilities for a new competitor to establish itself elsewhere in the relevant catchment area, for example in other shopping centres, or outside the shopping centre area;
- the number and size of the operators on the relevant market in the catchment area and levels of concentration;
- the nature of customer habits and loyalty to existing brands;
- the degree of any other economic, administrative and regulatory barriers to entry;
- the nature and duration of the restriction; and
- the existence of any other agreements which may create a cumulative effect on competition.

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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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Thank you!

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